ADVISORY ETHICS OPINION 88-02

SYNOPSIS:

An attorney must withdraw from representation when a former client with whom an attorney shares confidences and secrets is a trial witness for the opposition, unless the former client makes an informed consent to allow the attorney's use of the confidences and secrets *and,* if it is "obvious" that the attorney can protect both clients' interests, the former and present clients each make informed consents to allow the attorney's continued employment notwithstanding any conflict of interest.

FACTS:

Attorney A represents the accused in a prosecution for first degree murder. Discovery from the prosecution has revealed that a person listed as a potential witness is a former client. Attorney A had represented this person in an unrelated criminal matter, and two years have elapsed since the disposition of the former client's case. Attorney A had represented the former client for a period of approximately one year prior to case disposition.

Attorney A's staff reviewed the discovery, interviewed the witness/former client, and determined that she had no relevant or material evidence to offer with respect to the murder charge. Nevertheless, Attorney A brought the prospect of a conflict of interest to the attention of the State and the Court. At that time, it was unclear whether the former client would actually be called as a witness by the State at trial. When the State submitted its final trial witness list, however, the former client was included as a possible rebuttal witness.

As a result of Attorney A's representation of the former client, he is privy to client confidences and other information that would be utilized in conducting the cross-examination of his former client. If Attorney A did not use the information acquired during the course of the former representation, the present client would receive less than a thorough defense. On the other hand, Attorney A's withdrawal from the case at this late date may affect the interests of the present client in securing effective, substitute counsel.

DISCUSSION:

On these facts, the Vermont Code of Professional Responsibility requires Attorney A to withdraw from the present representation because: (a) DR 4-101(B) forbids the disclosure and use of confidences and secrets learned during the former representation to the present client's benefit; and (b) the former client's interest in preserving those confidences and secrets and her interest in Attorney A's continuing duty of loyalty conflicts with the present client's interest in Attorney A's unfettered loyalty and zealousness on his behalf.

Withdrawal, however, will not be required if two separate conditions are satisfied. First, pursuant to DR 4-101(C)(1), the former client, after full disclosure, must consent to Attorney A's revealing or using confidences and secrets learned earlier. Second, pursuant to DR 5-105(C), both the former and the present client must consent to Attorney A's vigorous representation of the present client notwithstanding his continuing duty of loyalty to the former client. A full explanation of Attorney A's obligations under DR 4-101 and DR 5-105 is set out below.

DR 4-101(B) prohibits the disclosure or use of a "confidence or secret" as follows:

> Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
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> (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.

The initial inquiry in applying DR 4-101(B) is determining whether Attorney A has learned any confidences or secrets. *See* VBA Ethics Opinion 88-1. Pursuant to DR 4-101(A),

> "[c]onfidence" 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 be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Here, Attorney A has explicitly indicated that he shares confidences with the former client, and in all likelihood Attorney A also has obtained knowledge of information which would be classified as secret under the Vermont Code of Professional

Responsibility. Under DR 4-101(B), then, Attorney A is precluded from using the former client's confidences and secrets to aid his present client during trial preparation, cross-examination, summation, or at any other point in the case.

The only way to lift the DR 4-101(B) preclusion of representation in this case is by complying with DR 4-101(C):

> A lawyer may reveal:
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> (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.

DR 4-101(C)(2), (3), and (4) do not apply to Attorney A's current quandary; if the confidences and secrets are to be used to the present client's advantage, or revealed at all, the former client must consent after full disclosure.

In making "full disclosure," an attorney should ensure that the former client comprehends the sanctity of the attorney's obligation to hold the information inviolate should the former client choose. The attorney should also carefully explain the purpose for which he intends to use the information and any legal or social consequences those intended uses will have for the former client. Until the attorney reveals or uses the confidences and secrets, the former client should be free to revoke his or her waiver. Although not required by the Disciplinary Rules, as a prudent practice, we would advise an attorney seeking consent under DR 4-101(C) to obtain the actual consent in writing. All of this simply recognizes the point made in EC 4-2 that "[a] lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship."

If the former client consents to disclosure of her confidences and secrets under DR 4-101(C), Attorney A must then go on to resolve issues affecting his exercise of independent professional judgment on behalf of the present client – the conflicts of interest problem. Attorney A, as most attorneys in this situation, has several legitimate interests in his relationship with the former client which may adversely affect the relationship with his present client.

Specifically, courts and commentators have identified three interests an attorney commonly has when a former client is a witness for the opposition. First, the attorney may have a pecuniary interest in maintaining or renewing his professional relationship with the former client. Second, absent a waiver under DR 4-101(C), discussed above, the attorney has a duty not to use or reveal the former client's relevant confidences and secrets. Third, if the former client does testify, the attorney implicitly puts his own credibility into issue during cross examination and summation; he explicitly puts his own credibility into issue if forced to testify himself (thereby triggering a different set of ethical considerations under DR 5-101(B) or DR 5-102).

At the same time, the attorney must represent the present client competently and zealously under DR 6-101 and DR 7-101. *See also* American Bar Association Standards for Criminal Justice Standard 4-1.1(b) ("The basic duty of the lawyer for the accused owes to the administration of justice to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability according to law.")

When faced with such a "conflict" problem after commencing the successive representation, DR 5-105(B) requires withdrawal. Similarly to DR 4-101(C)(1), with respect to the preservation of confidences and secrets, however, DR 5-105(C) provides the possibility of client waiver as a cure to the prohibition against continued representation.

> In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Consent under DR 5-105(C) must come from both clients, again with "full disclosure of the possible effect of such representation on the exercise of [the attorney's] professional judgment on behalf of each." As a prerequisite, to obtaining consent under this provision, moreover, it must be "obvious that [the attorney] can adequately represent the interest of each [client]."

On the facts presented, we believe that Attorney A's situation may be one in which both clients can consent to the representations, *i.e.,* meets the "obviousness" prerequisite. For reasons which we have not exposed here (to retain Attorney A's anonymity), there does not seem to be any risk that Attorney A would hold back against the former client for personal pecuniary gain in the future. There is a risk that Attorney A would hold back to preserve the former client's confidences and secrets. But, before reaching the DR 5-105(C) waiver issue, Attorney A must first obtain the DR 4-101(C) consent. If he obtains that consent, vigorous representation of the present client is more feasible.

Next, Attorney A should have in mind the potential for calling his own credibility into question and effectiveness on the present client's behalf as a result of cross-examining the former client. This is a judgment that necessarily must be resolved on a case by case basis. Based on the facts presented, we believe consent under DR 5-105(C) is an available option which would permit Attorney A to continue representing the present client. In this regard, Attorney A should use the same careful and full disclosure as outlined above for purposes of DR 4-101(C).

Three other matters have been suggested in connection with this Opinion: whether the disqualification of the former client as a witness (on relevance grounds) bears on the ethical issues; the effect of the Sixth Amendment right to effective counsel; and whether the appointment of a separate attorney, not privy to Attorney A's information on the former client, to cross-examine would cure the ethical problems.

Addressing these suggestions in order, the former client's disqualification as a witness would appear to leave the ethics issues moot. Attorney A has represented that the former client would be a government witness; if she is no longer relevant to the case, the prior representation should make no difference. We note, however, that the same considerations discussed above with respect to Attorney A's trial conduct vis-a-vis the former client also apply to his arguing the relevance of the former client's testimony.

The Sixth Amendment right to effective counsel entails a standard of decision outside the scope of this Committee's purview. Our procedural rule 7 provides "[t]he Committee will not issue opinions on questions of law." More importantly, noncompliance with our Code of Professional Responsibility does not necessarily demonstrate constitutionally ineffective assistance. In general, unethical behavior may in fact serve the client's immediate interest, and vice versa.

On the other hand, attorneys should be aware that the Supreme Court has held that ethical conflicts of interest occupy a special place in Sixth Amendment jurisprudence.

> One type of actual ineffectiveness claim warrants a . . . presumption of prejudice. In *Cuyler v. Sullivan,*[1] the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed Rule Crim Proc 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.[2]

In any event, a Sixth Amendment issue in this case would not be ripe for review until after the case is adjudicated. With that said, we reemphasize that Sixth Amendment law does not affect Attorney A's ethical responsibilities set out above.

Finally, a "third party" attorney stepping in to conduct the cross examination of the former client would not relieve Attorney A of the 5-105(B) requirement to withdraw. A failure to use the former client's confidences and secrets while Attorney A is involved with the defense, because of his continuing duty[ies to her] of loyalty, violates Attorney A's duty of loyalty to the present client. Obtaining consent, pursuant to 4-101(A)(1) and DR 5- 105(C), or withdrawal from representation are the only two available options.

[1] *Cuyler v. Sullivan,* 446 US, at 345-350, 64 L Ed 2d 333, 100 S Ct 1708.
[2] *Strickland v. Washington.* 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 674 (1984).