

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 89-013

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: A lawyer is prohibited from representing a client against a former client when two conditions are met: the interests of the former client and the present client are adverse in some material respect, and the matters involved in the former and the current representations are the same or substantially related. In order for this test, or any substantial relationship test to be applied, there must be an exploration of the complete factual situation involved. Such a determination cannot and should not be made in the form of an advisory opinion.

In addition, whether an attorney's disqualification should be imputed to other members of the affected attorney's law firm is a legal question for a court or similar adjudicative body to decide. However, we advise an attorney or law firm faced with this issue to consider the following analysis. First, will the disqualification work a substantial hardship on the present client? Second, is it clear that the affected lawyer was privy to confidential information from the former client? Third, is there a substantial relationship between the subject matter of the prior and present representations?

If the answer to these questions is "yes," then a presumption of the shared confidence arises which requires disqualification of the law firm unless rebutted. This presumption can be rebutted by showing that specific institutional screening mechanisms have been implemented to effectively insulate against the flow of confidential information from the affected attorney to other members of his or her law firm.

OPINION: We have received several requests for advisory opinions on the topic of lawyers and their representation against former clients. Typically what occurs is that a lawyer who works in a law firm representing a particular client then leaves that firm and joins another law firm representing someone against the lawyer's former client. The lawyer, while employed by the previous firm, had been involved in the representation of the former client. The question then

becomes, is the lawyer precluded from being involved in representing his new law firm's client against the former client? If the lawyer is disqualified because of the former representation, is this disqualification imputed to other members of the lawyer's present firm? Finally, is there anyway to prevent the entire firm from being disqualified?

A major concern in any situation where an attorney is representing a current client against a former client is the potential disclosure of confidential information. DR 4-101(B) states that a lawyer shall not knowingly:

- 1) Reveal a confidence or secret of his client.
- 2) Use a confidence or secret of his client to the disadvantage of the client.
- 3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Furthermore, "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment." Code of Professional Responsibility, EC 4-6.

However, we agree with one commentator who stated that an absolute rule prohibiting attorneys from representing a present client against the interests of a former client is unacceptable. Wolfram, Modern Legal Ethics 358 (1986). Likewise, freedom to enter into new representations by lawyers and clients should be restricted only for weighty reasons. Id.

The issues presented in this opinion typically arise in the context of a motion for disqualification. Therefore, the factors utilized by courts in resolving motions for disqualification are helpful in answering these questions under the Code of Professional Responsibility. When faced with a motion to disqualify, courts have generally established that when any substantial relationship can be shown between the subject matter of a former representation, and that of a subsequent adverse relationship, the latter will be prohibited. T.C. Theatre Corp. v. Warner Bros., 113 F. Supp. 265 (S.D.N.Y. 1953).

The lawyer, in the facts outlined above, could not represent the new client against his former client if the subject matter of the former and present representations are adverse and substantially related. It must then be determined whether the affected lawyer's disqualification is imputed to the members of his law firm.

The test utilized by the Courts of Appeals for the Sixth and Seventh Circuits in dealing with disqualification motions requires a two-step analysis. First, whether a presumption of shared confidences has been established by demonstrating: that disqualification will work a substantial hardship on the client who may have to seek new counsel, that the quarantined lawyer was privy to confidential information received from the former client now seeking disqualification of the lawyer's present firm, and that there is a substantial relationship between the subject matter of the prior and present representations. Second, if established, is the presumption rebutted by other factors? Manning v. Waring, Cox, James, Sklar and Allen, 849 F.2d 222, 225 (6th Cir. 1988).

Does the presumption arise here? It must be determined whether the confidences acquired by the lawyer in his or her representation of the former client have been passed on, or are likely to be passed on to members of his law firm. Id., (citing Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir.1983)). The presumption may be rebutted by showing specific institutional mechanisms have been implemented to effectively insulate against the flow of confidentiality from the quarantined attorney to other members of his or her present firm. Manning, supra, 849 F.2d at 225 (citing LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983)).

Whether the presumption of shared confidences has been rebutted through the use of screening devices should be based on objective and verifiable evidence and must be made on a case-by-case basis. Manning, supra, 849 F.2d at 225 (quoting Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983)).

Therefore, in terms of the law firm's ethical responsibilities, it should disqualify itself unless measures have been taken which sufficiently demonstrate that confidences of the former client have not been disclosed and that they have "in a timely fashion, implemented screening procedures which will be effective in preventing any disclosure of these confidences." Manning, supra, 849 F.2d at 227. We agree with the Manning court's holding that such a process maintains the law's traditional concern for the sanctity of a client's confidences in that the former client is "accorded a presumption of shared confidences which, if unrebutted, will dictate disqualification." Id.

In order for this test or any substantial relationship test to be applied, there must be an exploration of the complete factual situation involved. Such a determination cannot and should not be made in the form of an advisory opinion. Rather, the court or adjudicative body involved in the case is the appropriate forum for such a case-by-case determination.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.