

ETHICS OPINION

R0-1990-03

Lawyer should not undertake representation of client in matter adverse to former client which matter is substantially related to prior representation and where lawyer gained confidential information which may be used to detriment of former client.

QUESTION:

"Several years ago I talked to a person that I will refer to hereinafter as Ms. X. This relationship resulted in Ms. X hiring me for the purpose of protecting her interest in an estate matter ongoing in another county. This matter concerned a disagreement that she was having with her brothers, sisters, etc. relative to the disposition of estate property. Ultimately, I was assisted by another attorney in the county where the estate property was located and the matter was resolved. I would estimate that my last contact with Ms. X relative to the estate or any other matter was approximately three years ago. At that point in time I not only conferred with Ms. X but also her husband. At no time on that occasion were any matters of a domestic nature discussed concerning Ms. X and her husband.

Perhaps eighteen months ago Ms. X contacted my office by telephone and requested to see me relative to a domestic matter. I refused to see her and instructed my secretary that I would not be interested in representing her in any other matters. No information on that occasion was received from Ms. X relative to any domestic entanglements.

Several months ago or fall 1989, Ms. X filed a bill of complaint for divorce against her husband. Ms. X is being represented in this matter by an Anytown attorney. Ms. X's husband contacted me and retained me to defend this case. I have been doing so for the last several months. In the fact that I have never discussed with Ms. X any domestic matters and in the fact that I was not representing her currently on any other matters and had not for several years, I saw no problem in undertaking to represent her husband. As of late, a Motion to Recuse has been filed by Ms. X's attorney of which a copy I enclose for your inspection. She alleges in this petition that I have gained information from formerly representing her estate matters that can be used against her in the domestic matter. In my opinion, this is totally untrue. In any event, I would appreciate your opinion as to whether I should withdraw from this matter."

ADDITIONAL FACTS:

Attached as additional information is the Motion to Recuse filed in this matter.

ANSWER:

In previous opinions the Disciplinary Commission has opined that it is permissible for an attorney to undertake representation against a former client but has expressly conditioned

that employment upon several considerations. First, the Commission has held that there should be no substantial relationship between the first representation and the subsequent representation. Secondly, the Commission has held that the attorney, by virtue of the first representation, should not have been in a position to have learned confidences or secrets of the first client that could subsequently be used to the detriment of, or to embarrass, the former client. Third, the Commission has stated that the relationship between the attorney and the first client must not have been of such a character or nature so as to preclude the attorney from rendering, to the subsequent client, full, vigorous and undiluted loyalty. On occasion the Disciplinary Commission has required waiver from the former client before permitting the subsequent representation.

On the facts stated, and particularly in view of the fact that the former client has asserted that there is a substantial relationship between the prior representation and the present representation and further that certain confidences and secrets relating to the former client's mental and physical background, which could now be used to the detriment of, or to embarrass, the former client were made known to the attorney by virtue of the former representation, we are of the opinion that it would not be ethically proper for you to continue in your representation of Mr. X. The standards imposed by the Commission are in large part subjective. When there is a conflict or a disagreement such as this between the attorney and the former client as to disqualification, in an abundance of caution, this conflict should be resolved in favor of the former client.

DISCUSSION:

In lieu of further discussion see Opinions 87-108, 88-06, and 88-69.

AWJ/vf

1/22/90

ETHICS OPINION

RO-87-108

QUESTION:

"I need a legal opinion on the following matter:

I personally know a couple who wish me to represent them in a divorce proceeding. I have just recently represented both of them in a major lawsuit involving the death of their son where I obtained an out-of-court settlement for them and their surviving children. The other day, both of them approached me and advised me that they wished to obtain a divorce and that they had reached an agreement disposing of all property and custody matters if the court was able to enter an order of divorce.

I realize that I cannot represent both of them. My question is, can I represent either one of them if the other consents in writing and has an independent attorney review all of the documents and advise that individual as to the legal consequences of those documents? If you need additional information, do not hesitate to call."

ANSWER:

As the issues involved in the uncontested divorce proceeding between your prior clients are unrelated to the matter on which you previously represented them, you may ethically represent one of the spouses so long as you comply with the provisions of DR 5-105(C).

DISCUSSION:

An opinion of the General Counsel published in the January, 1986 Alabama Lawyer discusses the circumstances under which an attorney can file suit against a former client. Although the couple which you previously represented in a wrongful death lawsuit have reached agreement on all issues relating to their divorce, they will be technically adverse. By representing one of them, you will thus be suing the other.

This office has held that:

If there is a 'substantial relationship' between the issues in the prior representation of the former client and the issues in the contemplated suit against or position adverse to the former client such that the attorney could have learned of a 'confidence' or 'secret' of the former client that he can use adversely to the former client and

favorably to the new client, the attorney cannot ethically proceed against the former client. To preclude action against a former client it is not necessary that the attorney need, in fact, receive such a 'confidence' or 'secret.'

While the proceeds of the wrongful death action settlement would constitute a marital asset, the issues involved in that case are not substantially related to the issues in the marital proceeding. So long as the spouse whom you do not represent in the divorce proceeding consents to your representation of the other, you may ethically handle the divorce proceeding.

HLW/vf

12-31-87

ETHICS OPINION

RO-88-06

QUESTION:

"In December of 1985 A (Developer) comes to me with a real estate sales contract for purchase of a prime commercial tract. Contract recites 'A and Partners' as Purchasers.

A describes a plan that he and 2 investors (B & C) will incorporate ABC Corporation and buy the land, get construction loan, build commercial condominium project, sell units, and split profits equally. A asks if I would perform legal work. We agree on fees, etc.

Within 3 months, I incorporated them; ABC Corporation took title to the land and the construction loan is closed.

Over the next 2 years, I represented the corporation with respect to construction, creation of condominium documents, contracts, sales, closings, matters of construction, zoning variances, unit sale closings.

Then in last several months, it is discovered by one investor that A has many many unauthorized money withdrawals from the corporation checking account spanning the 2 year period and totalling around \$160,000.00 A is probably personally insolvent.

Special corporate meeting is called with notice to the 3 shareholder/directors. A does not attend and is removed as Director and Office by vote of B and C.

Discussion is had with District Attorney by B & C and one of my law partners. DA intends on referring to Grand Jury in early February for criminal indictment. I am told I will be called upon to testify.

QUESTIONS:

Do I have any ethical problems in

- A. Continuing to represent the ABC Corporation and advising B & C?
- B. Representing ABC Corporation in a civil lawsuit against A?
- C. Testifying against A before the Grand Jury?"

ANSWER:

In inverse order your questions would be answered as follows. First, as to testifying against A before the Grand Jury, you may offer testimony before the Grand Jury concerning confidences and secrets of A individually

or ABC Corporation, if required to do so by law. Disciplinary Rule 4-101(C)(4) states as follows:

"(C) A lawyer may reveal:

* * *

- (4) Confidences or secrets when required by law, provided that a lawyer required by a tribunal to make disclosure may first avail himself of all appellate remedies available to him."

The Disciplinary Commission has previously held that an attorney, under such circumstances, should assert the attorney/client privilege regarding confidences or secrets, but that the attorney does not violate this provision of the Code by answering questions once ordered to do so by the tribunal. In addition, Disciplinary Rule 4-101(C)(5) provides that an attorney may reveal the intention of his client to commit a crime and the information necessary to prevent a crime. In the event that A's alleged activity is criminal in nature and continuing in nature, you may be permitted to reveal such information as necessary to prevent the crime by this provision of the Code.

Questions A and B involve essentially the same issue, that being whether your previous representation of A is so substantially related to the present matter as to disqualify you from representation of ABC Corporation. As posed in your question, it is noted that A has never consulted with you regarding his alleged criminal activity and has never made confidential or secret communications to you on this issue that could be used to his detriment or to the benefit of any third parties. Since the issue of the proposed civil lawsuit against A would involve primarily an issue that was not subject to your representation and on which you had not been consulted, your representation of ABC Corporation in a civil lawsuit against A is permissible. Likewise, your continued representation of ABC Corporation and rendering advice to the two remaining principals, B and C, is also permissible.

DISCUSSION:

In several recent opinions the Disciplinary Commission has determined that Disciplinary Rule 4-101(C)(4) of the Code of Professional Responsibility should be interpreted in such a way as to permit disclosure of client secrets and confidences by an attorney when ordered to do so by a tribunal,

without the affirmative necessity of pursuing appellate remedies. Opinion RO-86-19, attached hereto, enunciates the principles to be followed by an attorney in those situations in which his testimony and/or records are sought.

In considering the propriety of your continued representation of ABC Corporation, and the two remaining principles, B and C, the Commission was mindful of the fact that your earlier representation of A was limited in nature and did not place you in a position to obtain confidences and/or secrets of A that subsequently could be used to his detriment by you or by a third party. In similar fashion, the legal services performed by you for ABC Corporation were standard legal services not related to management of the corporation nor to financial manipulations within the corporation by any of the principles. The Commission notes no substantial relationship between your prior representation of A, or ABC Corporation, and your contemplated relationship with B and C and ABC Corporation in future. In a sense, the action that you propose to take on behalf of ABC Corporation against A is unrelated to any matters in which you have previously represented A. Your representation of B and C, and ABC Corporation, insofar as said representation is counter to the interest of A, will involve the criminal activity of A and any resulting civil liabilities. Such was never the subject matter of any of your representations of A and your employment by B and C, and ABC Corporation, affords them no unethical advantage. While the Disciplinary Commission is very cautious in matters such as this, given the totality of the circumstances the representation outlined in your request has been deemed permissible.

AWJ/vf

6-13-88

ETHICS OPINION

RO-88-69

QUESTION:

On or about December 1, 1987, Attorneys P and B withdrew from law firm C and formed a partnership. During the time that P and B were employed by C, B represented Client A in litigation in the Circuit Court of ~~Madison~~ County. Subsequently, and while employed by C, Attorney P was contacted by Client B and was requested to represent Client B in a dispute with Client A. The dispute bore no substantial relationship to Attorney B's prior representation of Client A. Nonetheless, Attorney P declined representation on that occasion although another attorney in firm C did enter into initial representation of Client B. After Attorney P and B formed their partnership, firm C referred Client B to the new partnership and they in turn undertook to represent Client B. In discussing the matter between themselves, Attorney P learned that Attorney B had, while employed by firm C, also been contacted by Client A in reference to the dispute with Client B but that Attorney B had declined representation. No attorney/client relationship was formed and no confidential information was passed at the time of this prospective employment discussion. Subsequently, Client A retained Attorney M to represent him. Attorney M and Attorneys P and B entered into discussions regarding these various occurrences and Attorney M advised that his client, Client A, waived any objections to Attorneys P and B representing Client B. This was affirmed by letter from Attorney M to Attorney P. Based upon this, Attorney P advised the Circuit Court that a Petition for Instructions that had been filed by Attorney P in reference to the issue of disqualification would not need to be heard. At this point in time, Attorney P commenced his discovery. At the time that he accepted employment from Client B, Attorney P received from his client two written memoranda detailing altercations and statements between Clients A and B. In one of the memoranda, Client B stated that Client A had stated that "he was an evil man, a crazy man; that he had just been released from the VA Hospital after recovery from a nervous breakdown. He had been to jail and would be willing to go again if his actions would stop this nuisance." In another memoranda Client B alleged that Client A stated that he had been to "... jail, Vietnam, where he killed people and would do so again if provoked, and the V.A. Hospital for treatment of his nervous breakdown. During this time, he said he was not going to contact an attorney or the public authorities, but would come at night to cut down the cyclone and tear down the dust collection line. He wanted it clearly understood that one of us was going, and he was willing to go to jail to make sure it was my company that suffered physical property damage." In addition, Client B noted that Client A's "... speech was slurred, his thoughts disjointed." Based upon these statements Attorney P attempted to solicit from Client A, at a deposition, any material relating to his admission to a V.A. Hospital or treatment for nervous or psychiatric disorders. At this point Client A objected to offering any testimony on the ground of attorney/client privilege and information purportedly disclosed to Attorney B at the time Attorney B represented Client A in the unrelated matter. According to Attorney P, he entered into this line of inquiry based upon the memoranda furnished to him by Client B and in reaction to a claim for "both mental and emotional anguish" asserted by the plaintiffs (Client A and others) against Client B. Client A then attempted to withdraw the waiver he gave, through Attorney M, to Attorneys P and B. Attorney P states that he initially interpreted his potential problem in representing Client B as a "conflict of

interest question" and that the issue of confidential information was not raised until the attempt to take Client A's deposition. He states that he has received no information from his partner, Attorney B, and that in addition to statements made by Client A to Client B, Client A's mental state was a matter of public record by virtue of a March 17, 1986 affidavit from Roy A. Rosen, M.D., which forms a part of the official court file in the ~~McGowan~~ Circuit Court case wherein Attorney B had earlier represented Client A. Attorney P's position is that such information as he might have regarding Client A's mental state was available to him from non-confidential and non-privileged sources and that even if the same had been originally imparted to Attorney B in a confidential manner, its subsequent publication and disclosure in the public forum changed its character. Attorney P's query is whether he is disqualified, by virtue of his association with Attorney B, from continuing his representation of Client B and whether Client A's waiver, given with the advise of counsel, may now be withdrawn.

ANSWER:

Ethical Consideration 5-14 states in pertinent part that "Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or a continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client." Ethical Consideration 4-5 provides, in pertinent part, that "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes." Disciplinary Rule 4-101(C)(1) provides that a lawyer may reveal confidences or secrets of a client with the consent of the client but only after a full disclosure to the client. Definition (7) to Canon 9 provides that wherever in the Code the conduct of a lawyer is prohibited, all lawyers associated with him are also prohibited from engaging in such conduct.

In the instant case Client A has consented, in writing, through and on the advice of counsel to the participation of Attorneys P and B in the litigation in question. For purposes of this answer the Commission assume that Client A, in rendering his waiver to representation by Attorneys P and B, had access to and availed himself of competent counsel and that his waiver was, therefore, knowingly entered. Accordingly, the Commission is of the opinion that such a waiver cannot now be withdrawn.

The Commission is of the opinion that Attorney P may continue in his representation of Client B in the instant cause of action. While Client A did, by his own admission, make certain disclosures to Attorney B at an earlier time regarding matters considered by Client A to be confidential and/or secret, they were not confidences or secrets subject to the attorney/client privilege at the time that the present representation

commenced. Client A removed those matters from that classification by making disclosure to a third party on more than one occasion between the time of disclosure to Attorney B and the retention of Attorney P by Client B. In addition, records regarding Client A's mental health were a part of a public record compiled nearly two years prior to Attorney P's entry into representation of Client B.

Finally, the Commission is of the opinion that Attorney P quite properly entered into a line of inquiry regarding Client A's mental health since Client A, as a plaintiff in the cause of action, sought money damages for mental anguish, thus raising on his own initiative the issue of his mental health. There is no indication from any source that Attorney P initiated this line of inquiry into Client A's mental health on the basis of alleged confidential information received from his partner, Attorney B.

It is not for the client to determine what constitutes a confidence or secret or what is subject to privilege. Information that is publicly known at the time of its disclosure to a lawyer cannot be considered a confidence or secret. Likewise, information that may have been confidential at the time of its disclosure, but which subsequently becomes public through disclosure by the client, can no longer be considered a confidence or secret. It is noted that in the instant case Attorney P did not seek to disclose any confidential information but sought to pursue a line of inquiry instigated by Client A's own claim for money damages for mental anguish in the underlying lawsuit.

The Commission is of the opinion that on the facts of this case it would be ethically permissible for Attorney P to continue in his representation of Client B.

AWJ/vf

12/15/88