

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-316
Issued: January 1987

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May a lawyer or law firm, previously contacted but not retained by a prospective client regarding the possibility of bringing suit against another, represent the defendant in the litigation, provided a lawyer-client relationship with the client was never formed and the lawyer did not obtain confidences or secrets from the plaintiff that could be used to the advantage of the defendants?

Answer: Yes

References: ABA/BNA Lawyers' Manual on Professional Conduct § 31:101; DRs 4-101(A) and (B) and 5-105; Proposed Kentucky Model Rule 1.9(a) and (b); EC 4-1; Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978); Ala. Op. 448 (1981); Vt. Op. 84-5 (undated); C. Wolfram, Modern Legal Ethics 251 (1986).

OPINION

An attorney-client relationship is not dependent upon payment of fees, nor upon execution of a formal contract. Ordinarily, rules of agency and contract determine whether such a relationship has been formed, either expressly or impliedly. ABA/BNA Lawyers' Manual on Professional Conduct § 31:101. In addition, the relationship may be established by the client's reasonable and detrimental reliance on the lawyer to provide legal services. *Id.*

Furthermore, a lawyer may be precluded from accepting employment adverse to a prospective client who did not retain the lawyer, if the prospective client revealed to the lawyer confidences and secrets about a matter in a good faith effort to secure legal counsel. EC 4 Proposed Kentucky Model Rule 1.9; Westinghouse Elec. Corp. v. Kerr McGee Corp., 580 F.2d 1311 (7th Cir. 1978); Ala. Op. 448 (1981); Vt. Op. 84-5 (undated); C. Wolfram, Modern Legal Ethics 251 (1986).

If an attorney-client relationship was never formed and the lawyer did not obtain confidences or secrets in the manner so indicated, the lawyer should not be precluded from the adverse representation. If the rule were otherwise, the legitimate interests of counsel and persons seeking his services would be sacrificed for no apparent purpose. Such a rule could also be abused

by a prospective party, who might be tempted to “neutralize” available counsel in a given geographical area.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.