

ALASKA BAR ASSOCIATION  
ETHICS OPINION 89-1

Re: Ethical propriety of concurrent representation of potentially adverse clients

I. INTRODUCTION

The Committee has been asked whether one member of a law firm can represent plaintiffs in a class action suit while another member of the firm simultaneously defends an injured person in a personal injury suit brought by one of the class members. The class action suit involves present and former employees who claim their employer calculated overtime pay incorrectly. The personal injury suit results from an automobile accident. The inquiring firm states that it is not likely that information obtained in one suit would prejudice parties to the other action. The law firm asks three questions:

1. Who should be considered the law firm's client in the class action suit;
2. If all class members are clients, would the firm's concurrent representation of a defendant in an unrelated suit brought by a class member constitute a conflict of interest; and
3. If there is a conflict of interest, what would be the appropriate course of action? Will a Chinese Wall solve the conflict if a conflict exists?

The Committee concludes both attorneys owe their respective clients duties of vigorous representation, loyalty and confidentiality. The Committee concludes that the attorney representing the class can fulfill her duty of vigorous representation in this situation. Whether she can fulfill her duty of loyalty to each class member and her duty to keep class members' confidences secret are more difficult questions. The Committee concludes that the attorney's duty of loyalty to the class member can only be fulfilled if the class member consents in accordance with DR 5-105(C) or the court which certified the class authorizes continued representation in the absence of a waiver, and that procedures must be implemented to preserve client confidences.

Likewise, the Committee concludes that the attorney representing the defendant in the personal injury litigation can continue to represent the defendant only if the defendant consents in accordance with DR 5-105(C). If a conflict exists, a "Chinese Wall" cannot be used to avoid the conflict. The only options available to a firm which has a conflict are client waivers and withdrawal from representation. The Chinese Wall may help counsel to protect confidential information if the clients consent to continued representation, but it is not an alternative to consent.

Finally, the Committee has concluded that the conflict is not "obvious" - as that standard is set forth in Unified Sewerage Agency, Etc. V. Jelco, Inc., *infra* - and does not prohibit concurrent representation if the clients consent. If the conflict was obvious, the client's waiver would not be sufficient and the only recourse for the firm would be to withdraw from representation of one or possibly both clients.

## II. DISCUSSION

Although the firm requesting the opinion has framed the issue as whether each class member is its client, the Committee concludes that the questions raised cannot be answered by the simple expediency of labeling a class member "client" or "non-client." Several courts have said that all members of a class are individually clients of the class' attorney. See, e.g., Mandujano v. Basic Vegetable Products, 541 F. 2d 832 (9th Cir. 1976); Ficalora v. Lockheed California Co., 751 F. 2d 995 (9th Cir. 1985). Other courts and commentators have recognized the existence of a relationship and certain duties between the class attorney and the non-representative class members but have not necessarily characterized the relationship as one of attorney-client. For example, Newberg on Class Actions states:

Issues concerning the relationship between class counsel and class members, as well as the propriety of initiating communications generally with absent class members, have arisen frequently in several contexts. In reviewing proposed settlements in class actions for approval, the courts commonly refer to the special relationship between the plaintiff's counsel and the class members generally.

A second perspective views the relationship between the class attorney and absent class members as a constructive attorney-client relationship. Whether absent members are constructive clients for purposes of the rules of professional

ethics, or whether class counsel is simply charged with protecting their interests, may potentially be a significant distinction.

3 H. Newberg, Newberg on Class Actions, 198-199 (19\_\_).

Even those commentators who have concluded that the attorney-client relationship applies to all members of a class recognize that there are differences between the traditional attorney-client relationship and an attorney-client relationship with all of the class members. See Note, "Conflicts of Interest in the Legal Profession," 94 Harv. L. Rev. 1244, 1447-1457 (1981). Thus, the class attorney is not required to have the consent of all of his clients before accepting a settlement proposal, Laskey v. International Union UAW, 638 F. 2d 954 (6th Cir. 1981); Kincade v. General Tire and Rubber Co., 635 F. 2d 501 (5th Cir. 1981), nor can each class member individually dismiss counsel because of dissatisfaction with the representation being provided.

Although some courts and commentators label the relationship as an attorney-client relationship and other courts and commentators use terms such as "fiduciary relationship," there is in reality almost no difference in the elements each ascribe to the relationship. Thus, the class attorney has a duty to represent each class member vigorously, Alaska Bar Association Code of Professional Responsibility ("ABA Code") Canon 7, she has a duty to keep each class member's confidences secret, ABA Code Canon 4, and a duty of loyalty to all class members. ABA Code Canon 5. The Committee believes that the conflict presented by this inquiry can and should be analyzed in the context of these duties without deciding whether or not the non-representative class members are "clients."

#### A. The Duty of Loyalty

In cases where a law firm concurrently represents two clients with adverse interests, courts have held that the most appropriate inquiry is whether the firm can honor its duty of loyalty to both its clients, as required by Canon 5 of the ABA Code. Cinema 5, Ltd. v. Cinema, Inc., 528 F.2d 1384 (2d Cir. 1976); International Business Machines Corp. v. Levin, 579 F. 2d 271 (3d Cir. 1978); ABA Informal Opinion 1495 (1982). DR 5-105 provides:

(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 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 on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Thus, in order for a firm to avoid disqualification in concurrent representation cases, a two part test must be met:

1. It must be "obvious" that counsel can adequately represent the interests of both parties; and
2. Counsel must make full disclosure to both parties and obtain their consent to continue with their concurrent representations.

Courts deciding concurrent representation cases have reached a variety of conclusions on the issue of when adequate representation is "obvious". Some courts have implied that an attorney's good faith belief that he can render adequate representation is sufficient. International Business Machines Corp. v. Levin, *supra*, at p. 280. Other courts have required the attorney proposing concurrent representation to "... be prepared to show, that at the very least, there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation." In Unified Sewerage Agency, Etc. v. Jelco, Inc., 646 F.2d 1339, 1347-1348 (9th Cir. 1981), the Ninth Circuit Court of Appeals detailed factors it felt should be considered in determining whether it is "obvious" counsel can provide adequate representation:

In determining whether it is obvious that an attorney can represent adverse parties, the court should look at factors such as: the nature of litigation; the type of information to which the lawyer may have had access; whether the client is in a position to protect his interests or know whether he will still be vulnerable to disadvantage as a result of the multiple representation; the questions in dispute (e.g., statutory construction versus disputes over facts) and whether a government body is involved.

Id. at p. 1350 (Citations omitted).

Using these factors to analyze the potential for conflict in this present situation, the Committee finds that the instant suits are of dissimilar nature, but potentially share some issues of fact and law. One of the claims in the class action suit involves unpaid overtime wages. According to plaintiff's counsel in the personal injury case, past and future wage losses constitute a significant portion of the injured's claim against the defendant. The Committee is concerned that counsel from the same firm may be forced to take adverse positions. In an effort to minimize the plaintiff's damage claims in the personal injury case, defense counsel perhaps should question the class' likelihood of success. Defense counsel's inquiry may lead to questions concerning the merits of the class action. In such a situation, DR 5-105(B) would mandate disqualification. It is also possible, however, that the personal injury plaintiff's prospective damages are not a matter of substantial controversy if liability is proven. If this is the case, DR 5-105(C) would allow the parties to consent to continued concurrent representation.

Without more information regarding the likelihood of a contest over the class member/plaintiffs unpaid overtime wage claim in the personal injury case, the Committee cannot make a recommendation for or against disqualification. Defense counsel must assess this likelihood, and must decline representation if the potential for less than vigorous defense is apparent. Even if defense counsel feels the potential for controversy is slight, both defense counsel and class counsel must make full disclosure to their clients and obtain their respective consent for continued representation. Additionally, both counsel must make provisions to assure that the confidentialities of each client are preserved, as required by Canon 4.

#### B. The Duty of Confidentiality

It is not clear that there are any confidences particular to the class member since there has not been any communication between the class member and the attorney representing the class. If we assume, however, that confidential communications of the representative class member are also confidential with respect to each member of the class, then there is the potential for disclosure of client confidences. Canon 4 of the Code requires counsel to preserve the confidences of past and present clients. ABA Code EC 4-6. Traditionally, knowledge obtained by an attorney during the course of her representation is imputed to all other members of her firm.

Most courts require disqualification where proposed representation may be adverse to the interests of a former client and deals with issues that are substantially related to issues in the prior representation. T.C. Corporation v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268-269 (S.D.N.Y. 1953); Chugach Electric Assoc. v. U.S. District Court for the District of Alaska, 370 F. 2d 441, 443 (9th Cir. 1966); Aleut Corp. v. McGarvey, 573 P. 2d 473, 474-475 (Alaska 1978). "The majority rule is that the presumption of disclosure is not rebuttable when the interests of the previous client

are adverse to a client whom the attorney is now representing." Carlson v. Langdon, 751 P. 2d 344, 348 (Wyo. 1988).

Where there is no substantial relationship between issues raised in the representation of two clients, some courts have approved of the use of so-called "Chinese Wall" defenses, procedures by which each client's attorneys are screened off from those attorneys who represent the other client and from information gathered during that representation. These courts hold that the presence of these screening procedures will rebut the presumption of intra-firm disclosure. See Kadish v. Commodities Futures Trading Commission, 553 F. Supp. 660 (N.D. Ill. 1983); NFC, Inc. v. General Nutrition, Inc., 562 F. Supp. 332 (D. Mass. 1983); U.S. v. Titan Pacific Const. Corp., 637 F. Supp. 1556 (W.D. Wash. 1986p; See also, "The Chinese Wall Defense to Attorney Disqualification," 128 U. Pa. L. Rev. 650 (1981).

In a concurrent representation situation, procedures for preservation of client confidences are very important. Canon 4 of the ABA Code entitles each client to the assurance that information given to his attorney or gathered on his behalf will be preserved for his benefit. EC 4-1. DR 4-101(D) requires a lawyer to "exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client . . . ." In order to honor their duties to their

respective clients, both class counsel and defense counsel must employ procedures that will assure the confidentiality of their case work. At a minimum, the procedures should prohibit discussion of sensitive matters, limit the circulation of documents pertaining to the matters, limit the circulation of documents pertaining to the case, and restrict access to the case files. Kesselhaut v. U.S., 55 F.2d 791, 793 (Ct. Cl. 1977).

If the likelihood of adverse positions requires either attorney to disqualify himself or herself from representation of one client, remaining counsel must still take appropriate measures to avoid confidences gained in the discontinued representation from being divulged. In the event such information has already been divulged, or if it is unlikely preventative measures will prevent future disclosure, remaining counsel should also decline further representation and make arrangement for transfer of the case. International Business Machines Corp. v. Levin, *supra*, at p. 283; Westinghouse Corp. v. Gulf Oil Corp., 588 F. 2d 221, 228-229 (7th Cir. 1978).

### III. Conclusion

Both counsel have a duty of loyalty and a duty of confidentiality to their respective clients. Pursuant to DR 5-105(C), the attorney representing the class must make full disclosure of the potential for conflict to the affected class member.1/ If this class member objects to

continued representation, either the class attorney should disqualify herself, the attorney representing the defendant must disqualify himself, or either counsel may seek approval to continue representation in the absence of a waiver.

The attorney representing the personal injury defendant must examine his case, and the issues it raises, in order to determine whether he faces the possibility of being forced to a factual or legal stance adverse to the interests of the class.

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1/ Since, pursuant to Alaska Civil Rule 23(b), the court has the discretion to decide whether action as a class is appropriate, class counsel should also notify the court of the potential conflict and assure the court considers it appropriate for her to continue representing the class.

If the possibility of such an adverse position is "obvious", based on the factors listed in the Unified Sewerage case, defense counsel should decline further representation. If, after analyzing the possibility for adversity, defense counsel's continued representation will not adversely affect his ability to represent the defendant, he can continue representation of the defendant if the defendant consents after full disclosure.

If disqualification is not required, both class counsel and defense counsel must employ appropriate methods to avoid divulging the confidences of either client. These procedures should prohibit discussion of matters involved in the cases, and should limit circulation of case documents and access to the case files. If such measures will not be successful, or if client confidences have already been revealed, disqualification is appropriate.

Submitted by the Alaska Bar Association Ethics Committee on January 17, 1989.

Adopted by the Board of Governors on January 20, 1989.

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