

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 1982-4

The Committee has been asked by a member of the Delaware Bar for its opinion as to whether a lawyer who represented a creditor in a debt collection action can subsequently defend the debtor against attempts to collect the debt by the creditor's assignee.

The lawyer represented a bank (the "Bank") in the collection of two accounts owed by a debtor (the "Debtor"). The Bank had loaned the Debtor money, the repayment of which was secured by a security interest in the Debtor's business. Eventually, the Debtor went into default, and the Bank retained the services of the inquiring lawyer to collect the delinquent accounts. The lawyer made several attempts to arrange for the repayment of the debt, but his efforts were to no avail.* At this point, his involvement in the case on behalf of the Bank terminated.

Subsequently, the Bank assigned the Debtor's accounts to the Federal Deposit Insurance Corporation ("FDIC"). The information available does not indicate whether this assignment was with or without recourse against the Bank. FDIC then brought an action on these accounts and obtained a judgment against the Debtor. Recently, the FDIC has begun efforts to execute on these judgments. The Debtor has

* It appears that the Debtor had sold his business to a third party who gave the Debtor a note. The Debtor retained ownership of the business premises which the third party buyer occupied under a lease agreement. Although it is not clear, it appears that the third party buyer did not assume the Debtor's obligation to the Bank. As a result of the lawyer's collection efforts on behalf of the Bank, an agreement was reached in which the Debtor assigned to the Bank the notes given by the third party purchaser and the right to collect rent under the lease agreement. The Bank and the Debtor then joined as plaintiffs in an action against the third party debtor to collect these obligations. These collection efforts did not satisfy the Debtor's obligation to the Bank.

approached the lawyer and asked him to defend the Debtor's interests in opposition to the FDIC.

The lawyer has never represented FDIC, and he did not participate in obtaining the judgments which are the subject matter of the present execution proceedings. At the time when the Bank assigned this account to FDIC, the lawyer sent all files in his office relating to this matter to FDIC's legal counsel. He presently has in his possession no records or files which relate to his former representation of the Bank.

ISSUE

The issue presented is whether an attorney, having once represented a bank in a debt collection matter, can then defend the debtor in a proceeding by the bank's assignee to execute on a judgment based on the debtor's obligation to the bank.

OPINION

In the absence of his former client's consent, the attorney's obligation under Canon 4 to preserve his former client's secrets and confidences prevents him from accepting the subsequent representation. Furthermore, his Canon 4 obligation to his former client would interfere with his obligation under Canon 7 to be a zealous advocate on behalf of his new client.

DISCUSSION

The resolution of this inquiry is controlled by Canons 4 and 7 of the Delaware Lawyer's Code of Professional Responsibility.* Canon 4 states that "a lawyer

* Rule 61 of the Supreme Court of the State of Delaware provides:

The Canons and Disciplinary Rules of the Delaware Lawyer's Code of Professional Responsibility, promulgated by Order of this Court, dated March 22, 1971, together with all amendments thereto and interpretive guidelines thereafter adopted by this Court, shall govern the conduct of members of the Bar of this State.

should preserve the confidences and secrets of a client." DR4-101(B) provides, in part, that a lawyer shall not "use a confidence or secret of his client to the disadvantage of the client." Canon 7 establishes the lawyer's obligation to represent his client zealously within the bounds of the law.

The heart of the problem in this case is the need to ensure the preservation of cliental confidences and secrets. In Richardson v. Hamilton International Corporation, 469 F.2d 1382, 1384 (3rd Cir. 1972), the court stressed that "a client should not fear that confidences conveyed to his attorney in one action will return to haunt him in another one."

The inquiring lawyer has stressed that he has no present recollection of any confidential information gained in connection with his representation of the Bank, and that his files were delivered to FDIC's legal counsel. These facts do not, however, resolve the issue. In applying the standards imposed by Canon 4, the Court

need not, indeed cannot, inquire whether the lawyer did, in fact, receive confidential information during his previous employment which might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations which serve as the pillars of Canon 4 of the Code, with the client's ultimate and compelled response to an attorney's claim of nonaccess would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved.

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).

Analysis under Canon 4 focuses not on whether a lawyer actually has confidential information, but on whether "it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject matter of his subsequent representation." T.C. Theatres Corporation v. Warner Brothers Pictures, 113 F. Supp. 265, 269 (S.D. N.Y. 1953). Where a subsequent representation has a "substantial relationship" with the attorney's former representation

of that client, the courts have held that possession of confidential information will be presumed in order to preserve the spirit of Canon 4. Hull v. Celanese Corporation, 513 F.2d 568 (2nd Cir. 1975). C.f. Kramer v. Scientific Control Corp., 534 F.2d 1085, 1088 (3rd Cir. 1976); ABA Standing Committee on Professional Ethics, Information Opinion No. 885 (November 2, 1965). Thus, an attorney may not undertake a second representation where it is "so closely connected with the subject matter of the earlier representation that confidences might be involved." ABA Informal Opinion No. 1233 (August 24, 1972).

In the past, this Committee has held that an attorney is disqualified under Canon 4 where facts, not generally and publicly available, were accessible to him in his representation of a former client, and such facts are or may become relevant to the proposed representation. If, on the other hand, such facts would not be reasonably anticipated to be relevant, then Canon 4 would not prohibit the proposed representation. Delaware State Bar Association Committee on Professional Ethics, Opinion No. 1981-5; Opinion No. 1979-1.

In this case, it appears that there is a substantial relationship between the lawyer's former representation of the Bank and his present representation of the Debtor. Both involve the Debtor's obligations to the Bank. Although his former client is not, apparently, involved in the present action, and has not, apparently, objected to his representation of the Debtor, See, In Re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1975), the lawyer continues to have an obligation to maintain the confidentiality of information concerning his former client. Furthermore, DR4-101(B) is not limited to adversarial proceedings involving a former client. Its language is much broader, and prohibits a lawyer from using confidences or secrets "to the disadvantage"

of his former client. Thus, in the absence of informed consent by the former client, Canon 4 requires the lawyer to decline to accept the representation of the Debtor.

The lawyer's proposed representation of the Debtor also raises serious questions with respect to his obligation under Canon 7 zealously to defend the Debtor against the execution efforts of FDIC. Although the Committee is not fully conversant with all the facts and issues in the case, it would appear that the lawyer's defense of the Debtor would involve, in addition to possible relief under the bankruptcy laws, an attack on the validity of the judgments and the underlying obligations to the Bank. Pursuant to his obligation under Canon 7, the lawyer must be in a position zealously to press all of these issues. The concern here is that the lawyer's Canon 4 obligation to maintain the confidentiality of privileged information gained in connection with his representation of the Bank would prevent him from meeting his obligation under Canon 7 to use any and all available information to further the Debtor's cause. Although the lawyer has no present recollection of any confidential information, his memory may be refreshed by facts which arise in the context of the present proceedings.

For the reasons set forth above, the Committee concludes that the lawyer's obligation under Canon 4 to his former client and his obligation under Canon 7 to his present client require him to withdraw from his present representation of the Debtor, unless he obtains the informed consent of his former client including permission to reveal all cliental secrets and confidences which may be useful in defending the Debtor's cause.

Dated: March 25, 1982