

You have presented a hypothetical situation in which there were four co-defendants, A, B, C and D in a criminal matter in which each were charged with manufacturing marijuana. Attorney X was appointed to represent co-defendant A and Attorney Y was hired to represent co-defendant D. After the preliminary hearing, Attorney X became employed by the Commonwealth's Attorney's office, withdrew from representing A and had no further involvement with this case. The Commonwealth's Attorney's office entered into an agreement with three of the co-defendants, including co-defendant A previously represented by Attorney X. A, B and C were granted transactional immunity in exchange for their testimony against D. A special prosecutor was appointed to prosecute the remaining co-defendant, D, who continued to be represented by Attorney Y. At the trial of co-defendant D's case, B and C testified that D manufactured the marijuana without any assistance from them. Co-defendant A was not called to testify. The trial resulted in a hung jury, and the prosecutor announced he intended to retry the matter. By this time, Attorney X had left the Commonwealth's Attorney's office and was employed as a associate of Attorney Y.

Under the facts you have presented, you have asked the committee to opine as to the propriety of Attorney Y continuing the representation of his client, D.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:4-101 which requires an attorney to preserve confidences and secrets of a client; 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 states that if a lawyer is required to decline employment under DR:5-105, no partner or associate may accept or continue such employment.

The committee has previously opined that conflicts and confidences and secrets issues arise when an attorney undertakes to represent co-defendants in a criminal matter, especially when one of the co-defendants, pursuant to an agreement with a prosecutor, will testify against the other. In LE Op. 986, for example, an attorney represented two co-defendants on charges arising out of the same criminal conduct. One of the co-defendants entered into a plea agreement with the Commonwealth agreeing to cooperate by testifying against the other in exchange for a suspended sentence. The plea bargaining defendant obtained new counsel, but the attorney continued to represent the other co-defendant. The Committee concluded that the testifying co-defendant was a former client and that the trial of the other co-defendant at which the former client was expected to testify was substantially related. DR:5-105(D). Since the interests of the former client and the client standing trial were adverse, the attorney could not continue to represent the client standing trial without the consent of the former client after full disclosure. In

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addition, the Committee opined that there was a grave risk that DR:4-101 would be violated if the attorney continued to represent the other client facing trial. Continued representation would also place the attorney in the untenable position of having to cross-examine and impeach his former client at trial in order to defend the existing client. See, e.g., LE Op. 1181. par In the facts you present, the committee believes that co-defendant A is a former client of Attorney X, to whom Attorney X owes duties under DR:5-105(D) and DR:4-101. Co-defendants A and D are adverse, assuming that Co-defendant A plans to testify for the Commonwealth at D's upcoming trial. Now that Attorney X is employed by Attorney Y, any confidences and secrets Attorney X acquired in his prior representation of A, are imputed to Attorney Y. See, eg., LE Op. 1082 (merger of two law firms representing adverse parties creates conflicts; information obtained may be carried to merged firm). Similarly, Attorney X's former client conflict vicariously disqualifies Attorney Y from continuing the representation of D, absent A's consent. DR:5-105(E).

Therefore, the Committee is of the opinion that Attorney Y may not continue the representation of D absent A's consent after full disclosure of the conflict. Attorney X must be able to disclose the information acquired by Attorney X during his prior representation of A, and the risks or consequences to A if Attorney Y is permitted to continue the representation of D. DR:5-105(D). Also, A must consent to the use and disclosure of any information that would otherwise be protected under DR:4-101 as a confidence or secret. DR:4-101(C)(1).

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