ADVISORY ETHICS OPINION 84-05

SYNOPSIS:

Where a law firm is contacted but not retained by a prospective client who calls to inquire about the possibility of bringing suit against another, the law firm may later represent the other person in defense of the suit provided that the firm did not undertake to give the prospective client advice and provided that the prospective client did not in good faith disclose to the firm any confidential information.

OPINION:

A law firm has asked whether it is a conflict of interest to continue the defense of a lawsuit where the plaintiff had earlier consulted the firm about bringing the same suit but chose not to retain them. No one in the firm recalls any such contact. The firm was made aware of the situation by the attorney that was eventually retained by the Plaintiff.

The law firm theorizes that the Plaintiff made contact by telephone. They theorize that this contact was merely a "feeler" call. Fees may have been discussed and the facts of the case may have been discussed such that the attorney speaking for the firm could give the caller his "reaction" to the case. The firm is certain that no confidential or compromising information was disclosed.

We note that all too often, motions to disqualify opposing counsel "have become common tools of the litigation process, being used . . . for purely strategic purposes."[1] We disapprove of such tactics. We will not interpret our disciplinary rules to promote such a tactic in the name of erring on the side of caution. We will interpret our rules to vindicate the purpose they serve.

We look first to the rule that prohibits representing clients with differing interests. DR 5-105(A) reads:

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment 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, except to the extent permitted under DR 5-105(C).

Here, representation is not permitted to any extent under DR 5-105(C) because the plaintiff does not consent to the representation. Thus, we do not hesitate to say that the law firm is disqualified if the plaintiff was a "client" of the firm within the meaning of the rule. The question remains whether the plaintiff ever was the firm's client.

The attorney-client relationship is a fiduciary relationship. Its character is delicate, exacting, and confidential. It involves the highest degree of personal trust and confidence and, it requires the highest degree of fidelity and good faith.[2] We do not think that such a relationship is lightly undertaken.

The confidentiality which is the hallmark of the attorney-client relationship exists not only to protect the giving of sound legal advice by the attorney. It also exists to protect the giving of information by the client without which sound advice would be impossible.[3] Thus, as applied to the case before us, it is the firm's undertaking to give legal advice or the firm's undertaking to solicit facts in order to give advice that triggers the attorney-client relationship. We do not think that a layman who reveals certain facts at the outset of a case while making an inquiry about the desirability of retaining a law firm has become that firm's client absent some specific intent by a member of the firm to give advice or to glean facts fur thc purpose of giving advice.

Although we customarily do not give opinions on areas of law other than the Professional Responsibility Code, we think it proper to mention a word about the attorney-client privilege as it exists in our rules of evidence. We are aware that the evidentiary privilege is incorporated in the Professional Responsibility Code. DR 4-101(A) reads,

> "Confidence" refers to information protected by the attorney-client privilege under applicable law . . ."

We are also aware that the applicable evidentiary rule can be read to cover any feeler call. V.R.E. 502(a)(1) reads,

> A "client" is a person . . . who consults a lawyer with a view to obtaining professional legal services from him.

[1] Allegaert v. Perot, 565 F.2d 246 at 251 (2nd Cir. 1977).
[2] 7 Am.Jr.2d, Attorneys at Law §119.
[3] Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed2d 584 (1981).

For the reasons set out earlier, we think that such a reading would be unduly formalistic, and we will not interpret the Code in such a manner.

We venture to say that even if the firm received confidential information from the Plaintiff, the firm is not necessarily disqualified. The duty to preserve client confidences and secrets is a duty to do just that: To preserve client confidences and secrets, not the confidences and secrets of others.[4] If it were otherwise, a prospective litigant could disqualify an attorney he thinks his opponent will likely hire simply by placing a feeler call to the attorney and then blurting out a "confidence," the revelation of which is not so very embarrassing.

We do not hesitate to say, however, that it would be most unseemly if a prospective client were required to face in court an attorney to whom he had revealed a confidence about the case in a good faith effort to secure legal counsel. Such a situation would implicate DR 1-102(A).

> A lawyer shall not...
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
> (5) Engage in conduct that is prejudicial to the administration of justice.
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

We think such a situation would compel the attorney's withdrawal.

[4] DR 4-101.