NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #433 - 6/23/76 (33-76) Topic: Conflict of Interests.

Digest: Generally improper for an attorney to represent a plaintiff in a prospective action in which there is the real possibility that the prospective defendant may implead a third-party which is presently represented by the attorney's law firm as an impleaded third-party defendant in a similar action.

Code: EC 5-1; 5-15; 4-5.
DR 5-105(A); 4-101(B); 5-105(D)

QUESTION

May an attorney represent a client in an action for personal injuries against the manufacturer of a machine, when the attorney's law firm represents the client's employer in a similar action in which the employer was impleaded?

OPINION

Under normal circumstances it would be improper for a lawyer to represent the plaintiff in the prospective action in view of the possibility that his employer, presently represented by his law firm as a third-party defendant in a similar action, may be impleaded in the contemplated action as a third-party defendant. There is certainly the possibility and perhaps a likelihood that the employer will again be impleaded.

The professional judgment of a lawyer should be exercised for the benefit of his client free of compromising loyalties. EC 5-1. DR 5-105(A) provides that in general a lawyer should decline proffered employment if the exercise of his independent professional judgment in behalf of a client is likely to be adversely affected by acceptance. In addition confidences or secrets of the employer must be preserved and not used to its disadvantage. EC 4-5; DR 4-101(B).

EC 5-15 provides in part:

> "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the 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,

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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."

The above principles have been applied in N.Y. County 450 (1956) where it was said:

> "While under the circumstances outlined in the question there may be no actual conflict of interests, the committee has held that 'maintenance of public confidence in the Bar requires an attorney who has accepted representation of a client to decline, while representing such client, any employment from an adverse party in any matter even though wholly unrelated to the original retainer'". See also, N.Y. County 444 (1955), N.Y. State 410 (1975), N.Y. State 205 (1971), N.Y. State 74 (1968), N.Y. City 840 (1959), N.Y. City 382 (1936).

The foregoing makes it clear that if there is a real likelihood of the employer being impleaded, the attorney should decline the employment proferred by the injured employee. Even if the possibility of the employer being impleaded is considered to be remote, the attorney should undertake the proffered representation only if his client understands that if the employer is impleaded the attorney will withdraw and the client knowingly consents to the expense and delay such withdrawal would entail.

Of course, if the lawyer is required to decline the employment, no partner or associate of his firm may accept the employment. DR 5-105(D); see opinions collected in N.Y. State 426 (1976).
