

DELAWARE STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1981-5

The Committee has been asked by a Delaware law firm (the "Firm") for an opinion as to whether the representation by the Firm of certain interests in opposition to the interest of others whom it has represented in the past in unrelated matters constitutes a conflict of interest under the Delaware Lawyers' Code of Professional Responsibility.

The Firm has been retained by an individual (the "Client") who holds a life interest in one-half of the stock of a closely held corporation (the "Corporation") and holds by reason of the same bequest a life estate in a half interest of a partnership (the "Partnership"). The Client has employed the Firm to begin multiple actions at law and equity against the Corporation, the Partnership and certain individuals (the "Individuals") both on the Client's behalf and on behalf of an estate from which the Client received his interest.

Members of the Firm have had several meetings with members of two other law firms employed by the Corporation and the Individuals who coincidentally are now related to the Client by marriage. The Individuals purportedly representing not only themselves but the corporation as well,

have presented written notice to the Firm that representation by the Firm of the Client in this matter will constitute a conflict of interest. They claim that the Firm has represented the Individual defendants personally for approximately 40 years both in personal and business matters. The Individuals speaking on behalf of the Corporation assert that the Firm is retained counsel for the Corporation and have insisted that the Firm cease all further activities on behalf of the Client against the Corporation.

Prior to filing the request for an opinion, the Firm conducted a search of its own files to see if an actual conflict exists. The search has led the Firm to deny any past representation in any matter related to the proposed litigation as well as any representation of the Individuals in a personal capacity. They acknowledge, however, that in the past seven years, they prepared a partnership agreement which was apparently never executed, represented the Corporation periodically in collection matters and, several years ago, represented the Corporation in resolving a dispute which had arisen in the sale of certain real estate.

#### OPINION

If facts, not generally and publicly available were accessible to the Firm in their representation of

the Corporation or the Partnership and such facts are or may become relevant to the proposed litigation, the Firm may not ethically represent the Client in his proposed litigation against the Corporation or the Individuals. If such facts are not reasonably anticipated to be relevant, and if the attorney/client relationship between the Firm, the Corporation and the Partnership is now terminated, such representation is not unethical.

#### DISCUSSION

This inquiry is similar to the inquiry responded to in this Committee's Opinion 1979-1, a photocopy of which is attached. Opinion 1979-1 left unanswered the question as to whether a lawyer may never represent an interest adverse to a former client. On this point, American Jurisprudence summarizes the law as follows:

"It is said that the test of whether the attorney's employment is inconsistent with his duty to a former client is whether acceptance of the new retainer will require him, in forwarding the interest of the new client, to do anything that will injuriously affect a former client in any matter in which he formerly represented him, and also whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship."

7 Am.Jur.2d 238, § 186 (1980); Annot., 52 A.L.R.2d 1262

§ 8.

Since it is clear from the request that the Firm has never been consulted on the present question, the proper inquiry here centers on the termination of previous attorney/client relationships and whether or not any lawyer in the Firm had access to facts not publicly available because of the previous representation of the Individuals, the Partnership or the Corporation which could be used to their disadvantage in proposed litigation.

Dated: June 5, 1981