Committee Opinion
July 8, 1996

LEGAL ETHICS OPINION 1684

ATTORNEY AS MEDIATOR; SUBSEQUENT REPRESENTION ADVERSE TO A PARTY INVOLVED IN UNRELATED MATTER MEDIATED BY ATTORNEY

You have presented a hypothetical situation in which an attorney acts as a mediator between an individual investor (Investor A) and an investment brokerage firm (Firm). During mediation, attorney acquires information concerning internal rules and operations of Firm, which information is disclosed subject to the obligation of confidentiality under the mediation rules. After completion of the mediation, attorney is approached by another investor (Investor B) seeking representation against the same Firm. Investor B knows nothing of Investor A or the prior mediation. Investor B's allegations concern different securities, purchased through a different registered representative of the Firm. However, information about the Firm learned by attorney during the mediation applies to Investor B's case.

Under the facts you have presented, you have asked the committee to opine as to the propriety of attorney's accepting representation of Investor B against the Firm, after attorney gained relevant information about the Firm during prior mediation.

The appropriate and controlling disciplinary rules relative to your inquiry are 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 4-101(B)(2) & (3) which prohibit an attorney from knowingly using a confidence or a secret of his client either to the disadvantage of his client or to the advantage of the attorney or a third person, unless the client consents after full disclosure. Also applicable is EC 5-20 which states that a lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved in the mediation.

The committee has previously opined that attorneys are permitted to engage simultaneously in the practice of law and related endeavors. (LEO 1368). Once involved as a mediator, an attorney is prohibited from representing either party as an advocate in the subject matter of the mediation. (LEOs 511, 544, and 849). The committee has also opined that mediation is not the per se practice of law; however, the activities involved and the subject matter to which they apply closely resemble the practice of law. (LEO 1368). The Code of Professional Responsibility applies to attorneys acting in a fiduciary relationship even where no attorney-client relationship exists. [LEOs 1301 (trustee), 1335 (trustee), 1442 (lender's agent) and 1617 (executor, trustee, guardian, attorney-in-fact or other fiduciary)]. The Virginia Supreme Court also anticipated that mediators would be members of other professions and provided their standards for professional

responsibility would not limit the responsibilities a mediator may have under codes of ethics promulgated by any other profession to which the mediator belongs. Va. Sup. Ct., Standards of Ethics and Professional Responsibility for Certified Mediators, Para. J (March, 1993).

In the facts you present, the committee opines that the Code of Professional Responsibility applies to the conduct of the attorney serving as a mediator and requires an analysis of whether the representation of Investor B is substantially related to the matter the attorney mediated for Investor A and the Firm. The committee has previously declined to define "substantially related" since it is a fact-specific inquiry requiring a case-by-case determination. (LEO 1652). Although no precise test for "substantial relatedness" under DR 5-105(D) has been established, the committee has previously declined to find substantial relatedness in instances that did not involve either the same facts (LEO 1473), the same parties (LEOs 1279, 1516), or the same subject matter (LEOs 1399, 1456).

However, the committee notes that the federal courts have ruled on this subject using the test of whether an attorney could reasonably have been exposed to client confidences and secrets in the former matter. Rogers v. Pittston Company, 800 F. Supp. 350 (W.D. Va. 1992), aff'd. without op., 996 F.2d 1212 (4th Cir. 1993). It is not necessary to demonstrate that confidences were actually received by the attorney, since such a standard would place an unreasonable burden on the moving party. Id. at p. 353, citing Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 224 (7th Cir. 1978). Where matters are determined to be substantially related, and there was a reasonable chance that the attorney received confidences in the first matter, an irrebuttable presumption arises that confidences were exchanged. Id. at p. 353, citing Duncan v. Merrill Lynch, 646 F.2d 1020, 1028 (5th Cir. 1978), cert. denied, 454 U.S. 895, 70 L. Ed. 2d 211, 102 S. Ct. 394 (1981).

A confidence refers to information protected by the attorney-client privilege under applicable law, and a secret is defined 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 would be likely to be detrimental to the client. [DR 4-101(A)]. In the hypothetical facts presented, the mediator learned information about the internal rules and operations of the Firm having a bearing on the quality of the Firm's supervision of its agents. This information was disclosed by the Firm subject to the confidentiality requirement under the mediation rules. See, Va. Sup. Ct., Standards of Ethics and Professional Responsibility for Certified Mediators, Para. F(1)(b) (March, 1993); Va. Code Ann. Section 8.01 - 581.22. It is clear that the Firm would not want any information disclosed subject to a confidentiality requirement used against them on behalf of a future claimant, particularly when it may be detrimental to their defense of another claim.

Since the attorney received confidences of the Firm during the mediation with Investor A, it is necessary to determine if the nature of the confidence is sufficient to merit the attorney's disqualification. Mere familiarity with a corporation's workings or personality

of its representatives is not enough, when standing alone, to disqualify an attorney where it cannot reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of the present litigation. Chantilly Constr. Corp. v. John Driggs Co., 39 Bankr. 466 (Bankr. E.D. Va. 1984).

In this case, the committee notes that the information disclosed during the mediation was specifically given subject to the mediator's duty to keep it confidential and that it involves the same subject matter at issue in Investor B's case. Therefore, the committee opines that the matters are substantially related and the attorney is precluded from undertaking representation in Investor B's case. Confidentiality is critical to maintaining a mediator's ability to work impartially and neutrally with both parties to resolve their differences. Similarly, the confidentiality required of attorneys under DR 4-101 also exists to encourage complete candor and truthfulness between attorneys and their clients without fear of later repercussions. Moreover, the confidentiality statute for mediators specifically prevents the use of information disclosed and used during mediation from subsequently being used in litigation between mediating parties. Therefore, it would certainly be improper to permit the same attorney to use this information against a party on behalf of a future client simply because the attorney acquired the information while serving as a mediator when they would not be permitted to use it if they acquired it while serving as an advocate.

The committee further opines that the Code of Professional Responsibility permits the consent of a client after full disclosure to cure this conflict. The committee cautions attorneys from relying heavily on client consent because there are circumstances in which consent may be withdrawn at a later time. LEO's 1354 & 1652; Commercial & Sav. Bank v. Brundige, 5 Va. Cir. 33, 34 (1981).

[DRs 4-101(A), 4-101(B)(2) & (3), 5-105(D); EC 5-20; LEOs 511, 544, 849, 1279, 1301, 1335, 1354, 1368, 1399, 1442, 1456, 1516, 1617, 1652; Va. Sup. Ct., Standards of Ethics and Professional Responsibility for Certified Mediators, Para. J (March, 1993); Rogers v. Pittston Company, 800 F. Supp. 350 (W.D. Va. 1992), aff'd. without op., 996 F.2d 1212 (4th Cir. 1993; Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 224 (7th Cir. 1978); Duncan v. Merrill Lynch, 646 F.2d 1020, 1028 (5th Cir. 1978), cert. denied, 454 U.S. 895, 70 L. Ed. 2d 211, 102 S. Ct. 394 (1981); Chantilly Constr. Corp. v. John Driggs Co., 39 Bankr. 466 (Bankr. E.D. Va. 1984); Commercial & Sav. Bank v. Brundige, 5 Va. Cir. 33, 34 (1981)]