

ADVISORY ETHICS OPINION 88-12

SYNOPSIS:

A firm may represent a client in a dispute against former clients where the dispute is not substantially related to any matters as to which the firm represented the former clients and where the firm learned no secrets or confidences of the former clients that could be used to the disadvantage of the former clients or to the advantage of the current client.

FACTS:

A law firm requests our opinion as to whether it may represent a current client in litigation against several former clients. The firm represented one of the former clients in a real estate transaction seven or eight years ago. From the requesting letter we assume the real estate transaction was wholly unrelated to the current controversy. The firm also incorporated a business for some of the former clients but the incorporation of the business and the business itself are unrelated to the current controversy. The firm discussed the possibility of bankruptcy with another one of the former clients approximately five years prior to the current controversy, but we assume from the requestor's letter that the circumstances surrounding the possible bankruptcy are unrelated to the current controversy. The firm states that it has had no attorney-client relationship with any of the former clients for approximately five years.

ANALYSIS:

On the facts presented, the firm may undertake the representation of its current client against its former clients without violating the Code of Professional Responsibility. The applicable provisions of the Code are DR 4-101(B) and DR 5-105.

DR 4-101(B) requires in pertinent part that a lawyer shall not knowingly reveal a confidence or secret of his client or use a confidence or secret of his client to the disadvantage of the client or to the advantage of a third person unless the client consents after full disclosure. The disciplinary rules define a "confidence" as "information protected by the attorney-client privilege" but the much broader term "secret" is defined 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" Opinions interpreting the scope of the protection provided by the prohibition on revealing "secrets" have underscored the broad reach of the term "secrets".¹ DR 4-101(A) and (B) clearly establish an attorney's duty of loyalty to former clients which continues even after representation has terminated.

DR 5-105 addresses the question of conflicts between current clients and conflicts in the representation of multiple clients but does not by its express terms apply to successive representation questions. Nonetheless, its principles have been applied broadly to include potential conflicts that arise between present and former clients.²

The generally accepted rule with respect to successive representation is that, "A lawyer may not oppose a former client in a matter which is substantially related to the subject of the earlier representation."³ This proscription helps to safeguard confidential information gained in the prior representation (DR 4-101); eliminate any possible conflict of interest (DR 5-105); and avoid the appearance of impropriety (Canon 9).

Here, none of the firm's dealings with its former clients were related in any degree to the current controversy and there is nothing to suggest that a "secret" or "confidence" of a former client would be jeopardized by the firm's undertaking the current representation.

The possibility of conflict is suggested, however, should the firm seek an attachment or take collection efforts after securing a judgment, particularly with respect to the former client with whom the firm discussed the possible bankruptcy. To the extent that the firm learned of assets of the former client which may be subject to attachment or execution to satisfy a judgment, the firm would be placed in the position of using a "secret" or "confidence" of a former client to the disadvantage of that client. Should this situation present itself the firm would be required to disqualify itself from further representation of its current client absent the consent of the former client.

¹ See Opinion 88-1.

² See Opinion No. 87-18.

³ Opinion No. 85-8 citing *Silver Chrysler Plymouth v. Chrysler Motors Corporation*. 518 F.2d (2d Cir. 1975).