

You have presented a hypothetical situation in which indigent capital Defendants A and B were convicted of capital murder and sentenced to death. The crimes were unrelated, but occurred in the same jurisdiction. The trials took place within a month of one another, and both Defendants received the death sentence. Defendant A was represented at trial and on appeal by Attorneys 1 and 2. Defendant B was represented at trial and on appeal by Attorneys 3 and 4. Both cases were affirmed on direct appeal and the petition for certiorari in each case was denied. In May, 1995, the court appointed Attorney 4 to represent Defendant A in state habeas corpus proceedings. In October, 1995, with a final petition not yet filed on behalf of Defendant A, the court appointed Attorney 1 to represent Defendant B in state habeas corpus proceedings.

The result of these appointments was that Attorney 4 was expected to zealously advocate petitioner's claims of ineffective assistance of counsel against Attorney 1, while simultaneously defending himself against substantially similar claims made by Attorney 1. Attorney 1 would, of course, be in the identical situation.

The effective litigation of these claims requires not only their presentation in the petition, but also their factual development and substantiation through investigation, research and discovery. The petition developed by Attorney 1 and filed previous to Attorney 4's petition had only one claim regarding trial counsel's performance.

Under the facts you have presented, you have asked the committee to opine as to:

1. The obligation of the court to know of the simultaneous litigation.
2. The obligation of appointed counsel to make the court aware of the simultaneous litigation.
3. The obligation of the court to make the petitioner aware of the simultaneous litigation.
4. The obligation of appointed counsel to make the petitioner aware of the simultaneous litigation.
5. The obligation of the court to provide to petitioner full disclosure of the impact of appointed counsel's interests and to obtain from petitioner appropriate consent to waive any conflict.
6. The obligations of appointed counsel to provide petitioner full disclosure of appointed counsel's interests and obtain from petitioner appropriate consent to waive any conflict.
7. The duties owed by the court and counsel to the indigent petitioner with regard to corrective actions should petitioner object to the representation.

1 If either Attorney 1 or Attorney 4 were to withdraw, with leave of court, from representing his client, the cross-appointed counsel could continue the representation of his client since the personal conflict under DR:5-101 (A) would be removed. Thus, for example, if the court permitted Attorney 1 to withdraw from representing Defendant B, Attorney 2 could continue representing Defendant A, and vice versa.

8. Whether counsel's previous actions are binding on the client if the client refuses to waive the conflict.

9. Whether counsel can continue the representation in the absence of a waiver.

The appropriate and controlling disciplinary rule relative to your inquiry is DR:5-101(A) which states that a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure. The purpose of the rule is to insure that a lawyer's professional judgment is always exercised free of compromising influences and loyalties. EC:5-1.

The committee has previously opined that a lawyer had a conflict of interest under DR:5-101(A) if he undertook to represent a client in an unrelated lawsuit where the same client had filed a malpractice claim against another attorney in the same law firm in another branch office. The Committee opined that the lawyer's professional judgment on behalf of the client would likely be impaired by the law firm's self-interest in defending the malpractice claim asserted by the same client. However, the Committee concluded that the conflict under DR:5-101(A) was curable by informed consent after full and adequate disclosure. LE Op. 1637.

In LE Op. 1619 the Committee applied DR:5-101(A) to a situation where an attorney left private practice to become the Commonwealth's Attorney, but continued to hold substantial stock in his former law firm as a result of a protracted dispute with his former partners. Due to the Commonwealth's Attorney's continued financial interest in his former law firm, the Committee opined that it would be improper for the Commonwealth's Attorney to prosecute cases defended by his former law firm, because of the possible effect such circumstances could have on the attorney's zealous representation of the Commonwealth. Although a cure to this personal conflict might otherwise be effected by client consent after full and adequate disclosure, no such remedy was available to the Commonwealth's Attorney.

Under the circumstances you describe, the cross-appointed habeas counsel (Attorneys 1 and 4) have a clear conflict of interest under DR:5-101(A). Each must simultaneously prosecute and defend similar though technically unrelated claims of ineffective assistance of counsel against the other. The respective clients are seeking habeas relief following their convictions of capital murder, are indigent and thus represented by court-appointed counsel. Where both clients face the sentence of death, their attorney's duty to provide zealous and capable representation, free of any competing or distracting influences, is critical. Capital murder litigation triggers heightened scrutiny of an attorney's performance and the stakes are especially high in the context of post-conviction representation of death-sentenced inmates.

The Committee has issued many opinions applying this rule and has consistently opined that a personal conflict under DR:5-101(A) is curable by client consent after full and adequate disclosure, unless there is no client from whom consent may be obtained. LE Op. 1619, *supra*. In the factual context of your inquiry, the Committee cautions that the adequacy of disclosure to produce an informed consent imposes a substantial burden on counsel since an inadequate disclosure might itself become a basis for a claim of ineffective assistance of counsel.

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Therefore, the Committee is of the opinion that Attorneys 1 and 4 may not continue their simultaneous representation,¹ and must seek withdrawal from the representation, unless their respective clients waive the conflict after full and adequate disclosure of all consequences. The Committee refers you to LE Op. 1637 for a discussion of the requirements for an informed consent.

Your questions concerning the duties of the court with respect to the inmates in your hypothetical raise legal issues beyond the purview of this Committee. Likewise, the Committee cannot opine as to the legality or binding effect of counsels' prior actions in the event that the inmates refuse to waive the conflict.

Committee Opinion
April 1, 1996

¹ If either Attorney 1 or Attorney 4 were to withdraw, with leave of court, from representing his client, the cross-appointed counsel could continue the representation of his client since the personal conflict under DR:5-101 (A) would be removed. Thus, for example, if the court permitted Attorney 1 to withdraw from representing Defendant B, Attorney 2 could continue representing Defendant A, and vice versa.