

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-148
Issued: July 1976

Question: May a lawyer, who has been employed by a bank in numerous matters over a long period of years but is not paid a retainer by the bank, accept employment adverse to the bank in litigation unrelated to any matter in which he was formerly employed by the bank?

Answer: Yes.

References: ABA Canons of Professional Ethics 6, 37; DR 4-101(B), 5-105; EC 2-3; *In re Advisory Opinion*, 526 S.W.2d 306 (Ky. 1974); *In re Advisory Opinion*, 361 S.W.2d 111 (Ky. 1962); *Uniweld Products v. Union Carbide*, 385 F.2d 992 (5th Cir 1967); *Pioche Mines Consolidated v. Dolman*, 333 F.2d 257 (9th Cir 1964); *Gajewski v. United States*, 321 F.2d 261 (8th Cir 1963); *Cannon v. U.S. Accoustics*, 398 F.Supp. 209 (N.D. Illinois 1975); *Shelley v. Maccabees*, 184 F.Supp. 797 (E.D. New York 1960); *MacPherson-Sanford Trust*, 52 T C 580 (1969); *Redd v. Shell Oil Co*, 518 F.2d 311 (10th Cir 1975)

OPINION

The litigation in question is an action against a personal representative in which plaintiff alleges a partnership with the decedent and claims an interest in assets used in the business of the alleged partnership. The executor denies the existence of any partnership. While the litigation is pending, the executor dies. The lawyer in question represents the plaintiff. If the bank is appointed administrator and substituted for the executor in the litigation may the lawyer continue to represent the plaintiff?

Old ABA Canon of Ethics 6 defined and denounced conflicts of interest as follows:

...[A] lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

The protection of clients' confidences in general was the subject of old Canon 37.

Thus the old Canons dealt in one rule with conflict arising in concurrent representation of two or more clients and conflict arising from former representation of a client. The Code of Professional Responsibility deals with these matters separately. Conflict arising in concurrent representation of two or more clients is the subject of DR

5-105. Conflict arising by reason of former representation of a client is now dealt with by DR 4-101(B) as one aspect of protection of clients' confidences in general. Unlike old Canon 6, DR 5-105 does not define conflict of interest and DR 4-101(B) does not specify representation adverse to a former client as a situation in which abuse of confidences may occur. However, after studying the Ethical Considerations and notes accompanying Canons 4 and 5 in the Code of Professional Responsibility, we have concluded that the Code was not intended to change the definitions and principles of old Canon 6 but rather to modify them and the opinions rendered thereunder in another form. Accordingly, we look to old Canon 6 for guidance in applying DR 5-105 and 4-101(B), as does the Supreme Court of Kentucky, see In re Advisory Opinion, 526 S.W.2d 306 (Ky. 1974).

When a client employs a lawyer to handle a particular matter, the lawyer has a duty to see that his client understands the proper scope of the employment; and if he discovers that his client needs advice and services in other, unrelated matters, he may have a duty to call that fact to this client's attention, EC 2-3. Nonetheless, in the absence of a continuing retainer, a private practitioner's duties to his client are limited to those matters his client has employed him to handle. Representation of a client in one matter does not in itself create any lawyer-client relationship with respect to other, unrelated matters, In re Advisory Opinion, 361 SW(2d) 111 (Ky 1962), reversing Opinion KBA E-5 (1962).

It is thus apparent that a private practitioner has no conflict of interest with respect to an adverse party unless it is conflict based on concurrent or former representation of the now-adverse party in a matter substantially related to the present adverse employment.

Former representation of a client does not preclude subsequent representation adverse to him in a matter unrelated to the former representation, Uniweld Products v Union Carbide, 385 F(2d) 992 (5th Cir 1967); Pioche Mines Consolidated v Dolman, 333 F.2d 257 (9th Cir 1964), Gajewski v. United States, 321 F.2d 261 (8th Cir .1963), Cannon v. US Accoustics, 398 FSupp 209 (N.D. Illinois 1975); Shelley v. Maccabees, 184 F.Supp. 797 (E.D. New York 1960); MacPherson-Sanford Trust, 52 T C 580 (1969). See also Redd v. Shell Oil Co, 518 F.2d 311 (10th Cir 1975).

In some of the cases cited, the lawyer had been previously employed only once, or a few times. We do not understand why the frequency of prior employment, or the length of time over which it has recurred, should make any difference in the application of the rule stated in the preceding paragraph. If a client wants to assure himself that a lawyer will not accept employment adverse to him he can obtain the lawyer's explicit agreement to that effect ordinarily, though not necessarily, by paying him a continuing retainer fee.

Conceivably, there are circumstances in which frequent prior employment, recurring over a period of years, might give rise to a justifiable expectation by a client that the lawyer will not accept employment adverse to him. No such circumstances exist in this case. Banks commonly employ different law firms for different purposes.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides: “Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act.”