ADVISORY ETHICS OPINION 2000-07

SYNOPSIS:

An attorney who formerly represented a corporation in litigation may subsequently handle an unrelated matter adverse to the president of that corporation provided that no confidential information is used to the disadvantage of the former client.

FACTS:

The inquiring firm seeks an opinion concerning the propriety of its continued representation of a client in proceedings brought by the president of a former client. The pertinent facts are as follows:

In 1997 the firm (the "Firm") was hired as insurance defense counsel to defend a corporation (the "Corporation") against claims by an employee of defamation and breach of an employment agreement (the "1997 Suit"). The Corporation's involvement in the 1997 Suit concluded in 1998 with a motion for summary judgment in favor of the Corporation. At the time the 1997 Suit was decided, the Corporation had filed for bankruptcy, so the decision in the 1997 Suit was issued by the United States Bankruptcy Court, as part of more general bankruptcy proceedings (the "Bankruptcy Proceedings").

In 1999, the president and CEO of the Corporation (the "President") brought a pro se lawsuit in Superior Court, (the "1999 Suit") in his own name against a bank (the "Bank") that had issued a line of credit to the Corporation. The Corporation, through separate counsel in the Bankruptcy Proceedings had raised a challenge to the Bank's claims under the line of credit. In both the Bankruptcy Proceedings and the 1999 Suit, similar claims were asserted against the Bank, and the Bank employed the same counsel to defend against these claims.

In 2000, counsel for the Bank withdrew from the 1999 Suit, and the Firm was retained to assume defense of the Bank in the 1999 Suit, only. The attorneys representing the Bank in the 1999 Suit are not the same attorneys as represented the Corporation in the 1997 Suit or in the Bankruptcy Proceedings, and the Firm believes it received no confidential information from the Corporation in the course of the 1997 Suit or Bankruptcy Proceedings that would be bear on its current representation of the Bank against the claims of the President in the 1999 Suit. The President has disagreed, and objects to the Firm's representation of the Bank in the 1999 Suit.

ANALYSIS:

Rule 1.9(a) provides that: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client consents after consultation." The successive representation principles in Rule 1.9(a) contemplate an identity of clients and matters, neither of which is present here.

The participants in the 1997 Suit and the 1999 Suit are different. The Corporation, alone, was the party represented by the Firm in the 1997 Suit. The President, alone, has filed the 1999 Suit, and the Corporation is not a party to this action. This is not a situation where Rule 1.9(a) governs because the President, while an officer of a former client, is not the former client.

Rule 1.13 makes clear that "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Rule 1.13(e) does contemplate and permit dual representation of an organization and its directors, officers and employees, but there is no suggestion that the Firm's work for the Corporation on the defamation and breach of employment contract claims in the 1997 Suit constituted a dual representation of the President in that Suit.

Furthermore, while the issues the President seeks to litigate in the 1999 Suit are similar to the issues that the Corporation has been litigating, through separate counsel, in the Bankruptcy Proceedings, those issues bear no relationship to the issues litigated by the Firm in the 1997 Suit.

The "matter" for which the Firm was engaged in the 1997 Suit was limited to claims of defamation and breach of an employment agreement by a former employee. The Firm was not general counsel to the Corporation in the Bankruptcy Proceedings, and had no involvement in the Bank's claims against the Corporation in those proceedings. Thus, Rule 1.9(a) would not preclude the representation even if the Corporation, and not the President, were the client in the 1999 Suit, because the issues in that proceeding are not substantially related to the issues involved in the 1997 Suit.

Under these narrow circumstances, we conclude that the Firm's continued representation of the Bank in the 1999 Suit against the claims by the President is neither successive representation adverse to a client, nor a conflict of interest. Nonetheless, the Firm must be mindful of its continuing duties to its former client, the Corporation, under Rule 1.9(c). It cannot use information relating to that representation to the disadvantage of the Corporation, nor can it reveal information concerning that representation, except as permitted by Rules 1.6 and 3.3.