

ADVISORY ETHICS OPINION 88-01

SYNOPSIS:

A firm may not represent a criminal defendant charged with the first degree murder of a former client without betraying client secrets, in violation of DR 4-101.

FACTS:

Our advice is requested by a firm with a public defender contract assigned to represent a criminal defendant who is charged with the first degree murder of a former client of the firm.

The pertinent facts are as follows: The inquiring firm also represented the alleged murder victim in three separate violation of probation cases three years ago. The violations in each case involved alcohol and drug use.

The inquiring firm also represented the brother of the deceased in an unlawful mischief case, which subsequently was dismissed. In addition, other offices of the public defender have represented the deceased in juvenile and adult proceedings.

The inquiring firm anticipates raising a claim of self defense on behalf of their new client – a defense in which the former client’s use of alcohol and/or drugs will factor. The firm has reviewed its own files and found no information sufficiently related to the present case which it considers privileged.

The firm did find in the files, however, several affidavits given by the State’s witnesses against their former client which attest to the client’s reputation for violence and set forth specific prior instances of violent behavior by the former client. These affidavits are a matter of public record. The firm may call the affiants as witnesses in support of the claim that its present client killed the former client in self defense.

Additionally, the firm may want to depose the brother of the former client (who, as noted, is also a former client) to ascertain his knowledge as to his deceased brother’s reputation for aggressive behavior. The firm believes that the brother will not voluntarily cooperate.

Further complicating the picture, the firm has sent letters to the other public defender offices that represented the former client as a juvenile and adult, asking that their files not be made available to the firm. The firm, however, may want to depose certain staff members, such as investigators, of the other public defender offices “in pursuit of any non-privileged information they may have about the deceased.”

The above facts have been disclosed to all parties concerned, with the exception of the family of the deceased former client. The facts also have been disclosed to the prosecuting attorneys and the presiding judge. No party has objected to the continued representation and the present client has requested that the firm remain with the case.

QUESTIONS PRESENTED:

We are asked several questions. The overriding question presented is whether continued representation of the present client is proper. We are also asked the following subsidiary questions:

- (1) whether the firm’s knowledge that the former client had a juvenile record is privileged;
- (2) whether the firm’s constructive, as opposed to actual, access to files in other offices of the public defender system will disqualify it from the case;
- (3) whether the firm’s review of its former client’s files itself presents problems because only the firm is in a position to determine that the files contain no privileged information sufficiently related to the interests of the present client; and
- (4) whether the death of the former client affects the question of privilege and, if any surviving privilege could be waived by the next of kin.

DISCUSSION:

The principal ethical issue presented here arises from a lawyer’s duty to preserve the confidences and secrets of a client. DR 4-101 articulates this duty as follows:

DR 4-101: Preservation of Confidences and Secrets of a Client

- (A) “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101(c), a lawyer shall not knowingly:
 - (1) Reveal a confidence or secret of his client.
 - (2) Use a confidence or secret of his client to the disadvantage of the client.
 - (3) 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.
- (C) A lawyer may reveal:
 - (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
 - (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
 - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
 - (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
- (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidence or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

DR 4-101, thus, protects both “confidences” and “secrets.” The distinction between the two is significant. Confidences are limited to those matters protected by the attorney-client privilege. The scope of that privilege, of course, is delineated in V.R.E. 502. Secrets, on the other hand, are defined more broadly as “other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”¹

In the present case, the firm represents that it found no relevant privileged materials in the files of its former and now-deceased client. This suggests that no confidences would be betrayed in representing the present client, but this does not end the inquiry. Specifically, this does not address the issue of client secrets. In particular, the firm relates that it may be using information found in State affidavits in the former client’s file as well as information that the former client had a juvenile record. In our view, while such information does not appear to be a confidence, is still a secret as it includes matters “the disclosure of which would be embarrassing . . . to the client.”

The firm emphasizes that the affidavits involved are matters of public record. This fact does not make them any less protected secrets. EC 4-4 states that “[t]his ethical precept [against disclosure of confidences and secrets] . . . exists without regard to the nature or source of information or the fact that others share the knowledge.” Thus, the fact that some members of the public may be privy to the information contained in the affidavits and the fact that these affidavits could be obtained from court records, does not give the firm the right to broadcast their content publicly – either through use of the affidavits directly or indirectly by calling their authors as witnesses.

Use of the information that the former client was tried as a juvenile, once again, would betray a secret. In this area, ethical and legal obligations converge in light of the statutory confidentiality of juvenile proceedings under 33 V.S.A. §651.²

Accordingly, we conclude that any use of the information in the affidavits or relating to the juvenile proceedings would compromise a secret of the former client. EC 4-5 states:

Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no *employment should be accepted that might require such disclosure.* (Emphasis added)

Here, disclosure of the former client’s secrets to both the present client and the public at large seems unavoidable.

A fundamental question posed here is whether an attorney’s obligation to preserve a client’s confidences and secrets survives the death of the client. That question is best answered with reference to the underlying purposes behind preserving confidences and secrets. EC 4-1 makes clear that the goal is not simply one of fiduciary responsibility. The preservation of confidences and secrets is critical to open communication between the attorney and client, and thus, effective representation. As EC 4-1 emphasizes:

¹ DR 4-101(A).

² See generally, *In re J.S.*, 140 Vt. 458, 468 (1981).

A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system.

EC 4-6 states that a lawyer's obligation to preserve confidences and secrets continues after the termination of the lawyer's employment. We conclude that the facilitation of open communication between client and attorney likewise demands that client confidences and secrets not become public information upon the client's death. The threat of post-death disclosure of confidences and secrets could only inhibit free and open communication between attorney and client. Thus, we conclude that the duty of confidentiality survives the death of the client.³

DR 4-101(C) sets forth several exceptions to the prohibition against revealing confidences and secrets, but none applies here. One exception in DR 4-101(C) – permitting disclosure upon a client's informed consent – might have application if the former client were still alive. He is not. Consistent with the goal of encouraging free and open communication between client and attorney as discussed earlier, we do not believe that a deceased client's next of kin can consent to disclosure of the client's personal confidences and secrets. These are not property rights that pass upon death. As the confidences and secrets are intrinsically personal so too must be their waiver.

By its prior representation of the deceased, the inquiring firm finds itself in an ethically untenable position when called upon to defend the alleged assailant. Ethically, it cannot betray secrets of the former client. Yet, to comport with the constitutional demand of effective representation and the ethical demand of zealous representation, it must compromise those secrets. In such a situation, withdrawal appears to be the only ethical response. Accordingly, we do not reach the remaining issues raised for our consideration.

³ In so deciding, we follow ethics opinions issued by the Washington and Los Angeles Bar Associations. *Cf.* North Carolina State Bar Association Opinion No. 268 (7/9/80) (Obligation to maintain confidences and secrets does not bar disclosure to heirs of information concerning testamentary intent and competence of deceased client.)