

# 2000 FORMAL ETHICS OPINION 2

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### REPRESENTATION OF REMAINING SPOUSE AFTER FILING JOINT CHAPTER 13 BANKRUPTCY PETITION

*Adopted: January 18, 2001*

*Opinion rules that a **lawyer** who represented a husband and wife in a joint Chapter 13 bankruptcy case may continue to represent one of **the** spouses after **the other** spouse disappears or becomes unresponsive, unless **the** attorney is aware of any fact or circumstance which would make **the** continued representation of **the** remaining spouse an actual conflict of interest with **the** prior representation of **the other** spouse.*

#### Inquiry:

Attorney represented Husband and Wife in filing a joint Chapter 13 bankruptcy petition. Husband disappeared, leaving Wife responsible for **the** entire Chapter 13 payment plan. Wife called Attorney to inform him that Husband had disappeared and Wife did not believe that she could make **the** payments alone. She asked Attorney for his advice. Attorney believes that it would be best for Wife if she stopped making **the** payments. **The** case would be put on for dismissal and notice sent by **the** court to both spouses. If Husband does not respond to **the** notice of dismissal, **the** court will dismiss **the** plan as to Husband. Attorney can **then** modify **the** plan for Wife to include only **the** debts for which Wife is liable. If Attorney cannot assist Wife in this way, Wife will have to hire **another lawyer** at an added expense to her. May Attorney continue to represent Wife?

#### Opinion:

Rule 1.7 (a) prohibits Attorney from representing a client if **the** representation of that client will be, or is likely to be, directly adverse to **another** client, unless Attorney reasonably believes **the** representation will not adversely affect **the** interest of **the other** client, and that client consents.

**The** mere fact that Attorney continues to represent Wife in **the** absence of Husband does not present an actual conflict. If **the** Chapter 13 case is dismissed because of **the** inability of Wife to comply with **the** current plan, **there** will not be a discharge and both parties will remain liable for individual and joint debts. If Husband does not get a discharge from **the** debts, he will remain liable on his debts. However, this outcome will not be changed by **the** fact that **the** Wife receives a discharge after a plan modification. In fact, to **the** extent Wife pays on joint debts in a modified Chapter 13 plan, Husband benefits from **the** reduction in **the** amount for which he remains liable. **There** are circumstances under which representation of Wife to discharge (while Husband does not receive a discharge) is a conflict, such as instances in which Wife attempts to discharge marital debts, which are **the** subject of equitable distribution or alimony or child support claims. In addition, if Husband communicated confidential information to Attorney, Attorney may not use that information to **the** advantage of Wife or **the** disadvantage of Husband. Rule 1.9(c). If competent representation of Wife requires **the** use of **the** information, Attorney cannot continue to represent Wife.

Attorneys who undertake joint representation of a husband and wife in Chapter 13 cases should discuss with potential clients **the** potential conflicts that might arise in **the** three to five years of **the** plan's duration. Given **the** potential for conflicts, attorneys are encouraged to obtain a waiver of future conflicts from both spouses. See Rule 1.7(a)(2) and RPC 168 (waiver of objection to possible future conflict of interest). Waivers of future conflicts must be in writing. RPC 168. In **the** absence of such a waiver, **the** Bankruptcy Court, which has an ongoing supervisory role in **the** attorney-client relationship (11 U.S.C. §329; Rule 2016(b), F.R.Bkr.P.), may authorize **the** continued representation of Wife after notice and a hearing.

It should be recognized that if a potential conflict becomes an actual conflict, and **the** zealous representation of **the** remaining spouse requires acting contrary to **the** interest of **the** disappeared spouse, **the** Attorney would have to withdraw from **the** representation of Wife. Rule 1.7(c).