

CONFIDENCES AND SECRETS –
CONFLICT OF INTEREST – DOMESTIC
RELATIONS PRACTICE – FORMER
CLIENT: REPRESENTING EX-
HUSBAND/CLIENT IN AN INCREASE
FOR CHILD SUPPORT WHEN
ATTORNEY EARLIER REPRESENTED
EX-HUSBAND'S FORMER WIFE'S
PARAMOUR IN HIS DIVORCE.

You have asked the Committee to consider the propriety of an attorney representing a client, ex-husband, in an action to increase child support filed by ex-wife, when ex-wife's live-in paramour was a former client of the attorney. The following is a summary of the pertinent facts as you have stated them in your inquiry.

An attorney represented a client, ex-husband, in matters concerning child support for his three children in 1984 and 1986, and in both hearings ex-husband was directed to increase child support for the three children of the former marriage. You have also stated that there were subsequent matters of correspondence with ex-husband in 1987 but no further court proceedings were involved.

In December of 1987, the attorney was retained by another client, A, to represent him in a divorce proceeding filed by A's wife. During the representation of A, approximately six months later, A began living with former client/ex-husband's, ex-wife. You stated that the attorney apparently was informed of this arrangement sometime shortly after, and both A and ex-wife continue to reside in the latter's marital residence jointly owned by former client/ex-husband and ex-wife.

In January 1989, Client A terminated the attorney's services and employed another attorney, B, who had previously represented ex-wife in the child support proceedings in 1986, and in the correspondence matters in 1987. Now, Attorney B is representing ex-wife in her petition for increased child support against ex-husband for their three children. You have stated that some of the issues that may be raised in the child support increase will be whether or not ex-wife is underemployed or voluntarily unemployed because of her relationship with former client, A. Consequently, you indicate that there is a remote possibility that A will be called as a witness in the current proceeding. Ex-husband has once again called on the same attorney to represent him in the child support increase matter.

You wish to know whether it would be improper for the attorney to continue the representation of ex-husband in the child support increase proceeding when the attorney formerly represented opposing party's paramour in a suit for divorce. It is your opinion that the separate matters in which the attorney has represented ex-husband and former client A are not substantially related; therefore, you believe that DR:5-105(D) regarding representation of a client whose interests are adverse to a former client's in a matter that is substantially related to the former representation is not applicable.

Committee Opinion
April 20, 1990

The Committee believes the appropriate and controlling Disciplinary Rule relative to your inquiry is DR:4-101(B) which provides that a lawyer shall not knowingly reveal a confidence or secret of his client, use a confidence or secret of his client to the disadvantage of the client, or use a confidence or secret of his client for his own advantage or to the advantage of a third person, unless the client consents after full disclosure. LE Op. 441 states that the mere fact that a lawyer has formerly represented a person who is now the adverse party in a suit brought by the lawyer on behalf of another client does not warrant automatic disqualification of the lawyer on ethical grounds. However, a violation of DR:4-101(B) may result if the lawyer possessed confidential information which he obtained during the course of the representation of the former client.

The Committee is in agreement with your views that the matters are not substantially related and that the fact that the former client, A, and ex-wife are residing together may not necessarily be a confidence or secret. However, if the attorney learned any information during the course of representing A concerning ex-wife or her employment status, or, if he gained any other material facts that may be used to the advantage of his client or the attorney's own advantage in the current proceeding, there is a greater likelihood of a DR:4-101(B) violation.

Therefore, the Committee would opine that the continued representation of ex-husband would only be prudent if the attorney has no knowledge of any information which he gained during the course of representing former client, A, and which may constitute a secret or is a confidence that could be used to the advantage of ex-husband in the instant child support increase proceeding.

Furthermore, "secret" has been defined in Canon 4 as "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." Therefore, it is the Committee's belief that the fact that ex-wife and former client A reside together may be considered a secret even though such information may be known to other third parties. (See LE Op. 1147)

Committee Opinion
April 20, 1990

Editor's Note. – Overruled in part by L E Op. No. 1528. See footnote 1 of the opinion for scope.