



Committee on Professional Ethics

Opinion #310 - 11/16/73 (40-73)

Topic: Encroaching on professional employment of other lawyers; accepting employment to review work of another lawyer.

Digest: Lawyer may properly accept employment to review work of another lawyer, without advising such lawyer that he has been so retained.

Code: Canon 6; EC 2-20; DR 6-101(A)

QUESTION

May a lawyer accept employment to review work of another lawyer and make such a review, without advising such lawyer that he has been retained for this purpose?

OPINION

A client who has already retained a lawyer to handle a particular matter, has the right to replace his retained counsel, or to discuss a possible retainer with another lawyer, without his first lawyer's consent. See, N.Y. State 305 (1973). That opinion held that "there is no reason why the lawyer first employed should be informed that his client is discussing the possibility of employing another lawyer, unless and until the client actually makes an employment offer to new counsel to have him replace the lawyer originally retained, or to serve as co-counsel with him". For similar reasons, we conclude that subject to certain limitations set forth below, a lawyer may accept employment to review the work of another lawyer and make such a review without advising such lawyer that he has been so retained.

Occasions arise when a client wishes to retain a second lawyer solely to evaluate work done for him by a lawyer previously retained, and to do so without informing the lawyer already employed. While the new lawyer's position is a delicate one in which his motives and integrity may well be suspect if he should subsequently replace the other lawyer, such a retainer is not forbidden by the Code. We assume, of course, that the lawyer has sufficient information respecting the work being evaluated to be able to give a good faith opinion which will be completely fair to the other lawyer. Canon 6 and DR 6-101(A). He should also advise his client at the time of the retainer that it may not be possible to give a valid opinion without communicating with the other lawyer for the purpose of obtaining additional information. At the same time he should assure his client that no such communication will be had without the client's consent.

EC 2-30 provides, in pertinent part:

"If a lawyer knows a client has previously obtained counsel,

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he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment."

This provision would prevent a new lawyer from accepting employment as co-counsel without the first lawyer's approval, or from replacing the first lawyer unless that lawyer has withdrawn or the client has terminated his employment and so notified him. N.Y.State 305 (1973). To interpret a retainer to evaluate or review another lawyer's work as involving "employment in the matter", would be too narrowly restrictive of the client's right to consult any lawyer of his choice. To require notification might needlessly endanger an existing lawyer-client relationship which the lawyer first retained might be unwilling to continue if he knew that his client was questioning his performance, not withstanding his client's desire to continue the services. Thus we decline to follow N.Y. County 204 (1922) decided under the former Canons. The public interest must be paramount to professional courtesy.

We, however, caution a lawyer who accepts a retainer of this nature to seek his client's permission to communicate with the lawyer first retained before rendering an adverse evaluation, so as to be sure that it is given with adequate understanding of all relevant facts. He must also take care to act with the utmost good faith and care to avoid any appearance of improperly disparaging the work of the other lawyers. Drinker, Legal Ethics 191 (1953).
