
**E-76-4 Representation of a plaintiff after
investigation is undertaken for a
potentially adverse former client**

An inquiry was posed to the Ethics Committee of the Wisconsin Bar Association concerning the propriety of an attorney handling a claim against an insurance company for which an investigation of the same matter had been previously undertaken. The claim was brought under a performance bond seeking damages for a defective air conditioning system under the latent defect warranty contained in the performance bond. The X and Y corporations were co-sureties on the performance bond. However, the attorney only represented the X corporation; and it is now in liquidation. Confidential information was exchanged between the X corporation and the attorney. The claimant desires to hire the attorney to prosecute the Y corporation under the latent defect warranty provision. A claim for contribution might then be made against the former client, the X corporation.

Three different canons of the Code of Professional Responsibility have to be examined in light of the above fact situation. Canon 9 states that a lawyer should avoid even the appearance of professional impropriety, Canon 4 states that a lawyer should preserve the confidences and secrets of a client, and Canon 5 states that a lawyer should exercise independent professional judgment on behalf of a client.

It was pointed out that the Disciplinary Rules under Canon 9 do not seem to be applicable to the fact situation which was recited. They deal with the acceptance of private employment in a matter in which a person has dealt with the merits as a public employee, or a suggestion that a public body might be improperly influenced, or in situations involving the segregation of funds or property of a client. However, EC 9-2 states in part: "When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

Further, it was stated that there was no transmittal or confidential information to or from the X corporation and the lawyer involved. This would appear to satisfy the requirements of Canon 4, "A Lawyer Should Preserve the Confi-

dences and Secrets of His Client.” It brings to light the apparent inadequacy of the Canon. As has been written by Mr. Joel G. Chefitz, in 55 Boston University Law Review 61 (Jan. 1975), perhaps an additional Disciplinary Rule, 4-102 should be adopted to read:

A lawyer shall withdraw as counsel if, after undertaking representation of a client, a lawyer learns or it is obvious that he or a lawyer in his current firm or a lawyer in his previous firm had maintained a logically relevant attorney-client relationship with a former client whose interest is adverse to that of the present client; . . .

The fact that no disclosure of a confidential nature has been transmitted to or by the X corporation and the attorney appears to be immaterial. The general rule in both civil and criminal cases is that, in order to avoid even the appearance of impropriety and therefore uphold the honor of the legal profession, an attorney cannot represent a party opposing a former client in a related matter even though he acquired no knowledge in his former representation which might subsequently disadvantage his former client. *Marketti v. Fitzsimmons*, 373 F. Supp. 673 (W.C. Wis. 1974).

Also ABA Opinion Number 51 seems directly to the point when it says that a lawyer for an insurance company who has investigated an accident for it may not represent the injured person against the insured and another insurance company.

In ABA Informal Opinion 906, an attorney, while a law student, was employed by an insurance company as an adjuster. Subsequently, the attorney was retained as counsel for a claimant in a case in which he was involved as an adjuster while employed by the insurance company. The committee stated that if the young man had been an attorney at the time of his employment as an adjuster for the insurance company with respect to the matter, that the attorney could not ethically represent the claimant in a suit against the insurance company in connection with the same matter without the express and informed consent of the company and claimant.

Mr. Raymond L. Wise in his treatise on *Legal Ethics* says:

There have been more requests for interpretation of (the conflict of interest) canons than any other canons. Some of the questions and problems are complex and intricate. Thus, if there is the slightest doubt as to whether the proposed restriction involves a conflict of interest between two clients, or between a new

client and a former client, or may encompass the use of special knowledge or information obtained through service of another client or while in public office, or necessitates a conflict between the interests of a present or former client and those of the attorney, the doubt may best be resolved by Matthew VI, 24: “No man can serve two masters.”

It would, therefore, appear to the committee to be improper to represent the claimant against the Y insurance company.