

ADVISORY ETHICS OPINION 88-07

SYNOPSIS:

A defense attorney may continue to represent a client when a former client may testify as an adverse witness and the attorney does not share secrets or confidences or have a potential pecuniary interest in future relations with the former client, provided both clients make informed consents to the representation.

FACTS:

Approximately two years ago, a Vermont District Court assigned Attorney A, then a Public Defender, to represent a juvenile ("X") in a CHINS proceeding. The state claimed that the juvenile was beyond the control of the custodial parent. Approximately a year ago, Attorney A left the Public Defender's office and went into private practice. Attorney A continued to represent X as assigned counsel, pursuant to 12 V.S.A. A.O. 4. Under the terms of the court's assignment, that representation concluded approximately four months ago.

Another law office now represents X in connection with recurring issues involving placement by the Social and Rehabilitation Services Department and has possession of X's file. Attorney A has only general recollections of X's juvenile case; Attorney A has no specific recollection of the facts and circumstances of the case or any statements made by the juvenile. Attorney A has not sought and has no intention of seeking access to either X's court rue or the file now in the possession of the office representing X.

Approximately two months ago, Attorney A was hired to represent a client, charged with having sexually assaulted a minor child. The State's Attorney's Office prosecuting this case has recently listed X (the former client) as a possible noncorroborating witness. Through X, the State intends to offer evidence of motive, intent and common plan or scheme, pursuant to V.R.E. 404(b). The State claims that X will testify concerning his prior sexual contact with the Defendant. The State also intends to offer, through X, evidence of certain deceitful conduct by the current client to challenge the current client's credibility should he choose to testify at trial.

The facts and legal issues of the CHINS matter in which Attorney A represented X were wholly unrelated to the facts and legal issues raised in the current sexual assault matter. Attorney A can envision no secrets or confidences that might have been disclosed by X (the former client) that would have any legal or logical relevance to the pending case involving the current client. Attorney A has no intention of using any information that may have been obtained from X against X in the representation of the current client.

DISCUSSION:

In Opinions 88-1 and 88-2, this Committee addressed the ethical parameters imposed on defense attorneys when a former client is the victim (88-1) or a potential prosecution witness (88-2).¹ The parameters generally fall under the DR 4-101 (preserving secrets and confidences), DR 5-101 (lawyer-client conflicts), and DR 5-105 (multiple and successive client conflict) rules. See Opinion 84-1.²

Without explaining the type of information Attorney A acquired from X in the prior representation, Attorney A has represented that disclosure or use of the former client's secrets or confidences is not an issue.³ The Committee accepts that representation as an assumption in this Opinion. If secrets or confidences are an issue, additional considerations arise.⁴

¹ In Opinion 83-6, the Committee addressed a situation where a defense attorney's former client would testify against the current client. Opinion 83-6, however, analyzed the situation mainly in terms of the general conflict of interest criteria set out in the 1975 case of *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 518 F. 2d 751 (2d Cir. 1975). It applied a threshold test of whether the present representation is substantially related to the former representation, then noted that if DR4-101 or DR 5-101 applied withdrawal would be required regardless of the *Silver Chrysler* test. Opinion 83-6 explicitly reserved decision on whether the client's informed consent might solve the ethical problems. As reflected in Opinions 88-1 and 88-2, the relevant ethical standards applicable to Attorney A's situation have since become more particularized.

² Opinions 84-1 and 88-2 also noted the Sixth Amendment right to effective assistance of counsel issues presented in these cases. As a legal matter, some weight must be afforded to the client's right to have counsel of his or her own choice. Opinion 87-6 addressed the issue in civil cases.

³ While Attorney A has made a point of stating her lack of specific recollection of the facts and circumstances of the prior representation, this fact would not enter our analysis here. We believe the relevant inquiry is whether the lawyer obtained "secrets or confidences," not whether the lawyer subsequently remembers them.

⁴ See Opinion 88-1.

Nevertheless, based solely on the fact that the former client may be called as a witness against the present client, Attorney A is faced with a conflict of interest under the Code. At a minimum, there is a conflict between the continuing duty of loyalty to the former client, now acting as an adverse witness, and the duty of loyalty to the present client. As we stated in Opinion 88-2:

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 DR4-101(C), . . . 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.")

While some conflict almost always exists between a former client adverse witness and criminal defendant client, the degree of the problem will vary from case to case. If the degree is so slight that it is obvious that the attorney can adequately represent the interest of the current client without violating the attorney's duty of loyalty to the former client and if both the former and current clients give an informed consent, the representation may continue.⁵ Informed consent can also cure problems arising out of DR 4-101 and DR 5-101 considerations. In Attorney A's situation, consent to continued representation is a viable option.

Attorney A does not indicate that a significant pecuniary interest would affect the relationship with X or the present client, and X's "secrets and confidences" are not at issue. The remaining consideration, the question of Attorney A's credibility in dealing with X at trial, does not establish a dispositive factor precluding the representation here. Provided both clients understand the situation and consent, the Code would permit Attorney A's continued representation on the facts presented (The consent of X, the juvenile, would require the consent of a guardian.)

⁵ While not required by rule, the Committee strongly recommends that such consents be in writing whenever possible.