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Committee on Professional Ethics

Opinion – 579 — 3/20/87 — (37-86) Topic: Representing opposing counsel in unrelated litigation.

Digest: Not improper to represent opposing counsel in unrelated litigation with consent, after full disclosure, of the clients of each in the litigation in which the counsel represent adverse parties, provided both lawyers reasonably believe there will be no adverse affect on their professional judgments.

Code: DR 5-101, 5-105(A) & (C), 1-102(A)(2), 4-101; EC 5-1, 5-14 to 5-19.

QUESTION

May an attorney for a party in a pending lawsuit simultaneously represent counsel for the adverse party in a personal and unrelated litigation?

OPINION

DR 5-101 provides that, without first obtaining the consent of his client after full disclosure, "a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests." DR 5-105(A) requires a lawyer to "decline proffered employment (if) the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C)." DR 5-105(C) permits a lawyer to represent multi-

ple clients in a situation covered by DR 5-105(A) "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."

As this Committee noted in N.Y. State 162 (1970), these disciplinary rules, supplemented by EC 5-1 and EC 5-14 to 5-19:

> . . . impose on the lawyer the serious obligation not to accept employment from one client if it will result in impaired judgment or divided loyalty to another client. They admonish him to resolve all doubts against the propriety of the representation.
>
> If the clients' interests are not actually or potentially differing, or vary only slightly, so that it is likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client, such representation would not be improper.
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> However, there must first be a complete disclosure to the clients of all facts and circumstances which might cause any client to question his undivided loyalty, and a full understanding and a consent by each client to the multiple representation.

This Committee has not previously addressed the question whether Attorney A, who is engaged in litigation as opposing counsel to Attorney B, may represent Attorney B in a personal and unrelated matter. Other ethics tribunals that have considered the matter have expressed conflicting views. N.Y. City 502 (1939) held that, regardless of his good faith intentions, Attorney A, so long as he is actively engaged in litigation as opposing counsel to Attorney B, could not accept employment from Attorney B for the purpose of arguing motions, preparing briefs and doing other legal work on behalf of Attorney B's clients, because his natural tendency would be to avoid offending Attorney B and he would thereby compromise his ability to represent his existing client with undivided fidelity. In a similar vein, Michigan Opinion CI-649 (1981), ABA/BNA Lawyers' Manual on Professional Conduct at 801:4825, held that so long as Attorney A is representing Attorney B in his personal divorce action, he may not represent a client in a divorce action in which the adverse party is represented by Attorney B, since such a relationship would necessarily affect the attorney's independent judgment

and the zealousness of his representation, and create the appearance of impropriety, even with the informed consent of both clients.[1]

On the other hand, Illinois Opinion 822 (1983), ABA/BNA Lawyers' Manual on Professional Conduct at 801:3015, held that a lawyer may hire another lawyer to represent him though each lawyer frequently represents clients adverse to each other and each is presently involved in cases in which their clients are on opposite sides so long as they fully disclose the representation to those clients who have adverse interests and obtain the consent of each such client. Similarly, Maryland Opinion 82-4 (1981), ABA/BNA Lawyers' Manual on Professional Conduct at 801:4314, held that upon obtaining the consent of both clients after full disclosure, a law firm may defend a client-attorney in a legal malpractice action and at the same time maintain a professional adversarial relationship in matters that are completely unrelated to the malpractice claim, since defending a case in an unrelated matter that is being prosecuted by a client-attorney does not necessarily compromise client secrets and confidences.

It is the view of this Committee that the Code does not mandate a *per se* disqualification.[2] In the first instance, both Attorney A and Attorney B must satisfy themselves that the creation of an attorney-client relationship between them will not compromise in any way the representation of their existing clients in the pending litigation in which they represent adverse parties. If there is doubt in the mind of either attorney that the dual representation by Attorney A might

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1 The Michigan opinion limited its *per se* prohibition of the multiple representation to situations where "the two cases are the same type of litigation" since in those cases, "it is, if not impossible for the attorney to '. . . adequately represent the interest of each . . .,' at least not 'obvious' that he can adequately represent the interest of each" within the meaning of DR 5-105(C). The opinion was also grounded, in part, on the view that Attorney B's "views as to appropriate litigation tactics, negotiating techniques, property division, support levels, and the like" constituted "secrets" within the meaning of DR 4-101(A) and that Attorney A "could not reveal such matters without (Attorney B's) informed consent which it would seem (Attorney B's) obligation to (his client) would prohibit him from giving."

2 This Committee does not, of course, express opinions on matters of law and recognizes that, under some circumstances, simultaneous representation of a lay client and opposing counsel, particularly in a criminal context, might implicate constitutional guarantees. See *Zuck v. State of Alabama*, 588 F.2d 431 (5th Cir. 1979), where a law firm representing a defendant in a murder trial also represented the state prosecutor in an unrelated civil matter, and the Court held that absent a knowing and intelligent waiver, such dual representation rendered the trial fundamentally unfair in violation of the Sixth and Fourteenth Amendments.

affect any settlement recommendation, litigation strategy or other professional judgments either attorney might be called upon to make on behalf of those existing clients, then Attorney A should decline the proffered employment. If, on the other hand, both attorneys are confident that representation of their existing clients will not be compromised in any manner by Attorney A's acceptance of Attorney B as a client in an unrelated matter and if the existing clients in the pending litigation both give their informed consent to the dual representation following full disclosure, then Attorney A may properly accept employment by Attorney B. In addition, it must be apparent that representation of Attorney B will not call upon either attorney to reveal or use any confidences or secrets of the existing clients under circumstances proscribed by DR 4-101. Should either client decline to give consent, then the multiple representation is, of course, impermissible.[3]

It is important to stress that in order to avoid participating or assisting in the violation of a disciplinary rule by another, Attorney A must not only satisfy the obligations owed by Attorney A to his or her own client but also must ascertain that Attorney B is satisfied that his or her engagement of Attorney A as personal counsel will not compromise Attorney B's representation of his or her client and that Attorney B's client has given informed consent to the dual representation. While Attorney A cannot, of course, be privy to Attorney B's state of mind or to all the pertinent facts regarding the consent of Attorney B's client, Attorney A must obtain adequate representations from Attorney B on these matters, have no reason to doubt the truth of those representations, and be reasonably satisfied that Attorney B is aware of the applicable ethical requirements. Attorney B, of course, must meet these same requirements respecting Attorney A.

It should also be stressed that under no circumstances may Attorney A condition his or her representation of Attorney B upon the settlement or other termination of the existing litigation, as that would necessarily "result in impaired judgment or divided loyalty to another client." N.Y. State 162 (1970).

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3 For an excellent discussion of the "delicate balance" struck by DR 5-105(C), see *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981).

CONCLUSION

In sum, then, provided both clients consent and the other standards set forth in this opinion are met, an attorney for a client in a pending lawsuit may simultaneously represent counsel for the adverse party in a personal and unrelated litigation.