

Committee Opinion
September 27, 1989

LEGAL ETHICS OPINION 1252

ATTORNEY AS WITNESS –
CONFIDENTIALITY: TESTIMONY ON
BEHALF OF OPPOSING PARTY
REGARDING COMMUNICATIONS
BETWEEN COUNSEL AND
INTENTIONS OF PARTIES.

You have asked the Committee for guidance regarding an attorney's ability to testify as a witness for the opposing party regarding the issues of spousal support, after being discharged by his client for whom the attorney had prepared the property settlement agreement. The relevant facts of your inquiry are as follows:

Attorney X represented Client A in a domestic matter wherein the parties and counsel negotiated towards a property settlement agreement. This included several offers and counteroffers by both parties or their counsel. After several months, a property agreement was drafted by Attorney X's office and forwarded to Client A who approved and executed the same and then forwarded to counsel for Client A's husband for review and his client's execution. Throughout the negotiations with counsel for Client A's husband and prior to the execution of the property agreement by both parties, Attorney X and opposing counsel discussed the issue of spousal support and agreed that the property settlement agreement should be silent as to support. Attorney X discussed the matter with Client A and recommended that she waive the spousal support in light of the parties' income level and the favorable terms in the property agreement which Client A was receiving.

Approximately a month later, Attorney X was discharged by Client A who appointed a new attorney to represent her in further proceedings regarding the issues of spousal support. Subsequent to the motion for spousal support filed by Client A's new attorney, Attorney X was subpoenaed as a witness by counsel for Client A's husband to testify as to the intentions in the agreement between counsel and the parties that there would be no spousal support in the property agreement. Client A's new attorney has objected to Attorney X's testimony based on the attorney/client confidentiality privileges.

Under DR:4-101, a "confidence" refers to information protected by the attorney/client privilege under applicable law, and a "secret" 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.

Whether the communications described fall under the attorney/client privilege is a question of law upon which this Committee may not opine. However, it is the opinion of the Committee that the testimony of Attorney X regarding his communication with opposing counsel would not be improper since the information to be offered relates solely to the intent of the lawyers and the existence of an agreement between the parties.

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