New York State Bar Association

Committee on Professional Ethics

Opinion 777 – 8/30/04

Topic: Acquiring interest in subject matter of litigation, conflict of interest, lawyer testifying

Digest: A lawyer may represent a client in litigation notwithstanding that the lawyer owns a preexisting interest in the subject matter of the litigation, if the lawyer's interests and the client's interests in the outcome of the litigation are not in conflict and the lawyer will not be called as a witness.

Code: DR 5-101, DR 5-102(A), (B), DR 5-103(A), EC 5-3, EC 5-7.

QUESTION

May a lawyer who owns an interest in land that is the subject of an annexation dispute between two neighboring towns represent one of the towns in the dispute?

FACTS

The inquirer is a lawyer who owns an interest in land located in the Town of A. The lawyer filed a petition with the Town of A and with the neighboring Town of B to annex a portion of the property into the Town of B. The A Town Board opposed the annexation; the B Town Board supported it. Inquirer asks whether it is permissible to represent the Town of B *pro bono* in litigation between the two towns over the issue.

OPINION

The inquiry raises issues under three disciplinary rules: DR 5-101, relating to conflicts between a client's interests and a lawyer's personal interests; DR 5-103(A), barring a lawyer from acquiring an interest in the subject matter of

litigation; and DR 5-102, relating to lawyers acting as witnesses in matters in which they act as counsel.

Personal conflicts. DR 5-101 provides that:

> A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

The inquirer believes that the inquirer has a unity of interest with the Town of B in the outcome of the litigation, as both the inquirer and the Town wish to annex the land to the Town of B. The inquirer would proceed only after full disclosure of the interest to the Town B Board.

If the interests of the lawyer and the Town of B are fully aligned, then it is likely that a disinterested lawyer would conclude that the inquirer's representation of the client would not be adversely affected by the inquirer's interest in the land, so that Town B may validly consent to the representation after full disclosure. This determination depends on all the facts and circumstances, however. For example, the inquirer should consider whether the inquirer's interests and the Town's may diverge at some time in the future. "Even if the property interests of a lawyer do not presently interfere with the exercise of independent judgment, but the likelihood of interference can be reasonably foreseen by the lawyer, the lawyer should explain the situation to the client and should decline employment or withdraw unless after full disclosure the client consents, preferably in writing, to the continuance of the relationship." EC 5-3. The inquirer also should consider whether the Town can validly consent to waive the conflict under the standards set forth in N.Y. State 629 (1992).

Proprietary interest in subject matter of litigation. DR 5-103(A) provides that:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client, except that the lawyer may:
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> 1. Acquire a lien granted by law to secure the lawyer's fee or expenses.
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> 2. Except as provided in section DR 2-106(C)(2) or (3), contract with a client for a reasonable contingent fee in a civil case.

DR 5-103(A) does not prevent the inquirer from representing the Town of B, notwithstanding the ownership of an interest in the land that is the subject matter of the litigation, because the Code only prohibits the *acquisition* of an interest in the subject matter of litigation, not the preexisting possession of such an interest.

Other ethics committees have likewise reached the conclusion that DR 5-103(A), or the similar ABA Model Rule 1.8(i), do not prevent a lawyer with a preexisting interest in the subject matter of a litigation from representing a client whose interests are aligned with the lawyer's in that litigation. *See, e.g.*, Maine Opinion 92 (1988) (the rule "does not extend so broadly as to prohibit a lawyer who has an interest in his client from representing the client in litigation provided the lawyer's interest was acquired for reasons independent of and apart from any consideration of litigation which might thereafter be contemplated"); Alabama Opinion 85-23 (attorney who is one of the heirs may represent self and other heirs in filing a petition for division and sale); Alabama Opinion 84-159 (lawyer who is member of property owner's association may represent other property owners in seeking to prevent liens on their property); *see also In re Capobianco v. Halebass Realty, Inc.*, 72 A.D.2d 804 (2d Dep't 1979) (action to foreclose on mortgage not champertous "if the attorney had a legitimate business interest in acquiring the assignment, e.g., as an incidental part of a commercial transaction"); *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 105 (5th Cir. 1978) ("Ordinarily there would be no objection to an attorney representing his wife in litigation").[1]

This does not mean that a lawyer with a preexisting interest in the subject matter of the litigation may represent a party to the litigation without any restrictions. Such an interest will generally give rise to a conflict or potential conflict under DR 5-101. *See also* EC 5-7 ("The possibility of an adverse effect upon the exercise of free judgment by the lawyer on behalf of the client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of the client or otherwise to become financially interested in the outcome of the litigation"). As indicated by the facts here, however, the conflict under DR 5-101 will often be waivable. Without deciding the issue, we observe that DR 5-103(A) appears to bar acquisition of an interest in the subject matter of the litigation regardless of whether the client is willing to consent. One explanation for this treatment is that the roots of DR 5-103(A) lie in the prohibitions on maintenance and champerty. *See, e.g.*, ABA 00-416 ("Rule 1.8(j) [now 1.8(i) which is virtually identical to DR 5-103(A)] is rooted in the common law doctrines of maintenance and champerty. The present Rule is intended to

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[1] *See also Peggy Walz, Inc. v. Liz Wain, Inc.*, No. 94 Civ. 1579, 1996 WL 88556, at *3 (S.D.N.Y. 1996) (disqualifying plaintiffs counsel, citing DR 5-103(A), where the lawyer had formed the plaintiff corporation with a client after the dispute had arisen). *But see Bachman v. Pertschuk*, 437 F. Supp. 973, 976-77 (D.D.C. 1977) (federal employee cannot represent a class of federal employees against employer-agency, citing, *inter alia*, DR 5-103).

prevent conflicts of interest that might interfere with the lawyer's exercise of independent professional judgment on the client's behalf").

Lawyer as witness. DR 5-102(A) provides that, with certain exceptions:

> A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client . . . .[2]

DR 5-102(B) also bars a lawyer from accepting employment in contemplated or pending litigation if the lawyer or a lawyer in his or her firm "may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client."

Thus, the inquirer may be barred from accepting employment on behalf of the Town of B if the lawyer "ought to be" called as a witness on the client's behalf (and no exception applies) or if the inquirer might be called as a witness adverse to the client. *See also* ABA Inf. Op. 899 (1965) (where an attorney both appears *pro se* and represents others in a legal proceeding, "there is . . . the possibility he might become a witness in the proceedings in which case he should not act as an attorney except in rare and unusual circumstances"); *Walz*, 1996 WL 88556, at *3-4 (disqualification would not be appropriate under DR 5-102 where other witnesses could testify about the same facts).

CONCLUSION

The inquirer may represent the Town of B in the dispute with the Town of A, notwithstanding the preexisting ownership interest in the subject matter of the litigation, where the inquirer's interests are aligned with the Town of B's interests and informed consent has been obtained from the Town of B, unless the inquirer

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[2] The exceptions are:

1. If the testimony will relate solely to an uncontested issue.
2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
3. If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client.
4. As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case.

ought to be, or in certain circumstances may be, called as a witness on a significant issue.

(12-04)