

Committee Opinion
September 12, 1995
Reconsidered and Revised
July 8, 1996

LEGAL ETHICS OPINION 1652

REVOCABLE CONSENT; ADVERSE CLIENTS;
CLIENT OBJECTING TO ATTORNEY'S
REPRESENTATION OF ADVERSE CLIENT
AFTER HAVING EARLIER SIGNED WAIVER
THAT THERE WAS NO OBJECTION TO
REPRESENTATION OF ADVERSE CLIENT
(RECONSIDERATION OF OPINION ISSUED
09/12/95)

I am writing in response to your letter dated June 14, 1995, requesting an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("committee"). As you know, the committee issued an advisory opinion on September 12, 1995, in response to your inquiry. On June 11, 1996, the committee reconsidered the opinion on the issue of whether a client may withdraw at any time consent previously given to a conflict. Because the statement made in the prior opinion may be overbroad, the committee concluded that this matter requires clarification, and overrules the prior opinion in that regard.

You have presented a hypothetical situation in which Attorney A, in 1986, began representing Client with regard to alleged arrearages by her ex-husband in the payment of sums due under a property settlement agreement which had previously been ratified as part of the divorce proceeding between Client and ex-husband. Attorney A instituted contempt proceedings which were still pending in April, 1987. At that time, ex-husband requested that Attorney A represent him, as co-counsel with Attorney B, on DUI and refusal charges. In the presence of Attorneys A and B, ex-husband was informed of the conflict and signed a waiver stating he had no objection to Attorney A's continued representation of Client. Ex-husband agreed orally to not object in the future to A's representation of Client. Client also executed a waiver of conflict acknowledging that the retainer paid by ex-husband to Attorney A would not be available to apply toward arrearages owed by ex-husband to Client.

In March, 1992, Attorney A was still representing Client and attempting to collect arrearages from ex-husband. When criminal and traffic charges were placed against ex-husband, Client again permitted Attorney A to represent ex-husband. Client signed a waiver acknowledging the potential conflicts, including the fact that the retainer paid by ex-husband to Attorney A would not be available to satisfy, in part, the arrearages sought by Client. Client also acknowledged that Attorney A could take no actions on Client's behalf against ex-husband without ex-husband's consent until the charges were resolved. Ex-husband again signed a waiver of the "potential conflict of interest" and authorized Attorney A to "take whatever actions he deems necessary" against ex-husband regarding the arrearage claim while representing him in the criminal matters. Client is continuing to collect the alleged sums due from ex-husband, and ex-husband now objects to Attorney A's continued representation of Client.

You ask the committee to opine whether Attorney A may continue to represent Client (the former wife) in the contempt proceeding against her former husband to compel payment of arrearages owed

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Client under their property settlement agreement over ex-husband's objection to such representation.

On the facts you presented, Attorney A's representation of ex-husband was concluded in 1992. Ex-husband is, therefore, a former client of Attorney A. The controlling disciplinary rules pertinent to your inquiry are DR 5-105(D), which bars representation adverse to a former client in the same or a substantially related matter without consent from the former client, and DR 4-101(B), which prohibits the use of a client's confidences or secrets to the disadvantage of the client, or for the advantage of a third person, unless the client consents. The duty of confidentiality applies equally to existing clients and to former clients. EC 4-6.

Whether current representation adverse to a former client is "substantially related" to the former representation is a fact-specific inquiry requiring a case-by-case determination. LEO #1613 addressed "substantial relatedness," as follows:

[T]he committee has not established a precise test for substantial relatedness under DR 5-105(D). The committee, however, has previously declined to find substantial relatedness in instances that did not involve either the same facts (LEO #1473), the same parties (LEOs #1279, #1516), or the same subject matter (LEOs #1399, #1456).

Courts addressing the issue have stated that substantial relatedness exists where the matters or issues raised in the current and the former representation are essentially the same, arise from substantially the same facts, or are byproducts of the same transaction, Tessier v. Plastic Surgery Specialists, Inc., 731 F. Supp. 724 (E.D. Va. 1990), or entail virtually a congruence of issues or a patently clear relationship in subject matter. In re Stokes, 156 B.R. 181 (Bkr. E.D. Va. 1993). See also Pasquale v. Colasanto, 14 Va. Cir. 54 (1988). On the facts presented, the committee is of the opinion that Attorney A's current representation of Client against ex-husband in a contempt proceeding to compel payment of arrearages is not substantially related to his former representation of ex-husband in defending traffic charges.

The committee observes that DR 5-105(D)'s proscription is rooted in DR 4-101(B)'s mandate to safeguard the confidences and secrets of clients, both existing and former. Tessier expresses the relationship between DR 5-105(D) and DR 4-101(B), at 728:

The problem implicated by successive representation is the potential for the use of confidences gained from a former client to the detriment of that client or the failure to use information favorable to the present client in order to protect the confidentiality of the former client.

If substantial relatedness exists between the matter in former representation and the matter in current representation adverse to the former client, there is a presumption that the attorney gained confidences and secrets in the former representation which could be used to the former client's disadvantage in the current representation. Rogers v. Pittston Co., 800 F.2d 350, 353-54 (W.D. Va. 1992), aff'd without op., 996 F.2d 1212 (4th Cir. 1993). There is no presumption, however, if the matters are not substantially related. See Pasquale v. Colasanto, supra.

In LEO #622 the committee opined that it was permissible for an attorney to represent a creditor seeking to collect a debt from the attorney's former client when the matters were not substantially

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related and the collection matter did not implicate confidences and secrets gained from the former client. On the facts represented the committee cannot determine whether Attorney A would have gained confidences or secrets from ex-husband that could be used to his disadvantage in Attorney A's representation of Client in the contempt proceeding.

The Committee notes, however, that since ex-husband is the subject of a contempt proceeding, ex-husband's earnings, employment, ability to earn, assets, use of earnings, lifestyle and the like could be material to Attorney A's representation of Client against ex-husband. To the extent Attorney A acquired information about those factors in his former representation of ex-husband, they would be confidences and secrets which Attorney A could not use to the disadvantage of ex-husband without ex-husband's consent. Moreover, ex-husband's refusal to consent would adversely affect the character of Attorney A's representation of Client. See DR 7-101(A)(1) and (3).

On the facts presented, ex-husband consented to Attorney A's simultaneous representation of Client and thereafter objected to Attorney A's representation of Client following Attorney A's representation of ex-husband. It is doubtful that Attorney A's consent from ex-husband, as well as Client, cured Attorney A's conflict of interest in his simultaneous representation of both. DR 5-105(C); see LEO #1408. In any event, consent is not a contractual obligation and a client under certain circumstances may withdraw the consent. See, e.g., LEO #1354; Commercial & Sav. Bank v. Brundige, 5 Va. Cir 33, 34 (1981).

Based on the foregoing, it is the opinion of the committee that Attorney A has an incurable conflict and must withdraw from the representation of Client.

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