

ADVISORY ETHICS OPINION 83-06

SYNOPSIS:

A lawyer may provide the defense of a criminal case even though in doing so he will attempt to impeach the testimony of a person the lawyer formerly represented in a juvenile case because the past juvenile case and the current criminal case are not substantially related. The lawyer may not, however, disclose or use confidential information obtained from the witness while a client.

OPINION:

This opinion is requested by a lawyer who is representing a criminal defendant in a case in which the main witness is a young woman who was formerly represented by the lawyer in the juvenile case that resulted in the commitment of the witness to state custody. There is apparently no direct relationship between the juvenile case and the pending criminal case.

The lawyer has no specific recollection of the witness's case. Nor does he have possession of his file which is now stored by the state pursuant to a policy of the public defender program. He has not sought access to the official file held by the court. That file might contain copies of an investigative and disposition report prepared on the witness by the Department of Social and Rehabilitation Services. It is not clear whether that file might be available to the lawyer under 33 V.S.A. 663.

The lawyer asks two questions:

- (1) Whether he can continue the criminal representation if he does not have access to his file or the court files and both the client and the witness consent; and
- (2) Whether he can continue the criminal representation if he gains access to his file and determines that no secret or confidence is available to use in impeaching the witness, again if both the defendant and the witness consent.

The Code of Professional Responsibility has been interpreted as preventing the representation of a current client against the interests of a former client where the current matter and the former matter are substantially related.¹ This objective test is used so that the former client doesn't have to disclose confidential information to show how it might be misused in the current representation. We can find no indication that matters are ever considered to be sufficiently related solely because the lawyer might use information from the former representation of the client to attack the client's credibility. Thus, it is our opinion that the disqualification of the objective test does not apply to the instant situation.

If the objective test does not apply, there are two other principles in the Code which do. First, DR 4-101(B) prevents a lawyer from disclosing a confidence or secret of a client or using it to the disadvantage of the client. These prohibitions clearly apply to the lawyer here and prevent use of any information he may have obtained from the former client against the former client. If the lawyer feels he can not meet these requirements and represent his current client properly, he must withdraw.

Second, DR 5-101(A) prevents representation of a client where the lawyer's interests are such that they may impair his judgment for his client. If the lawyer can not effectively represent the current client in questioning the witness because of some concern for the interests of the witness, the lawyer should also withdraw.

We have answered this question without regard to the effect of the consent of the former and present client. Generally, consent has only a limited effect under the Code.² However, some courts have treated consent by the former client as a waiver of the protections of DR 4-101 that removes the conflict problem.³ While the consent of the former client may help the position of the lawyer, we are unwilling to say it is determinative.

Because of the answer to the first question, it is unnecessary to answer the second question. In fact, it might be inappropriate for the lawyer to obtain his file on the former client because it will appear that his only motive will be to find information to help in the defense of his current client.

¹ See *Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975).

² See DR 5-105(C) (consent effective only where it is "obvious" lawyer can adequately represent multiple clients).

³ See *In re Yam Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976).