

Committee Opinion  
June 13, 1990

LEGAL ETHICS OPINION 1363

CONFIDENCES AND SECRETS - CONFLICT OF  
INTERESTS: INTERVIEWING CODEFENDANTS  
SIMULTANEOUSLY

You wish to know whether it is ethically permissible for an attorney to conduct the initial interview with two/multiple codefendants who have sought that attorney's advice, or whether that attorney must interview one defendant first and then the other in order to avoid having to decline representation of both clients.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR 4-101 (B), DR 5-105 (A) and DR 5-105(C). Disciplinary Rule 4-101(B) provides that a lawyer shall not knowingly reveal a confidence or secret of his client, use a confidence or secret of his client to the disadvantage of the client or for the advantage of himself or a third person, unless the client consents after full disclosure. The term "confidence" has been defined in the Disciplinary Rules as information protected by the attorney-client privilege under applicable law and a "secret" is other information gained in the professional relationship that the client has requested by held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. See DR 4-101 (A).

Disciplinary Rules 5-105 (A) and (C) are responsive to conflicts which may arise that may impair the attorney's independent judgment on behalf of another client. Taken together, the rules provide that a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect on the exercise of his independent professional judgment on behalf of each.

The committee directs your attention to Legal Ethics Opinion No. 307 in which the committee has previously opined that where A has given a statement implicating both himself and codefendant B, and B has denied complicity, it is improper for the attorney to represent both parties. If B is not to be a witness at the time of the Commonwealth's case against A, the attorney could represent A. If B will testify, the attorney should refrain from representing either party.

Likewise, the facts of Legal Ethics Opinion No. 986 indicate that an attorney represented codefendants A and B on various charges arising from the same criminal conduct; however, before accepting the representation, the attorney interviewed each defendant separately to ensure that no conflict of interest existed. One week before the trial, the Commonwealth's Attorney's office proposed a plea bargain to B conditioned upon his testimony against defendant A. Subsequent to the plea bargain proposal, a hearing was held and the court determined that a conflict for representation existed and B was to obtain new counsel. The attorney continued to represent defendant A even after learning that B would accept the plea arrangement and would testify against A, and after learning that B had divulged the work product of attorney for A. The committee opined that under the circumstances, it was improper for attorney to continue to represent A even if B consented to the representation after full disclosure and that the continued representation of A could result in a violation of DR 4-101 as to defendant B.

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The committee believes that where multiple representation of codefendants is contemplated, the problem of confidentiality is not necessarily avoided by separate interviews of each defendant, since it is possible for the attorney to gain information during the separate interviews which could be construed to be a confidence or secret from an individual defendant which may preclude the multiple representation. Once an attorney has talked privately with an individual about that person's legal problem or question, the committee believes the relationship of attorney-client is deemed to have existed.

Therefore, the committee opines that it is possible that, after interviewing one defendant whose interests are potentially adverse to the interests of another codefendant, interviewing of another codefendant charged in the same or substantially related crime may result in a violation of DR 5-105(C) if it is obvious that the attorney could not have adequately represented the interests of each client. Even if the initial client would have consented to the potential adverse representation, the committee opines that the potential for prejudicing a client by the use of or divulging a confidence or secret would outweigh any informed consent. See DR 7-101 (A)(3) and LEO #1181.

The committee opines that the determination of whether to engage in the multiple representation of codefendants should be made on a case-by-case basis depending on the charges and circumstances surrounding the incident. An attorney should consider the fact that, because of the potential for the interests of one defendant being adverse to the another, undertaking multiple representation of codefendants may not be ethically permissible and may eventually require withdrawing from the representation of both or all codefendant clients. Therefore, where there is any doubt as to whether a conflict may exist, an attorney should represent only one of the similarly charged codefendants in a criminal matter.

Finally, the committee opines that the attorney has no principled basis on which to decide which of two codefendants to interview first. Therefore, the committee would suggest that it would be best, although not required by the Code of Professional Responsibility, for the attorney to explain to the codefendants the problem and the possible consequences and let the prospective clients make the choice. If they cannot decide, then the two choices open are (1) to represent neither, or (2) to make an unprincipled or arbitrary decision, e.g.: flip a coin, as to whom to interview first.

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