

Nebraska Ethics Advisory Opinion for Lawyers  
No. 79-2

AN ATTORNEY OR HIS FIRM MAY NOT ACCEPT LITIGATION AGAINST A PAST CLIENT IF SUCH REQUIRES THAT THE ATTORNEY CONTEST THE SAME ISSUE FOR WHICH HE PREVIOUSLY WAS AN ADVOCATE IN THE PRIOR LITIGATION.

FACTS

Lawyer A represented the wife in a divorce action for a period of time, in which one of the questions to be decided was child custody. The wife subsequently discharged Lawyer A, who then became a County Judge. Upon retiring from the County Judgeship, Lawyer A associated himself with Lawyer B, who had consistently represented the husband in the divorce action. The divorce action had previously been appealed to the Nebraska Supreme Court and the husband has consistently been granted the custody of the children. The wife has now instituted new proceedings to obtain custody of the children and the question is whether Lawyer B, now associated with Lawyer A, can represent the husband in these new proceedings.

DISCUSSION

Essentially the question deals with Canons 4 and 5 of the Code of Professional Responsibility. Canon 4 deals with the preservation of the confidences and secrets of a client, while Canon 5 requires that a lawyer exercise independent judgment on behalf of a client, primarily concerning conflicts of interest. Since the wife is not presently a client of Lawyers A or B, the committee is of the opinion that Canon 4, dealing with the preservation of confidences of a client, is the primary Canon to be considered.

An argument can be made that Canon 4 prohibits the disclosure of confidential information where it might be material. See, e.g., ABA Informal Ethics Opinion C493.

It may be argued that any information received by Lawyer A in the original child custody proceedings is no longer material or relevant, by reason of the nature of the Nebraska divorce statutes, which require that a court's decree may only be modified upon a showing of a change in circumstances. Since the original court decree was entered on the basis of the facts which Lawyer A may have obtained originally, new facts would be necessary in order to justify a change in the original order. Therefore, any such facts learned by Lawyer A in confidence from the wife would no longer be material.

However, it would appear that the preservation of confidences and the need to avoid any appearance of impropriety dictate a different conclusion. The case presented is a close one, as was true in the facts presented under ABA Informal Opinion No. 891, in which the committee ultimately determined that the lawyer could accept the new employment if he obtained the consent of both the former client and the new client. In this particular case, we believe the same is true. As stated in Opinion No. 891, it is important that the lawyer carefully consider whether it is wise for him to take a case against a former client:

"While it may not be a violation of the Canons, under the circumstances to take a case against a past client, it is certainly a situation which in many instances ought to be avoided and therefore the lawyer should be especially careful. For instance, he should consider whether or not his knowledge of his former client's affairs could prejudice that client in the present litigation."

This point is shown in Informal Opinion No. 885 of the American Bar Association Standing Committee on Professional Ethics:

"The thrust of the foregoing authorities is, a lawyer should not accept litigation against a former client, under any circumstances if such would result in conflict of interest or disclosures of confidences of the former

client.

"Moreover, the lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a conflict of interest or a possible violation of confidence, even though this may not be true in fact."

This latter point is also evidenced by Canon 9 of the Code of Professional Responsibility, which states that a lawyer should avoid even the appearance of professional impropriety.

Formal Opinion No. 33 of the ABA Committee on Professional Ethics specifically requires that an attorney shall not accept litigation against a past client if the new litigation requires that the attorney contest the same issue for which he previously was an advocate in the prior litigation. It is clear in the facts presented that the same issue that was litigated by Lawyer A on behalf of the wife in the original proceedings is now being litigated once again, with the reservation that the new litigation would have to be tried on a basis of a change in circumstances.

The fact that Lawyer A is not actually handling the new litigation on behalf of the husband does not make a difference because Lawyer B, as a partner of Lawyer A, is prohibited from accepting such litigation. As stated in Formal Opinion 33, a partner of such attorney may not accept such litigation even though he was not a partner at the time of the prior litigation.

Because the question is a close one, the committee is of the opinion that Lawyer A's firm may not represent the husband in the new child custody litigation. However, pursuant to Informal Opinion No. 891, such representation is proper if Lawyer A's prior representation of the wife is fully disclosed, both to the present client--the husband--and to the wife and the express consent of both secured.

Perhaps the essence of the rule is best stated in Henry

Drinker's Legal Ethics, in which he quotes from Justice Story and Judge Morrow:

"When a client employs an attorney, he has the right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgments or endanger his fidelity."

"The test of inconsistency is not whether the attorney has ever appeared for the party against who he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection."

Drinker at 105.

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