

Advisory Opinion 1983-5

An attorney, designated "Attorney B," inquired into the ethical propriety of his representing "Client B" given the following facts:

1. Attorney B and Attorney A are members of the same firm;
2. On June 16, 1980, Client A engaged the services of Attorney A for the handling of an estate of which Client A was the Personal Representative;
3. Attorney A represented Client A from June, 1980, through October, 1982, when the last act relating to the estate was completed;
4. At a time which is not set forth, but which was before November 15, 1982, Client B, an attorney, sought the representation of Attorney B in defense of a malpractice claim, one of the claimants of which was Client A;
5. The alleged malpractice by Client B was on a matter wholly unrelated to the matter handled by Attorney A; and
6. Client A has expressly refused to consent to Attorney B's representation of Client B.

Since neither the exact date of Attorney A's completion of the estate matters for Client A was given nor the exact date of Client B's first attempt to hire Attorney B, the Committee could not tell whether Attorney B's acceptance of employment by Client B would conflict with the interests of a *current* client or a *former* client. Accordingly, this opinion sets forth the appropriate standards in each of these situations, leaving it to Attorney B to determine which is applicable to him.

There are three preliminary matters which the Committee wishes to clarify. First, since Attorney A and Attorney B are members of the same firm, neither can accept any employment which the other could not accept. Code of Professional Responsibility, Rule 5-105D. Second, Attorney A's representation of Client A continued up until the date of the final act he took on behalf of Client A, which was in October, 1982, notwithstanding the perfunctory, even clerical, nature of the last act. Third, the appropriate date for Attorney B to judge his ethical obligation to reject the tendered employment by Client B is the date the matter was first discussed with him. This date is chosen as the appropriate date because fiduciary relationship between attorney and client extends to preliminary consultation with a view to a retention of the lawyer. *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978). Moreover, Code of Professional Responsibility, Rule 5-105A speaks in terms of declining *preferred* employment. (Emphasis added.)

Duty to Current Client

If Client A was still a client of the firm at the time Client B discussed his proposed representation with Attorney B, Attorney B owed an undivided duty of loyalty to Client A and was obligated to decline any representation in opposition to the interests of Client A, unless Client A expressly consented to the representation. *United Nuclear Corp. v. General Atomic Company*, 96 N.M. 155 (1980); Code of Professional Responsibility, Canon 5; *See also, Cinema Five, Ltd., v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). This rule relating to interests which conflict with current clients is absolute, and it is irrelevant that the matters have no relationship to one another. Since Client A has refused to consent to Attorney B's representation of Client B, he must decline to represent Client B.

Duty to Former Client

If Client A was no longer a client of the firm at the time Client B discussed his proposed representation with Attorney B, considerably more latitude is available. Canon 4 requires that an attorney keep the confidences and secrets of former clients, as well as of current clients. Any time an attorney is representing an interest in opposition to a former client, the potential for misuse of confidential information exists. This dilemma has generally been resolved by the application of the "substantial relationship standard." *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978); *United Nuclear Corp. v. General Atomic Company*, 96 N.M. 155 (1980). That standard provides that, if the present controversy in which the attorney will be opposing his former client has a substantial relationship to any matter on which the attorney has represented the former client, then the current representation must be declined. If there is no substantial relationship between the matters, however, the attorney may then oppose his former client. In the case of a former client, as opposed to a current client, no consent from the former client is necessary.

For the purposes of this opinion, the Committee has assumed, without deciding, that the matter for which Client B seeks Attorney B's representation is wholly unrelated to the matter which Attorney A handled for Client A. Based on that assumption, it is the Committee's opinion that Attorney B may represent Client B in opposition to the firm's former client.

Should the facts fall into the second category above and the representation be undertaken, the Committee wishes to add one additional cautionary note. We observe that the time period during which the alleged malpractice took place overlapped to a large extent the time period during which Attorney A represented Client A. It is not readily apparent that Attorney A will be a witness in the controversy between Client A and Client B, and so we have not addressed that problem. Should it develop that Attorney A will testify regarding any contested fact, Attorney B may be required to withdraw immediately from the case. Code of Professional Responsibility, Rule 5-101. If there are additional facts which suggest that Attorney A will be a witness, then the representation should probably be refused.