

ADVISORY ETHICS OPINION 79-05

SYNOPSIS:

No conflict arises simply from the existence of two contracts, serving as special legal counsel to governor and simultaneous “consulting agreement” with Control Electronic Corporation, to require automatic withdrawal from one contract or the other.

FACTS:

A private attorney has entered into a contract for legal services with the State of Vermont, providing that he will serve as special legal counsel to the Governor of Vermont, on a substantially full-time basis. He has also entered into a “consulting agreement” with Control Electric Corporation

ISSUE:

Whether a violation of the Code of Professional Responsibility results for the simultaneous existence of both contracts, or from the attorney’s performance of his duties under both contracts.

APPLICABLE RULES:

The provisions of the Code of Professional Responsibility which appear to govern the above situation are DR 5-105 (A) through (C), which read as follows:

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).
- (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).
- (C) In the situations covered by DR 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 of the exercise of his independent professional judgment on behalf of each.

Consideration should be given also to Ethical Consideration EC 5-15, which reads in pertinent part as follows:

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation . . . On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally 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; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

DISCUSSION:

The operative words which appear in both DR 5-105 (A) and (B), with regard to the determination of whether a conflict requiring withdrawal or refusal of employment exists, are “will be or is likely to be.” In other words, the bare possibility that conflicting interests which will affect the lawyer’s professional judgment may appear in the future, does not require withdrawal. The certainty, or a high probability, that such conflicting interests will exist, obviously does. The disciplinary rules do not define the level or probability of existence of conflicting interests which will require withdrawal; this determination is left to the judgment of the individual practitioner in each particular case.

It certainly cannot be determined, as a matter of certainty, that the State of Vermont and Control Electric Corporation have conflicting interests which will fall in the area of the attorney’s representation of both parties. Furthermore, in light of the exclusion of matters involving the State of Vermont or state regulatory agencies from the attorney’s representation of Control Electric Corporation, it cannot be said to be “likely” that such conflicting interests will exist. On the other hand, it is certainly impossible to rule out the possibility of such conflicts arising in the future. It would appear that, in the course of his representation of the two parties, the attorney will necessarily acquire information of a privileged nature, the possession of

which information might well affect the action of the other party. This is particularly true with regard to future regulatory or promotional plans of the State of Vermont, advance notice of which might well be of great value to Control Electric Corporation. It would appear that the attorney, in the execution of the two contracts, will be placed in a situation which will require exercise of extreme vigilance on his part to prevent himself from even inadvertently disclosing information obtained in the representation of the one client, to the other. This situation is, however, simply an extreme case of a problem that is faced by every attorney with more than one client, and no assumption can be made that the attorney will be unable to protect the confidences of both clients.

CONCLUSIONS:

No conflict arises simply from the existence of the two contracts, which would require the attorney to withdraw from one contract or the other. It should be stressed, however, that the possibility of a conflict arising in some particular matter exists throughout the terms of the two contracts; and a decision as to whether a particular conflict situation requires withdrawal can be made only upon a review of the particular situation. This opinion should not, therefore, be construed as a ruling that no conflict requiring withdrawal may exist at any time in the future. On the contrary, the situation is one which requires continued scrutiny by the attorney of every matter in which he is called upon to represent either client as to whether a conflict exists with regard to that particular matter.