ADVISORY ETHICS OPINION 1999-04

SYNOPSIS:

An attorney who has had communications with a party to a divorce which might be of significant use or materiality in the representation of such party, and who has rendered counsel or advice in response to such communications, has an obligation to maintain confidentiality as to such information and advice even if he is not retained to represent such party. In the event he should subsequently discover that the opposing party to the matter is represented by another attorney in the firm with which he practices, he should make the fact of his contact (but not the substance of it) known to the relevant attorneys in his firm. His firm may continue to represent B provided the attorney does not disclose any information obtained from, or advice given to, A to others in the firm, and further provided that both A and B consent to the firm's continued representation of B after the facts (including the prophylactic measures being undertaken to preserve any confidential information obtained from A) are disclosed to both clients.

FACTS:

An attorney participating as a volunteer in a Family Court Legal Clinic met and had communications with A, a person seeking generalized divorce advice. During the meeting, certain specifics of A's situation were discussed, and preliminary advice rendered concerning them. No undertaking was entered for representation of A. Several days later, the attorney discovered for the first time that one or more other attorneys in his firm represented B, A's spouse, in regard to the matters discussed with A. The requesting attorney has never met with B in regard to legal matters, has not seen his file, and has no knowledge of any facts or claims asserted by B. He has not and will not disclose any facts disclosed by A to any person(s) in his firm, nor any advice imparted to A. In short, he intends to insulate himself from any and all contact with client B's matter.

ISSUE:

Is the attorney's firm permitted to continue to represent B in regard to the divorce matter, and under what circumstances?

DISCUSSION:

We have previously concluded, in Opinion 96-11, that an attorney who has secured information from an individual in the context of a free initial office conference, in which legal advice has been sought and given in circumstances reasonably likely to create an expectation of confidentiality, is required to treat such information as if it had been received in the course of representation, even if the conference does not result in the individual engaging the attorney for further services. Although Opinion 96-11 was rendered under the Vermont Code of Professional Responsibility, which was replaced effective September 1, 1999 by the Vermont Rules of Professional Conduct, we can discern nothing in the Vermont Rules of Professional Conduct inconsistent with our views as expressed in Opinion 96-11. While the conference here involved was not specifically a "free initial office conference," there is no reason to believe that the expectations of A in this case would be any different from those of a person so situated.

In Opinion 96-9, issued shortly before 96-11, this Committee opined that where the non-client contact had been confined to matters not "critical to the representation" of either the client or the non-client in the same or related matter, neither the attorney nor his firm was obligated to withdraw from representation of the client. The Committee did not condition its opinion upon any requirement that the attorney or his firm secure the consent of the parties to continued representation, presumably because of the limited nature of the non-client contact. In the instant case, however, the requesting attorney has specifically noted that the advice render to the non-client involved the discussion of specific information concerning the facts of the case, and the rendition of preliminary advice based thereon. In such circumstances, we believe that Rule 1.7 of the Vermont Rules of Professional Conduct offers the appropriate guidance.

Rule 1.7 provides as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  (2) each client consents after consultation.

While Rule 1.7 is not totally apposite in that A and B are not both "clients" of the firm, they are each entitled to reasonable expectations that their confidentiality interests will not be compromised by unconsented-to disclosure, and the Rule appears to adequately protect each of their interests. Given the attorney's commitment to insulate himself from any contact with the matter, and to preserve the confidentiality of any information obtained from A, the firm is justified in reasonably believing that its representation of B will not adversely affect A's interests, and that it will secure no advantage over A on B's behalf. Similarly, if

A consents to the firm's continued representation of B in the face of full disclosure as to the attorney's commitment to maintain the confidentiality of the communications, no impediment should exist to the firm's continued representation of B.

CONCLUSION:

In the context of the question posed by the requesting attorney, we are of the view that, provided both A and B consent after being advised of the internal measures taken to protect A's interests, the firm may continue in its representation of B. If, however, either A or B object to continued representation, the firm should withdraw from representation of B.