



Committee on Professional Ethics

Opinion #517 - 2/26/80 (69-79)

Topic: Conflict of interests;
differing interests;
matrimonial litigation

Digest: Lawyer may not simul-
taneously represent
wife in divorce action
and co-respondent's
husband in another
matrimonial proceeding.

Code: EC 5-15, 5-16;
DR 4-101(A), (B), and (C)(1);
5-105(A) and (C);
Definition 1

QUESTION

May a lawyer who represents a wife in an action for divorce undertake to represent the alleged co-respondent's husband in another matrimonial proceeding directed against the latter's wife?

OPINION

At first glance, it would seem that the two parties whom the lawyer proposes to represent are united in interest. Their respective spouses have formed a meretricious relationship in violation of their marital duties to the persons whom the lawyer proposes to represent.

On closer examination, however, we find that this apparent community of interest is far less significant in determining the lawyer's proper course than the myriad issues on which their interests, both present and potential, may differ. We believe that these differing interests would inevitably give rise to problems of impairment of judgment and divided loyalty for counsel seeking to represent both the client wife and the alleged co-respondent's husband. "An attorney should not be placed in a position in which, even unconsciously, he or she will be tempted to 'soft pedal' zealous representation for one client in order to avoid an obvious clash with another." American Bar Foundation, Annotated Code of Professional Responsibility 228 (1979).

OVER---

The grounds for divorce sought by the client wife against her spouse may involve facts and circumstances which the co-respondent's husband may not wish to assert vis-a-vis his spouse. The client wife may wish to obtain financial relief from her spouse which may be affected by the financial arrangements between the co-respondent and her husband. There may also be different considerations with respect to custody, as well as a host of assorted differences arising from the extremely personal and emotion-laden nature of the relationships involved.

DR 5-105(A) provides that "a lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)." The sole exception set forth in DR-105(C) permits a lawyer to represent "multiple clients" with differing interests "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."

Our present Code of Professional Responsibility defines "differing interest" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Definition 1. Hence, the prescription contained in DR 5-105(A) should be understood as far broader in scope than that previously articulated by the former Canons of Professional Ethics which merely proscribed the representation of "conflicting interests". Cf., Former Canon 6.

EC 5-15 states: "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests." See also N.Y. County 620 (1972) (attorney may not handle litigation for and against the same client even in unrelated matters); cf., ABA Draft Model Rules of Professional Conduct (January 30, 1980), Proposed Rule 1.8. As one recent article on the subject has observed, "The fact that the parties are on good terms or appear to be in

complete agreement at the time ... does not negate the possibility that future disenchantments may develop. A professionally responsible attorney avoids such conflicts by refusing to represent even potentially adverse interests." Aronson, "Conflict of Interests," 52 Wash. L. Rev. 807, 815 (1977).

Underscoring the need for informed consent, EC 5-16 provides: "before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent." Each client must fully understand the potential conflicts and their consequences, especially the potential necessity for counsel to withdraw from representing one or both of them and counsel's inability to reveal confidences received from any of his clients when their interests differ.

Potential conflicts are so inherent in the situation posed that it would be virtually impossible for clients to give informed consent to such multiple representation. It is difficult to see how a fully informed consent could be obtained without initially compromising counsel's ethical obligation to preserve the confidences and secrets of each of his clients. See DR 4-101(A) and (B). Even the threshold consent of one client to disclose the requisite information to the other, in itself, would be fraught with difficulty. See DR 4-101(C)(1).

Where the consent of one client should logically depend upon the intentions of another and upon alternative courses of action which cannot be foreseen or determined with reasonable certainty, that consent, even if freely given, can hardly be characterized as knowledgeable or informed. Ethically, therefore, such consent is without meaning. As in N.Y. State 516 (1980), this is another situation where it is not "obvious that [the lawyer] can adequately represent the interest of each" client, and therefore dual representation could not in our view be permitted by consent. In matrimonial disputes where the course of future proceedings cannot be clearly foreseen, we believe that any doubts should be resolved in favor of separate representation.

For the reasons stated, the question posed is answered in the negative.
