

Committee Opinion
April 19, 1995

LEGAL ETHICS OPINION 1637

CONFLICT OF INTEREST;
REPRESENTING CLIENT WHO HAS
FILED MALPRACTICE CLAIM
AGAINST FIRM IN UNRELATED
MATTER.

You have presented a hypothetical situation in which a law firm with multiple offices is sued by their client for malpractice. The law firm has professional liability coverage for this claim. Another branch office of this firm also currently represents this same client on unrelated matters.

You have asked the Committee to opine whether, under the facts of the inquiry, the firm's apparent conflict presented by their representation of a client who is an adversary of this firm in an unrelated legal malpractice action may be curable by the client's consent.

The Committee believes DR:5-101(A) is instructive. That rule 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."

Furthermore, EC:5-1 and EC:5-2 address the issue of a lawyer exercising, free of personal interest or compromising influences, professional judgment on behalf of a client. EC:5-2, in pertinent part, states:

"After accepting employment, a lawyer carefully should refrain from ... assuming a position that would tend to make his judgment less protective of the interest of his client."

Although the firm is not representing itself in defending the client's malpractice claim, it is apparent to the Committee that the law firm's independent judgment on behalf of its client is likely to conflict with the firm's self-interests to defend against an adverse ruling related to the malpractice claim. Therefore, as stated in EC:5-3, continued representation of this client in another matter not related to the malpractice claim should occur only with the client's informed consent obtained after full and adequate disclosure under the circumstances.

Consent may be oral or written. LE Op. 1364. The Committee suggests, however, that it would be prudent to have a consent in writing in order to avoid any subsequent dispute about the content and adequacy of the disclosures made to the client.

The Committee cautions that an informed consent is a product of an adequate explanation of the nature, extent and implications of a conflict of interest, including the possible effect on the exercise of the lawyer's independent professional judgment on behalf of the client. See Matter of James, 452 A.2d 163 (D.C.App. 1982); 74 C.J.S.,

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Attorney and Client, Sections 151 and 154. On the facts presented, the client must be informed, inter alia, that in the malpractice actions against the same law firm representing him in unrelated matters the law firm's standard of practice and possibly the credibility of one or more of its attorneys (though in different offices) will be disputed issues.

The client must be informed, too, that counsel for the same law firm which represents him in unrelated matters may cross-examine him to elicit testimony adverse to his claim of malpractice and favorable to the law firm. In that regard the Committee cautions that the law firm may not, without the client's consent, disclose to its counsel in the malpractice action any confidences or secrets which it has obtained from its client through representation of him in unrelated matters. DR:4-101(B).

Significantly, client consent is not contractually binding; it may be withdrawn at any time. *Commercial & Savings Bank v. Brundige*, 5 Va. Cir. 33, 34 (1981); LE Op. 1354.

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Legal Ethics Committee Notes. – Editor's Note: See also LEO 1652 concerning the client's withdrawal of consent.