

You advise that you represent client "Y" in a criminal matter, in which the United States intends to try all defendants and counts together. Your client has been charged with Counts 1, 18, 19 and 20 of the indictment. Codefendant "X" has been charged with Counts 1, 18 and 19 of the same indictment. You were also retained to represent "X" on a potential Agent Orange claim in 1984. In 1985, while discussing the then pending Agent Orange claim, "X" alluded to the fact that the Drug Enforcement Agency had seized his farm. His reference to the matter and your comments lasted only a few minutes.

You advised you would investigate the matter if "X" paid you an initial retainer. Since "X" did not get back to you on this matter, you noted in the file that no further action would be taken. "X" now intends to testify against client "Y".

You wish to know whether a conflict of interest exists such that you must withdraw from representing "Y".

Your inquiry is controlled by Canons 4 and 5 of the Code of Professional Responsibility. Canon 4 provides for the preservation of client confidences and secrets. Specifically, DR:4-101(B)(2) states that a lawyer shall not knowingly use a confidence or secret of his client to the disadvantage of the client. DR:4-101(B)(3) provides that a lawyer shall not knowingly use a confidence or secret of his client to the advantage of himself or a third person, unless the client consents after full disclosure. EC:4-6 provides that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment." In this instance, however, it does not appear that you gained any confidences in your two to three minute conversation which could be used to the disadvantage of "X" or to the advantage of "Y".

DR:5-105(D) states that "a lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the client consents after disclosure." In this situation, however, you did not represent "X" in the criminal matter. Therefore, DR:5-105(D) would not be violated if you continue to represent "Y".

You also advise that you informed "Y" of the statements made by "X" and that "Y" wants to continue his representation. The Committee believes that your disclosure to "Y" was necessary since the statements made by "X" were clearly adverse to "Y" and the fact that "X" had been your client.

Committee Opinion  
December 9, 1987