

Committee Opinion
May 8, 1990

LEGAL ETHICS OPINION 1352

ATTORNEY AS WITNESS –
CONFIDENCES AND SECRETS –
CORPORATE PRACTICE: ATTORNEY
PREPARING BUY OUT AGREEMENT
BETWEEN STOCKHOLDERS A AND B;
TESTIFYING AFTER DISPUTE
BETWEEN A AND B.

You have asked the Committee to consider the propriety of an attorney testifying in a dispute arising out of a corporate buy-out agreement to which the attorney allegedly had not acted as counsel for either party to the agreement, but had served as company counsel and subsequently drafted the agreement between A and B. The following is a summary of the pertinent facts as you have stated them in your inquiry.

An attorney incorporated a business (“Company”) on behalf of A and B who were the sole stockholders of the Company. In addition, the attorney discussed and advised both A and B on other personal unrelated separate legal matters when called upon. The Company became unprofitable and accrued a substantial tax debt. You advise that, at this juncture, each stockholder attempted to “buy out” the other's interests and the attorney informed A and B that he would not be able to represent either since they then had adverse, differing interests. The attorney was not a part of the “buy out” discussions, but agreed to prepare a letter for each setting forth each one's position. However, these terms were never carried out, and A and B continued their discussion outside the attorney's office, calling attorney to appear as counsel for the Company only.

You indicate that, during this meeting, the attorney reminded parties A and B that he was not present to represent or advise either of them and did not offer any advice to either party, but rather served only to “point out the facts.” The parties reached an agreement which was acceptable to each; the attorney was asked to act as scrivener; and the attorney agreed to draft the agreement between A and B. Subsequently, a dispute arose and one of the parties has sued the other and subpoenaed the attorney to testify.

You wish to know whether the attorney may ethically testify. The Committee will assume that the testimony will relate solely to the terms as agreed upon between the parties as memorialized in the agreement.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR:4-101(B) and (C)(2). These rules provide that a lawyer shall not knowingly reveal a confidence or secret of his client; use a confidence or secret of the client to the client's disadvantage; or use a confidence or secret of the client to his own advantage or the advantage of another client. However, a lawyer *may* reveal a confidence or secret of a client when required by law or court order. This rule is permissive in nature and, above all, a lawyer is expected to take whatever steps are available within the bounds of the law to preserve the confidences and secrets of a client.

Committee Opinion
May 8, 1990

The Committee previously opined in LE Op. 654 that the provisions of Canon 4 of the Code of Professional Responsibility address the preservation of confidences of former clients. Except with the consent of the former client after full disclosure or pursuant to court order under the provisions of DR:4-101(C), an attorney is prohibited from testifying about any confidence or secret gained from former clients in pending actions in which a former individual client is a plaintiff and a former corporate client is the defendant. "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." Thus, information which is considered "secret" may even be known to other third parties or even a matter of public record. (See LE Op. 1147)

The Committee is of the opinion that the question of whether you acted solely in the capacity of attorney for the corporation requires a factual determination beyond the purview of the Committee. As noted above, a lawyer is expected to take whatever steps are available within the bounds of the law to preserve the confidences and secrets of a client. In doing so, it is the Committee's opinion that the lawyer is obliged to attempt to quash the subpoena, testimony under which might require him to reveal secrets and confidences. In the course of ruling on such a motion to quash, the court would make the factual determination as to the identification of the attorney's client. Obviously, should the court deny such a motion and require such testimony, the lawyer may then testify as permitted under DR:4-101(C)(2).

Furthermore, under the facts you have presented, the Committee opines that the Company lawyer's testimony would not be violative of DR:4-101(B) if the testimony will be limited solely to the existence of the agreement between A and B and their intention to have the attorney present only to draft the agreement as agreed upon between A and B and not in any other capacity, such as counsel to either or both. (See LE Op. 1252. See also LE Op. 967 and LE Op. 1087)

Finally, the Committee cautions that where a lawyer accepts a role as scrivener when neither party is represented by independent counsel, the potential for improper multiple representation is manifest. Having been counsel to the corporation, it is imperative that the lawyer take no further role on behalf of either shareholder when a dispute arises between the two shareholders of a closely held corporation.

Committee Opinion
May 8, 1990