

## SUMMARY OF INFORMAL ADVISORY ETHICS OPINIONS

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Reprinted from *Bench & Bar of Minnesota* (May/June 1983)

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

### 1. Representation Against Former Clients

Attorney sought to defend personal injury suit brought by former client. Attorney represented former client as a plaintiff six years earlier in another personal injury suit. Because of the similarity of issues, and because the client contends attorney will misuse past confidences, attorney should decline defense of personal injury action brought by former client.

A lawyer may not accept employment adverse to a former client if the subject matters are "substantially related." A twofold 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 contemplated representation is "substantially related" to his past representation of former client. Second, attorney must determine whether any relevant "confidences" or "secrets" were obtained in previous representation of former client. Employment which may require the attorney to disclose confidences or secrets of a client or former client should not be accepted.

See DR 5-105(A), (C); DR 4-101(A); EC 4-5; *National Texture Corp. v. Hymes*, 282 N.W. 2d 890 (Minn. 1979).

### 2. Withdrawal Due to Client's Failure to Honor Fee Agreement

A lawyer may withdraw or seek permission to withdraw when client "deliberately disregards an agreement or obligation as to expenses or fees." A lawyer must exercise his or her own professional judgment in determining whether the client's conduct constitutes a clear breach of the fee agreement.

However, the burden is upon the lawyer to establish fee or expense agreement by clear and convincing evidence. A lawyer who withdraws must heed dictates of DR 2-110(A)(2).

Client had agreed to pay attorney's fee for patent, trademark and intellectual property matters once he was "funded." Client did not receive funding as expected. Client thereafter refused to respond to attorney's demands for payment of fees. Attorney must exercise his own professional judgment in determining whether client's conduct constituted a clear breach of fee agreement warranting withdrawal.

See DR 2-110; EC 2-32; Lawyers' Professional Responsibility Board Opinion 4; ABA Informal Opinion

1461 (Nov. 11, 1980).

### **3. Withdrawal Due to Unresolvable Difficulties with Client**

Client refused to follow attorney's advice to accept defendant's settlement offer where legal fees incurred were already nearly equal to the amount in controversy. Client insisted upon jury trial.

Attorney must exercise his own professional judgment in determining whether client's insistence upon jury trial justifies withdrawal request. Attorney must obtain tribunal's permission to withdraw if required by tribunal's rules.

A lawyer may withdraw or seek permission to withdraw when his or her client's conduct "renders it unreasonably difficult for the lawyer to carry out his employment effectively." Burden is on lawyer to determine whether circumstances justify withdrawal before pending matters are concluded. A lawyer who withdraws is required to take reasonable steps to avoid foreseeable prejudice to his or her client's rights.

*See* DR 2-110; EC 2-32; ABA Informal Opinion 1461 (November 11, 1980).

### **4. Confidences and Secrets**

General rule is that attorney-client privilege attaches to communications by a client or prospective client where the client requests legal advice. Information protected by attorney-client privilege should not be disclosed without client's consent. A lawyer is prohibited from using privileged information to the disadvantage of the client or for the advantage of the lawyer or of a third person. A lawyer should not accept employment which may require disclosure of privileged information.

Prospective client, B, sought legal advice from attorney concerning a matter adverse to attorney's present client, A. Before attorney recognized B as party adverse to A, B disclosed confidences and secrets. Necessary threshold met to bring disciplinary rules into play with B to be treated as client. Attorney may not disclose B's confidences and secrets to A. Attorney should decline to represent A in the matter.

*See* DR 4-101; DR 5-105(A), (B); New York State Bar Ass'n. Opinion 525 (November 14, 1980).

### **5. Office Sharing**

Attorneys contemplates sharing office space where office will have one door, one receptionist and one waiting area.

Attorneys sharing office space must make every reasonable effort to avoid creating any impression that a partnership exists. The use of any firm name without the existence of a partnership of professional corporation is improper. Also, office procedures should insure that client confidences are protected and conflicts of interests are avoided.

*See* DR 2-102; DR 4-101; DR 5-101(A); EC 2-13; ABA Informal Opinion 1486 (February 2, 1982); Hoover, "The Name 'Law Firm' Must Mean Just That," *Bench & Bar*, Feb. 1981.

### **6. Homestead Liens**

Attorney sought to file and potentially foreclose lien against client where attorney had successfully defended homestead against IRS seizure. Circumstances do not warrant exception to Director's position

outlined in *Bench & Bar*.

Attempts to foreclose attorneys' liens against homestead property are tantamount to advancement of unwarranted claims in violation DR 7-102. Lawyer may be subject to discipline for merely filing notice of lien if filing is coercive either in itself or in relation to all relevant facts and circumstances.

*See* DR 5-103(A)(1); DR 7-102; *Northwestern Nat'l Bank of S. St. Paul v. Kroll*, 306 N.W.2d 104 (Minn. 1981); Minn. Stat. § 510.07 (1982) Hoover, "Attorneys Liens on Homesteads," *Bench & Bar*, Nov. 1982.

## **7. Attorney as a Witness**

After undertaking representation, attorney learned a lawyer in his firm would be called as a witness. Lawyer's testimony concerned the drafting of documents and negotiations of a sale related to the suit. Attorney should exercise his own professional judgment in determining whether withdrawal would work undue hardship on client under DR 5-102(A) and DR 5-101(B)(4).

As a general rule a lawyer should not accept or continue representation when it is obvious the lawyer or a lawyer in his or her firm may be called as a witness. Exceptional circumstances do arise, however, when the disadvantages of having the lawyer testify as a witness are clearly outweighed by the hardship to the client in retaining substitute counsel.

In determining whether continued representation is justified, the lawyer should look to the personal or financial sacrifice of the client, the materiality of the lawyer's testimony and the continued effectiveness of the lawyer as an unreasonable hardship upon the client before the lawyer continues as counsel. All doubts should be resolved in favor of the lawyer testifying and against continuing as counsel.

*See* DR 5-101(B); DR 5-102; EC 5-10; ABA Formal Opinion 339 (January 31, 1975).