

You advised that you previously defended “A” at the preliminary hearing stage of a criminal prosecution and were successful in having the charges dismissed. “A” was subsequently indicted and you briefly represented him after he was indicted but then were relieved as counsel.

Although “A” did not advise you of any facts or information which was inconsistent with his innocence, subsequent to your representation of “A” you read newspaper accounts stating that “A” was testifying on behalf of the Commonwealth in other jurisdictions against various other co-defendants. You have now been contacted by “B” to defend him (in a different jurisdiction than that in which you defended “A”) on a charge similar to the charge on which you defended “A”. In particular, the charge allegedly involves defrauding customers through his employment with the same company that “A” was working for when “A” allegedly performed similar fraudulent acts (the charge on which you represented “A”). You have been advised by the Commonwealth's attorney that “A” will be a witness in the case against “B”.

You ask whether it would be proper for you to represent “B” in light of your prior representation of “A”.

Disciplinary Rule 5-105(D) [DR:5-105] states that “a lawyer who has represented a client in a matter should 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 a former client unless the former client consents after disclosure.” The Committee opines that “A” is a “former client” whom you represented “in the same or substantially related matter” as that involved in your representation of “B”. Therefore, because it is apparent that the interests of “A” and “B” are now adverse, it would be unethical to represent “B” without consent of “A” after full disclosure. Furthermore, DR:4-101 generally provides for the preservation of the confidences and secrets of a client (including those of a former client) and prohibits the use of such for the advantage of a third person. The Committee opines that there would necessarily be a grave risk of a violation of this disciplinary rule if you were to represent “B”.

In light of the above cited disciplinary rule the Committee opines that it would be improper for you to represent “B” in this matter.

Committee Opinion
December 9, 1987