

ADVISORY ETHICS OPINION 2000-05

SYNOPSIS:

An Attorney may represent a client in an action against a client of the firm where the attorney was previously employed, if the Attorney assures himself or herself that the Attorney has not personally worked for the client of the former firm during the time the Attorney was at the former firm and the Attorney has no knowledge of the matter about the representation from the employment at the former firm.

FACTS:

The Attorney worked in an office that represented the seller of a residence. After the closing on the sale of the residence, the buyer of the residence discovered a significant problem with the septic system. No one from the attorney's office remembers having attended the closing. The buyers were not represented by an independent attorney. The attorney for the mortgage company took care of the title work and the closing. Since the closing the Attorney has left the former firm and is practicing elsewhere. The Attorney indicates that the Attorney does not remember having learned any facts related to the seller or the residence, nor does the attorney specifically remember reviewing the deed or being involved in the transaction. The buyers of the residence contacted the attorney to represent them. The attorney questions whether such representation is prohibited as a sequential representation or would constitute a conflict of interest.

DISCUSSION:

The question asked raises the issue of conflicts of interest where former clients are involved and issues of disqualification of counsel. The seller of the residence is a potential adverse party in any proceedings to resolve the questions related to the defective sewage disposal system. Rule 1.9 of the Professional Conduct Rules addresses the issues of representing a client where the matter involves former clients. Rule 1.9(a) and Rule 1.9(b) address two circumstances which are relevant to the question of representing a new client where a former client is involved. Rule 1.9(a) provides that a lawyer may not represent a client in the same matter or a substantially related matter where the interests of the new client are adverse to the interests of a former client, unless the former client consents after full disclosure. Rule 1.9(a) applies to attorneys in the same firm.

Rule 1.9(b) applies when an attorney has left one firm to join another and seeks to represent a client as an adversary of a client of the former firm. Rule 1.9(b) restricts an attorney who has left one firm from representing clients in the same or substantially related matters where a client of the former firm is the adversary and the lawyer has obtained information about the client of the former firm that is protected under Rule 1.6 or Rule 1.9(c), unless the client of the former firm consents after full disclosure.

Rule 1.9(b) is the applicable rule in the present case because the attorney is no longer with the firm that represented the seller of the property. Rule 1.9(b) is a two part test. First the Attorney must be seeking to represent a client with interests adverse to the client of the former firm; and second, the attorney must have acquired information protected by Rules 1.6 and 1.9(c). If both parts of the test are met, then an attorney may not represent the new client without the prior consent of the former client. Before undertaking the representation of the new client the Attorney must confirm, by reviewing billing records or other available material to insure that the Attorney was not involved in any way in the representation of the client of the former firm. If there was any involvement with the client in the related matter during the employment of the former firm, then the Attorney must not undertake to represent the new client. It would be unlikely that the Attorney would not have learned something about the matter at the former firm. In addition, it would be inappropriate for the Attorney to appear to have "switched sides" in the transaction. Rule 1.9 was intended to avoid such an event. If the Attorney had not been actively involved in the representation of the client at the former firm, then the Attorney may undertake to represent the new client in a matter adverse to the client of the former firm.

Rule 1.9(c) is applicable to the representation of the new client. The Attorney may not use information that the Attorney may have learned about the former client of the former firm in connection with the representation of the present client.

CONCLUSION:

An Attorney may represent a client against a client of a firm where the Attorney was formerly employed, in a matter which is adverse and related to matters handled by the prior firm, if the Attorney did not actively participate in the representation of the former client, and the Attorney does not have knowledge obtained from the prior firm's representation of the former client about the matters constituting the current representation.