

Ethics Opinion

940112

In 1988, Attorney undertook to represent Mr. A in a dissolution action against Mrs. A. Their marriage had been very aggressively physical. While Mr. A was in city jail, Mrs. A took their three children and proceeded to the State of M. Upon being released from city jail, Mr. A retained Attorney to represent him in the dissolution action. Attorney prepared to obtain an order to show cause regarding custody. Before an order was obtained, Mr. A proceeded to the State of M and, without the consent of Mrs. A, obtained physical custody of the children and returned them to the State of Montana. The State of M filed felony charges for spouse/custody interference.

The dissolution was finalized with Mr. A obtaining custody of the two older children, with the younger child being returned to Mrs. A in the State of M. The criminal charges against Mr. A in the State of M were eventually dismissed by agreement of Mr. A to plead guilty to fugitive from justice charges in the State of Montana.

During the separation of Mr. A and Mrs. A, Mr. A started living with Ms. B, whom he subsequently married after completion of the divorce. One child was born of that marriage. In 1991 Mr. A went to a different attorney and commenced a dissolution action against Mrs. B. Mrs. B obtained counsel and various orders to show cause were issued. In the summer of 1992, Mrs. B terminated her counsel and sought representation from Attorney.

Attorney advised Mrs. B that there might be a conflict of interest, but that he did not feel so as, "the interests of Mr. A as relates to his first divorce and as to this second divorce were materially different, that they were not adverse to his interests." Attorney talked to counsel for Mr. A; she indicates she does not want Attorney disqualified.

In the fall of 1992, Mr. A obtained other counsel in an effort to obtain custody of his third child from ex-Mrs. A in the State of M. This was accomplished by default, but ex-Mrs. A then immediately came to Montana and started a modification proceeding. At a hearing therein, Mrs. B was subpoenaed and did testify regarding the abusive nature of Mr. A. Mrs. B requested and Attorney did attend the proceeding.

There may be an issue over custody of the child in the current proceeding which would require the person representing Mrs. B to "divulge" the abusive nature of Mr. A in his prior marriage to ex-Mrs. A and in his current marriage to Mrs. B.

QUESTION PRESENTED: Is an attorney disqualified from representation of the current spouse of a party in a dissolution proceeding after having represented that party four years before in a prior dissolution proceeding involving a former spouse?

ANSWER: Yes, a conflict of interest does exist which precludes the attorney from representing a new client against his former client unless both parties' consent is obtained pursuant to Rule 1.9.

ANALYSIS: Rule 1.7 Mont.R.Prof.Conduct provides in pertinent part:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected;
- (2) the client consents after consultation. . . .

Rule 1.8 provides:

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

Rule 1.9 provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client when the information has become generally known.

The tests as set forth by the courts under the former Canons of Professional Ethics would seem to continue to apply under the current Rules of Professional Conduct.

The relevant test for disqualification is whether the former representation is "substantially related" to the current representation . . .

. . . Perhaps the most important facet of the professional relationship served by this rule of disqualification is the preservation of secrets and confidence communicated to the lawyer by the client. If there is a reasonable probability that confidences were disclosed which could be used against the clients in later, adverse representation, a substantial relation between the two cases is presumed. Confidentiality, however, is not the only aspect of the professional tie preserved by the disqualification rule.

. . . The rule we state is necessary to implement the following Canons of Professional Ethics: Canon 1 (maintaining integrity and confidence in the legal profession); Canon 4 (preserving confidences and secrets of a client); Canon 5 (exercise of independent professional judgment); Canon 6 (representing a client competently); Canon 7 (representing a client zealously within the bounds of the law); Canon 9 (avoiding even the appearance of professional impropriety).

. . . The test does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the rule is intended to protect. See *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d at 224 and n.3. The inquiry is for this reason restricted to the scope of the representation engaged in by the attorney. It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification.

Trone v. Smith, 621 F.2d 994, 998-999 (9th Cir. 1980); see also *Fitzpatrick v. McCormick*, 869 F.2d 1247 (9th Cir. 1989).

In effect, there are four elements to examine:

- (1) An attorney-client relationship.
- (2) The present litigation must include same or substantially related matters to the previous representation.
- (3) The interest of the present client must be materially adverse to the former client.
- (4) Failure of consent by either client.

Hutchinson v. Gilmore, 827 P.2d 784 (Kan.App. 1992). It appears that all elements are present here.

Whether there exists a substantial relationship depends on the factual context within the two representations and whether they are similar or related. If a court would find a substantial relationship between the matters, the attorney is disqualified. *Trust Corp. of Montana v. Piper Air Craft Corporation*, 701 F.2d 85 (9th Cir. 1983).

Where an attorney-client relationship has existed, it will be presumed that confidences were reposed. *Food Brokers, Inc. v. Great Western Sugar*, 680 P.2d 857 (Colo.App. 1984). In *Oar Lock Land and Cattle Company v. Crowley, et al.*, 833 P.2d 146, 148 (Mont. 1992), the Montana Supreme Court noted:

However, this rule does not bar the attorney, when the relationship has terminated, from representing a client adverse to his former client if the matter in controversy is different or even though the controversy arises out of facts which the attorney might have been familiar.

The issue is whether or not the prior divorce proceeding and the current divorce proceeding are "substantially related." Under *Westinghouse*, supra, the elements to be analyzed are:

- (1) The scope of the prior legal representation.
- (2) Whether it is reasonable to presume the lawyer would have received confidential information of the type alleged.

(3) A determination of whether the alleged confidential information is relevant to the issues raised in the litigation pending against the former client.

As both the former and the current proceeding are dissolution proceedings involving custody issues, they appear to be substantially related. It is presumed confidential information would have been imparted in Attorney's representation in the prior dissolution proceeding. The relevancy of the confidential information is presumed due to the close proximity of the cases in time and issues presented.

Interests are sufficiently adverse if it is shown the attorney owes a duty to his client to take some action that could be detrimental to his former client. *Dorsey v. King County*, 55 Wash.App. 664, 754 P.2d 1255 (1988). The issue in regard to child custody is present in both dissolutions. The potential for adversity is plain.

Pursuant to Rule 1.9, the attorney would be disqualified from representation of the current spouse unless the former client consents after consultation. Under the facts as provided there is no indication that the former client's current counsel consulted regarding or had authority to waive the conflict. Should the former client consent after consultation, the representation may be undertaken if under the circumstances it is not in violation of Rule 8.4(d) which states that it is a professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice; . . ."