

Committee Opinion
March 12, 1991
Affirmed and Expanded
May 13, 1991

LEGAL ETHICS OPINION 1408

CONFIDENCES AND SECRETS –
CONFLICT OF INTEREST – MULTIPLE
REPRESENTATIONS: MULTIPLE
REPRESENTATION ADVERSELY
AFFECTING ATTORNEY'S
PROFESSIONAL JUDGMENT.

You have presented a hypothetical situation in which Attorney A in a firm represents a borrower in the defense of litigation filed by a bank on an indebtedness generated from the bank's real estate loan division. Subsequent to Attorney A undertaking his representation, but while it is continuing, Attorney B in the same firm is asked to represent the same bank against a third party in a litigation/bankruptcy matter generated from the bank's commercial finance division. Upon a disclosure to the commercial finance division of Attorney A's representation, the commercial finance division reports that it is entirely distinct from the real estate loan division in management and business and, therefore, there is no objection to Attorney A's representation in an unrelated matter with another division of the bank.

You have asked the Committee to opine whether, under the facts of the inquiry, the law firm can simultaneously represent one subdivision of a company while representing a client against another subdivision of the same company in unrelated matters, with the consent of both subdivisions and the client who opposes one of the two subdivisions.

The appropriate and controlling disciplinary rules related to your inquiry are DR:4-101(B), DR:5-101(A), DR:5-105(A), (C), and (E). Disciplinary Rule 4-101(B) states that, except in certain very limited circumstances, a lawyer shall not knowingly reveal a confidence or secret of his client or 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. Disciplinary Rule 5-101(A) requires that a lawyer may only accept employment when the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, with the consent of his client after full and adequate disclosure under the circumstances. Disciplinary Rule 5-105(A) and (C) state, in pertinent part, that a lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure.

Finally, DR:5-105(E) states that if a lawyer is required to decline employment or to withdraw from employment under DR:5-105, no partner or associate or his firm may accept or continue such employment.

The Committee has previously opined that where an attorney represents the plaintiff in a medical malpractice suit against a hospital medical group and where a partner in the

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same law firm was subsequently retained by an insurance carrier, which provided premise liability insurance to the aforementioned medical group in an unrelated premise liability matter, it would be improper, even with the clients' consent, to continue the simultaneous, multiple representation as it would not be possible to adequately represent the interest of a client when the attorney is defending a client in an action one day and suing the same client the next day in a separate action brought by an unrelated party. The Committee has also stated that a lawyer should be diligent in his efforts to prevent the misuse of the client's confidential information, and employment should not be accepted if disclosure of the same to another client would be required. The committee further opined that withdrawal from the representation in both matters, as well as disqualification of the firm would be the appropriate action. (See LE Op. 1150, LE Op. 706.)

Under the facts you have provided, the Committee believes that the inherent dangers of simultaneously representing and attacking the same client are present despite the two subdivisions' indication that they are entirely distinct from each other in both management and business. A potential misuse of clients' confidential information exists since both divisions are part of the same entity managed under the same supervisory scheme.

Therefore, the Committee is of the opinion that the simultaneous representation of the bank's borrower and of the commercial finance Legal division of that same bank, in unrelated litigation, would be improper since it is not obvious that adequate representation of both clients' interests can be provided. Since that threshold test cannot be met, full disclosures of the potential conflict and consent from both clients will not cure the impropriety.

Legal Ethics Committee Notes. – This opinion's conclusion that consent would not cure this conflict could be different under Rule 1.7 (a)'s "reasonably believes" subjective standard rather than the old Code's "obvious" standard.