ADVISORY ETHICS OPINION 85-06

SYNOPSIS:

An attorney may represent a corporate client in administrative litigation where he has formerly represented another client in a commercial transaction, learned no confidences or secrets of the transaction, and there is no substantial relationship between the work undertaken for the former client and the present administrative litigation.

FACTS:

In November 1984 an attorney was retained to represent Corporation A, a newly formed corporation. in the acquisition of a pre-existing corporation. Corporation B. The closing occurred in June 1985. For approximately two months after the acquisition, the attorney continued to serve as counsel to corporation A by attending to certain post-closing matters. In August 1985, the attorney withdrew from representing the two corporations.

In June. 1985 a filing deadline for a franchise application in the field of endeavor of Corporations A, B and C lapsed. Neither Corporation A nor B filed an application prior to the deadline. In July 1985 Corporation C, which had filed an application, retained the same attorney to appear in its behalf in administrative litigation concerning the franchise. In September 1985 Corporation A requested that the attorney withdraw from representation of Corporation C. (Corporation A also requested that the attorney file out of time a franchise application in its behalf).

The attorney requests the opinion of the committee as to whether he may continue to represent Corporation C despite the objection by his former client.

ANALYSIS:

DR 4-101(B) requires in part that a lawyer not knowingly reveal a confidence or secret of a client or use a confidence or secret to the advantage of a third person. This precept establishes the ethical obligation which an attorney owes to a former client even after the representation has terminated. EC 4-6 summarizes the obligation: a lawyer shall preserve the confidences and secrets of his client even after the termination of his employment.

To analyze the propriety of successive representation, most courts employ the "substantial relationship" test. The party seeking to disqualify counsel by means of this test must prove that the subject matter of the prior representation is substantially related to the subject matter of the representation at hand. In the present case representation of Corporation A was for the purpose of acquiring Corporation B. Representation of Corporation C was for the purpose of litigating administrative entitlement to a franchise license. Therefore, on the facts of the case as presented, there is no conflict.[1]

However, where the work of all three corporations is similar, a conflict could exist if the attorney had learned, while preparing for the acquisition of Corporation B by A, of the policies and procedures of Corporation A in dealing with the type of litigation in which Corporation C is involved. Where no "substantial relationship" between the matters undertaken in behalf of successive clients exists, if the clients are engaged in the same area of business endeavor, the prudent attorney must be particularly attentive in assessing the risk of disclosing a confidence or secret of the former client.[2]

[1] *Silver Chrysler Plymouth v. Chrysler Motors Corporation*, 518 F.2d 751, 754 (2d Cir. 1975).
[2] *Motor Mart, Inc. v. Saab Motors, Inc.*, 359 F. Supp. 156, 157 (S.D.N.Y. 1973).