NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion #305 - 10/17/73 (33-73)

Topic: Superseding lawyers; encroaching on professional employment of other lawyers; conferring with prospective client already represented by counsel for the same matter.

Digest: Lawyer may properly confer with a prospective client who is already represented by counsel in the same matter, without first notifying the lawyer previously retained; lawyer may not replace or serve as co-counsel with lawyer previously retained, unless that lawyer consents or his employment is terminated

Code: Canon 1, 9
EC 2-30, 9-1, 9-2, 9-6
DR 1-102(A), 2-104, 2-110(A),(B)

QUESTION

May a lawyer properly confer, or continue an initial conference, with a prospective client after learning that the client already has counsel for the same matter, without first notifying the lawyer previously retained?

OPINION

Where a prospective client comes to a lawyer to discuss a possible retainer, there would be no professional impropriety in the lawyer conferring with a client as to possible employment for a matter for which the lawyer knows that the client has already retained other counsel. It makes no difference whether the lawyer already knows of the other lawyer's retainer, or first learns about it during the conference.

Any client has a basic "right to be represented at all times by counsel of his own selection." ABA 10 (1926). A client may at any time for any reason which seems satisfactory to him, however, arbitrary, discharge his attorney. Matter of Krooks, 257 N.Y. 329, 331 (1931); Reubenbaum v. B. & H. Express, 6 A.D. 2d 47, 48, 174 N.Y.S. 2d 287, 289 (1st Dept. 1958). The discharge may, however, be subject to court approval and the imposition of appropriate conditions, if the lawyer discharged is counsel of record in a pending court proceeding. Cf. DR 2-110(A), (B) and National Equipment Rental Ltd. v. Mercury Typesetting Co., 323 F. 2d 784 (2d Cir. 1963). Any client

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is thus free to discuss a possible retainer with another lawyer at any time.

There is no reason why the lawyer first employed should be informed that his client is discussing the possibility of employing another lawyer, unless and until the client actually makes an employment offer to new counsel to have him replace the lawyer originally retained or to serve as co-counsel with him. At that point the new lawyer could not accept the offered employment "unless the other counsel approves, or withdraws, or the client terminates the prior employment". EC 2-30. A similar standard was mandated under former Canon 7.

ABA Inf. 360 provides sound guidance for the lawyer who is asked to handle a matter previously handled by another lawyer. That opinion states:

> "When retained in a matter previously handled by another, a lawyer should make sure that his client has discharged the other lawyer and has so advised him. While it is not necessary for him to communicate with the other lawyer, it is courteous for him to do so. It is often wise to give the other an opportunity to state any facts which the client has refrained from telling him and which might influence him not to proceed with the case."

See also, ABA 149 (1936); Drinker, Legal Ethics, 198-201 (1953).

A prospective substitute lawyer should also take special care to avoid suspicion that he may be using improper means to have himself substituted for the previously retained attorney. Thus he must not wrongfully or improperly disparage the other lawyer in an endeavor to supplant him, nor may he utilize any other means violative of accepted standards relating to solicitation. See, Drinker, Legal Ethics, 190-191 (1953). Cf. ABA 10 (1926); ABA 65 (1932).

As Drinker states at pp. 190-191:

> "In addition to and distinct from the obligations imposed on members of the bar by reason of the special privileges granted to them by the public, they have voluntarily assumed, by mutual understanding and recognized custom of the bar over a long period, certain obligations to one another. The recognition and observance of these obligations is primarily what characterizes the practice of law as a profession as distinguished from a business. They constitute the most significant part of the lawyers' distinctive code of etiquette and of ethics."
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> "One of the amenities which, over many years, lawyers have recognized toward one another, is the obligation to refrain

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from deliberately stealing each other's clients. This, as well as the obligation not to advertise and solicit, it is impossible to define precisely. As we approach the borderline between what is generally considered proper and what is improper, the question,as in the case of many other problems of professional ethics and etiquette, becomes one of good taste."

While the Code contains no express "encroachment" provisions similar to that in former Canon 7, the same basic principles continue to be applicable under the Code through such provisions as Canon 1 and Canon 9, EC 9-1, EC 9-2, EC 9-6, DR 1-102(A) and DR 2-104.
