ADVISORY ETHICS OPINION 85-02

SYNOPSIS:

Where a partner in a law firm represents the husband in a divorce action a former associate of the firm who worked for the firm during the time the firm represented the husband may represent the wife in the same litigation provided the former associate gained no knowledge of the divorce action while employed by the firm and had no involvement in the firm's representation of the husband.

OPINION:

The facts presented by this request are as follows: after leaving the employ of a law firm a former associate in that firm was retained by the wife in a divorce action in which the firm represents the husband. The firm represented the husband at the time the former associate worked for the firm but the former associate had no knowledge of the firm's representation of the husband while employed by the firm and had no involvement in the representation.

The general rule that the knowledge of one member of a firm will be imputed by inference to all member of the firm, including law clerks and associates, applies only to current members and associates of the same firm and does not apply to former firm partners or employees. Where an attorney has left a firm and had no knowledge of the firm's representation in the matter at issue while working for the firm, then it will be presumed that the attorney had no knowledge such as would otherwise disqualify him from representing a party adverse to the firm's client, and the burden of proof to show disqualifying knowledge will rest on the party claiming a conflict.[1] In Laskey the theory of imputed knowledge would have barred a former partner in a private law firm from undertaking the representation in question had he remained a member of the firm. The Court held that a former partner may rebut any inference of disqualifying knowledge by denying such knowledge and thereafter the burden of proving actual disqualifying knowledge rests on the party claiming a conflict.

The ethical impropriety to be avoided is the compromise of the confidences or secrets of a client. This impropriety is clearly avoided where the former partner or associate has no knowledge of any client confidences or secrets while employed by the firm and had no involvement in the firm's representation of the client. The rule imputing knowledge of a client's confidences and secrets to all existing members of the firm is rooted in the Canon 9 admonition that "a lawyer should avoid even the appearance of professional impropriety." This Canon 9 concern is substantially removed where the attorney undertaking the conflicting representation is no longer associated with the firm. It is wholly absent where the former firm associate had no knowledge of client confidences while employed by the firm.

Any other rule would extend to unreasonable limits the disqualifying reach of the imputed knowledge principle and is not necessary in order to fully comply with the mandates of Canon 9. As stated by then District Judge Irving R. Kaufman (later Chief Judge of the Second Circuit) in United States v. Standard Oil Company:[2]

> "It is doubtful if the Canon of Ethics are intended to disqualify an attorney who did not actually come into contact with materials substantially related to the controversy at hand when he was acting as an attorney for a former client now adverse to his position."

We perceive no ethical bar to the firm's former associate undertaking the representation of the wife.

[1] Laskey Brothers v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955).
[2] United States v. Standard Oil Company, 136 F. Supp. 345 (S.D.N.Y. 1955).