

ADVISORY ETHICS OPINION 92-14

SYNOPSIS:

The Code of Professional Responsibility does not expressly bar an attorney from representing a client where the attorney's partner is a personal friend of two potential adverse witnesses and where the partner previously represented one of the witnesses in an unrelated matter; continued representation depends on the attorney's ability to provide full loyalty to the client during the representation.

FACTS:

An attorney in a local public defender's office has been appointed to represent a person facing numerous criminal charges. Two witnesses against the defendant, one being the State's chief witness, are former employees of another attorney in the public defender's office who had run a local business before joining the office. The second attorney has remained friends with the two witnesses and in the past represented one of them in an unrelated matter. For purposes of this opinion we assume the second attorney is a partner of the requesting attorney.

ANALYSIS:

There is no conflict of interest under the Code. These facts do not present a case of representing current clients in separate matters, and the representation of the witness by the requesting attorney's partner was in a matter unrelated to the instant matter. Under the "substantial relationship" test applicable to instances of successive representation the current representation presents no conflict. There is no issue raised regarding secrets or confidences of a former client.

There remains the question whether the requesting attorney's partner's friendship with the witnesses may create an appearance of impropriety or otherwise undermine the requesting attorney's duty of loyalty to the client. The following ethical considerations may have bearing on how the attorney should proceed.

EC 5-1 states:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and *free of compromising influences* and loyalties. Neither his personal interests, the interest of other clients, *nor the desires of third persons* should be permitted to dilute his loyalty to his client. (emphasis added)

EC 5-2 states in pertinent part:

A lawyer should not accept profit employment if his personal interests or desires will, *or there is a reasonable probability that they will*, affect adversely the advice to be given or services to be rendered the prospective client . . . (emphasis added)

EC 5-21 is also instructive. It provides:

The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer *unless that person is in a position to exert strong economic, political or social pressures upon the lawyer*. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressure should make full disclosure of them to his clients; and if he or his client believes that the effectiveness of his representation has been, or will be, impaired thereby, the lawyer should take proper steps to withdraw from representation of his client. (emphasis added)

The requesting attorney is the only one who can fairly assess the influence, if any, that the partner's friendship with the two state witnesses will or may have on the attorney's advocacy on behalf of the client. EC 5-21 suggests the steps we would recommend that the attorney follow to ensure that the representation of the client is free from competing influences that would impair the vigor of the representation. The attorney must first resolve, in the attorney's own mind, whether the prospect of investigating and cross-examining a friend and former employee of the partner will dissuade the attorney from vigorous pursuit of the client's interests. The attorney should disclose to the client the existence the social facts which have raised the concern. If the attorney or the client believe the effectiveness of the representation will be impaired, the attorney should seek permission of the court to withdraw from further representation.