

ADVISORY ETHICS OPINION 90-07

SYNOPSIS:

A lawyer who represents simultaneously Client A and Client B in separate and unrelated matters should discontinue multiple employment under DR 5-105(b) when the lawyer likely would cross-examine Client A, expected to be a principal witness for Client B's ex-spouse in a divorce modification proceeding brought by the lawyer on behalf of Client B.

FACTS:

Client A has retained an attorney to assist the client with legal advice about the client's marital situation, then and now in some difficulty. About six months later, the same attorney was retained by Client B to modify Client B's divorce order in Superior Court. About two months later Client A disclosed to the attorney for the first time that Client A is the "live-in girlfriend" of Client B's former husband, the defendant in the divorce modification proceeding. Client A has told the attorney that she expects to be a principal witness for the ex-husband against Client B's petition. Client A has further informed the attorney that she thinks the attorney might embarrass her if the attorney cross-examines her during a hearing on the modification petition.

ISSUE:

Should the attorney discontinue his multiple employment under the requirements of DR 5-105(B)?

ANALYSIS:

Multiple client representation is unethical if an attorney's independent professional judgment will be or is likely to be affected adversely, or if such multiple representation would likely involve the lawyer in representing "differing interests", except for client consent.

Some cases have held that even a mere possibility of a conflict requires a lawyer to decline or otherwise discontinue employment.¹ On the other hand, most courts under the Code have used a "substantial risk" test to determine whether there is a disqualifying conflict.²

The conflicts rules in DR 5-105 rest on general principles of client loyalty and assurances of confidentiality as to client information. The basic question under DR 5-105(B) is whether multiple representation of clients with "differing interests" will "likely impair the lawyer's independent professional judgment" or cause a lawyer to represent those varied "differing interests".

The interests of Client A and Client B in the outcome of the divorce modification case appear to be in conflict or otherwise inconsistent and diverse. In view of the apparent close relationship between Client A and Client B's ex-husband, there is a reasonable probability of a material impairment of the attorney's loyalty (or even the disclosure of confidential information however inadvertent) if the attorney cross-examines Client A in the modification hearing. In any event, the dilemma faced by the attorney is an ethical Hobson's Choice between loyalty and vigorous representation of one client with adverse interest against another.

Although the question presented does not involve simultaneous representation of two adverse clients in the same or even related litigation, the loyalty principle underlying the proscriptions in DR 5-105(B) against adverse effects on independent professional judgment and representation of differing interests applies here.

The standard to be applied in the absence of substantial relationships between two controversies was well stated by the Second Circuit in *Cinema 5, Limited v. Cinema, Inc.*,³ involving a lawyer's acceptance of employment against an existing client in unrelated cases. The court held that the propriety of such conduct "must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients". The court then continued:

¹ *Matter of Lantz*, 442 NE2d 989 (Indiana 1982) ["mere possibility"]; *First National Bank v. Rapides Bank*, 244 SE2d 51 (Georgia 1978) ["possibilities"]; and *In re: Holmes*, 619 P2d 1284 (Oregon 1989) ["slightest doubt" standard] but see, e.g. *Realco Services v. Holt*, 479 F Supp 867 (ED Pennsylvania 1979) ["the . . . standard . . . serves as a substitute for analysis rather than as a guide to it. It is easier to find a doubt than to resolve difficult questions of law and ethics"]

² See, e.g., *In re: Tonkon*, 642 P2d 660 (Oregon 1982).

³ *Cinema 5, Limited v. Cinema, Inc.*, 528 F2d 1384 (1976)

Where the relationship is a continuing one, adverse representation is a prima facie improper [citation omitted] and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation.

A 1981 Professional Guidance Opinion of the Philadelphia Bar Association on facts almost identical to the present case advised against continuing representation. In the Philadelphia Bar matter, an attorney represented a wife in a separation case which was scheduled for trial in the very near future. Within several days before trial, the attorney was advised that the wife's husband had been dating another woman who was likely to be called by the attorney at trial or possibly deposed. As in the present case, the problem for the Philadelphia lawyer was that the "other woman" was a present client of the lawyer in an unrelated domestic relations matter. Without any analysis, the Philadelphia Bar Association advised

It would appear necessary to withdraw from the currently pending litigation if that can be done without jeopardizing the rights of his client. In view of the impending hearing, the inquirer was advised to apply to the court for leave to withdraw.⁴

Rather than just intuit withdrawal, we rely on the guidance of EC 5-15 and the reasoning of *Cinema 5* to conclude that continuing representation of Client B will likely violate DR 5-1 05(B), and that the attorney in our case should seek leave to withdraw. Also, we make reference in support to Opinions 88-2 and 88-7 concerning the circumstance of an attorney facing the prospect of cross-examining a former client.

An additional caution is that the attorney should be careful not to use or anyway employ any confidences or secrets obtained from Client B to the advantage of Client A. If there is a reasonable likelihood that Client B's confidences or secrets would or even could so be employed, then the attorney must also sever his professional relationship with Client A under DR 4-101(B).

⁴ PBA Opinion 81-51.