

ADVISORY ETHICS OPINION 95-13

SYNOPSIS:

A lawyer may represent the wife against her husband in a contested divorce even though the lawyer had previously represented the husband in a criminal matter several years earlier, where there is no substantial relationship between the issues in the divorce and the former representation and the lawyer did not learn or retain any confidences or secrets from the husband that would work to his disadvantage in the divorce.

FACTS:

The requesting attorney represents the wife in a divorce in which the husband is alleged to have seriously abused the wife and children and who is charged with first degree aggravated domestic assault in the Vermont District Court. The attorney had represented the husband ten years earlier on an unrelated criminal charge in which the husband was convicted of sexual assault. The lawyer has no file involving that case, cannot recall any details of his representation and has no present recollection of any client confidences or secrets concerning the husband from the prior representation. The husband's attorney in the divorce proceeding moved to disqualify the requesting attorney from representing the wife. This motion was denied by the district court, which accepted the requesting attorney's representations concerning his lack of knowledge about the details of the prior representation and noted the absence of a substantial relationship between the issues involved in the prior representation and the present divorce action. The divorce action concerns only whether the husband abused the wife and children in 1995 and issues of custody and visitation but does not involve division of marital assets. The husband had his own lawyer in the divorce action and a separate public defender on the pending criminal charges.

The requesting attorney indicates that there is no evidence concerning the prior criminal representation of the husband that is relevant to the divorce action; and that there were no private conversations with the husband during the course of the prior representation, because the wife was present at all meetings. The attorney has had no contact with the husband since the prior representation.

The attorney asks for an advisory opinion as to ethical propriety of his continuing to represent the wife in the present divorce action.

DISCUSSION:

In order to determine whether an attorney should be disqualified from representing a party against a former client, this Committee has turned to DR 4-101, which requires attorneys to protect confidences and secrets of clients, an obligation which continues even after representation ceases.¹

DR 4-101(A) defines "confidences" and "secrets" as information protected by the attorney-client privilege or gained during the professional relationship and which the client requests to be kept secret or which, if disclosed, would likely be detrimental to the client. The Rule goes on to state in pertinent part:

- (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.

The purpose of this proscription is to encourage complete confidence and open communication between lawyer and client in order to protect the fiduciary relationship and assure the proper functioning of the legal system.² That purpose has been at the heart of numerous opinions by this Committee.³ We have applied the Rule to advise that a lawyer is disqualified from representing a party against a former client where the information about the former client was obtained from other sources but acquired during the lawyer-client relationship and its disclosure would be detrimental to the former client.⁴ In addition, we have focused the discussion in each case on whether there existed a "substantial relationship" between the former and present representations. See, e.g., Opinion No. 78-3 (divorce action between clients both of whom were previously represented by the same attorney), where we noted that disqualification was required because the lawyer was likely to have acquired "relevant impressions and opinions formed on the basis of confidential information," even though the information may have been gained

¹ See Opinion No. 88-1.

² EC 4-1.

³ See, e.g., 78-3, 78-13, 83-6, 89-15.

⁴ See Opinion No. 89-1.

in the presence of both parties.⁵ Likewise, we have followed the Vermont Supreme Court's admonition in In Re Thamilis⁶ that prohibits use of "any knowledge or information acquired through the former connection" with a client which would work to that client's disadvantage.⁷

The "substantial relationship" test that has been applied by this Committee is found in the Second Circuit's decision in Silver Chrysler Plymouth v. Chrysler Motors Corp.⁸ This common law test has been applied because there has not been a Disciplinary Rule which squarely addresses the issue of subsequent adverse representation.⁹ The bases of the test are Canon 4 (Confidentiality) and Canon 9 (Appearance of Impropriety), and the court decisions have resulted from rulings on motions for disqualification, where the moving party has been required to prove that:

- (1) the moving party is a former client of the adverse party's counsel.
- (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and
- (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of . . . prior representation of the client.¹⁰

The courts in the Second Circuit have applied the "substantial relationship" test in two significant ways. Some courts have held that the presumption that a lawyer will disclose confidential information derived from a former, substantially related representation is irrebuttable, while others have held that the attorney who works on later adverse representation against a former client is permitted to prove that he or she was not privy to confidential information.

This Committee has taken a case-by-case approach to disqualification and has attempted to avoid applying an irrebuttable presumption in favor of determining whether:

- (1) the lawyer involved in subsequent representation adverse to a former client represented that client on any issues substantially related to the current representation;
- (2) the lawyer actually obtained confidences or secrets, including impressions and opinions about the former client, that would be likely to work against the interests of the former client, even though the former representation was not substantially related to the current representation.

This necessarily involves an inquiry as to whether the lawyer has maintained a file or has notes, present recollection or opinions about the former client that could be used to that client's disadvantage (or which could impair the zealotry of the lawyer's representation of the new client). In effect, where there is evidence that there was a prior confidential relationship, the Committee has assumed that it is the lawyer's burden to show that no confidences or secrets were obtained that are presently usable to the former client's disadvantage.

It is pointed out by the requesting attorney that the wife has a right to have counsel of her choice in the divorce action and that this should weigh against the lawyer's disqualification. While we accept this principle, and note that courts have looked upon motions to disqualify opposing counsel with extreme caution, especially after substantial preparation of the case has been completed¹¹, we have not been provided with any information that the opposing counsel in the divorce matter here has abused the motion to disqualify or is using it to gain a tactical advantage. We also note that the requesting attorney sought a ruling from the trial court and has raised this issue. Our opinion assumes that absent some abuse, the attorney's ethical obligation to protect confidences and secrets would override the interest of the client in having an attorney of her choice.

Applying this approach to the request in this case, we conclude that the lawyer is not compelled to withdraw from representing the wife in the pending divorce. The prior representation of the husband was not on a substantially related matter and was performed ten years ago. The requesting lawyer has no file, personal notes, or present recollection of confidences or secrets or opinions about the former client which were based upon the confidential relationship. And finally, while not dispositive in our view, any communications that may have taken place between the lawyer and the former client were in the presence of the wife; and there is nothing in the facts presented to us to show that such communications relate to the present controversy. (In Opinion No. 78-3, the Committee stated its reluctance to conclude that confidential information obtained in the course of common representation could never be treated as privileged in a "side-switching" situation).

⁵ Id.

⁶ In Re Thamilis, 117 Vt. 19, 23 (1951).

⁷ See Opinion No. 94-10.

⁸ Silver Chrysler Plymouth v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975).

⁹ Cf Model Rule 1.9.

¹⁰ Evans v. Artek Sys. Corp., 715 F.2d 788, 791 (2d Cir. 1983). See, also, "Conflicts of Interest: Subsequent Adverse Representation," 3 Georgetown Journal of Legal Ethics, pp. 177-189 (1989).

¹¹ See Cox v. American Cast Iron Pipe Co., 847 F.2d 725, 732 (11th Cir. 1998)

We note, however, that if the requesting attorney, through discussions with the wife in the course of representing her in the divorce, recalls information from the former representation that would be detrimental to the husband's interests, then the lawyer should withdraw from representing the wife.