

LEGAL ETHICS OPINION 1459

CONFLICT OF INTEREST - FORMER
CLIENT: ATTORNEY JOINING FIRM
WHICH REPRESENTS CLIENTS
ADVERSE TO FORMER FIRM AND
ASSERTING FINANCIAL INTEREST IN
FEES RECEIVED BY FORMER FIRM IN
CASES OTHER THAN THOSE
DEFENDED BY NEW FIRM.

You state that Law Firm A has represented plaintiffs in litigation. A partner of Firm A who worked on such litigation has withdrawn from Firm A and joined Firm B which represents the defendants in some of the cases initiated by Firm A. Firm B has agreed to exclude the withdrawing partner from the pending litigation by use of a Chinese Wall. The withdrawing partner, however, continues to assert a financial interest in fees which may be received by Firm A in certain cases other than those defended by Firm B but which involve the same product.

You have requested that the Committee opine as to the several issues raised by the above-described factual situation.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:2-105(D), which enumerates the three requirements which must be met in order to properly make a division of fees between lawyers who are not in the same firm; DR:5-101(A), which states that a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances; 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 full disclosure; and DR:5-105(E) which disqualifies, vicariously, from such employment the firm of any lawyer who himself is disqualified under DR:5-105.

With this background, the committee responds to your inquiries as follows:

1. You have requested the Committee's opinion as to whether the withdrawing partner's assertion of a financial interest in plaintiffs' litigation involving the same issues as litigation defended by Firm B precludes Firm B from continuing to represent defendants absent the consent of all parties after full disclosure.

The Committee opines that as to fees owing from cases completed before the withdrawing partner joined Firm B, the assertion of a financial interest by the withdrawing partner would not constitute a personal interest as articulated in DR:5-101(A). Thus, Firm B would not be precluded from continuing to represent defendants as a result of the attorney's receipt of those fees provided that Firm B's clients consent after full disclosure.

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As to fees owing from cases completed by Firm A after the withdrawing partner joined Firm B, the Committee believes that DR:2-105(D) and DR: 5-101(A) are controlling. The Committee is of the opinion that it would be improper for the withdrawing partner to assert a financial interest in such cases unless: (1) the lawyer can qualify under DR:2-105(D) as, and the clients (of Firm A) consent to the employment of, additional counsel; (2) both Firm A and the withdrawing partner are in a position to, and expressly assume responsibility to the clients; and (3) the terms of the divisions of the fee are disclosed to the clients and the clients consent thereto. The Committee believes, as a practical matter, that the withdrawing partner is precluded from expressly assuming responsibility to the clients because of his new affiliation with Firm B. Thus, the Committee believes that it would be improper, and violative of DR:2-105(D), for the withdrawing partner to assert a financial interest in fees for legal services provided by Firm A on cases subsequent to his departure from Firm A. Therefore, the Committee opines that Firm B is also precluded from representing defendants in those cases which continue following the attorney's move from Firm A to Firm B. See also LE Op. 1332.

2. As to what constitutes "full disclosure," the committee directs your attention to prior LEO Nos. 187 [LE Op. 187], 1097 [LE Op. 1097], 1198 [LE Op. 1198], and 1254 [LE Op. 1254] which conclude that disclosure is adequate if it is such that the attorney's client is able to make an informed decision as to whether or not to give consent. The Committee also opined that all doubts regarding the sufficiency of the disclosure must be resolved in favor of the client.

3. With regard to your question as to the efficacy of a "Chinese Wall," the Committee believes that the clear language of DR:5-105(D), which requires the client's consent, would dictate that such device would not be effective here. The facts presented indicate that the withdrawing partner worked on continuing litigation on the other side of cases which continue in Firm B. Under these circumstances, the Committee opines that absent the consent of the withdrawing partner's former client (various defendants in the litigation) after full disclosure, it would be improper for the attorney to personally represent plaintiffs and similarly improper for his new firm to continue any such representation. Such conduct would be improper whether Firm A currently represented parties adverse to those represented by Firm B or was subsequently contacted about a claim against a manufacturer which had been previously represented by the attorney who has moved from Firm A to Firm B. The Committee opines that the only cure to such impropriety is the former clients' consent, as described by DR:5- 105(D), and that no cure would be affected simply by a unilateral agreement within Firm B to exclude the attorney from the pending litigation by use of a "Chinese Wall." See LE Op. 1428.

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Legal Ethics Committee Notes. – Rule 1.5(e) does not require that a lawyer sharing in fees also share responsibility.