

DIVORCE – CONFLICT OF INTEREST –
MULTIPLE REPRESENTATION –
WITHDRAWAL FROM
REPRESENTATION: REPRESENTING
CLIENT WHOSE ALLEGED
PARAMOUR/CORRESPONDENT IS THE
ESTRANGED HUSBAND OF ANOTHER
CLIENT.

You have advised that you were employed by Client 1 in a divorce matter against her husband during which time you discussed property settlement terms and a separation agreement, as well as her suspicions that her husband may be committing adultery. However, Client 1 did not make a specific reference to anyone, nor did she indicate she knew who the woman was. Approximately one year later, a separation agreement was signed by Client 1 and her husband, and you also filed a no-fault ground divorce action a year or so later on behalf of Client 1; a final decree was entered shortly thereafter. During your representation of Client 1, you also engaged in representing Client 2 who wanted a separation from her husband as he was committing adultery with a specifically named individual. You filed a divorce proceeding on behalf of Client 2, in response to which a cross-bill was filed by Client 2's husband alleging Client 2's adultery with a named co-respondent, who happened to have the same name as your former Client 1's husband. Through discovery proceedings, you became aware that the named co-respondent in Client 2's husband's cross-bill was the estranged husband of Client 1. Client 2 denies the allegations and maintains that they are a complete fabrication.

You have not taken any action on behalf of Client 2, since Client 1 expressed the concern that she would be called as a witness for Client 2's husband and, thereby, would be cross-examined by her own attorney, although you indicate the case is set on the court's trial docket for divorce and equitable distribution. Client 1 has not been subpoenaed and you have not been advised of what she would testify to, nor are you aware of any relevant evidence she may have.

You have asked several questions with regard to this situation which the Committee will address in the order in which you have presented them in your inquiry.

I. Is there a conflict of interest under the circumstances?

[DR:5-105\(D\)](#) provides as follows:

A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

The Committee believes that as soon as the co-respondent's name was revealed, and certainly as soon as Client 1's name appeared on the list of persons having knowledge of the facts alleged in Client 2's husband's cross-bill, you were obligated, pursuant to [DR:5-](#)

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[105](#) to disclose to Client 1 any possible conflicts that may arise by the naming of her husband as a co-respondent in another client's divorce action. Likewise, Client 2 should have been informed of any possible conflict, and consent from both clients for continued representation of Client 2 should have been obtained.

II. Should you withdraw from representing Client 2? If not, is there a point at which recusal would be required?

An attorney should withdraw or recuse himself as counsel when continuing the representation will result in a course of conduct that is illegal or inconsistent with the Code of Professional Responsibility (See: [DR:2-108\(A\)](#)). Additionally, you advise that Client 1 now alleges that she told you information regarding her husband's adultery that you and your secretary dispute. This may require your appearance in court as a witness which would necessarily be detrimental and prejudicial to either Client 1 or Client 2 and certainly would require your withdrawal as counsel for Client 2 (See: [DR:5-102](#)).

III. Is Client 1's request for your assistance in filing a no-fault divorce action, while aware of your pending representation of Client 2, a waiver of any potential or actual conflict of interest?

The answer to this question is no. The fact that Client 1 is aware of her attorney's representation of another does not constitute a waiver of conflict, nor may any attorney ignore his obligations to counsel and perform on behalf of a client. The Committee opines that a waiver of conflict theory as it relates to an attorney's ethical responsibility, unless specifically authorized by the Code of Professional Responsibility cannot be construed nor would it be supported. It is important to note that the Disciplinary Rules are mandatory in character (See [DR:1-102\(A\)\(1\)](#)), and they set forth the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

IV. Should litigation be suspended pending the disposition of the complaint filed by Client 2's husband in connection with this matter?

The filing of a complaint against an attorney does not automatically preclude an attorney from representing his client zealously and within the bounds of the law. An attorney shall promptly attend to matters undertaken for a client, which would otherwise prejudice the client's rights if unattended. (See [DR:7-101](#) and [DR:6-101\(B\)](#)) There is no need to suspend litigation if the attorney can adequately exercise his independent, professional judgment and has obtained his clients' (in this case Client 1 and Client 2) informed consent after full disclosure of any conflicts which may arise, pursuant to [DR:5-105\(A\)](#) and (D). If you cannot obtain this consent you should withdraw from representing Client 2 pursuant to [DR:2-108\(A\)](#) and/or [DR:5-102](#).

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