

Advisory Opinion 1985-8

An attorney has requested an opinion from the Advisory opinions Committee regarding the possibility of a conflict of interest in the representation of two different clients.

FACTUAL SITUATION

A woman has asked the attorney to represent her in a divorce proceeding. Five years ago, the attorney was retained by another party to represent them in a fraud action brought against the woman's husband. The attorney was successful in that lawsuit and obtained a verdict for actual and punitive damages against the husband. The woman was not a party to that lawsuit, was not called as a witness, and was not involved in the discovery stages of the action. The lawsuit currently is pending on appeal before the New Mexico Supreme Court. The husband has posted a supersedeas bond in the form of an irrevocable letter of credit from a local bank.

QUESTION PRESENTED

May the attorney represent the woman in a divorce proceeding against her husband when the attorney currently represents another party in a lawsuit against the husband and has obtained a judgment for actual and punitive damages against the husband?

DISCUSSION

It is appropriate to first discuss the parameters of when an attorney should decline proffered employment. Rule 5-101 of the New Mexico Code of Professional Responsibility provides in relevant part:

(A) Except with 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.

Rule 5-105 of the New Mexico Code of Professional Responsibility says:

(A) A lawyer shall decline proffered employment if the exercise of his independent judgment in 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 Rule 5-105(C).

(C) In the situations covered by Rule 5-105(A) and (B), 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.

Finally, according to Rule 1.7 of the ABA Model Rules of Professional Conduct (August 3, 1983):

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

Loyalty is an essential element in a lawyer's relationship to a client.. As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. See Comment to Rule 1.7 of the ABA Model Rules of Professional Conduct (August 2, 1983). An attorney should avoid representation of clients with differing interests that will adversely affect either his independent professional judgment or his loyalty to a client, whether the differing interests are conflicting, inconsistent, diverse or otherwise. See Informal opinion 1322 (1975).

At first glance, there does appear to be a conflict to the extent that the current client and the woman are both seeking property of the husband; the client seeks to satisfy their judgment and the woman seeks to recover her share of community property in the divorce proceeding. Section 40-3-11 N.M.S.A. (Repl. 1983) states in part:

Community debts shall be satisfied first from all community property and all property in which each spouse owns an undivided equal interest as a joint tenant or tenant in common, excluding the residence of the spouses. Should such property be insufficient, community debts shall then be satisfied from the residence of the spouses . . . Should such property be insufficient, only the separate property of the spouse who contracted or incurred the debt shall be liable for its satisfaction.

The existence of a conflict in this instance though will depend upon whether the judgment is characterized as a community debt or a separate debt. If the debt is community, there is a conflict. In New Mexico, whether a husband's tort is a community or separate debt depends upon whether the husband was engaged at the time of the tort in an act which was of potential or actual benefit to the community. *Delph v. Potomac Ins. Co.*, 95 N.M. 257, 620 P.2d 1281 (1980). The request does not state whether the debt is community or separate. If the nature of the debt is disputed, a judicial determination is probably needed before the attorney will know if a conflict exists.

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and if it does whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclosure courses of actions that reasonably should be pursued on behalf of the client. See Comments to Rule 17.

It is unclear to the Committee from the facts presented whether the amount of the letter of credit is sufficient to pay the entire judgment plus whatever additional costs or fees may be awarded to the current client and what assets the bank has required as security for the letter of credit. If the amount is inadequate or the bank has tied up community assets, there is greater likelihood of a conflict. The attorney should review the letter of credit and determine to what extent the letter of credit protects the current client. The attorney should then determine whether the interests of the current client and the woman are actually or potentially differing.

A client may consent to representation notwithstanding a conflict. Rule 5-105(c) *supra*. The attorney is advised to consult with his current client about the possibility of a conflict, its nature and its effect on the attorney's professional judgment. The attorney should then obtain the client's consent before undertaking representation of the woman. Likewise, the attorney should consult with the woman, explain to her the possible conflict and its effect, and obtain her consent before agreeing to represent her. If the attorney reasonably concludes that he can represent both the current client and the woman without adversely affecting either one, exercise independent professional judgment on behalf of each, and the current client and the woman both consent to the attorney's representation of the other after consultation, then the Committee feels the attorney may represent the woman in her divorce proceeding. It is important that the attorney proceed in such a manner that no question about undivided loyalty arises with either the current client or the woman.