ADVISORY ETHICS OPINION 93-11

SYNOPSIS:

A lawyer must withdraw from representing a Town on an Act 250 project, where the lawyer's partner had earlier given legal advice to an opponent of the same project.

FACTS:

Lawyer A and Lawyer B are partners in a small (2-3 person) law firm. Client contacted Lawyer A by telephone concerning opposition to a Town bridge construction project. Client forwarded documents to Lawyer A for review, including warnings, news articles, minutes of Selectboard meetings, Act 250 Notices and Memoranda, and letter to Secretary of State's Office. Following a review of the documents, Lawyer A wrote a letter to Client stating, among other things, that "the documents raised substantial concerns," "a negative vote of the electorate on this project raises a substantial issue as to whether the project can proceed without some action on the part of the voters," and "Under the circumstances, it would be prudent for the Selectboard to avoid taking any further action on this project until the issue is resolved." Lawyer A also telephoned the Secretary of State's Office on behalf of Client. Client believed that Lawyer A undertook to review the documents and to provide evaluative comments.

Eleven months later, the Town engages Lawyer B to represent it in connection with the Act 250 proceedings on the same bridge project. Lawyer A had no recollection of the earlier contact with the Client. Lawyer A never billed the Client, and never opened a file in the matter. Lawyer A believed his review was limited to whether the vote of the, electorate was lawful on the project, and not in connection with the Act 250 proceedings. Client took Lawyer A's evaluative comments into consideration in devising a strategy with respect to the Act 250 proceedings on the project. Client anticipated paying Lawyer A, and never requested that the bill be abated.

QUESTIONS PRESENTED:

1. Was there an attorney-client relationship between Lawyer A and Client?

2. Was the subject matter of the subsequent representation of the Town "substantially related" to the matters addressed in connection with the Client?

ETHICAL CONSIDERATIONS:

An analysis of the above questions requires the Committee to examine Canon 4, Canon 5 and Canon 9 of the Code of Professional Responsibility.

Canon 4 of the Code of Professional Responsibility states:

> A lawyer should preserve the confidences and secrets of a client.

DR 4-101(A) provides as follows:

> (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.

DR 4-101(B) provides as follows:

> (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.

EC 4-1 provides in relevant part:

> 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.* (emphasis added).

Canon 5 of the Code of Professional Responsibility states:
A lawyer should exercise independent professional judgment on behalf of a client.

DR 5-105(A) provides in relevant part:
(A) A lawyer shall decline proffered employment ... if it would be likely to involve him in representing differing interests...

The principles of DR 5-105 have been applied broadly to address not only questions of conflicts between current clients and conflicts in the representation of multiple clients, but also to include potential conflicts that may arise between present and former clients.[1]

Canon 9 of the Code of Professional Responsibility states:
A lawyer should avoid even the appearance of professional impropriety.

DISCUSSION:

It is of little consequence whether a formal attorney/client relationship existed between Lawyer A and Client, including opening a file, billing, etc. Information imparted by even a would-be client seeking legal representation is protected from revelation or use under DR 4-101(A), even though a lawyer does not work for the would-be client.[2] Ordinarily, when information relating to representation is known by one lawyer in a firm, it is considered as known by all lawyers in the firm.[3]

"The fiduciary relationship 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."[4] Thus, at the least, there existed in the present case an implied attorney-client relationship between Lawyer A and Client.[5]

This Committee has long adopted the "substantial relationship" test in analyzing issues with respect to conflicts in successive representations.[6]

Under the "substantial relationship" test, a lawyer, should decline the new representation if the subject matter of the second representation is substantially related to the prior representation. In such cases, a presumption arises 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.[7] Of course, the requirements of DR 4-101{8) apply regardless of the "substantial relationship" test.[8]

Moreover, the Vermont Supreme Court has defined the test for disqualification in broader and more sweeping terms, holding that disqualification is required if the new representation will require the lawyer "to do anything which will injuriously affect his former client in any matter in which he formerly represented him . . ."[9]

The purpose of the foregoing is to safeguard confidential information gained in a prior representation (DR 4-101); eliminate any potential conflict of interest (DR 5-105); and avoid even the appearance of any professional impropriety (Canon 9).[10]

In the present case, the subject matter discussed with Lawyer A in the prior representation, the opposition to the bridge project, is substantially related to Lawyer B's representation of the Town in the Act 250 proceedings on the same project. Consequently, Lawyer B must withdraw from representation of the Town in the Act 250 proceedings.

For the foregoing reasons, the Committee believes that to continue representing the Town in these circumstances would be violative of DR 4-101, DR 5-105, EC 4-1, EC 5-1, EC 5-15 and EC 9-8.

[1] See Opinion No. 88-12, Opinion 87-18 and Opinion No.80-8; see also ABA Informal Opinion 1322 (1976).
[2] See ABA Formal Opinion 90-358 (September 13, 1990) (a lawyer may, however, take certain measures to avoid subsequent disqualification).
[3] *Id.* at 2.
[4] *Westinghouse Electric Corp. v. Kerr-McGee Corp.* 580 F.2d 1311, 1319 (7th Or. 1978); see also Opinion No.92-13.
[5] See *Bridge Products, Inc. v. Quantum Chemical Corp.,* 58 UsLAW 2733,20 Envtl. L. Rep. 20, 940, 1990 WL 70857 (N.D. Ill. 1990).
[6] See, e.g., Opinion No. 92-11, Opinion No. 91-16, Opinion No. 89-15, Opinion No. 88-12, Opinion 83-6 and Opinion No. 78-3.
[7] See Opinion 91-16; see also *Silver Chrysler/Plymouth v. Chrysler Motors Corp.* 518 F.2d 751 (2d Or. 1975); and Opinion No. 89-15 (the new representation must be declined based upon the strong probability of a violation of DR 4-101, citing Opinion No. 79-26).
[8] See Opinion No. 83-6.
[9] *In re Themlis,* 117 Vt. 19,23 (1951); see also Opinion No.91-16, Opinion No. 89-15 and Opinion No.78-3.
[10] See Opinion No. 88-12.