

Committee Opinion
April 12, 1993

LEGAL ETHICS OPINION 1517

CONFIDENCES AND SECRETS —
FORMER CLIENT — ATTORNEY AS
WITNESS: REPRESENTATION OF ONE
OF TWO CORPORATE
SHAREHOLDERS AFTER HAVING
REPRESENTED THE CORPORATION.

You have presented a hypothetical situation in which Lawyer has represented Corporations 1 and 2 (collectively, the “Corporations”) since their formation, both of which were owned at all times equally by individual shareholders M and S. Prior to and subsequent to the creation of the Corporations, Lawyer's law firm (the “Firm”) had represented S personally in other unrelated matters. Neither Lawyer nor any other attorney in the Firm had ever represented M personally nor had any communications with M that the Firm would consider privileged as to M.

You advise that negotiations between M and S recently occurred for the complete redemption of M's shares by the Corporations, resulting in a request by S to Lawyer to represent the Corporations in the preparation of purchase documents of M's shares. M consented to this representation.

During the process, S learned of M's alleged breach of fiduciary duty to the Corporations by operating a competing business and utilizing corporate assets and employees. Lawyer then resigned as counsel to the Corporations after proper notice to M, S, and the Corporations. You advise that another attorney in the Firm has now undertaken to represent S in filing a shareholder's derivative action against M on behalf of S as a shareholder in the Corporations for the alleged violations.

Finally, you indicate that M's attorney has raised an objection to the Firm's representation of S in this litigation, alleging a conflict of interest due to Lawyer's prior representation of the Corporations and suggesting that Lawyer might become a witness in the litigation.

You have asked the committee to opine whether, under the facts of the inquiry, (1) it is improper for a lawyer to represent a shareholder in a derivative action against another shareholder when the lawyer has previously represented the corporation and the plaintiff shareholder personally in unrelated matters but has never represented the defendant shareholder; and (2) whether the mere threat by opposing counsel in the derivative action to call a partner in the plaintiff shareholder's law firm as a witness is sufficient to require the law firm's withdrawal from the case.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-105(D) which provides 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:5-102(B) which states that if, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is

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obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client; DR:4-101(A) which defines a “confidence” as information protected by the attorney-client privilege under applicable law, and “secret” 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 likely to be detrimental to the client; and DR:4-101(B) which precludes a lawyer from knowingly revealing a client's confidence or secret and from using a client's confidence or secret to the disadvantage of the client or to the advantage of the lawyer or a third person.

As to whether the attorney may represent the plaintiff shareholder against the defendant shareholder and the corporation, the committee is of the opinion that such representation would not be improper under DR:5-105, since the attorney neither represented the defendant shareholder individually and provided that the attorney never obtained confidences or secrets from that defendant shareholder during the course of the attorney's representation of the corporation. *See* LE Op. 1458.

Regarding your second inquiry, the committee believes that the threat by an opposing counsel to call an attorney as a witness is not *per se* sufficient to require the attorney's withdrawal from the case. Instead, the committee opines that the plain language of DR:5-102(B) allows the attorney to continue representation of his client, even if called to testify by opposing counsel, until it is apparent that the attorney's testimony is or may be prejudicial to his client. *See* LE Op. 866, LE Op. 1240, LE Op. 1455.