

ADVISORY ETHICS OPINION 86-01

SYNOPSIS:

An attorney may represent a prospective corporate client before a State agency which previously employed the attorney in matters substantially unrelated to the State employment.

FACTS:

From October 3, 1983 until December 31, 1985, an attorney served as Special Counsel with the Vermont Department of Public Service (the "Department"). The Special Counsel's duties included litigating public utility rate cases on behalf of Vermont ratepayers and representing the Department before the Vermont Public Service Board (the "Board") in annual small power production rate setting hearings and in various proceedings concerning approval of operating conditions and levelized rates for small power contracts.

The Special Counsel's work for the Department in the small power production area occasionally involved litigation involving the Vermont Power Exchange, Inc. (VPX). VPX is the purchasing agent established by the Board governing small power production and cogeneration. As purchasing agent, VPX contracts with the Board to perform certain power accounting and other functions. VPX receives its operating funds from small power producers in the form of administration fees and also from the Board itself. VPX enjoys party status before the Board in most matters concerning small power production.

The Board reviews contracts between VPX and small power producers concerning the terms and conditions of operation and security arrangements required whenever a small power producer obtains levelized rates.

Examples of the types of cases involving VPX in which the Special Counsel represented the Department include a petition brought by small power producers questioning the legality and reasonableness of VPX administration fees, and several routine cases reviewing contract provisions between VPX and small power producers. In addition, the Special Counsel was asked to conduct a review of contracts between VPX and small power producers but this assignment was not begun.

The attorney requests the opinion of the committee as to whether the attorney may accept employment from VPX, including representation in proceedings before the Board, and whether there is any time requirement before such representation may commence.

ANALYSIS:

Canon 9 (EC 9-3) provides that "after a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists." DR9-101(B) provides that "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

Some courts have employed the language of Canon 9 and the heading of DR9-101 to establish the "appearance of impropriety" as a substantive test, and disregard the special standards set forth in the code.¹

A number of courts have stated however that the "possible appearance of impropriety is simply too slender a reed on which to rest . . . particularly . . . where . . . the appearance of impropriety is not very clear."² Such courts look to whether the questioned representation constitutes a threat to the integrity of the trial process. Also relevant are Canon 4-6 and DR4-101(B) which provide that a lawyer may not reveal a confidence or a secret of a client or use a confidence or a secret to the advantage of a third person.

To analyze the propriety of successive representation, most courts employ the "substantial relationship" test. Under that test, the subject matter of the prior representation must be substantially related to the subject matter of the representation at hand.³ In *Silver Chrysler*, the Court held that an attorney is not disqualified from representing a client in litigation with a prior client where the prior representation was limited to discrete matters and where the attorney was not entrusted with confidences that could be used against the prior client *Id.* atp.1247.

¹ eg. *United States v. Dorfman*, 542 F. Supp. 402 (N.D. Ill. 1982).

² *Armstrong v. McAlpin*, 625 Fed. 2d 433, 445 (2d Cir. 1980), citing *Board of Education v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979).

³ *Silver Chrysler Plymouth v. Chrysler Motors Corp.* 518 F.2d 751, 754 (2d Cir. 1975).

In the present case, the attorney was only occasionally involved with discrete matters involving VPX, eg. VPX administrative fees and certain routine cases. In no situation does it appear that counsel came into the possession of information of a confidential nature which bears a substantial relationship to matters of the intended employment, or which could be used against the Department. Therefore, on the facts of the case presented, there is no conflict, and counsel may represent VPX, including representation before the Public Service Board, with- out waiting any period of time. Our opinion follows our previous Opinion No. 85-6 on the subject of successive representation.

While we believe the preferable standard is that enunciated in the *Armstrong v. McAlpin* and *Silver Chrysler* cases, *supra*, we are not unmindful of the obligation, however imprecise, to avoid the appearance of impropriety as provided in Canon 9. On this point, we note the observation of the *Silver Chrysler* Court that neither Chrysler nor any other client can reasonably expect to foreclose lawyers who have represented a former client on unrelated matters from subsequently representing an opposing party. The Court went on to declare that although Canon 9 dictates that doubts should be resolved in favor of disqualification, it is not intended completely to override the delicate balance created by Canon 4 and the decisions thereunder.⁴

We also note that through the years there has been a regular transition of counsel associated with the Board and with the Department to private practice where such counsel typically represent successive clients on a wide range of matters before the agencies. Legislation which was proposed some time ago which would have provided detailed rules governing such successive representation was never advanced or enacted. This history, which enjoys at least tacit approval, satisfies us that the present request does not involve a violation of Canon 9.

Of course, if the Special Counsel did come into the possession of secret or confidential information on matters which bear a substantial relationship to those involving future VPX representation by Special Counsel, a conflict would exist.

⁴ *Silver Chrysler Plymouth v. Chrysler Motor Corp.*, *supra* at p. 757.