

ADVISORY ETHICS OPINION 80-21

SYNOPSIS:

Vermont attorney who has in recent months represented the husband and wife in various business and personal matters should decline to represent husband in divorce action against wife.

QUESTION:

A Vermont attorney over the last several months has represented a husband and wife in:

- (a) negotiating a purchase and sales agreement under which they will both purchase a restaurant, which they are currently operating pending the closing;
- (b) preparing a second mortgage which they both gave to secure a loan;
- (c) preparing a lease according to which they both were to lease their home; and
- (d) interpreting a lease on a bar which they both run.

The husband had recently asked the attorney to represent him in obtaining a divorce. There are no children involved, and the primary issue it is believed will be the division of property in which the husband will be generous.

The attorney asks whether he “may ethically represent H against W in the divorce action.” Phrased another way, the question is, “May the attorney accept litigation against a former client in these circumstances?”

OPINION:

It should be noted that many of the matters in which the attorney has recently represented both husband and wife involve:

- (1) continuing legal relationships with others in which the attorney might be expected to continue to represent both parties, but, upon institution of the divorce proceedings, the interests of the husband and the wife may differ, and
- (2) joint financial commitments and joint benefits which must now be divided in some manner. While every divorce case contains potential conflicts between husband and wife, the facts posed suggest that very real conflicts will have to be settled and that the attorney will be working to change legal relationships which the attorney helped create while representing the wife.

Similar problems of ethics have arisen in the past and undoubtedly will again in the future. For discussions of the problems, see Drinker, Problems of Professional Ethics in Matrimonial Litigation¹ and Drinker, Legal Ethics². ABA Informal Opinion 885 (1965), which is not limited to matrimonial actions, concludes:

...a lawyer should not accept litigation against a former client, under any circumstances if such would result in a 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 a possible violation of a confidence, even though this may not be true in fact.

In the Committee’s opinion, on the facts presented, the attorney should decline to represent the husband against the wife in the divorce action.

¹ Drinker, Problems of Professional Ethics in Matrimonial Litigation, 66 Harv. L. Rev. 443 (1953).

² Drinker, Legal Ethics, 103-112 (1953).