

ADVISORY ETHICS OPINION 92-15

SYNOPSIS:

A lawyer may not represent a client whose interests are adverse to those of another current client. This applies even if the two representations are unrelated. Multiple representation for matters in litigation is allowed only in limited instances where each client consents after full disclosure and there is a clear showing that either clients' respective interests will not be adversely affected by the representation of the other client.

FACTS:

Attorney is the chairman of a municipal board of listers and the board of civil authority. The municipality underwent a property tax reappraisal. Not unexpectedly, various landowners grieved increased assessments and the listers decided those grievances. Some taxpayers appealed to the board of civil authority. Attorney recused himself from hearing the appeals and instead presented the municipality's case as chairman of the listers. Several taxpayers took further appeal to the Superior Court. Attorney was asked by the municipal agent to represent the municipality as its legal counsel for those appeals, which engagement he has accepted.

One of the taxpayers who appealed pro se is a client of Attorney. Attorney defends taxpayer in a civil action alleging taxpayer wrongfully cut wood from another's land. That action is entirely unrelated to the tax appeal.

In the tax appeal, Taxpayer has asked the Superior Court to disqualify Attorney from representing the municipality citing both a conflict of interest between his duties as lister and as legal counsel for the municipality on the tax appeal, as well as raising objection because of his representation of Taxpayer in the civil matter.

The Superior Judge suggested Attorney seek an advisory opinion from the Committee.

OPINION:

There is a substantial body of law concerning representation of two clients whose interests may be adverse to one another. The ABA/BNA Lawyers' Manual on Professional Conduct 51:101 "Representation Adverse to Existing Client" contains a comprehensive analysis of the issues, advisory opinions, and attorney disciplinary and judicial decisions. A recent A.B.A. Formal Opinion comprehensively reviews the issue as well.¹ Between 1976 and 1992 this Committee issued 76 advisory opinions on conflict of interest situations.² The Vermont standards are set forth in DR 5-105.

DR 5-105 (A) requires a lawyer to

“decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).”

DR 5-105 (8) states:

“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).”

DR 5-105 (C) permits a lawyer to 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.”

Our analysis focuses on the critical issue of the relationship of trust and confidence between lawyer and client. The ABA Committee on Ethics and Professional Responsibility points out in its Informal Opinion 1495 (1982) that “[l]oyalty is an indispensable element of a lawyer's relationship with a client.” Can a lay client truly trust the loyalty of his lawyer, if that lawyer opposes him in an unrelated matter in litigation? The California Court of Appeals expressly posed this question in a

¹ A.B.A. Formal Opinion 92-367 (10/16/92).

² See generally, Opinion 91-4 (representation of multiple parties who may be called as witnesses in each other's cases), Opinion 87-18 (disqualification from representing a mortgagee in a foreclosure action having represented mortgagor in the property's purchase), Opinion 80-8 (prohibition of appellate representation of a former adversary in a case versus a former client when the new representation arises out of the same transaction).

disqualification motion before it.³ It is not unreasonable to expect that a client will harbor doubts about the vigor of the lawyer's representation, even if those doubts are not expressed. Can the lawyer himself reliably and believably assert that neither representation is affected to some degree, however subtle or unconscious? There are ample opportunities for miscommunication and misunderstandings between lawyers and clients involved in complex legal matters. The necessity of this Committee and its counterparts elsewhere, as well as the increasing number of cases in the disciplinary system itself, are clear testament to the pitfalls of contemporary legal practice.

Ours is a generally broad view of the restriction on multiple representation and conflict of interest involving matters in litigation. While we expressly adhere to the standard that adverse effect must appear, we find in the presence of one client's objection unequivocal evidence that the relationship has already been adversely affected. Similarly, the client consent contemplated by DR 5-105 (C) cannot be obtained. Finally, our discussion here is limited to litigation matters. There may be times when corporate clients, for instance, have adverse interests because they are competitors. We do not reach those issues here since they are beyond the factual background presented by this advisory opinion request.

In addition, Attorney requested our opinion as to whether an attorney who appears before the Board of Civil Authority as chairperson of the town Board of Listers can later represent a town on an appeal from the Board of Civil Authority's decision. In light of our comments concerning the multiple representation issue, it became unnecessary to address this second situation.

³ *Jeffry v. Pounds*, 67 Cal.App.3d 6,9 (1977).