ADVISORY ETHICS OPINION 95-22

SYNOPSIS:

An attorney who was once, but is no longer, actively involved in representation of a public corporation in matters such as public offerings, annual meetings, and takeover defense planning may not, without the consent of the corporation, properly represent the company's former president/board chairman, who is a significant shareholder in the company, in connection with exercising his rights as a shareholder, including efforts to promote the sale of the company to outside interests.

FACTS:

The requesting attorney was previously employed by law firms which represented a public company in a range of matters including public stock offerings, annual meetings, proxy statements, takeover defense planning, securities law compliance, executive compensation, and regulatory assistance. During his time with these firms, the attorney was actively involved in such matters, as well as in providing counsel to the company's board of directors in connection with one hostile takeover attempt, and to the best of his recollection, one informal acquisition overture of a non-hostile nature.

The attorney, who is no longer affiliated with the law firms which represented the company, has been asked by the company's former president/board chairman, who is a significant shareholder of the company, to personally represent him in analyzing and pursing his rights as a shareholder. The former executive, who was forced out of his management positions with the company at a time subsequent to the attorney's employment with the law firms representing the company, would like to see the company sold. Future action might include communications with other shareholders to promote urging of the directors to sell the company, presenting an opposing slate of directors, and seeking to place a formal resolution for the sale of the company before the shareholders.

The requesting attorney states that even though the matters on which representation is sought are matters of corporate control and securities law, no specific matter bridges his proposed representation of the executive and his representation of the company. He further states that he possesses no knowledge concerning the company, its affairs, or its prospects not already known to the executive, and does not believe there is any possibility of his revealing any new information about the company to the client. While he is aware of the existence of a shareholder rights plan adopted by the company several years ago, and which relates to the handling of corporate control issues, this plan is available for public inspection at a federal agency. Finally, the attorney acknowledges that if he possessed confidential information acquired during the course of his representation of the company, he would have an obligation to maintain its confidentiality.

QUESTION:

The attorney asks if he may properly represent the former executive in these matters.

ANALYSIS:

While the Code of Professional Responsibility has no specific provisions directly addressing the problem of successive representation, several of the Code's provisions have been viewed as imposing limitations on such representation. The most significant of these limitations are to be found in DR 4-101, imposing a duty to maintain client confidences and secrets, and in Canon 9's exhortation that an attorney should "avoid even the appearance of professional impropriety."

The indications by the requesting attorney that he knows of no client confidences which could be compromised by his representation of the company are not, in this instance, dispositive of the concerns underlying DR 4-101 as they relate to the attorney individually. A presumption is generally viewed as arising, in the context of representation by a firm of attorneys, that a client's confidences are shared among the members of the firm. See e.g. Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982). The Code defines the term "confidences" broadly, as "information protected by the attorney-client privilege." Moreover, DR 4-101 prohibits not only the disclosure of confidences, but also the disclosure of "secrets." A secret includes all information gained in the professional relationship, "the disclosure of which . . . would be likely to be detrimental to the client." Notably, with respect to both confidences and secrets, the Code makes no distinction as to whether or not the information might be available to the attorney from other sources, and the information gained about the company an its internal workings during the prior representation is still a confidence or secret as to the attorney, which he is not permitted to disclose or to utilize against the former client.

Under these circumstances, regardless of the attorney's assurance that he would not use "confidential information" to the disadvantage of the former client, it appears unlikely, at best, that the attorney could successfully purge himself of knowledge of the former client, its reaction to certain situations (including takeover overtures, friendly or hostile), its susceptibility to certain pressures, receptiveness to certain arguments, the personalities of the board members who would be making decisions concerning the sale of the company, and other factors that would go into developing a strategy for the former president/board chairman, and, at the same time, fulfill his obligation under Canon 7 to zealously represent his new client.

Accordingly, the Committee is of the view that the attorney cannot properly undertake representation of the former executive obtaining the consent of his former client pursuant to DR 4-101(C)(1). Such a consent will also serve to eliminate any appearance of impropriety under Canon 9.