The Legal Ethics Committee of the Indiana State Bar Association has been presented with the following question:

May an attorney on his own behalf file an application for a building permit with the City Building Commissioner and a variance with the Board of Zoning Appeals (BZA) of his community and then personally appear before the BZA for the hearing for the variance when that attorney is an associate in a firm whose members include the City Attorney and the Assistant City Attorney who is the regular counsel for the BZA?

The Committee is aware that hundreds of variances are granted each year to individuals who represent themselves before BZA's. The attorney requesting the variance is in the best position to know his own request and to describe it to the BZA at the variance hearing.

The right of self-representation is inherent in our legal system. Although a Board of Zoning Appeals is an administrative body operating under strict administrative guidelines, this committee has neither the authority or the desire to deny the attorney seeking the variance the opportunity to represent himself.

However, Canon 9 is unyielding in its requirement of avoiding even the appearance of impropriety. Therefore to fulfill Canon 9's requirement, this Committee feels that it is incumbent that the requesting attorney's associate, the Assistant City Attorney, be under a duty to make a full disclosure of the relationship which exists between the two attorneys and then to disqualify himself for the purposes of that matter before the BZA.

However, there is no guarantee that every variance requested will be approved by the BZA. If the request fails and relief cannot be found in the Courts, the final step may be to try to change the zoning ordinance. Such an attempt would result in two members of the same firm being on opposite sides of the controversy. This would result in a conflict of interest which this Committee cannot and will not condone in light of Canon 9's requirement of avoiding even the appearance of impropriety.

As such, the Committee feels it necessary to extend the aforementioned disclosure/disqualification requirement to all proceedings which follow a denial of a variance by the BZA. Placing a disclosure/disqualification requirement upon BZA attorneys fulfills the requirements of Canon 9 while protecting the right of self-representation.
The Committee has been asked whether the spouse of a county court judge may accept an appointment as a deputy prosecutor if the spouse does not work on cases pending in the judge's court and the spouse's responsibilities will be limited to support, paternity and juvenile matters.

In dealing with the issue of conflicts involving spouses who practice law with different law firms in the same community, ABA Formal Opinion 340 (September 23, 1975) stated that although it cannot be assumed that a lawyer who is married to another lawyer necessarily will violate any particular disciplinary rule, married partners who are lawyers must guard carefully at all times against inadvertent violations of their professional responsibilities arising by reason of the marital relationship. For the same reason, we do not believe that the lawyer-spouse is prohibited by the Code of Professional Responsibility from serving as a deputy prosecutor provided the lawyer does not work on matters pending in the judge's court. However, a lawyer who is the spouse of a judge or in an equivalent position should scrupulously avoid any appearance of violation of the Code of Professional Responsibility, particularly DR 7-110 which would forbid the lawyer from communicating with the judge as to the merits of a cause involving the state pending in the judge's court and DR 9-101(C) which would prohibit the lawyer from stating or implying that the lawyer is able to influence improperly any tribunal.

Canon 2 of the Code of Judicial Conduct provides that a judge should not allow his family relationships to influence his judicial conduct or judgment. If it is clear that the judge's conduct and judgment in a matter pending in his court involving the state will not be affected by the spouse's position, we do not think the judge should be disqualified. Canon 3(C)(1)(c) disqualifies a judge when his spouse has a financial interest in the subject matter of a proceeding or in a party to the proceeding, which interest could be substantially affected by the outcome of the proceeding. This provision should not apply because, as was pointed out in State ex rel. Goldsmith v. Superior Court of Hancock Co. (Ind. 1979), 386 N.E. 2d 942, 945, the relationship of deputies in a prosecutor's office, rather than being pecuniary, is no more than sharing the same statutory duty to represent the state in criminal matters. Canon 3(C)(1)(d)(ii) disqualifies a judge when his spouse is acting as a lawyer in the proceeding. In State ex rel. Meyers v. Tippecanoe County Court (Ind. 1982), 432 N.E. 2d 1377, 1379, it was held:

Where a lawyer who has represented a criminal defendant on prior occasions is one of the deputy prosecutors, disqualification of the entire office is not necessarily appropriate. Individual rather than vicarious dis-
qualification may be the appropriate action, depending upon the specific facts involved.

We believe the same type of analysis should apply to the interpretation of Canon 3(C)(1)(d)(ii). Under the circumstances presented, the lawyer-spouse would not be acting as a lawyer in the proceeding within the scope of that Canon.
This Committee has been presented with a two-part question. The first question presented is whether or not two members of the same law firm can continue representing two clients with present differing interest as to future matters.

The facts presented are that one member of the firm advises the City Zoning Appeals Board and City Planning Commission, and the other member is the City Attorney of this third class city. In addition, these attorneys also maintain a private practice with this law firm, which happens to represent on a continuing basis, a corporate client that at this time desires a variance from the City Zoning Code, which would require an appeal to the Zoning Appeals Board.

The question specifically raised is whether or not these two attorneys, having both disqualified themselves from representing either client in the present instance, have to terminate any future dealings with the Zoning Appeals Board or the corporate client.

It must be said at the outset that whenever an attorney represents a public body on a part-time basis and also carries on a private practice that there is an obvious potential conflict of interest at all times as to all of his clients.

It is also essential, however, that we have part-time city attorneys, county attorneys, deputy prosecutors, etc., in order to maintain our system in its present form. To attempt to place all attorneys who advised public bodies on a full-time status would create an undue burden upon the tax-paying citizens of the State of Indiana.

Therefore, we feel that since there is an obvious potential conflict at all times when one holds himself out as a practitioner and also represents a public board or commission, each and every case must be examined strictly on its own merits.

Therefore, in answering the question before us, we take the position that we are only to decide as to whether or not in this instance, without any more information being furnished, it is a per se ethical violation to continue representation of these two different clients in the future as to non-related matters.

In our Opinion No. 1 of 1982, we stated that a city attorney of a third class city, could not represent corporate clients who appeared before city boards and commissions.
Thus it would appear in this instance that the law firm involved would have no choice but to decline assisting both the Zoning Appeals Board and the corporate client, which they evidently have done.

We would also take the view that once the lawyers have disqualified themselves, as they evidently have in this instance, they must take a complete "hands off" approach and completely divest themselves from any handling of this matter on behalf of either party, the Zoning Appeals Board or the client. Nor should any member of their firm be involved in this matter. We do not think that there is a requirement without more evidence or more factual matter before us to state categorically that it would be necessary that these two attorneys terminate all future unrelated activities with the Zoning Appeals Board or the corporate client. However, in taking this view we are assuming, of course, that future relationships with the Zoning Appeals Board and the Corporate client, would create no factual situation that would give rise to a violation of either DR 4-101 or DR 5-101.

The next question raised refers to whether or not the members of this particular firm can ethically solicit or appoint the lawyers that would continue to represent the Zoning Appeals Board and the corporate client in this instance. We think not. One lawyer was an agent or advisor of the city Zoning Appeals Board before he resigned his position for this particular case. He must remain outside of the matter completely to satisfy the mandate of DR 4-101 and DR 9-101(B). He should avoid the appearance of impropriety in accordance with DR 9-101. The fact that these lawyers were holding these offices would create a violation of DR 9-101(B) as indicated above and DR 1-102(A)(2), if they would continue to have input into the matter before the Zoning Appeals Board and with respect to the corporate client. Since the two lawyers involved here could not ethically handle these matters themselves, they could not appoint or solicit parties to do what they themselves cannot do. See DR 1-102(A)(2). However, we think that, absent unusual circumstances, it would be permissible for the disqualified lawyer to recommend to the corporate client the names of local lawyers capable of handling the matter, provided that the client makes the actual selection.

The final question asked is whether or not the lawyer representing the corporation may continue to prepare deeds, abstracts and title opinions involving the real estate, which is the subject of the request for a variance from the Zoning Appeals Board. For the same reasons set forth above, we feel that the second part of the question must also be answered in the negative. We do not feel that the lawyer who represents the city and also the law firm can ethically continue with the preparation of abstracts, title opinions or deeds concerning the property that is the subject of the variance petition. We are of the opinion that this conduct should cease and the attorney completely divorce himself from any part of this problem in all respects.

Res Gestae - February, 1985
The Committee has been asked whether there is an ethical question based on the following facts situation:

I am a part-time prosecuting attorney whose salary is, in part, paid by the county. A former client has been ordered to show cause why he should not be found in civil contempt for failure to comply with an order of the county Board of Zoning Appeals. I do not represent the Board of Zoning Appeals.

Question: Can I ethically represent my client before the Board of Zoning Appeals, even though the county pays part of my salary?

The initial questions are whether there is an appearance of impropriety and whether there is a division of loyalties to the county or to the client. This Committee, in Opinion No. 5 of 1979, precluded a prosecuting attorney from suing a police officer because of the possibility that the "lawyer's loyalties could be divided. It further posed a risk to future cooperation between the police and the prosecutor."

Also, the Committee held that a conflict existed where the prosecutor represented a plaintiff in a civil action against a defendant who also was being prosecuted in a criminal action arising out of the same conduct. Additionally, in Opinion No. 6 of 1978, the Committee said that a prosecutor could not represent a client adverse to the State in a proceeding involving eminent domain without "meaningful consent."

Nevertheless, this current problem is unique. A prosecutor by statute has no responsibilities in behalf of the county and prosecutes cases in the name of the State of Indiana; and for purposes of this opinion, it is assumed he does no work in behalf of the county. The appearance of impropriety or division of loyalties rests on the facts that payment is made by the county to the prosecutor and that the public generally perceives, albeit mistakenly, that the prosecutor is a public official. Although the better practice would be to avoid such employments, we cannot say that the above situation alone gives rise to conflict. Lawyers, who are paid by the county, may represent clients against the county if: a) there is no request for criminal prosecution; b) there is no use of inside information; c) there are no official duties performed by the prosecutor in behalf of the county; and d) there is meaningful consent by all affected parties.

Res Gestae - April, 1985
The Committee has been asked for its opinion involving the following fact situation. Certain plaintiffs purchased the assets of a fixed base operator at an airport. With the assistance of their counsel, the sellers peacefully repossessed the assets for alleged breach of the installment purchase agreement. The plaintiffs filed a lawsuit against, among others, the sellers, the entity assuming responsibility for operating the facility after the repossession and a partner in the law firm serving as counsel for the seller and the successor operator. Lawyer A was retained to represent the seller, the successor operator and the law firm in the lawsuit. After Lawyer A had engaged in considerable work on the case and fees in excess of $25,000 had been paid therefor, Lawyer A dissolved the partnership of which he was a member and formed a new partnership with the previous partners of the law firm in which the lawyer-defendant was a member. The Committee has been asked for its opinion on whether the law firm may continue to represent the defendants assuming all conflicts between defendants have been satisfactorily resolved, the plaintiffs have no objection and only lawyers who were not associated with the former law firm during the events in question will work on the case.

The principal remaining issue appears to be whether the rule regarding withdrawal as counsel when a lawyer becomes a witness would be applicable to this situation. DR 5-102 provides:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

If no member of the firm will be called or ought to be called as a witness by either side, there is no problem under this rule. If a member of the firm
may be called as a witness by plaintiffs and the testimony to be given by
the lawyer is not prejudicial to the defendants, the firm need not withdraw.
If a member of the firm will be called as a witness by the plaintiffs and
the testimony will be prejudicial to Lawyer A's clients, the firm must
withdraw. However, if counsel will or ought to call as a witness a member
of the firm to testify on behalf of the defendants on a contested matter,
the firm is required to withdraw from the conduct of the trial unless, as
provided in DR 5-102(B)(4), "refusal would work a substantial hardship on
the client because of the distinctive value of the lawyer or his firm as
counsel in the particular case."

The Legal Ethics Committee is not a fact-finding body and, therefore, cannot
assume responsibility for determining in the final instance whether a "sub-
stantial" hardship exists in the situation. However, we will attempt to
provide some guidance.

We do not believe that the pecuniary hardship involved in retaining another
firm to try the case alone satisfies the "substantial hardship" test. See
17 (financial hardship is not synonymous with substantial hardship within
the meaning of the exception). For this reason, the Court in United States
ex rel. Sheldon Electric Co. v. Blackhawk Heating and Plumbing Co. (1976),
423 F.Supp. 486, 490, found that no substantial hardship existed even though
the disqualified law firm represented the plaintiff for ten years and had
expended approximately 450 hours of time in connection with the claims com-
prising plaintiff's case. Furthermore, since the disqualification situation
arose solely from the actions of the lawyer for which the clients had no
responsibility and from which the clients did not benefit, a fee adjustment
to prevent any undue financial hardship to the client may be appropriate.

The exception requires that the hardship be due to the "distinctive value"
of the lawyer or his firm. As was stated in Supreme Beef Processors, Inc. v.
American Consumer Industries, Inc. (1977), 441 F.Supp. 1064, 1068:

This exception generally contemplates only an attorney
who has some expertise in a specialized area of the law
such as patents and the burden is on the firm seeking to
continue representation to prove distinctiveness . . . .
In addition, the distinctive value must be apparent
before the decision to accept or to refuse employment
is made. Accordingly, the rule is to be very narrowly
construed.

Based on the facts presented in the letter, the Committee cannot say that the
firm has sufficient "distinctive value" to satisfy this exception. Even
assuming Lawyer A has distinctive value as an antitrust specialist, Comden v.
Superior Court of L.A. County (1978), 145 Cal. Rptr. 9, 576, P.2d 971, 975,
cert. denied, 439 U.S. 981, indicates that the clients would not necessarily
lose Lawyer A's expertise merely because he removes himself as trial counsel.
Lawyer A will not be barred from participating in a consulting capacity.
Nevertheless, we do not foreclose the possibility that Lawyer A may satisfy the exception because of the complexity of the lawsuit, a matter of which he would be the best judge. ABA Informal Opinion 339 (Jan. 31, 1975) stated:

Despite these considerations, exceptional situations may arise when these disadvantages to the client would clearly be outweighed by the real hardship to the client of being compelled to retain other counsel in the particular case. For example, where a complex suit has been in preparation over a long period of time and a development which could not be anticipated makes the lawyer's testimony essential, it would be manifestly unfair to the client to be compelled to seek new trial counsel at substantial additional expense and perhaps to have to seek a delay of the trial. Similarly, a long or extensive professional relationship with a client may have afforded a lawyer, or a firm, such an extraordinary familiarity with the client's affairs that the value to the client of representation by that lawyer or firm in a trial involving those matters would clearly outweigh the disadvantages of having the lawyer, or a lawyer in the firm, testify to some disputed and significant issue.

Although not all-inclusive, such situations serve to illustrate the intent of DR 5-101(B)(4).

Under the Code the critical question is whether the distinctive and particular value to the client of that lawyer or that law firm as trial counsel in that particular case is so great that withdrawal would work a substantial personal or financial hardship upon the client. The most serious and extensive consideration should be given, with the client's informed participation, of the possibility and practicality of engaging other counsel to try the case so that the client may have the lawyer's necessary testimony without the risk of less effective representation resulting from his own counsel being both witness and advocate. If withdrawal, under the circumstances, would clearly work such a hardship on the client, the lawyer or firm should continue as counsel despite the necessity for such testimony.

The lawyer or firm concluding under this standard to continue as counsel should advise the court and opposing counsel immediately that he, or a lawyer in his firm, intends to testify and the nature of the testimony. He should also refrain from expressly arguing the credibility of his own testimony or that of a lawyer in his firm.

In the event that Lawyer A cannot satisfy himself that "substantial hardship" exception does apply, we believe the firm should withdraw and that the disqualification cannot be waived by the consent of the clients and the plaintiffs. As was stated in _Supreme Beef Processors, Inc. v. American_
Consumer Industries, Inc., 441 F.Supp. at 1068:

Although these disciplinary rules are for the protection of clients, they are also for the protection of the Bar and the integrity of the court. I therefore hold that these disciplinary rules may not be waived by the client.
I. THE ISSUE

The Legal Ethics Committee of the Indiana State Bar Association has been requested to issue an opinion as to whether or not a lawyer can represent both criminal defendants and a county sheriff in the following situation:

Lawyer A has an extensive private criminal practice and also represents criminal defendants as a public defender on a case-by-case basis. Sheriff B, the current sheriff in the county where Lawyer A practices, has sought to employ Lawyer A to represent him in a civil action filed by the former Sheriff C. The action filed against Sheriff B individually and in his official capacity seeks the continuation (or reinstatement) of Sheriff C's employment as a deputy sheriff after the expiration of Sheriff C's term.

The issue presented is whether it is ethical under the Indiana Code of Professional Responsibility for an attorney to represent a criminal defendant in a criminal proceeding where the sheriff or one of his deputies will be an adverse witness at trial and also to represent the sheriff in other civil matters.

II. PRELIMINARY DISCUSSION

The fact that Lawyer A occasionally serves as a public defender in criminal matters is irrelevant to the ethical issue presented because the lawyer's obligations and duties to his client are the same whether he is privately employed or employed through a pauper attorney system.

III. DISCUSSION OF THE ISSUE

The most relevant Canon to the above-stated issue is Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client"), and the most applicable Disciplinary Rule is DR 5-105, which provides:

DR 5-105: Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment except to the
(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representations of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

The Committee is of the opinion that in the above factual situation the representation of criminal defendants and Sheriff B would violate DR 5-105(A) and (B). The Committee assumes that Lawyer A currently is representing or will represent in the future criminal defendants in cases where the sheriff or his deputies will be witnesses. The Committee is also of the opinion that it is irrelevant whether Sheriff B actually testifies or whether the testimony is that of a deputy sheriff, because Sheriff B is ultimately responsible for the conduct of his department. Clearly, the interests of Sheriff B and his department are adverse to the interests of criminal defendants.

Lawyer A has a real interest in maintaining a good relationship with Sheriff B due to the existence of pending legal work and/or the anticipation of future legal work. It is a fact of life that this relationship between Lawyer A and Sheriff B could be either adversely or advantageously affected by the lawyer's representation of criminal defendants. In light of these considerations, the Committee believes that Lawyer A's "independent professional judgment in behalf of a client will be or is likely to be adversely affected" by either the acceptance of employment or the continued representation of criminal defendants in actions where the sheriff's department is involved. Thus, on its face, DR 5-105(A) and (B) appear to be violated.

However, DR 5-105 provides an "escape valve" in subsection (C) thereof. In order for subsection (C) to apply, it must be "obvious" that the lawyer can "adequately" represent the interests of "both clients," and that each client "consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each client."

Assuming there is no connection between the civil matter involving Sheriff B and any crimes allegedly committed by criminal defendants represented by
Lawyer A, there is no doubt that Sheriff B and each criminal defendant can consent to such representation. In the opinion of the Committee, if it is "obvious" that Lawyer A can "adequately represent the interests of each" client, it is the opinion of the Committee that Lawyer A may represent the criminal defendants, if meaningful consent is obtained from each defendant after a "full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of" the defendant is made without being violative of DR 5-105. Full disclosure should include an explanation that the vigorousness of Lawyer A's cross-examination of any witnesses from the Sheriff's Department may be affected by Lawyer A's representation of Sheriff B.

The informed consent of Sheriff B should also be obtained because Lawyer A in fully representing his criminal defendant clients may be required to take action which could indirectly have an adverse impact on the civil action or create strains upon their attorney-client relationship.

IV. CONCLUSION

The conclusion reached by the Legal Ethics Committee is that, while it is unethical under the Indiana Code of Professional Responsibility for a lawyer to represent criminal defendants in a criminal proceeding in which the sheriff or a member of his department will be a witness at trial and the sheriff is represented in other civil matters by the same lawyer, such representation would be ethical provided the lawyer made a full disclosure to each criminal defendant and the sheriff "of the possible effect of such representation on the exercise of his independent professional judgment on behalf of" each criminal defendant and the sheriff and obtained their meaningful "consent" under DR 5-105(C).

We recognize the possibility of abuse if a lawyer represents a law enforcement official and then appears in an adverse position to that official in a criminal case. Lawyers should be careful not to cultivate the client relationship with a law enforcement official for purposes of assisting the lawyer in the defense of criminal cases.

If the lawyer regularly practices defense work, he should avoid representations of persons who have against them material witnesses who are law enforcement officials and also clients of the lawyer.

Finally, this opinion presumes that the lawyer has been personally employed by the Sheriff in his private capacity. If the lawyer is employed by the county to represent the Sheriff and in so doing essentially becomes an employee of the county, he may be precluded from doing criminal defense work. See Opinion No. 7 of 1978.
The Legal Ethics Committee has been supplied the following inquiry, viz:

The decedent was driving a motor vehicle, accompanied by two (2) minors and one (1) adult passenger. He was driving the car approximately forty (40) m.p.h. according to the statements of the surviving witnesses, when the car struck a large chuck hole extending across the road and he lost control of the car, and the car left the road and overturned. The decedent sustained fatal injuries and the surviving passengers also received injuries. The attorney was contacted by the sons of the decedent and now serves as attorney for the decedent driver's estate and has filed a wrongful death action on behalf of his heirs.

While investigating the factual situation, said attorney took the statement of the surviving passengers in the presence of their father, and he was asked "... if I would represent them in a claim against the County for negligent construction of the road . . ." Said attorney informed them that he was representing the estate and the fact that if they wished to press a guest case against the estate or the decedent driver's insuror that would definitely be a conflict of interests and that he could not represent them to that extent.

A proposed form of the attorney employment contract was also submitted with the inquiry, and said contract recites the surviving passengers have sustained injuries as a result of being involved in an automobile accident, "... allegedly resulting from negligent design, construction and maintenance of the County road . . ." The contract further provides that the surviving passenger clients are aware that said attorney is prosecuting a claim on behalf of the estate and heir for wrongful death; that "... the attorney has informed the Clients that they could conceivably have a claim against the Estate or insuror . . ." of the driver pursuant to a claim as a guest of said decedent driver. "They specifically do not wish to assert said claim against the estate or insuror . . ." at this time. Said proposed contract further recites that should the clients in the future desire to prosecute a claim against the decedent's estate within the statute of limitations they will inform said attorney and he will withdraw from said case.
Said contract further provides that the attorney has informed said clients that it would be a conflict of interest for him to represent said clients against the estate or insuror of the decedent driver.

Indiana Legal Ethics Opinion No. 2 of 1971, involving a law firm which was employed by a client interested in a casualty loss receiving a contact from possible mutual claimants while conducting an investigation of the loss is on point. In that opinion this Committee stated:

"... The proper activities of an attorney in handling a case for a client necessarily may place him in contact with others with mutual claims and thus potential sources of related legal business. The circumstances under which such business may be accepted and the required form of the lawyer's approach have been discussed previously in American Bar Association Informal Opinion 280 (1956) and by this Committee in Opinion No. 5 of 1966.

Canon 5, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client," presents the first requirement in deciding whether or not the investigating firm may undertake representation of others having mutual claims. The propriety of representing multiple clients depends in part on whether the clients have potentially differing interests and whether the lawyer's loyalty may possibly be diluted by the acceptance of additional employment. All doubts about the propriety of the representation must be resolved against the representation. A lawyer may not represent multiple clients unless he has first explained to each client the implications of the common representation; and he may accept or continue employment only if the clients all consent after a full disclosure. Code of Professional Responsibility EC 5-14, 5-15, 5-16 and 5-17; DR 5-105; American Bar Association Opinion 247 (1942).

Second, a lawyer may not solicit legal work or recommend himself to one not seeking his advice. Code of Professional Responsibility DR 2-103; American Bar Association Informal Opinion 1161 (1971). If the attorney as a professional sees fit to recommend to one not his client that he employ counsel, such attorney may not accept the employment if offered to him. Code of Professional Responsibility DR 2-104. A lawyer may not be motivated to offer advice for the purpose of obtaining personal benefit; and, pursuant to the Code of Professional Responsibility EC 2-3, "a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation" American Bar Association Informal Opinion 5 (1924).
Third, the problem of preserving the confidences and secrets of a client is inherent in multiple representation. Information received by a lawyer from a client may not be revealed without the consent of the client after a full disclosure to the client. Code of Professional Responsibility, Canon 4; EC 4-1, EC 4-2, EC 4-4 and EC 4-5; DR 4-101; Burns Indiana Statutes Annotated § 2-1714; Borum v. Fouts (1860) 15 Ind. 50; George v. Hurst (1903) 31 Ind. App. 660, 68 N.E. 1031.

Finally, pursuant to Code of Professional Responsibility, Canon 9, a lawyer is obliged to avoid at all costs the appearance of any professional impropriety. As is stated in EC 9-1, every lawyer is duty bound to promote public confidence in the legal profession. Any act which may cause a layman to suspect disreputable practices must be shunned. American Bar Association Informal Opinion 49 (1951).

The conclusion of the Committee is that any lawyer when presented with the opportunity of multiple representation must guard against potential unethical conduct and the appearance of a breach of ethics. An attorney may not solicit employment from potential mutual claimants. It must be clear that the claimant voluntarily seeks and requests the attorney's representation; and the attorney may not accept employment unless the client has initiated negotiations for the services. (The attorney who without request from the layman suggests the need for representation must not under any circumstances undertake the professional work.) The attorney must reveal to his existing client or clients and to the potential client his representation of all others with connected interests.

Furthermore, the Committee feels that an attorney is obliged to suggest to the potential client that he seek the services of his own regular counsel. The attorney is further obliged to obtain the consent of his existing clients and the potential client to the disclosure of information received from each to the other and in all judicial proceedings as may be necessary in the successful representation of the multiple clients.

Finally, the attorney may not accept employment which involves differing interests or potentially differing interests without the consent of each of the multiple clients after a full disclosure of the possible effect on the exercise of his independent judgment on behalf of each...

Since that time Indiana Legal Ethics Opinion No. 5 of 1975 held that a law firm should decline representation of its regular client the bank, which was
adverse to the bank acting in a fiduciary capacity, and in the course of said opinion the following rule was stated:

"... These Canons impose a strict course of conduct and, in our opinion, requires that if there is any doubt as to whether or not there is a conflict, the problem should be resolved by the attorney declining to accept the employment. As this committee has earlier said:

"... pursuant to the Code of Professional Responsibility, Canon 9, A lawyer is obliged to avoid at all costs the appearance of any professional impropriety. As is stated in EC 9-1, every lawyer is duty bound to promote public confidence in the legal profession. Any act which may cause a layman to suspect disreputable practices must be shunned." (Indiana Legal Ethics Opinion No. 2 of 1971) (Emphasis Added)

Professor Wise has expressed this strict standard in conflict situations in the following words:

"... if there is the slightest doubt as to whether a proposed representation involves a conflict between two clients or between a new client and a former client, or may encompass the use of special knowledge or information obtained through service of another client... the doubt can best be resolved by Matthew VI, 24: "No man can serve two masters." (Wise, Legal Ethics, p. 256, 1970) (Emphasis Added)

On the other hand, Canon 9 must be construed so as to harmonize with other parts of the Code and the facts of each situation must be carefully examined. This is illustrated by Ethical Consideration 5-17 which reads as follows:

"Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely..."

Shortly after that opinion was rendered, our Supreme Court considered a disciplinary action which resulted in the attorneys being given a public
reprimand; In re Farr; In re Huse (1976) 264 Ind. 153, 340 N.E. 2d 77.

Justice Prentice speaking for the undivided court indicated that it is well settled that there are certain disputes or conflicts of interest that are so adverse that an attorney simply may not under any circumstances represent both parties to the conflict. That court held the joint representation was improper notwithstanding the fact that the guest passenger statement that the host driver was not negligent was made, because the evidence showed the driver had been drinking at the time of the accident, which occurred on his side of the road, and accordingly a conflict of interests existed. Our court noted that when a disclosure of multiple representation is made, it is the attorney's obligation to advise both sides of possible adverse theories which would affect his undivided loyalty to either of them. The Court indicated that DR 5-105(a) and (b) contemplate that the obligation of the lawyer in multiple representation situation, is to not only make disclosure at the inception of the employment but that he has a continuing duty to disclose all subsequent developments in a case which might adversely affect the independence of his professional judgment. The court further indicated that EC 7-8 requires a lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which might lead to a decision that is morally just as well as legally permissible.

While the only absolute prohibition against representing multiple interests is that a lawyer should never represent in the same litigation multiple clients with directly adverse interests, it is also true that in other instances one attorney may and often does represent multiple interests in non-litigation matters or even as co-parties to a lawsuit. Oftentimes it would render legal services prohibitively costly in certain circumstances, however, it should be noted that such multiple representation such as contemplated by the aforesaid agreement must be based upon concept of full disclosure of the potential for adverse interests, informed consent to the risk of that potential, and timely withdrawal if the potential for adverse interests becomes actual. The instant inquiry does not set out many of the facts involving the complete accident. Factors which a good and prudent attorney should consider, for example, might include whether the driver or the passengers had consumed alcohol, whether the driver was licensed, or whether criminal charges were pending as well as factors noted in the aforesaid Indiana Supreme Court disciplinary proceeding. Unless the defendant county was trying to make new law, there probably would not be any claim for contribution being made back upon the decedent driver's estate, however, it might be elsewhere where the local law permits such a defense, e.g. State Bar of Wisconsin Ethics Committee Formal Opinion E-75-2, Jedwabny v. Philadelphia Transportation Co. (Pa. 1957) 135 A. 2d 2521, cert. den. 355 U.S. 966. If there is any doubt that the defendant will be financially able to satisfy both judgments should all of the suits be successful, an attorney can only ethically proceed if all his clients agree to divide the recovery in proportion to their judgments, A.B.A. Opinion 132 (3-15-1935). If, in fact, there is some master servant or agency relationship between the parties so as to permit the defendant to urge contributory negligence as a defense against one of the parties
it would appear for an attorney to represent people who might take different positions on that issue, see Illinois State Bar Opinion 188 (9-16-1961); 1010 C.J.S. Workmens Compensation § 10 10(c). Both parties should also be advised that the Court may in the future prohibit the attorney from representing either of them and both of them may have to employ new and separate counsel, e.g., Stanley v. State (Ind. App. 1982) 435 N.E. 2d 54, at footnote2. The duty to disclose any circumstances that might cause a client to question the lawyer's undivided loyalty, which is required by EC 5-19 also applies to non-parties who have been represented in substantially related matters, e.g. Whiting Corp. v. White Machinery Corp. (7th Cir. 1977) 567 F. 2d 713; ABA Informal Opinion 1425 (9-18-1978). As noted in the last cited informal opinion, an attorney has divided allegiance whenever one of his clients unexpectedly testifies to facts unfavorable to his other client. Furthermore, the representation by plaintiff's counsel of even non-party witnesses might cast out on their impartiality or disinterest to the detriment of the plaintiff's case. That opinion involving non-party witnesses indicates that the caveat does not necessarily disqualify an attorney from representing people with a conflict, but does raise problems that should be considered by an attorney in advance of accepting employment.

Specifically the attorney employment contract provision that indicates that should the passenger clients in the future desire to prosecute a claim against the decedent driver's estate within the statute of limitations they will inform said attorney and he will withdraw from said case is not specific. If the words "said case" referred to the passenger's case against the county there is no ethical problem. But if the words "said case" refer to a potential case against the decedent driver's estate, then the estate will suffer a harm as it will have to pay for the reeducation of a new attorney. It is this Committee's opinion that said attorney would not be able to represent either side should the passengers decide to bring a claim against the estate because he has had the advantage of the confidence of both of them, and such continued representation of either of them would be improper, EC 5-15; EC 9-2; c.f. Jedwabny v. Philadelphia Transportation Co. supra at 135 N.E. 2d 254-255. In the specific case involved assuming that the estate and the heirs have no objection to the joint representation, the lawyer may wish to refer the injured passengers to independent counsel so that there be no later claim that he was incompetent in trying to figure out some sort of recovery theory against the driver. Finally, as recommended in our aforesaid Opinion No. 2 of 1971, the representation and disclosure and consents should be in writing so as to avoid the appearance of impropriety.

**CONCLUSION**

Multiple representation of the decedent driver's estate and the injured passengers claim against a common defendant is permissible. No doubt, in fact, the mutual representation of plaintiffs can cut down the costs of discovery and may be to their potential advantage. If the aforesaid attorney employment contract paragraph, which is indefinite, is cleared up, it would seem to be possible in this case for such multiple representation to be permitted if both clients' consent and in fact for so long a period of the time as their interest not be in conflict, inconsistent, diverse or otherwise
discordent. This Committee is not conversent with all of the facts and circumstances surrounding the automobile accident, and can only suggest principles which have to be examined in order to make a decision on whether there is a conflict of interests. If the aforesaid attorney after full and informed discussion with both clients and if after the passenger clients have talked to independent counsel, both of the parties have agreed that he may do so, an attorney should then weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts the employment. After making such disclosure and having had such informed consent and he has thereafter resolved all doubts against the propriety of the representation, and he still has a belief, he can give effective representation to both clients, there is no such conflict of interests present which would prohibit his representation of said parties. Any attorney facing multi-client problems should consider the comments of Weddington, "A Fresh Approach to Preserving Independent Judgment," 11 Ariz. L. Rev. 31, 35 36, 52 (1969) prior to contracting with both clients, viz:

"As with most legal postulates, the principle that a lawyer should exercise independent professional judgment is as difficult to apply as it is simple to state. Perhaps the only realistic way to determine whether or not representation is proper in a given situation is by use of a balancing process . . . Determining the potential harm requires consideration of such factors as the degree to which the interests differ, the probability that the lawyer will be influenced by the differing interests, and the extent to which the clients' interests would be harmed if the lawyer's judgment were affected. Factors favoring the propriety of representation could include any unique value to the client's interest in retaining the lawyer in question, such as his familiarity with the details of a complex legal transaction, or the desire of several parties that the lawyer in question serve as mediator or arbiter of these interests. Representation also might be proper where the parties are anxious to avoid the expense of an added lawyer . . . [D]oubts should be resolved against the propriety of representation."
The Legal Ethics Committee has the following inquiry:

Our office specializes in commercial law with a particular emphasis on the collection of accounts. One of our largest clients is a collection agency who represents many clients. It has always been the practice of the collection agency to refer the accounts to us for litigation in the name of the particular individual or corporation who rendered the service. However, it is our understanding that there is a wide-spread practice in this state for attorneys to institute litigation in the name of the collection agency upon receipt of an assignment of the particular debt. No money is paid for the assignment. It is further our understanding that in most instances this practice is undertaken in order to avoid the potential publicity of the owner of the account.

We seek an advisory opinion as to whether the practice of acceptance of an assignment and suing in the name of the collection agency comports with the ethical standards as outlined in the Code of Professional Responsibility.

Trial Rule 17 commences "Every action shall be prosecuted in the name of the real party in interest." This is a continuation of the prior statute in the State of Indiana.

Whether or not a plaintiff is the real party in interest is a question of substantive law, and the Legal Ethics Committee does not issue legal opinions.

The question has never been addressed in the State of Indiana, but 59 Am. Jur. 2d, Parties, §41, states that an assignment of an account for collection gives the plaintiff collection agency the "real party in interest" status.

If the collection agency is not a real party in interest, the Ethical Considerations and Disciplinary Rules of Canon 7 would come into play. If the collection agency who has accepted an assignment without monetary consideration is the real party in interest, there is no ethical consideration involved.