# E-87-4 Conflicts and disqualification: Law firm represented by opposing counsel in unrelated matter

## Facts

Attorney A and his law firm. ABC, S.C., a service corporation, has been sued by attorney A's former client for legal malpractice. ABC's insurance carrier retained attorney X of the law firm, XY & Z, to represent attorney A and his firm. Attorney X and his firm practice law in the same county as the ABC firm. Attorney X and his law firm are regularly involved in separate legal matters with the ABC firm and their respective sides of civil litigation representing respective clients in those matters as well as opposite sides of municipal corporate matters, divorce and the like.

## Questions

Does the law firm, ABA, S.C., or any attorney therein, have a conflict of interest each time they are involved in a separate legal proceeding in which attorney X or his law firm represents the opposing party? If a conflict exists can it be cured by disclosure? If so, who should do the disclosing? What must be disclosed? To whom should the disclosure be made? If it is concluded that attorney X or his firm must make a disclosure to separate clients, is this not a violation of the confidentiality owed to the ABC firm in the initial legal malpractice case? Further, can it be concluded that the insurance company, in choosing counsel for this particular legal malpractice case, thrusts the conflict on its insured, the ABC firm?

## Opinion

When counsel for a lawyer malpractice defendant is offered a retainer by the lawyer's insurance carrier, the committee believes that counsel with whom the defendant lawyer has or likely would have adversary contact as opposing counsel in unrelated matters should decline the representation unless the informed consent of defendant law firm is obtained. As the questions asked imply, such adversary relationships may cause the defendant lawyer to question his or her

 

malpractice counsel's undivided loyalty. And the lawyer's clients, against whom the malpractice counsel appears, could reasonably question whether their lawyer's dependence on opposing counsel for personal representation could affect their lawyer's zealous representation of them. *See generally* SCR 20.23(1), (2)(a) and (4); SCR 20.24(1); and Committee on Professional Ethics Formal Opinion E-83-9.

Assuming, however, that an insurance carrier actually selected counsel as set forth in the facts, or the conflict arose after the representation commenced, the committee recommends that the issues be addressed in the context of a motion for substitution of counsel. *See, e.g.*, SCR 11.02(3). *See also* 20.16(2)(b) and (d) regarding mandatory withdrawal. Regarding potential adverse personal interests of a lawyer and the ethical implications, *see generally* ''Developments in the Law SCR—Conflicts of Interest in the Legal Profession,'' 94 Harv. L. Rev. 1244, 128-92 (1981); and Annot., 35 A.L.R.3d 674 (1971).

If however, there were no substitution of counsel under the circumstances described herein, the committee believes that both ''ABC'' and ''XYZ'' law firms would have to make disclosures to their clients who are involved in matters in which the other firm represents persons with differing or adverse interests. *See* SCR 20.24(1) and Committee on Professional Ethics Formal Opinion E-83-9 [reported at 57 Wis. Bar Bull. 83 (June 1984)].

In some cases, the rules of confidentiality (i.e., SCR 20.22) and the law of privilege (e.g., Wis. Stat. section 905.03) may preclude disclosure of client identities in making a full disclosure of potential adverse or differing interests. *See, e.g., DeBardeleben v. Ethics Board*, 112 Wis. 2d 324, 327, 332 N.W.2d 826 (1983). *See also generally* Annot., 16 A.L.R.3d 1047. If this occurs under the circumstances set forth herein, the committee believes that the ''ABC'' and ''XYZ'' law firms must join in a motion for substitution for ''X'' as counsel in the legal malpractice action. *See generally* SCR 20.16(2)(b), (3)(a)(4), (3)(b), (3)(c), (3)(e) and (3)(f). *See also* SCR 20.30(2), 20.35(1)(b), (c) and (2)(b).

Note: Please be aware that the Wisconsin Supreme Court has amended the Code of Professional Responsibility. The new code was published in the August 1987 Bar Bulletin, to become effective Jan. 1, 1988. The above opinion is predicated on the existing code and may or may not require modification based on provisions of the amended code.