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## CONFLICTS OF INTEREST

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### *Introduction*

The Ethics Committee receives many inquiries each year from members of the Bar seeking guidance in situations raising possible conflicts of interest. It has also been true in recent years that many conflicts of interest or possible conflicts of interest have reached the courts through motions to disqualify attorneys. In order to provide guidance in this area, the Ethics Committee has decided in this Opinion to consider several of the most common conflicts situations.

### *Syllabus*

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. In order to ensure that each client receives the independent professional judgment to which he is entitled, a lawyer must be careful to recognize situations which may involve the lawyer in conflicts of interest. Among the situations raising potential conflicts are: (1) situations where the lawyer wishes to represent more than one client in a certain transaction; (2) situations where a lawyer has a financial interest in the matter in which he wishes to represent the client; (3) situations where an attorney is considering suit against a former client; (4) situations where a former government lawyer wishes to represent a client in a matter involving a government agency which previously employed the lawyer; and (5) situations where a lawyer may be called as a witness in litigation he intends to handle.

### *Opinion*

#### *1. The simultaneous representation of multiple clients.*

DR 5-105 provides that a lawyer must decline proffered employment “if the exercise of his professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of such employment.” In resolving situations which present potential conflicts of interest, a lawyer’s prime concern should be ensuring that his loyalty to his client is not diluted by the interests of other clients.

Because of the nature of litigation and the fact that unforeseen conflicts may sometimes develop at trial causing hardship to both clients should a lawyer be forced to withdraw, a lawyer should rarely represent more than one client in a litigation setting. EC 5-15 states that a lawyer “should never represent in litigation multiple clients with differing interests” and warns that “there are few situations in which a lawyer would be justified in representing in litigation multiple clients with potentially differing interests.” Of course, in any such situation if a lawyer determines that he can adequately represent each of the clients, it is obligatory that an attorney fully disclose to the clients the potential conflicts that may arise no matter how remote and obtain the consent of the clients to such representation.

When considering whether to represent two parties in litigation it is important to remember that agreement over trial tactics and strategies by the two clients does not resolve the question of conflicts because settlement negotiations may still raise serious conflicts. For example, where the amount of proceeds in a case will not be sufficient to cover the claims of both clients, a lawyer will be severely limited in negotiating settlements and it would be preferable that the negotiations be conducted by separate counsel for each client.

Similarly, in criminal cases, a lawyer who represents two defendants may be precluded by his position from fully exploring plea negotiations on behalf of one of the defendants that would involve cooperating with the prosecution. Or at sentencing a lawyer may find it difficult to argue for a light sentence on behalf of one defendant when the consequence may be a heavier sentence for the other defendant.

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), the Supreme Court warned that in cases of joint representation of conflicting interests the evil “is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and at the sentencing process.”

Government attorneys also face potential conflict situations from multiple representation, such as situations where an attorney represents both an agency and individual employees of the agency. The warning contained in EC 5-15 that “there are few situations in which a lawyer would be justified in representing in litigation multiple clients with potentially differing interests” applies with equal force to attorneys working part-time or even full-time for the government. And like the private practitioner, a government attorney has the same obligation in any case involving multiple representation of parties with potentially differing interests to make sure that each of the parties represented has received full disclosure and has consented to such multiple representation. See, e.g., *Aetna Cas. & Ins. Co. v. United States*, 570 F.2d 1197 (4th Cir. 1978). It is important to remember, however, that there may be instances where an attorney representing a public body may not engage in conflicting representation regardless of disclosure and consent. See DR 9-101 and Formal Opinions 45 and 48 of the Ethics Committee of the Colorado Bar Association.

In situations other than litigation DR 5-105(c) provides that a lawyer may represent clients with differing interests if

it is obvious that he can adequately represent the interest of each and if each consents after full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of each.

Such full disclosure should include careful explanation to each client of the implications of common representation including the risks involved as well as the advantages of common representation. One of the risks of representing clients with differing interests which should be explained to the clients before undertaking joint representation is the possibility that at some later point a serious conflict may develop which would require the lawyer to withdraw from representing either of the clients in the matter.

The ethical considerations in representing both parties in a dissolution of marriage were discussed in an earlier opinion of the Ethics Committee. See CBA Ethics Opinion No. 47 (February 26, 1972). For a case dealing with the propriety of representing both the buyer and seller in a real estate transaction and specifying the nature of the disclosure and consent that is required, see *In re Dolan*, 76 N.J. 1, 384 A.2d 1076 (1978).

## 2. Representation of a client in a transaction where the attorney has financial interest in the transaction.

EC 5-3 warns that the “self-interest of a lawyer resulting from his ownership of property in which his client also has an interest . . . may interfere with the exercise of free judgment on behalf of his client.” When a lawyer wishes to enter into a business, financial, or property interest with a client, a lawyer should be careful to determine whether his self-interest will interfere with his ability to exercise his professional judgment on behalf of his client. Obviously such a decision depends on the nature of the transaction and the degree to which the interests of the lawyer and client differ. If the interests of the client and the lawyer in a transaction differ significantly a lawyer should not attempt to represent both the client and himself the transaction. See, e.g., *People v. Good*, 195 Colo. 177, 576 P.2d 1020, 1024-25 (1978). But if the interests of the lawyer and client differ only slightly and the lawyer is certain that the transaction will involve no risk of unfairness to the client, the lawyer may enter into such a transaction but only after the client has consented to the representation by the lawyer after the lawyer has fully disclosed the risks and the advantages of joint representation in the transaction. Such disclosure is required by DR 5-104(A).

While a lawyer may enter into certain transactions with a client, this does not include the acquisition of a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client. DR 5-103 bars the acquisition of any such interest, other than a contingent fee interest in a civil case.

### 3. Suits against former clients.

In deciding whether to accept an offer of employment involving litigation against a former client, a lawyer's paramount concern should be his obligation to preserve the confidences of the former client. Canon 4, in particular DR 4-101(B), forbids a lawyer from using a confidence or secret of a client to the disadvantage of the client and this obligation continues even after the termination of employment. The determination of whether confidences of a former client will be protected in the present litigation depends to a large extent on the nature of the prior relationship between the lawyer and his former client. Where a lawyer handled a single, discrete transaction for the former client, it may not be difficult to determine whether confidences would be jeopardized by the present litigation against that client. But if the former representation involved advice in a range of matters over a period of time the determination that a lawsuit against the former client will not endanger any secrets or confidences will be much more difficult to make. If it appears likely that confidences and secrets of the former client cannot be protected, the proffered employment must be refused.

A second factor to be considered in determining whether to undertake litigation against a former client is the subject matter of the litigation and its relationship to the subject matter of the prior representation. Where the subject matter of the present litigation is substantially related to the subject matter of the previous representation, a lawyer should not undertake the employment against the former client. In situations where the subject matter of the present and prior representation is substantially related, it will be difficult to tell whether confidences of the former client will be protected. In order to protect confidences, a number of courts when faced with a motion to disqualify have held as a procedural matter that a lawyer is disqualified from representing a party in litigation if he formerly represented an adverse party in a substantially related matter. See, e.g., *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978); *Government of India v. Cook Industries Inc.*, 569 F.2d 737 (2d Cir. 1978). See also, *Osborn v. District Court*, 619 P.2d 41 (Colo. 1980). In addition to concern for confidences, a lawsuit against a former client on a matter substantially related to the prior representation poses a serious threat to a lawyer's independent professional judgment under Canon 5. It also may undermine the protection of public confidence under Canon 9 which demands that a lawyer not appear to be "switching sides" by accepting employment against a former client where the subject matter of the litigation is substantially related to the subject matter of the previous representation.

### 4. Suits by a former government lawyer against his former employer.

DR 9-101(B) provides that a lawyer shall not represent a private client "in a matter in which he had substantial responsibility while he was a public employee." The term "substantial responsibility" is not capable of a precise definition, especially in light of the broad spectrum of types of government practice and the various kinds of authority in certain agencies. But in ABA Formal Opinion 342, which was aimed at interpreting DR 9-101(B) in light of its history and underlying purposes and policies, "substantial responsibility" was interpreted to require more than that as a government employee, the lawyer "passed upon" a matter. The Opinion concluded that "substantial responsibility" contemplates

a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question.

Thus where an attorney, while working for the government on a certain transaction or lawsuit, became "personally involved to an important, material degree" in the handling of that matter, a lawyer upon leaving government service should not represent a private client in that matter. To do so might jeopardize confidential government information and would give the appearance of professional impropriety in that it creates the suspicion that a lawyer conducted his governmental work in a way to facilitate his own future employment in that matter.

The bar against representing a client in a "matter" in which the lawyer as a government employee had substantial responsibility is not meant to bar an attorney from ever representing a private client in a case against the former government agency simply because the lawyer at one time had a responsibility in

drafting the statutes or regulations of the agency. If the statute was of broad application this would in effect bar the lawyer from ever appearing before that agency. ABA Formal Opinion 342 concludes that the term “matter” contemplates “a discrete and isolatable transaction or set of transactions between identifiable parties.” It is not the fact that a former government employee brings into a later proceeding a knowledge of the procedures and substantive law of an agency that gives rise to a conflict of interest. Rather it is the situation where a former government lawyer brings into a proceeding on behalf of a private client a personal knowledge of particular background facts and data that creates a conflict of interest demanding that the lawyer not undertake the representation of the private client.

*5. The lawyer as a witness and an advocate on behalf of his client.*

Occasionally it may occur that a lawyer will be, or is likely to be, a witness in a lawsuit he wishes to handle on behalf of a client. Such a role for the lawyer as both advocate and witness may create conflicts because a lawyer may be forced in certain circumstances to argue his own credibility. Such a dual role may weaken the lawyer’s role either as advocate or as witness and it may lead to confusion on the part of the jury over the distinction between argument and testimony.

Like other conflicts of interest situations, whether a lawyer should remain as an advocate in a case where he is likely to be a witness depends on the particular factual situation and, in particular, on the nature of the lawyer’s testimony. DR 5-101 provides that if the lawyer’s testimony relates only to an uncontested issue or to a matter of formality which is unlikely to be disputed, the lawyer may nonetheless undertake employment as an advocate in that case. Similarly, if the lawyer’s testimony relates only to the nature and value of the legal services rendered in the case on behalf of the client, a lawyer may continue to serve as an advocate for the client. But where the testimony of the lawyer goes beyond such matters and concerns a material issue in the case, a lawyer should not act as an advocate. In *People v. Spiegel*, 193 Colo. 161, 567 P.2d 353 (1977), one of the violations leading to discipline was an instance where an attorney continued to represent a defendant in a criminal case despite the fact that the attorney knew he would be an important witness.

The only exception in DR 5-101 to continuing as an advocate in a case where the lawyer’s testimony goes to a material issue is the situation mentioned in DR 5-101(B)(4) where the refusal to act as an advocate “would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.” ABA Formal Opinion 339 (November 16, 1974), which deals at some length with the substantial hardship exception, gives as an example of substantial hardship where new counsel should not be required, the situation of a complex lawsuit which has been in preparation over a long period of time where an unanticipated development suddenly makes the lawyer’s testimony essential. In such a situation it would be unfair to compel the client to seek new trial counsel at substantial additional expense and delay. Another such exceptional circumstance would be the situation where a long and extensive professional relationship with a client has given the lawyer such extensive familiarity with the client’s affairs that the value to the client of representation by that lawyer in a trial involving those matters would clearly outweigh the disadvantages of having the lawyer testify on a disputed issue. See *Greenebourn- Mountain Mortgage Co. v. Pioneer National Title Insurance Co.*, 421 F.Supp. 1348 (D. Colo. 1976).

In any situation where a lawyer may be required to be both advocate and witness, the decision whether or not to obtain new counsel belongs to the client and, in order to make an informed decision, the client should be made aware of the materiality and necessity of the lawyer’s testimony and the possible detrimental effect on both the lawyer’s testimony and his advocacy. If withdrawal under the circumstances would clearly work a substantial hardship and if the client wants counsel to continue to represent the client, counsel should advise the court and opposing counsel that he intends to testify and the nature of such testimony. See ABA Formal Opinion 339 (November 16, 1974). See generally, Note, The Advocate-Witness Rule, 52 N.Y.U.L. Rev. 1365 (1977).

**1995 Addendum**

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rules 1.7(a) (b) and (c), 1.8(a), (b), (d), (e), (g) and (j), and 1.9(a) (regarding conflicts of interest); Rule 1.10(c) (regarding imputed disqualification of a lawyer's firm when the lawyer cannot ethically represent a client); Rule 1.11(a) (regarding successive government and private employment); Rule 1.12(a) and (b) (regarding former judges or arbitrators); Rule 1.13(e) (regarding an organization as client); Rule 1.15 (regarding safekeeping property and COLTAF accounts); Rule 1.16 (regarding declining or terminating representation); Rule 2.2(a) and (c) (regarding the lawyer as intermediary); Rule 3.7(a) (regarding the lawyer as witness); Rule 6.3 (regarding membership in legal services organizations); and Rule 6.4 (law reform activities affecting client interests).

The Ethics Committee directs attorneys to Opinions 68 and 78 and the relevant provisions of the Colorado Rules of Professional Conduct contained in those opinions. This opinion is supplemented by Opinions 68 and 78 which should be reviewed in conjunction with the Rules.