Office of Bar Counsel

Just Say No! The Perils of Representing Both Spouses in a Divorce

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Someone—a friend, perhaps—calls and tells you he and his spouse have decided to split the sheets. It's going to be an amicable divorce. They have agreed on everything—custody, child support, visitation, an equitable division of marital property and debts. Will you please draw up the decree? Neither spouse wants to spend a bunch of money on lawyers.

Too often, well-meaning lawyers are lured into this potential trap. The first thing that should set off alarm bells is when the lawyer sits down to prepare the engagement letter. Who is the client? Surely, no lawyer with an ounce of sense would agree to represent Dick *and* Jane in a lawsuit styled *Dick v. Jane*, any more than a lawyer would agree to represent both the plaintiff and the landowner in a slip and fall case. Yet, this is exactly what lawyers who agree to represent both parties in a divorce are getting themselves into.

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Consider the sad case of Kenneth R. Weiland, a divorce lawyer in Fairfax, Virginia. Weiland agreed to represent Frances and William Vinson in an "uncontested" divorce. Weiland's retainer agreement listed both husband and wife as clients and provided that each party would pay one-half of Weiland's fee. Weiland met only with Mrs. Vinson, who told him that she and her husband agreed on the distribution of their assets and that they had no disagreements about the divorce. Weiland never spoke with the husband. An associate in Weiland's firm prepared the agreed-upon property settlement agreement (PSA) and instructed Mrs. Vinson to get her husband's signature on the agreement, which she did. The associate later met with Mr. Weiland and drafted a will for him.

Enter one David L. Ginsberg, one of Weiland's competitors in the bustling Fairfax divorce market. Ginsberg filed a motion on Mr. Vinson's behalf seeking to have the PSA set aside and to disqualify Weiland as Ms. Vinson's counsel. The trial court granted Ginsberg's motion, finding

> a gross conflict of interest here that was apparent on the face of that [retainer] document.... [Weiland] has conceded that he didn't really investigate the ethical issue until way, way late in the game.... And I find that [Weiland] did not make a reasonable inquiry into the legal and factual basis for his position with regard to the conflict until way late in the game, long after he had been notified of the issue by [Mr. Vinson's attorney]. I find that there was no good faith basis for [Weiland's] actions and positions related to the PSA subsequent to [Mr. Vinson's attorney] raising the issue with regard to the conflict.... I find that those attorneys' fees were caused or incurred because of the position taken by [Weiland] orally and in writing to the Court.

Vinson v. Vinson, 588 S.E.2d 392, 396 (Ct. App. Va. 2003). The trial court entered an order awarding sanctions against Weiland and in favor of Mr. Vinson in the amount of $23,100. This figure was based on Mr. Vinson's fees and costs related to the motion to set aside the PSA and motion for sanctions, and reimbursement of $1,250 Mr. Vinson paid to Weiland's firm for drafting the PSA.

In holding that the trial court did not abuse its discretion in

awarding sanctions against Weiland, the Virginia appellate court held:

> We agree with the trial court that [Weiland] did not conduct a reasonable inquiry into the conflict of interest presented by his representation of wife nor did he have a reasonable basis to believe no conflict existed. On its face, the retainer agreement established an attorney-client relationship between him and husband, as [Weiland] conceded in his testimony. [Weiland], or his firm, also represented husband in the preparation of his will. [Weiland] billed husband for his services.

Vinson, supra, 588 S.E.2d at 398.

There is a school of thought that suggests that a lawyer may avoid this obvious concurrent-client-conflict-of-interest quagmire by agreeing to serve as a mediator/scrivener, not to give legal advice but merely to assist the parties in achieving their already agreed-upon objectives. This approach, too, should be avoided. In most cases, the process of working through an "uncontested" divorce will turn up issues the couple failed to consider. What does "reasonable visitation" really entail? How much child support is required? What about retirement accounts? Joint credit card debt? If one spouse takes the house and the corresponding debt, is the other spouse released from the mortgage? Questions like these are bound to pop up, leaving the attorney who has agreed to mediate but provide no legal advice to the couple in an impossibly awkward position.

This conundrum, which Mark Bassingthwaighte, Risk Manager at ALPS, calls the "accidental client" phenomenon,[1] arises when the non-client becomes a client because the lawyer is unwittingly caught offering legal advice. After all, the law recognizes that a lawyer who should know that a non-client is relying on the lawyer for legal advice may find himself or herself saddled with a client despite the lawyer's intentions to the contrary.[2] In Bassingthwaighte's words,

> I am always a bit surprised by the response of attorneys who have had to deal with a claim brought by an accidental client. Statements along the lines of, "I never intended to create an attorney-client relationship," "there was no signed fee agreement," or "no money was exchanged so how could this be" are common; but it's not about you! While these issues are not completely irrelevant, please understand that it is going to be more about how the individual you interacted with responded to the exchange. If whoever you were talking to happened to respond to the exchange as if they were receiving a little legal advice from an attorney about their legal issue and that response was reasonable under the circumstances it can start to get muddy. Worse yet, if it was reasonably foreseeable that this individual would rely or act on your casual advice and then in fact did so to their detriment, you may have a serious problem on your hands.[3]

The safe route is to accept one of the divorcing spouses as the client, document the representation with an engagement agreement, and ask the non-client spouse to agree in writing that there is no lawyer-client relationship. Be sure to urge the non-client in writing to seek independent counsel. In this way, the trap of the accidental client in an "uncontested divorce" may be avoided.

In this, as in so many ethics scenarios, better safe than sorry! WL

(Endnotes)

1 Mark Bassingthwaighte, "Yes, Virginia, There Really Are Accidental Clients," ALPS blog, December 14, 2016, https://blog.alpsinsurance.com/category/practice-management/page/16.

2 *See* Restatement of the Law Governing Lawyers 3d § 14, comment e ("Even when the lawyer has not communicated willingness to represent a person, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services, and the lawyer, who reasonably should know of this reliance, does not inform the person that the lawyer will not do so …").

3 M. Bassingthwaighte, endnote 1, *supra*.