

ADVISORY ETHICS OPINION 80-08

SYNOPSIS:

An attorney should decline employment, even in context of appellate representation, from a former adversary in a case versus his former client arising out of the same transaction.

FACTS:

The attorney requesting this opinion from the Committee (“the attorney”) represented Plaintiff A, a corporation, seeking the balance due on a note from Defendant B. An action was commenced, and B counterclaimed for alleged damages inflicted upon its property by actions of A. The matter was concluded by settlement prior to hearing, with B agreeing to pay A a certain amount in cash, to convey a certain lot, and to relinquish its counterclaim for damages. Pursuant to the agreement, a Stipulation of Dismissal as to all claims was filed with the Court. Thereafter, A underwent a corporate change, and through other counsel, brought suit against B on the original note. In the second action, B was represented by the same attorney as in the first action. A hearing was conducted on the second action, and Findings of Fact and a Judgment Order were entered. During the period of time following the attorney’s representation of A in the first legal proceedings, the attorney represented B on a completely different matter not involving A or its successors, but has now been asked by B to represent its interests by filing, briefing, and arguing its appeal from the Judgment in the second action.

QUESTION PRESENTED:

Given his prior representation of A and B, may the attorney properly represent B’s interests in connection with the taking of the appeal?

OPINION:

The query propounded to the Committee is whether or not it is proper for an attorney to act as counsel in a case against a former client. Further complicating the question is the fact that the proposed representation here involved arises out of the same subject matter as was involved in the former representation.

Under the Code of Professional Responsibility the Canon which is applicable to this situation is Canon 5 which provides: “A lawyer should exercise independent professional judgment on behalf of a client.”

Reference here should be had to the following Ethical Consideration:

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Disciplinary Rule 5-105(A) provides as follows:

DR 5-105. Refusing to accept or continue employment if the interest of another client may impair the independent professional judgement of the lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgement in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests. . . .

The loyalty a lawyer owes to his client referred to in EC 5-1, and his duty to refuse proffered employment when he may be involved in representing differing interests, as provided in DR 5-15, extends to his former clients as well as his present. In other words, it appears that the duty of loyalty to the former client survives the employment relationship.

Having represented one party in a transaction, a lawyer may not thereafter represent the other party in an action against the lawyer’s former client arising out of or closely related to the same transaction [ABA Inf. Op. 1322 (1976)].

Even if the lawyer’s subsequent representation is not based precisely on the same transaction for which he was initially retained, the lawyer should be disqualified where he former client is able to “show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or

cause of action wherein the attorney previously represented the former client.” [T.C. Theater Corp. v. Warner Bros., 113 F. Supp. 265, 268 SDNY 1935.]

Furthermore, it should be presumed that in his representation of his former client the lawyer was privy to the confidences of that client, and by now zealously representing the position of his former adversary he may unconsciously violate those confidences.

CONCLUSION:

It appears from all of the above that the lawyer should decline employment, even in the context of appellate representation, from a former adversary in a case against his former client arising out of the same transaction. The lawyer should not now promote the interests which it was formerly his duty to oppose.

In addition, it should be added:

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. DR 5-105(D).