

ADVISORY ETHICS OPINION 86-02

SYNOPSIS:

A restriction on private, employment following government service applies to those matters in which the lawyer had actual significant involvement as a public employee.

FACTS:

Attorney A is employed by the State government, as an assistant to the Governor.

Prior to Attorney A's employment in State government, Attorney A was employed by the law office of Attorney B, "on a contractual basis" for a three-week period during one summer. The opinion request does not state clearly whether Attorney A was at the time of former employment an attorney, or a summer clerk prior to admission. At the time of Attorney A's former employment, the office of Attorney B represented a corporate defendant in a Federal criminal anti-trust matter, and in a civil anti-trust suit filed in the United States District Court, by the State as a plaintiff. The latter action is still pending.

During Attorney A's former employment, Attorney A performed research on issues involved in the civil and anti-trust litigation referred to above. Upon entering into service of the State of Vermont, Attorney A informed the State that Attorney A was disqualified from participation in the State's claim on the same matter. Attorney B is advised by Attorney A's superiors in State government that Attorney A did not in fact participate in any respect on any matters involving said action.

The law office of Attorney B also represents claimants against the State of Vermont in two other unrelated matters now pending. Attorney B advises that the events giving rise to both cases occurred prior to Attorney A's employment with the State of Vermont but that Attorney A was not involved in any way with respect to either of said cases.

Attorney B now proposes to employ Attorney A as an associate in the law office of Attorney B. The committee is asked for an opinion "as to the ethical propriety of employing . . ." Attorney A as an associate, and, further, whether Attorney B would be disqualified from representation of the clients above referred to, by the employment of Attorney A.

DISCUSSION:

The Code of Professional Responsibility, as enacted by the Vermont Supreme Court, contains a specific provision relating to private employment by a lawyer previously employed in a public capacity. DR9-101:

"(B) A lawyer shall not accept private employment in a manner in which he had substantial responsibility while he was a public employee."

As is pointed out in Formal Opinion 342 of the American Bar Association Committee on Ethics and Professional Responsibility, the above wording represents a narrowing of the language contained in the former Canon 36, of the ABA Canons of Professional Ethics, which forbade a former government lawyer from accepting employment in connection with any manner he had "investigated or passed upon" while in government service. As was stated in that opinion, "there are . . . , weighty policy considerations in support of the view that a special disciplinary rule relating only to former government lawyers should not broadly limit the lawyer's employment after he leaves government service." It appears to be clear that the intent of the present wording of DR9-101(B) was to apply the restriction on private employment following government service to those matters in which the lawyer had actual significant involvement as a public employee – not to any matter with which the lawyer may have had some fleeting contact or merely had the opportunity to review in his government employment.

The other provision of the Code of Professional Responsibility which should be considered is DR4-101 which prohibits the revealing, by an attorney, of secrets or confidences of his client. While there is no provision of the Code which expressly prohibits an attorney from representing a client in a matter in which he has previously represented a person with an adverse interest, it is generally considered that DR4-101(B)(2), prohibiting an attorney from using a confidence or secret of his client to the disadvantage of the client, creates a strong presumption against the propriety of such presentation.

In the present matter, the committee is advised that Attorney A had no involvement, while in government employment, with any of the matters in which the office of Attorney B is now involved. We are not informed whether Attorney A had actual access to the government's files, or ever in fact read them.

CONCLUSIONS:

- I. Since the committee is advised that Attorney A did not, while a public employee, have "substantial responsibility" in any of the matters in which the office of Attorney B represents persons with interest adverse to the State, the employment of Attorney A in the law office of Attorney B, while that office continues to handle the cases adverse to the State which were pending while Attorney A was in government service, will not constitute a violation of DR9-101(B).

- II. Based on the statements contained in the Opinion Request, that Attorney A ". . . in fact did not participate in any respect on matters involving the State and (the corporate Defendant), either in connection with the pending litigation or any other Agency . . . items of business", and ". . . was not involved in any way with respect to either (of the other cases involved)," it is assumed for purposes of this opinion that Attorney A is not in actual possession of any information that would be considered confidences or secrets of the State. Provided that this assumption is in fact the case, no possibility of violation of DR4-101(B)(2) exists.