

ETHICS OPINION
RO-94-13

Lawyer who has formerly represented a client may not represent another person in the same or a substantially related matter where the present client's interests are materially adverse to the former client.

QUESTION:

"The purpose of this letter is to request a formal opinion from your office regarding whether my law firm should be disqualified from representing the Plaintiff Corporation A in litigation.

I believe that all of the relevant facts are set out in the following documents which are enclosed:

1. Complaint filed by Corporation A against Corporation B and Mr. Jones for damages arising from an alleged breach of equipment lease and on a personal guaranty.
2. Answer and counterclaims of Corporation B and Jones.
3. Amendment to answer and counterclaims.
4. Corporation A's answer to counterclaims.
5. Appearance of Lawyer A as counsel for Corporation A.
6. Defendant's Objection to Appearance of Attorney, with attached Exhibits A, B, and C.
7. Letter from Lawyer X to Judge Rite, with referenced attachments.
8. Response of Lawyer A's firm in opposition to Defendants' 'Objection to Appearance of Attorney' with attached Exhibits 1 through 6.

Judge Rite has asked that I request this opinion from your office. Enclosed is a copy of the order which I am submitting to Judge Rite which I expect will be signed shortly."

ANSWER:

The documents submitted with your request for opinion show that your firm is presently representing Corporation A against Corporation B and Mr. Jones. Corporation B is in the business of designing and providing printed business forms. Jones is the president and sole stockholder. This lawsuit was filed on and deals with an alleged breach of an equipment lease/purchase agreement by Corporation B and Jones. There is a counterclaim and a third-party complaint as well. The lease agreement was entered into on July 29, 1988.

Corporation A is claiming damages in the amount of \$9,320.00 as a result of the breach.

During 1991, Lawyer A's partner ("Partner") represented Jones when he was considering the formation of another corporation which would offer consulting services to the same clientele that Corporation B serviced. Partner met with Jones on one occasion and with his accountant on another. Prior to this, Partner had never had any dealings with either man. Partner met with the accountant, Mr. Smith, and sent a letter the next day confirming "the key points we examined". In August, Partner met with Jones about forming the new company. The next day, he sent Jones a four page letter setting out "the essential facts you imparted to me together with my recommendations for further consideration". After that, there was no further contact between Partner and Jones or the accountant. At the end of August, Partner sent a bill for his services. Partner has submitted an affidavit of his association with Jones and all documents from his file are attached as exhibits. There is no question that Jones was a client of Partner's for a brief period of time and that he obtained information in the course of the representation which would be confidential under Rule 1.6(a).

Since Jones is a former client of Lawyer A's firm, Rule 1.9 must be addressed when another member of the firm represents another party in a lawsuit against Jones. Any member of the firm is disqualified under Rule 1.10 if Partner himself would be disqualified by any type of conflict of interest. Rule 1.9(a) provides that a lawyer who has formerly represented a client may not represent another person in "the same or a substantially related matter where the present client's interests are materially adverse to the former client." In determining whether two matters are "substantially related", the scope and subject of the two matters must be examined. The issues involved must be very closely connected. Partner's representation of Jones appears to have been brief and limited in scope as opposed to an ongoing representation of Jones' business. If the trial court finds from the facts before it that Corporation A's suit is substantially related to the issues of Partner's prior consultation, then the firm is precluded from representing Corporation A against Jones in the instant case. If the finding is otherwise, then Rule 1.9(b) must be addressed.

Rule 1.9(b) is directed to the protection of client confidences gained by a lawyer during the former representation. Public information or information generally known is not encompassed in the rule. There is a presumption that a lawyer has gained confidential information in the prior representation of a client. That can be rebutted by the lawyer. There is also the presumption that if a lawyer possesses confidential information that he will potentially use it in a way adverse to the former client. In that sense, if the confidential information is in any possible way disadvantageous to the former client, the lawyer is disqualified.

If it is found that Partner could use the information he gathered during his short representation of Jones, in any adverse way, or that he would have an advantage because of his acquired knowledge, then he and the firm are disqualified from representing Corporation A. If an analysis of the information reveals that it could not be used by Partner, in any way, in the Corporation A case, then the firm is not disqualified.

The Disciplinary Commission is not going to make any factual or other findings determinative of this question. There is a motion to disqualify pending in the trial court and those matters are for the court to decide. The Commission would point out that the "appearance of impropriety" is not the standard at this time and, that, in and of itself, does not require a disqualification. That term is not used in the Rules of Professional Conduct. The application of such a standard tends to result in blanket disqualification because it does not take the actual relationship, if any, between the subject matter of the two representations into account.

MLM/vf

10/3/94