

ADVISORY ETHICS OPINION 2000-12

SYNOPSIS:

A Vermont law firm who once represented a husband and wife in certain limited aspects of implementing an estate plan by reviewing deeds transferring Vermont real estate to effect the goals of the plan, may not later represent the estate of the deceased husband and the personal representative in the Vermont ancillary administration proceedings if the wife objects. Rule 1.9(a) restricts the Vermont law firm's opportunity to represent a new client with interests adverse to those of a former client in the same or substantially related matter.

FACTS:

A Vermont law firm was retained by an out-of-state law firm to review deeds and other real estate transfer documents which were drafted by the out-of-state law firm to effect an estate tax planning transaction for the out-of-state firm's clients, a married couple. The role of the Vermont firm in effecting the estate planning transactions was limited to the review and approval of the deeds and other transfer documents. No significant financial information was provided to the Vermont firm. The Vermont firm did not participate in meetings or consultations with the clients and the out-of-state firm. Ultimately, transfer documents were completed and recorded. Additional advice was given to the out-of-state law firm several years later when further changes to the ownership of the Vermont property were contemplated. The husband died about a year after the last contact between the Vermont law firm and the out-of-state law firm regarding the clients and their Vermont property holdings. Proceedings to open an ancillary administration of his estate commenced in Vermont. The out-of-state law firm retained the Vermont law firm to represent the personal representative and the estate in the ancillary proceedings. The wife, through other counsel, is contesting the ancillary proceeding in Vermont and the appointment of a personal representative in the ancillary proceeding. Counsel to the wife has raised an objection to the Vermont firm representing the estate and the personal representative in the ancillary proceedings in Vermont, asserting that the Vermont firm has a conflict of interest.

ANALYSIS:

The husband and wife who engaged the out-of-state firm to do the original estate planning work were the clients of both firms. The Vermont law firm and the out-of-state law firm should be treated as co-counsel in a single matter with regard to the estate planning. Subsequently the wife obtained different Vermont counsel to object to the ancillary administration and the appointment of the personal representative. Under the facts stated, the Vermont attorney is being asked to advance the cause of the ancillary administration and the appointment of the personal representative in the face of an objection by the wife. For the purposes of this opinion we assume that the wife is no longer a present client of the Vermont firm or the out-of-state firm based on her having obtained other counsel. We view the estate of husband and the personal representative as a "new" client. The relevant Rule of Professional Conduct is Rule 1.9 (a) which addresses the question of when an attorney may represent a client with interests adverse to a former client. The general rule expressed in Rule 1.9(a) is that a firm may not undertake representation in a position adverse to a former client in the same or substantially related matter unless the former client consents. The issue in this inquiry is whether the opening of the ancillary administration and the estate planning work (limited as it was) constitutes the "same or substantially related matter." Applying a rule of reason, it would appear that the matters are in fact substantially related. The purpose of the estate planning is to ensure that the disposition of the client's property on death occurs as the client desired. The estate administration is a foreseeable element of the estate planning process. On that basis we conclude that the post mortem process is substantially related to the estate planning process. We further note that the scope of the prior representation and the amount of information about the former client which the Vermont firm has is not relevant to the inquiry under Rule 1.9(a). The policy behind Rule 1.9(a) is based on avoiding circumstances which give the appearance to non-lawyers that the law firm is changing sides and abandoning the former client. Loyalty to clients, present and past, is one foundation of the lawyer client relationship and must be protected.

Consent by the wife as a former client is an essential element to permitting the Vermont law firm to represent the estate and the personal representative in an adverse position to the wife. The request by the former client's present counsel is evidence that the Vermont firm does not have consent and therefore can not continue representing the estate and the personal representative in a matter which is adverse to the interest of the wife.

If the representation of the estate and the personal representative has commenced, the law firm should withdraw from the representation. When the conflicting interests arise during the course of the representation, the firm with the conflict must withdraw. Rule 1.16.