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CONFLICTS OF INTEREST AND SOLICITATION OF BUSINESS

LEGAL ETHICS INQUIRY 77-2

Your letter requesting opinions with respect to two matters therein set out have been referred to this Committee by Mr. Stern, the Executive Director of The West Virginia State Bar.

The first question you asked relates to a possible conflict of interest. You state that you formerly represented a wife who sought a divorce. After the action had been commenced by the filing of the complaint, the wife advised you that there had been a reconciliation between her and her husband and she requested that you dismiss the action. You have now been asked by the husband to represent him and to bring an action for a divorce against the wife, your former client. You state that you believe the reconciliation of the parties "starts the game over" and you can "switch sides."

Canon 6 of the old Canons of Ethics reads in part as follows:

It is unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the sub-

sequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

The new Code of Professional Responsibility DR 5-105(A), (B) and (C) reads as follows:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he 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 his independent professional judgment on behalf of each.

Drinker, in Legal Ethics, p. 112, states the general proposition that an attorney may sue a former client, if his representation is ended and the matter does not involve confidential communications:

The test of inconsistency is not whether the attorney has ever appeared before the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any

manner in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection. Drinker, p. 105, quoting from In Re Boone, 83 F. 944, 952-53 (1897).

It is only where there is no conflict of interest that old Canon 6 does not apply, as where the two matters are wholly unrelated.

Disclosure of confidential communications is not the sole test in considering the propriety of acceptance of litigation against a former client. Despite the fact that the other or former client acquiesced, and there were apparently no confidences, the possibility that other matters might develop has been held to be sufficient to require the attorney to decline the employment. Drinker, Legal Ethics, p. 109, citing opinions of the New York county and city bars, and particularly New York city bar opinion B-136:

The rendition of professional services by an attorney to one party to a litigation, which thus establishes necessarily a relation of trust and confidence, precludes the acceptance of employment by such attorney in any subsequent phase of the same litigation from the adverse party. A client is encouraged to make full disclosure of all facts to his attorney, and he should be justified in feeling that his attorney will never be found helping the other side of the litigation. The matter is not to be determined by such facts as that the original services were rendered on the employment of another attorney, or that the services may have had no particular bearing upon the phases of the litigation contemplated to be conducted on behalf of the new employer, or that it is probable that no information was acquired in the

first employment that might prove useful in the subsequent employment. Irrespective of any actual detriment, the first client might naturally feel that he had in some way been wronged when confronted by a final decree obtained by a lawyer employed in his behalf in an earlier part of the same litigation. To maintain public confidence in the bar, it is necessary not only to avoid actual wrongdoing, but an appearance of wrongdoing. Drinker, Legal Ethics, p. 115.

The import of the foregoing authorities is that a lawyer should not accept litigation against a former client under any circumstances if such would result in a conflict of interest or disclosure of confidences of the former client. In such a situation a court is justified in enjoining a lawyer from proceeding with the litigation against the former client. ABA Inf. Op. 885, 11-2-65. Moreover, the lawyer should avoid representation of a party in a suit against a former client where there may be the appearance of a conflict of interest or a possible violation of confidence, even though this may not be true in fact.

To answer your question, the Committee is of the opinion that it would be highly improper for you to "switch sides" and now represent the husband against the wife, your former client.

Your second question concerns the solicitation of legal business. You state that you represent the estate of a sailor who was killed in a collision between a United States Navy launch in which he was a passenger and another vessel. The administratrix of the sailor's estate wishes you to make claims against the United States Navy and the owners of the other vessel. Before doing so, you wish to communicate with the families of the other

sailors who were killed to ascertain the names of their lawyers so you may cooperate with them in any action to be taken. You further state that some of the families are certain to have no lawyers and you would like to take their cases if they so desire. You wish to know whether you could be accused of soliciting business.

The Code of Professional Responsibility provides:

A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding the employment of a lawyer.

DR 2-103(C) states:

A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner. . . .

In an opinion dated May 10, 1934, the Committee on Professional Ethics of the American Bar Association (ABA Op. 111) said:

So long as the profession adheres to Canon 27 as a declaration of its views as to proper professional conduct within the field of methods properly available to lawyers in their efforts to secure professional employment, no solicitation by the lawyer, except such as is warranted by personal relations, is proper.

However, we see no valid ground to condemn the lawyer involved for accepting as clients such persons in a similar situation to that of his client, who may, without his active intervention, be persuaded by his client to employ him.

At p. 251 of Legal Ethics, Henry S. Drinker states:

Difficult questions arise as to the propriety of notifying persons having interests similar to those of a client of a controversy in which they should be represented and whose participation in the litigation may be of benefit to the lawyer's client, not only in dividing the expense, but also in guarding against an inconsistent or inefficient presentation of the client's contention. In such cases, while it would seem clearly proper for the lawyer to see to it that these similar interests are properly represented, they should be approached by the client and not by the lawyer, and be made to understand that they may be represented by a lawyer of their own choosing. He may not advise them in order to get their business.

A lawyer should not request others to recommend him as a lawyer. DR 2-103(C).

From the foregoing we conclude it would be improper for you to canvass the families of the other sailors who were killed. Your clients may determine whether they have counsel and the identity of that counsel. However, it would be improper for you through your clients to suggest your own employment. If the families of any of the sailors seek you out, you may accept the employment.