

Ethics Opinion No. 78-3

Is there a Conflict of Interest if a Law Firm Represents a Defendant in an Action Filed on Behalf of a Plaintiff by an Attorney Who, Before Trial, Joined the Defendant's Law Firm?

The Committee has been asked the following question:

Is there a conflict of interest if a law firm represents a defendant in an action filed on behalf of a plaintiff by an attorney that, before trial, joined the defendant's law firm?

It is our understanding that the facts are these:

Attorney A, an employee of Alaska Legal Services Corporation in a certain rural community, was retained by the plaintiff in an action for divorce, which also contained an issue of child custody. Attorney A consulted with the plaintiff, prepared the necessary documents, and initiated the action for divorce, and proceedings to secure custody of the children for the plaintiff. Prior to trial, Attorney A terminates his employment with Alaska Legal Services Corporation, and becomes an employee of the partnership of Y & Z, attorneys. The defendant had previously retained the firm of Y & Z as counsel. The partnership of Y & Z maintains an office in that same community, but it is our understanding that Y & Z are themselves only present part of the time. Attorney A is the only attorney employee in the partnership in the subject community. We have been asked to assume that Attorney A does not disclose or otherwise take advantage of any confidential communication to which he may be privy as a result of his previous representation of the plaintiff. In this factual situation, is the firm of Y & Z required to withdraw from the representation of the defendant?

The Code of Professional Responsibility properly counsels that the ". . . decision by a lawyer to withdraw should be made only on the basis of compelling circumstances. . .". EC 2-32. However, an attorney is required to withdraw from employment, after proper compliance with the rules of the court, when "he knows or it is obvious that his continued employment will result in violation of a disciplinary rule." DR 2-110 (B)(2). If a lawyer is required to withdraw from employment, he is required to take all reasonable steps to avoid foreseeable prejudice to the rights of his client. DR 2-40 (a)(2).

The primary ethical consideration which presents itself in this matter is whether the employment of Attorney A by Y & Z creates an appearance of impropriety in the subject child custody case.

It is clear that Attorney A could not personally undertake the representation of the defendant, for such representation would present a specific breach of his duty to preserve the confidences and secrets of plaintiff under Canons 4 and 9 as set out in our Opinion 75-2, (App. by Bd. of Gov. October, 17, 1975). In that prior opinion we quoted from ABA Opinion 165, August 23, 1936, which interpreted former Canon 6 as preventing acceptance of professional employment against a former client:

. . . which will or even *may* require him to use confidential information obtained by the attorney in the course of [such former employment]. (emphasis in the original)

The question of whether or not the firm of attorneys, Y & Z, by whom Attorney A is now employed is disqualified, was, no doubt, posed because of the hardship to defendant, particularly as Y & Z is the only law firm in the community so that he or she must now retain counsel from the next nearest city which may be hundreds of miles distant. The question also raises implications regarding the mobility of attorneys in Alaska, particularly in communities in rural Alaska, where the prospect of such possible conflicts is high.

Notwithstanding these legitimate and somewhat unique concerns, the Committee is impelled to determine that the firm of Y & Z must withdraw from the subject litigation.

The continued representation of defendant by the firm Y & Z would create an irresistible appearance of disclosure by Attorney A of the confidences and secrets of plaintiff as prohibited by a combination of Canons 4 and 9. It is well settled that an

attorney may not accept litigation against a past client if such requires that the attorney contest the same issue for which he previously was an advocate in the prior litigation. Nor may a partner of such attorney accept such litigation even though he was not a partner at the time of the prior litigation.

ABA Formal Opinion 33.

A similar result was reached in ABA Informal Decision C-493 (November 22, 1961) in which the Committee stated:

[The former] Canon 6 also is designed to make it unethical to divulge confidences in situations where there may be conflict of interests between clients. This has been interpreted to prevent a lawyer from representing a client when there has been prior disclosure of confidences to himself or another member of his firm by a person who has an adverse interest to the proposed client in the litigation which the client proposes to undertake.

* * *

It is also true that it is not what the lawyer may have learned in the previous lawyer-client relationship but what others, the bar and the public, may have thought was learned that prevents assuming a new lawyer-client relationship with a former opponent.

The Alaska Supreme Court in *Aleut Corp. v. McGarvey*, 573 P.2d 473 (Alaska 1978), has confirmed this position, holding

We believe that an attorney may not represent a third party against a former client where there exists a substantial possibility that knowledge gained by him in the earlier professional relationship can be used against the former client, or where the subject matter of his present undertaking has a substantial relationship to that of his prior representation.

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It is well established that where one member of a firm is disqualified from representing a client all are.

Charles P. Flynn, Chairman, Ethics Committee

Adopted by the Board of Governors on December 2, 1978.