

You have asked the Committee to consider the propriety of representing multiple clients who may have differing interests in a civil suit against a third party when one of the clients has requested an assignment against the other two clients of a portion of the settlement proceeds awarded to each. The assignment would serve as consideration for the one client, Corporation X's, agreement to pay for the other two clients', Employees A and B, criminal legal fees and settlement with third party, Landlord, in order to avoid any criminal prosecution. The following contains a synopsis of the pertinent facts as you have presented them in your inquiry.

An attorney represents Corporation X and its sole stockholder and president. A dispute arose between Corporation X and Landlord regarding the lease for the occupancy of certain demised premises, resulting in Corporation X having to leave the premises. Subsequently, the Landlord filed a suit in circuit court ("Landlord and Tenant Action") and Attorney is retained by Corporation X to represent its interest in the suit. After commencement of the action and while Corporation X was moving out of the premises, Landlord caused two employees, of Corporation X, A and B, to be arrested for trespass and destruction of property. Attorney is likewise retained by the employees to represent them in the criminal matter for which Corporation X agreed to be initially responsible for the payment of the legal fees.

For several months prior to the arrests, Landlord and Corporation X had been engaged in on-going settlement discussions in an effort to resolve their dispute. Following the arrest of the employees, it became apparent that if Corporation X would accept the Landlord's settlement demands requiring Corporation X to pay to Landlord a certain sum, the Landlord would not pursue the criminal charges against the employees and would request that the Commonwealth Attorney's Office *nolle prosequi* the pending criminal charges. Corporation X acquiesced to the offer and the criminal charges against Employees A and B were *nolle prosequi*.

Now Employees A and B have retained Attorney to pursue independent civil claims against Landlord for false arrest, malicious prosecution and abuse of process. In addition, the president of Corporation X has expressed a desire to pursue a separate claim against the Landlord for defamation and slander which action may or may not be filed concomitantly with the employees' claims. Subsequent to the dismissal of the criminal charges, Corporation X also expressed the desire to have an assignment of a portion of any proceeds received by the employees in their contemplated civil action against the Landlord. Employees A and B are not opposed to reaching a reasonable arrangement with Corporation X to assign a portion of any recovery from their civil action against Landlord to Corporation X because of X's earlier agreement to pay A and B's criminal legal fees

Committee Opinion
April 20, 1990

and because of X's willingness to settle the "Landlord and Tenant Action" on unfavorable terms in order to avoid criminal prosecution of the employees. Furthermore, one of the employees also owes Corporation X a sum of money for a prior debt.

You wish to know whether the request by Corporation X for an assignment of a portion of the employee's recovery raises a conflict of interest under DR:5-105(B) and, if so, could the conflict be waived if the parties consent after full and adequate disclosure pursuant to DR:5-105(C). Secondly, you would like to know whether such an agreement between Corporation X and Employees A and B assigning a portion of the recovery of A and B's action to X is proper in light of § 8.01-26 of the Code of Virginia which prohibits the assignment of a right of action for personal injury.

The appropriate and controlling disciplinary rules relative to your inquiry are, as you have noted, DR:5-105(B) and (C), and DR:7-101(A). Disciplinary Rule 5-105(B) and (C) provide 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, except that the lawyer may represent multiple clients *if it is obvious that he can adequately represent the interest of each client*. The lawyer must first obtain the clients' consent 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.

While you have stated in the inquiry that the clients have potential differing interests since Corporation X would want a greater share of the proceeds and the employees would want to minimize that share as much as possible, you also stated that all have consented to allow the attorney to mediate and negotiate an agreement in which the share would be acceptable to the parties. It would be ethically improper, however, for Attorney to represent Corporation X or Employees A and/or B if a dispute should arise during the course of such mediation. If the attorney can adequately represent the interests of each, and, if he can exercise his independent judgment on behalf of each so that an acceptable assignment agreement between the parties can be reached, this Committee believes that it is ethically permissible to represent the employees in their independent actions and Corporation X who will have a vested interest in any recovery from the civil action. The Committee believes that presumably all parties would desire to recover the most favorable settlement, and it is not obvious, from the facts of the inquiry, that the attorney cannot adequately represent the interest of each once an agreement of the portion assigned to X from each employee is determined.

The Committee directs your attention to LE Op. 894 in which the Committee opined that it is not improper for an attorney to assist in a recovery on behalf of a corporate entity when the entity is adverse to the attorney's client in litigation and has assigned its rights against the individual from whom recovery may be made to attorney's client. This was based on the theory that if the individual was found liable to attorney's client for the monies alleged to have been misappropriated, the client could in turn be found liable to the corporate entity for these same monies. This Committee believes that the potential conflict between the entity and client would have been cured with consent from each after

Committee Opinion

April 20, 1990

adequate and full disclosure. Thus, the attorney upon obtaining such consent may adequately represent the interests of each. Obviously, if any circumstances should arise wherein the employees institute an action against Corporation X in this matter, or if the employees offer as a defense any grounds which may be negative to the corporation, such multiple representation would then be improper.

The second issue you have presented concerning the propriety of the attorney assisting in negotiating an agreement between Employees and Corporation X whereby a portion of the recovery from employees' civil claim, if any, would be assigned to X is a legal question. The Committee believes, however, that if Virginia Code § 8.01-26 allows an assignment of the settlement proceeds from a personal injury action, then the Code of Professional Responsibility does not preclude the attorney from exercising those rights under statutory law on behalf of his clients. Disciplinary Rule 7-101(A) provides in part that a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.

Therefore, the Committee opines that the instant multiple representation of the Employees and Corporation X in the Employees' civil action against Landlord, where X will be assigned a portion of the recovery, may be permissible if, after obtaining consent from each, the attorney can adequately exercise his independent judgment and represent the interests of each client in negotiating an equitable assignment to Corporation X. The propriety of such an assignment is based solely on whether statutory or case law permits the activity.

Committee Opinion

April 20, 1990