



Committee on Professional Ethics

Opinion 560 - 6/7/84 (10-84)

Topic: Conflict of interests;
multiple representation

Digest: In the absence of clients' consent, it is improper for lawyer to defend two defendants in medical malpractice action where one defendant may have claim over against the other.

Code: EC 4-5, 5-14, 5-15, 5-16,
5-17, 5-19;
DR 4-101, 5-105.

QUESTION

In defending two defendants in a medical malpractice action, where one defendant is claimed to be the active and the other the passive tortfeasor, is defense counsel obligated to refer one of the defendants to separate counsel if that defendant does not consent to the multiple representation?

OPINION

Representation of two defendants in a negligence action would be improper where one client may have a cross-claim against the other unless that client makes a voluntary, informed and understanding waiver of the cross-claim. N.Y. State 191 (1971). A lawyer is prohibited from representing both defendants if the client is unsure whether he will pursue the cross-claim. *Id.* The fact that the defendants carry professional liability insurance is irrelevant; their interests are nevertheless adverse. N.Y. State 161 (1970); N.Y. State 74 (1968).

A lawyer may accept or continue multiple representation only if it is obvious that he can adequately represent the interests of each client and if each client 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. DR 5-105 (A) and (C).

EC 5-14 provides:

"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. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests,

whether such interests be conflicting, inconsistent, diverse, or otherwise discordant."

EC 5-15 provides in pertinent part:

"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; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. . . ."

EC 5-16 provides:

"In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus 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. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances."

See also EC 5-17, 5-19, DR 5-105, EC 4-5 and DR 4-101.

A fortiori, where one client has specifically requested separate counsel, defense counsel may not accept or continue the multiple representation.

Moreover, in the absence of consent (DR 4-101 (C) (1)), if the attorney has received confidential information from the client who has requested separate counsel, the firm must withdraw from representation entirely so as not to be put in the position of using against a former client confidential information received from that client. DR 4-101 (B); N.Y. State 349 (1974); N.Y. State 161 (1970); N.Y. State 555 (1984).

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