

Advisory Opinion 1986-9

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:

The law firm represents Client A in defense of a lawsuit regarding real property. The law firm also represents Client B on a continuing basis, concerning several diverse matters, all of which are entirely unrelated to the litigation involving Client A. However, B purchased from A a tract of land, B executed a Modification of Restrictive Covenant, and later both A and B sold land to the plaintiffs. Plaintiffs now are suing A seeking to enforce the original restrictive covenant.

Though the law firm originally believed that A's and B's positions were entirely compatible regarding the modification of Restrictive Covenant, the law firm has now discovered that B is openly hostile to A and is displeased that the law firm represents A. The attorney also believes B's present testimony would or could be in derogation of the modification being disputed by the plaintiffs. There is also good reason to believe that B would or could attempt to bolster her testimony by referring to the fact that she, too, is represented by the law firm and that she has indicated to the firm her own personal belief that A's case is without merit. The attorney acknowledges that B's testimony could be the subject of vigorous cross-examination by the law firm in properly representing A before the court and jury. The attorney also notes that the law firm will likely seek a court order compelling discovery of items in a file which has been maintained by B's prior attorneys in connection with the conveyance from A to B and B to plaintiffs.

Finally, the attorney has disclosed this conflict of interest to both A and B, with A, a retired attorney, fully consenting to the firm's continued representation of B on unrelated matters. B, however, only reluctantly and orally consented to the firm's continued representation of A. It is not clear whether B would commit to a written consent.

Questions Presented:

The attorney presented four questions:

1. Must the law firm withdraw from representation of A in the described litigation under Rule 5-501(B) or any other applicable disciplinary rule?
2. If the law firm may properly continue to represent A in the described litigation, what disclosures must be made to A and to B under Rule 5-105(C) or any other applicable disciplinary rule?
3. Under the circumstances recited above, is the consent of B to the law firm's continued representation of A required for the law firm to continue its representation of A?
4. If the answer to question three is in the affirmative, is that consent effective if it is freely but reluctantly given?

Discussion:

To answer the attorney's questions, this Committee examined the following applicable provisions:

(a) Rule 5-105(B) of the Code of Professional Responsibility states:

A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of the client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under Rule 5-105(C).

(b) Rule 5-105(C) provides:

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 judgment on behalf of each.

(c) In addition, Disciplinary Rule 7-101(A)(3) requires that a lawyer shall not intentionally prejudice or damage his client during the course of the professional relationship, except as required under Rule 7-102(B).

(d) Finally, Canon 9 encourages lawyers to avoid even the appearance of impropriety in their professional conduct.

(e) The appeals court in *State v. Martinez*, 100 N.M. 532, 535, 673 P.2d 509 (Ct. App. 1983), (a criminal case) notes that Canon 4, regarding confidences and possible disclosure thereof, Canon 5, which deals with loyalty in exercising independent judgment, and Canon 9, encouraging the avoidance of the appearance of impropriety, are all concepts created for the benefit of the former or first client, in this case, Client B.

The Case at Issue:

The attorney acknowledges that B's testimony could be the subject of vigorous cross-examination by the law firm in properly representing A before the court and jury. This vigorous cross-examination, by its very nature, would adversely affect the interests of B and would intentionally prejudice or damage B during the course of the professional relationship between B and the law firm. Rule 7-102(B) would not apply, and the law firm would be in violation of Rule 7-101(A)(3).

The interest of other clients, notably Client A, could cause the attorney to dilute his loyalty to Client B. Not only would vigorous cross-examination destroy the loyalty of the attorney to Client B, it would also present a vehicle for possible disclosure of confidences or the appearance that the attorney was using client confidences against the client even when that was not the case.

The potential for a conflict in this case seems inevitable, if Client B is required to testify at trial. Accordingly, Disciplinary Rule 2-110(B)(2) requires mandatory withdrawal if the attorney knows or it is obvious that his continued employment will, result in violation of the disciplinary rule.

Although disclosure, as contemplated by Rule 5-105(C) can be used by an attorney representing two clients with possible conflicting interests, this procedure is not applicable unless "it is obvious that he can adequately represent the interest of each." Rule 5-105(C). Adequate representation does not merely mean that the lawyer will adequately perform tasks for B which are unrelated to the above-mentioned litigation, but that the lawyer will perform his obligations of undivided loyalty to Client B. Under the facts related to this Committee, the attorney cannot adequately represent both A and B. It is unreasonable to believe that the lawyer could vigorously cross-examine Client B at trial and still remain undividedly loyal to that client.

Conclusion:

In accordance with the above-mentioned discussion, assuming that the firm's representation of B predated its representation of A, the law firm must cease representation of A. *State v. Martinez, supra*. The first client (Client B) is the party protected by Canon 4, regarding confidences and possible disclosure thereof, Canon 5, which deals with loyalty and exercising independent judgment, and Canon 9, encouraging the avoidance of the appearance of impropriety.

If the law firm desires to continue to represent Client A, it can do so only if (1) such representation is freely consented to by Client B, the first client, (2) such representation would not require the law firm to conduct a hostile cross-examination of B, and (3) it is clear that there are no confidences of B that the law firm would have to protect in the course of representing A in the suit.

The law firm could make a motion in limine in the suit over the restrictive covenant and receive a ruling that B will not be called as a witness in the suit. Since B would no longer have an interest in the property that is the subject of the suit, the potential for divided loyalties and violation of Rule 5-105(B) would seem to be eliminated if these conditions are met.