

ADVISORY ETHICS OPINION 92-08

SYNOPSIS:

Public defender's office may not represent a client on criminal charges where defense of current client may require assertion that former clients actually perpetrated the offense and engaged in illegal conduct, and would violate the confidences and secrets of those former clients.

FACTS:

This request comes for a public defender's office assigned to represent a defendant accused of homicide. After initial investigation, the office has determined that there are three potential perpetrators of the crime (other than the accused), all of which are former clients of this same public defender's office. Representation of the current client may require efforts to establish that one or more of the former clients was the actual perpetrator. During the course of representing one of these former clients, the public defender's office learned confidential information that would be pertinent to those efforts.

In addition, the accused may have a diminished capacity defense involving consumption of drugs allegedly furnished to the accused by yet another former client. The public defender's office is aware that this former client has a history of drug convictions including convictions for the sales of drugs.

ANALYSIS:

This request raises but one of the many ethical issues regularly faced by public defenders' offices functioning in a small state such as Vermont.

The central ethical precept implicated is the obligation to preserve the secrets and confidences of former clients as set forth in DR 4-101.

Representation of the accused in this case places the inquiring office in an untenable position. To meet its duty of zealous representation under Canon 7, the office may end up asserting that one or more former clients actually committed the offense, and also asserting that another former client engaged in illegal conduct by furnishing drugs to the accused.

Under these circumstances, it appears inevitable that representation of the accused will require intrusion into the protected realm of confidences and secrets of the former clients. Here, a zealous defense would result in compromising both "confidences" of at least one former client, and "secrets" involving another client's history of prior drug convictions. We have earlier opined that an attorney may reveal secrets and confidences of a former client, with consent after full disclosure.¹ We have also opined that, again with informed consent, an attorney may cross-examine a former client called as an adverse witness.²

Where defense of the accused will necessitate accusing former clients of criminal conduct, informed consent appears unlikely and improbable. Absent such consent, we conclude that the inquiring public defender's office must withdraw from representation of the current client.

¹ See Opinion No.88-2.

² See Opinion No.88-7.