

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 823 – 6/30/08

Topic: Joint representation; conflict of interest; withdrawal

Digest: A lawyer cannot continue to represent joint clients in litigation if their strategies significantly diverge. The lawyer can continue to represent one of the joint clients in the litigation if the former client provides informed consent to the future representation and the lawyer can represent the current client zealously and competently. The lawyer is required to comply with the court's procedures for withdrawal.

Code: DR 2-110(A)(1), (2); 4-101(C); 5-105(A), (B), (C); 5-108(A); EC 7-8, 7-9.

QUESTIONS

1. May a law firm continue to represent joint clients whose strategies significantly diverge in litigation?
2. May a law firm continue to represent one of the joint clients in the litigation after the conflict arises and, if so, under what circumstances?

OPINION

3. A law firm represents "X" and "Y" in litigation. Prior to the firm's representation of these two clients, they were co-owners of a business, which they then sold. The purchasers sued X and Y. At the outset of the litigation, the interests of X and Y were identical. X and Y interposed a counterclaim against the purchasers.
4. For unknown reasons, the plaintiff purchasers have not vigorously pursued the litigation. X desires to pursue the counterclaim aggressively. Y, however, has directed the lawyer to do nothing and let things remain quiescent.
5. 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.¹ In cases where multiple representation would give rise to 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.²

6. We addressed the representation of joint clients prior to contemplated litigation in N.Y. State 787 (2005). There, the inquiring lawyer was retained to represent a woman on her personal injury claim and her spouse on a derivative loss-of-services claim. The husband subsequently abandoned the wife, and she obtained a divorce. The lawyer and the wife lost contact with the client/former husband. Prior to commencement of personal injury litigation on behalf of the husband and wife, a settlement offer was made to the wife, who wanted to accept it.

7. We observed that if assisting the wife to procure the settlement would prejudice the husband's derivative claim, the lawyer was required to withdraw from both representations:

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, 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.

The consent required under DR 5-105(C) could not be obtained from the husband, who could not be located.

8. Not every disagreement regarding the course to be charted in litigation rises to the level of differing interests. EC 7-7 provides, "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions."³ EC 7-8 states that, in areas in which the client is to make the decision, the lawyer should "exert best efforts to ensure that decisions of

¹ DR 5-105(A), (B).

² DR 5-105(C).

³ EC 7-9 adds, "In the exercise of the lawyer's professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of the client."

the client are made only after the client has been informed of relevant considerations.” But where joint clients, having received appropriate advice, determine to pursue diametrically opposed strategies, either of which is consistent with law and the lawyer’s ethical responsibilities, a conflict of interest exists. In the circumstances of this inquiry, moreover, the conflict is not consentable, because the firm cannot simultaneously pursue both clients’ objectives – a disinterested lawyer could not conclude that the lawyer could competently represent the interests of each client. Therefore, the firm cannot continue to represent both clients in the matter.

9. Whether the firm can continue to represent either X or Y in the litigation is governed largely by DR 5-108(A), which provides:

A lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: (1) Thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client. (2) Use any confidences or secrets of the former client except as permitted by section DR 4-101(C), or when the confidence or secret has become generally known.

10. Here, the firm’s continued representation of X in this matter, who wishes to pursue the counterclaim aggressively, could be materially adverse to the interests of Y, who prefers that nothing be done, apparently in an effort not to arouse sleeping dogs. Similarly, the firm’s continued representation of Y may be materially adverse to X, if achieving Y’s goal (no action) would be expected to require the lawyer to take action inconsistent with X’s goal of vigorous prosecution of the counterclaim. In either case, unless the clients validly consented in advance to continuing representation of one of them in the event of a conflict emerging, the firm needs to obtain the informed consent of the former client after full disclosure. Insofar as necessary to avoid misunderstanding, the firm should explain that the former client is under no obligation to consent to allow the firm to represent the other client and “that no negative consequences will attend [a] denial of consent.”⁴

11. Likewise, while there generally are no confidences between co-clients,⁵ to the extent that the lawyer has acquired, under an understanding of confidentiality,

⁴ N.Y. County 716 (1996).

⁵ See, e.g., *Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977) (“Neither Walston nor anyone connected with it could have thought . . . that any information given to the law firms conceivably would have been held confidential from the primary clients of the firms.”); *Moritz v. Medical Protective Co.*, 428 F. Supp. 865, 872 (W.D. Wis. 1977) (“communications by either client to [the lawyer] concerning the subject matter of the . . . suit . . . were not privileged as to the other client and were not confidences. . . . Nor were they ‘secrets’ within the meaning of Canon 4.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. 1 (2000) (“Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected.”).

information not known to the proposed continuing client, “[t]he former client must also be informed that she has the right to insist that all of her confidences and secrets or specific confidences and secrets be held inviolate.”⁶ In that circumstance, the firm must also consider whether it can competently represent the interest of the continuing client while keeping the former client’s confidence. Any restriction placed on the firm by the former client to preserve certain information protected as a confidence or secret may present a compromising influence that may prevent the firm from representing the current client competently and zealously.⁷

12. In withdrawing from representing X and/or Y, the firm must comply with the court’s procedures pertaining to withdrawal.⁸ In seeking to withdraw, the firm must take steps “to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client[s], including giving due notice to the client[s], allowing time for employment of other counsel, delivering to the client[s] all papers and property to which the client[s] are] entitled and complying with applicable laws and rules.”⁹

CONCLUSION

13. A lawyer cannot continue to represent joint clients in litigation if their strategies significantly diverge. The lawyer can continue to represent one of the joint clients in the litigation if the former client provides informed consent to the future representation and

⁶ N.Y. County 716 (1996); see N. Y. State 555 (1984) (lawyer may not disclose to one joint client confidential communications from the other joint client relating to the subject matter of the representation, absent express or implied consent).

Attorneys who represent joint clients in the same matter should, in advance of the joint representation, reach an agreement with the joint clients as to the sharing of confidential information. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60, cmt 1 (2000) (“Co-clients . . . may explicitly agree to share information. Co-clients can also explicitly agree that the lawyer is not to share certain information, such as described categories of proprietary, financial, or similar information with one or more other co-clients”); ABA Model Rule 1.7 cmt. 31 (“The lawyer should, at the outset of the common representation . . . , advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.”). As recently noted by the ABA’s Committee on Ethics and Professionalism, “[c]larifying expectations at the onset of the representation is always preferable in these situations, and may affect the ability of the lawyer to continue representing one or the other client after difficulties arise.” ABA Formal Opinion 08-450, n.21.

⁷ See ABA Formal Opinion 08-450, at 1 (“a conflict of interest arises when the lawyer recognizes the necessity of revealing confidential information relating to one client in order effectively to carry out the representation of another”).

⁸ DR 2-110(A)(1) (“If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.”); see, e.g., CPLR 321(b) (change or withdrawal of attorney).

⁹ DR 2-110(A)(2).

the lawyer can represent the current client zealously and competently. The lawyer is required to comply with the court's procedures for withdrawal.

(3-08)
