

LEGAL ETHICS OPINION 1505

CONFLICT OF INTEREST — MULTIPLE
REPRESENTATION: REPRESENTATION
OF CORPORATION AND ITS
CHAIRMAN.

You have presented a hypothetical situation in which Corporation X is sued and the chairman of the board of Corporation X is sued in his individual and “fiduciary” [i.e., representative] capacities. Attorney A represents both the corporation and the chairman of the board in his individual and fiduciary/representative capacities. At the end of the trial of the case, the judge found for the plaintiff and against the corporation and the chairman in both the individual and fiduciary/representative capacities.

You further advise that, in a brief in support of a post-trial motion, the plaintiff raised matters outside the record that were adverse to the chairman. With respect to the chairman's culpability, the plaintiff also made an argument that was inconsistent with arguments previously made at trial. The chairman asked Attorney A to raise the issue of inconsistent arguments before the trial court because he felt it would strengthen his case. However, Attorney A refused on the ground that raising the issue before the trial court might adversely affect the corporation. You further advise that, in response to a suggestion that Attorney A might have a conflict, Attorney A stated that there is no conflict because the chairman is a fiduciary and, accordingly, the interests of the chairman and the interests of the corporation are identical.

Finally, you advise that the chairman then asked Attorney A to send a letter to the court in his behalf rebutting the extra-judicial comments that were made in plaintiff's post-trial memorandum. Attorney A refused to correct or rebut those extra-judicial comments unless the chairman concurred with Attorney A's filing of a letter with the court asking it to strike from the record the plaintiff's inconsistent argument. Attorney A asserted that the tactic of asking the court to strike plaintiff's inconsistent argument from the record benefitted the corporation. The chairman felt that striking the inconsistent argument from the record would adversely affect his case on appeal. Accordingly, no letter was sent to the trial court.

You have asked the Committee to opine whether, under the facts of the inquiry, it is proper (1) for Attorney A to represent both the chairman of the board and the corporation on appeal and (2) for Attorney A to represent the chairman in both his individual and fiduciary/representative capacities.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:5-105(B), which precludes a lawyer from continuing 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; and DR:5-105(C) which permits the lawyer who encounters the type of conflict described by subsection (B) to continue such multiple representation if (a) it is obvious that he can adequately represent the interest of each and (b) each consents to the representation after full disclosure of the

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possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

Further guidance is provided by Ethical Consideration 5-15 [EC:5-15], the pertinent part of which exhorts a lawyer faced with a conflict as described in DR:5-105(B) to “resolve all doubts against the propriety of the representation”; Ethical Consideration 5-18 [EC:5-18] which allows a lawyer employed or retained by a corporation or similar entity to represent a stockholder, director, officer, employee, representative, or other person connected with the entity “only if the lawyer is convinced that differing interests are not present”; and Ethical Consideration 5-19 [EC:5-19] which cautions that “regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client”.

The Committee has previously opined that it would be ethically improper for an attorney to continue his representation of both a corporation and its president, if the corporation would be entitled to recover substantial assets from the president in a cross-action against the president should the cross-action prove successful. LE Op. 384. The Committee has also opined, in circumstances involving an attorney's proposed simultaneous representation of both a federal agency which placed a financial institution into receivership and one of the institution's officers/directors/shareholders who has been served with a *subpoena duces tecum* seeking documents which may relate to either the financial institution or the individual, that such representation would be potentially improper if it developed that the documents sought actually related to a matter on which the attorney represented the agency. Furthermore, the same opinion found that, even where the conflict was potential rather than actual, consent of both the agency and the individual would be required to permit the simultaneous representation. Finally, the opinion also held that *should the potential conflict develop into an actual conflict, the attorney would then be required to withdraw from representation of both parties*. LE Op. 1454 [emphasis added]. In opining as to whether an attorney could represent a mother in a custody contest after having previously represented the child's paternal grandparents in a separate custody proceeding, the Committee cited the admonition of EC:5-19 in requiring a lawyer to defer to a client who believes a conflict exists even though the lawyer believes his multiple representation is not improper. LE Op. 1191.

From the facts presented by you, the Committee is of the opinion that an actual conflict exists between the interests of Corporation X and the chairman of the board. That being the case, the committee further opines that, in contradiction to the requirements of DR:5-105(C), it is obvious that Attorney A cannot adequately represent the interests of each. Since adequate representation cannot be provided, it is the Committee's opinion that even if consent of both Corporation X and its chairman had been granted, it would not cure the impropriety. Thus the Committee concludes that Attorney A must withdraw from representation of both the entity and its chairman.

Finally, the Committee directs your attention to DR:2-108(A)(1) which, in pertinent part, requires a lawyer to withdraw from representing a client if continuing the

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representation will result in a course of conduct that is inconsistent with the Disciplinary Rules.