

# ADVISORY ETHICS OPINION 97-12

## **SYNOPSIS:**

An attorney may not represent a criminal defendant where one theory of defense involves implicating a person who was previously represented by the same attorney in defense against a charge brought by the same victim.

## **FACTS:**

Requesting attorney's firm had represented a client on a charge of criminal conduct against a minor victim. Part of the defense involved developing evidence that the victim was confused and that, in fact, the perpetrator of the illegal acts was a second individual. Requesting attorney's firm conducted extensive witness investigations to establish the likely guilt of the second person. That second individual has now been charged by the prosecutor with a similar crime involving the same victim, but during a time frame one year later than the time frame charged against the original criminal defendant. The second person now seeks to be represented by requesting attorney. Although the time frame for the crime charged against the second person is a year later than the time frame of the crime charged against the original defendant, it is apparent to requesting attorney that an adequate defense will include efforts to establish that the original defendant and former client was the responsible party for the newly charged crimes.

## **QUESTION:**

Requesting attorney asks whether he can represent the second client under these circumstances.

## **DISCUSSION:**

### **CODE OF PROFESSIONAL RESPONSIBILITY:**

The relevant code provisions are the first two sections of DR 4-101 which state the following:

#### **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.
  - (3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

## **CONCLUSION:**

The attorney may not represent the second client. This case does not present an issue of multiple representation since the attorney no longer represents the first client, but the subsequent representation of the second client would violate the mandates of DR 4-101 which protect secrets and confidences of a client. Here, the attorney had full disclosure from the first client regarding the State's charges and conducted an extensive investigation involving many witness interviews, some of which implicated the second person in the earlier crime charged against the first client. If the attorney were now to represent the second person, the attorney would unavoidably make use of information learned during the representation of the first client in pursuing leads, identifying potential witnesses, and interviewing those witnesses. The attorney would also likely face the prospect of having to cross-examine the former client on a matter closely connected to the matter in which the attorney represented that former client. This is not a circumstance where a waiver of conflict or consent to the second representation by the first client would be reasonable since, from the facts presented, it is fairly predictable that the second client's interests will be directly opposed to the first client's interests and there will be an actual and very significant conflict between the two. Prior Opinion 92-8 supports the conclusion reached here. See also EC 4-1 and Opinion 84-1 and see discussion of the substantial relationship test in Opinions 94-10, 95-13, 95-16 and 95-22.