

Committee Opinion
September 7, 1988

LEGAL ETHICS OPINION 1122

MULTIPLE REPRESENTATION –
CONFLICT OF INTEREST – ARGUING
YOUR OWN INEFFECTIVE
ASSISTANCE OF COUNSEL FOR
CRIMINAL DEFENDANT.

You have advised that Attorney A was employed by codefendants, X, Y and Z, to represent them in a criminal case. The three defendants agreed to sign a waiver of conflict of interest after being informed of the problems attendant to this multiple representation. Codefendants were advised a second time by the circuit judge of the problems associated with multiple representation; however, the three defendants insisted that Attorney A continue handling their defense. At the conclusion of trial and sentencing, Defendant Y requested court-appointed counsel to prosecute an appeal and was given an attorney other than Attorney A. Y alleged, among other things, that Attorney A was ineffective in representing X, Y and Z, and obtained a writ of error on appeal. Defendant Z also requested an appeal; however, she retained Attorney A to represent her on the appeal. Attorney A has also raised the issue of his inability to be effective counsel for Z at the trial stage.

You wish to know whether or not it is improper for an attorney to represent a client on appeal if an issue which the attorney should raise is his prior ineffective representation of that client at the trial stage. For the purposes of this opinion, we will assume that the client has retained the same attorney to represent her on the appeal, after full and adequate disclosure of the attorney's personal interests in the continued representation and consent thereto.

The Committee believes that DR:5-101(A) is the appropriate and controlling rule relative to your inquiry. This disciplinary rule states that an attorney should not accept employment if his own financial, business, property or personal interest may affect his independent professional judgment on behalf of his client, unless the client consents after full disclosure under the circumstances.

Also, Ethical Consideration 5-1 [EC:5-1] provides that an attorney should exercise his professional judgment within the bounds of the law, solely for the benefit of his client and free from compromising influences and loyalties. Neither the attorney's personal interest, or the interest of other clients, nor the desires of third persons should be permitted to encumber this loyalty.

While there are no legal ethics opinions in Virginia addressing this issue, Kentucky has ruled on this matter. LE Op. 321 (7/87) states that an attorney for a defendant in a criminal case may not argue as a ground for reversal ineffective assistance of counsel to the defendant/client. If in fact this is true, the attorney should so inform the defendant/client and withdraw from the case for the following reasons: (1) It creates a conflict between the client's interest and the lawyer's interest in his reputation which may give rise to a claim that the lawyer did not zealously pursue the client's case; (2) it raises

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skepticism in the court as to whether the attorney is merely trying to obtain a reversal; and (3) such a claim may involve the presentation of facts which are outside the record, and thus violate the rule prohibiting an attorney from acting as both counsel and witness. Furthermore, the Kentucky Bar believes that this rule extends to the other attorneys in the law firm, as attorneys in the same office have a personal relationship and share an interest in the quality of the legal work product. Notwithstanding the foregoing, an attorney may argue his own ineffectiveness if, for example, he was unable to present his case due to government interference, or if the situation is one in which the ineffectiveness does not raise a question as to the lawyer's performance, nor does it implicate the lawyer/witness rule.

The Committee believes that a conflict exists between attorney and client if an issue which the attorney should raise is his prior ineffective representation of the client at the trial level. In order for the attorney to carry out the duty to exercise his professional judgment solely for the benefit of his client, he would have to assert a position which would expose him to personal liability for ineffectiveness of counsel.

Given the facts presented in your letter and assuming that client consent is obtained after full disclosure, the Committee opines that it would nevertheless be improper for an attorney to represent a client if his prior ineffective representation of that client at trial is an issue on appeal.

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