



Committee on Professional Ethics

Opinion #410 - 8/28/75 (70-75)

Topic: Client's confidences.

Digest: Partnership may not continue to represent clients in personal injury action against former client of one partner, involving the same occurrence, even if the previous litigation has terminated and the parties consent.

Code: Canon 5, 9
EC 4-5, 4-6, 5-14, 9-2
DR 4-101, 5-105(D)

QUESTION

May a partnership continue to represent passengers involved in a personal injury action against an insured driver when one of the partners, prior to the establishment of the partnership, represented the driver in his claim arising out of the same accident, even though the driver's claim was settled prior to the formation of the partnership and both parties consent?

OPINION

Where a lawyer, who represents passengers in a personal injury action against an insured defendant, thereafter forms a partnership with another lawyer who previously represented the defendant driver in a matter arising out of the same accident, the partner may not continue to represent the plaintiffs.

A lawyer is required to preserve the confidences and secrets of a client, even after the termination of his employment. DR 4-101; EC 4-5; EC 4-6. Inherent in these ethical considerations is that subsequent acceptances of retainers which might adversely affect a former client, with regard to matters in which the attorney counselled the client, should be avoided. N.Y. State 25 (1966); N.Y. State 303 (1973).

In the instant inquiry it is stated that no confidences could be revealed as the driver suffered amnesia. Nonetheless, confidential information, which might adversely affect the former client, may have been obtained from other sources during the course of the previous representation. N.Y. County 446 (1956).

Public confidence may be undermined if it appears that a lawyer could have gained useful information in the course of representing a prior client or in the appearance of a conflict of interest, even though this may not be the fact. Canon 9; EC 9-2; N.Y. State 161 (1970); N.Y. State 395 (1975).

OVER---

Reference is made to ABA Inf. 885 (1965) which states:

"Disclosure of confidential communications is not the sole test of considering the propriety of acceptance of litigation against a former client. Despite the fact that the other former client acquiesced, and there were apparently no confidences, the possibility that other matters might develop has been held to be sufficient to require the attorney to decline the employment."

Representation against the former client in a related matter may be permitted only upon consent of the parties after full disclosure. DR 4-101(C)(1). In the instant inquiry, plaintiffs and the former client have consented. However, the defendant's insurance carrier, which has a contractual obligation to indemnify the defendant, has objected to this representation. Moreover, there are instances where consent of the parties may not be sufficient to remedy serious conflicts of loyalty. N.Y. State 74 (1968); Drinker, Legal Ethics 120 (1953).

The present situation raises a possibility of collusion and an impression of impropriety. See N.Y. State 74 (1968); cf., Rotante v. Lawrence Hospital, 46 A.D. 2d 199, 361 N.Y.S. 2d 372 (1st Dept. 1974) and Edelman v. Levy, 42 A.D. 2d 758, 346 N.Y.S. 2d 347 (2d Dept. 1973). This question was previously considered under former Canon 6 in N.Y. City 823 (1957), where in a similar set of facts, it was stated:

"Although it is true that Canon 6 contains an exception in the event that express consent is given by all parties concerned after full disclosure of the facts, the Committee has never construed this exception as absolute. Further, if A were to represent Y, a suspicion of collusion between the private parties to the civil action against the insurer might arise."

The lawyer for the plaintiffs has an obligation to fully pursue the interests of plaintiffs. Canon 5. A situation could arise where differing loyalties could collide. EC 5-14. If a judgment in excess of the policy were awarded, the attorney may be required to proceed against the former client. N.Y. State 205 (1971). Representation should be avoided even with the consent of parties, where the situation poses the possibility of divided loyalties or that conflicts not presently envisioned are likely to arise. N.Y. City 603 (1942); N.Y. State 74 (1968); Matter of Kelly, 23 N.Y. 2d 368 (1968). See also, N.Y. State 161 (1970) where it was stated that consent of the parties not to seek any recovery in excess of the insurance policy did not cure the conflict or appearance of impropriety posed by Canons 4 and 9.

If a lawyer is precluded from participating in litigation because

of a conflict of interest, his partners and associates are similarly precluded. DR 5-105(D); N.Y. State 274 (1972); ABA Inf. 437 (1961). It is inconsequential that the partnership was formed subsequent to the acceptance of the conflicting retainers.

This opinion is limited to the facts cited herein, and does not apply to all instances where potentially conflicting situations might arise. Each such case must be judged on its merit and consideration of the facts presented. Cf. EC 5-17.
