

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1985-2

The Committee has been asked by a member of the Delaware Bar for its opinion concerning the extent to which an attorney may properly participate in litigation between his present employer, the City of Wilmington (the "City") and his former employer, New Castle County (the "County").

The facts presented for the Committee's consideration are as follows: During the period from June of 1983 until January 11, 1985, the attorney was employed by the County as County Council Attorney. As County Council Attorney, the attorney was responsible to the members of the majority party of County Council.¹ The attorney's duties as County Council Attorney consisted primarily of drafting ordinances and resolutions for the members of County Council. As County Council Attorney, the attorney also occasionally had discussions with attorneys in the County Attorney's office regarding ongoing litigation involving the County.² The purpose of these discussions was limited to

¹By ordinance, the County Council Attorney must be a member of the same political party as are a majority of the members of County Council.

²The County Council Attorney's Office is separate both physically (across the hall through usually locked doors) and administratively from the County Attorney's Office. As mentioned above, the County Council Attorney position exists to serve the majority members of County Council, and is not associated with the County Attorney's Office or the County Administration per se.

keeping the attorney informed of current developments so that he could keep the members of County Council informed.

During the attorney's tenure as County Council Attorney, the City and the County became involved in a dispute over the City's attempted annexation of two parcels of County land. In late 1984, the County, through the County Attorney's Office, filed suit against the City seeking to invalidate the City ordinance purporting to annex the County land. Pursuant to his position as County Council Attorney, the attorney was briefed several times by attorneys in the County Attorney's Office regarding information about the annexation litigation. The Committee has been asked to assume that no information or opinions which could be considered confidences or secrets of the County were conveyed to the attorney during those briefings.

On January 11, 1985, the attorney left his position as County Council Attorney and became employed by the City in the City Solicitor's Office, the attorney now seeks to participate in negotiations and possible further litigation on behalf of the City in the above-described annexation dispute between the City and the County.

Issue: May an attorney who was formerly employed by the legislative branch of one governmental entity ("Entity A") represent his current employer, a second governmental entity

("Entity B"), in litigation against Entity A in a matter upon which the attorney was briefed pursuant to his employment by Entity A?

Opinion: Seven members of the Committee, constituting a majority, hold the view that the attorney may represent Entity B in its dispute with Entity A so long as no secrets or confidences of Entity A relative to the dispute were conveyed to him when he was briefed on the matter pursuant to his employment with the legislative branch of Entity A. If confidences or secrets of Entity A relative to the dispute were divulged to the attorney, then he must be screened from any direct or indirect participation in this matter and any other matters in which he received confidences and secrets while employed by Entity A. An eighth member of the Committee concurs in this result but not in the majority's reasoning.

Four members of the Committee, constituting a minority, take the view that the attorney may not represent Entity B in its dispute with Entity A, because, having participated in briefing sessions with the attorneys handling the litigation for Entity A, he will be presumed to have received secrets or confidences of Entity A relative to the dispute.

Finally, one member of the Committee believes that the resolution of this issue turns on the question of whether an attorney-client relationship existed between the attorney and Entity A. Since the resolution of that question involves

statutory law, municipal ordinance, and custom and practice, it is beyond the Committee's purview.

Discussion for the Majority: The facts presented to the Committee raise ethical issues under Canons 4, 5 and 9 of the Code of Professional Responsibility. Canon 4 states that a lawyer should preserve the confidences and secrets of a client. Canon 5 precludes an attorney from switching sides during the course of litigation and regulates the employment a lawyer may take after terminating past employment. Canon 9 requires that a lawyer avoid the appearance of impropriety.

1. Confidentiality. The Disciplinary Rules of Canon 4 generally forbid a lawyer from revealing or using a confidence or secret of a client. DR 4-101(B) provides, in part, that a lawyer shall not "use a confidence or secret of his client to the disadvantage of the client."³ These rules apply to a government lawyer as well as to a private practitioner. See ABA Formal Opinion 342 (Nov. 24, 1975) at 2.

In DSBA Opinion 1982-4⁴, the Committee construed Canon 4

³DR4-101(C) (1) provides that a lawyer may reveal such confidences and secrets where the client consents. As presented to the Committee, Entity A has not consented to the attorney's participation in the matter on behalf of Entity B.

⁴Opinions of the Delaware State Bar Association Committee on Professional Ethics will be cited as "DSBA Opinion."

with respect to the obligation of a lawyer to withdraw from the representation of a client where that client's interests were adverse to those of a former client. The Committee stated:

Analysis under Canon 4 focuses not on whether a lawyer actually has confidential information, but on whether "it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject matter of his subsequent representation." T.C. Theatres Corporation v. Warner Brother Pictures, 113 F. Supp. 265, 269 (S.D.N.Y. 1953). Where a subsequent representation has a "substantial relationship" with the attorney's former representation of that client, the courts have held that possession of confidential information will be presumed in order to preserve the spirit of Canon 4. Hull v. Celanese Corporation, 513 F.2d 568 (2d Cir. 1975). Cf. Kramer v. Scientific Control Corp., 534 F.2d 1085, 1088 (3d Cir. 1976); ABA Standing Committee on Professional Ethics, Information Opinion No. 885 (November 2, 1965). Thus, an attorney may not undertake a second representation where it is "so closely connected with the subject matter of the earlier representation that confidences might be involved." ABA Informal Opinion No. 1233 (August 24, 1972).

DSBA Opinion 1982-4 at pages 3-4.

These principles apply where a single lawyer is involved in the successive and substantially related matters. However, where the issue arises not as a result of an individual attorney's actions, but rather by virtue of his association with

a law firm, the presumption that the attorney has knowledge of confidences or secrets should be subject to rebuttal. In that regard the Committee has stated:

The knowledge of secrets and confidences entrusted to members of the attorney's former firm will be imputed to him if the circumstances are such that the members of the firm working on the matter could reasonably be expected to share the knowledge of the secrets and confidences of the client with the attorney. [State of Arkansas v. Dean Foods Product Co., 605 F.2d 380 (8th Cir. 1979); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975)] However, "a peripheral representation" exception applies, and knowledge will not be imputed, if it can be demonstrated that the lawyer was segregated from the prior matter in some way.

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Thus, if a lawyer played an extremely minor role, or no role at all, in his former firm's representation of a person who is now adverse to his present firm's client, neither the lawyer nor his present firm must withdraw. Silver Chrysler Plymouth, supra. Similarly, if a lawyer moves from one firm to another and can be separated by his second firm from the second case by a "chinese wall" his disqualification under Canon 4 will not be extended to disqualify his second firm. Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (En Banc), Cf. DSBA Opinion 1985-1.

In summary, the presumption of confidential knowledge is irrebuttable, where the two clients were represented by a single

attorney. However, where knowledge is imputed to an attorney by virtue of his association with a large firm, the attorney may rebut that imputation by showing he was not in a position to gain such knowledge.

The present case falls somewhere between these two polls. The inquiring attorney did not actively represent the County. He did, however, consult with the attorneys who did so. To the extent that those attorneys conveyed to him confidential or secret knowledge, he has a duty to preserve those confidences and secrets. Cf. Gilbane Building Co. v. Nemours Foundation, C.A. No. 83-58-WKS (D. Del. March 15, 1985). This duty would prevent him from now taking a position adverse to the County. Under these circumstances, the inquiring lawyer's Canon 4 duty derives from what he actually learned during these conferences. Therefore, the question of whether the attorney must withdraw turns out to be a factual one. If he was made privy to confidences and secrets, he must withdraw from representing a party whose interests are adverse to the County. On the other hand, if he did not receive confidential information from the attorneys representing the County, he does not have a Canon 4 duty to the County.

In the present case, the Committee has been asked to assume that the attorney was not privy to confidences and secrets of the County during his prior employment. This assumption compels the conclusion that the attorney's representation of the

city in its dispute against the County does not violate Canon 4.⁵

2. Representation of Differing Interests
in Subsequent Employment.

While the Disciplinary Rules do not explicitly deal with the problem of representation of interests adverse to those of former clients, a few courts have applied Canon 5 and in particular DR 5-105(A) in prohibiting lawyers from representing interests adverse to those of former clients. See, e.g., In Re Evans, 113 Ariz. 458, 556 P.2d 792 (1976).

DR 5-105(A) provides:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

This rule has been interpreted to preclude a lawyer from switching sides and opposing a former client in a matter in which he provided the former client with legal advice. See, e.g., In re Evans, 113 Ariz. 458, 556 P.2d 792 (1976); Adams v. Adams, 58 N.W.2d 172 (Neb. 1953).

⁵The Committee expresses no opinion as to whether confidences and secrets were actually divulged under the facts of this case. The Committee has been asked to assume no confidences or secrets were divulged, and its opinion is based on this assumption without any investigation of the actual facts.

The problem of representation adverse to the interests of former clients is comprehensively discussed in Rule 1.9 of the Model Rules of Professional Conduct.⁶ Rule 1.9 provides:

A lawyer who has formerly represented a client in a matter shall not:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when that information has become generally known.

The Comment to Rule 1.9 states: "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can justly be regarded as a changing of sides in the matter in question." The attorney had no such involvement under the facts presented in the present case. The Committee is asked to assume that he never investigated or passed upon the subject matter of the case and never rendered or had any official duty pursuant to his former employment to render any legal advice concerning the matter. He had no access to files or

⁶The Model Rules, though not yet adopted in Delaware, provide guidance in this area.

other confidential information. He was not even employed in the County Attorney's Office, which was responsible for handling the case. His sole knowledge of the matter came from briefings by members of the County Attorney's Office. The Committee has been asked further to assume that no confidences or secrets were divulged in those briefings.

Based on these facts, the Committee believes Canon 5 and Rule 1.9 will not be violated by the attorney's representation of Entity B.

3. Appearance of Impropriety.

DR 9-101(B) regulates subsequent employment by a government attorney. That rule provides:

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

Ethical Consideration 9-3 likewise provides:

After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving since to accept employment would give the appearance of impropriety even if none exists.⁷

⁷Ethical Considerations, unlike Disciplinary Rules, are not mandatory. Rather, they are "aspirational in character and represent the objectives toward which every member of the profession should strive." Preamble to ABA Code of Professional Responsibility.

To determine whether the attorney's representation of the City violates either DR 9-101(B) or EC 9-3, it must be determined whether his employment by the City constitutes "private employment" or whether the attorney had "substantial responsibility" in the matter he currently seeks to handle on behalf of the City while he was employed by the County. Because the attorney's employment by the City is not "private employment" and because the attorney had no "substantial responsibility" in the matter when he was employed by the County, his representation of the City does not violate Canon 9.

First, the attorney's employment by the City is not "private employment" within the meaning of 9-101(B). As stated in ABA Formal Opinion 342 (Nov. 24, 1975):

As used in DR 9-101(B), "private employment" refers to employment as a private practitioner. If one underlying consideration is to avoid the situation where government lawyers may be tempted to handle assignments so as to encourage their own future employment in regard to those matters, the danger is that a lawyer may attempt to derive undue financial benefit from fees in connection with subsequent employment, and not that he may change from one salaried government position to another. The balancing consideration supporting our construction is that government agencies should not be unduly hampered in recruiting lawyers presently employed by other government bodies.

(emphasis added). Because the attorney is a salaried government employee, his employment by the City does not constitute "private employment" within the meaning of 9-101(B). Compare General Motors Corp. v. City of New York, 501 F.2d 639 (2d. Cir. 1974) (former government attorney engaged in "private employment" when retained, with a fee arrangement, as counsel for City of New York).⁸

Second, the attorney had no "substantial responsibility" in the matter when employed by the County. ABA Formal Opinion 342 (Nov. 24, 1975) at 9 provides:

As used in DR 9-101(B), "substantial responsibility" envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree in the investigative or deliberative processes regarding the transactions of facts in question. Thus, being the chief official in some vast office or organization does not ipso facto give that government official or employee the "substantial responsibility" contemplated by the

⁸While it is thus not necessary to reach the question of whether the attorney had "substantial responsibility" in the matter while he was employed by Entity A in order to determine whether the attorney's representation of Entity B violates 9-101(B), that question is raised under EC 9-3, which does not specifically contain the "private employment" limitation.

rule in regard to all the minutae of facts lodged within that office. Yet it is not necessary that the public employee or official shall have personally and in a substantial manner investigated or passed upon the particular matter, for it is sufficient that he had such a heavy responsibility for the matter in question that it is unlikely that he did not become personally and substantially involved in the investigative or deliberative processes regarding the matter. With a responsibility so strong and compelling that he probably became involved in the investigative or decisional process, a lawyer upon leaving public service should not represent another in regard to that matter.

(emphasis added).

The facts in the present case lie far outside the bounds of "substantial responsibility" required to violate DR 9-101(B) or EC 9-3. The attorney was not even employed in the County Attorney's Office, the agency which handled the suit. He played no part in either the investigative or deliberative aspects of the matter while employed by the County. His involvement with the matter was merely as a conduit, relaying information told to him by members of the County Attorney's Office to the County Council. Other than performing this relaying function, the attorney had no involvement with this or any other litigation being conducted by the County through the County Attorney's Office. Compare Kessenich v. Commodities Future Trading Commission, 684 F.2d 88 (D.C. Cir. 1982) (former government

attorney disqualified from representing party in matter in which he exercised discretion as government lawyer). Under these facts, the attorney's representation of the City will not violate Canon 9.

Discussion for the Minority

The minority does not quarrel with the majority's analysis under Canon 5 or Canon 9. However, the minority would not reach those issues, since it takes the view that the inquiring attorney should withdraw under Canon 4.

The majority holds that the question under Canon 4 is, in essence, a factual one to be determined by whether the attorney was made privie to confidences and secrets during the course of the briefing sessions. But, the minority believes that a factual determination of whether confidences and secrets were divulged to an attorney, would compromise the very information which Canon 4 is intended to protect.

The better approach is that set forth in T.C. Theatres Corporation v. Warner Bros. Pictures, 113 F.Supp. 265, 269 (S.D.N.Y. 1953). There, the Court held that an attorney in successive and substantially related matters should withdraw from the representation of a person whose interests are adverse to those of his former client, if "it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject matter of his subsequent representation."

Accordingly, the minority believes that where, as here, a substantial relationship exists between the two matters, an attorney who was in a position to gain confidences and secrets, should be conclusively presumed to have such knowledge. Hull v. Celanese Corporation, 513 F.2d 568 (2nd Cir. 1975); DSBA Opinion 1982-4.

For the foregoing reasons, the minority would advise the inquiring attorney that he should withdraw from the representation of the County. However, his withdrawal from the matter should not require that the Law Department of the County to withdraw. An appropriate screening measure such as that discussed in DSBA Opinion 1985-1 could be employed to preserve the ability of the Law Department to act on behalf of the County.