

ADVISORY ETHICS OPINION 85-05

SYNOPSIS:

An attorney who represented a married couple in another matter may not reveal any confidence or secret to one spouse's attorney in a pending divorce action, without consent and full disclosure.

FACTS:

Attorney A represented a married couple in their purchase of real estate several years ago. The couple is presently involved in a divorce proceeding. A does not represent either party in the divorce. The husband wishes A to acknowledge in writing (and perhaps testify to) matters in the real estate file. He also wishes her to reveal communications between himself and A as well as communications between A and the other lawyer involved in the real estate transaction.

ISSUE:

Should Attorney A reveal any communication with the other lawyer? Should Attorney A acknowledge (and perhaps testify to) matters in the real estate file?

OPINION:

Canon 4 of the Vermont Professional Responsibility Code, DR4-101(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 DR4-101(B) by saying "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of this employment. "

DR4-101(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.

DR9-101 mandates that a lawyer avoid even the appearance of impropriety.

EC 9-2 states "While a lawyer should guard against otherwise proper 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 fun discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism."

The Committee is cognizant of Vermont Rule of Evidence 503(d)(5), which excepts from the lawyer-client privilege concerning confidential communications those matters revealed to a lawyer consulted in common and to Rule of Evidence 504(d)(4) which excepts proceedings from the husband-wife privilege in civil proceedings between them.

EC 4-4 states "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

The fact situation indicates there is a high probability that Attorney A will be subpoenaed to testify in the divorce action. Even if Attorney A does not use information obtained while representing the wife, there is certainly the appearance that A could have obtained this information in that manner. Although the wife is no longer a client, Attorney A is still obliged to preserve her secrets and confidences.

In the event Attorney A is subpoenaed, she may then rely on an order to testify pursuant to DR4-101(c)(2) which provides that an attorney may reveal a confidence or secret when permitted under Disciplinary Rules or required by law or court order.