

LEGAL ETHICS INQUIRY 78-20

(November 29, 1978)

The Committee on Legal Ethics has directed me to advise you that it declines to consider the conflict of interest question posed in your recent letters to this office, since they relate to litigation pending before the Circuit Court of County. Further, any matters regarding the disqualification of attorneys in pending litigation should be brought before the court in which the case is pending.

Glyn Dial Ellis

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November 15th, 1978

Robert D. Aitcheson, Esquire
West Virginia State Bar
Room E-404,
State Capitol
Charleston, West Virginia
25305

W. VA.
STATE BAR

NOV 27 REC'D

In re: Advisory Opinion
Expert Witness

Dear Mr. Aitcheson,

It was October 24th, 1977 when I wrote Mr. J. D. Trout, adjuster for General Adjustment Bureau, Inc. and forwarded him a letter of my expert witness Roby Stacy.

This letter stated: "I, Roby Stacy, am a partner of Browning & Stacy Building Contractors who are the Contractors that are making the repairs to the building occupied by Milne Pontiac on the ground floor and apartments on the second floor.

"I have been on the job from the start of making necessary repairs to the building and it is my opinion that those damages are covered by the extended coverage in your insurance policy."

A copy of this letter to Mr. Trout and this letter from Mr. Stacy are enclosed herewith.

After suit was entered I attempted to take the deposition of Mr. Stacy on Friday, March 31st, 1978 but he did not attend due to personal business.

Enclosed are the letter to Mr. Norman Fenstermaker dated February 17th, 1978, the Subpoena Duces tecum issued to Mr. Stacy, and the Notice of Taking Deposition by Stipulation on March 31st, 1978 all in photo.

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It was on August 17th, 1978 that I tried again to get the deposition of Mr. Stacy along with other witnesses. Copies in photo of the Subpoena Duces Tecum and Notice of Depositions are enclosed herewith.

This hearing was continued in the taking of the deposition of Mr. Stacy at that time until both sides could look into the law of the factual situation presented.

AUTHORITIES IN POINT

WEST VIRGINIA CODE OF PROFESSIONAL ETHICS

"6. It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"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."

Omitted as dealing with undivided fidelity and confidences and subsequent employments affecting confidences reposed.

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CASES AND MATERIALS ON THE
LEGAL PROFESSION
ELLIOTT E. CHEATHAM
SECOND EDITION: UCB
1955

Page 158 et sequentia: "Appearance For and Against The Same
Person in Different Cases"

"New York County Lawyers' Committee, Question 279.
Question: In the opinion of the Committee, is it ethical for an
attorney to accept employment in a negligence case under the
following circumstances?

B is his client. A, a friend of B's, while riding in B's car,
is injured as a result of a collision between B's car and a
taxicab. The injuries have been investigated by the two insur-
ance companies that insured B's car and the taxicab, respec-
tively. An offer was made to A, which offer she refused as
unacceptable to her. A comes to me with the case. While I
represent B in other matters of a commercial nature, can I
accept this case for A?

Answer: In the opinion of the Committee the lawyer should not
accept the employment from A while he remains the legal adviser
of B, though in other matters. A conflict of interests arising
in the litigations may prevent the lawyer from doing his full
duty to either client.

American Bar Association Canon 6.

"Canon 6 of the Canons of Professional Ethics, adopted by the
American Bar Association on September 30, 1937 and by the Penn-
sylvania Bar Association on January 7, 1938, provides in part
that '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 to another

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"client requires him to oppose." The full disclosure required by this Canon contemplates that the possibly adverse effect of the conflict be fully explained by the attorney to the client to be be affected and by him thoroughly understood...."

CODE OF PROFESSIONAL RESPONSIBILITY
AMERICAN BAR ASSOCIATION
MARTINDALE-HUBBELL, INC.
COPYRIGHT 1969
Page 22; Jedwabny v. Philadelphia,
390 Pa. 231, 235, 135 A 2d 252, 254(1957)
cert. denied 355 U. S. 966, 78 S. Ct. 557(1958).

ARGUMENT

According to Mr. McCue it was on the morning of the taking of the deposition of Mr. Stacy on August 17th, 1978 that the possible conflict of interest came to his attention. His employment by Mr. Browning and Mr. Stacy was prior to this time and certainly no explanation of any possible conflict of interest could have been explained to the two men since Mr. McCue phoned them long distance that morning and asked if such employment were **acceptable** under the existing circumstances.

Mr. Stacy is not just a witness, Mr. Stacy is an expert witness who has been involved in the case since the original damages were done and who repaired the damages after removing the debris which in this case is relevant to the peril involved.

Mr. Stacy is a man of many years in the industry of building who is highly respected in Logan County who took the job of replacing serious damages to my building at the instant the damages were done. Who could replace him?

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ARGUMENT CONTINUED

If Mr. McCue disposes of the case with a motion for summary judgment they have no problem with cross-examination or credibility to which he refers in his letter of November 13th, 1978 but nothing is said on the contrary side.

This is a problem novel to extant literature on ethics and to have referred it to a judge would only have allowed him to point out it was an ethics problem.

If I had allowed the matter to pass to a later time then I would have met the argument of laches.

At page two of his letter of November 13th, 1978 Mr. McCue speaks of the problem of a named peril. This problem is the very foundation of my case and the one witness who can fully meet the description of the kind of peril involved based on actual knowledge and long training is Mr. Stacy, my expert witness. Mr. McCue's firm had this opinion in writing from Mr. Stacy long before Mr. Stacy came to them seeking their representation.

The slightest impediment should not be placed in front of a disinterested witness. No witness with an interest in the suit should be asked to exercise impartial judgment.

Any lawyer with trial experience must say that the purpose of cross-examination is testing. By its very nature cross-examination is testing and in the hands of competent counsel it is at best difficult.

Mr. McCue stands ready to test the credibility of his client Mr. Stacy.

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ARGUMENT CONCLUDED

When Mr. Stacy sits down to testify in my case in order to justify his actions of describing the peril involved sitting opposite Mr. Stacy will be the lawyer who represents him in a suit involving thousands of dollars belonging to Mr. Stacy and Mr. Browning.

QUERY

Query: Is a conflict of interest present under the facts of this case involving an expert witness where the attorney does not actually represent the expert witness?

Respectfully submitted,

Glyn Dial Ellis
Glyn Dial Ellis

Mailed Confidential to all Parties
Mr. Robert D. Aitcheson, Esquire :: Certified No. 40418, Return Rec.
Mr. David C. McCue, Esquire :: Certified No. 40343, Return Rec.
Photos enclosed as stated.

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