

ADVISORY ETHICS OPINION 1998-12

SYNOPSIS:

A lawyer who represented husband in a divorce action many years before is not necessarily disqualified from representing husband's new wife in a divorce action against husband.

FACTS:

The lawyer making this request has been asked to represent a wife (W) against her husband (H) in a divorce action after representing H in a divorce action against a former wife. The divorce action, which took place over 15 years ago, was uncontested. The parties had reached an agreement as to the division of all of the marital property of the couple. The lawyer does not consider the new divorce to be substantially related to any of the matters involved in the former representation of the husband. The requesting lawyer states that "no matters were gleaned from the husband in connection with his [earlier] divorce that would have any effect whatsoever upon him in this matter. There were no confidences or secrets disclosed. Rather, representation merely involved the formalization and presentation to the court of the parties' agreement." The requesting lawyer also states that the property awarded to the husband in the prior divorce action is no longer owned by him. It is not stated, but we assume that the lawyer has not represented either H or W since the last divorce representation.

DISCUSSION:

A question involving this type of issue has been before this Committee on several occasions in the past.¹ The Code of Professional Responsibility does not contain a Disciplinary Rule that squarely addresses the issue of subsequent adverse representation, unlike Model Rule 1.9. The applicable areas of the Code are Canon 4 (Confidentiality) and Canon 9 (Appearance of Impropriety). DR 4-101(A) states:

"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.

DR 4-101 (B)(2) and (3) provide:

- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
 - (2) Use a confidence or secret of the client to the disadvantage of the client.
 - (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

As we stated in Opinion 78-3, concerning a divorce action between clients, both of whom were previously represented by the same attorney,

"The rules on providing representation against past clients are fairly well defined. Such representation is unethical if the matters in the current representation are 'substantially related' to the matters involved in former representation of the now adverse party, or if the new representation will require the lawyer to do anything which will injuriously affect his former client in any matter in which he formerly represented him."

One commentary suggests that there are seven questions that should be posed regarding prior representation:

1. Was there ever an attorney-client relationship between the lawyer and a party who might seek his disqualification?
2. Is the client truly a former client of the lawyer?
3. Are the interests of the former and current clients adverse?
4. Is there a substantial relationship between the two representations?
5. Has the former client consented to the current representation, or waived objections to it?
6. Is the presumption that the lawyer gained confidential information from the former client rebuttal?
7. Has the presumption been rebutted?

Here, the requesting lawyer claims that there were no confidences and secrets acquired and there is no substantial relationship between the prior representation and the proposed representation. The Committee discussed the "substantial relationship" test

¹ See Opinions 98-6, 95-13, 93-3, 88-7, 87-14, 85-5.

at length in Opinion 95-13, which approved an attorney representing a wife in a divorce case where the attorney had represented the husband 10 years earlier on an unrelated criminal charge.

In the factual situation before the Committee, several of the questions must be answered in the affirmative. However, the passage of time and the reported nature of the prior representation are critical here. In particular, assuming as we must the accuracy of the lawyer's recollection that no confidences or secrets were acquired, his role as a scrivener of an agreement previously arrived at by the parties and the sale by the husband of the property acquired in the prior divorce convince us that representation of the wife should not be barred. While the confidences or secrets of the former client are paramount, the new client also has a right to be represented by the attorney of his or her choice. However, if the requesting attorney discovers or recalls information from the former representation of the husband that would qualify as a confidence or secret that would be detrimental to the husband's interests, the lawyer should withdraw.

CONCLUSION:

In the factual situation presented, with no substantial relationship between the subject matter of the two representations and no confidences or secrets of the client that might be revealed, the attorney may represent the wife of a former client in a divorce action.