

LEGAL ETHICS OPINION 1365

CONFLICT OF INTERESTS –
DOMESTIC RELATIONS PRACTICE –
ATTORNEY AS WITNESS – ZEALOUS
REPRESENTATION: REPRESENTING
CLIENT IN CUSTODY PROCEEDING;
CLIENT'S SPOUSE PREVIOUSLY
TREATED AT CLINIC WHERE
ATTORNEY SERVED AS COUNSELOR.

You have advised that an attorney represented Client A on numerous matters from 1960 until the latter part of 1978, at which time the attorney turned in his license to practice law which was later revoked in 1980. You have stated that during this time in which the attorney's license was revoked, the attorney held several jobs, one of which was an addictions counselor and director of addiction programs at a hospital. During the last six months of the former attorney's employment at the hospital as counselor, A's spouse, B, was admitted to the hospital. You indicate that B had her own counselor and she was not the former attorney's patient, nor did former attorney participate in B's family sessions or individual sessions while at the hospital. Finally, you have stated that A and B were subsequently divorced and B obtained custody of their child. In the meantime, former attorney's license to practice law is reinstated in January of 1988. Attorney is then approached by A to represent him again on several matters including the divorce proceeding to seek custody and visitation rights with infant son.

You wish to know whether, under the facts as stated above, the attorney is precluded from representing A in the divorce and custody proceeding against B because of attorney's involvement as a director of a chemical dependency program of a facility during which time B was also a patient.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR:5-101(A) and DR:5-102. Disciplinary Rule 5-101(A) provides 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 under the circumstances.

Disciplinary Rules 5-102(A) and (B) provide that if a lawyer learns or it is obvious that he or a lawyer in this firm ought to be called as a witness on behalf of his client in contemplated or pending litigation, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial unless (1) the testimony will relate solely to an uncontested matter and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (2) the testimony will relate solely to the nature and value of legal services rendered in the case, and (3) as to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm in the particular case. See DR:5-101(B) and DR:5-102(A). However, if an attorney learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of the client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client

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(DR:5-102(B)).

The Committee believes that while the attorney was a counselor and director of a chemical dependency program at a facility to which Client A's spouse, B, was admitted, he would not have been acting in his professional capacity as attorney since his license had been revoked. The Committee sees no possibility of the establishment of an attorney/client relationship since, during the period of his revocation, the former attorney/counselor would have been prohibited from counseling another non-lawyer in matters involving the application of legal principles to facts or purposes or desires since such activity would have been construed as the unauthorized practice of law.

Thus, the Committee opines that, if the attorney has ethical duties which arise from the mandates of another profession, including the guarding of communications or information gained from the patients he counseled individually or in the chemical dependency program he supervised, the attorney/counselor must determine whether those former responsibilities will affect the exercise of his professional judgment as an attorney on behalf of his client. The Committee cautions that, should the attorney be encumbered from using information beneficial to his client as a result of compliance with the mandates of another profession, the attorney's ability to zealously represent his client as required by Canon 7 and DR:7-101 may be compromised. Nevertheless, the Committee is of the opinion that any violation of that other profession's requirements may be improper and therefore violative of DR:1-102(A)(3) and (4) which respectively preclude a lawyer from committing a deliberately wrongful act or from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation when any such activity results in an adverse reflection on the lawyer's fitness to practice law.

Furthermore, the Committee is of the opinion that the attorney should not assume the representation if it is likely that he should testify on behalf of his client. Conversely, if he anticipates or should know that he will be called as a witness to testify on behalf of someone other than his client, i.e., client's spouse, he may be required to withdraw from the representation if it becomes apparent that his testimony is prejudicial to his client. In either case, the committee believes that the attorney should consider whether the client's interests would best be served by his role as an advocate or as a witness and where there is any doubt, the question should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate. (See EC:5-9, EC:5-10)

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