In ABA Informal #775 it is stated:

"(1) If the separate business is clearly not necessarily the practice of law when conducted by a lawyer, and (2) if it can be conducted in accordance with and so as not to violate the Canons, and (3) if it is not used or engaged in in such a manner as to directly or indirectly advertise or solicit legal matters for the lawyer as a lawyer, and (4) if it will not "inevitably serve" as a feeder to his law practice, and (5) if it is not conducted in or from a lawyer's law office, except in cases where the volume of the law practice and business is so small that separate quarters for either is not economically feasible and where, even in such cases, there is no indication on the shingle, office, door, letterhead, or otherwise that the lawyer engages in any activity therein except the practice of law, it is not necessarily a violation of the Canons for a practicing lawyer to engage in such a business activity."

It is the opinion of the Committee the letter proposed to be used for soliciting subscriptions to the publication and references to the promoter as a lawyer in material used by the corporation would be improper.

Opinion #155 - 10/9/70 (39-70)

Topic: Waiver of Defenses.

Digest: Client may direct lawyer to waive technical defenses.

Code*: EC 7-8

QUESTION

Is a lawyer bound by a client's instructions to defend all suits on the merits and to avoid the use of technical defenses?

OPINION

Once a client is fully informed as to the legal consequences of a waiver of a defense that may be available, the decision whether to forego a legal defense is ultimately for the client and not for the lawyer (EC 7-8). Accordingly, the lawyer is bound to follow the client's instructions.

Opinion #156 - 10/9/70 (45-70)

Topic: Representation in Action Against Former Client.

Digest: Not proper to be attorney in action against former client who previously discussed matter with attorney.

Code*: EC 4-6
DR 5-105 (D)

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

QUESTION

An attorney's former firm represented an insurance carrier on a regular basis. The attorney resigned from his former firm about two years ago, is now a member of another firm, and has been requested to represent a plaintiff in a negligence action against a defendant who is the local agent of the carrier. The accident occurred while the attorney was with his former firm. The defendant claims that he discussed the accident with the attorney at the time it occurred, and that he did so because he regarded the attorney as his regular counsel. The attorney had a social relationship with the defendant and his former firm represented him in some matters, but the attorney does not recall any discussion of the accident with the defendant, doubts that such discussion occurred, denies in any event that it was in an attorney-client relationship, and suggests that perhaps the consultation was with one of his former partners.

OPINION

If there is a reasonable possibility that the defendant did discuss the matter with the attorney under the circumstances claimed, the attorney should not act in the action. The matter is put as follows in Wise "Legal Ethics", pp. 283-4:

> "...The test as to whether a communication or fact must be held to be confidential and treated as such is simply whether or not it was received in a lawyer's professional capacity, while the relation of client and lawyer existed, no matter how temporary.
>
> "Thus, it does not matter whether a fee was paid or whether, after the encounter with the client, the attorney refused the case or withdrew before taking any overt action.
>
> "The question is whether at the time the confidence was imparted the person regarded the lawyer as acting in a legal professional relation toward him. The deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought."

As further stated in Wise "Legal Ethics", p. 272:

> "The impropriety of taking a case against a former client is not based solely on necessity for disclosure of confidential communications. If the former client has any reason to feel aggrieved, the necessity of maintaining proper public relations for the bar and of avoiding the appearance of wrongdoing should cause the attorney to refuse to accept employment in a capacity adverse to the interests of a former client.
>
> "The lawyer must always put the interests of his client ahead of his invididual interests. . ."

The fact that the attorney is no longer with his former firm and does not recall the discussion makes no difference. EC 4-6. See also N.Y. County #557. If the defendant believes that he discussed the matter professionally with the attorney and there is a reasonable possibility that the defendant is correct, this is enough to preclude the attorney's participation. It is important that there be no appearance of impropriety.

If the discussion was with one of the attorney's former partners, the attorney is likewise foreclosed from acting. See DR 5-105 (D).

Opinion #157 - 10/9/70 (31-70)

Topic: Alumni Bulletin Article Featuring Law Firm.

Digest: Propriety of alumni bulletin article featuring law firm and of firm members participation depends on meeting proper standards.

Code*: DR 2-101 (A); 2-101 (B)

Former Canon: 27

QUESTIONS

1. May a law school alumni bulletin publish an article of historical interest about a historically prominent small law firm with which members of the same family have practiced for several generations?

2. May an alumnus partner of such a firm cooperate in the preparation of the article?

OPINION

The Code of Professional Responsibility governs members of the bar only. A law school alumni magazine, however, has a special obligation to see that its articles and news reporting are in good taste and do not violate professional standards. Thus it would be inappropriate for the magazine to publish any article lacking in dignity, or which contains self-laudatory statements calculated to attract the lay public, or which appears to promote the practice of a specific firm. Nor should material be included, the publication of which a member of the bar would have a professional obligation to discourage. See N.Y. City 806 (1955). The magazine may, however, include material of historical or current news interest which meets these standards. Cf. N.Y. City 615 (1942).

The Code of Professional Responsibility specifically condemns any form of participation by a lawyer in the publication of professionally self-laudatory statements.

DR 2-101 (A) provides:

> A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients . . .

DR 2-101 (B) provides:

> A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, . . . or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. . .