
E-80-17 Conflict of interest in co-defendant situations

Question

May an attorney who is presently serving as counsel for the convicted defendant (D#1) in a federal habeas corpus application in the United States Court, also file an amicus curiae brief on behalf of his client's co-defendant (D#2) if such co-defendants (D#1 and D#2) presented inconsistent defenses at the trial, but the alleged grounds for a writ of habeas corpus in the federal court are not inconsistent?

Opinion

Attention is directed to SCR 20.23 and SCR 20.28. SCR 20.23(3) considers the interest of multiple clients, subparagraph (a) of which states:

Maintaining the independence of professional judgment required of a lawyer precludes his or her acceptance or continuation of employment that will adversely affect his or her judgment on behalf of or dilute his or her loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.

Subparagraph (c) of SCR 20.23(3) requires that whenever a lawyer is justified in representing two or more clients, it is essential that each client be given the opportunity to evaluate his or her need for representation free of any potential conflict and to obtain other counsel if he or she so desires, and (c) states in part:

“Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case,” etc.

SCR 20.28(3) points out that in situations covered by subs. (1) and (2) of that rule, a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

In your request, you inform us that notwithstanding that D#2 is represented by counsel other than yourself you have been asked to file a brief on his behalf and that neither defendant has voiced any objection to your so doing. However, it does not appear that affirmative consent has been obtained from each of the defendants after explaining to each of them the possible effect of your filing the brief on behalf of D#2.

A somewhat similar situation was presented in E-75-18 with respect to conflict of interest in cases of representation of indigent co-defendants by the Legal Aid Society. The ethical guidelines to be followed in such cases were discussed at length, after which the committee came to the conclusion that the attorneys were not forbidden to accept nor automatically required to withdraw from representation of indigent co-defendants in criminal actions.

The committee would reaffirm the position that you are not automatically forbidden to comply with the request of D#2, provided that:

- (1) The matter, and its effect, has been explained fully to your client (D#1) and to D#2 and that consent has been obtained from both parties after such full disclosure; and
- (2) It is obvious that you can adequately represent the interest of each without in any way whatsoever adversely affecting your duty to the other.

Your position is not exactly the same as that presented in E-75-18, because in this instance D#1 is represented by you, and D#2 is represented by other counsel. Therefore, D#2 has adequate independent representation but D#1's only representation is yourself. Consequently, if D#1 would be in any way adversely affected by your participation on behalf of D#2, you must decline to do so.