

## INFORMAL ADVISORY ETHICS OPINIONS

By

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This month's column summarizes a number of informal advisory opinions issued by my office since May, 1983. See my October, 1982, *Bench & Bar* column for further details.

### 1. REPRESENTATION AGAINST FORMER CLIENT

Law firm sought to assert counterclaim against former client, a construction company. Attorney previously represented company and its president in several business matters, and drafted a will for the president. Construction company contend attorney's previous representation creates a conflict of interest which disqualifies him from asserting the counterclaim.

A two-fold test is generally applied to determine whether an attorney may ethically handle a matter against a former client. First, attorney must determine whether the subject matter of the counterclaim is "substantially related" to the business and personal matters in which he or she represented former client. Construction company contends that "substantial relationship" exists.

Second, attorney must determine whether any "confidences or secrets" were obtained during the previous representation. If a substantial relationship between the current and previous representations is established, it is assumed that confidences bearing on the subject matter of the current representation were disclosed. Since construction company contends a substantial relationship exists, there is arguably an irrebuttable presumption that confidences were received from the former client. Given the factual disputes between the parties, the Director declined to give an opinion whether continued representation would constitute a disciplinary rule violation.

A third component in disqualification cases requires the balancing of competing equities. The facts do not indicate any existing involvement by the attorney in the suit, or any long-term attorney-client relationship with the current client. Attorney's possible disqualification appears to impose no real financial hardship on current client.

See DR 5-105(A) and (C); DR 4-101(A); EC 4-5; *National Texture Corp. v. Hymes*, 282 N.W.2d 890 (Minn. 1979); *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720 (Minn. 1983).

### 2. "OF COUNSEL" DESIGNATION

Law firm recently employed attorney with government and corporate experience. Attorney's role and responsibilities were similar to those of firm's associates, not those of an independent contractor. Firm sought to designate new attorney as "of counsel" on firm letterhead.

Law firm may not list a new attorney as “of counsel” when his or her employment will be similar to that of an associate. An individual attorney who properly may be shown to be “of counsel” is a member or component part of a law office, but his or her status is not that of a partner or associate, nor that of a controlling member of a professional legal corporation. Moreover, a lawyer or law firm shall not use professional announcement cards or letterheads containing statements which are false, fraudulent, misleading or deceptive.

*See* DR 2-101; DR 2-102(A); DR 2-102(C); ABA Formal Opinion 330 (August, 1972); ABA Informal Opinion 1378 (August 21, 1976).

### **3. PART-TIME PROSECUTOR**

Attorney represents criminal defendants. Attorney contemplates part-time city prosecutor position. Issue: whether attorney may accept prosecutor position and continue defense representation in same or another jurisdiction.

Under Lawyers Professional Responsibility Board Opinion No. 6, it is improper for a municipal attorney to defend criminal cases arising within the municipality he or she serves. It is not improper, however, for a municipal attorney to defend criminal cases in other areas, provided he or she is not required to challenge the validity of a state statute which he or she would otherwise be required to support as municipal attorney. If such challenge arises, the attorney should withdraw from the case.

The attorney should scrupulously refrain from any references to his or her position as municipal attorney in the course of all defense proceedings.

The Lawyers Professional Responsibility Board is currently considering amendment of Opinion No. 6.

*See* DR 5-101(A); DR 5-105; EC 5-14; Lawyers Professional Responsibility Board Opinion No. 6.

### **4. DUAL PRACTICE**

Attorney contemplated forming a financial planning business to provide investment and business services to closely-held corporations. Attorney would develop financial plans and handle subsequent investments on a commission basis.

Attorney’s financial planning business would not render legal advice or prepare legal documents. Attorney anticipated, however, that clients of a financial planning business were likely to call upon him for legal services as well as financial planning.

An attorney is not precluded from engaging in a second profession or business concurrent with the practice of law. Due to the potential conflicts arising from a dual practice, however, an attorney should obtain client consent after full disclosure of all potential conflicts of interest. The attorney must also avoid unauthorized practice of law by the second business. Furthermore, the attorney must not share legal fees with a non-attorney or form a partnership with a non-attorney if any of the partnership’s activities consist of the practice of law.

If the second occupation is so law-related that the work of the attorney in such occupation will involve, inseparably, the practice of law, the attorney is considered to be engaged in the practice of law

while conducting that occupation. Accordingly, the attorney is held to the standards of the Code while conducting that second occupation from his or her law offices.

*See* DR 3-101(A); DR 3-102(A); DR 3-103(A); DR 5-101(A); DR 5-104; DR 5-105; ABA Formal Opinion 328 (June, 1972); ABA Informal Opinion 1482 (April 8, 1982); *In re Scallen*, 269 N.W.2d 834 (Minn. 1978).

## **5. ATTORNEY AS ESCROW AGENT**

Real estate agent asked attorney to act as escrow agent in real estate closing. Attorney to hold closing in his office, draft closing statements, and make disbursements from his office trust account.

Attorney may serve as escrow agent provided both parties agree.

Attorney should avoid acting as escrow agent when the client is a party to the escrow agreement. This is due to the inherent conflict between the attorney's duties as an escrow agent and as an advocate for his or her client. Attorney should urge the parties to select a neutral third party to serve as escrow agent.

*See* Hoover, "Attorney as Escrow Agent," *Bench & Bar*, October, 1981; ABA Informal Opinion 923 (April 26, 1976); DR 5-105.

## **6. ATTORNEY AS WITNESS IN WILL CONTEST**

Attorney represents estate of decedent for whom he drafted will. Inquiries from decedent's nephew indicate possibility of will contest. If contested, attorney plans to withdraw as counsel and testify regarding decedent's competency and lack of undue influence. If will found valid and admitted to probate, attorney plans to resume representation of estate.

Drafting attorney may represent executor in probate proceeding until receipt of formal notice of intent to contest will. Where attorney's testimony is necessary to establish competency and lack of undue influence, independent counsel must be obtained to continue the probate proceedings. Drafting attorney may not resume probate duties even if will is found valid, due to his financial interest in sustaining the will. Such financial interest cannot be temporarily suspended during the attorney's testimony and resumed thereafter.

*See* DR 5-101(B); DR 5-102(A); ABA Formal Opinion 339 (January 31, 1975); ABA Informal Opinion 396 (August 2, 1961).