

Committee Opinion
February 22, 1989

LEGAL ETHICS OPINION 1196

CONFIDENTIALITY – CONFLICT OF
INTEREST: CLIENT REPRESENTATION
ADVERSE TO FORMER CLIENT.

You advised that in 1983 you represented your client/seller against his landlord, who would not consent to the assignment of the lease of the business premises to another. To facilitate diversity jurisdiction, the proposed assignee/buyer, who is not a United States citizen, was made the nominal plaintiff whom you represent at the expense of the initial client, the seller, in the suit against the landlord. Your client's suit was successful and thereafter the sale of the business was consummated, with the seller taking back a note from the buyer. You were not involved in the sale transaction in any way other than as stated above. In 1988, another dispute arose with the landlord in which you represented the initial client/seller; the assignee/buyer retained separate counsel. In the second litigation the buyer and seller had only common interests.

Now you have been approached by the client/seller to represent him against the assignee/buyer to collect upon the note which is in default. You wish to know whether a conflict of interest would preclude you from accepting such employment.

It appears that the current representation may not be the same or substantially related to the initial representation which occurred in 1983, between your client/seller and assignee/buyer against the landlord in the assignment of the lease, since you have stated that you were not involved in the consummation of the sale transaction. The determination of whether or not there is a substantial relationship is a legal question and not within the purview of this Committee. The Committee believes that the second dispute between the client/seller and the landlord, which arose in 1988, would not affect your representation of seller in the current matter, since assignee/buyer had obtained separate counsel, unless you were privy to any information concerning the representation of assignee/buyer.

The Committee directs your attention to DR:5-105(D) and DR:4-101(B), which are the appropriate and controlling rules relative to your inquiry. The rules provide 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 interests of the former client, unless the former client consents after full disclosure. (See DR:5-105(D)) A lawyer shall not knowingly reveal a confidence or secret of his client or use the same to the disadvantage of the client or for his own advantage or the advantage of a third person unless the client consents after full disclosure. (See DR:4-101(B))

The Committee has previously opined that the mere fact of the representation of a former client who is now an adverse party in litigation brought by another client is not sufficient to warrant disqualification on ethical grounds. However, if the lawyer was privy to confidential information or secrets of the former client in the prior representation, he may be in violation of DR:4-101(B) if it appears that such knowledge was used without the consent of former client for the advantage of the current client in

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the present litigation. The Committee has also opined that it would be improper for an attorney to represent a client in an adverse action against a former client if the matter is the same or substantially related to former client if the matter is the same or substantially related to the prior representation, and the former client does not consent to the current representation after full and adequate disclosure. (See LE Op. 441, LE Op. 672 and LE Op. 803)

Under the facts as you have presented them in your inquiry, the Committee would opine that representation of the client/seller in the collection action against the assignee/buyer is ethically permissible provided that you have not gained any confidences or secrets in the prior representation which could be used to the disadvantage of the former client (the assignee/buyer), and that you have obtained the informed consent of the former client after full and adequate disclosure if the current matter is substantially related and adverse in any material respect to the prior representation.

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