

Committee Opinion
February 2, 1988

LEGAL ETHICS OPINION 1032

REAL ESTATE – CONFLICT OF
INTEREST – REPRESENTING
HUSBAND IN A DIVORCE ACTION
AFTER PREVIOUSLY REPRESENTING
BOTH IN THE PURCHASE OF THEIR
HOME.

You inquire as to the propriety of the representation of the husband in a divorce action in which you have known the husband and wife for nine years, and have previously represented them both in the purchase of their home four years ago and the refinance of that home two years ago. You further indicate that you were unaware of any marital difficulties between the two until one year ago and that the wife has indicated to you that you may be called as a witness in the action to testify regarding the execution of the second deed of trust on the couple's house.

Your inquiry is controlled by DR:5-105(D) and DR:5-102(B). DR:5-105(D) provides that, "A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure." Clearly, this question turns on whether your previous representation of the wife is the "same or substantially related" to the couple's divorce. In LE Op. 774, the Committee opined that it is not improper of an attorney to represent a husband in the preparation of a property settlement agreement for use in a divorce proceeding when the attorney previously represented both husband and wife in a real estate transaction, providing, "That the attorney did not obtain confidences or secrets during the course of the previous representation which might be used to the advantage or disadvantage of husband or wife in a divorce proceeding." Based on the above, and based on the fact that you claim that you have no special knowledge which is not of public record about the couple's real estate transaction, the Committee opines that your representation of the husband does not violate DR:5-105(D).

Disciplinary Rule 5-102(B) provides that if a lawyer learns or it is obvious that he may be called as a witness by an adverse party, that, "He may continue the representation until it is apparent that his testimony is or may be prejudicial to his client." Therefore, based on the facts of your inquiry, the Committee opines that you are under no ethical obligation to withdraw from your client's case until, in the words of DR:5-102(B), you learn or it is obvious that you will be called as a witness by your client's wife and that your testimony is or may be prejudicial to your client. (See also LE Op. 866)

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