

ADVISORY ETHICS OPINION 78-03

SYNOPSIS:

A lawyer who has represented both husband and wife in a number of matters may not thereafter represent the wife against the husband in a divorce where issues in the divorce are substantially related to the former representation.

OPINION:

The lawyer making this opinion request to the Committee has been asked to represent a wife (W) against her husband (H) in a divorce action after representing both H & W in the past on a number of occasions. The divorce action will require resolution of marital property and child support issues.

The lawyer first represented H in an accident claim and settled the case favorably to H. In preparing and negotiating the case, the lawyer had H examined by a psychiatrist and a neurologist and passed on the reports to the opposing side.

The lawyer next represented H as administrator of his son's estate in a wrongful death action. There were psychiatric examinations of H, W and their surviving son to show the impact of the death of the son. All evidence developed were acquired in the presence of both H and W and both shared equally in the proceeds of the settlement.

Most recently, the lawyer represented H and W in a claim against an insurance company which had written a policy guaranteeing home mortgage payments during his disability. This arose when H was voluntarily admitted to the Vermont State Hospital. Again the lawyer obtained and passed on psychiatric information with the consent of both H and W. This matter was settled favorably.

The lawyer no longer represents either H or W on any pending matter.

The rules on providing representation against past clients are fairly well defined. Such representation is unethical if the matters in the current representation are "substantially related" to the matters involved in former representation of the now adversary party, or if the new representation will require the lawyer "to do anything which will injuriously affect his former client in any matter in which he formerly represented him . . ."¹

There is no question that accepting W as a client against H would involve the lawyer in representation substantially related to the former representation of H, especially in view of the presence of disputed child custody issues. This would suggest the lawyer could not ethically accept W at this time.

The request, however, may present a variation of the normal situations. Most of the confidential information obtained from H was pursuant to common representation of H and W and was available to W. In general, where a lawyer represents two or more parties, information obtained from one is not privileged against the other.² There has been a reluctance, however, to extend this principle to the point of carving out an exception to the "side-switching" rule.³

We believe that to the extent an exception can be made from the "side-switching" rules when the lawyer represented both the present adversaries in the past, it should be very narrow and cannot cover the circumstances presented in this request. Here, there was a lengthy course of representation, part of which appears to be solely of H. Even if confidential information was gained theoretically in the presence of W, the lawyer's file is probably much more comprehensive than W's recollection. In addition, it is likely that the lawyer has relevant impressions and opinions formed on the basis of confidential information.

For these reasons, we believe it would be ethically improper for the lawyer to now represent the wife in a divorce action against the husband.

¹ See, In Re Themelis, 117 Vt. 19, 23 (1951); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).

² See, e.g., Garner v. Wolfenbarger, 430 F.2d 1093, 1103 (5th Cir. 1970).

³ See, e.g., In Re Braun, 49 N.J. 16 227 A.2d 506 (1967) (lawyer who represented both H and W to try to achieve reconciliation may not thereafter represent W and H in a divorce).