

### ANSWER TO QUESTION NO. 13

1. On these facts, Larry may not represent Camilla absent consent by Dennis after consultation with Larry. Also, even if Larry could represent Camilla, he would have a duty not to use confidences and secrets obtained from Dennis unless Dennis consented after consultation with Larry.

MRPC 1.9(a) provides that "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." Here, the divorce and the previous matter handled for the husband are not the same matter. However, they are substantially related.

"A subsequent representation is substantially related to a former representation if (a) the subject matter of the representation is the same, (b) the factual or legal issues overlap, or (c) there is a likelihood that confidential information obtained in the former representation will have relevance to the subsequent representation." Here, the assets held by Dennis will be relevant in the divorce matter. Dennis need not prove that Larry actually possesses confidential information.<sup>2</sup> Given the legal and factual issues in Larry's prior representation of Dennis, and the likelihood (indeed, virtual certainty in light of the facts set forth in the question) that Larry learned confidential information regarding Dennis's financial situation, the matter Larry handled for Dennis is substantially related to Camilla's matter.

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'State Bar of Michigan Committee on Professional Ethics Opinion RI-282, citing RI-46, RI-95. See also *Alpha Capital Management, Inc v Rentenbach*, Mich App ; 2010 Mich App LEXIS 548 (March 23, 2010) (matter substantially related when former client might have disclosed confidences which could be relevant or detrimental to him or her in the current litigation; the lawyer "might have acquired" such information if the facts should have been discussed or if it would not have been unusual for them to have been discussed). *Trustees v Premier Plumbing & Heating Inc*, 2008 US Dist LEXIS 55867 (July 23, 2008).

*Trustees, supra*, fn 1. Compare, Model Rule, cmt [3].

Even though the terms "materially adverse" may not be well-defined in the law, there can be no reasonable argument that the interests of divorcing parties are not materially adverse. This is so even if the parties are relatively cooperative; their interests are still adverse.

Because the interests of Camilla and Dennis are materially adverse, and their matters are substantially related, Larry is prohibited from representing Camilla under MRPC 1.9(a) unless Dennis consents to Larry's representation after consultation.

Additionally, Larry is prohibited from revealing to Camilla confidences or secrets gained in his professional relationship with Dennis, MRPC 1.6(b)(1). He is also prohibited from using confidences or secrets, or, indeed, "any information relating to the representation," to the disadvantage of Dennis (unless Dennis consents after consultation). MRPC 1.6(b)(2); MRPC 1.8(b); MRPC 1.9(c).

2. It is not clear whether Larry's proposed fee arrangement is permissible under the Rules of Professional Conduct.

A Michigan lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive (unreasonable) fee. When a lawyer has not regularly represented a client, the lawyer has a duty to communicate the basis or rate of the fee to the client, preferably in writing, before or within a reasonable time after commencing representation. MRPC 1.5(b). Although Larry's agreement recites several factors that are appropriate in determining reasonableness under MRPC 1.5(a), some courts and ethics committees have held or opined that using these factors to enhance a fee otherwise subject to straightforward computation may convert the arrangement into a contingent fee.

Contingent fees are generally allowed subject to certain exceptions. MRPC 1.5(a)(8); MRPC 1.5(c). One such exception is for "domestic relations" matters. MRPC 1.5(d) ("A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter").

A clause similar to the one Larry proposed was recently found by the State Bar of Michigan's Committee on Professional Ethics to be a contingent fee and therefore impermissible in a divorce case. RI-346. But see, *Alexander v Inman*, 974 SW2d 689, 693 (Tenn, 1998) ("under the terms of the agreement between Inman and the attorneys, there is no question that they would be paid regardless of the outcome of the case. Payment itself is certain; only the exact amount of payment is uncertain.")

Contingent fees must be in writing and must "state the method by which the fee is to be determined." MRPC 1.5(c). Although it is always advisable to memorialize a fee arrangement in writing, the fee dependent upon results obtained and other factors recited in the question need not be reduced to writing unless it amounts to a contingent fee, and if it is such, it would be impermissible in a domestic relations matter.

3. Again, Larry's path is not clear with regard to Camilla's proposed limited scope of representation and ghostwriting project. Camilla is asking Larry to "unbundle" the legal services he would ordinarily deliver in a divorce representation.

A lawyer may limit the objectives of the representation if the client consents after consultation, so long as the representation is in accordance with the Rules of Professional Conduct and other law. MRPC 1.2(b) and comment. A lawyer may not make a false statement to a court or fail to disclose client fraud on a tribunal. MRPC 3.3(a)(1) and (2). Nor may a lawyer engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. MRPC 8.4(b).

There are two possible conclusions that can be drawn. The first is that unless a rule of professional conduct or of civil procedure requires client or lawyer to disclose drafting assistance to a court, there is no misrepresentation by either the client or the lawyer. Thus, the lawyer has not violated MRPC 3.3(a)(1) or MRPC 8.4(b) by making a false statement to the court. Nor has the lawyer assisted in client fraud in violation of MRPC 1.2(c), 3.3(a)(2), or 8.4(b). The State Bar Committee on Professional Ethics recently found that, assuming compliance with the Michigan Rules of Professional Conduct and other law, a lawyer may, without appearing or otherwise disclosing his or her assistance, assist a pro se litigant by giving advice on the content of documents to be filed in court, including pleadings, by drafting those documents and giving advice about what to do in court. RI-347. See *ABA Formal Opinion 07-446* (May 5, 2007) (no violation of rules similar to MRPC 1.2[c], 3.3[a][2], or 8.4[b] requiring disclosure of client fraud upon tribunal and proscribing dishonest lawyer conduct); *Arizona Ethics Opinion 05-06* (July 2005) (no violation of rules similar to MRPC 3.3[a][1] or 8.4[b]).

The second conclusion is that because a court assumes that a party who files a pleading under his or her own name is actually unrepresented, a lawyer who ghostwrites a pleading is helping a client mislead a court. Courts tend to hold the pleadings of unrepresented litigants to less stringent standards. *Kircher v Ypsilanti Twp*, 2007 US Dist LEXIS 93690 (Dec 21, 2007). Thus, a

benefit is being unjustly obtained when a lawyer assists a client by drafting a pleading without disclosing it to the court. See also *Grievance Administrator v Miller*, 06-125-Rd (HP, 2/7/2009) (suspending for 180 days an attorney who prepared bankruptcy petitions for filing by clients *in propria persona* in order to avoid the requirement that attorneys, but not parties representing themselves, file bankruptcy pleadings electronically).