
**E-79-1 Public official: Disqualification of law
firm**

Question

Under what circumstances, if any, would your law firm be disqualified from representing a specified client if an official of a state agency with regulatory jurisdiction over that client were to become a member or associate of your firm? You have presented the following facts for our consideration.

Facts

Your law firm has for several years represented a major client in a variety of matters which are subject to the regulatory jurisdiction of a Wisconsin state agency. Several of the firm attorneys devote a substantial portion of their practice to this representation. You are presently considering the addition to your firm of a person who now sits on the decision-making body of that state agency. The person under consideration by you has held an agency position for several years and has recently been involved in decision-making matters relating to issues of direct and substantial relation to your client. Your firm's discussion with the official concerning his addition to your firm have all occurred subsequent to his participation in or disposition of any matters pending before the agency, although there were, and remain, other matters of concern to your client pending before that agency at various stages of the administrative process. You note that the addition of this person to your firm would require prior termination of the official position with the agency, as well as a strict prohibition on the former agency official's participation in representation of your client in any matters over which he, as a public employee, had substantial responsibility.

Opinion

Since the person concerned is or has been a public official, we would at the outset call your attention to Section 19.45, Code of Ethics for public officials. While it is not within our province to elaborate on the interpretation of that Code, such being within the province of the Ethics Board, we nevertheless wish to call your attention to 1 Op. Eth. Bd. 125 (1978), and its applicability to your question.

Insofar as the Wisconsin Code of Professional Responsibility is concerned, we believe that your question based on the facts submitted, comes within the purview of Canons 4, 5 and 9, and the associated ethical considerations and disciplinary rules pertaining thereto, as well as Section 757.29, Wisconsin Statutes.

Canon 4 and the disciplinary rules thereof require the preservation of confidences and secrets of a client, and generally forbid the revelation or use thereof, with certain exceptions. DR 4-101(D) states: "A lawyer shall exercise reasonable care to prevent his employees, *associates* and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(c) through an employee." The exceptions referred to are not herein set forth, since they are not pertinent to the question.

Section 757.29 of the Wisconsin Statutes, the attorney's oath, includes the following paragraph:

I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with my client's business except from my client or with my client's knowledge and approval.

Under the presented facts, it is evident that the client of the lawyer in question is and has been the State of Wisconsin. Therefore, throughout this opinion, and opinions quoted herein, we must necessarily substitute by inference the "State of Wisconsin" for the word "client."

Ethical considerations 4-4 and 4-5 state:

The obligation to preserve cliental confidences and secrets is wider than the attorney-client privilege under law. The former exists even if others share the confidence. . . .

A lawyer should not use confidential cliental information to the disadvantage of the client, nor without the fully informed consent of the client, to his own advantage. He should be diligent to prevent its disclosure by his associates and employees and to prevent the disclosure of confidential cliental information about one client to another. A lawyer must not accept employment which requires such disclosure.

And the first sentence of ethical consideration 4-6 charges that:

The obligation to preserve confidential client information as such survives the termination of the employment and also the practice of law by the lawyer.

Canon 5 requires that a lawyer should exercise independent professional judgment on behalf of a client and further requires a lawyer to refuse employment when the interests of the lawyer may impair his independent professional judgment, or if the interests of another client may impair such independent professional judgment. (DR 5-101; DR 5-105)

However, even when a lawyer may be unaware of any impropriety, and even though no impropriety may actually exist, Canon 9 constrains a lawyer to avoid even the appearance of professional impropriety. Disciplinary Rules 9-101(a) and (b) state:

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

A lawyer shall not state or *imply* that he be able to influence improperly or upon *irrelevant* grounds any tribunal, legislative body or public official. (emphasis supplied)

Ethical consideration 9-3 further explains that:

After a lawyer leaves public office, he should not accept employment in his practice in connection with a matter in which he had responsibility or substance while in office. To do so would give the appearance of impropriety, even if none exists.

We also wish to draw upon the discussion had in ABA Formal Opinion Number 342 dated November 24, 1975, wherein the relationship between Canon 4, Canon 5 and Canon 9 and the Disciplinary Rules had been discussed at length.

We wish to particularly quote from pages 2, 3, 4 and 5 of that Opinion as follows:

The Disciplinary Rules of Canon 4 generally forbid a lawyer to reveal or use a confidence or secret of a client; see DR 4-101(b). That rule applies to a government lawyer as well as to private practitioners, for “the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities.” A lawyer violates DR 4-101(B) only by knowingly revealing a confidence or secret of a client or using a confidence or secret improperly as specified in the rule. Nevertheless, many authorities have held that as a procedural matter a lawyer is disqualified to represent a party in litigation if he formerly represented an adverse party in a matter substantially related to

the pending litigation. Even though DR 4-101(B) is not breached by the mere act of accepting present employment against a former client involving a matter substantially related to the former employment, the procedural disqualification protects the former client in advance of and against a possible future violation of DR 4-101(B).

The Disciplinary Rules of Canon 5 bring into professional regulation, and with some specificity, the ancient maxim that one cannot serve two masters. The Disciplinary Rules of Canon 5 are concerned largely with the effect of dual representation upon the quality of the professional service rendered to a client. Therefore the rules generally require a lawyer to refuse employment or to withdraw from employment when his exercise of professional judgment on behalf of a client may be affected; see DR 5-105; EC 5-14; and EC 5-15. The rules also forbid a lawyer to switch sides even in situations where the exercise of the lawyer's professional judgment on behalf of a present client will not be affected. To this extent, the Disciplinary Rules of Canon 5 regulate the employment a lawyer may undertake after concluding or terminating past employment, whether the past employment was a private or as a public lawyer.

DR 9-101(B) appears under the maxim of Canon 9, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

It is obvious, however, that the "appearance of professional impropriety" is not a standard test or element embodied in DR 9-101(B). DR 9-101(B) is located under Canon 9 because the "appearance of professional impropriety" is a policy consideration supporting the existence of the Disciplinary Rule. The appearance of evil is only one of the underlying considerations, however, and is probably not the most important reason for the creation and existence of the rule itself.

The policy considerations underlying DR 9-101(b) have been thought to be the following: the treachery of switching sides; the safeguarding of confidential governmental information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil.

There are, however, weighty policy considerations in support of the view that a special disciplinary rule relating only to former government lawyers should not broadly limit the lawyer's employment after he leaves government service. Some of the underlying considerations favoring a construction of the rule in a manner not to restrict unduly the lawyer's future employment are the following: the ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future

practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service; the rule serves no worthwhile public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel; and the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their own choosing, particularly in specialized areas requiring special, technical training and experience.

We wish to point out, however, that Formal Opinion 342 was adopted after the 1974 Amendment of DR 5-105(D), which extended every disqualification of an individual lawyer in a firm to all affiliated lawyers. DR 5-105(D) of the Wisconsin Code of Professional Responsibility limits its extent by requiring “If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Thus, one might superficially conclude that the prohibitions of DR 9-101(B) and (C) are to be observed only by the lawyer who was the former government officer or employee and not by other members of the firm or associates. Before reaching such a conclusion, however, we call your attention to the footnote on Page 1 of the Opinion, wherein it is stated:

It has long been recognized that the disqualification of one lawyer in an organization generally constituted disqualification of all affiliated lawyers. (Citing numerous cases decided prior to 1974, and then continuing) The rule is based upon the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment.

We believe that the rule stated in footnote 2 is still valid today, notwithstanding the nonamendment of DR 5-105(D) of the Wisconsin Code of Professional Responsibility, since it is based upon a general recognition recognized by courts of various jurisdictions and is certainly in accordance with the letter and spirit of Canon 9, to-wit: “A lawyer should avoid even the appearance of professional impropriety.” Thus, all members or associates of a firm in which the lawyer in question is a member are charged with the duty of avoiding appearance of professional impropriety, as well as the lawyer in question.

However, keeping that Canon in mind, it does not necessarily follow that all members of a firm are irrevocably prohibited from being disqualified from representing a specified client because a former member of the agency is now a

member of the firm. In this connection we wish to quote from and adopt the language of ABA Opinion 342 at pages 11 and 12 thereof:

All of the policies underlying DR 9-101(B), including the principles of Canons 4 and 5, can be realized by a less stringent application of DR 5-105(D). (That is an absolute disqualification of all members of the firm.) The purposes, as embodied in DR 9-101(B) of discouraging government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service, and of avoiding the appearance of impropriety, can be accomplished by holding that DR 5-105(D) applies to the firm and partners and associates of a disqualified lawyer who has not been screened, to the satisfaction of the government agency concerned, from participation in the work and compensation of the firm on any matter over which as a public employee he had substantial responsibility. Applying DR 5-105(D) to this limited extent accomplishes the goal of destroying any incentive of the employee to handle his government work so as to affect his future employment. Only allegiance to form over substance would justify blanket application of DR 5-105(D) in a manner that thwarts and distorts the policy considerations behind DR 9-101(B).

Accordingly, it is our opinion that whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under DR 5-105(D). In the event of such waiver, and provided the firm also makes its own independent determination as to the absence of particular circumstances creating a significant appearance of impropriety, the result will be that the firm is not in violation of DR 5-105(D) by accepting or continuing the representation in question.

Although this opinion has dealt explicitly and at length with the interpretation and application of DR 9-101(B), it is not amiss to point out that, on the ethical rather than the disciplinary level of professional responsibility, each lawyer should advise a potential client of any circumstances that might cause a question to be raised concerning the propriety of his undertaking the employment and should also resolve all doubts against the acceptance of questionable employment. *See* EC 5-15 and EC 5-16.

Consequently, it is our conclusion that in any instance in which the former official of the state agency would be disqualified under the provisions of sections 19.45 and 757.29 of the Wisconsin Statutes, and Canons 4, 5, and 9 of the Code of Professional Responsibility as interpreted by ABA Formal Opinion Number

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342 above cited, each member of your firm or associate thereof would be disqualified in like manner.