

ADVISORY ETHICS OPINION 95-16

SYNOPSIS:

An attorney may not disclose a client's confidences or secrets even after the representation has terminated, and a client's prior grant of limited authority to discuss a case with an adverse party in the course of investigation does not constitute a consent to disclose confidences and secrets with the adverse party after termination of the representation.

FACTS:

A client requested legal representation from Attorney A in connection with injuries she sustained while working on a short term basis for Ms. X. Ms. X is a former client of Attorney A.

Attorney A told the client that he would not represent her if she intended to bring a claim against Ms. X. He undertook a preliminary investigation to determine the nature of their working relationship. He discussed that issue with his client and later, with the knowledge and consent of the client, discussed the same issue with Ms. X. Attorney A then continued the representation with the express understanding that he would not pursue any claim against Ms. X.

Sometime later, the client decided to pursue a workers compensation claim against Ms. X. She terminated her attorney-client relationship with Attorney A and retained new counsel. Her new attorney has filed a claim against Ms. X.

Ms. X. has subpoenaed Attorney A to testify at the hearing. Ms. X's attorney now argues that the client waived her attorney-client privilege when she gave Attorney A authority to discuss her case with Ms. X.

ANALYSIS:

There is no question that the client's communications with Attorney A and Attorney A's investigatory work in the course of the representation cannot be disclosed as they fall within the secrets and confidences categories of DR 4-101. It is also clear that the prohibition on disclosure extends beyond termination of the representation.

DR 4-101(A) and (B) provide:

- “(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 this client to the disadvantage of the client.
 - (3) Use a confidence or secret of this client for the advantages of himself or a third person, unless the client consents after full disclosure.”

Opposing counsel has suggested an exception to the prohibition based on the client's limited grant of authority for Attorney A to investigate the case. That authority, however, does not match the DR 4-101(C)(1) exception to the prohibition, which requires formal consent after full disclosure: “(C) A lawyer may reveal: (1) Confidence or secrets with the consent of the client or clients affected, but only after a full disclosure to them.” Based on the facts, moreover, that limited grant of authority from the client bears no relation to the testimony subpoenaed -- what the client told Attorney A in seeking legal services.

CONCLUSION:

We conclude that in the absence of either client consent after full disclosure or a court order as contemplated in DR 4-101(C)(2), Attorney A must decline to testify.