

# Legal Aid Divorce Representation and Conflict Of Interests

The need for the services of a lawyer is one of the realities of life in a democratic state. Ours is a government of law. The rights of all are thus defined and to maintain and protect such rights, recourse to the courts and those licensed to practice law is a frequent and necessary occurrence.<sup>1</sup>

It can be forcibly argued that no society which proudly boasts the maxim "Equal Protection Under Law", can afford to tolerate the exploitation of a substantial segment of the public — indeed, any member — because they are unaware of their legal rights.<sup>2</sup>

## I. INTRODUCTION

Divorce for the poor person has seldom been easy or affordable in California or elsewhere in the United States. In recent years constitutional attacks through the courts culminating in the *Boddie v. Connecticut* decision (1971) have admittedly improved court access for the indigent seeking an end to a marriage.<sup>3</sup> The U.S. Supreme Court ruled in *Boddie* that court fees can no longer be demanded of indigents in divorce actions. Courts must provide without charge to the indigent service of process or publication of the appropriate notice, as required, or alternatively allow the lower expense of service by mail to the poor.

The major expense of divorce litigation however has always been the cost of legal counsel.<sup>4</sup> Ending an unworkable marriage through the courts can present to the layman a bewildering legal maze which he has neither time nor expertise to negotiate. In addition, serious, sometimes violent, spousal disagreement may flare up over alimony, support and custody. Even in California, where the elimination of

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<sup>1</sup>*Azzarello v. Legal Aid Society*, 24 Ohio Opp. 2d 263, 266, 185 N.E.2d 566, 569 (1962). The court held that a legal aid society employing attorneys on a salary basis was not engaging in the unauthorized practice of law.

<sup>2</sup>Schwarz, *Group Legal Services in Perspective*, 12 UCLA L. REV. 279, 287 (1965).

<sup>3</sup>401 U.S. 371 (1971).

<sup>4</sup>LaFrance, *Constitutional Law Reform For the Poor*, 1971 DUKE L. J. 487, 532. Arthur B. LaFrance was counsel for the successful appellants in *Boddie v. Connecticut*, 401 U.S. 371 (1971).

fault testimony greatly reduces acrimony, a contested custody case still retains its former bitterness.<sup>5</sup>

Simple matters such as rights and hours of visitation often prove to be sources of contention where spouses are vindictive or hostile. Obviously, in a contested hearing, particularly if one side has counsel, a layman has little likelihood of protecting his interests.<sup>6</sup>

The expansion of legal aid programs<sup>7</sup> for the indigent in recent years has done much to solve the problems of counsel for an increasing number of the poor.<sup>8</sup> Even for those with access to indigent legal aid services, however, new barriers present themselves. One particularly disturbing development is the frequent disqualification of legal aid societies as the counsel of an indigent individual whose spouse is already represented by the agency. A recent decision of the Court of Appeals in the District of Columbia, *Borden v. Borden*, imposes a broad judicial enforcement of the heretofore voluntary disqualification rule against a legal aid society.<sup>9</sup> Yet a blanket application of a disqualification rule, whether self-imposed by the agency or ruled by a court, may not always be warranted in an indigent domestic relations case where both parties simultaneously seek the assistance of a legal aid agency.

This article will explore the following issues:

(1) what considerations lie behind the disqualification rule as represented by the *Borden* ruling and the ABA Code of Professional Responsibility upon which the *Borden* court relies;

(2) whether there exists a double ethical standard in the ABA's reluctance to extend the disqualification rule to conflicts within military legal commands, while imposing the full harshness of *Borden* on legal aid conflicts;

(3) what protections from the full weight of *Borden* may California lawyers find in state statute and case law.

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<sup>5</sup>CALIFORNIA CONTINUING EDUCATION OF THE BAR, ATTORNEY'S GUIDE TO FAMILY LAW PRACTICE, 2d ed. (1972) 115.

<sup>6</sup>LaFrance, *Constitutional Law Reform For The Poor*, 1971 DUKE L. J. 487, 532.

<sup>7</sup>*Id.* at 532, n.212, citing *Brief for Solicitor General as Amicus Curiae* in *Boddie v. Connecticut*. The government noted, however, that nine out of ten poor people are not reached by legal assistance programs.

<sup>8</sup>See BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951) 10.

<sup>9</sup>*Borden v. Borden*, 277 A.2d 89 (D.C. Ct. App. 1971). During a brief six month internship with the legal aid office of a local community, this author encountered the adverse application of the disqualification rule twice, each time self-imposed by the legal aid agency. Both cases involved indigent males whose spouses had abandoned the home after having requested earlier legal assistance from the agency about marriage related problems. The fact that the woman in each case had received the earlier assistance was used by the attorneys as a basis for denying any additional counseling or representation to the men.

## II. LEGAL AID CONFLICT OF INTEREST AND BORDEN V. BORDEN

### A. CONFLICTS OF INTEREST AND PROFESSIONAL ETHICS GENERALLY

An initial review of the basic standards of the American Bar Association concerning conflict of interest and the representation of multiple clients is relevant here.<sup>10</sup> The disqualification rule at issue was originally devised, as we shall see, in response to the problems of the small private law office. Canon Five of the Code of Professional Responsibility (hereinafter Code) forbids a lawyer to accept employment that will (or is likely to) adversely affect his independent judgment.<sup>11</sup> The Code condemns the representation by an attorney of "differing interests". This includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client,

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<sup>10</sup>In the *Borden* case the controlling ethical considerations were those provided by the ABA CODE OF PROFESSIONAL RESPONSIBILITY. The ABA CODE had been adopted by the District of Columbia Bar Association the year preceding the decision. *Borden v. Borden*, 227 A.2d at 90, n. 3. Besides the ABA CODE, the most important statements of general legal ethics principles have been: the ABA CANONS OF PROFESSIONAL ETHICS OF 1908 (see history and amendments in DRINKER, LEGAL ETHICS (1953) 23-26, 309-25), and *Professional Responsibility: A Statement* (1958) (for background see 44 A.B.A. J. 1159 (1958) with complete text).

The adoption of standards by the organized bar does not give them the force of law. Nevertheless, the standards of the ABA are often referred to by the courts in the development of the law. This was the case in *Borden v. Borden*.

... The American Bar Association is not a legislative tribunal, and its canons of ethics are not of binding obligation and are not enforced as such by the courts, although they constitute a safe guide for professional conduct in the cases to which they apply, and an attorney may be disciplined by this court for not observing them ..."

*Hunter v. Troup*, 315 Ill. 293, 302, 146 N.E. 321, 324 (1925).

Moreover, the older CANONS were adopted by numerous state bar associations, by some courts and a few legislatures. The new CODE OF PROFESSIONAL RESPONSIBILITY, which the ABA hopes will be given as broad an acceptance, was intended to largely replace and update the CANONS. The *Borden* decision bears out that hope.

The most influential committee of the ABA remains the Committee on Ethics and Professional Responsibility which answers questions on legal ethics and generally interprets the CODE. It issues both formal opinions directed at broad ethical questions and informal opinions that respond to specific factual matters submitted to it for consideration, usually by individual attorneys. These decisions are frequently cited as authority by courts engaged in regulation of the legal profession. A recent formal opinion, cited in the body of the *Borden* decision, was ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS, NO. 324 (August 9, 1970) which deals with the general ethical duties of the governing body or board of a legal aid society. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, NO. 1233 (August 24, 1972) deals with the conflicts problems of a particular legal services office asked to act as counsel both for and against an Indian tribe.

<sup>11</sup>ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON FIVE.

whether it be a conflicting, inconsistent, diverse or other interest.”<sup>12</sup> The basis of this view is that a client is entitled to the benefit of his lawyer’s judgment undiluted by commitments to others.<sup>13</sup> The Code elsewhere reiterates that

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client.<sup>14</sup>

Consequently, a lawyer may not represent two clients in one matter if their interests diverge to the extent that the lawyer’s independence of judgment on behalf of one might seem affected by his representation of the other.<sup>15</sup> Broad disqualification from representing interests adverse to a client has been justified in order to avoid even “the appearance of evil”.<sup>16</sup>

The knowledge of one member of a law firm about a client’s case is vicariously imputed to his associates through operation of a legal fiction. This “imputed knowledge” rule has been exercised to disqualify private partnerships and legal firms from representing both sides of the same suit or dispute.<sup>17</sup> The rule is based on an assumption of a community of economic interests between the members of such a firm or partnership, a belief that a client who retains one member, in fact elicits the undivided loyalty of the entire membership. Each lawyer has an “economic interest” in any client an associate undertakes to represent, according to the profit sharing setting of the typical private practice.<sup>18</sup>

A more practical concern supporting the disqualification rule exists over the ability of one attorney to keep information, possibly harmful, from his client’s adversary. That “secrecy” consideration lies above and beyond the basic fear that the attorney’s economic

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<sup>12</sup>*Id.*, DEFINITIONS.

<sup>13</sup>Weddington, *A Fresh Approach to Preserving Independent Judgment*, 11 ARIZ. L. REV. 31 (1969).

<sup>14</sup>ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-14.

<sup>15</sup>*Id.*, DR 5-105 (A), (B); Weddington, *A Fresh Approach to Preserving Independent Judgment*, 11 ARIZ. L. REV. 31 (1969).

<sup>16</sup>Maltby, *In re*, 68 Ariz. 153, 202 P.2d 902 (1949).

<sup>17</sup>W.E. Bassett Co., v. H.C. Cook Co., 201 F. Supp. 821 (D. Conn. 1961), *aff’d per curiam*, 302 F.2d 268 (2d Cir. 1962).

<sup>18</sup>N.A.A.C.P. v. Button, 371 U.S. 415, 442-3. The U.S. Supreme Court indicated in this case that the primary consideration in determining if there exists a possibility of a dilution of an attorney’s loyalty to his client is whether there exists any economic interest which might cause the attorney to subvert his loyalty to his client:

... There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. *Id.*

reliance on his partners' success will cloud his judgment. It is the established professional duty of the lawyer to preserve the secrets of the client everywhere.<sup>19</sup> A client might justifiably have some apprehension about making disclosures in confidence if he felt that something told to his attorney might find its way to the attorney's associate and be used against him.

The American Bar Association Committee on Professional Ethics and Grievances has thus expressed the rule requiring summary disqualification of the entire law firm to which a disqualified attorney belongs:

... [T]he relations of the partners in a law firm are so close that the firm, and all members thereof, are barred from accepting any employment that any one member of the firm is prohibited from taking ... [A]nything which requires a lawyer to withdraw from a case requires that his partners withdraw.<sup>20</sup>

## B. THE BORDEN DECISION

The importance of *Borden v. Borden* (1972) for purposes of the present inquiry lies in its attempt to judicially extend the blanket disqualification rule beyond the private law office to legal aid societies.<sup>21</sup> The *Borden* decision is an appeal taken to the Courts of Appeal of the District of Columbia. A client of the Neighborhood Legal Services Program (NLSP), one Helen Borden, sought to bar the appointment by a lower court of an additional NLSP attorney to represent the defendant-husband because such a situation would create an unacceptable conflict of interests. The Court of Appeals agreed with Mrs. Borden.

The appellate court concluded that it was error for the trial court to refuse to vacate its assignment order which mandated that an NLSP attorney represent Mr. Borden. The effect of the lower court order, according to Associate Judge Kern, speaking for the Court of Appeals, would be "... to force the parties to go to trial represented by attorneys who practice law within the same organization, which appears on its face to constitute a conflict of interest ..."<sup>22</sup>

The appellate court attacked the obvious argument that "NLSP cannot be adequately analogized to the typical law firm for the purposes of the conflict-of-interest concept."<sup>23</sup> In the appellate

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<sup>19</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON FOUR: "... A lawyer should preserve the confidences and secrets of a client." *Id.* EC 4-4:

... This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.

<sup>20</sup> ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OP. NO., 50; *see also* FORMAL OP., NO.'S 33, 49, 72.

<sup>21</sup> *Borden v. Borden*, 277 A.2d at 89.

<sup>22</sup> *Id.* at 90.

<sup>23</sup> *Id.* at 91.

court's view, there was sufficient community of interests between the two attorneys, derived from their organizational ties, to exclude the dual representation. The higher court made reference to but resisted the reasoning of an earlier case determined by the same D.C. trial court on review in the *Borden* case. That lower court had stated:

Since, therefore, no economic conflict exists, no corporate interests are in any way involved and no legal partnership as such has been disclosed it would appear that in fact and objectively speaking there is no conflict of interest.<sup>24</sup>

The *Borden* court refused to conclude from the apparent absence of economic conflicts that there is no possibility for other equally damaging conflicts.<sup>25</sup> The chilling effect upon the attorney-client relationship of the mere possibility of intentional or inadvertent disclosure particularly concerned the court:

Lawyers who practice their profession side-by-side, literally and figuratively, are subject to subtle influences that may well affect their professional judgment and loyalty to their clients, even though they are not faced with the more easily recognized economic conflict of interest.<sup>26</sup>

The court's focus on the narrower issue of confidentiality rests on the particular facts surrounding the NLSP organization.

While the NLSP is not a law firm, it is a group of attorneys practicing law together in an organizational structure much like a law firm . . . All NLSP attorneys participate in office meetings and receive intra-office communications on substantive law, litigation techniques and tactics and office policy.<sup>27</sup>

Whatever its enthusiasm for the private law firm analogy, the D.C. Court of Appeals was not willing to accept a further analogy of NLSP's activities to those of group legal services.<sup>28</sup> The organized bar and state courts continue to use so-called professional standards against "conflicts of interests" to reject representation of multiple

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<sup>24</sup>*Id.* at 90, quoting *McGee v. McGee*, (D.C. Gen. Sess.) 98 Wash. L. Rptr. 929 (May 26, 1970).

<sup>25</sup>It is the general practice among legal aid organizations, including presumably NLSP, that the attorneys receive no direct compensation from their indigent clients.

<sup>26</sup>*Borden v. Borden*, 277 A.2d at 91.

<sup>27</sup>*Id.* at 91.

<sup>28</sup>Standing Committee on Group Legal Services, *Report*, 39 CAL. S.B.J. 639, 661, n. 7 (1964). The report defined these services as:

. . . Legal services performed by an attorney for a group of individuals who have a common problem or problems or who have joined together as a means of best bargaining for a predetermined position, or who have voluntarily formed, or become members of an association with the aim that such association shall perform a service to its members in a particular field or activity, or through common interests it appears that the organization can gain a benefit to the members as a whole. *Id.*

clients by most group legal services programs.<sup>29</sup> The demand for such services finally culminated in the recent decisions of the Supreme Court: *N.A.A.C.P. v. Button* (1963);<sup>30</sup> *Brotherhood of Railroad Trainmen v. Virginia* (1964);<sup>31</sup> and *United Mine Workers of America v. Illinois State Bar Association* (1967).<sup>32</sup>

The state courts had often attempted much more than the condemnation of group legal services before the U.S. Supreme Court decided to act.<sup>33</sup> Illinois is one example.

They wrote that condemnation into the state constitution, for under the separation of powers principle (Illinois) . . . had held it had the last word on what constitutes the unlawful practice of law.<sup>34</sup>

While the Supreme Court has emphasized that "the states have broad power to regulate the practice of law," constitutional rights being asserted under the group legal services programs outweighed apparent professional impropriety on the scale of public interest.<sup>35</sup> Appellee counsel in *Borden* argued similarly that in this recognized balance of public interest, the right and need of the poor to have legal representation in domestic relations matters was more important than the mere *possibility* of a conflict of interest from dual NLSP representation in the case.<sup>36</sup>

The *Borden* court did not meet the constitutional right-to-counsel issue head on, but distinguished the case on its facts from *Button*. "(W)e are not persuaded that the supply of attorneys available in the District of Columbia has been exhausted", the *Borden* court said. *N.A.A.C.P. v. Button*, according to *Borden*, was based on "extraordinary facts":<sup>37</sup>

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<sup>29</sup>The ABA CODE OF PROFESSIONAL ETHICS still condemns group legal services with extraordinarily vindictive language. Group legal services are damned, in effect, except as they are protected by the U.S. CONSTITUTION:

. . . only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activity. ABA CODE, DR 2-103(D)(5).

<sup>30</sup>371 U.S. 415 (1963).

<sup>31</sup>377 U.S. 1 (1964).

<sup>32</sup>389 U.S. 217 (1967).

<sup>33</sup>See, for example, *People v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931); *People v. Ass'n. of Real Estate Taxpayers of Illinois*, 354 Ill. 102, 187 N.E. 823 (1933); *Illinois State Bar Ass'n. v. United Mine Workers*, Dist. 12, 35 Ill. 2d 112, 219 N.E.2d 503 (1966).

<sup>34</sup>PATTERSON & CHEATHAM, *THE PROFESSION OF LAW* (1971) 319.

<sup>35</sup>389 U.S. at 222.

<sup>36</sup>*Id.* at 221-22:

. . . We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

See also holding in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1962).

<sup>37</sup>*Borden v. Borden*, 277 A.2d at 91.

... where legal representation to vindicate constitutional rights of a group of citizens was simply unavailable except in the form of group legal services which the state contended amounted to barratry, maintenance and champerty.<sup>38</sup>

Finally, the *Borden* court emphasized its extreme reluctance to approve of any distinction between attorneys who are in private practice and government attorneys "because then we might encourage a misapprehension that the special nature of such representation justifies departure from the profession's standards."<sup>39</sup> In establishing its point the court makes reference to a New York insurance case,<sup>40</sup> an express statutory recognition by Congress that "anti-poverty lawyers" are to be governed by the traditional standards of the profession,<sup>41</sup> and an ABA opinion stating that legal aid attorneys are required "to act in accordance with the Code of Professional Responsibility."<sup>42</sup>

### C. PROBLEMS WITH BORDEN V. BORDEN

Read liberally, the *Borden* decision stands for an automatic court imposition of the conflicts disqualification rule in an indigent domestic relations case where both sides seek representation by attorneys from the same legal aid agency. However, the *Borden* decision creates some problems.<sup>43</sup> Factual distinctions and a better policy would properly urge a narrow application of the *Borden* disqualification rule.

The *Borden* court brushes aside too easily a major distinction between the private law firm and the typical urban legal aid society. While a typical private firm might have but one office, the urban legal aid office, exemplified by the NLSP in the *Borden* case, generally has several branches.<sup>44</sup> There seems to be no serious inquiry into the facts of NLSP to see if both attorneys in the case were working

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<sup>38</sup>*Id.* at 92.

<sup>39</sup>*Id.* at 93.

<sup>40</sup>*American Employers Insurance Co. v. Goble Aircraft Specialties*, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (1954):

... The Canons of Professional Ethics make it pellucid that there are not two standards, one applying to counsel privately retained by a client, and the other to counsel paid by an insurance carrier.

<sup>41</sup>42 U.S.C. § 2809(a)(3):

... Projects involving legal advice and representation shall be carried on in a way that assures maintenance of a lawyer-client relationship consistent with the best standards of the legal profession.

<sup>42</sup>ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OP., NO. 324, 8 (August 9, 1970).

<sup>43</sup>See generally Article, *Professional Responsibility — Conflicts of Interest Between Legal Aid Attorneys*, 37 MO. L. R. 346 (1972).

<sup>44</sup>*Borden v. Borden*, 277 A.2d at 91:

... It (NLSP) has one (supervising) attorney in each of its branch offices ...



out of the same branch office where the records would presumably be kept together and available to either counsel. In fact, the *Borden* decision makes clear that the individual NLSP attorneys answered to the supervising attorney at each branch, not directly to a central headquarters, which latter arrangement might support the *Borden* fears.<sup>45</sup>

An inflexible "implied knowledge" disqualification rule, moreover, has not been universally supported even in its application to private law firm conflicts. Critics have called for a more pliant disqualification rule toward private firms that could effectively accommodate the interests of both attorneys and clients.<sup>46</sup> The dangers involved in the representation of clients with adverse interests are obvious. But the establishment of formal procedures for the discovery of conflicts, full notification to affected parties, and insulation of critical information can substantially diminish any dangers.

As was discussed previously in this article, the "imputed knowledge" rule is but a convenient legal fiction analogizing a firm's representation of conflicting interests with the generally impermissible representation of adverse parties by the individual attorney. But even for the individual lawyer, the organized bar has accepted "conflicts" cases when adverse parties consented to joint counsel.<sup>47</sup>

(T)he case for allowing consent to (multiple) representation by a law firm is the stronger one, given the greater ease with which a law firm, as opposed to an individual, can divide its loyalties.<sup>48</sup>

Domestic relations cases are by this author's own experience the most frequent occasions where both parties seek simultaneous assistance from the local legal aid agency. Procedures for exposing intra-agency domestic relations conflicts could include the circulation of memoranda to all attorneys, the description of new cases in detail and the creation of a committee within the agency to evaluate con-

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<sup>45</sup>*Id.* Of course not all legal aid agencies in urban areas are the same. For example, in Sacramento, California, the Legal Aid Society of Sacramento County has several branch offices, but a centralized domestic relations unit is maintained at the Society's headquarters. All domestic relations cases taken by the Society are referred to this central unit by outlying branch offices.

<sup>46</sup>See generally Article, *Unchanging Rules in Changing Times: The Canons of Ethics and Intrafirm Conflicts of Interest*, 73 YALE L. J. 1058.

<sup>47</sup>ABA CANONS OF PROFESSIONAL ETHICS OF 1908, No. 6:

... It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts ... *Id.*

The new ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(C):  
... a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. *Id.*

<sup>48</sup>Article, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-firm Conflicts of Interest*, 73 YALE L. J. at 1076.

flicts. Upon discovery of a domestic relations conflict, steps could be taken to obtain intelligent waivers from affected spouses, under the same guidelines extended to the individual attorney representing multiple parties in other areas of law practice. Finally, procedures for insulation of attorneys working for opposing spouses, primarily assignment of each spouse to a separate agency branch office, where possible, could adequately insure ethical conduct.<sup>49</sup> The presumption implied in *Borden* that adverse indigent spouses in a domestic relations case need live in constant fear of abuse of confidence merely because abuse is possible is not warranted in every legal aid agency, particularly when several local offices exist within the framework of a single organization.<sup>50</sup> That abuse should be demonstrated in fact, not simply presumed.

Finally, both attorneys in *Borden* stated that they could not represent their clients, under the circumstances, and remain faithful to the Code of Professional Responsibility.<sup>51</sup> This, too, is a distinguishing fact that should not be overlooked in cases of this sort. The Code strongly protects this exercise of independent professional judgment.<sup>52</sup> But where there is no such conclusion on the part of the individual attorney the courts should not be bound to impose it unilaterally.

There are policy considerations, in addition to possible factual variations, that argue against too broad an application of *Borden*-type disqualifications. Legal aid to the indigent within a single community is commonly the task of a single unified organization of attorneys, primarily for reasons of economy and federal funding.<sup>53</sup> Disqualification of an entire legal services program in a given community from representing opposing parties to a divorce action can have the effect of eliminating any legal assistance at all for one of the parties.

This was not the effect of the *Borden* decision for the Washington, D.C., area which is exceptionally lawyer-rich because of the presence of so many federal agencies. Although the area operates with the common unified Neighborhood Legal Services Program, another organization, the Federal Bar Association in the District of Colum-

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<sup>49</sup>*Id.* at 1075 *et seq.* These suggestions paraphrase relatively similar recommendations made for private law firm conflicts problems.

<sup>50</sup>There should be some limits to the Bar's presumption of evil intent. An oft-quoted remark by Professor Seavey of Yale underlines the necessity of an element of trust in the enactment of the rules of legal ethics:

The aphorism that Caesar's wife must be above suspicion is based on a distrust of her virtue.

<sup>51</sup>*Borden v. Borden*, 277 A.2d at 90.

<sup>52</sup>ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR5-105(B).

<sup>53</sup>One organization services all of Sacramento and Yolo counties in California. This combined metropolitan, suburban and rural area comprises a population of nearly 1 million people.

bia, has "a panel of 200 government lawyers who have volunteered to handle civil cases for indigents."<sup>54</sup> The appellate justices were not convinced that the lower trial judge had exhausted all of the available attorneys in the District of Columbia who could be drafted into service under the local appointment statute.<sup>55</sup>

However, in some jurisdictions there may be no appointment statute for domestic relations cases or no judge willing to apply a general discretionary statute in such cases. The arrangement of the legal services agency with the local bar may require that the indigent be first referred out and turned down by one or more private attorneys before proceeding to the agency for advice and help. In California, the Legal Aid Society of Sacramento, which serves both Sacramento and Yolo Counties of California, has a particularly humiliating system with which the author is acquainted. An initial interview is performed by the referral secretary of the legal aid office of first contact. The interview determines at the outset whether the individual is indigent and economically eligible for the government subsidized legal assistance offered by the agency. By arrangement with the local bar societies in both counties, the individuals are referred out at this point to no less than three private attorneys. Each attorney presumably may volunteer his services at little or no fee. In practice, with few exceptions, they simply confirm that the person is indeed unable to pay for counsel. Only after this procedure is the poor person sent back to legal aid. For this referral "service" the individual is charged five dollars.

Undoubtedly, there are ample occasions when a court will see to it that an individual in need of counsel has one appointed. But there well may be concrete advantages in associating indigent cases with a legal aid society that specializes in the peculiar characteristics of poverty law practice. These obvious advantages range from the agency attorney's personal familiarity with the type of domestic tensions that are perhaps peculiar to a poor family to the expertise of the office staff in filing an *in forma pauperis* petition with the court. In many, if not most, cases legal aid experience will outweigh concern that one's interests will be betrayed by intra-branch gossip and intrigue.<sup>56</sup>

Federally supported legal aid services throughout the country are

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<sup>54</sup> *Borden v. Borden*, 277 A.2d at 92, n. 9.

<sup>55</sup> *Id.* at 92.

<sup>56</sup> Continuing participation in the legal difficulties of the poor, as by a legal aid society, stimulates a perception of the underlying causes of which individual cases are illustrations. The history of the Legal Aid Society of New York, cited by PATTERSON & CHEATHAM, *THE PROFESSION OF LAW* (1971) 337, demonstrates the advantage of this specialization over the rendition of aid case by case through private court-appointed lawyers. See J. MAGUIRE, *THE LANCE OF JUSTICE* (1928); H. TWEED, *THE LEGAL AID SOCIETY, NEW YORK CITY, 1876-*

prefaced on the inadequacies of the traditional court appointment system. Most appointment statutes deal only with criminal cases, leaving it to the discretion of the trial judge to appoint counsel somewhat at random when a defendant is brought into court without a lawyer. There is a long recognized professional duty to accept such cases and carry on the defense with little or no fee.<sup>57</sup>

This sort of service, haphazard as to both clients and lawyers and with the burden cast on the young or else the charitably disposed of the profession, is unsatisfactory and unfair . . . There have been notable illustrations of assigned counsel performing their duty, though it was the practice of many judges to assign young lawyers who gained courtroom experience at the cost of their client's fate.<sup>58</sup>

Unlike in criminal cases,<sup>59</sup> there is no clear legal duty requiring the states to furnish counsel in civil matters.<sup>60</sup> Hence, the indigent spouse may be trapped without the legal aid assistance provided his or her mate because of the disqualification rule, without the *pro bono* services of the private attorney whose past enthusiasm for such work has been dampened by the rise of legal aid, and without appointed counsel since the trial judge has no legal duty to appoint an attorney. Our much honored maxim *equality before the law* is not served when an indigent defendant in a civil proceeding, whether a divorce action brought by his spouse or a money action by a creditor, has no access to the legal counsel he needs.

Even local appointment systems that provide adequate compensation for indigent defense in civil actions are ultimately an inadequate solution, if solely for economic reasons. The Institute of Judicial Administration of New York University was asked to study the comparative costs of representation by private assigned counsel and by the Legal Aid Society in New York City. The Institute concluded:

It is evident that the cost of representing indigent defendants through a system of assigned counsel would be vastly greater than the cost of having them represented by the Legal Aid Society . . .

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1951 (1954). Also see Robb, *Controversial Cases and the Legal Services Program*, 56 A.B.A.J. 329 (1970).

<sup>57</sup>See Cardozo, J. in *People ex rel. Korlin v. Kulkin*, 248 N.Y. 465; 162 N.E. 487 (1928). The Supreme Court of New Jersey has held that it had the power to require counties to compensate counsel appointed by the courts to defend indigent defendants. *New Jersey v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966).

<sup>58</sup>PATTERSON & CHEATHAM, *THE PROFESSION OF LAW* (1971) 330-31.

<sup>59</sup>See *Powell v. Alabama*, 287 U.S. 45 (1932). Even in some stages of a juvenile court proceeding the constitutional right to have counsel has been affirmed. *Gault, In re*, 387 U.S. 1 (1967). *Gideon v. Wainwright*, 372 U.S. 335 (1963) extended the right to counsel in a criminal case to include a minor felony charge. See also *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>60</sup>On the constitutional right to counsel in civil cases see Douglas, J., dissenting in *Hackin v. Arizona*, 389 U.S. 143 (1967).

According to our most moderate estimate and best judgment, the cost would be approximately 10 times as great.<sup>61</sup>

### III. POST-BORDEN: THE MILITARY COMMAND AND THE A.B.A.

In *ABA Informal Opinion 1233*, the ABA Committee on Ethics and Professional Responsibility (hereinafter Committee or Ethics Committee) interpreted *Borden* broadly, citing the case for the principle "[t]he professional standards regarding representation of differing interests apply to legal aid offices the same as to other lawyers."<sup>62</sup> The Ethics Committee concluded that a Legal Aid Society may not properly represent individuals in actions against a particular Indian tribe when the society was simultaneously representing the tribe itself in a separate action to determine the size of the reservation.

Ironically, in an informal opinion issued the same day as 1233, the Committee gave a much more lenient answer to the U.S. Coast Guard on virtually the same issue: the simultaneous representation of conflicting interests by government legal aid offices.<sup>63</sup> The Committee undertook a question from the Coast Guard relating to the operation of a legal office under military command in which four military attorneys both prosecuted and defended nearly all court martial cases convened within the command district. The attorneys were responsible to a single superior officer, also an attorney. In addition, all worked out of the same office with partitioned desk spaces, using the same library and the same clerical help. Copies of all motions and all correspondence were inserted into a reading file that was circulated among the attorneys and which contained matters of a privileged character. The military counsel's office was, in sum, almost completely analogous to a typical legal aid office, except for the military's engagement solely in criminal cases.

The ABA Committee members were clearly concerned in both cases about the general issue of confidentiality and the special pressures derived from the close proximity in the practice of law of two possibly opposing attorneys from the same office. But in the instance of the military legal office, which involved the much more protected

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<sup>61</sup>Cited by PATTERSON & CHEATHAM, *THE PROFESSION OF LAW* (1971) 336. A statute of New York at the time of the study provided that legal counsel should be made available at public expense for the indigent in all criminal cases except minor traffic violations. It left to the counties and cities the option of providing counsel through a public defender, a private legal aid society, a private assigned counsel system, or any combination of them.

<sup>62</sup>ABA COMM. ON PROFESSIONAL ETHICS, *INFORMAL OP.*, No. 1233 (Aug. 24, 1972) at 2.

<sup>63</sup>ABA COMM. ON PROFESSIONAL ETHICS, *INFORMAL OP.*, No. 1235 (Aug. 24, 1972).

area of criminal rights, the Committee imposed a far looser standard than that imposed on the Indian legal services agency. Rather than applying a blanket disqualification, the Committee noted that the military client has the option of securing non-military counsel of his choosing in lieu of a military law specialist appointed to represent him from the office.<sup>64</sup> There is a certain element of fiction in the Committee's assumption that those who choose a military attorney for defense of criminal charges do so with free will and not because they can simply afford no other counsel. The same fiction, however, can apply equally as well to the indigent Indian who seeks legal aid assistance to pursue a claim against the government. The A.B.A.'s Coast Guard opinion also notes with emphasis that military lawyers are "public employees appointed to their tasks by the government."<sup>65</sup> So, presumably are the federally-funded poverty lawyers in the Indian tribe case, although the Committee curiously ignored the obvious parallel.

To remove any questions of impropriety, the committee recommends that opposing military attorneys should be afforded separate facilities, that access to files should be subject to strict controls, and that there be some separation of direction, so that influences by a single superior would be minimized.<sup>66</sup> The committee's observations are certainly applicable to legal aid offices where, as we have previously pointed out, at least in many urban areas if not on Indian reservations, the organization of legal services for the poor is frequently broken down into semi-autonomous neighborhood legal offices with separate records systems.

Even where circumstances do not admit of these formal adjustments, according to the ABA group, there is no need of an automatic and rigid disqualification of the military attorney undertaking the representation of a client with interests adverse to those represented by other lawyers in the same command. Rather, the military counsel "... must adjust as well he can, without prejudice to his client."<sup>67</sup> Might one not presume this same flexibility of the legal aid attorney? So far, the ABA Committee on Ethics and Professional Responsibility has not been so persuaded.

#### IV. THE CALIFORNIA EXPERIENCE: PROTECTION FROM BORDEN?

California has not been as ready as the District of Columbia and other jurisdictions to find a debilitating clash of interests in every

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<sup>64</sup>*Id.* at 3.

<sup>65</sup>*Id.* at 3-4.

<sup>66</sup>*Id.* at 4-5.

<sup>67</sup>*Id.* at 6.

case involving the representation of adverse clients.<sup>68</sup> The basis for the "imputed knowledge" rule disqualifying a firm or organization for conflicts has been whether a single attorney could properly represent the same interests. California has yet to rule directly on the disqualification of legal aid societies in domestic relations conflicts, but it has dealt with the problem of single attorneys providing counsel to both spouses in divorce-related matters.

For example, in California, during negotiations between husband and wife for settlement of property matters, one attorney may properly serve both parties. *Gregory v. Gregory* (1949) held that in such a case one attorney may serve both parties in negotiations as long as he makes sure "that each party is fully advised as to his or her legal rights and to the right to independent counsel."<sup>69</sup> An earlier case, *Davidson v. Davidson* (1949), recognized that there would be occa-

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<sup>68</sup>The primary provision in California on ethical standards and rules of the legal profession is the State Bar Act, first enacted in 1927. Ch. 34 (1927) Cal. Stats. 38. That act is now embodied in CAL. BUS. & PROF. CODE § 6000 *et seq.* (West Supp. 1972). § 6068 sets out broad duties of the attorney, including the duty to "maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." CAL. BUS. & PROF. CODE § 6068(e). § 6076 provides that the Board of Governors of the State Bar may formulate and enforce rules of professional conduct. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT in CAL. BUS. & PROF. CODE fol. § 6076 (West Supp. 1972), hereinafter CAL. RULES. These CAL. RULES, subject to the approval of the California State Supreme Court, are designed to establish ethical standards for the bar and to prohibit unprofessional conduct. *Zitny v. State Bar of Cal.*, 64 Cal.2d 787, 51 Cal. Rptr. 825, 415 P.2d 521. There are 21 CAL. RULES, numbers 4-7 dealing with the representation of conflicting and adverse interests: Rule 4 (Acquisition of Interest Adverse to Client); Rule 5 (Acceptance of Adverse Employment); Rule 6 (Disclosure of Adverse Interests and Relationship); Rule 7 (Representation of Conflicting Interests).

In general, the pertinent CAL. RULES provide that a member of the California State Bar shall not represent conflicting interests, except with the consent of all parties concerned, and by disclosing his relationship, if any, with the adverse party, and his interest, if any, in the subject matter of the employment. See generally 6 CAL. JUR. 2D REV. 265, § 177. The prohibition applies to successive as well as contemporaneous representation of conflicting interests. *In re Cowdery*, 69 Cal. 32, 10 P. 47 (1886); *Galbraith v. State Bar*, 218 Cal. 329, 23 P.2d 291 (1933); *Sheffield v. State Bar*, 22 Cal. 2d 627, 140 P.2d 376 (1943). The CAL. RULES impose upon an attorney the duty to terminate his relationship to a new client when he has reason to believe that it may conflict with the discharge of his duties toward another client. *Pennix v. Winton*, 61 Cal. App. 2d 761, 143 P.2d 940, 145 P.2d 561 (1943).

The ABA CODE OF PROFESSIONAL RESPONSIBILITY is not, as yet, incorporated for direct application in California, which operates, rather, under the CAL. RULES, *supra*. But regarding the effect of the ABA CODE OF PROFESSIONAL RESPONSIBILITY, note CAL. RULES, No. 1:

The specification in these rules of certain conduct as unprofessional is not to be interpreted as an approval of conduct not specifically mentioned. In that connection the Code of Professional Responsibility of the American Bar Association should be noted by the members of the State Bar. *Id.*

<sup>69</sup>*Gregory v. Gregory*, 92 Cal. App. 2d 343, 349, 206 P.2d 1122, 1126 (1948).

sions when the opposing party may be without counsel because of refusal or inability of that person to obtain counsel.<sup>70</sup> In such a case it is definitely not prohibited under California law for an attorney for one of the parties in a divorce proceeding to discuss a proposed property settlement with the other party.<sup>71</sup> California has recognized, of course, that in fairness to both parties, they should be represented at all times by independent counsel, if they wish.<sup>72</sup> But *Davison, supra*, holds that a litigant cannot be compelled to secure an attorney. One might argue for commensurate practicality when dealing with the indigent respondent spouse who is unable to pay for private counsel in California.

Outside of domestic relations cases, a California attorney is not absolutely forbidden to represent conflicting interests, even in a court proceeding. Three cases of recent vintage reflect apparently less rigid California standards.

In *Jacuzzi v. Jacuzzi* (1963), an order was sought by certain corporate representatives to enjoin several attorneys from representing minority stockholders in a derivative suit against the corporation.<sup>73</sup> The attorneys had earlier connections to the corporation. The California Court of Appeals affirmed an order of the lower court denying the injunction. The higher court held that a former attorney for the firm was not disqualified from representing minority shareholders in a derivative action for the directors' malfeasance in office, absent a showing of actual breach of the professional confidence entrusted to the attorneys while working for the corporation.

The case is important here because it deals with Rule 5 of the California Rules of Professional Conduct (Acceptance of Employment Adverse to Client or Former Client).<sup>74</sup> The court insists upon looking beyond mere *appearance* of impropriety in applying the rule, concluding that the specific interest represented in the shareholders' behalf was not in fact adverse to the corporation but rather to its benefit.<sup>75</sup> The Court remarks: "Whether or not the rule is applicable in a given case must depend on the facts."<sup>76</sup>

In contrast the *Borden* court rested its decision not on a factual determination of actual conflict in the use of the same legal aid agency, but a determination only that there was a mere appearance of possible evil. "... [T]he appointment of attorneys who work together presents an impression scarcely consistent with the bar's

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<sup>70</sup> *Davidson v. Davidson*, 90 Cal. App. 2d 809; 204 P.2d 71 (1949).

<sup>71</sup> See generally 6 CAL. JUR. 2D REV. 270, *Attorneys at Law*, § 178, citing *Davidson v. Davidson*.

<sup>72</sup> *Swart v. Johnson*, 48 Cal. App. 2d 829, 120 P.2d 699 (1942).

<sup>73</sup> *Jacuzzi v. Jacuzzi Bros., Inc.*, 218 Cal. App. 2d 24, 32 Cal. Rptr. 188 (1963).

<sup>74</sup> CAL. RULES OF PROFESSIONAL CONDUCT, NO. 5

<sup>75</sup> *Jacuzzi v. Jacuzzi Bros., Inc.*, 218 Cal. App. 2d at 29, 32 Cal. Rptr. at 191.

<sup>76</sup> *Id.*



efforts to maintain public confidence in the law and lawyers."<sup>77</sup>

A second California case raises the problem of conflict between insurer and insured, represented by the same counsel in pursuit of a mutual damage claim. *Lysick v. Walcom* (1968) notes that California law allows an attorney, under minimum standards of professional ethics, to represent dual interests as long as full consent and full disclosure occur.<sup>78</sup> The case reiterates the principle that an attorney-at-law is not necessarily required to withdraw from a case, or terminate his relationship of attorney to the client whose interests would prevent the attorney from devoting his entire energies in that client's behalf and to that client's interests. Of course, the attorney may himself desire to withdraw, a desire which the court must honor.

In a final case, *Kraus v. Davis* (1970), the court refused to disqualify an attorney who had formerly been associated in the practice of law with one of the defendants in a pending action.<sup>79</sup> The opinion in *Kraus* was narrow, stating that while a waiver of a conflict, after full disclosure, may permit representation of adverse clients, under no circumstances will a waiver be presumed from a mere delay in raising the objection.<sup>80</sup> The California court once again recognized in *Kraus* that a client (or former client) may properly consent to an attorney's acceptance of employment which may be adverse to a client's interest.<sup>81</sup>

*Borden's* fact pattern has not yet emerged in a significant California case. Whether California courts would allow a single legal aid society to represent both petitioner and respondent in a dissolution thus has not been tested. A considered study of the *Lysick*, *Kraus*, and *Jacuzzi* cases, however, would significantly aid the chances for a favorable decision when proper procedures for protecting confidences were taken by the directing officials of the legal aid agency.<sup>82</sup>

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<sup>77</sup>*Borden v. Borden*, 277 A.2d at 91-92.

<sup>78</sup>*Lysick v. Walcom*, 258 Cal. App. 2d 136, 147, 65 Cal. Rptr. 406, 413-14 (1968).

<sup>79</sup>*Kraus v. Davis*, 6 Cal. App. 3d 484, 85 Cal. Rptr. 846 (1970).

<sup>80</sup>*Id.* at 492, 85 Cal. Rptr. at 851.

<sup>81</sup>*Id.* See also *Earl Scheib, Inc., v. Superior Court*, 253 Cal. App. 2d 703, 707, 61 Cal. Rptr. 386, 389 (1967); *Lessing v. Gibbons*, 6 Cal. App. 2d 598, 605-606, 45 P.2d 258, 261 (1935).

<sup>82</sup>A less certain but no less inviting test of California standards would be the representation by one attorney of both parties as joint petitioners to a dissolution of marriage. Despite California's new no-fault dissolution of marriage, the practicality of a joint petition might be doubted. A vestigial social custom apparently still prevails in California pressuring the wife to file the initial action in the overwhelming number of cases. A fellow student of the author handled only three male clients out of nearly 100 divorces during a clerkship with a local legal aid society. All 100 were processed under the new California dissolution of marriage law. One of the three men was a respondent. This initial filing custom by the woman casts the husband as respondent, rather than joint petitioner. The suggestion by the attorney of a joint petition, which would seem allowable

## V. CONCLUSION

In the absence of adequate counsel, the poor man's alternatives are to represent himself or avoid the processes of the law altogether. In practice, self-representation is rarely possible.<sup>83</sup> Few court officials have the patience, or the time, to provide procedural forms and information to the general public. "Few laymen understand the complexities of court calendars, appearance dates, hearing schedules and trial techniques."<sup>84</sup>

The problems of the indigent denied counsel in the dissolution of an unworkable marriage is admittedly of statistically minor moment in the great divorce mills that our courts have become. But for those

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under existing California law, would further remove needless acrimony in some cases and should be explored.

The allowance of dual representation in insurance cases where objectives of both insurer and insured are basically agreed upon is analogous, certainly, to some divorces. In an uncontested California dissolution both parties may seek the same determination of the court: the faultless, yet irreparable breakdown of their marriage. Note that CAL. CIV. CODE § 4506(1) (West Supp. 1972) establishes as sufficient grounds for a decree of dissolution of marriage: "Irreconcilable differences, which have caused the irremediable breakdown of the marriage." It is important to note that California courts are *petitioned* for a decree of dissolution. In a majority of states, by way of contrast, the plaintiff's grounds approach outright criminal charges in a suit brought against the person of the defendant-spouse. 24 AM. JUR. 2D 448-54, *Divorce and Separation*, §§ 299-306. Charges may include, separately or together, adultery, cruelty, impotency, habitual drunkenness, or desertion. California's approach, on the other hand, makes no determination of the "guilt" of either party, assessing rather the condition of the marriage.

The adversary element remaining in California with regard to support, custody and property may be conspicuously absent in an indigent marriage, particularly when no children are involved. If neither has the income with which to support the other, if custody is not in question, and if there is little property of consequence to fight over beyond a car and a television set, why hastily cast them as legal adversaries? Even the "appearance" of undue persuasion presented by a single attorney in a joint petition approach for dissolution can easily be averted. Reliance might be made, for example, on family court counselors, where available, who could help draw up the petitioners' settlement agreement in a non-adversary arbitration setting before a choice is made whether to seek one or separate attorneys. The settlement could thus be an accomplished fact before the attorney enters the picture. CAL. CIV. CODE, § 4356 (West Supp. 1972).

Reliance on a single legal counsel for divorce is an untried idea. But use of one attorney in effecting the unitary purpose of two individuals with even obviously adverse interests is not unprecedented on other areas of the law and has been accepted without difficulty by the organized bar and the courts.

The position of an attorney who acts for both parties, to the knowledge of each, in the preparation of papers needed to effect their purpose, and gives to each the advice necessary for his protection, is recognized by the law as a proper one. *Hobart's Adm'r v. Vail*, 80 Vt. 152, 161, 66 A. 820, 823 (1907).

<sup>83</sup>Note, however, the rising use in California of do-it-yourself legal aids in securing a divorce. See the immensely successful handbook, SHERMAN, HOW TO DO YOUR OWN DIVORCE IN CALIFORNIA (1972).

<sup>84</sup>LaFrance, *Constitutional Law Reform For The Poor*, 1971 DUKE L.J. at 532.

few thus caught in the poverty trap, resigned to the burden of an unhappy marriage they cannot discard, the denial of help is an incident of great moment and personal tragedy.

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