

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1978-2

We have been asked to provide an opinion on professional ethics for a member of the Delaware Bar on a question concerning representation against-a former client in a matter arising out of the same transaction for which he represented the former client.

The lawyer who has requested this opinion formerly represented a local corporation. The lawyer was employed by the corporation for nine years. During that period of time he was the single corporate attorney. His representation was of a general corporate nature and involved drafting contracts, corporate documents, and advising management on all matters of legal significance. Three years ago the lawyer left the corporation for the private practice of law, and he terminated his representation of the former corporate client.

During the period of time he was employed by and represented the corporation he drafted a contract for the corporation with one of its contractors. Although he took no part in the contract negotiations, the lawyer drafted the words and terms of the contract after discussing these matters with the management of the corporation. In addition, he recommended that management sign the contract.

Since leaving the corporation over three years ago, the lawyer has been retained for general legal work by the same contractor who was party to the contract the lawyer drafted for his former corporate clients. The contractor has sought the lawyer's advice and representation concerning renegotiation of the existing contract between the contractor and the lawyer's former corporate client. The lawyer has recommended renegotiation for the purpose of securing more favorable terms. This is the same contract which was drafted by the lawyer and recommended to management during the course of his representation of the former client.

Confidential information was gained by the lawyer during the course of his representation of the former corporate client. He is uncertain whether any information gained in

connection with the contract transaction between the former corporate client and his present contractor client was confidential or secret in nature.

The lawyer has asked how far he ethically can proceed in representing his client against a former client in a contract negotiation matter arising out of a contract which he drafted and recommended for his former client.

OPINION

Under the circumstances of this case, it would be unethical for the lawyer to represent the client in seeking to renegotiate a more favorable contract against his former client.

DISCUSSION

The controlling authority for this inquiry is found in Canon 4 of the Delaware Lawyers Code of Professional Responsibility and the underlying Ethical Considerations and Disciplinary Rules of this canon. To an equal extent Canon 9 requiring a lawyer to avoid even the appearance of professional impropriety and Canon 5 requiring a lawyer to exercise independent professional judgment on behalf of a client, are implicated.

Canon 4 directs that a lawyer should preserve the confidences and secrets of a client. Disciplinary Rule 4-101(B) mandates that a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.

Delaware Lawyers Code of Professional Responsibility, DR4-101(B)(1-2). Ethical Consideration 4-6 makes clear that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment" Delaware Lawyers Code of Professional Responsibility, EC 4-6. And, Ethical Consideration 4-5 directs that,

* * *

"Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure."

Delaware Lawyers Code of Professional Responsibility EC 4-5. (Emphasis Added).

Finally, Disciplinary Rule 5-105(A) directs that:

"(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"

Delaware Lawyers Code of Professional Responsibility DR 5-105(A).

The precepts bring into focus some of the problems created by a lawyer who undertakes representation of a client against a former client in a matter related to his representation of the former client. Several opinions have addressed the propriety of a lawyer who has represented one party in a transaction, subsequently representing the other in an adversary posture against his former client. In ruling such representation improper, the opinions uniformly have noted the potential for disclosure of confidences of the former client and resulting conflict of interests.

For example, in A.B.A. Formal Opinion 165 (August 1936) the Committee on Professional Ethics relying upon former A.B.A. Canons 6 and 37 stated:

"[A]n attorney must not accept professional employment against a client or former client which will or even may require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of his employment."

A.B.A. Formal Opinion 165 (August, 1936).

This opinion was made the subject of a footnote to EC 4-5 of the American Bar Association Code of Professional Responsibility and was incorporated by reference into the Delaware Lawyer's Code of Professional Responsibility as an approved interpretive guideline. See Order of the Supreme of the State of Delaware, May 1, 1971; Del. Supr. Court R. 61. To like effect is the opinion of the Massachusetts Bar Association that a lawyer should not represent a present

client in an adversary matter against a former client if his representation of the present client in such matter may involve the use of confidences or secrets of the former client or even may appear to do so. Massachusetts Bar Association Opinion 75-7, (March 13, 1975).

In the case under consideration, the lawyer gained confidential information from his former corporate client during the nine year period of time he was an employee of the corporation providing general legal representation. Moreover, during the course of that former corporate representation, the lawyer drafted and recommended to management the terms of the very contract he now, on behalf of his new client, seeks to renegotiate. There is no doubt that the lawyer by seeking to renegotiate more favorable terms for his current client is acting in an adversarial posture with respect to his former client. Nor is there any doubt that the lawyer represented his former client in a transaction related to the same transaction he represents his current client. Under the circumstances the lawyer is clearly prohibited from disclosing any confidences or secrets of his former client to his current client or from using any such confidences and secrets to the disadvantage of his former client. Thus, to the extent the lawyer will be required, or even may be required, to divulge or use such information during the course of his current representation against his former client, he should decline such representation.

The lawyer, however, has noted that there is a question whether the information gained by him during the representation of his former client in this transaction was of a confidential or secret nature. A careful review of the authorities and the particular circumstances of this case, nevertheless, lead us to conclude that representation against his former client in a transaction related to his former representation is sufficient ground to cause him to decline such employment. Tainting such representation is the thread of a common transaction giving rise to a conflict of interests. Reflective of the concern to avoid conflict of interests is Canon 5 directing a lawyer to exercise independent professional judgment on behalf of his client and DR 5-105(A) directing a lawyer to decline employment where he cannot.

In Cord v. Smith, 338 F.2d 516 (9th Cir. 1964) the court recognized and followed the rule that an attorney who has represented one party in a transaction may not thereafter

represent the other party in an action against his former client arising out of or closely related to the transaction. In that case, Smith sued Cord for breach of contract. The attorney for Smith in the suit had previously represented Cord in negotiating the terms of the contract. To the attorney's contention that his disqualification was not required because there had been no confidential communications involved and because the rule against representing conflicting interests applies only where confidential communications are involved, the Court said:

"[The rule] does not depend for its operation upon a subsidiary decision as to whether the attorney would or might be using or misusing confidential information from his former client." Cord v. Smith, 338 F.2d at 524.

In short, the mere fact that the attorney represents his current client against a former client in matters related to the same transaction in which he represented his former client, requires disqualification. The conflict of interests, real or potential, inherent in such representation give rise to at least the appearance of impropriety.

The A.B.A. Committee on Ethics and Professional Responsibility in Informal Opinion 885 (November 2, 1965) reached a similar conclusion:

"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 sufficient to require the attorney to decline the employment." Id.

The reason for the rule is summarized in Drinker, Legal Ethics in which he quotes from a New York County Bar Opinion:

"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 lawyer, 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, at 115.

The opinion concludes by summarizing the rule that a lawyer should not accept litigation against a former client, under any circumstances if such would result in conflict of interests or disclosure of confidences of the former client. 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 possible violation of a confidence, even though this may not be true in fact. A.B.A. Informal Opinion - 885 (November 2, 1965). This latter qualification, of course, is embodied in Canon 9 of the Delaware Lawyer's Code of Professional Responsibility requiring a lawyer to avoid even the appearance of impropriety.

Although, in Cord v. Smith, supra, and A.B.A. Informal Opinion 885, supra, the rule enunciated forbid representation against a former client in matters of litigation, we do not believe the rule should be understood to preclude such employment only in matters of litigation. Clearly the logic and assumptions in which the rule is grounded make it equally applicable to lawyers acting in an adversarial posture of the kind contemplated by the lawyer in the present case. Lending support to this latter conclusion is Opinion 548, Association of the Bar of the City of New York County Lawyer's Association, Committee of Professional Ethics (May 15, 1940) holding that a former assistant corporation counsel who represented the city in negotiating a contract may not represent the other side in further negotiations, even if he does not know confidential information not known to the other side. See also Informal Opinion 1971-7 Los

Angeles County Bar Association (June 23, 1971) (advising that an attorney who has confidential information from a client or former client may not represent an interest adverse to the client or former client without his consent); Wise, Legal Ethics, pp. 138-142 (1966).

The Committee notes that the requirements of both DR-4-101(B) (1-2) prohibiting disclosure or adverse use of the confidences and secrets of a client and DR 5-105(A) - requiring a lawyer to decline proffered employment where the exercise of his independent professional judgment may be affected, generally can be waived with full disclosure and consent. Since, however, the attorney currently representing the lawyer's former client initially raised the issue of the propriety of the lawyer's adversary representation in a matter in which he had previous contact, consent is not likely to be forthcoming.

We believe the preceding authorities accurately interpret the principles of Canons 4, 5 and 9 of the Delaware Lawyer's Code of Professional Responsibility. In conclusion, absent full disclosure and consent, the lawyer's representation in an adversarial position against a former client with respect to a transaction in which he represented the former client is improper.

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