

MINUTES

COMMITTEE: Ethics Committee

DATE: May 5, 2005

5. CHAPTER 6: WHETHER LAWYER CAN ACT ON COMMITTEE APPLICATION INVOLVING FORMER CLIENT

The Committee considered whether it is proper for a lawyer to act on an application to have a committee appointed for a former client. This issue may arise when a lawyer has acted for a client over a period of years and a new client, often a member of the former client's family, consults the lawyer to have a family member appointed as the former client's committee. The Committee recognized, however, that applications for committee membership can arise in a variety of circumstances. They will sometimes be contentious and can require a trial to determine the issues.

Majority view

A majority of the Committee were of the opinion that many applications to have a committee appointed are made with a view to assisting the former client in the management of his or her estate, or person, or both, and it was therefore not appropriate to analyze this issue under the usual conflict rules, since a lawyer acting in these circumstances cannot necessarily be said to be "acting against the interests of a former client." Nevertheless, the majority felt that there must be serious limitations on lawyers acting in circumstances where a real conflict with the former client may arise, and concluded that it is reasonable for a lawyer to act in such an application provided:

- The lawyer believes on reasonable grounds that the former client does not oppose the application and is incapable of contesting it or seeking legal advice concerning it.
- The former client had never, while a client, expressed any wish that the applicant not have any control over the client's affairs.
- The former client had never, while a client, expressed any wish that the lawyer not assist in bringing an application for control over the client's affairs.
- The lawyer believes on reasonable grounds that the applicant is an appropriate person to be appointed Committee.
- There are no other circumstances that suggest that it would be inappropriate for the lawyer to act because of the lawyer's past association with the former client.

Minority view

A minority of the Committee were of the view that it is not reasonable to conclude that a lawyer acting on a committee application in these circumstances is not acting against that former client's interests. The process itself is an adversarial one, and the removal of the right of prospective patients to manage their personal affairs or property by the appointment of a committee is a dramatic intrusion into their personal autonomy.

Where a lawyer is engaged by a new client to bring such an application the lawyer has a duty to seek instructions from the new client, use all the lawyer's knowledge and skill to advance the interests of the new client and to act only in that new client's interest. It is not reasonable to expect the lawyer to exercise a discretion concerning the interests of the former client and it will usually be a breach of the lawyer's duty to the new client to do so. Moreover, to expect the lawyer to make such a judgment is to predetermine several of the issues the court is expected to decide in the committee proceeding.

The proper approach to this question is to apply the current Chapter 6, Rule 7 of the *Professional Conduct Handbook* with respect to the issue of acting against a former client. If the client does not consent to the appointment of the committee, or is unable to do so, Rule 7 will permit a lawyer to act against that client on a committee application in some circumstances: if the application is unrelated to the work the lawyer formerly did for the client and the lawyer has no confidential information from that work relevant to the committee application.

If the Ethics Committee favours permitting a lawyer to act in these circumstances without requiring the lawyer to comply with Rule 7, the rules should be changed to expressly permit such a result. Exceptions to general ethical rules ought to be resisted and should only be considered when the strict application of the rule leads to some mischief. Here there is no mischief, since a proposed applicant can easily retain independent counsel without causing any delay or increase in costs. There is potential mischief in the majority position in that the prospective patient, who may be in a weakened state, may be deprived of the right to retain a lawyer with whom he or she may have formed a relationship.

JO/
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