

ADVISORY ETHICS OPINION 97-03

SYNOPSIS:

If a lawyer, while with one firm, acquires no knowledge or information relating to the representation of a particular client of the firm, and that lawyer later joins another firm, the second firm may represent another client in the same or a related matter even though the interests of the two clients conflict.

FACTS:

In 1990, Law Firm “A”, representing a number of homeowners in a planned unit development, brought suit against the developer. Law Firm “A” has recently hired a new associate who previously worked for Law Firm “B”. Law Firm “B” represents the developer in the litigation referred to above. While the associate worked at Law Firm “B”, he did not work on the case in question, nor perform any other work for the developer. The associate does not recall anything about the case. The matter may have been discussed at weekly Firm meetings of Law Firm “B”, but the associate has no recollection of any such discussions.

QUESTION:

Law Firm “A” has requested an advisory opinion as to the ethical propriety of its continued representation of the individual plaintiff against the defendant developer in light of the hiring of the new associate who formerly worked for Law Firm “B”.

DISCUSSION:

The situation described here and the dilemma presented have been addressed by this Committee before. As we have indicated in previous opinions, this Committee believes that the issue presented must first be analyzed under the provisions of DR 4-101 (A) and (B).

DR 4-101 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 his client.
 - (2) Use a confidence or secret of his client to the disadvantage of the client. . . .

The facts presented in the request indicate that the associate attorney, while working at Law Firm “B”, did not work on the litigation in question, nor did he perform any work for the developer client, has no actual knowledge or information relating to this particular client, and does not possess any privileged information or secrets of the client.¹

However, because DR 4-101 does not squarely address the issue of subsequent adverse representation, this Committee has also looked at whether, in the specific case, there existed a “substantial relationship” between the former and present representations.² While some courts in the Second Circuit have applied this test to hold that the presumption that a lawyer has obtained confidential information derived from a former, substantially related representation is irrebuttable, other courts in the Second Circuit 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, in the past, 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;

¹ See, e.g., Opinion #81-4.

² The “substantial relationship” test applied by this Committee is found in the Second Circuit’s decision in Silver Chrysler-Plymouth v. Chrysler Motors Corp., 518 F.2d 751 (2d C ir 1975).

(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.

See, e.g., Opinion #95-13.

CONCLUSION:

This approach 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. Where there is evidence that there was a prior confidential relationship, this Committee has assumed that it is the lawyer's burden to show that no confidences or secrets were obtained that are presently useable to the former client's disadvantage.

The facts presented here indicate that the newly-hired associate of Law Firm "A" has no file, no personal notes, nor any present recollection of confidences or secrets or opinions about the former developer client which were based upon a confidential relationship. We therefore conclude that Law Firm "A" may continue to represent the individual homeowners against the developer. However, Law Firm "A" should take steps to ensure that the new associate will not participate in the pending litigation or discuss it with other members of the firm.³

³ See Opinion #81-4 and State v. Minor, 128 Vt. 55, 258 A.2d 815 (1969) for description of suggested precautions.