

Advisory Opinion 1985-11

No ethical violation has occurred, but the committee has some cautionary observations regarding the situation in which the attorneys requesting the opinion find themselves.

A. Facts Set Forth in the Request for Advisory Opinion.

1. The attorney requesting the advisory opinion ("Attorney A") represents a client who was injured in an automobile accident.
2. This client is employed by Albuquerque Public Schools ("APS").
3. The other driver involved in the accident with Attorney A's client has sued APS on a respondent superior theory (the "tort action"). Attorney A's client is an involuntary counterclaimant in this action.
4. APS is represented in the tort action by Attorney B. Attorney B has agreed with Attorney A's suggestion to have the matter reviewed by a Bar Committee. Therefore, this Committee will consider Attorney A's request although the Committee's rules of procedure prevent it from answering requests pertaining to the conduct of other attorneys.
5. Attorney A then filed a workers' compensation lawsuit (the "workers' compensation action") against APS.
6. Attorney B has entered his appearance in the workers' compensation action on behalf of APS.
7. Attorney A believes that Attorney B and his law firm are in a conflict situation because they represent the employer of Attorney A's client in the tort action and are providing the defense against Attorney A's client in the workers' compensation action.
8. Attorney B and his law firm do not believe that a conflict exists because all parties agree that Attorney A's client was within the course and scope of his employment at the time the accident, which is the subject of the tort action, occurred and because negligence is not an issue in the workers' compensation action.

Facts Not Set Forth in Requesting Letter

1. The basis upon which the court granted APS' motion to join Attorney A's client as an involuntary counterclaimant is not mentioned. Apparently, this was done to allow APS to pursue its counterclaim for reimbursement of compensation payments.
2. In addition, Attorney A seems to assert that Attorney B represents Attorney A's client in the tort action but Attorney B specifically denies such representation. This opinion is written assuming that Attorney B represents only APS in the two lawsuits.

B. Advisory opinion Requested

Attorney A has requested an opinion as to whether Attorney B's representation of APS in both the tort action and the workers' compensation action constitutes an ethical violation.

C. Opinion

The situation presented to this committee for its opinion does not avail itself of a clear answer. It involves responsibilities which imaginably may become conflicting, but which are not obviously conflicting as in a case where a dispute arises between several clients of one attorney or law firm.

It is the committee's opinion that a conflict does not presently exist. Under these circumstances, neither the Code of Professional Responsibility nor the Model Rules of Professional Conduct require Attorney B to withdraw from representation of APS in either or both of these lawsuits. Attorney B should, however, diligently evaluate his effectiveness to his client, and in the event that he determines that he cannot represent his client in the tort action as completely as he could if the workers' compensation action did not exist, he should withdraw. Likewise, he must consider the prejudice which his client would suffer should an actual conflict arise (such as the appearance of evidence that Attorney A's client had been under the influence of drugs or alcohol at the time of the accident) and weigh that prejudice against the degree of likelihood that such a conflict will develop. Attorney B's withdrawal after the case is substantially prepared would be costly to APS. Finally, Attorney B must consider whether Canon 9 applies to this situation. If he concludes that there exists an appearance of impropriety in his representation of his client in both cases, he must withdraw.

D. Discussion

Whether Attorney B may ethically represent his client, APS, in both of the lawsuits is directly or indirectly addressed by Canons 5, 6, 7 and 9 of the Code of Professional Responsibility and Model Rules 1.7 and 1.1 of the model Rules of Professional Conduct.

Because Attorney B has not encountered a blatant conflict of interests, prohibited by Canon 5, we are more concerned with the ability of the attorney to represent his client competently, as required by Canon 6, zealously within the bounds of the law, as required by Canon 7, and that he avoid an appearance of impropriety, as required by Canon 9. In preparation of his case in the tort action, Attorney B will need the cooperation of Attorney A's client as a witness. The primary question facing Attorney B is whether that cooperation will be diminished because of Attorney A's client's knowledge that Attorney B will be representing APS against him in the workers' compensation case. If so, Attorney B's ability to represent his client may be impaired and he must consider withdrawing from at least one of the representations.

Ethical Consideration 5-1 states that: "[n]either his personal interests, the interests of other clients, nor the desires of the third persons should be permitted to dilute [an attorney's] loyalty to his client." Under the circumstances presented to this committee, there is at least some risk that Attorney B may pursue his client's case more warily than if he were not concerned with the emergence of a conflict. Attorney B has taken the position that no conflict exists and that the possibility of a conflict arising is miniscule. As stated in Ethical Consideration 5-2, "a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client. There exists some risk, however small, that Attorney B's position regarding the question of a conflict may "tend to make his judgment less protective of the interests of his client."

In arriving at his decision, Attorney B is directed toward a careful reading of Ethical Consideration 9-2:

"Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

Prudence may dictate that Attorney B, even though there is no rule requiring it, discuss with his client, APS, the possibility of a conflict arising with regard to these lawsuits. For guidance of this disclosure to APS, Attorney B is referred to *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981). Although this is a case in which an actual conflict existed, the court discusses the nature of the disclosure which the attorney is required to make his client.