

# New York State Bar Association

## Committee on Professional Ethics

Opinion 787 – 6/9/05

Topic: Conflict of interest; missing client

Digest: A lawyer who represents a wife in a personal injury matter and her husband on a loss of consortium claim cannot continue to represent either if the wife wishes to accept a settlement offer that would bar the husband's claim. If the husband has disappeared, the lawyer must take all reasonable steps to protect the client's interests and to locate the husband client. After exhausting all reasonable efforts to locate the husband, the lawyer may withdraw from the representation.

Code: DR 2-110, DR 5-105, DR 5-108, DR 7-101(A)(1); EC 5-15.

### QUESTION

May a lawyer who agreed to represent a wife in a personal injury matter and her husband on a derivative loss of consortium claim continue to represent the wife where settlement of her claim would prejudice the husband's interests? How should the lawyer proceed if the husband has disappeared?

### OPINION

A lawyer was retained to represent concurrently a married woman with respect to a personal injury claim and her husband on a derivative loss of services claim. The husband later abandoned the wife and she obtained a divorce. Although no lawsuit was commenced with respect to either claim, a settlement offer has been made to the wife that she would like to accept. Both the wife and the lawyer have lost contact with the former husband.

#### *Differing Interests*

A lawyer may represent multiple clients in the same or related matters unless (i) the

exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by the lawyer's representation of another client, or (ii) the multiple representation would likely involve the lawyer in representing differing interests. DR 5-105(A).<sup>1</sup> In cases where multiple representation would involve an adverse effect on independent professional judgment or representation of differing interests, a lawyer may undertake or continue the multiple representation if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. See DR 5-105(C).

If assisting the wife to effect the settlement would prejudice the husband's separate claim,<sup>2</sup> the lawyer must withdraw from both representations.<sup>3</sup> Continuing to represent both parties would involve a simultaneous representation of "differing interests." Specifically, the lawyer would be forced to choose between settling the wife's claim and thus barring the husband from pursuing his loss of consortium claim,<sup>4</sup> or advising the wife to reject the settlement offer that she wishes to accept in order to preserve the husband's claim. In this situation the lawyer could proceed only with the husband's informed consent, which would require explaining to the husband the risk that the loss of consortium claim may be compromised.

### *Missing Client*

Because the lawyer has not been discharged by the husband nor withdrawn from the husband's representation, he or she is obligated to continue to protect the husband's interests through reasonably available means.<sup>5</sup> However, the lawyer's inability to communicate with the client makes it difficult to protect the husband's interests. For example, if the client has not authorized the lawyer to file suit, the lawyer cannot know whether the client wishes to pursue the matter. A lawyer may withdraw from a representation if *either* "withdrawal can be accomplished without material adverse effect on the interests of the client"<sup>6</sup> or "if the client [b]y other conduct renders it unreasonably

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<sup>1</sup> DR 5-105(B); see also EC 5-15 ("The lawyer should resolve all doubts against the propriety of the representation.")

<sup>2</sup> Whether settling the wife's claim would prejudice her former husband's claim is a question of law beyond this Committee's jurisdiction.

<sup>3</sup> If the lawyer withdrew from only one representation, the remaining representation would be adverse to the former client "in the same or [a] substantially related matter," a violation of DR 5-108.

<sup>4</sup> See, e.g., *Buckley v. National Freight*, 90 N.Y.2d 210, 681 N.E.2d 1287, 659 N.Y.S.2d 841 (1997) (settlement of the injured spouse's claim and release generally bars the other spouse's pursuit of loss of consortium claim).

<sup>5</sup> DR 7-101(A)(1); see Rhode Island Opinion 1992-94 (attorney must continue to protect missing client's interests).

<sup>6</sup> DR 2-110(C).

difficult for the lawyer to carry out employment effectively.”<sup>7</sup> DR 2-110(A)(2) requires the lawyer, when withdrawing, to take “steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.”

Before withdrawing, the lawyer must take all reasonable steps to locate the client. Such steps might include sending a letter via certified mail to the last known address, a personal visit to the last known address, or a search of telephone directories, public records or the Internet to determine the client’s current address.<sup>8</sup> If the lawyer has exhausted all reasonable steps and decides to withdraw, the lawyer must send written notice of intent to withdraw to the client’s last known address, warning the client that the client’s claim may be prejudiced by delay, and suggesting that the client obtain other counsel.

Even if the lawyer withdraws from representation of the husband in accordance with DR 2-110(A)(2),<sup>9</sup> the lawyer would be unable to continue to represent the wife if settling her claim would prejudice the interests of the now-former husband client.<sup>10</sup> Absent consent from the former client (the husband), the lawyer could not continue to represent the wife in the same or a substantially related matter where her interests are materially adverse to the former client.

## CONCLUSION

A lawyer who agreed to represent a wife in a personal injury matter and her husband on a derivative loss of consortium claim may not continue to represent the wife absent both clients’ informed consent where settlement of her claim would prejudice the husband’s claim for loss of consortium. The lawyer may seek to withdraw from representing the missing client subject to the considerations discussed above.

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<sup>7</sup> DR 2-110(C)(1)(d).

<sup>8</sup> See, e.g., ABA Inf. Op. 1467 (1981) (if after reasonable inquiry and effort the client cannot be located, and problem is not caused by the lawyer’s neglect, the lawyer has no duty to file a lawsuit to toll the statute of limitations for a client who has disappeared); Arizona Opinion 01-08 (reasonably diligent search necessary); Philadelphia Opinion 98-8 (if after reasonable efforts to locate the client, the client cannot be found, the lawyer has no further obligation); South Carolina Opinion 98-07 (if after reasonable diligence, the client cannot be found, the lawyer can assume representation has terminated); Wisconsin Opinion E-96-2 (the lawyer must make a reasonable effort to locate the client before withdrawing); Rhode Island Opinion 91-82 (steps to be taken).

<sup>9</sup> Taking “steps necessary to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.”

<sup>10</sup> DR 5-108.

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