

Nebraska Ethics Advisory Opinion for Lawyers
No. 73-5

A LAWYER WHO HAD BEEN EMPLOYED BY CERTAIN INDIVIDUALS TO INCORPORATE THEIR COMPANY, AND WHO HAD CONTINUED TO REPRESENT THEM AND THE CORPORATION PRIOR TO THE INVOLUNTARY DISSOLUTION OF THE CORPORATION SHOULD NOT ACCEPT EMPLOYMENT ON BEHALF OF HIS FIRM FROM A BANK TO SUE THE CORPORATION AND THE INDIVIDUALS ON A NOTE GIVEN BY THE CORPORATION AND GUARANTEED BY THE INDIVIDUALS.

CODE PROVISIONS INTERPRETED:

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to

prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

FACTUAL SITUATION

The inquiring lawyer had been retained by a father and son to incorporate their business and had continued to represent the corporation and the individuals in matters involving the interests of the individuals in the corporation. The corporation was later dissolved for non-payment of the corporate occupation tax, although the individuals continued to do business in the name of the corporation for more than a year after it was dissolved. The inquirer had also, during this time, advised the father on estate planning problems. The inquirer states that he was not aware of the fact that the corporation had been "dissolved by the State."

The inquirer and his firm have now accepted employment from a bank to sue and recover judgment against the corporation on a note given by it to the bank and against the individuals who guaranteed payment of the note. The inquirer states that neither he nor his firm had any knowledge of the transaction upon which the suit is based until retained by the bank.

QUESTION

The question is whether or not the inquirer and his firm should withdraw as attorneys for the bank in the pending suit.

DISCUSSION

The inquirer seems to feel that since neither he nor his

firm was aware of the fact that the corporation had borrowed money from the bank and that the individuals had guaranteed the payment of the debt, they could not be in possession of any secrets or confidences of the former clients that would have to be preserved in the pending litigation. .

Drinker, in Legal Ethics, has this to say (p. 105):

"The temptation to get into an interesting, important, or profitable case is always alluring, and the lawyer is very prone to rationalize himself into the belief that he will be able to steer safely between Scylla and Charybdis, when sober reflection or a discussion with his partners would bid him pause. Where there is any serious doubt, it should be resolved by declining the second retainer."

Morrow, J., in *In Re Boone* 83 F. 944, 952-53 (1897), said:

"The test of inconsistency is not whether the attorney has ever appeared for the party against whom 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."

Canon 37 of the old Canons of Professional Ethics provided:

"Confidences of a Client. It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees: and

neither of them should accept employment which involves or may involve the disclosure or use of these confidences.....A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former client or to his new client."

Other authorities might be invoked to sustain the position that the facts in the instant case do, indeed, present a situation involving the preservation of the confidences of a client.

CONCLUSION

The Committee concludes that the inquirer and his firm should withdraw from the representation of the bank against the former clients.

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