

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-355
Issued: March 1993

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rule 1.7 and the Comments; both the conflicts and consent provisions were amended. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: Lawyer L1 represents client A in the defense of a civil matter brought by B. Lawyer is then retained by the insurer of B's (the plaintiff's) lawyer L2 to represent L2 in the defense of an unrelated legal malpractice claim. Assume in the alternative that instead of being retained by a malpractice insurer, L1's firm is hired by L2's firm to do legal work in a specialized, non-litigation matter for L2's firm or for a client of L2. Is there a conflict of interest in either of these scenarios? If there is a conflict, can the client or clients consent to the representation?

Answer: There may be a conflict under Rule 1.7(b). Consent after consultation may be sufficient to alleviate the problem, depending on the facts and circumstances.

References: Rule 1.7(b); Maryland Op. 82-4 (1981); KBA Informal Op. IO-146 (1984); Illinois Op. 822 (1983); New York State Op. 579 (1987).

OPINION

The "malpractice defense" variation of this question was presented to the Committee in 1984. At that time it was virtually a matter of first impression. The Committee voted to approve an opinion based on the minority or dissenting opinion in the only published opinion available at that time - Maryland Op. 82-4 (1981). In the Maryland Opinion, the majority view was that there was a conflict, but that the conflict could be cured if the clients of both lawyers consented to the representation after full disclosure. The minority opinion was that consent did not have to be sought if the lawyer could reasonably conclude that there was no threat to his or her independent professional judgment. Our Committee opted for this minority view, but submitted the matter to the Board for a decision on a Formal Opinion. The Board was unable to approve of the opinion as a Formal Opinion, but allowed the Committee opinion to issue as an Informal Opinion of the Committee. See SCR 3.530(2). The same questions has now arisen again. A new requestor relies upon Informal Opinion IO-146, and argues that a lawyer should not have to obtain the consent of the client in such cases.

Since the time that IO-146 was given, other bar committees have addressed this issue. In addition to Maryland Op. 82-4 (1981), Illinois Op. 822, and New York State Op. 579 (1987) also

take the view that in the malpractice or litigation type scenario (in which L1 is representing L2 in a litigated matter) the clients of the lawyers involved (that is, clients represented by one or the other of the lawyers, who are also on opposite sides of the v. from the other lawyer) ought to be made aware of the situation and be given the opportunity to consent to continued representation, or withhold that consent. In addition to these three opinions, we note that one additional opinion goes so far as to prohibit the representation in spite of any consent. Michigan Op. CI-649 (1981).

Under the new Rules of Professional Conduct, this is not a direct conflict between clients within the meaning of the Rule 1.7(a). On the other hand, it is clear that the scenarios set forth are within the terms of Rule 1.7(b).

In both litigation and non-litigation settings the question is whether the representation of any of the lawyer's clients may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests. This determination must initially be made by the lawyer involved. The identification and resolution of conflicts is primarily the responsibility of the lawyer undertaking the representation. Comment (14) to Rule 1.7. It is conceivable that a lawyer might reasonably come to the conclusion that the representation of the client or clients will not be materially limited, particularly if the representation occurs in a non-litigation setting. Cf. Comment (10). If some concern is presented by the facts and circumstances of the case, then consent may cure the conflict; but only if the lawyer reasonably believes that the representation will not be adversely affected and if the client consents after consultation. Rule 1.7(b)(1) and (2).

We direct the lawyer to Comment (4), which points out that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, then the lawyer cannot properly ask for such agreement or provide representation on the basis of the client's consent." With that caveat it is probably fair to say that a lawyer must be given some room for judgment in these matters, since they are fact-sensitive. Nevertheless, a majority of the Committee members believe that the ethics opinions, and prudence, strongly suggest that the client or clients that might be so affected should ordinarily be consulted, at least in cases involving litigation.

In effect, the requestor argues for a no duty rule that would eliminate any need for consent and disclosure in any case. We cannot find any warrant for such a no duty rule. We cannot say that consultation and consent may be dispensed with in all cases, or dismissed as a burdensome formality.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.