

ADVISORY ETHICS OPINION 96-09

SYNOPSIS:

Information imparted to a lawyer by a prospective client seeking legal representation is generally protected from further disclosure or use under DR 4-101, even though the lawyer does not ultimately work for the would-be client. However, if the lawyer takes adequate measures to limit the information initially imparted by the prospective client, and no representation relationship is created, the lawyer may continue to represent, or to undertake representation of another client in the same or related matter. When the subject matter of the discussion between the prospective client and the lawyer, or a member of her or his firm, is not critical to the representation of either the existing or new client in the same or related matter, the lawyer need not withdraw from either representation.

FACTS:

Lawyer has represented defendant in a divorce action for approximately four years. Lawyer has recently been informed that plaintiff asserts she met with lawyer or someone in his firm seeking to retain a member of lawyer's firm to represent her in connection with the same matter. Plaintiff does not allege that any substantive information was imparted by her which would be critical to lawyer's representation of her or her husband in the same divorce action. A review of the record-keeping procedures maintained by lawyer and his partners does not reveal that any meeting between plaintiff and a member of lawyer's firm ever took place. Neither lawyer nor any member of the firm has any recollection of meeting with the plaintiff, let alone substantive discussion. Plaintiff alleges that the discussion with lawyer or his partner took place at the front counter at the reception area of lawyer's firm. It would appear that any conversation held in that area would necessarily be brief and limited in nature, without significant detail or substance requiring confidentiality.

QUESTION:

Is the lawyer permitted to continue to represent the defendant, plaintiff's husband, in the divorce proceeding?

DISCUSSION:

If the information imparted to lawyer or another attorney of the firm at the front desk was material to the representation of either the prospective client or the existing client (i.e., her husband), and were its use to be detrimental to her, lawyer could not continue to represent the existing client, plaintiff's husband. Even limited information obtained, such as the names of the interested parties in the matter involved, might be of significant use or materiality in the representation of the existing client.

The attorney-client privilege ordinarily attaches to communications made to a lawyer by a prospective client for the purpose of securing legal advice or assistance, even if the representation subsequently is not agreed to by both lawyer and client. However, where the discussion between the would-be client and the lawyer does not contain any material communications beyond a general solicitation of lawyer's services and her or his declination to be retained, there is generally no possible violation of DR 4-101(B) regarding disclosure or use of confidences or secrets.

CONCLUSION:

Here, the Committee believes that balancing the interests of the existing client against those of the prospective client results in the conclusion that the representation of the existing client can continue, as long as lawyer believes that the on-going representation would not involve the disclosure or use of any confidences or secrets of the plaintiff.