Advisory Opinion 1990-3

A number of attorneys have asked for the Committee's advice concerning their ability to represent clients in light of their other responsibilities. Some of the requests pose direct questions about whether the attorney may ethically undertake the representation; others assume that the attorney either can or cannot undertake the representation and ask questions concerning the consequences. Guidance in all of these situations is found in SCRA 1986, 16-107 and the commentaries thereto. We therefore set forth the situations and then discuss the application of the rule and commentaries.

1. Several attorneys have asked whether their being on contract to the Risk Management Division to defend the state in civil tort litigation precludes their representation of private clients in other areas of litigation in which the state is a party. Specifically, one attorney wishes to represent a client in litigation concerning real property in which the State Land Office has an interest. Another attorney wishes to know if he can accept court appointment to represent respondents in neglect matters.

2. A similar situation is presented by an attorney who is a member of Navajo Nation Bar. He is on contract to the Navajo Nation, representing a particular tribal enterprise. Judges of the courts of the Navajo Nation appoint members of the Navajo Nation Bar to represent defendants in criminal cases prosecuted by Navajo Nation Department of Justice.
3. Another attorney wishes to know if he may represent a financial institution in litigation matters when his partner sits on the board of the institution.

4. An attorney wishes to know if his firm may represent respondents in neglect cases when members of his firm are guardians ad litem for children in other neglect cases.

In all of these situations, the representation of one client appears to be adverse to another client or appears to be limited by the lawyer's responsibilities to another. Rule 16-107 specifically permits such representation subject to following two requirements. First, the lawyer must reasonably believe that he can undertake both representations without adverse effect on either one. Second, the lawyer must obtain the consent of both clients after explaining all of the implications, advantages, and risks involved.

In each of the above situations, the Committee can conceive of circumstances pursuant to which it would be permissible to undertake the representation and circumstances pursuant to which it would be impermissible. The commentary to the rule states, "a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation." It would seem that, in the situations where the lawyer is on contract to a governmental entity as to a particular matter, that lawyer could represent clients in suits against the entity on totally unrelated matters. Examples of these situations are where the lawyer having a Risk Management contract or a contract with the tribe regarding a particular retail enterprise wishes to represent a client in a land transaction or a client accused of child neglect under the Children's Code or a crime under the Criminal Code. In these cases, it would appear that the lawyer could reasonably believe that the dual representation would affect neither client adversely. The commentary to the rule gives the following guidance on whether a lawyer could so reasonably believe. It states that, when a disinterested lawyer would conclude that the client should not agree to the dual representation, the lawyer should not ask for consent. This implies that before disclosure to and consent of the client the lawyer must conclude that no lawyer would reasonably believe that the dual representation would affect either client adversely.

Of course, the lawyer must obtain the informed consent of each client. In fulfilling the duty of consultation, the lawyer would have to explain to the client exactly why the client might want to consent. Thus, for example, the lawyer with the Risk Management contract who wishes to represent the respondent in a neglect matter would have to advise the respondent that the lawyer has a contract with the state in an unrelated matter due to which the respondent might think the lawyer would not give best efforts on behalf of the respondent. The lawyer may assure respondent that this is not the case and that the lawyer reasonably believes that he can undertake the representation without adverse affect on either client. However, the lawyer should advise the respondent that it is respondent's decision whether to consent. Similarly, Risk Management, either in the contract of employment or on a case by case basis, would also have to give its informed consent.

The law firm, a member of which sits on the board of a financial institution, presents a similar situation. The commentary to the rule contains extensive guidance on this issue, which we adopt in full herein;

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as director.

The lawyer concerned with this problem specifically referred to the possibility that the lawyer/director could not be totally objective in making board decisions which would affect the amount of business his firm would get in litigation. It appears to the Committee that, while this type of conduct is a realistic possibility, any potential conflict created by it could be waived by a sophisticated business corporation upon full disclosure. However, if the lawyer/director believes he or she could not be totally objective, the representation should not be undertaken, even with the consent of the corporation. Furthermore, because the exercise of professional judgment, both as an attorney and as a director is a continuing responsibility, the lawyer/director must continually assess the impact of positions taken and of facts developed to assure the necessary independence of professional judgment.

Finally, the question concerning some members of the firm acting as guardians ad litem while others are representing other parties in similar litigation raises the same concerns as discussed above. Again, our answer will depend on the facts. If, for example, the attorneys are to appear before the same trial or appellate court and take diametrically opposite positions on what constitutes neglect sufficient to remove the children from the home, the commentary to the rule indicates the lawyers should not attempt the dual representation. On the other hand, if the lawyers are before different courts or the issues in the cases are not related, it would not be improper for the firm to seek the consent of each client to simultaneous representation.

In all situations, the lawyers first must be satisfied that they can actually undertake both representations without compromising either. If the lawyers have any doubts about whether they can do this or about whether a disinterested lawyer would believe they can do this, those doubts should be resolved against attempting to undertake both representations. Once the lawyers conclude they may seek the consent of the clients, a full and fair disclosure must be made to the clients. This disclosure must include advice on all of the advantages and, particularly, disadvantages of the proposed course of action. Finally, both clients must consent. Only when these requirements are met may lawyers represent what may appear to be adverse interests.