

FORMAL OPINION NO. 35\*

The Ethics Committee has been requested to submit its opinion on the following matters:

"A law firm, composed of X, Y and Z, represents corporations A, B and C, three competing companies. A and B each seek a license in the town in question, and C already has such a license, and opposes the granting of any additional license.

"At the hearing before the State Commission to determine whether the community would be best served by the granting of none, one, two, or more licenses, X represented A corporation, and Y represented B corporation. C corporation represented that it wished no such license granted, and Z appeared in its behalf. It was not known how many, if any, licenses would be granted, and it was incumbent upon each corporation to present the case most favorable to its own position.

"X, Y and Z also cross-examined counsel for another and additional applicant for a license in the same community, D corporation. XYZ firm had previously represented D corporation prior to the hearing, but had withdrawn as counsel for this hearing.

"In a different portion of the same hearing Z represented A corporation as applicant for a license in another community. The hearing had been divided according to the community for which licenses were being sought. X and Y did not appear at this portion of the hearing.

"Do the acts of the members of the law firm constitute unethical conduct, and would full disclosure of the facts to the clients and the receipt of consent from each client change the answer?"

It is the opinion of the Committee that it was unprofessional for X, Y and Z to represent the three corporations at the hearing, even if full disclosure had been made and each client had consented thereto. Their conduct violated Canon 6(2), which provides:

"It is unprofessional to represent conflicting interests except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon a lawyer represents conflicting interests when, in behalf of one client it is his duty to contend for that which duty to another client requires him to oppose."

The canon expresses the rule that it is unethical for an attorney to represent both parties to a suit. The rule recognizes that an attorney cannot give undivided attention and loyalty to adverse parties. He cannot serve two conflicting masters. The prohibition applies to administrative as well as judicial proceedings. In fact, this canon establishes the extent and standard of his representation in his every professional capacity. The same standard demanded of an individual attorney applies as well to a firm of attorneys, and if one is precluded, the firm would be precluded as well.

The exception to the rule is applicable to few cases, and should seldom be used. The inherent evils of dual representation are ordinarily not eliminated by full disclosure to the client. We feel that "consent is not available where the public interest is involved." A.B.A. Opinions 16, 34, 77.

The legal profession is best served through avoidance of unfavorable public impressions created by representation of conflicting interests. The discreet lawyer would not allow himself to be placed in a position of representing conflicting interests, or of being subject to the charge of betraying professional confidence.

The propriety of a member of this firm of lawyers cross-examining counsel for D corporation depends upon the nature of their prior representation. If the past representations were connected in any manner with the application of D corporation for a license, this would be a violation of confidence and of Canon 6(3):

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Also, in this connection, Canon 37(1):

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer, or his employees, or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

It is our opinion that Z was within his rights in representing A corporation as applicant for a license in another community so long as the representation did not create conflicting interests or breach his confidence owed to other clients.

DATED this 17th day of July, 1962.

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\*See, DR 4-101, DR 5-105 and Canon 9, Idaho Code of Professional Responsibility; I.S.B. Opinion No. 93 (February 2, 1976).