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## Revised Wisconsin Ethics Opinion E-84-3: Representing both Spouses in a Divorce<sup>1</sup>

*Revised June 26, 2019*

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### Question

May an attorney represent both spouses in a divorce proceeding?

**Answer: No**

### Synopsis:

Representation of both spouses in a divorce proceeding is prohibited because divorce is a litigation process in which the clients are directly adverse to one another. SCR 20:1.7(b)(3) provides that a concurrent conflict of interest may not be consented to by clients when the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation.

### Opinion

Wisconsin Supreme Court Rule 20:1.7 states:

#### **SCR 20:1.7 Conflicts of interest current clients**

(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

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<sup>1</sup> The original E-84-3 also addressed the question of whether a lawyer may withhold a file from a former client until any outstanding fees were paid. That question, however, was addressed and answered in the negative by Wisconsin Formal Opinion EF-16-03.

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in a writing signed by the client.

## Analysis

In Formal Opinion 84-3, the Standing Committee on Professional Ethics of the State Bar of Wisconsin (the “Committee”) considered the question “May an attorney represent both spouses in a divorce proceeding?” The Committee reviewed then existing SCR 20.23(3)(b) and SCR 20:28 and answered the question “no,” reasoning that “an attorney should never represent in litigation two clients with differing interests.” The enactment of SCR 20:1.7 has not changed the conclusion reached in 1984<sup>2</sup> and the answer remains “no.”

Divorce actions are governed by Wisconsin Statutes Chapter 767, “Actions Affecting the Family.” A divorce is initiated by a petition by either spouse for a judgment of divorce, or by a joint petition of both spouses to a court. Regardless of how initiated, Wis. Stats. Sec. 767.201 states that the rules of civil procedure as set forth in Chapters 801 to 847 govern procedure and practice in an action brought under Chapter 767. A divorce action is a court proceeding in which a claim by one spouse is inherently a claim asserted against the other spouse. SCR 20:1.7(b)(3) makes such a conflict of interest not consentable. Dual representation is thus improper in Wisconsin even when both spouses are in full agreement on the terms of the marital settlement agreement.<sup>3</sup>

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<sup>2</sup> This opinion and SCR 20:1.7(b)(3) are consistent with the following cases and ethics opinions holding that a lawyer should not represent both spouses even in a “friendly” divorce. In re Breen, 552 A.2d 105 (N.J. 1989); Walden v. Hoke, 429 S.E.2d 504 (W. Va. 1993); North Dakota Ethics Op. 92-18 (1992); New Hampshire Ethics Op. 1998-99/15 (1999). Further, the Restatement (Third) of the Law Governing Lawyers states that a lawyer may not represent both spouses in a judicial proceeding needed to obtain a divorce, because at that point the spouses are adversaries in litigation. Restatement §122 cmt. g(iii) (illus. 8).

<sup>3</sup> Some authority from other jurisdictions permits a lawyer to represent both spouses in situations in which they have reached a full agreement so long as there is no apparent conflict and the lawyer secures informed consent. We disagree. See, e.g., Friedman v. Friedman, 122 Cal. Rptr. 2d 412, (Cal. Ct. App. 2002); Egedi v. Egedi, 105 Cal. Rptr. 2d 518; Klemm v. Superior Court, 142 Cal. Rptr. 509 (Cal. Ct. App. 1977).

The Restatement goes further and permits a single lawyer to represent both spouses in negotiating their property settlement, if they have given informed consent and there is a reasonable prospect of reaching an agreement. Restatement (Third) of the Law Governing Lawyers §§122 cmt. g(iii) and 130 cmt. c (2002).

The Restatement's position permitting dual representation in negotiations between divorcing spouses is at odds with much authority. For example, in the California cases cited above, the courts emphasized that the shared lawyer's role was limited to drafting and did not extend to actual bargaining. Other decisions indicate that joint representation is permissible only under strict conditions. E.g., Levine v. Levine, 436 N.E.2d 476 (N.Y. 1982).

Ethics opinions typically advise that this dual representation may be undertaken, if at all, only when the spouses have agreed on all material matters and the lawyer's role is ministerial. Colorado Ethics Op. 68 (1985); New York State Ethics Op. 736 (2001); cf. Blum v. Blum, 477 A.2d 289 (Md. Ct. Spec. App. 1984) (court refused to invalidate

SCR 20:1.7(b)(1) allows lawyers to represent clients despite the existence of a concurrent conflict of interest, provided that the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client. SCR 20:1.7(b)(4) requires that when the conditions set forth in SCR 20:1.7(b)(1) exist, the lawyer must further obtain the informed consent of each affected client in a writing signed by the clients. However, when the parties are asserting claims against each other in litigation, such as in a divorce, SCR 20:1.7(b)(3) does not permit consent to the conflict and the prohibition against representing clients with a concurrent conflict of interest is absolute.

A recent change to the Supreme Court Rules confirms our conclusion that a lawyer cannot act for both clients in a divorce action, but allows a lawyer-mediator to assist divorcing couples reach and implement a settlement. In 2016, the Planning and Policy Advisory Committee of the Wisconsin Supreme Court filed a petition for amendments to the Rules of Professional Conduct for Attorneys to allow Lawyer-Mediators to Draft Settlement Documents in Family Cases (Supreme Court Petition 16-04). This petition was premised explicitly on the principle that a lawyer could not represent both spouses in a divorce, even when the representation involved out of court preparation of settlement documents after an agreement, because such representations presented a non-consentable conflict of interest under SCR 20:1.7(b)(3).<sup>4</sup> The adoption of the amendments to SCR 20:2.4 now make it clear that a lawyer may act as a third party **neutral**, rather than as a lawyer for the parties in a divorce action and in that role may both facilitate the clients reaching an agreement and prepare the settlement agreements. In fact, the Rule as adopted by the court explicitly states that the preparation of post-mediation documents *does not create a lawyer-client relationship with either party*. See, SCR 20:2.4.<sup>5</sup> Thus, the rule was created to allow lawyers to

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property settlement but strongly advised against dual representation of husband and wife even if parties apparently agree on issues).

<sup>4</sup> The Memorandum in Support of the Petition states “In addition, SCR 20:1.7(b)(3) (“Conflicts of interest current clients”) prohibits a lawyer from representing both parties in a family court action because doing so involves the assertion of claims by one client against another “in the same litigation.” This position was also articulated in Ohio Supreme Court Ethics Op. 2009-4 (lawyer may not represent both spouses in divorce action after mediating their dispute because Rule 1.7 prohibits representation of parties who are asserting claims against each other in same proceeding, even if both parties consent to multiple representation).

In 2010, the ethics committee of the ABA's Dispute Resolution Section advised that a lawyer-mediator may draft a divorcing couple's property settlement and child custody and support agreement provided that the lawyer heeds mediation standards and obeys ethics rules—including the standards governing joint representation of clients. The opinion contains a compendium of other resources to consult in determining whether a particular jurisdiction allows mediators to draft mediated agreements. ABA Section of Dispute Resolution Comm. on Mediator Ethical Guidance, Op. SODR-2010-1, 26 Law. Man. Prof. Conduct 433 (2010).

<sup>5</sup> SCR 20:2.4(c) reads, in relevant part, as follows:

(c)(1) A lawyer serving as mediator in a case arising under ch. 767, stats., in which the parties have resolved one or more issues being mediated may draft, select, complete, modify, or file documents confirming, memorializing, or implementing such resolution, as long as the lawyer maintains his or her neutrality throughout the process and both parties give their informed consent, confirmed in a writing signed by the parties to the mediation. For purposes of this subsection, informed consent requires, at a minimum, the lawyer to disclose to each party any interest or relationship that is likely to affect the lawyer's impartiality

provide limited assistance to both spouses in a divorce, but only when acting as a mediator-drafter rather than lawyer.

SCR 20:2.4(c)(1)c requires the lawyer-mediator to refrain from giving legal advice and to inform the clients of the advisability of seeking independent legal advice. SCR 20:2.4(c)(1) further requires that a lawyer-mediator make clear that as a mediator, the lawyer is not representing either party nor providing legal advice or advocacy to any client. The lawyer-mediator may not appear in court on behalf of either or both of the parties. These provisions make clear to unrepresented parties that the lawyer-mediator does not provide legal advice to either party and that it is desirable to have legal advice in divorce matters.

While SCR 20:2.4(c) permits lawyers to act as mediators in family law matters, lawyers must avoid any suggestion that they may represent both parties or are acting as a lawyer for both parties in a divorce action.

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in the case or to create an appearance of partiality or bias and that the lawyer explain all of the following to each of the parties:

- a. The limits of the lawyer's role.
- b. That the lawyer does not represent either party to the mediation.
- c. That the lawyer cannot give legal advice or advocate on behalf of either party to the mediation.
- d. The desirability of seeking independent legal advice before executing any documents prepared by the lawyer-mediator.

(2) The drafting, selection, completion, modification, and filing of documents pursuant to par. (1) does not create a client-lawyer relationship between the lawyer and a party.

(3) Notwithstanding par. (2), in drafting, selecting, completing or modifying the documents referred to in par. (1), a lawyer serving as mediator shall exercise the same degree of competence and shall act with the same degree of diligence as SCRs 20:1.1 and 20:1.3 would require if the lawyer were representing the parties to the mediation.

(4) A lawyer serving as mediator who has prepared documents pursuant to par. (1) may, with the informed consent of all parties to the mediation, file such documents with the court. However, a lawyer who has served as a mediator may not appear in court on behalf of either or both of the parties in mediation. (5) Any document prepared pursuant to this subsection that is filed with the court shall clearly indicate on the document that it was "prepared with the assistance of a lawyer acting as mediator."