ALASKA BAR ASSOCIATION ETHICS OPINION NO. 91-5

Ethical Obligation of an Attorney to Withdraw After Undertaking Dual Representation of Estates With Factually Conflicting Positions in Existing Litigation

QUESTION PRESENTED

What are the ethical duties of an attorney, when the attorney after undertaking representation of a client in personal injury litigation, undertakes representation of the estate of a potential tortfeasor for the purpose of preserving the claims that the estate of the potential tortfeasor might have had against a third party in order to assure a source of recovery for the original client?

CONCLUSION

An attorney may not represent parties, including estates, against each other in the same litigation regardless of motivation. Such conflicts may not be waived. Since each "client" is entitled to the undivided loyalty of counsel, withdrawal from the representation of one, will not suffice. Attorney must withdraw from representing both clients.

STATEMENT OF FACTS

Attorney was retained by the victim of a two car collision. The client was without fault and suffered property damage and personal injury in amounts which the attorney valued at between \$50,000 and \$100,000.

The second car was operated in an allegedly reckless manner by an intoxicated minor. There were two other intoxicated minors in the car. The driver and one passenger were killed. The surviving occupant suffered serious head injuries. The driver was without insurance. Discovery disclosed that the alcohol was purchased from a liquor store by the driver and that all of the minors had paid for the alcohol. Suit was filed against the surviving minors, the estate of the driver, and the estate of the deceased passenger as well as the liquor stores involved.

In evaluating the case, the Attorney concluded that none of the surviving individuals would be able to pay meaningful damages. Depending upon how fault was allocated, the Attorney concluded that his client might not be able to recover all of his damages against the liquor stores involved. The Attorney however concluded that if he sued the estate of the deceased passenger, his client might recover from the estate, if a dram shop suit was brought by the estate against the liquor stores.

Attorney contacted the mother of the deceased passenger, advised her of the fact that two liquor stores had been implicated and encouraged her to file suit on behalf of the estate of her son. The Attorney also advised the mother that the statute of limitations would run in two days. The mother asked the Attorney to speak with her daughter who was more sophisticated and worked for a lawyer. Attorney contacted the daughter, informed her of the statute of limitations and the fact that he was amending his client's complaint to include a count against her brother's estate. No estate had then been opened. Attorney told the deceased's sister that it would be possible for his client to open an estate as the client was a creditor but that it would be easier if someone from the family made application. The sister told Attorney that she did not think that she had time to hire a lawyer before the running of the statute of limitations.

Attorney agreed to prepare the papers, opening the estate and appointing the sister as personal representative. He would then file a complaint on behalf of the estate against the liquor stores. It was anticipated that Attorney would then withdraw from the representation of the estate because of the conflict between the estate and the original client which was suing the newly opened estate. Attorney accomplished these steps.

Attorney asked sister to find a new attorney. She indicated that she thought that her boss would handle the matter. After a delay of five months, Attorney contacted Sister who advised that she would send papers allowing the attorney to withdraw with her consent and that she was abandoning both the estate as well as the claim. Sister said that the subject was too painful for the family and that she thought that the Attorney's conduct in contacting her was wrong. Sister and her family intend to oppose Attorney's continued representation of his original client.

The complaint filed on behalf of the estate was never served. The Attorney now wishes to have the guidance of the Ethics Committee as to his duties, having found himself in this situation.

DISCUSSION

Generally speaking, a lawyer may not represent two opposing parties in litigation no matter how benign the circumstances. Consent of the parties is irrelevant. See American Law Institute Restatement of the Law Governing Lawyers Tentative Draft No. 4, Chapter 8 Section 209, Comment C (4/10/91). Numerous provisions of the Code of Professional Responsibility support this proposition.

DR 5-105 requires an attorney to decline or withdraw from representation when it is likely that the exercise of his independent judgment will be adversely

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a lawyer may not represent both spouses.

¹There is a minority view holding that in the case of no-fault divorce where there are no issues of alimony, custody, child support or property division, the same lawyer with consent may represent both spouses. Hazard and Hodes, <a href="https://doi.org/10.2016/nd.2016/

affected. DR 5-105(C) states that a lawyer may represent multiple clients, "if it is obvious that he can adequately represent the interests 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." In a Formal Opinion 91-2, the committee published its view that a lawyer for an estate represents the personal representative and can if fact advise the personal representative in disputes with beneficiaries. Here, it is clear that Attorney's first duty (rightfully so) was to the original personal injury plaintiff. The personal representative for the Estate had the right to an independent evaluation of the merits of the claim against the estate as well as the merits of the claim made on behalf of the estate. It would be impossible for the lawyer suing the estate to give independent, candid advice. Whatever advice was given would of necessity be tainted by the desire to provide a corpus to pay damages to the original client. Likewise, EC 5-1 provides that "The professional judgment of a lawyer should be exercised ... solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients nor the desires of third persons should be permitted to dilute his loyalty to his client."

Nor is an agreement to limit the nature of services controlling. Attorney has a duty under DR 7-101 to represent the interests of the estate vigorously within the bounds of law. The agreement contemplated that at least for some initial period, Attorney would represent the estate in its dram shop action. A lawyer cannot undertake to file a complaint without undertaking the responsibility of moving the matter forward. the problem is that independent counsel may well have taken a different view of the merits of the separate actions and may well have advised the client to sue other entities or take other actions to preserve the estate. The client, who was the personal representative, is entitled to the best advice of the lawyer and is entitled to look to that lawyer to do his or her personal best to protect the interests of the estate.

The conflict of interest mandates withdrawal from all representation.

Courts will disqualify counsel in an adversary proceeding when: (1) the moving party was previously represented by the attorney whose disqualification he now seeks; (2) the matters embraced within the pending lawsuit are substantially related to the matter or the cause of action on which the attorney previously represented the moving party; and (3) the attorney is representing an adversary of the movant party in the pending suit.

First American Carriers, Inc. v. Kroger, 788 S.W.2d 742 (Arkansas 1990).

It is interesting to note that in <u>First American</u>, the conflict was inadvertently created and the Court accepted the fact that the law firm was totally innocent of improper behavior. In this case, all three conditions would be met should the Estate move to disqualify counsel.

Justification for this position within the Code of Professional Responsibility would include the duty under DR 4-101 to preserve the confidences and secrets of a client as well as the duty to withdraw under DR 2-110(B)(2). Attorneys have a duty to avoid even the appearance of impropriety under DR 9-101. Accordingly, it is the view of the committee that Attorney should withdraw totally from the representation of either client.

Approved by the Alaska Bar Association Ethics Committee on October 3, 1991. Adopted by the Board of Governors on October 25, 1991.

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/¹/There is a minority view holding that in the case of no-fault divorce where there are no issues of alimony, custody, child support or property division, the same lawyer with consent may represent both spouses. Hazard and Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (2d ed. 1990), Section 2.2:204. See also District of Columbia Rule of Professional Conduct 1.7, Comment <6>. The committee has not considered the circumstances under which a lawyer may represent both spouses in a Dissolution filed under the Alaskan Act. Needless to say, if there are disputes as to any issue, a lawyer may not represent both spouses.

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