ADVISORY ETHICS OPINION 90-05

SYNOPSIS:

A lawyer may go into business with a client, provided their interests in the business do not differ and the client does not expect the lawyer to exercise his professional judgment in the business for the protection of the client

FACTS:

Members of the same law firm are also partners in a real estate development general partnership. A client of their law firm wishes to become a partner in the lawyers' real estate partner- ship. The lawyers inform us that they have discussed with the client the conflict of interest problems which may arise when attorneys enter into business relations with clients, that their client engages other lawyers for some legal matters, and that the client will be represented by independent legal counsel when he acquires an interest in the lawyers' real estate partnership and when he otherwise engages in any business relationship with the real estate partnership.

The lawyers ask whether their proposal presents any ethical issues that need to be addressed.

DISCUSSION:

Disciplinary Rule 5-104(A), which deals with limiting business relations with the client, reads as follows:

> "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure."

On the facts given, the members of the real estate partnership would not seem to have differing interests and therefore DR 5-104(A) is not applicable. To the extent there maybe differing interests within the partnership, of course, it would be incumbent on the lawyers to make certain their client-partner knows they are not representing him or protecting his interests in anything they do which is related to the partnership.

Ethical Consideration 5-3 reads in part:

> "The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. . . . A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

The canon behind EC 5-3 is that a lawyer should exercise independent professional judgment on behalf of a client The issue that the inquiring lawyers must face is whether their own self-interest in the partnership property may interfere with their exercise of free judgment on behalf of their client and real estate partner. So long as the inquiring lawyers do not represent the client in any matter affecting the partnership's interests, nothing should inhibit their exercise of independent judgment on behalf of the client in other legal matters.

Lawyers probably exert influence over their clients without intending to do so, and even without realizing it The attorneys in this case, therefore, must be mindful of EC 5-3's admonition against influencing a client to invest in an enterprise in which the lawyer is interested. Similarly, they must be extremely careful that their votes on business decisions are not taken by their non-lawyer partner as professional opinions that such and such a course of business is legal, or will produce a certain legal result.

The lawyers' proposal appears to be ethically appropriate, especially because of the provision for independent counsel for the client Both the lawyers and their client should understand at the outset, however, that "(t)here are no transactions which courts will scrutinize with more jealousy than dealings between attorneys and their clients."[1] Many courts hold there is a presumption of unfairness in such dealings, and force the lawyer to prove full disclosure was made to the client and that the deal was equitable.[2] Thus, the proposal presented here will have ethical risks, as well as business risks, for the participating lawyers.

[1] *Spilker v. Hankin,* 188 F.2d 35 (D.C. Cir. 1951).
[2] See *In re James,* 452 A.2d 163 (D.C. 1982); *Radin v. Opperman,* 64 A.D.2d 820, 407 N.Y.S. 303 (1978); *In re Brown,* 262 Or. 180, 497 P.2d 668 (1971).