

# ADVISORY ETHICS OPINION 98-13

## **SYNOPSIS:**

A lawyer may not represent a criminal defendant in a criminal case where another client in an unrelated matter is a State's witness, notwithstanding that each client may make an informed consent after a full disclosure of any relevant facts concerning such dual representation, because such dual representation would involve an inherent risk of violation of one or more Disciplinary Rules.

## **FACTS:**

Lawyer represents Client A in a family court proceeding. Client B has asked Lawyer to represent Client B in an unrelated criminal prosecution, in which Client A is a State's witness to testify against Client B. Lawyer has fully disclosed to Client B his representation of Client A and Client B does not object to Lawyer's dual representation. Although not clear from the facts presented, the Committee assumes that Client A would likewise consent to the dual representation after full disclosure. Lawyer believes that the dual representation will not likely undermine the confidences and secrets of either Client A or Client B. Further, from pre-trial interviews, Lawyer expects Client A's testimony to be favorable and exculpatory to Client B.

## **QUESTION:**

May Lawyer represent Client B in the criminal proceeding where Lawyer also represents a State's witness, Client A, in an unrelated matter in the Family Court?

## **DISCUSSION:**

The applicable ethical canons invoked by the question before the Committee are *Canon 5: A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client*, and *Canon 7: A Lawyer Should Represent a Client Zealously Within the Bounds of the Law*.

The relevant Disciplinary Rule and Ethical Considerations involved in this inquiry are DR 5-105 and EC 5-15 and EC 5-19. DR 5-105 reads as follows:

### **DR 5-105 - Refusing To Accept Or Continue Employment If The Interests Of Another Client May Impair The Independent Professional Judgment Of The Lawyer.**

- (A) A lawyer shall 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).
- (B) 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).
- (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients *if it obvious that he can adequately represent the interests 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. (emphasis added)

EC 5-15 provides in pertinent part as follows:

**EC 5-15** If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. . . .

EC 5-19 provides in pertinent part as follows:

**EC 5-19** The lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

DR 7-101 provides in pertinent part as follows:

**DR 7-101 Representing a Client Zealously.**

(A) A lawyer shall not intentionally:

- (1) Fail to seek the lawful objectives of his client to reasonably available means permitted by law and the Disciplinary Rules. . . .
- (2) Fail to carry out a contract of employment entered into with a client for professional services. . . .
- (3) Prejudice or damage his client during the course of the professional relationship. . . .

EC 7-9 provides in pertinent part as follows:

**EC 7-9** In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. . . .

The conflicts rules set forth in DR 5-105 are premised on the general principles of client loyalty and assurances of confidentiality as to client information. DR 5-105(B) asks whether dual representation of clients with “differing interests” will “likely impair the lawyer’s independent professional judgment”.<sup>1</sup> “[T]he dilemma faced by the attorney is an ethical Hobson’s choice between loyalty and vigorous representation of one client with adverse interest against another.”<sup>2</sup> A lawyer may not represent a client whose interests are adverse to those of another current client, even if the two representations are unrelated.<sup>3</sup>

In the facts before us, the fundamental inquiry is whether Lawyer is faced with a conflict of interest under the Code. At a minimum, there appears to be a conflict between Lawyer’s continuing duty of loyalty to Client A, now acting at least nominally as an adverse witness to the interests of Client B in the criminal prosecution, and the duty of loyalty to Client B, whom he must represent competently and zealously under DR 6-101 and DR 7-101. In these circumstances, Lawyer should be mindful of the potential for calling his own credibility into question and effectiveness on Client B’s behalf as a result of having to cross-examine Client A. See *Opinions 88-7 and 88-2*; see also *Opinion 84-1* where this Committee discussed the inherent conflict and potential prejudice to both clients of cross-examining one client who was appearing as a witness against another, and Footnote 1 therein discussing the added consideration of the Sixth Amendment right to counsel. Whether dual representation will be permissible is “a judgment that necessarily must be resolved on a case by case basis.”<sup>4</sup>

In *Opinion 88-7*, this Committee decided that a lawyer may continue to represent a client when a former client may testify as an adverse witness and the lawyer does not share secrets or confidences or have a potential pecuniary interest in future relations with the former client, provided both clients make informed consents to the representation. In the past, the Committee has strongly recommended that such consents be in writing whenever possible, as a prudent practice, although not required by the Disciplinary Rules.<sup>5</sup> Thus, dual representation is permissible under DR 5-105(C) if each of the clients makes an informed consent to the representation after a full disclosure of any relevant facts, and if it is *obvious* that the lawyer can adequately represent the interests of each client.<sup>6</sup>

Cross-examining one’s own client as an adverse witness on behalf of another client is likely (1) to pit the duty of loyalty to each client against the duty of loyalty to the other; (2) to risk breaching the duty of confidentiality to the client-witness; and (3) to present a tension between the lawyer’s own pecuniary interest in continued employment by the client-witness and the lawyer’s ability to effectively represent the litigation client.<sup>7</sup> “Underlying the ethical prohibition is the precept that the lawyer’s duty of loyalty demands that a client not be concerned with whether the lawyer may subconsciously be influenced by the differing interests of another.”<sup>8</sup> As this ethical dilemma was aptly explained,<sup>9</sup> an attorney should “not be permitted to put himself in a position where, even unconsciously, he will be tempted to ‘soft pedal’ his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another.”<sup>10</sup> In such a case, the lawyer “may well be torn between a ‘soft’, or deferential, cross-examination, which compromises the representation of the litigation client, and a vigorous one, which breaches the duty of loyalty to the client-witness.”<sup>11</sup>

In the present case, Lawyer does not perceive that the confidences and secrets of either Client A or Client B will be undermined by the testimony of Client A at the trial of Client B. Lawyer expects Client A’s testimony to be favorable and exculpatory to Client B. If Lawyer’s pre-trial perceptions and expectations are accurate, there would be no apparent conflict

<sup>1</sup> See *Opinion 90-7*.

<sup>2</sup> *Id.*

<sup>3</sup> See *Opinion 92-15*.

<sup>4</sup> *Opinion 88-2*.

<sup>5</sup> See *Opinions 88-2 and 88-7, fn. 4*.

<sup>6</sup> See *Opinions 91-4, 88-7 and 88-2*.

<sup>7</sup> See *ABA Formal Opinion 92-367* (October 16, 1992) (decided under the Model Rules of Professional Conduct).

<sup>8</sup> *Id.*

<sup>9</sup> *Estates Theatres v. Columbia Pictures Industries*, 345 F. Supp. 83, 89 (S.D.N.Y. 1972)

<sup>10</sup> *Id.*

<sup>11</sup> See *ABA Formal Opinion 92-367*.

between the information possessed by Client A and the position to be taken by Client B in the criminal prosecution.<sup>12</sup> Moreover, the subject matter of the representation of Client A and Client B is entirely different.<sup>13</sup> However, “you can never plan the future by the past,” as Edmund Burke once said. As every trial lawyer knows, one can never accurately predict what may or may not occur during the usual ebb and flow inherent in every jury trial.

Because of the potential conflict of interest attending the prospect of having to cross-examine one’s own client, and Lawyer’s pecuniary interest in future relations with Client A,<sup>14</sup> the Committee believes that the command of DR 5-105(B) requiring the exercise of independent professional judgment, as well as DR 6-101 and DR 7-101 relating to the competent and zealous representation of a client, necessarily preclude undertaking the dual representation in these circumstances. Thus, the Committee is persuaded that “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.”<sup>15</sup> In so stating, the Committee has considered whether the salutary consent/full disclosure provision of DR 5-105(C) may permit dual representation in these circumstances. The Committee concludes that, in this setting, each client’s consent after full disclosure cannot resolve the ethical impediment that confronts Lawyer<sup>16</sup> (depending on the facts, there may be conflicts that are “nonconsentable”).<sup>17</sup>

## **CONCLUSION:**

In these circumstances, it is not permissible for Lawyer to represent Client B, given Lawyer’s concurrent representation of Client A, a State’s witness in Client B’s criminal prosecution, without doing violence to the mandate of DR 5-105(B), DR 6-101 and DR 7-101 requiring the exercise of independent professional judgment, competent and zealous representation at all times.<sup>18</sup>

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<sup>12</sup> See, e. g., Opinions 91-4 and 98-1.

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., Opinion 88-7.

<sup>15</sup> See Opinion 90-7.

<sup>16</sup> See ABA Formal Opinion 92-367, fn. 14

<sup>17</sup> If, as Lawyer represents, there are no confidences and secrets of Client A that reasonably appear to be at issue in Client B’s case, such that Lawyer’s cross-examination of Client A, even if Client A proves to be more hostile than anticipated, would not implicate confidences and secrets, it would be permissible for Lawyer to withdraw from further representation of Client A and represent Client B in the criminal trial, provided Client A consents after full disclosure, pursuant to DR 5-105. In other situations inapposite to the present case, a satisfactory solution that has been suggested may be the retention of another lawyer solely for the purpose of examining the principal lawyer’s client. See ABA Formal Opinion 92-367 at fn. 18.

<sup>18</sup> While this case is decided under the precepts of the Code of Professional Responsibility, we would reach the same result under the applicable provisions of the Model Rules of Professional Conduct. See Model Rule 1.7 (dealing with conflicts of interest); Rule 1.10 (governing imputation of a lawyer’s disqualification); Rule 1.6 (governing the obligation of confidentiality); Rule 1.8(b) (which prohibits using information relating to a client representation to the client’s detriment); and the obligations of competence and diligence set forth and Rules 1.1 and 1.3.