

ADVISORY ETHICS OPINION 83-04

SYNOPSIS:

Where the husband of one marriage is living with the wife of another, a lawyer may represent both of the spouses of these persons in separate divorce actions. Even if there were an impermissible conflict of interest, the consent of the clients to the dual representation would allow it as long as actual conflicts do not arise.

OPINION:

The facts of this request are somewhat complex but can be reduced to an essential few. Two married couples who we will call H1 and W1 and H2 and W2 were social friends. A couple of years ago H1 left with W2 to live together in another state. The remaining spouses both sought the legal assistance of the lawyer who has requested an opinion, one to begin a divorce action against her spouse and the other to defend a divorce action brought by his spouse. While the divorce actions were pending, H2 and W1 began living together.

During the course of the divorce action brought by W1, the lawyer for H1 suggested that the lawyer for W1 had a conflict of interest because of the contemporaneous representation of H2. The lawyer for W1 discussed the situation with both the clients and, obtaining their consent to continue, declined to withdraw from either case. The W2 v. H2 case has now been tried with H2 receiving custody of the minor children of the marriage and a support order against W2. On the eve of trial, the lawyer for H1 is again questioning the propriety of the continued representation of the lawyer for W1. As a result, the lawyer for W1 has sought the opinion of this committee as to whether he may continue to represent W1. The only issue is whether the lawyer has a conflict of interest because of the contemporaneous representation of H2.

The situation is addressed, if at all, by Code of Professional Responsibility DR 5-105(B) and (C). These provisions state:

- (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 on the exercise of his independent professional judgment on behalf of each.

The term "Differing interests" is defined in the definition section of the Code to include:

... every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

Based on these provisions, we can reduce the inquiry to two basic issues: (1) Whether W1 and H2 have differing interests or the representation of one will adversely affect the representation of the other; (2) Whether if there is a conflict, it can be vitiated by consent under DR 5-105(C). We will treat these questions in order.

The lawyer requesting this opinion has not provided any detail on how he thinks the interests of his clients may differ, or how the representation of one might be adversely affected by the representation of the other. We can think of two possible ways. First, the new couple of W2 and H1 may have limited financial ability so that maximizing the support award for H2 may minimize such an award for W1, or vice versa. One could conceive of a similar tradeoff on alimony or custody.

Second, the other client of the lawyer may become a witness in one of the divorce actions in a way that the lawyer would have to cross-examine and impeach that client.

In our judgment, these are possibilities that do not on the facts presented reach the "likely to be" standard in the Disciplinary Rule. The facts presented show a community of interest between W1 and H2, such that it is difficult to see how either would become an adverse witness for the other. While disputes over support, custody, alimony, or property might put them in a difficult situation of reconciling their individual demands, the facts do not show any inconsistencies have yet arisen. Accordingly, we believe that DR 5-105(B) does not bar the lawyer from representing both W1 and H2 at this time. Of course, the lawyer must be vigilant for differing interests and will not be able to continue if they arise.

Even if there were an impermissible conflict, this is an appropriate case to give effect to client consent under DR 5-105(C). In Informal Opinion 1441 (1979) the ABA Ethics Committee recently found consent effective to allow the joint representation of a dealer and a manufacturer against consumer warranty claims as long as any conflicts are potential rather than "actual and apparent at the outset." The situation in that opinion is similar to that present here. There are possibilities that serious conflicts will emerge but they are neither actual nor apparent at this point. As long as the possibilities do not ripen into actual conflicts, the consent will be effective to allow the dual representation of W1 and H2.