

FORMAL OPINION NO. 93*

The conflicts question asked is whether circumstances hereafter described violate Canon 9 of the Code of Professional Responsibility, and particularly in light of the fact that the litigation is a planned friendly test case with all lay clients fully informed of the one attorney's separate interest and no objection having been expressed.

Lawyer "A" is Chairman of the Board of Directors of Corporation "B", which is licensed by State Regulatory Agency "C." Corporation "B" sues State Agency "C" for declaratory judgment, in order to obtain an interpretation of a licensing statute. Lawyer "A" is selected to represent defendant State Regulatory Agency "C." In addition, he files a petition for Association "D", which consists of a non-governmental group of other corporations licensed by State Regulatory Agency "C", to intervene as a defendant. In the meantime, as per previous agreement, other interested groups designated "E" intervene as plaintiffs, or file as amicus curiae for plaintiff.

All parties to the suit agree that this is a friendly test case, requiring speedy action, and that both sides of the question will be and are being vigorously and ably presented to the Court, although some attorneys have questioned Lawyer "A's" continued participation. May Lawyer "A" simultaneously be on the Board of Directors of plaintiff Corporation "B", represent defendant State Regulatory Agency "C", and represent intervening defendant Association "D", whose members are licensed by the said Regulatory Agency?

The committee respectfully declines to pass judgment here, if any opportunity has been offered, upon the acts or omissions of any attorney referred to in the above hypothetical case and the following is offered hopefully only as helpful guidance.

Canon 9 directs that "A lawyer should avoid even the appearance of professional impropriety." It appears that other provisions of the Code of Professional Responsibility may bear upon the question submitted.

DR 5-105 of the Code reads as follows:

- "(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).
- "(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 judgment on behalf of each."

We call attention to Ethical Consideration 5-15 which is a part of the Code adopted by the American Bar Association:

"A lawyer should never represent in litigation multiple clients with differing interests; and there are a few situations in which he would be justified in representing in litigation multiple clients with potentially different interests. If a lawyer accepted such employment and the interests did become actually

differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially."

An attorney who represents a state agency would not seemingly be free from the requirement of DR 8-101 which provides:

"A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official."

Reference again to ABA Ethical Consideration 8-8 we find:

"A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."
(Emphasis added)

and Ethical Consideration 9-2 gives this advice:

"When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promote public confidence in the integrity and

efficiency of the legal system and the legal profession."

The Code of Professional Responsibility does not define "special advantage" or "not in the public interest" as mentioned in DR 8-101, but it has been stated, and we agree, that "special advantage" refers to a direct and peculiar advantage and "not in the public interest" refers to action clearly inimical to the best interest of the public as a whole. In a given disciplinary proceeding it becomes apparent that such interpretation involves issues of fact such as whether there was a special advantage for the client (or for the attorney's personal interests) or whether the action was in the public interest. Likewise whether a public official, or an attorney serving in a related position, has or has not used "his public position to influence, or attempt to influence" is an issue of fact which the committee obviously cannot determine.

Reference to DR 5-101 may provide additional guidance in the language of paragraph (a).

"Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

There is one further observation that should be made and that is that "the public" cannot give its consent in conflict situations and therefore if the public interest is involved, such consent will always be lacking.

DATED this 2nd day of February, 1976.

*DR 5-105(A), (B) and (C) have been amended to include in conflict considerations whether representation "is likely to involve him in representing differing interests." See also, I.S.B. Opinion No. 35 (July 17, 1962).