ADVISORY ETHICS OPINION 80-14

SYNOPSIS:

Attorney who has represented wife in divorce proceedings against first and second husbands may not properly thereafter represent first husband in criminal prosecution alleging criminal conduct of second husband.

FACTS:

Attorney Doe represented wife in a divorce action. Wife obtained a divorce in 1974 and married second husband shortly thereafter. In Fall of 1979, wife again retained Attorney Doe to represent her in a divorce action against second husband.

In January, 1980, husband #1 requested Attorney Doe represent him in a criminal prosecution alleging husband #1 shot husband #2.

Attorney Doe appeared at husband #1's arraignment and was present on behalf of husband #1 during the taking of various depositions.

Wife will be a witness at trial. Wife has told Attorney Doe that she and husband #2 have reconciled and she no longer requires his service.

ISSUE:

Should attorney continue representing husband #1 under these facts?

OPINION:

Canon 4 of the Vermont Professional Responsibility Code, DR 4-101(B), states that a lawyer shall not knowingly reveal a confidence or secret of his client, use a confidence or secret to the disadvantage of a client or use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

EC 4-6 extends the time parameters of DR 4-101(B) by saying, "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

DR 4-101(A) defines "confidence" as information protected by the attorney-client privilege and "secret" as other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.

DR 9-101 mandates that a lawyer avoid even the appearance of impropriety. EC 9-2 states "while a lawyer should guard against otherwise propre conduct that has a tendency to diminish public confidence in our legal system or in the legal profession his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism."

The fact situation indicates there is a high probability that attorney will cross examine wife. Even if attorney does not use information obtained while representing wife, there is certainly the appearance that he could have obtained this information in that manner. Canon 9, in conjunction with Canon 4, suggests that attorney's representation of husband #1 is not within the parameters of the code. Although wife is no longer a client, attorney is still obliged to preserve her secrets and confidences and the probability these may emerge on cross-examination seems directly contrary to the mandates of Canon 4.

ABA Opinion 165 (1936) goes on to say that an attorney must not accept professional employment against a client or former client which will or even may require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of his employment. ABA Opinion 154 (1936) states that confidential communication outlasts the attorney's employment.

In Re: Themelis, 117 Vt. 19, (1951) quoted Thornton on Attorneys at Law, Volume I §174 §176. These sections say that it is a well settled rule that an attorney cannot represent conflicting interests or "undertake the discharge of inconsistent duties." Once an attorney has been retained he cannot accept employment from one whose interests are adverse to the client in the same

controversy "or in matters so closely allied thereto as to be, in effect, a part thereof." The criminal case in our facts appears to be closely allied to matters of attorney's prior representation of wife.

In Re: Themelis goes on to say that the test of inconsistency offered by Thornton is not whether the attorney has ever been retained by the party against whom he proposes to appear, but whether his accepting the new retainer will require him, in forwarding interests of his new client, to do anything which will injuriously affect his former client and "whether he will be called upon in his new relation to use against his former client any knowledge or information acquired through is former connection." The Vermont Court says the test is even more rigid than enunciated by Thornton. The Court says the attorney should refrain from accepting any employment which will require him to do anything which will injuriously affect his former client in any matter in which he formerly represented him and where he may be called upon in his new relation to use against his former client, any knowledge or information acquired through his former connection. Wife is not the opposing party in this case but the test promulgated by the Vermont Supreme Court is whether attorney will injuriously affect the wife as his former client. There is no question that this could be done in cross examination and even if the attorney does not use information gained in his representation of wife, there is a very strong appearance that he got this or could have got information used on cross examination from his former client.

Canon 4 and Canon 9, therefore, indicate attorney should not accept employment from husband #1. Our facts show attorney has already represented husband #1. The questions now becomes should attorney continue his representation of husband #1 or withdraw?

Disciplinary Rule 2-110 speaks to withdrawal. If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission. In any event a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, allowing time for employment of other counsel, delivering all papers and property to which the client is entitled and complying with all applicable law and rules. Attorney has not yet cross-examined wife. It seems, therefore, that he should withdraw from representation of husband #1 especially if he can do so in accordance with DR 2-110. Nothing in our facts indicate that he cannot do so.