

ADVISORY ETHICS OPINION 81-02

SYNOPSIS:

Attorney who formerly represented three partners in partnership-related matters is not disqualified from representing two remaining partners in dissolution negotiations with withdrawing partner, under facts presented.

QUESTION PRESENTED:

Over the past few years, an attorney has had occasion to represent a partnership of three brothers, A, B, and C, engaged in the operation of a farm. The attorney's past representation of the partnership has included

- (a) representation which was concluded a few years prior to this request, in negotiating a settlement for a partnership claim against an insurance company;
- (b) drafting of a contract for use of the partnership in operating a gravel pit located on the farm property; and
- (c) representing the partnership in a pending civil action concerning a boundary dispute with an adjoining land owner.

In addition, the attorney has represented A and B personally in drafting their wills. C, whom the attorney has not represented on an individual basis, has recently decided to withdraw from the partnership and has his own attorney to represent him in negotiating an agreement with A and B concerning a division of the partnership assets. A and B have asked the requesting attorney to represent the, and C has requested that the attorney not represent his brothers, based upon the attorney's representation of all three brothers in the pending civil action. The requesting attorney explains that he acquired no information in the course of his representation of the partnership which would tend to create a conflict of interest such as to disqualify him from representing A and B, and points out that the partnership has no written partnership agreement. According to the attorney, his total knowledge of the operation of the partnership up until the present has consisted of knowledge that all three partners owned the assets, and that all three shared equally in its debts and profits. Such knowledge as the attorney does possess regarding the partnership assets came to him as a result of discussing estate planning with A and B, and he has never spoken with C concerning operation of the partnership.

The attorney asks whether it would be ethical for him to represent A and B, who have so requested, in connection with the dissolution of the partnership.

OPINION:

Accepting as correct the requesting attorney's beliefs as to not having acquired any information in the course of his representation of the partnership that might be used to the disadvantage of C¹, and further assuming that there is an overall communality of interest among all three partners in the outcome of the pending civil litigation, there appears to be no ethical prohibition against the attorney continuing to represent A and B in their negotiations with C. (The Committee recently addressed a similar question, in its Opinion #80-21, which is distinguishable on the basis of the substantiality of prior involvement of the attorney in the affairs of the multiple clients involved.) Naturally, the attorney should remain alert to the possibility of the interests of the three partners in the pending litigation developing to the point where the interests of the respective partners become differing (e.g. with regard to settlement negotiations or compromise), so that he will not be put in a situation which would impair his ability to exercise independent professional judgment in the matter. (Such a possibility might exist, for example, if the real property interest at stake in the boundary litigation were a substantial one and if dissolution negotiations were to develop to the point where the risks or benefits to be derived from this particular property interest were proposed to be shared on some basis other than equally.)

While no opinion has been requested as to the propriety of the attorney's continued representation of the partnership in the pending boundary litigation, the attorney should be mindful of EC 5-19, which would compel him to honor a request by C that he withdraw as his attorney in the litigation. We are of the view that the attorney's continued representation of A and B, after withdrawing as counsel for C, should be premised upon an agreement with A and B that his fees, and the costs of subsequent litigation incurred on behalf of A and B would be the obligations of A and B, and not of the partnership as an entity.

¹ See EC 4-5.