

CONFIDENCES AND SECRETS —  
CONFLICT OF INTEREST:  
REPRESENTING HUSBAND THREE  
YEARS AFTER WIFE CONSULTED  
WITH ATTORNEY REGARDING  
DIVORCE.

You have indicated a hypothetical situation in which a lawyer consults with a wife/potential client concerning a divorce. At the time of the consultation, the wife and her husband, both employed, had recently separated and had a young child. At the consultation, the wife informed the attorney of her husband's and her respective incomes, the approximate value of the home, and the fact that she desired to maintain custody of the child. The wife also indicated what she desired to obtain in the divorce, support, and equitable distribution proceedings and gave the attorney a basic outline of the parties' debts and assets. Further, the wife stated generally her grounds for divorce without stating the factual basis therefor. Although the attorney quoted a fee to the wife, he did not request or bill a consultation fee to the wife. The wife, therefore, paid neither a consultation fee nor retained the attorney. Subsequently, the husband and wife sold the marital home, divided the proceeds, and reconciled.

You indicate that, more than three years later, the wife filed divorce proceedings against the husband. In the Bill of Complaint for the divorce, the wife set forth as her grounds for divorce the same general grounds of separation that she had earlier stated to the attorney, although the separation was a different one which occurred more than three years after the original separation for which she had consulted the attorney. In addition, the Bill of Complaint alleges a pattern and history of physical abuse and substance abuse by the husband and prays for the same relief the wife had said she wanted from her divorce when she consulted with the attorney three years earlier. You indicate that the wife may rely on acts occurring more than three years ago to establish apprehension of danger to her safety.

You indicate that at the present time, three years following the wife's initial consultation, the husband wishes to hire the attorney for representation in the divorce matter. Finally, you indicate that any information divulged by the wife to the attorney in the conference three years ago was less detailed than she will be required to divulge under the discovery rules and pursuant to the rules of the Judge of the Court.

You have asked the committee to opine whether, under the facts of the inquiry, it is proper for the attorney to represent the husband in this divorce. In the event that the committee should opine that the attorney may not represent the husband, you have also asked the committee to opine whether that opinion would be altered if the wife had consulted with many lawyers in the area with the specific intent of precluding her husband from being able to engage any of them for representation in the divorce matter.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:5-105(D) which provides that a lawyer who has represented a client in a matter shall not

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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; and 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 for his own advantage or that of a third person unless the client consents after full disclosure. *See also* ECs 4-4 [EC:4-4] and 4-5 [EC:4-5].

The committee has previously opined that a potential client's initial consultation with an attorney creates an expectation of confidentiality which must be protected by the attorney even where no attorney-client relationship arises in other respects. LE Op. 1453. However, the committee recognizes that the preservation of confidentiality must be based upon a case-by-case determination as to the lawyer's actual receipt of a potential client's secrets or confidences. In certain circumstances, the law firm may have an obligation to put the prospective client on notice that no attorney-client relationship exists between the firm and the prospective client until the firm accepts the engagement. *See Bridge Products, Inc. v. Quantum Chemical Corp.*, 1990 U.S. Dist. LEXIS 5019 (N.D. Ill. 1990) (counsel interviewed, but not hired, by the plaintiff was disqualified from representing the defendant because the plaintiff had disclosed confidential information relevant to the defendant's defense); Formal Op. 90-358 (1990) ABA Comm. on Ethics and Prof. Resp. (protective guidelines for lawyers).

In the facts you present, the committee is of the opinion that, despite the indication that the present divorce matter is based upon a later separation, it is substantially related to the earlier potential divorce upon which the wife consulted the lawyer. Further, the committee is of the view that the lawyer actually did receive confidential and secret information during the prior consultation with the wife. Thus, the committee opines that any representation of the husband in the divorce matter would be improper absent the wife's consent following full disclosure. Furthermore, since the prohibitions under DR:4-101 are considerably broader than the attorney-client privilege, the committee is of the further opinion that the secret information may not be revealed even if it is subject to discovery. *See* LE Op. 452; *Greene v. Greene*, 418 N.Y.2d 379 (Ct. App. 1979).

To the extent that this conclusion is in conflict with the conclusions of prior LE Op. 318, LE Op. 337, LE Op. 888, and LE Op. 1189, those opinions are hereby overruled.