

You have furnished the Committee the following facts:

Attorney A represented Y in successfully obtaining a Certificate of Public Need ("CON") for a fixed specialized medical treatment facility in 1985. In 1987, attorney A undertook to represent X in filing for a CON for the same type of facility nearby, after unsuccessfully negotiating with Y or X for over five months to establish a joint facility of a similar type. Immediately thereafter in 1987, Y began to seek a CON for a similar, but mobile treatment facility, to serve other hospitals in the same planning district. The 1987 applications for both X and Y, while in separate review cycles, are considered competing. Attorney A asks if he has a conflict of interest. The Committee opined that DR:5-105(D) was not violated because the two matters were not substantially related. A's initial representation of Y was to establish the need for a fixed medical treatment facility and that representation has been completed. A's later representation of X is not substantially related because A is now representing a different client in an attempt to show a need for an additional identical unit in another facility. The interest of X is only adverse to Y's interest in its most recent CON application.

You ask the following: (1) Is there a conflict of interest under Disciplinary Rule 5-105(D) created by your representation of * * * and its certificate of need application; (2) In this matter does Canon 4 require your withdrawal from representation of * * *; and (3) Has * * * waived any right to allege a conflict of interest due to their knowledgeable acquiescence of your representation of * * * for over five months.

With regard to your first question, 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 former client consents after disclosure." You advise that while a member of your former law firm, you previously represented in its CON application for its fixed site MRI to be located at the * * *. You now represent * * * in their CON application to establish a mobile MRI facility in Northern Virginia. The Committee does not believe that these two matters are substantially related. Your representation of * * * was to establish the need for a fixed MRI and that representation has already been completed. The Committee does not believe that your representation of * * * is substantially related merely because you are now representing a different facility in their attempt to show a need for a mobile unit at another facility. The Committee therefore opines that a conflict of interest does not exist with your representation of * * *.

Your second question is whether Canon 4 requires your withdrawal from representation of * * *. DR:4-101(B)(2) states that a lawyer shall not use the confidence or secret of his client to the disadvantage of the client. DR:4-101(B)(3) states that a lawyer shall not use a confidence or secret of the client for the advantage of himself or a third person, unless the client consents after full disclosure. Ethical Consideration 4-6 [EC:4-6] advises that the obligation of the lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Based upon the

information provided in your letter, the Committee opines that Canon 4 would not be violated. The Committee bases this opinion on the fact that you state in your letter that the information you learned during your former representation of * * * is now a matter of public record. Furthermore, you state that you did not learn any information other than that which is now public which would be confidential since you withdrew from the former firm prior to the initiation of operation of the MRI unit at the * * *.

Finally, you ask whether * * * waived any right to allege a conflict due to their knowledgeable acquiescence of your representation of * * * for over five months. The Committee does not generally support a waiver theory as it relates to an attorney's ethical responsibility unless specifically authorized by the Code of Professional Responsibility.

Committee Opinion
March 31, 1988

Editor's Note. – The asterisks in the opinion above represent deletions made to protect the confidentiality of the parties.