

Committee Opinion
May 11, 1992

LEGAL ETHICS OPINION 1458

CONFLICT OF INTEREST:
REPRESENTING PARTNERSHIP AND
ONE PARTNER IN A SUIT AGAINST
THE OTHER TWO PARTNERS.

You have indicated that a partnership is composed of three partners: "A," a lawyer; "B," who has a background in real estate; and "C," who has a background in construction. The partnership's sole asset is a commercial building which is rented to tenants and you indicate that B and C are the managing partners of the real property while A is a "silent partner," not being involved in the daily management of the company or privy to the checkbook or checks written on its account.

You further advise that, during the course of financial difficulties in the partnership, one of several noteholders was to take over and manage the property and collect rents. The noteholder later called the entire note. In a subsequent suit, the noteholder sued A and B individually, and the partnership. Partner B suffered a default judgment with full knowledge of the consequences to be taken against him. You indicate that Lawyer advised partner B that he should seek independent counsel and that Lawyer was unable to represent him. Lawyer represented A individually in the suit and, since one of A's assets was his partnership interest, Lawyer also undertook representation of the partnership. Lawyer sought to establish an offset which would be due in favor of the partnership and A by virtue of the monies held by noteholder which had been collected but not accounted for during the time the noteholder had managed the properties.

You indicate that B and C knew of Lawyer's representation of the partnership, that they voiced no objections to the representation, and that they signed, and forwarded, partnership checks to Lawyer. You also indicate that B and C never met with Lawyer or discussed any confidential matters related to partnership business, or otherwise, with him. You also state that A never indicated to Lawyer that he has any secret or confidence which would adversely affect his relationship with either the partnership or with B and C.

Furthermore, you indicate that, in attempting to establish what the partnership assets were in order to make an offer to the noteholder for settlement, A and Lawyer requested B and C to produce the partnership checkbook for which a subpoena duces tecum was issued. The checks returned pursuant to the subpoena indicated that while substantial bills were owed to the partnership's creditors, B and C wrote substantial checks to themselves, or to other persons, for their own benefit, not related to partnership business.

You indicate that the partnership may have a potential cause of action against B and C for misappropriation of funds, including conspiracy allegations and possible treble damages under Va. Code § 18.2-500. You also state that any such funds recovered would be placed in the partnership account for purposes of paying the creditors as required by statute. Finally, you represent that the creditors' claims would far exceed the amount of reasonably anticipated recovery, even if treble damages were to be awarded.

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You have asked that the Committee opine as to several issues related to Lawyer's representation of A and of the partnership.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:5-105 which dictates that a lawyer must refuse to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer. Further guidance is available through Ethical Consideration 5-18 [EC:5-18] which, in pertinent part, exhorts the lawyer to recognize that (1) a lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity, and (2) on occasions when a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity, the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

For purposes of responding to your inquiries, the Committee assumes that, although partner A is identified as a lawyer, partner A and Lawyer are two separate individuals. The Committee responds to your inquiries relative to the facts you have presented as follows:

1. With regard to your inquiry as to whether Lawyer may represent partner A in asking the court to appoint a conservator of the partnership's assets in order to bring suit in the name of the partnership against partners B and C, the Committee believes it is well settled that partner A and the partnership are considered to be separate legal entities. See LE Op. 557. See also ABA Formal Op. 91-361 (July 12, 1991). Under the facts you have presented, which assert that the interests of partner A and the partnership are not adverse, the committee opines that it would not be improper for Lawyer to represent partner A in asking to have a conservator appointed in order to bring a suit in the name of the partnership against partners B and C. The Committee specifically does not opine on the legality of the partnership suing one of its partners.

2. As to whether Lawyer may represent the partnership and/or partner A in a suit against partners B and C when Lawyer has neither represented partner B or C individually nor met with or received confidences as to the partnership or otherwise from B or C, the committee opines that such representation would not be improper under DR:5-105. Thus, again assuming that the partnership and partner A are not adverse, it would not be improper for Lawyer to represent both in the suit against partners B and C.

3. With regard to your inquiry as to whether Lawyer must withdraw from representing the partnership and partner A in the pending suit brought against them by the noteholder, the Committee believes whether or not Lawyer is authorized to represent the partnership is a question of law,

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the resolution of which is beyond the purview of this Committee. However, assuming that Lawyer is authorized to represent the partnership and assuming further that there is no conflict under DR:5-105 in Lawyer representing both A and the partnership, the Committee believes it irrelevant that partner B has chosen not to go forward since Lawyer never represented B and therefore possessed no secrets or confidences of B. Thus, the Committee is of the view that, because Lawyer never represented partner B, rather advising him to seek outside counsel, Lawyer may then continue representation of partnership and partner A.

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