Committee Opinion
April 19, 1995

LEGAL ETHICS OPINION 1638

CONFLICT OF INTEREST; CONFIDENCES AND SECRETS; DEFENDING CIVIL MATTER WHERE PLAINTIFF'S EXPERT WITNESS IS PRESIDENT OF CORPORATION CURRENTLY REPRESENTED BY DEFENDING FIRM.

You have presented a hypothetical situation in which a law firm has been hired to represent a defendant in a pending civil case involving a construction dispute. The plaintiff's expert for this case is the president of a corporation which the law firm has, on a few occasions in the past, represented in litigation, sometimes as plaintiff and sometimes as defendant. The committee assumes that the president will testify if the case goes to trial. One case, where the law firm is defending the corporation in a discrimination action, remains pending. The law firm is also the registered agent for this corporation. In the course of its representation of the corporation, the law firm has gained general knowledge of the scope and nature of the corporation's operations. The information which the law firm has gained does not fall outside the scope of information that could readily be discovered in the course of discovery in the pending construction dispute litigation.

You have inquired as to whether the law firm may continue to defend the construction case, given its past and current representation of the corporation.

The appropriate and controlling disciplinary rule relevant to your inquiry is DR:4-101(B) which precludes a lawyer from knowingly revealing a confidence or secret of the client and from using such information either to the disadvantage of the client or to the advantage of himself or a third person unless the client consents after full disclosure. DR:4-101(A) defines confidences as information protected by the attorney-client privilege and secrets as information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. The committee noted in LE Op. 1546 that because the “secret” provisions of DR:4-101 are broader than the attorney-client privilege, secret information may not be revealed even if it is subject to discovery.

The Committee has previously opined that it is improper for an attorney to continue to represent a party when, in the course of zealously representing that party it becomes necessary to attack the credibility of a former client with confidences or secrets because that former client is now an adverse witness. LE Op. 1407. In the facts of that opinion, the law firm had previously defended the adverse expert witness on charges of malpractice and could have used that knowledge to discredit him in the current litigation when he was denying ever having been accused of malpractice.

Under the facts presented, the committee assumes that the law firm has represented the corporation, but has not represented the president personally. Thus, the attorney-client relationship exists between the law firm and the corporation. *See* EC:5-18. Even if no

attorney-client relationship exists or existed between the president and the law firm, there nevertheless may be an expectation of confidentiality giving rise to Canon 4 duties.

In LE Op. 1457 the committee determined that a former president of the board of directors of a condominium, who was going to be a witness on behalf of the condominium and was for that purpose interviewed by the attorney for the condominium, had an expectation of confidentiality that the attorney must protect unless the attorney told the former president that he did not represent him and that nothing he said in their discussions would be kept confidential. Absent such disclosures, any admissions by the former president which could be used to the advantage of the condominium and the disadvantage of the former president would disqualify the attorney from representing the condominium because he could not reveal such information under DR:4-101, nor fail to reveal it, if required, in the course of zealously representing his client under DR:7-101. (See also LE Op. 1407).

The committee believes that if, in the course of representing the corporation, the law firm had any discussions with, or received any information from the president, such communications would give rise to an expectation of confidentiality unless it gave the president the disclosures and warnings required under the circumstances presented in LE Op. 1457. The committee notes that expectations of confidentiality can arise even without formal attorney-client relationships. In LE Op. 1546 the committee opined that a potential client gave to an attorney information protected under DR:4-101 sufficient to disqualify the attorney from representing an opposing party even though the attorney never represented the potential client. *See* LE Op. 452.

Thus, any confidences or secrets, as defined by Canon 4, that the law firm gained from the president in the course of representing the corporation, in circumstances where the president was not warned of any lack of confidentiality and where his expectations were of confidentiality, could not be used against the president or to anyone else's advantage without his consent. Using such confidences or secrets to discredit the president as an expert witness would thus be violative of DR:4-101(B).

The opportunities in which the law firm has had to gain information regarding the president's credibility as an expert witness, as well as other personal information that could be used to find information regarding the president's credibility, have been numerous. The law firm has represented the corporation more than once in the past and is currently representing it, and the president who, presumably, has been involved with these cases. The law firm is the corporation's registered agent and has gained general knowledge of the scope and operation of the corporation by and through communications with the president.

Thus, the committee concludes that it would be proper for the law firm to continue to represent the defendant in the pending litigation only if it has gained no information from the president under any circumstances that would have indicated an expectation of confidentiality as discussed above, or if no such information thus gained can be of any use whatsoever to the current defendant so that the law firm will not need to use it, or if

the president consents after full disclosure, or if the president was adequately warned that what he told the law firm would not be held in confidence because the law firm did not represent him or his interests.

In addition the law firm must fully and adequately disclose to its client in the pending construction case that the expert witness designated by plaintiff's counsel is president of a corporation which the law firm represents and has represented in the past; and, the law firm must obtain informed consent, after adequate disclosure of all known facts creating a possible conflict, to continue defending the client in the construction case.