ADVISORY ETHICS OPINION 92-13

SYNOPSIS:

An attorney may not disclose to an existing client that a person has contacted the attorney regarding possible representation in a claim against the existing client. The attorney is not precluded from representing his or her existing client in a subsequent dispute with the prospective client if the attorney did not learn any secrets relevant to the lawsuit as a result of the initial contact about representation.

FACTS:

Attorney received a telephone call from someone with whom Attorney had no prior professional relationship ("Employee"). Employee told Attorney his name, and that he had been referred to Attorney by another attorney. Employee then began to explain why he contacted Attorney, stating that he worked for a not-for-profit entity and believed that he may have been the victim of employment discrimination based on a prohibited characteristic. Attorney realized that there are a limited number of entities of the type for which Employee worked and that Attorney represented one of those entities. Attorney asked Employee not to reveal any further information about the potential case and immediately asked the name of Employee's employer. Employee indicated that Attorney's client was Employee's employer ("Employer"). Attorney then told Employee that he could not represent him and that Attorney represented Employer. Attorney then recommended several other attorneys to Employee. Attorney also inquired whether Employee had notified Employer of his intent to make a claim. Employee said he had not and that he had not conclusively determined to make the claim. Employee asked Attorney not to inform Employer that Employee was considering filing a claim. In the course of the conversation, Attorney formed a conclusion, based on the observation of certain facts, that Employee may have a condition that would be relevant as a defense to the discrimination suit, if filed. The conclusion was not based on any facts disclosed to Attorney by Employee. Attorney received a request for an auditor's letter, in the customary form, for Employer asking for disclosure of pending, threatened and unasserted claims which may be asserted as defined in Financial Accounting Standard No.5.

QUESTIONS:

Attorney inquires:

(A) Must Attorney refrain from disclosing the telephone conversation with Employee to Employer directly and through the request for an auditors letter and if so, how does that impact the Attorney's duty of loyalty to an existing client-Employer and Attorney's obligations to respond to the auditors request.

(B) If Employer consults with Attorney about Employee, must Attorney disclose the telephone conversation with Employee to Employer.

(C) May Attorney represent Employer in connection with Employer's relations with Employee, regardless of whether a claim is filed.

DISCUSSION:

Pertinent Disciplinary Rule is DR 4-101 (A) and (B) which reads as follows:

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to 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.

(B) Except when permitted under DR 4-101 (C), 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.

The first sentence of EC 4-1 in clarification reads as follows:

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.

Employee's disclosure that he was considering action against Employer for discrimination constitutes a secret, and may constitute a confidence. See the discussion of *Westinghouse Electric Corporation v. Kerr-McGee Corp.*[1], below. Employee's request that Attorney not disclose the call to Employer brings that information squarely within the provisions of DR 4-101 (A). DR 4-101 (B) (1) prohibits an attorney from disclosing a secret of a client unless the communication of the secret is permitted under DR 4-101 (C). None of the exceptions to the rule against disclosure apply in this case. The portion of EC 4-1 cited above indicates that an attorney must pre- serve the confidences and secrets of one who has employed or sought to employ the attorney.

In *Westinghouse Electric Corporation v. Kerr-McGee Corp.,* reported in 580 F .2d 1311 at 1319, the court said, "The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result." (Citing EC 4-1.) Also, see *Taylor v. Sheldon*[2]*,* where the court stated, "Communications in the course of preliminary discussion with a view to employing the lawyer are privileged although the employment is in the upshot not accepted."

This Committee cannot undertake to advise Attorney about his obligation to respond to the auditors request letter; however, we will direct attention to the preamble of the American Bar Association, Statement of Policy Regarding Lawyer's Responses To Auditor's Requests for Information, which appears to find that the balance between disclosure and protection of client's secrets is weighted in favor of protecting the secrets of clients. We also direct attention to Section (5) of the Policy for Information related to the duty to disclose certain types of claims.

Attorney may be precluded from representing Employer in connection with its relations with Employee. Under the statement of facts presented, Attorney may have come into possession of information which would constitute a secret of Employee. That information may be relevant to the pending dispute between Employee and Employer, and therefore Attorney is in possession of a secret of Employee, which could be used to the disadvantage of Employee. Employee did not become a client within the meaning of DR 5-105 (A) and therefore Attorney is not prohibited from representing Employer because of a conflict of interest. Had Employee disclosed any factual matters to Attorney, Attorney would be prohibited from representing either party in a manner which would be adverse to the other. Attorney's conclusions based on his impressions and not on information intentionally communicated to Attorney by Employee are not secrets or confidences of the client and are not a basis for finding that Attorney has a conflict of interest between clients with adverse interests under DR 5-105.

[1] *Westinghouse Electric Corporation v. Kerr-McGee Corp.,* 580 F.2d 1311 (7th Cir. 1978).
[2] *Taylor v. Sheldon,* 172 Ohio SD. 118, 173 N.E. 2d 892, 895 (1961).