ADVISORY ETHICS OPINION 89-15

SYNOPSIS:

A lawyer may represent a new client in a regulatory proceeding in which a former client is a competing, adversary party, provided there is no substantial relationship between the subject matter of the former representation and the subject matter of the current representation, and provided the lawyer learned no confidences or secrets of the former client which could be used to the disadvantage of the former client or to the advantage of the new client in the current proceeding.

FACTS:

Several years ago the inquiring law firm, Firm A, was called in to represent a limited partnership which was being acquired by a corporation. Both entities had been clients of Firm B, and they and Firm B decided that representation of the client being acquired should be referred to another firm.

The acquisition required the approval of the Public Service Board. The acquiring corporation had to show that the acquisition was in the public good and met a series of approval criteria. Law Firm B represented the acquiring corporation before the Public Service Board, but in preparation for the approval proceedings, Firm A became aware of the details of the acquisition proposal and the acquiring corporation's strategy for winning regulatory approval. Firm A, however, did not play a significant role in developing or presenting the acquiring corporation's case for approval.

The Public Service Board approved the acquisition in 1988, after which Firm B resumed sole representation of both the acquired and acquiring companies (which continued doing business under their original names).

In 1989, Law Firm A was retained by two different companies to procure Public Service Board approval of their business proposals. Those companies are engaged in the same business as the parties to the 1988 acquisition. Coincidentally, Firm B represented the previously acquired company (Firm A's client in the acquisition) in filing for Public Service Board approval of a business proposal that competed directly with Firm A's clients' proposals. There were other applicants too, and the Public Service Board consolidated all of the proposals into one proceeding.

Law Firm B and the general counsel of the original acquiring corporation have now informed Firm A that Firm A has a conflict of interest and should not represent its new clients in the consolidated Public Service Board proceeding. They complain that Firm A's representation in the 1988 acquisition made it "privy to confidential information concerning the strengths and weaknesses of (the acquirer's) case, the same strengths and weaknesses that may still (be) present today. "Firm A's new clients want Firm A to represent them and Firm A thus requests an opinion from the Committee as to whether it is disqualified from acting on behalf of its new clients in the consolidated Public Service Board proceeding.

In the regulatory proceeding, the interests of Firm A's new clients conflict with the interests of the company it represented in the 1988 acquisition proceeding. In urging the Committee to find no disqualification, however, Firm A stresses three facts: (1) the pending Public Service Board proceeding involves wholly different facts and legal issues from those presented in the acquisition proceeding; (2) no confidential information about Firm B's clients' pending proposals was or could have been obtained by Firm A when the acquisition was accomplished, and neither Firm B nor its complaining client has alleged that any specific confidences were communicated; and (3) Firm A's representation of Firm B's client was a one-shot matter limited to the acquisition proceeding, and in all subsequent regulatory proceedings and for long-term planning and strategy, the client has looked solely to Firm B for representation.

ANALYSIS:

The issue presented by these facts is whether a lawyer ethically may represent a current client in a regulatory proceeding in which a former client, whose interests compete and conflict with those of the current client, is also a party. The Disciplinary Rule which bears most directly on this issue is DR 4-101(B), which provides that 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.

Out of concern that the former client in such situations should not have to disclose confidential information to show how it might be misused in the lawyer's new representation,[1] this Committee has adopted the "substantial relationship" test for determining the propriety of successive representations. As we wrote in Opinion No.78-3:

> The rules on providing representation against past clients are fairly well defined. Such representation is unethical if the matters in the current representation are "substantially related" to the matters involved in former representation of the now adversary party, or if the new representations will require the lawyer "to do anything which will injuriously affect his former client in any matter in which he formerly represented him . . ."[2]

Where the current and former representations are substantially related, the potential exists that confidences or secrets of the former client will be used to the advantage of the current client. in violation of DR 4-101(B). Our posture in such cases has been that the lawyer must decline the new representation, based on the "strong probability of a violation of DR 4-101."[3] We have consistently cited ABA Informal Opinion 885:

> "A lawyer should not accept litigation involving a former client under any circumstances if such litigation would result in a conflict of interest or disclosures of confidences of the former client."[4]

The prohibitions of DR 4-101(B) apply regardless of the substantial relationship test, of course.[5] Where, as here, the lawyer asserts in fact that he obtained no confidences or secrets of the former client which could be used against that client or to the advantage of his current client, the substantial relationship test will determine whether disqualification is required because of a potential breach of DR 4-101(B).

In Opinion No. 79-26, we recommend disqualification because the lawyer was asked to represent a client in opposing the same project the lawyer had sought approval of on behalf of his former client. In Opinion No. 85-6, on the other hand, we decided that an attorney may represent a corporate client in administrative litigation where he had formerly represented another competing client in a commercial transaction, had learned no confidences or secrets of the former client during the transaction, and there was no substantial relationship between the work undertaken for the former client and the present administrative litigation. We think Opinion No. 85-6 provides apt guidance in the matter now under consideration.

In No. 85-6 the former client was not a party to the administrative proceeding, although it had tried to be. We found no conflict, citing the substantial relationship test and *Silver Chrysler Plymouth v. Chrysler Motors Corporation,*[6] because the lawyer's former representation was for the purpose of a corporate acquisition, and the current representation was for tile purpose of litigating a regulatory issue.

Here, the former and current representations were and are for those same purposes, and they are not at all related. The inquiring lawyer asserts he learned no confidences or secrets of the former client pertinent to the current Public Service Board proceeding, and that in fact he had no opportunity to learn such confidences and secrets. On the facts presented, there is no conflict of interest and no potential for a violation of DR 4-101(B). In our opinion, the inquiring lawyer may represent his new clients in the consolidated Public Service Board proceeding, notwithstanding that the client he represented in the 1988 acquisition is a competing, adversary party in the proceeding.

[1] See Opinion No. 83-6.
[2] *See, In Re Themelis*,117 Vt. 19, 23 (1951); *Emle Industries, Inc. v. Patentex, Inc.,* 478 F.2d 562 (2d Cir. 1973).
[3] Opinion No. 79-26.
[4] See, *e.g.*, Opinion No. 79-26 & Opinion No. 81-4.
[5] Opinion No. 83-6.
[6] *Silver Chrysler Plymouth v. Chrysler Motors Corporation,* 518 F.2d 751, 754 (2d Cir. 1975).