

Nassau County Bar Issues Two New Ethics Opinions

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The Committee on Professional Ethics of the Nassau County Bar Association has issued two new ethics opinions, both dated March 26, 2002. Both present novel issues.

Opinion 2002-01.

Lawyers A and B practice independently in New York. In some cases, they represent clients on the opposite side of the same matter. A and B are also admitted in Florida. They want to form a law partnership in Florida, but continue to practice independently in New York. Under what circumstances may they independently represent adverse interests in New York?

The creation by A and B of the law partnership in Florida subjects all their transactions in New York and in Florida to review under the New York Code of Professional Responsibility. The scope of review would be substantially the same as if A and B were partners in a New York law firm or if either one of them represented both sides in an adversarial transaction in New York. If this were not the rule, non New York law firms with partners practicing in New York would be able to avoid "conflicts" by "having their New York partners engage in independent representations of clients that might conflict with their law firm's concurrent or prior representation not based in New York...."

Under DR 5-105(E), which requires New York law firms to maintain an ongoing "conflicts" list, A and B must include in this list not only the clients they serve independently in New York, but also all the clients they share in Florida. All clients on the list will be imputed both to the Florida firm and to A and B independently in New York in determining whether a conflict exists.

Whether a particular client may waive the conflict and consent to adversarial representation under DR 5-105 depends on the nature of the transaction. Some transactions are "non-consentable" by their very nature (e.g., some real estate transactions, adoption proceedings, etc.). Preliminarily, the attorney faced with a conflicts issue must ask whether "a disinterested lawyer would believe that the lawyer can competently represent the interests of each (client)." (DR 5-105(C)).

Professor Mary C. Daly suggests that the real question for the conflicted lawyer is: "If the client asked my counsel, would I advise him to consent to the conflict?" If the answer is no, the inquiry is ended and the lawyer may not ask the client for his consent.

A and B did not disclose the nature of their practices or of their clients. The Committee therefore could not advise whether their conflicts were "consentable." But the Committee advised the lawyers to proceed with caution.

...The lawyer must provide the client with full disclosure of the implications of the simultaneous representation and the advantages and risks involved. While there is no requirement that the disclosure and consent be in writing, documentation protects the interests of both the client and the lawyer. From the client's perspective, it provides an opportunity for review and study that an oral explanation simply does not.... From the lawyer 's perspective, the documentation offers proof of a good faith effort to comply with [DR 5-105] Subsection C. It may also force the lawyer to think more carefully about the conflict...Composing the full disclosure requires close attention. (quoting Professor Daly).

Opinion 2002-02

Attorney A is acting as co-counsel with independent Attorney B in representing a criminal defendant. A is convinced that B is not effective in his representation of the client and wants to communicate his reservations to the client. B objects, insisting that A has no right to interfere with the lawyer-client relationship between the defendant and B.

Nothing in the Code of Professional Responsibility prevents Lawyer A from discussing his doubts about B's effectiveness with the client. A lawyer's function is not only to act for his client, but to offer his opinion on matters of vital interest to the client.

A lawyer's opinion about the effectiveness of his co-counsel is a proper subject for discussion with the client. Indeed, the lawyer may be required to express his opinion if the other lawyer's ineffectiveness suggests the need for disciplinary action against him under the Code.

Attorney A must have a good faith basis for revealing his doubts and reservations to the client. "A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations....A lawyer should bring to bear upon this decision making process the fullness of his or her experience, as well as the lawyer's objective view point....The lawyer may emphasize the possibility of harsh consequences that might result from the assertion of legally permissible positions...." (EC 7-8).

"In the exercise of the lawyer 's professional judgment on those decisions which are for the lawyer 's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of the client...."(EC 7-9).