Utah Ethics Opinions

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42. USB EAOC Opinion No. 42

Utah State Bar

Ethics Advisory Opinion No. 42

Approved January 12, 1978

Summary: An attorney may not represent a plaintiff in a malpractice suit against a doctor and simultaneously represent that doctor in a Chapter XI suit. The dual representation creates so many conflicts that even if all parties consent after full disclosure suit representation may be improper.

Comments:*See* Utah Opinion 10.

Facts: You have inquired into the propriety of your continued representation of one or both of two clients under the following factual situation.

You were engaged by Mrs. A to handle a medical malpractice claim against Doctor N, and you filed suit against him. You subsequently engaged counsel with the permission of A.

Sometime later N sought to engage you to file a Chapter XI arrangement proceedings in the U.S. District Court. You discussed with him the fact that you were suing him, and he wrote a letter to you stating that he was and is aware of your representation of a client in the suit against him and others, but that he consents to have you act for him in the Chapter XI proceedings, believing that this is no conflict of interest on your part.

You indicate that you also discussed the situation with your client A, and she is aware of your representation of N and has assented to it. You do not indicate what you have disclosed to her.

You do not indicate the form this assent has taken. This may be important to you in the ethical implications involved. Similarly, the "full disclosure" exception puts a substantial burden on the attorney which cannot be viewed lightly. Canon 5, DR 5-101(A) provides that:

"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."

Opinion: Reference is made to Utah Opinion 19, wherein it was held that the attorney could not ethically represent one client against another client by whom he was then employed in other litigation between the same two parties. The burden of the opinion in that case was that it violated the spirit of Canon 5 and 9, in that independent judgment might be impaired on behalf of one or the other client, and the appearance of impropriety was present.

We see no amelioration of the effects of Canons 5 and 9 by reason of the fact that you have co-counsel in the malpractice suit, or in the fact that an insurance carrier is the party sought to be reached in that suit. While sophisticated persons may be expected to understand the workings of such matters, to the general public a bad image is projected. So long as you are attorney of record in the matter, you are counsel and are responsible for the case in each instance.

Other problems appear to exist. Should you be unsuccessful in the obtaining of a recovery in the suit, you may well have the problem of A claiming that you did not fully explain the matter to her, or the potential of a loss. Since you apparently have nothing in writing, this could be a problem.

Similarly, if a small verdict were to be obtained, she might claim collusion.

Consider your position in the event you obtain a substantial recovery. Will not the insurance carrier, the real party in interest be in a position to claim collusion and conflict of interest?

There is nothing to indicate that the insurance carrier has been made aware of the consent by the doctor, or has agreed to it. This raises the possibility that the insurance contract may be vitiated, or at least subject to the claim by the carrier that the action of N jeopardized the defense of the case.

Even if your independent judgment can be exercised in each instance on behalf of your respective clients, it is apparent that you can and likely will be subject to the charge that it has been compromised because of the appearance of impropriety. Suppose there is an excess verdict beyond the insurance policy limits. Has the doctor been advised that in suing him on behalf of A there is a very real possibility that he may be forced to respond in additional damages? Has A been informed that by reason of the Chapter XI bankruptcy her ability to recover an excess

judgment may be impaired or defeated?

Full disclosure to the parties would seem to require that each and all of these disclosures be made to the respective parties and that each specifically consent in light of these factual matters. Even if this were done, it appears from a recital of the possibilities that counsel places himself in a position where he cannot exercise independent judgment for either of the parties without compromising the rights of the other.

Finally, since the insurance company has not consented to the dual representation, it appears that the conflict of interest remains paramount. The fact that the dual representation is so fraught with the potential and actual conflicts, and your representation in the two matters is so susceptible of challenge to your exercise of independent judgment, that we think it would be improper for you to continue the dual representation, and you must cease to represent one or the other of the clients.

Rule Cited:

Canon 5