

ADVISORY ETHICS OPINION 93-03

SYNOPSIS:

An Attorney representing a Husband in a divorce action, who also is a landlord to the Husband and the Wife, may continue to represent the Husband in the divorce action so long as he makes full disclosure to the Husband of potential areas where the attorney's pecuniary interest as landlord might conflict with the Husband's objectives in the lawsuit and the Husband provides an informed consent.

FACTS:

Requesting Attorney (hereinafter Attorney) represents Husband in a pending divorce action. The Husband and Wife jointly own a mobile home in a mobile home park owned by Requesting Attorney's law partnership. The Wife has not lived in the mobile home for a number of years. The partnership will continue to rent to either party awarded the mobile home in the divorce action as long as that party meets the standard qualifications for residing in the park. The Attorney has not specified what those "standard qualifications" are.

Wife's Attorney has requested Husband's Attorney to step aside on grounds of conflict of interest. Husband's Attorney requests our opinion as to whether he is required to withdraw.

DISCUSSION:

Attorney does not now and never has represented the Wife, so no conflict exists with respect to the Wife. The potential for conflict, if any, arises from Attorney's pecuniary interest in the mobile home park through his partnership interest and the possibility that the Husband's objectives in the divorce litigation may not coincide with the interests of the partnership as owner of the mobile home park. If, for example, it was the Husband's desire that the mobile home be awarded to the Wife in return for some cash settlement, where the Wife was a less financially secure tenant than Husband, the partnership might prefer that Husband retain the mobile home. It is also possible that Attorney may learn financial information during the litigation that would influence or have the potential to influence his or the partnership's decision regarding further rentals. The Attorney owes a fiduciary duty to his partners which may conflict with his duty of loyalty to his client.

DR 5-101 and DR 4-101 are implicated by these facts.

DR 4-101 provides in pertinent part that an attorney shall not use a secret or confidence of his client for the advantage of himself or third persons unless the client consents after full disclosure.

DR 5-101 provides in pertinent part that "except with the consent of the client after full disclosure, an attorney shall not accept employment if the exercise of the attorney's professional judgment on behalf of the client will, or reasonably may be affected by the attorney's own financial business property or personal interest."

It should be noted here that information that would cause the partnership to have an interest adverse to the client will also cause the Attorney to have an interest adverse to the client since the Attorney and the partnership's interest in connection with the mobile home park ownership are the same. Also, since the Attorney's knowledge is imputed to all partners, information learned by the Attorney is deemed to be known to the partnership in regard to any conflict analysis.

Under these circumstances, the Attorney must discuss the potential areas of conflict with the client. If a reasonable possibility exists either that the Attorney will gain information that might be used against the client in regard to the mobile home park tenancy, or that client's objectives in the litigation will be at odds with the partnership's interest as owner of the mobile home park to such a degree that the Attorney's loyalty to the client and exercise of independent professional judgment for the client may be impaired, then the Attorney must withdraw at once. Otherwise, the Attorney may continue to represent the Husband so long as the Attorney makes full disclosure to the Husband of the areas of potential conflict and the Husband gives consent.

If the Attorney continues to represent the Husband, any information gained regarding the Husband during the litigation may not be used against the Husband or for the advantage of the Attorney or the partnership, except with the client's consent after full disclosure. Theoretically, if the Attorney learned information regarding the Husband or the Wife which later influenced the Attorney or the partnership to consider an adverse action against whichever party remained a tenant in a way that was adverse to the Husband's interest, then, absent consent by Husband, the partnership would be required to refrain from making any such decision and, if necessary, would have to hire an independent manager to run the affairs of the mobile home park vis-a-vis the

party tenant. The likelihood of this scenario occurring seems remote, but the client must be informed of the possibilities and must provide informed consent to the continued representation by the Attorney.