ADVISORY ETHICS OPINION 91-16

SYNOPSIS:

The law firm retained by insurer to defend insured in personal injury case may not, following its withdrawal as counsel for insured on grounds of insured's failure to cooperate in defending, and after entry of default judgment against insured, properly represent insurer in subsequent action brought by plaintiff seeking judgment against insurer .

FACTS:

The law firm was retained by insurer to defend insured in a motor vehicle personal injury case. The policy was an auto policy. The law firm answered the complaint on behalf of the insured and conducted discovery as to the plaintiff's claim.

Insured, who lived out of state, did not contact the law firm and did not answer plaintiff's interrogatories and requests to produce, which the law firm forwarded to insured. The law firm contacted insured's mother who arranged with insured to attend insured's deposition in Vermont. Insured did not appear and did not contact the law firm, despite numerous attempts of law firm to obtain the cooperation of the insured.

Insurer directed the law firm to withdraw its appearance on behalf of insured due to insured's failure to cooperate in defense of the suit as required by the insurance policy. The law firm filed a Motion to Withdraw as insured's attorneys, and the Court granted the Motion.

Later, plaintiff obtained a default judgment against insured. Neither the law firm nor insured were a party to the default proceedings.

Plaintiff thereafter sued insurer, but not the insured, in a different court. Plaintiff alleged that insurer should pay to plaintiff the full amount of the judgment under the auto policy. Insurer has retained the law firm to defend it in the second lawsuit. The issue in the second suit involves whether or not the insurer must pay the plaintiff's judgment, or a portion thereof, even though no judgment has been entered against insurer. Insured is not a party to the second suit.

The law firm did not learn any confidence from insured, due to insured's lack of cooperation in defending the personal injury suit. The associate of the law firm who handled the original defense of the insured is not employed with another firm.

Assuming that the law firm undertakes representation of the insurer in the second case, insurer would like to call, as a witness, the former associate, who had been responsible for the defense of the insured before moving to withdraw as counsel. Insurer requires the former associate to testify in the present case about the insured's non-cooperation and the resulting prejudice to the ability of insurer to successfully defend the original issue.

ISSUES:

The questions presented are (a) whether the law firm may now represent the insurer in the second lawsuit; and (b) whether the former associate may testify on behalf of the insurer as to the non-cooperation of the firm's former client, the insured, where the former client is not a party to the present action.

DISCUSSION:

In analyzing issues involving the propriety of a successive representation, this Committee has consistently adopted the so-called "substantial relationship" test.[1] Under the "substantial relationship" test, disqualification is in order if a lawyer-client relationship previously existed, and if the subject matter of the second representation is substantially related to the prior representation. Courts using this formulation emphasize the likelihood, or engage in a presumption, that confidential disclosures were made in the course of the prior representation, and that such information would be used adversely to the former client on behalf of the new client.[2]

The Courts have not been consistent in applying the presumption that confidential disclosures were made in the course of the prior representation. In some cases, the presumption has been accepted as irrebuttable, resulting in automatic disqualification.[3]

[1] See e.g., Opinions 78-3, 83-6, 89-15.
[2] See, e.g., *Silver Chrysler Plymouth v. Chrysler Motors Corp.,* 518 F.2d 751 (2d Cir. 1975).
[3] *See, e.g., Emle Industries v. Patentex, Inc.,* 478 F.2d 562 (2d Cir. 1973).

In other cases, countervailing evidence has been considered to rebut the presumption.[4] Based on the facts as stated above, it seems highly probable that client confidences may not have been shared with the law firm. If this were in fact the case, it would appear that under at least one line of cases, the "substantial relationship test" might permit the law firm to continue its representation.

The Vermont Supreme Court, however, has stated the test for disqualification in broader and more sweeping terms, and the facts presented above appear to present a clear example of a situation in which the Vermont Supreme Court's standard calls for a conclusion at variance with what otherwise might be the result under the "substantial relationship test." In *In Re Themelis,* the Vermont Supreme Court posited the following test, to which an attorney in these circumstances should subject himself.

> He should refrain from accepting any employment which may require him to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and where he may be called upon in his new relation to use against his former client, any knowledge or information acquired through his former connection. Paramount duties of a lawyer are to see that justice is done, to aid in its administration, to assist in preserving the dignity and authority of the court before the public and to keep the trust and confidence that a client has placed in him.[5]

Under the test set forth in *Themelis,* it appears clear to this Committee that the law firm should refrain from accepting employment from the insurer. First, it is clear that representation of the insurer in the second litigation, if the insurer prevails, will injuriously affect the former client in respect to the litigation brought by the plaintiff in the personal injury case, since it will leave the former client without the benefit of insurance coverage. In addition, the new representation will clearly cause the former law firm to use against the former client "knowledge or information acquired through the former connection," in the form of evidence, regarding the client's lack of cooperation in defense of the first litigation.

Given the disposition of the first issue presented by the above facts, we need not reach the second question presented; however, should the former associate ever be called to testify in any subsequent proceeding, he should be mindful that his knowledge of the insured's history of non-cooperation may constitute a protected secret within the meaning of DR 4-101().

[4] *See, e.g., Interstate Properties v. Pyramid Co.,* 547 F.Supp. 178 (S.D.N.Y. 1982).
[5] 117 Vt. 19, 23 (1951).