

Ethics Opinion

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FACTS: Attorney represents landowner in a lease/sublease dispute against a federal governmental agency. Attorney also represents Smith, an employee of the agency in an employment grievance against the agency. Smith represented the agency in negotiations on the lease/sublease arrangement which is the subject matter of Attorney's representation of landowner against the agency. Smith likely will be a material witness on behalf of the agency in the lease/sublease dispute, and Smith has access to or controls the records in the dispute. Smith's responsibilities, including the negotiations of the lease/sublease transaction, are the subject matter of her employment grievance against the agency. No litigation in either matter is pending.

QUESTION PRESENTED: May the attorney properly represent both the employee and the lessor under Rule 1.7?

SHORT ANSWER: No.

DISCUSSION: Rule 1.7, Conflict of Interest: General Rule, applies to the question presented here. The Rule states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- 1. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and*
- 2. each client consents after consultation.*

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests, unless:

- 1. the lawyer reasonably believes the representation will not be adversely affected; and*
- 2. the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.*

Loyalty is an essential element in the lawyer's relationship to a client. The facts presented here imply that the attorney's loyalty may confront conflict as both clients are suing the same defendant, the federal agency. Despite the fact that the actions are separate, they address the same topic, i.e., the lease-sublease negotiation. The critical questions are the likelihood that a conflict will develop and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. See *Kentucky Bar Ass'n v. Roberts*, 579 SW 2d 107 (KY 1977) (improper, without informed consent, to defend client in one suit and advance

claims against same client on behalf of another in separate suit involving common facts but different issues).

Conflict is certain if the lawyer's representation of the parties is limited by the lawyer's duties to each client's position. The lawyer is bound to exercise independent professional judgment for each client. Rule 1.7 specifically provides that the lawyer must "reasonably believe that the representation will not adversely affect the relationship with the other client". The rule's comment elaborates that such a belief is not reasonable "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances". If that is the case the comment directs, "the lawyer cannot properly ask for such an agreement or provide representation on the basis of the client's consent".

Hence, despite the fact that the rule allows a client to waive the conflict following full disclosure of the implications of the common representation, the issue here is whether disinterested lawyers would conclude that the client should agree to the representation. Given the facts here, the potential for conflict is too great for us to reach that conclusion.

The employee Smith is a material witness for the federal agency in the lessor's suit and at a minimum faces hard questions in that suit by his (Smith's) own attorney. It seems difficult to believe that the attorney could perform effectively with Smith in the lessor's suit while still protecting Smith's interests in the employment grievance, especially when Smith's responsibilities are the subject matter of the employment grievance against the federal agency. At the very least the attorney's course of action would be limited. Accordingly, while the potential for conflict does not preclude representation, given these facts it appears that there is a substantial likelihood that conflict will arise and that the conflict will materially interfere with the lawyer's independent judgment.

CONCLUSION: Under the facts supplied it appears that even if each client waived the conflict of interest such a waiver would be unreasonable under the "disinterested lawyer" standard. Therefore representation of both the employee and the lessor appears to be improper.

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