Committee Opinion
January 13, 1995

LEGAL ETHICS OPINION 1613

CONFLICTS; CONFIDENCES; FORMER CLIENT; ATTORNEY EMPLOYED BY GOVERNMENT AGENCY AFTER HAVING REPRESENTED FORMER CLIENT WHO WAS TARGET OF AGENCY ENFORCEMENT.

You have presented a hypothetical situation in which a first-year associate at a large law firm was assigned to work on several related anti-trust class action cases approximately three months before leaving the firm to work for a government agency that enforces anti-trust laws. The anti-trust class action cases involve the same or related anti-trust issues, and the associate's firm represents the same single defendant in each case. In all, there are approximately forty defendants, the majority of which had signed a joint defense agreement with the associate's client.

You indicate that the full extent of the associate's involvement in the cases over the three-month period consisted of the following activities:

1. Researched and wrote a draft brief and a memorandum in opposition to class certification in one of the cases. In the course of preparing these procedural documents, the associate had access to its client's files but did not refer to any of those files because the only facts relevant to the brief and memorandum were the plaintiff's allegations, which the associate gleaned from the plaintiff's complaints. The associate also did not have access to any other defendant's files but did receive copies of some privileged joint defense correspondence.

2. Composed a draft answer in one case on behalf of the firm's client only. Reviewed other defendants' draft answers circulated pursuant to a joint defense agreement in the course of selecting language for the draft answer but did not have access to other defendants' files. The associate did not rely upon its client's files in preparing the draft but did have conversations with a more senior associate regarding facts relating to the client. The draft answer was finalized by the more senior associate.

3. Reviewed third-party documents produced to the plaintiffs pursuant to a third-party subpoena; some documents contained information about certain joint defendants.

4. Composed initial draft responses to interrogatories and document requests on behalf of the firm's client. Attended one meeting with the client only (no joint defendants) regarding responses to document requests. A more senior associate performed all the factual investigation for the responses to interrogatories and finalized the draft by filling in the relevant facts. The senior associate also finalized the responses to document requests. Reviewed other defendants' privileged draft objections and responses to interrogatories and document requests in the course of selecting language for the firm's client's draft responses. Did not have access to other defendants' files at any time but did receive and review privileged joint defense

correspondence discussing joint defense strategy as it affected responding to discovery.

5. Attended one joint defense meeting at which some, but not all, members of the joint defense were represented. The purpose of the meeting was to discuss strategy for responding to interrogatories and document requests. Did not have access to other defendants' files at any time, although some attorneys for other defendants discussed their planned responses to interrogatories and document requests based upon the limited information they had received from their clients up to that date. (The meeting occurred before many attorneys had an opportunity to review their clients' files.)

You further indicate that at no time did the first-year associate have access to any of the other defendants' files, but the associate did receive regularly joint defense correspondence relating to discovery and other aspects of the pending litigation.

Finally, you advise that the associate subsequently began to work for a federal agency that enforces anti-trust laws. You have asked the committee to opine, relative to the facts presented, as to several issues regarding possible conflicts between the associate's present governmental employment and the former clients.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:4-101 which provides for the preservation of client confidences and secrets; DR:5-105(D) which states 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; and DR:5-105(E) which provides that if a lawyer is required to decline employment or to withdraw from employment under DR:5-105, no partner or associate of his or her firm may accept or continue such employment.

The committee opines relative to the facts presented as follows:

1. With regard to whether a lawyer-client relationship exists between the associate and the joint defendants such that DRs 5-105(D) and 4-101 are triggered, the committee is of the opinion that no attorney-client relationship with the co-defendants has been established to which DR:5-105 would be applicable. The committee has previously opined, however, that a potential client's initial consultation with an attorney creates an expectation of confidentiality which must be protected by the attorney, as demanded by DR:4-101, even where no attorney-client relationship arises in other respects. *See* LE Op. 1453, LE Op. 1546.

In the facts presented, although the associate did not have access to the co-defendants' files, the associate was provided with copies of joint correspondence relating to case facts and strategies. The committee is of the opinion, therefore, that the associate has actually received confidences and secrets from the co-defendants. Furthermore, the information gained relative to co-defendants is also construed to be protected as a secret of the client/defendant since it was gained in the professional relationship, was apparently

intended by the client to remain confidential, and since the interest of the co-defendants is parallel to the interest of the client/defendant. Thus it is the committee's view that although the associate would not necessarily have a conflict related to the joint defendants, it would be incumbent upon the associate to preserve any secrets or confidences received, in accordance with DR:4-101. However, the committee cautions that a determination as to whether any such information was actually received requires an examination of all circumstances by a finder of fact. *See, e.g., Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1027 (5th Cir. 1981).

The committee is of the further opinion that both variations on your inquiry, i.e., (a) whether the co-defendants signed/participated in the joint defense agreement, and (b) whether the co-defendants attended the one joint defense meeting the associate attended, are immaterial to the conclusions reached.

2. Under DR:5-105(D), an attorney shall not represent another person in the *same or substantially related matter* [emphasis added] 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.

With regard to the determination of the existence of a “substantial relationship”, the committee has not established a precise test for substantial relatedness under DR:5-105(D). The committee, however, has previously declined to find substantial relatedness in instances that did not involve either the same facts (LE Op. 1473) the same parties (LE Op. 1279, LE Op. 1516) or the same subject matter (LE Op. 1391, LE Op. 1399, LE Op. 1456). Under the facts presented, then, the committee would find not substantially related any anti-trust enforcement which did not involve either the same relevant facts necessary to prove a violation, the same parties (the same co-defendants), or the same subject matter (anti-trust). *See Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 730-31 (E.D. Va. 1990), and *Rogers v. The Pittston Co.*, 800 F. Supp. 350 (W.D. Va. 1992).

3. With regard to a time limit on any bar against the associate's participation in all kinds of antitrust enforcement, the committee believes that a response to this inquiry has been rendered moot since the committee has opined above that there is no attorney-client relationship between the associate and the co-defendants. However, the committee notes that Disciplinary Rule 5-105(D) does not provide for a time limit on the prohibition against representing a current client adverse to a former client. The plain language of the Rule provides a total bar to representation, unless consent of the former client, after full disclosure, is received. Furthermore, the committee has previously opined that an attorney's responsibility to preserve a client's secrets or confidences survives the death of the client, thus placing no time limit on such protections. *See* LE Op. 1207; *see also* LE Op. 1307.

4. As to whether any disqualification that applied to the associate would be imputed to the government agency or the associate's new office, the committee is of the opinion that, since there is no attorney-client relationship between the associate and the co-defendants,

the provision of DR:5-105(E) regarding imputed disqualification are inapposite to the facts you present.