

You have indicated that Attorney A, located in one office of a law firm, represented Doctor X in at least two prior malpractice cases. Subsequently, Attorney B, located in another office of the same firm and apparently without knowledge of the firm's earlier representation of Doctor X, assumed representation of Doctor Y who has been sued for malpractice in a case in which the prior client, Doctor X, has been named as an expert witness for the plaintiff. During the discovery deposition of Doctor X, he denied being a defendant in any prior malpractice cases. Attorney B ultimately learns from another member of the firm that the firm had earlier represented Doctor X in at least two malpractice cases.

You have asked that the Committee opine as to the propriety of the law firm's continued representation of Doctor Y in light of its prior representation of Doctor X and of his deposition testimony.

The appropriate and controlling disciplinary rule relevant to your inquiry is DR:4-101(B) which precludes a lawyer from knowingly revealing a confidence or secret of the client and from using such information either to the disadvantage of the client or to the advantage of himself or a third person unless the client consents after full disclosure. Although the disciplinary rule defines a confidence as "information protected by the attorney-client privilege under applicable law," the term "secret" has a much more expansive application in that it refers to "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR:4-101(A); EC:4-4, EC:4-5.

The Committee has earlier opined that it is improper for an attorney to represent a new client when the attorney earlier represented the opposing client in an unrelated matter and became privy to confidential information relating to the issues in the current suit. (See LE Op. 792; see also LE Op. 1147.) Of significance is the conclusion reached by the committee when it opined that the attorney's responsibility to protect the client's secrets and confidences survives the termination of representation, even beyond the death of the client. (See LE Op. 1207; see also EC:4-6.) Furthermore, even where information regarding a former client's legal matter has become public information, the committee has opined that it is incumbent upon the attorney to preserve the client's confidentiality. (See LE Op. 1349.)

Under the facts you present, the Committee is of the opinion that the firm's continued representation of Doctor Y would be improper since it would place Attorney B in the untenable position of having to challenge the credibility of the firm's former client, Doctor X, after having supported his credibility in defending him against malpractice charges, in order to zealously represent the interests of the present client, Doctor Y.

The Committee construes the fact of Doctor X having been a defendant in two earlier malpractice actions as a secret despite the possibility that such information is available through other sources, since it constitutes information gained in the professional relationship. Therefore, the Committee is of the further opinion that would be violative of DR:4-101 to reveal such information in the course of attempting to impeach Doctor X's testimony as an expert witness since to do so would be embarrassing, likely to be detrimental to the witness/former client, and constitute both a disadvantage to Doctor X/former client and an advantage of Doctor Y/present client. Obviously, it would be

permissible to reveal such information with the informed consent of Doctor X, as permitted by DR:4-101(C)(1). (See Alabama Op. 90-25 (6/28/90), ABA/BNA Law. Man. on Prof. Conduct 901:1066; Oregon Op. 510 (3/87), ABA/BNA Law. Man. on Prof. Conduct 901:7102.)

Committee Opinion

March 12, 1991