

Committee Opinion  
May 8, 1989

LEGAL ETHICS OPINION 1226

ATTORNEY AS WITNESS – MULTIPLE REPRESENTATION – PERSONAL INJURY PRACTICE: ATTORNEY REPRESENTING WIF EIN DOMESTIC MATTER AND REPRESENTING HUSBAND IN PERSONAL INJURY ACTION AGAINST WIFE’S EX-HUSBAND.

You have asked the Committee to opine as to the propriety of Attorney X continuing to represent Client A and Plaintiff, Client A's present husband, in a personal injury suit given the following facts.

Attorney X has represented Client A for several years. Approximately two years ago, Client A was caught naked in bed with her lover by her husband, who then shot and wounded the lover. Client A's husband subsequently filed for divorce and was awarded a divorce on the grounds of adultery approximately one and one-half years later. Shortly thereafter, Client A and her lover, the Plaintiff, were married.

You have indicated further that although the divorce was granted, issues concerning custody, support, visitation with the children and equitable distribution remained unresolved. In an attempt to settle these issues, Attorney X offered to release Client A's ex-husband from all liability regarding the wounding of Plaintiff. The ex-husband rejected the proposal; thereafter, Attorney X filed a personal injury action against Client A's ex-husband on behalf of the current husband, the Plaintiff. Recently Attorney X has learned the Client A's ex-husband plans to call Attorney X as a witness, to testify regarding the earlier offer to release all liability, in an attempt to demonstrate potential bias and bad faith in the filing of the suit, which prays for \$500,000.

You wish to know whether Attorney X may continue to represent Client A, and whether he may also continue to represent the Plaintiff, Client A's current husband and former lover, given the likelihood of the attorney's being called as a witness for Client A's ex-husband in the personal injury lawsuit being brought by Plaintiff.

With regard to the continued representation of Client A, the Committee believes the appropriate and controlling disciplinary rule is DR:5-105(B) and (C), which requires that 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, unless it is obvious that 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 his independent professional judgment on behalf of each.

It is the opinion of the Committee that the facts of your inquiry do not indicate a per se reason why Attorney X should not continue to represent Client A.

Committee Opinion

May 8, 1989

The Committee believes that Attorney X should consider whether the exercise of his independent professional judgment on behalf of Client A is likely to be adversely affected by his representation of Plaintiff in determining whether he may continue to represent both. If the attorney knows of facts, or if it is apparent that the clients have conflicting interests, precluding adequate representation of each, or if both Client A and Plaintiff will not consent to the multiple representation after full disclosure of its possible effect on Attorney X's judgment, then it would be inappropriate for the attorney to continue the multiple representation.

With regard to the continued representation of Plaintiff by Attorney X, considering the likelihood of the attorney's being called as a witness for Client A's ex-husband, the appropriate and controlling disciplinary rule is DR:5-102(B), which permits a lawyer to continue such representation until it is apparent that his testimony is or may be prejudicial to his client.

The Committee has previously opined that it is not improper for a lawyer to continue representing a client in a matter pending litigation under the circumstances you have described. (See LE Op. 593, LE Op. 655 and LE Op. 866)

The Committee opines that Attorney X should determine whether continuing the professional relationship is in the client's best interest in light of the possibility that the subject on which he will testify may be prejudicial to his client. Where the question arises as to whether withdrawal would impose a personal or financial sacrifice on the client, the attorney must also consider the materiality of his testimony and the effectiveness of his representation in view of his personal involvement. Any doubts should be resolved in favor of the lawyer testifying and against his continuing as an advocate. (See EC:5-10)

Committee Opinion

May 8, 1989