

ETHICS

Representation of Business and One Business Owner Against Another in Divorce

DAVID L. WALTHER

May a lawyer who represents a business entity, which is a marital or community asset, also represent one of the business owners in a divorce? The seminal case on this issue is *Woods vs. Woods* 149 Cal. App3d 931. In that case, the court concluded that,

... absent consent or waiver, the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a dissolution action, [the attorney] acted properly when he told Wife he could not represent her. He should have said the same thing to Husband to avoid any appearance of impropriety. (p. 937)

This is based on the principle that,

Whatever the size of the corporation ... certain demands are basic. The loyalty of a corporate lawyer must be directed solely toward the interests of the entity. A corporate lawyer may not assist one group of shareholders to achieve an advantage over others with respect to ownership or control of the enterprise. Wolfram, *Modern Legal Ethics* (West, 1986) sec. 8.3.2, p. 421. See *Egan v. McNamara*, 467 A.2D 733 (D.C.App. 1983) cited therein.

REMAINING NEUTRAL

It would seem evident that where the business is an asset to

be allocated in a divorce action, counsel for the business should remain neutral, and equally accessible to both parties to the divorce. Both lawyers and accountants who have represented the business usually maintain their neutrality when the partners of the business are in a dispute. It is certainly daunting to the out party, usually the wife, to be faced with counsel on the other side with complete access to all of the secrets of the corporation, which counsel refuses to divulge. And yet, in the formulation of the Bounds of Advocacy for the American Academy of Matrimonial Lawyers, the board of the Academy rejected this principle as one of its standards. The objection was that divorce lawyers who are members of a large multi-practice firm would be barred from representing a long term client of the firm, where another member of that firm had organized the client's business entity. Thus, the incorporation of a one doctor medical practice by one member of that firm would bar another member of the firm from representing that doctor in his or her divorce action.

The issue phrased in *Woods* was, "... whether an attorney, who for years has represented the interests of a family corporation, can represent one spouse against the other in an action for dissolution of their marriage when the

family corporation is a primary focus of the dispute on the dissolution." (p. 932) However, the facts in *Woods* did not raise the issue in quite so pristine a fashion. In *Woods* the wife had moved to join the corporation as a party in the divorce action, and counsel for the husband appeared for both the husband and the corporation in responding to that motion. The wife also claimed that the husband's counsel had represented her in the past, and that she had shared confidences with him with respect to the corporation. These facts would raise additional conflict issues, apart from the question of simultaneous representation of the business and an owner.

AUTHORITY

In *Forbrush vs. Forbrush* 107 A.D.2d 375, 485 N.Y.S.2d 898 (4th

David L. Walther is the founder of Walther Family Law, in Albuquerque and Santa Fe, NM; a New Mexico Board of Legal Specialization Recognized Specialist in Family Law; Adjunct Professor of Law, University of New Mexico School of Law; Diplomat, American College of Family Trial Lawyers; Fellow, American Academy of Matrimonial Lawyers; Member, State Bar of New Mexico, Board of Bar Commissioners, 1994-1997.

Dept. 1985), the facts were also a bit muddled. The wife claimed that she had earlier met with the husband's counsel, and shared confidences with him. In reliance on the *Woods* case, the New York court disqualified the husband's attorney, because, in addition to being company counsel, he had served as the Forbush family attorney, had drafted wills for both parties, and had advised both with respect to their legal affairs and those of the family. Further, there was a dispute as to the extent to which the company, of which the husband was the sole shareholder, was a marital asset for the purposes of division in the divorce. The court held, "As the attorney who represented [the husband] in his business affairs, [he] should have anticipated that, in the event of a divorce, he would be consulted with respect to the financial aspects of a property distribution." (p. 903)

In *Sturm vs. Sturm* 61 Ohio St.3d 298, 574 N.E.2d 522 (1991), the Ohio Supreme Court found that the wife had effectively waived the conflict of interest. However, in a well reasoned two justice dissent, the minority of the court addressed the conflict of interest issue, which it clearly stated to be, "Where an Attorney represents a close corporation, what duty does that attorney owe to two equal shareholders who are involved in a dispute which involves the corporation's assets?" (p. 525) The dissenters then cited the "solid analysis" of the *Woods* case, and concluded:

As counsel to the corporation [the attorney] represented [the husband's] interest in the family business as well as [the wife's] interest. [He] had a fiduciary duty to protect the interests of both shareholders. When [he] continued to represent the corporation, he therefore continued to

represent [the husband]. The once identical interests of the corporation, [the husband] and [the wife] have now diverged. Particularly where the corporate assets are the focus of the divorce action, [the attorney] cannot fulfill his counsel, while representing either one of them individually. This conflict is sufficient to disqualify [him] from representing [the husband] in the divorce proceedings. (p. 525)

Counsel for the business should remain neutral.

In Wisconsin, however, the Wisconsin standing Ethics Committee issued a formal opinion, E-88-12 (1988) approving simultaneous representation of the corporation, and the husband, its sole stockholder, in a divorce case. The opinion did not cite the *Woods* case, and the facts were not quite so blatant as they were in the *Woods* case. The lawyer was not the incorporating attorney, and was not an officer or on the board of directors. He represented the corporation in two lawsuits, but did not represent the corporation in any other fashion. The opinion stated that the wife owned no stock in the corporation, and that the only interest she had in the corporation is what was derived from the marital property laws of Wisconsin. The opinion did not mention that at the time the opinion was issued, the wife's interest would have been a full community interest under the newly adopted Wisconsin Marital Property Act.

The husband's lawyer had agreed that there would be an evaluation of the company, and that the Wife's interest was 50 percent. The opinion found no direct adversity under Rule 1.7(a) of the

Model Rules. Even if the opinion were limited to its fairly antiseptic facts, it was hard to understand how counsel could fulfill his duty to the wife, the husband, and the corporation simultaneously. The opinion seems wrong.

That leaves the intriguing question of whether screening could solve the big firm dilemma, raised by the Academy Board in denying approval of the proposed disqualification rule. At play are several rules of professional responsibility.

SEVERAL RULES AT PLAY

New definitions proposed by the ABA Ethics 2000 committee would define screening in Rule 1.0(k) as "... the isolation of a lawyer from any participation in a matter through the timely imposition of procedures with a firm that are reasonably adequate under circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." However, comment number 7 to that proposed rule, states that the definition applies to situations where screening is permitted to remove imputation under Rules 1.10, 1.11, 1.12 or 1.18.

Rule 1.10, creates imputation to forbid any lawyer associated in a firm from representing a client when any one of them practicing alone would be prohibited from doing so. That rule allows screening as an exception to imputation only with respect to newly arrived lawyers in a firm. That screening exception does not apply to simultaneous representation in the same firm. Rule 1.11 applies only to former government employees, Rule 1.12 applies to former judges, and Rule 1.18 applies to prospective clients. There is no rule that

provides for screening to allow one law firm to represent conflicting parties at the same time, although case law could provide for that in other appropriate cases.

Of course, many conflicts can be cured by written informed consent. Rule 1.7. The comments

to the Ethics 2000 proposed Rule 1.7 could even be interpreted in some circumstances to allow one lawyer to represent both parties to an agreed upon divorce. But nowhere in the rules have the imputation rules been lifted with respect to a divorce where one of the parties objects

to the conflict. And it would therefore seem that any lawyer who represents a business would be disqualified, and the whole firm as well, from representing an owner of the business in a divorce against a party with a marital community claim to that business.