

Committee Opinion
February 17, 1988

LEGAL ETHICS OPINION 1039

CONFLICT OF INTEREST –
REPRESENTING CLIENT IN SAME
MANNER AS FORMER CLIENT FEES –
INTEREST ON PAST DUE ACCOUNTS.

Your letter raises two separate questions. First, you inquire whether it is improper for you to represent the plaintiff in a personal injury action when, several months prior to you being contacted by the plaintiff, the defendant in the action consulted with your law partner regarding the possibility of representation. You further indicate that your firm was never retained to represent the defendant, that no fees were charged for the defendant's consultation, and that your partner remembers nothing regarding the substance of the consultation.

Your inquiry is controlled by DR:5-105(D), which 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.

Thus, because it is quite clear from the facts that you have given that the proposed representation would involve the same matter and that the plaintiff and defendant will have adverse interests, the key question is whether, for purposes of DR:5-105(D), your partner "represented" the defendant.

On point with this question is LE Op. 318, which provides that,

It is improper for an attorney to accept a case where a member of the firm had previously consulted with the opposing party concerning the possibility of representation unless the opposing party consents to such representation.

Additionally, the Committee has previously opined that the payment of fees is not a prerequisite to the initiation of an attorney-client relationship. [See, LE Op. 221 (Gratuitous Discussion of a Divorce Action with Husband), LE Op. 452 (Gratuitous Discussion at a Social Event); Rules of Court Part 6, § I: Definition of the Practice of Law].

Therefore, the Committee opines that based on the fact situation which you have presented, representation of the plaintiff without disclosure and consent of the defendant would be improper.

Your second inquiry deals with the logic behind prohibiting lawyers from charging interest on past due accounts. Extensively discussed in LE Op. 186B, the Council based

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this opinion on the rationale that the imposition of an automatic finance charge ignores the personal element of the attorney-client relationship inherent in Ethical Consideration 2-20's [EC:2-20] admonition that, "the determination of a proper fee requires consideration of the interests of both client and lawyer."

It is important to note that LE Op. 186B does not absolutely prohibit the use of finance charges. Such charges are allowed if the client has agreed to the amount of the attorney's fee, is able to pay, but desires payment be deferred for his convenience. This arrangement is acceptable provided that the client agrees to the terms, retains the right to prepayment without penalty, and is not assessed a finance charge on fees prior to the time that the fees are earned by the attorney.

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