
**E-89-5 Disqualification based upon initial
consultation**

Question

Under what circumstances may a lawyer's initial consultation with a prospective client constitute grounds for the lawyer's disqualification in a matter in which the lawyer is retained to oppose said client's interests?

Opinion

The existence of a lawyer-client relationship is a mixed issue of law and fact in each case in which the issue arises. *See, e.g., Security Bank v. Klicker*, 142 Wis. 2d 289, 418 N.W.2d 27 (1987); *Westinghouse Elec. Corp. v. Kerr-McGee*, 580 F.2d 1311, 1318 (7th Cir. 1978); *King v. King*, 52 Ill. App. 3d, 749, 367 N.E.2d 1358 (1977); Friedman, "The Creation of the Attorney-Client Relationship: An Emerging View," 22 Cal. W.L. Rev. 209 (1986); and Rottier, "Legal Malpractice: Our Duty May Arise Sooner Than We Realize," 55 Wis. B. Bull. at 10 (June 1982). The ethics committee's jurisdiction does not include authority to issue opinions on questions of law. *See generally* State Bar By-laws, Article IV, Section 5, relating to the ethics committee's authority.

However, we deem the question presented of sufficient importance and probable general interest among the bar that we would suggest a few prophylactic guidelines for the conduct of initial consultations or contacts with prospective clients to minimize the possibility of creating the basis for a subsequent disqualification motion or a related disciplinary proceeding. Before discussing the merits of the prospective client's matter or seeking any information regarding it which could be held privileged or confidential:

1. Obtain sufficient basic prospective client data upon which it can be determined whether or not discussion of the merits would or could involve the lawyer in a conflict of interest situation (for example, perhaps the lawyer's partner has already accepted representation of the opposing party); and
2. Caution the prospective client at the outset of the initial communication not to volunteer information pertaining to the matter in question until the lawyer

has had an opportunity to determine whether or not it would be appropriate or even possible for him to provide legal services or counsel in the matter. *See generally* SCR 20:1.6; Wis. Stats. § 905.03 (1987-88); and *Dyson v. Hempe*, 140 Wis. 2d 792, 413 N.W.2d 379 (Ct. App. 1987).

We believe that observance of the guidelines stated herein should, in most instances, render possible acceptance of representation adverse to the prospective client even in the same or substantially related matters. The care exercised in avoiding providing legal service or counsel in that matter to the prospective client and in avoiding the acquisition of client confidences related to that matter should lead to that result. In summary, the lawyer-client relationship would not have attached. *See generally* SCR 20:1.9, "Conflict of Interest: Former Client." *See also* *Berg v. Marine Trust Co.*, 141 Wis. 2d 878, 416 N.W.2d 643 (1987); and Committee on Professional Ethics Formal Opinions E-85-8 and E-85-9, relating to representation adverse to a former client.