ADVISORY ETHICS OPINION 84-08

SYNOPSIS:

Under the facts presented, an attorney is not required to withdraw from a boundary dispute even though he represented the opposing party, when a property in question was purchased, where the prior representation specifically excluded investigation of "area boundaries and such matters as would be disclosed by a survey and/or a personal inspection of the premises" and the attorney gained no secrets or confidences during the former representation relating to the subject matter of the boundary dispute.

OPINION:

Attorney A, who requests the opinion, has been retained by former clients whom we will call "Abe1" in connection with a boundary dispute with other former clients of Attorney A whom we will call "Baker", Attorney A had represented Abel in connection with land matters prior to his representation of Baker. He represented Baker in 1978 when Baker purchased property adjacent to property of Abel, and it is the boundary between Abel and Baker which is now in dispute. Attorney A had represented both the buyers (Baker) and the sellers in 1978, with the knowledge and consent of all parties, and performed the usual title work culminating in a title certificate. The title certificate specifically disclaimed any responsibility on the part of Attorney A to investigate the boundaries of the land in question.

Baker consulted and retained Attorney B in connection with the current boundary dispute. Attorney B has now asked Attorney A to withdraw, on the grounds that Attorney A has knowledge of secrets or confidences of Baker regarding the boundaries, because of Attorney A's prior representation of Baker. Attorney A informs us that Baker's title search was performed by a paralegal under his suspension and specifically was not concerned with the accuracy of boundary descriptions. He states, however, that during his prior representation of Abel and of Baker's predecessor in title, he had gained some knowledge of the descriptions of the common boundary, as they appeared in various deeds.

A lawyer may not reveal a client's confidences or secrets. DR4-101(B)(1). A lawyer may not use a client's confidences or secrets to the client's disadvantage.[1] A lawyer may not use a client's confidences or secrets to the advantage of another (or himself) unless the client gives his informed consent.[2] These obligations continue even after the lawyer's services have ended.[3]

Not all information that a lawyer obtains during representation of a client, however, is a secret or a confidence. A "confidence" is matter disclosed in confidential communications protected by the attorney client privilege under V.R.E. 502. A "secret" is other information gained during the professional relationship which would embarrass the client, or be detrimental to the client, or that the client has asked to be held inviolate.[4] The only information here in question are the boundary descriptions stated in deeds of record. Such descriptions, of course, are available to anyone who cares to search the appropriate land records. We have no difficulty in holding that when the accuracy of such descriptions are not the subject matter of the representation, as, for instance in this case, where any investigation of their accuracy was specifically excluded from the representation and was not compensated, the reading or even copying of such descriptions during representation would not ordinarily make them a "secret" within the meaning of DR4-101(B)(1).

But Attorney B states that Baker now requests Attorney A to hold this information "inviolate". He argues that such a request by a former client, alone, will make any information that comes to an attorney's attention during the course of representation a "secret" within the meaning of DR4-101(B)(1).

We believe this argument goes too far. It would mean that once an attorney had drawn a deed or searched a title on a piece of property, he could be automatically barred from representing any adjoining property owner or prospective purchaser of adjoining property in any matter that required knowledge of the description of record of the boundaries of the first piece of property. In 1978, Baker, the purchaser, and his co-client, the seller, asked Attorney A to disclose the information here in question by publishing it (1) in the body of a deed, and (2) in the body of a mortgage, which were then delivered to others at their instruction. Baker specifically desired and benefited from these disclosures on the public record by Attorney A. For Baker to now ask that the boundary description and references to earlier boundary descriptions, the sum total of the information Attorney A received in regard to the boundary in the course of the representation, be deemed "secrets" within the meaning of DR4-101(B)(1) is to ask for more than this rule was promulgated to provide.

[1] DR4-101(B)(2).
[2] DR4-101(B)(3).
[3] EC 4-6.
[4] DR4-101.

Because something is a matter of "public record", hidden in some official file, does not mean that knowledge of it obtained during the course of representation may not qualify as a "secret". But we are unwilling to hold that DR4-101 was intended to cover boundary descriptions of record that were not in issue during the course of representation.

We next face the question whether Attorney A should with- draw from representing Abel in this matter in order to avoid even the appearance of professional impropriety. The disciplinary rules of Canon 9 do not address the facts presented here. DR9-101(A) prohibits a lawyer from accepting private employment in certain matters on which he worked as public employee. DR9-101(C) prohibits a lawyer from implying that he can improperly influence official conduct. There is no disciplinary rule under Canon 9 that requires withdrawal here.

We next examine the ethical considerations to see whether this is one of those cases where the spirit of our Code requires particular action, despite the silence of the rules. EC 9-2 is the only one that pertains. It reads,

> "Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical . . . While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the 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. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

Explicit guidance does not exist under the facts presented, and it is up to Attorney A, therefore, to determine for himself the appropriate conduct in the premises.