

LEGAL ETHICS OPINION 1419

CONFLICT OF INTEREST — FORMER
CLIENT — CORPORATE
REPRESENTATION: FORMER IN-
HOUSE ASSISTANT GENERAL
COUNSEL'S ADVERSE
REPRESENTATION OF POTENTIAL
CLIENT OVER THE OBJECTIONS OF
FORMER CORPORATE SUBSIDIARY
CLIENT.

You have indicated that a corporation . . . employed a Virginia attorney as [in-house] assistant general counsel whose duties included advising the corporation and its subsidiaries on contracts, other commercial transactions. . . and leases. You advise that, as part of his duties with the corporation, the attorney in question advised one of the subsidiary companies concerning a lease on several thousand acres of . . . lands, which lease runs until all . . . merchantable [product] has been removed. Furthermore, you indicate that the lease obligates the subsidiary/lessee to pay a production royalty on . . . [the product taken from the land] and a minimum royalty regardless of the actual amount of . . . [product taken]. The hypothetical facts you have provided indicate that, during the course of his employment, in order to advise the subsidiary, the attorney reviewed the subsidiary's vault file, containing confidential memoranda and other important papers; offered a written opinion as to the operation of the minimum royalty provision in the lease; and received a copy of a legal memorandum prepared by his fellow in-house counsel analyzing other provisions of the lease.

You advise the Committee that, after leaving the employ of the corporation, the in-house assistant general counsel is subsequently engaging in private practice and is presently representing the lessor in regard to a dispute which has arisen as to the lease described above, which lease was in existence during the entire time of the attorney's employment with the subsidiary. On behalf of the lessor, the attorney is presently asserting claims that the subsidiary's practices and lack of diligence, some of which occurred during the attorney's employment with the corporation, resulted in substantial loss to the lessor.

Finally, you indicate that the corporation and its subsidiary object to the attorney's present representation of their lessor against them in this matter, but the attorney indicates that he has "no independent recollection" of reviewing the lease or vault file while employed by the corporation.

You have asked the Committee to opine whether, under the hypothetical facts of the inquiry, it is proper for the former in-house assistant general counsel to continue to represent the lessor against his former client over his former client's objections.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:5-105(D), which prohibits a lawyer from representing a new client materially adverse to a former client in the same or substantially related matter unless the former client consents

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after [full] disclosure; and DR:4-101(B), which prohibits a lawyer from knowingly revealing a confidence or secret of his client and from using a confidence or secret of his client to the disadvantage of the client or to the advantage of himself or a third person.

Although the Committee has previously opined, in general, that the mere fact that a lawyer has formerly represented a client, who is now the adverse party in a suit brought by the lawyer on behalf of another client, is not sufficient to warrant *per se* disqualification of the lawyer on ethical grounds, the committee has more specifically opined that such disqualification should turn on both (a) whether the issue is substantially related to the attorney's prior employment and (b) whether the attorney is in possession of secrets and confidences of the former client. (See LE Op. 441, LE Op. 672, LE Op. 933, LE Op. 718.)

The Committee recognizes that you have indicated that the attorney in question disputes having received any secret or confidential information while in the employ of the corporate subsidiary. You do not indicate, however, that any dispute exists as to the relatedness of the matters, since apparently the dating of the lease falls within the period of the attorney's employment with the corporate subsidiary. *Cf.* Wisconsin Formal Op. E-87-3 (April 15, 1987). The committee believes that the resolution of either or both such disputes would require a factual determination employing whatever tests and assigning whatever burden of proof the appropriate factfinder chooses to adopt. See, e.g., *T C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F.Supp 265 (S.D. N.Y. 1953); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981). Thus, the resolution of any dispute as to either of the two issues, i.e., the substantial relatedness of the matters or the attorney's possession of the former client's secrets and confidences, requires a factual determination which is beyond the purview of the Committee.

The Committee is cognizant that the facts you present indicate both that there is a substantial relationship between the former corporate representation and the matter now in dispute, and that the former in-house assistant general counsel was privy to the corporate subsidiary's confidences and secrets. Assuming the facts you have presented, regardless of the attorney's lack of any independent recollection, and without presuming to make a factual determination as to any dispute regarding those facts, the Committee is of the opinion that it would be improper for the former in-house assistant general counsel to subsequently represent the lessor in the claims you have described, without the consent of the corporate subsidiary as required under both DR:5-105(D) and DR:4-101(B).

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