ADVISORY ETHICS OPINION 79-06

SYNOPSIS:

An attorney should not represent a client in litigation involving a legal document prepared by the attorney where an adverse party was neither represented by independent counsel at the time of preparation of the document, nor clearly advised by the attorney to obtain such representation.

OPINION:

This opinion requires a rather more complete explication of its procedural background that is typically the case. Attorney A brought suit on behalf of a client in District Court to evict a tenant. The tenants' attorneys moved to disqualify A on the basis of an alleged conflict of interest. The Court asked the tenants' attorneys to seek an opinion of the Committee with respect to the alleged conflict, and those attorneys wrote to the Committee's Chairman to request an opinion. Attorney A also wrote to the Chairman, disputing the statement of facts in the original submission.

In response, the Chairman refused to issue an opinion, for two reasons. First, the Chairman noted that:

> The Committee has consistently adhered to the practice . . . of responding to "before the fact" requests for advice. The Committee believes it inappropriate to give its opinion on ethical matters in cases where disputes have already arisen. There are other bodies charged with enforcement responsibilities.

The Chairman also pointed out that there were apparently serious disputes as to certain material facts, and refused to put the Committee in the position of deciding factual matters.

Subsequently, the Court made Findings of Fact in order to relieve the Committee of fact-finding responsibility.

The Committee continues to doubt seriously whether it should express an opinion in this situation. The question of whether an attorney should withdraw from a case may well be different from the question of whether a court should order disqualification of an attorney while litigation is pending. In addition, the Committee continues to feel that its proper role is to render advice to attorneys seeking guidance as to their future conduct, and not to pass judgment on previous behavior.

The Committee notes, however, that Attorney A has apparently not objected to the submission of the matter to the Committee. Because this is not an academic exercise, but a real case with real people concerned about the outcome and delay, the Committee has decided to proceed as though this were a request for advice from Attorney A. While the distinction may seem pedantic, the Committee means to insist on the proposition that it is not deciding whether the Court should decide that Attorney A should be disqualified. The Committee is only rendering its opinion as to whether Attorney A should, consistent with the Code of Professional Responsibility, continue with representation in this case.

The facts (based upon the Court's findings) are as follows: Some years ago Attorney B drafted the lease here in issue. While there is some uncertainty on this point, we are willing to assume that, in drafting the lease, B represented only the landlord (actually, there are multiple parties on each side of this litigation. That fact is not relevant, and, in the interest of not making a complicated matter any more so than necessary, we will use the singular form.) At about the same time, B was providing other legal services for the tenant, including the incorporation of the business which occupied the leased premises. There is no indication that B gave the tenant a clear warning as to the possible conflict, and the tenant had no other counsel with respect to the Lease. (The tenants and landlords are all related by blood.) We note, in addition, that one of the landlords is now a defendant in the eviction suit, because she prefers not to see the tenant evicted.

Under these circumstances the Committee has no hesitation in saying that Attorney B should not represent the landlord in an eviction proceeding based upon the Lease. We need not determine whether the situation would be different if, for example, the tenant had had other counsel with respect to the Lease Agreement or, at lease, had been warned clearly about his need for independent representation.

The Committee believes that Attorney B should not accept employment as the landlord's attorney to evict the tenant where, as here, at the time of preparation of the lease in question, B was the tenant's attorney and allowed the tenant to believe that B was representing the tenant in connection with the Lease. See Canon 5, and the Ethical Considerations thereunder.

Here we must look at a further question, for Attorney A contends that the disqualification of Attorney B does not extend to Attorney A. Attorneys A and B practice law together (and with Attorney X) under the firm name and style of B, X and A. That name is used on the office sign, on the stationery the lawyers use, and in their telephone listing. Attorney A now contends, however, that his relationship with B is "simply one of sharing office space." While there is no question that an ethical requirement of withdrawal of a lawyer poisons his partners and associates with respect to that matter (DR 5-105 (D)), Attorney A contends that, because he is not a partner of B, he is not required to decline employment. This contention is wrong. DR 5-105 (D) is not limited to partners, but says:

> If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment. (emphasis added).

We note, in passing, the provisions of EC 2-11, which appear to make the use of the firm name B, X and Z improper where the three are not partners, and 11 V.S.A. 1208 which indicates when persons may become "partners by estoppel." But the plain language of DR 5-105 (D) is sufficient here, as A and B are plainly "affiliated" within the meaning of the rule.

It is, therefore, our opinion that it is not consistent with the Code of Professional Responsibility for Attorney A to represent the Landlord in this controversy.