



Ethical and Practical Considerations in Representing the (Un)Happily Married

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Considerations at the beginning of the attorney client relationship.

- Decide if the representation will be sole or joint.
- Sole representations and joint representations raise different practical and ethical considerations.

Joint representation works so long as...

- The clients have goals that are aligned.
- The clients both participate in the estate planning process.
- The clients communicate well with each other and with you.

Some Possible Red Flags

- Blended or unconventional family structures.
- Prior relationship between one client and the attorney.
- Differing goals and expectations.
- Power imbalances between the spouses.
- Capacity issues for either spouse.
- Abusive conduct between the spouses.

Sole representation of one spouse

- Fewer ethical issues, provided that the representation really is a sole representation.
- Meetings and communications with the unrepresented spouse might inadvertently give rise to a joint representation.
- Whether an attorney-client relationship exists depends, in part, on the putative client's subjective belief that the relationship exists.

Joint representation of both spouses

- More ethical challenges.
- Not always possible or advisable.
- Engagement letter signed by the clients is critical (and sometimes required).

Tips for Joint Representation Engagement Letters

Define the scope of the representation as narrowly as possible

- **Why?**

- Establishes clear boundaries.
- Helps convert current clients to former clients efficiently.

- **How?**

- If possible, define the scope of the representation by reference to specific documents.
- If relevant, specifically exclude thorny issues from the scope of the representation.

Explain how communications and confidentiality work in joint representations

- Zone of confidentiality is between the spouses and the attorney against the outside world.
- Communications from one spouse can and will be shared with the other spouse.
- Attorney-client privilege may not apply in later dispute between the spouses.

Explain the attorney's role in a joint representation

- Attorney **can** explain the pros and cons of various options.
- Attorney **cannot** take sides in disagreements between the spouses.

Explain what happens if a conflict arises

- Some conflicts will cause a joint representation to terminate.
- Attorney may withdraw from representing either spouse.
- Attorney might try to retain one of the spouses.

Considerations Once Joint Representation is Underway

Remember the principles of your engagement letter.

- Keep both spouses involved in communications.
- Advise clients of risks associated with various planning options (including risks associated with divorce).
- When/if risk to one spouse is significant, remind spouse of opportunity to consult outside counsel.
- Keep an eye out for any red-flags.

What triggers the termination of a joint representation?

- Any irreconcilable conflict of interest, such as divorce or a material secret one spouse withheld from the other.

I learned of a big secret one spouse is keeping from the other. Now what?!

- Convince the client to come clean.
- Withdraw....but how?

Effect of Divorce on Joint Representation

My clients are divorcing...now what?

- Continued joint representation occasionally possible.
- Separate representation of one or both spouses might be possible.

Separate representation during/after divorce

- New engagement letter(s) needed.
- Conflict waiver(s) possibly needed.
- Continued separate representation of one spouse might be possible even if other spouse refuses to waive the conflict. But, proceed carefully.

Sometimes the divorce should terminate your relationship with both spouses.

- Prior representation is an issue in the divorce.
- Attorney is being called to testify in the divorce.

Questions?
