

ADVISORY ETHICS OPINION 94-10

SYNOPSIS:

An attorney must withdraw from representation of a client who has a potential claim against a private foster care agency when the attorney's law partner had already been provided with confidential information by the agency concerning the subject matter of the potential claim.

FACTS:

An attorney was contacted by the parent of a child who had been sexually assaulted by another juvenile, who, at the time of the assault, was a ward of a private foster care agency. The attorney agreed to represent the parent and child in a claim and potential lawsuit against the private agency. At this time, the requesting attorney was not aware that on several prior occasions, one of his law partners had been contacted by a representative of the private agency, who was seeking representation for the juvenile ward who allegedly committed the assault in question. The representative also provided confidential information concerning the juvenile and the subject matter of the assault including an admission of guilt. The attorney's partner and the agency had reached an agreement on the hourly rate for the partner's legal services, but no actual representation had commenced. The partner never actually spoke to the juvenile ward, did not open a file and did not keep notes of his conversations with the agency's representative. No charges were brought against the juvenile for the sexual assault. The requesting attorney notified the agency of the claim against it in light of its communications with the requesting attorney's law partner, the agency has demanded that the attorney's law firm withdraw from representing the claimants.

QUESTIONS PRESENTED:

1. Did the earlier contact between the representative of the private foster care agency and the requesting attorney's partner produce information that should be regarded as confidences and secrets of a client?
2. If the representative of the private foster care agency provided information to the requesting attorney's law partner in a good faith effort to secure legal counsel for the agency's minor ward, is the attorney's law firm prohibited from representing another client in an action against the agency where the subject matter of the action involves the same facts that were communicated to the law partner?

DISCUSSION:

The request presents a dilemma with which the Committee has dealt before. Here, as in other circumstances, a law firm has acquired information which was provided to it about a potential client. The information relates directly to the subject matter of a probable lawsuit by the law firm against the agency which provided the information in the first instance. In all likelihood, the claim will be that the agency ought to be liable for the actions of the minor ward who sexually assaulted the law firm's client while under the care and supervision of the agency.

There was no formal lawyer-client relationship between the law firm and the agency or the minor ward at the time the information was provided to the requesting attorney's law partner. Thus, it might appear that the proscriptions of DR 4-101 would not apply. That Rule provides:

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 *(a) client*.
 - (2) Use a confidence or secret of *(a) client* to the disadvantage of the client,
 - (3) Use a confidence or secret of *(a) client* for the advantage of [the lawyer] or a third person, unless the client consents after full disclosure. (Emphasis added).

However, we have consistently recognized that 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."¹ It appears in this instance that the information, i.e. the admission of sexual abuse, notwithstanding the fact that the requesting attorney also learned of the admission from another source (foster parent), is both a confidence and a secret, since its initial disclosure was made in the course of seeking representation and its use by the requesting attorney would be likely to be detrimental to both the agency and its minor ward.

The import of our prior interpretations of the reach of DR 4-101 is to disqualify the attorney and the law firm from representing a client in an action or claim against the agency, especially since the subject matter of the representation is identical to that of the prior disclosure by the agency to a member of the firm.² Moreover, the conduit for such information - the agency - is the target of the claim and any lawsuit that might be filed.

We also call attention to Opinion No.91-16, in which the committee acknowledged the Vermont Supreme Court's opinion in In Re Themelis,³ which contains a broad prohibition against using "any knowledge or information acquired through the former connection" with a client (or, as in this case, one who has sought in good faith to obtain legal counsel for one of its wards).⁴

The requesting attorney points out that the agency was seeking representation for its ward in a possible juvenile court prosecution, not for itself; and comments that the law firm does not believe that any confidences or secrets were revealed by the agency which could lead to a violation of DR 4-101 or EC 4-1. The Committee does not feel that simply because the agency was acting on behalf of its ward in approaching the law firm for representation that it did not expect confidential information or secrets to be preserved by the law firm. We also disagree that the information and the circumstances under which it was disclosed were not covered by the Code. First, even though the agency was seeking to secure legal services for its ward, according to the requesting letter, the attorney's partner gave "routine legal advice" to the agency. Second, the nature of the information obtained from the agency goes to the heart of any legal action that the law firm might bring against it. Third, the use of the information would obviously be detrimental and embarrassing to the agency and the ward. Finally, the proper functioning of the legal system depends upon potential clients or those acting on their behalf to be able to repose confidences and secrets in those attorneys to whom they turn for consultation and advice, whether or not the contact actually results in formal representation. Therefore, absent consent from the private child care agency, the requesting attorney and her law firm should withdraw from representing the client with the claim against that agency.

¹ Opinion No.92-13, quoting from Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F. 2d 1311, 1319 (7th Cir. 1978). See also, EC 4-1: "Both the fiduciary relationship ... and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has sought to employ [the lawyer]."

² See, e.g. Opinion Nos. 78-13, 83-6, 89-15 and Silver Chrysler Plymouth v. Chrysler Motors Corp., 518 F. 2d 751 (2d Cir. 1975).

³ In Re Themelis, 117 Vt. 19, 23 (1951).

⁴ See also, Opinion No.88-12 (Discussing substantial relationship test as preserving confidences and secrets, eliminating potential conflicts of interest and avoiding appearance of impropriety).