

NEW YORK STATE BAR ASSOCIATION  
**Committee on Professional Ethics**

Opinion 639 - 12/7/92 (28-92)

Topic: Multiple representation;  
differing interests.

Digest: Lawyer may not represent in separate actions two plaintiffs against the same defendant where there will be insufficient assets available for full satisfaction of all claims unless it is obvious the lawyer can adequately represent both plaintiffs and both plaintiffs consent after full disclosure.

Code: Definitions; DR 5-105(A) and (C); DR 5-106; ECs 5-1; 5-14; 5-15; 5-16; 5-17; 5-19.

**QUESTION**

May a lawyer represent two plaintiffs injured in the same occurrence in separate actions against the same defendant where there likely will be insufficient assets available for full satisfaction of all claims?

**OPINION**

A, an attorney, has been retained to represent X, a person who suffered serious injuries in a fire, in X's suit against defendant D, the person allegedly responsible for the fire. Y was injured in the same fire and has sought to retain A to represent him in a separate suit against defendant D. It is clear that neither X nor Y caused or contributed to the cause of the fire or the other's respective injuries. Furthermore, A is aware that the insurance coverage and other assets available for satisfaction of claims resulting from the fire would be insufficient to satisfy in full the potential claims of both X and Y. The inquiry primarily concerns the attorney's ethical obligations in accepting potentially adverse multiple

representations, governed by DR 5-105, and settling claims of multiple clients, governed by DR 5-106.

DR 5-105(A) requires a lawyer to decline employment that would likely involve the lawyer in representing differing interests unless, under DR 5-105(C), it is obvious that the lawyer can adequately represent the interest of each and each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each. "Differing interests" is defined to include conflicting, inconsistent, diverse and other interests that will adversely affect the judgment or the loyalty of a lawyer to a client.<sup>1</sup>

Representation of multiple defendants or of multiple plaintiffs in the same or a related matter is not prohibited *per se*. Such multiple representation is proper under DR 5-105 (C), however, only if, under the particular facts and after consideration of all the interests involved, (1) it is determined that the multiple representation is not likely to involve the representation of differing interests or (2) it is obvious that the lawyer can adequately represent both clients and each client consents after full disclosure.

Representation of two plaintiffs in a personal injury action clearly will involve differing interests if any one of the plaintiffs has contributed to the cause of the accident and the second plaintiff would have a cross claim against the first. The term "differing interests," however, includes not only directly adverse claims in litigation, but also inconsistent and other interests that will adversely affect the loyalty of a lawyer to a client. We conclude that the interests of X and Y will be inconsistent, hence "differing interests" within the meaning of DR 5-105, if the available assets are likely to be insufficient to satisfy the judgments that realistically may be obtained by X and Y in the aggregate.

Although this Committee has not previously addressed the issue, we concur generally in the results reached in Alabama Opinion 82-591 (March 17, 1982) (BNA 801:1030) that a lawyer may not represent all plaintiffs in an automobile accident case where the assets are not sufficient for the full satisfaction of all potential claims and a recovery by one claimant would reduce the assets available for the satisfaction of the other claims. *See also* Colorado

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<sup>1</sup> *See also* EC 5-1 (professional judgment of lawyer should be exercised solely for the benefit of client and free of compromising influences and loyalties and interests of other clients should not be permitted to dilute lawyer's loyalty to client); EC 5-14 (problem of maintaining independence of professional judgment arises when lawyer is asked to represent clients who may have differing interests, whether conflicting, inconsistent, diverse or otherwise discordant); EC 5-17 (typically recurring situations involving potentially differing interests that require analysis of each case as to whether lawyer can fairly and adequately protect interests of multiple clients include lawyer asked to represent co-plaintiffs in personal injury case or beneficiaries of estate of decedent).

Opinion 58 (March 21, 1981) (BNA 801:1902) (lawyer may represent more than one client involved in the same water rights litigation, unless the claims or rights of one client constitute impairment in fact, in likelihood or in reasonable appearance, of the water rights or claims of another client); *Matter of Guardianship of Lauderdale*, 15 Wash. App. 321, 549 P.2d 42 (1976) (with respect to apportionment of a settlement of a wrongful death action, an attorney may not act as guardian ad litem for several minors whose interests are not substantially the same where he must recommend a larger settlement for one to the potential detriment of another).

Upon determining that it is likely that insufficient assets will be available to pay the aggregate judgments,<sup>2</sup> it is then necessary for the attorney to decline employment or to determine whether consent under DR 5-105(C) may be obtained. Multiple representation is proper under DR 5-105(C) only if it is obvious that the lawyer can adequately represent both clients and each consents after full disclosure. For example, the obviousness condition may be met if both claims will be pursued zealously by the same lawyer (and the respective interests are not differing except as to the lack of sufficient assets for satisfaction) with the expectation that the plaintiffs will divide the available assets in proportion to their respective judgments or in accordance with an agreement regarding allocation of recoveries. Under those circumstances, the lawyer may proceed with multiple representation if each client consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each. If, however, the circumstances are such that it is not obvious that the lawyer can adequately represent both clients (because, for example, in certain circumstances, one client's damages vastly exceed any claims that could be asserted or proven on behalf of the other client) or if both clients do not consent, the lawyer may not proceed with the multiple representation.

In the settlement context, DR 5-106 prohibits a lawyer from making an aggregate settlement of claims of multiple clients unless each consents after being advised of (1) the existence and nature of all the claims involved, (2) the

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<sup>2</sup> EC 5-15 cautions that all doubts should be resolved against the propriety of multiple representation of clients having potentially differing interests. EC 5-15 further acknowledges that there are few situations in which the lawyer would be justified in representing in litigation multiple clients with potentially differing interests and that, if the lawyer accepted such employment and the interests did become actually differing, the lawyer would have to withdraw from employment with the likelihood of resulting hardship on the clients.

Further, EC 5-19 states that, even if the clients' interests are not actually or potentially differing, the lawyer should explain any circumstances that might cause a client to question the lawyer's undivided loyalty and defer to the client and withdraw from representation if the client does not believe the lawyer may properly represent the multiple clients, regardless of the lawyer's belief to the contrary.

total amount of the settlement, and (3) the participation of each person in the settlement. These protections are in addition to, and not in lieu of, the protections afforded by DR 5-105. A multiple representation that appeared appropriate at the outset may nevertheless require the lawyer to withdraw from representing either client if the circumstances – such as an aggregate settlement proposal – place the clients in an irreconcilable conflict.

**CONCLUSION**

For the reasons stated above and subject to the qualifications noted above, the question is answered in the negative.

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