

## **Ethics Opinion No. 76-3**

### **Propriety of an Attorney in the Public Practice of Law Continuing to Represent Two Defendants in a Criminal Appeal in Which there is a Substantial Potential Conflict of Interest Between the Two Defendants.**

The Committee has been asked whether or not an attorney in the public practice of law may continue to represent two defendants in a criminal appeal in which there is a substantial potential conflict of interest between the two defendants. From the facts presented to us, it is our understanding that a full and vigorous representation of the interests of one of the co-defendants would necessarily, at least inferentially, involve impugning the other co-defendants' testimony, and would further involve casting criminal responsibility from the codefendants jointly to one of the codefendants exclusively. We have also been asked to assume for purposes of the question that both of the co-defendants have had this potential conflict fully, fairly and candidly explained to them, by the attorney, and that after that explanation they desired to waive any conflict of interest and continue with the representation of a single attorney.

In this connection, we are referred to the case *United States v. Amredo-Sarmiento*, decided by the Second Circuit October 10, 1975. After reviewing the text of that opinion, we do not consider it on point. That opinion held that the Sixth Amendment right to assistance of counsel, when raised by a defendant in a criminal appeal, overbore the conflict of interest considerations involved in that case, and allowed the accused to make a selection of counsel of his choice despite that conflict. The question for our consideration, however, is whether or not the attorney so chosen should accept the proffered employment. As such, we deal with the obligations of the attorney not only to the accused, but also to the profession and the adversary system of justice.

In the Committee's opinion, the two defendants in the situation presented, may not continue to be represented by a single attorney.

This opinion is based in large part on EC 5-15, which provides in part:

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.

In the Committee's view, the facts presented indicate a very strong potential for differing interests between multiple clients, if not actually differing

interest at this time. It is therefore the Committee's opinion, as previously expressed, that the attorney may not continue to represent both defendants.

The waiver of this conflict by the co-defendants does not cure the conflict. EC 516 provides:

In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus, before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent.

It is our opinion that this is not an "instance in which a lawyer is justified in representing two or more clients," and therefore the clients' consent does not cure the taint created by the conflicting or potentially conflicting interests of the co-defendants. There is an initial threshold question which must be answered by the attorney representing multiple clients in litigation, which is whether or not, under the particular facts and circumstances of the case, he would be ethically permitted to continue the multiple representation. If that question is answered affirmatively, the attorney still has an obligation to explain the potential conflict to each of the multiple clients, and after such explanation, secure the clients consent to such continued multiple representation. In the case before the Committee the threshold question is answered negatively, and therefore the question of the clients consent never arises.

Approved by Board of Governors on June 1, 1976.

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