

Dual Representation Proper If No Present Conflict Exists

BY LAZAR EMANUEL

In Opinion 01-5, the Nassau County Bar Association Committee on Professional Ethics considered the following question: may a lawyer defend both a stockbroker and her employer in a single litigation in which, by their agreement, the employer will pay the lawyer's legal fees but the stockbroker will pay any settlement or judgment. The opinion answered the question, "Yes, at least for the moment, but..."

A customer of the firm sued both the employer and the stockbroker. Concluding that their interests were essentially the same, both asked the same lawyer to defend them.

Construing DR 5-105, the Committee advised the lawyer to investigate all the facts to determine whether the two defendants had differing interests at the outset of the representation, and, even if not, whether, measured through the eyes of a disinterested lawyer, their interests might diverge later in the litigation.

The Committee conceded that it's often difficult for a lawyer to determine whether dual clients have or may develop conflicting interests. The Committee advised the lawyer to inquire whether the interests were "conflicting, diverse or otherwise discordant" and whether he might be faced with the dilemma of asserting an argument for one client which would disadvantage the other.

DR 5-105(A) requires a lawyer to decline employment if his professional judgment in behalf of the client will be adversely affected or if the employment is likely to involve the lawyer in representing different interests. DR 5-105(B) imposes the responsibility to withdraw from employment if the same impediments arise after the employment begins.

However, under DR 5-105(C), a lawyer may represent multiple clients, even those with adverse interests if two conditions exist: 1) a disinterested lawyer would believe that the lawyer can competently represent the interests of each client; and 2) each client consents to the representation after full disclosure of the implications of the dual representation and the "advantages and risks involved."

Under the facts presented to the Committee, the intrinsic problem is the obligation by one party only to pay the legal fees. This might induce that party to push for an early settlement while the other party took a tougher stance.

For the moment, however, the lawyer may proceed because no conflict has developed. But the lawyer would be advised to disclose to both clients in writing the potential for conflict and the possibility the lawyer would be forced to withdraw from representing both if a conflict should develop.