

Committee Opinion
October 6, 1988

LEGAL ETHICS OPINION 1146

ATTORNEY AS WITNESS –
CONFIDENTIALITY – CONFLICT OF
INTEREST – FORMER CLIENT:
ATTORNEY REPRESENTING
CRIMINAL DEFENDANT IN MATTER
SUBSTANTIALLY RELATED AND
ADVERSE TO FORMER CLIENT'S
REPRESENTATION.

You have advised that you are currently representing a defendant in a criminal matter in which the defendant has been charged with two counts of attempted murder. Recently you were advised by the Commonwealth's attorney that he had been informed of a meeting which took place a couple of years ago between you and one of the attempted murder victims.

You have admitted that the attempted murder victim came to your office accompanied by a private detective and another female to meet with you a couple of years ago, before you were employed to represent the present client on the felony charges against him. The attempted murder victim was inquiring as to the possibility of serving a notice on your present client, restricting him from coming on her property and bothering her. In addition, the Commonwealth's attorney has alleged that you read one or more letters from your present client to attempted murder victim at the time of that meeting. You have stated that you have no recollection of reading such letters, nor do you recall the contents of the same if, in fact, you were privy to any letters. You have also stated that you made no notes of the meeting and no charges were made to her whatsoever. After having spoken with you, she decided not to take any action.

You wish to know whether your previous contact with the attempted murder victim presents any ethical problems with your current employment by defendant in the recent criminal matter.

Obviously, if the matter discussed with the attempted murder victim was not related to her fear of harm by your present client or to your current representation, and if the defendant's identity was not revealed to you, there would be no impropriety because of your previous contact with an adverse witness. However, if any information was revealed during the meeting with the attempted murder victim that would be considered a confidence or secret as provided under DR:4-101, or if the information revealed is material or substantially related to the subject matter of the current representation, it would be improper to represent the current client without the former client's consent after full disclosure. Disciplinary Rule 5-105(D) provides as follows:

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.

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Under the limited facts outlined in your inquiry and since some of the allegations made by the Commonwealth's attorney are in dispute, the Committee can only opine that continued representation may be improper, provided you were privy to confidences or secrets which are protected by the attorney-client relationship and the current representation is substantially related but adverse to the subject of the former client's representation, as provided in DR:5-105(D). (See LE Op. 1039)

In addition, though you have not specifically raised the issue in your inquiry, it appears possible that the Commonwealth's attorney may seek to call you as a witness on behalf of the prosecution. In this regard, you should also consider the applicability of DR:5-101(B) and DR:5-102.

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