

Committee Opinion
March 1, 1993

LEGAL ETHICS OPINION 1507

MULTIPLE REPRESENTATION –
CONFIDENCES AND SECRETS –
CONSENT: PUBLIC DEFENDER'S
COMMUNICATION WITH ADVERSE
PARTY.

You have indicated that a Public Defender has been appointed to represent a client in a capital murder case and that three identified prosecution witnesses (Witnesses A, B and C) and one other person (Witness D, who could be a witness for either side) have been clients of the same public defender office [" office"] in the past. You further indicate that Witnesses A and B were represented by attorneys working for the same public defender office, but neither attorney is still with the office. Witness C was recently represented by the Assistant Public Defender who is still with the office and who is co-counsel on the murder case. Witness D is a sibling of the defendant, and was charged with being an accessory after the fact to this murder, the Commonwealth accusing Witness D of having helped to dispose of the body.

As regards Witness D, you advise that the charge against that individual was dismissed when the prosecution realized that the statute forbids charging a sibling with being an accessory after the fact. The Assistant Public Defender had also represented Witness D on an earlier, unrelated assault charge, and discussed the accessory to murder charge with Witness D to determine the impact of that charge on the assault case. Following that representation, the office declined an appointment to represent Witness D on the accessory charge on the assumption that the office would be appointed to the murder case under discussion.

You further indicate that Witnesses A and B allege that the defendant made admissions to them concerning the murder, although Witness B is presently incarcerated on unrelated crimes and is of highly questionable integrity and Witness A has a past which renders him/her open to serious attack with regard to credibility. The Commonwealth's Attorney has indicated that he does not intend to call Witness B to testify, although there is no guarantee that B would not be called if the prosecutor decided he needed B's testimony. Should Witness A and/or Witness B be called, their anticipated testimony is such that the defense would have to attack their credibility with everything available.

You have advised that Witness C is the murder victim's sibling and is considered to be a present client of the office in that he/she has a suspended sentence and, in any potential revocation action for an alleged violation of probation, the office would be required to represent Witness C at any show cause hearing and would expect to represent and advise Witness C with regard to any activity which might impact on his suspended sentence.

Your facts indicate that, although the Commonwealth has statements from several witnesses concerning Witness D's (the client's sibling) involvement in helping to cover up the murder, the Commonwealth's Attorney has stated that he does not intend to call Witness D but, as with the other witnesses, there is no guarantee. You indicate that if Witness D were called to testify, the Public Defender could not cross-examine him/her

Committee Opinion

March 1, 1993

adequately without using confidential information. Conversely, however, Witness D has made statements which not only indicate that he/she knows nothing about the murder, but which suggest that he/she would be a valuable defense witness. However, in order to formulate an appropriate direct examination of Witness D, the Public Defender would have to rely on secret or confidential information.

Furthermore, you indicate that the Commonwealth's Attorney, who opposes the withdrawal of the Public Defender from the case, has obtained a "Waiver and Release" from each of Witnesses A and C, apparently by having them interviewed by police officers. Your facts indicate that the waivers use the same form; that Witness A's signature was witnessed by a police officer while Witness C's signature was witnessed by a guard at C's place of incarceration; and that no defense attorney advised or discussed these waivers with either witness.

Further, as regards Witness C, you indicate that C was approached by his/her attorney (the Assistant Public Defender) and refused to discuss the waiver or what the Commonwealth's Attorney may have told or promised C. You indicate that there is concern that Witness C may have been threatened or promised immunity or some other benefit in consideration of the signing of the waiver. Finally, you indicate the possibility that Witness C may be planning to commit perjury in an effort to help convict the person charged with C's sibling's murder and, as C's attorney, the Assistant Public Defender should be advising him/her as to the effect such an action might have on probation. In addition, if Witness C testifies perjurally, the Assistant Public Defender co-counsel will be required as an impeachment witness.

You have requested that the Committee opine as to the propriety of several situations involving the facts you have provided, specifically with regard to (1) the client's waiver of the attorney's conflict of interest; (2) the continuation of the attorney-client relationship during the client's probationary period; and (3) the withdrawal of an attorney when an attorney formerly with the same office must be called as a witness to impeach a former client.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:5-105(B) which precludes a lawyer from continuing multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client except [as permitted by DR:5-105(C)] if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each; DR:5-105(D) which mandates 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 interest of the former client unless the former client consents after disclosure; DR:4-101(B) which prohibits a lawyer from knowingly revealing a confidence or secret of his client or using that confidence or secret to the disadvantage of the client or for the advantage of a third person unless the client consents after full disclosure; DR:5-102(A)

Committee Opinion

March 1, 1993

which requires that a lawyer withdraw from the conduct of a trial if he learns or if it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client; DR:2-108(A) and (C) which require, respectively, that a lawyer shall withdraw from representing a client if continuing the representation will result in a course of conduct by the lawyer that is inconsistent with the Disciplinary Rules and that, in any court proceeding, such withdrawal shall not take place except by leave of court; DR:7-101(A)(2) which exhorts that a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services; and DR:7-103(A)(1) which prohibits a lawyer from communicating with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

With regard to your specific questions involving the client's waiver of the attorney's conflict of interest and of the attorney's responsibility to protect confidential information, the Committee is of the opinion that the consent/waiver received from the client must be based upon the attorney's full and adequate disclosure of the possible effect of such waiver. The Committee has previously opined that disclosure is adequate if it is such that the client [or former client] is able to make an informed decision as to whether or not to give consent. Furthermore, the Committee has also opined that all doubts as to the sufficiency of disclosure must be resolved in favor of the client [or former client] and against the attorney's proceeding. See LE Op. 1198, LE Op. 1459, LE Op. 1489. In the facts you present, the Committee is of the view that the relevant disciplinary rules require that the onus of responsibility for making full disclosure leading to the client's consent rests on the attorney who holds the confidence. Thus, in response to your first three questions, the Committee opines that if the consent/waiver was made without the attorney's full disclosure, the attorney may only cross-examine the former [or present client] if no use will be made of confidential or secret information possessed by the attorney. In addition, the Committee has consistently opined that continued representation of a new client is improper when it becomes necessary to challenge the credibility of a former client, even in an unrelated matter, if it requires the use of the former client's confidential information in order to zealously represent the current client. See LE Op. 1407.

With regard to your fourth question, the Committee is of the opinion the court's requirement of your continuation of representation of a client through all appeals and at any probation violation hearing establishes and maintains the attorney-client relationship throughout the period of probation and until the client is discharged from supervision.

Furthermore, the Committee cautions that, should the attorney's relationship with Witness C be construed to constitute a current attorney-client relationship leading to a simultaneous multiple client situation, the applicable requirements of DR:5-105(C) mandate that each consents. Since the facts you provide indicate that the current client does not consent, it would be improper to continue any such multiple representation.

As to your fifth question, regarding a Commonwealth's Attorney's approach to a former client of defense counsel for the purpose of obtaining a waiver of the attorney-client

Committee Opinion

March 1, 1993

privilege [sic] without the knowledge of the defense counsel, the Committee directs your attention to prior LE Op. 1389 which found that, following the entry of a final order in litigation, it would not be improper for the [opposing] attorney to write to a previously represented party for the sole purpose of securing information as to current representation. The opinion further indicated that, should the attorney determine that the party was then unrepresented, the lawyer must not give advice to the individual other than the advice to secure counsel.

As regards the Commonwealth's Attorney approaching a present client of defense counsel for the purpose of obtaining a waiver of the attorney-client privilege [sic] without the knowledge of the defense counsel, the Committee is of the opinion that the plain language of DR:7-103(A)(1) would prohibit such contact without the defense counsel's prior consent.

In addition to the waivers being ineffective, the Committee is of the opinion that the public defender may only continue representation if it is obvious that he can adequately represent the interest of each defendant since that is the threshold which must be crossed before any client consent becomes operative. DR:5-105(C); see also LE Op. 1408.

Finally, the Committee opines that it would not be improper for an attorney to continue serving as court-appointed counsel should it become necessary to call as a witness an attorney who is no longer in the same office since the mandate of DR:5-102(A) is applicable only when a lawyer presently associated with the office [firm] ought to be called as a witness on behalf of the client. However, the Committee cautions that the attorney/witness must comply with obtaining the disclosure and consent requirements of DR:4-101 as regards any information he has which concerns the credibility of his former client.