

ADVISORY ETHICS OPINION 88-06

SYNOPSIS:

In representing a person accused of murdering a former client, a public defender may present evidence of the former client's reputation for violence if none of that evidence contains confidences or secrets originating with the attorney-client relationship with the former client.

FACTS:

Our advice is sought by a public defender assigned to represent a defendant charged with murdering a former public defender client.

The operative facts are as follows: Over eight years ago, the public defender's office represented the deceased on several incidents of violent or disorderly behavior. Subsequent to that representation, the public defender's office underwent a complete replacement of attorneys.

Five years ago, the public defender's office represented the deceased on a misdemeanor unlawful mischief charge. The inquiring public defender handled arraignment and sentencing, while another member of the public defender's office handled primary representation.

Three years ago, the inquiring public defender represented the deceased on a misdemeanor unlawful trespass charge. This case was resolved after minimal involvement.

The inquiring public defender now has been assigned to represent a defendant charged with second degree murder of the former client. In an effort to establish that the present client acted in self-defense, the public defender intends to introduce evidence of the former client's reputation for violence.

The inquiring public defender relates several important facts, which can be summarized as follows: First, all evidence that the public defender's office has accumulated in connection with the former client's reputation for violence was developed independently based on interviews of witnesses and review of public records. Second, some of the former client's files have been reviewed and the information therein does not include confidences or secrets, nor does it refresh the public defender's recollection of any confidences or secrets that would bear on the present representation.¹ In short, as the facts are presented to us, there is nothing that the public defender's office presently knows concerning the former client's reputation for violence that can be traced to confidences or secrets of the former client: all such evidence was independently derived and developed.

ANALYSIS:

In Opinion No. 88-1, this Committee addressed whether a firm with a public defender contract could represent a client accused of murdering a former client. There, as here, a claim of self-defense was to be asserted, and the past behavior of the former client was to be called into issue.²

We opined in Opinion No. 88-1 that client confidences and secrets survive the death of the client. We also stated that it was inappropriate to use secrets of the former client (in that case, the fact that the former client had a juvenile record and the use of certain affidavits taken from the former client's file) to help a current client establish the former client's violent tendencies. We likewise concluded that the fact that some of these "secrets" could have been also found in public records was ethically irrelevant under the Code of Professional Responsibility. We relied on EC 4-4 for the proposition that secrets and confidences must be preserved inviolate even if some members of the public share the knowledge.

¹ We necessarily rely on the inquiring public defender's determination that examination of these files revealed no secrets or confidences. As used in the Code of Professional Responsibility, "secrets" is a far more encompassing term than "confidences." While "confidences" consist only of information protected by the attorney-client privilege, "secrets" include any information gained in the attorney-client relationship that: (a) the client has requested be held inviolate; or (b) would be embarrassing or detrimental to the client if disclosed. See DR 4-101(A). We concluded in Opinion No. 88-1, for example, that the mere fact that a client had a juvenile record was a "secret" protected under the Code.

² Of course, the public defender system is considered one "firm" in assessing whether such successive representation is permitted under the conflict of interest provisions of the Code. See Opinion No. 76-18. At least where a former client remains alive, the public defender's office must make the threshold determination that there is no "substantial relationship" between the subjects of the former and current representation. *Silver Chrysler Plymouth v. Chrysler Motor Corp.*, 518 F. 2d 751 (2d Cir. 1975). Likewise, continuing duties of loyalty to the former client must be considered. See Opinion No. 88-7. We are not asked to address, and accordingly refrain from considering, the effect of death of a former client on the duty to avoid conflicts of interest and the duty of loyalty.

The facts presented in the instant request diverge from those considered in Opinion No. 88-1 in a simple yet significant respect. In Opinion No. 88-1, the information helping to establish violent propensities included secrets derived from the attorney-client relationship. Here, in contrast, the information establishing violent propensities came from an entirely independent source. The difference is dispositive.

DR 4-101(A) states:

"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 (Emphasis added).

The information sought to be used here was not "gained in the professional relationship." Under these narrow circumstances the connection between representation of the former and current clients is an ethically inconsequential coincidence. Accordingly, we conclude that continued representation is permitted.