

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 88-021

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Withdrawn by Adv. Op. 2020-04 on June 12, 2020

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: A lawyer or law firm which represents a public entity whose agency is seeking a land use variance cannot ethically represent landowners opposed to that variance. A lawyer should not represent multiple clients with differing interests unless it is obvious the lawyer can adequately represent the interests of each client AND each client consents to the representation after full disclosure of all the implications of the common representation.

OPINION: We have before us your request for an advisory opinion on a possible conflict of interest. In your request you indicate that your law firm has a contract with a Community Mental Health Board (Board) to provide legal services on an as needed basis for the year 1988. The Board contracts with an Agency to provide services and facilities for domestic violence victims in the area. The Agency is seeking a land use variance for a shelter. Your law firm represents a group of landowners which are opposed to the location of the Agency's shelter in their neighborhood. The Board, your client, is in support of the Agency's efforts to locate the shelter in the neighborhood and seek appropriate variances.

For reasons set forth below, it is our opinion that representing both the neighbors and the Board would constitute a conflict of interest. It is our understanding that the Community Mental Health Board has significant control over the Agency in that the Board finances, monitors and evaluates the Agency's activities. Ohio Rev. Code §340. Therefore, for purposes of this opinion, we consider the Agency to be a subsidiary of the Board.

There are several provisions in the Code of Professional Responsibility which apply here. First, EC 5-14 states:

[m]aintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two ...clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

According to your request letter, your law firm's clients (the Board and the neighbors) have differing interests with regard to the placement of the shelter.

Ethical Consideration 5-15 recommends that a lawyer should resolve all doubts against the propriety of the representation of clients having potentially differing interests. There are, however, instances in which a lawyer is justified in representing clients having differing interests. See, e.g., Code of Professional Responsibility, EC 5-15. Although, if a lawyer feels justified in representing clients with differing interests, he or she should "explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent." Code of Professional Responsibility, EC 5-16 (emphasis added). In addition, EC 5-19 states that,

[a] lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

Thus, when a lawyer represents multiple clients it is the client and not the lawyer who determines whether the representation shall continue.

The aforementioned Ethical Considerations are “aspirational in character and represent the objectives toward which every member of the profession should strive.” Code of Professional Responsibility, Preface. The Disciplinary Rules are mandatory in character and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” Id.

The Disciplinary Rule which is applicable to your request is DR 5-105, which states:

...B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Therefore, in order to avoid disqualification under DR 5-105(B), a lawyer must satisfy the two conditions found in DR 5-105(C). Unified Sewerage Agency of Washington County, Oregon v. Jelco Inc., 646 F.2d 1339, 1345 (9th Cir. 1981). First, it must be obvious that the lawyer can adequately represent the interests of each client and second, each client must consent to the multiple representation after full disclosure of the risks. Id.

The necessity of obtaining a client's consent to multiple representation places the burden of affirmatively providing disclosure and obtaining consent upon the lawyer. IBM v. Levin, 579 F.2d 271, 282 (3d Cir. 1978) “Full disclosure means just that - affirmative revelation by the attorney of all the facts, legal implication, possible effects, and other circumstances relating to the proposed representation. A client's mere knowledge of the existence of his attorney’s other representation does not alone constitute full disclosure.” Financial General Bankshares, Inc. v. Metzger, 523 F.Supp. 744, 771 (D.D.C. 1981).

Furthermore, maintaining public confidence in the bar requires an attorney to decline employment adverse to his or her client, even though the nature of the employment is wholly unrelated to that of his existing representation. Cinema 5, Ltd. v. Cinerama, Inc., et al., 528 F.2d 1384, 1387 (2d Cir. 1976). The Cinema 5 case also stands for the proposition that “[w]here the relationship is a continuing one, adverse representation is prima facie improper, (citation omitted) and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation.” Id. (emphasis in original).

In conclusion, it is our opinion and you are so advised that, based upon the Disciplinary Rules, the Ethical Considerations and the case law, continuing to represent both the Board and the landowners would constitute a conflict of interest. Such a conflict may be overcome if it is obvious that your law firm can adequately represent the interests of each client and if both the neighbors and the Board consent to the multiple representation after full disclosure of all the facts involved.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.

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Secretary, Board of
Commissioners