Committee Opinion
August 12, 1993

LEGAL ETHICS OPINION 1508 — CONFLICT OF INTEREST - REPRESENTATION OF MULTIPLE PARTIES IN SUPERFUND LITIGATION.

You have presented a hypothetical situation in which there is pending in the United States District Court for the Eastern District of Virginia an action brought pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") by Telephone Company against approximately 140 defendants. The object of the suit is to have the court assign an "equitable allocation" to each defendant for its proportional share of the cost for the cleanup of a hazardous waste site located in Virginia.

You indicate that the Court has entered an order declaring that every party in the action is deemed to have counterclaimed against the plaintiff and cross-claimed against every other defendant for contribution. The Court's order permits parties to file notices to "opt out" from contribution claims against any parties a defendant so designates. You advise that, in CERCLA cases, it is generally understood that if one party contributes a larger amount to a cleanup, another party will necessarily contribute a smaller amount.

Thus, it tends to be in each party's interest to try to establish as high a volume as possible of waste generated by every other party going to the site. In other words, if more waste can be attributed to one party, the other parties will have reduced cleanup costs.

You further indicate that, in the case pending in federal court, several law firms represent more than one defendant in the action. In such instances, counsel have filed "opt out" notices so that none of their clients are seeking cross-claims for contribution against each other. You indicate that you presume that the "opt out" notices have been filed after full disclosure and with the consent of the clients.

You have asked the committee to opine whether, under the facts of the inquiry, in a CERCLA private cost recovery action, conflicts are waivable in situations of multiple representation when the clients have statutory rights of contribution against each other and it is in all the clients' interests to assert said contribution claims.

The appropriate and controlling Disciplinary Rules related to your inquiry are DRs 5-105(A), (B), and (C) [DR:5-105] which state respectively that a lawyer shall decline proffered employment and shall not continue 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 the representation of another client, except 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 of such representation on the exercise of his independent professional judgment on behalf of each.

For additional guidance, the committee directs your attention to Ethical Consideration 5-15 [EC:5-15] which exhorts the lawyer facing the possibility of impaired independent judgment or divided loyalty to

> *resolve all doubts against the propriety of the [multiple] representation*. A lawyer should never represent in litigation multiple clients with differing interests, and there are few situations in which he would be justified in representing in litigation multiple clients with *potentially* differing interests. *If* a lawyer accepted such employment and *the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients*; and for this reason it is *preferable that he refuse the employment initially*. . . there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation . . . if [those] interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients. [emphasis added]

The committee is of the opinion that the proposed multiple representation would not be *per se* improper and violative of DR:5-105(A), (B) or (C). However, since the interests of the multiple clients are *potentially* differing as to the respective amounts of each contribution, the requirements of full disclosure and consent to the representation by all clients, as articulated in DR:5-105(C), must be met. Furthermore, should the potential differing interests mature into actual adverse interests, it may then become necessary for the attorney to withdraw from representing all clients involved in the litigation. *See* LE Op. 1410, LE Op. 1499, LE Op. 1505.