# Advisory Opinion 1984-8

An attorney "Attorney" wishes to know whether he may continue representation of a client under the following circumstances. Owner and general contractor ("GC") entered into a contract for the construction of an office building. During construction a dispute arises between GC and the plumbing subcontractor over testing chilled water lines and completing the boiler hookup and the boiler room. The Owner, GC and subcontractor meet in Owner's office where they resolve the dispute. Owner recommends that GC contact Attorney to draft an agreement reflecting the resolution. Attorney previously had represented Owner and GC in separate matters. GC pays Attorney's fee for drafting the agreement, although the resolution of the dispute is in the interest of both the owner and GC.

Thereafter, a dispute arises between Owner and GC regarding certain claims of defective work and completion of mechanical punch list items. Both parties contact Attorney about the dispute and ask Attorney to represent them. Attorney refuses to represent either one but offers to mediate the dispute without fee. Both parties accept. Subsequently, a meeting is held with both parties in Attorney's office at which time the items of dispute are resolved. Attorney then prepares an agreement which both parties later sign. Attorney was not paid a fee for his services.

Sometime later further disputes arise between owner and GC over allegedly defective work in other areas of the building which are unrelated to the owner's prior claim of defective work. One particular claim of defective work involves installation work performed by the plumbing subcontractor on fan coil units.

Owner retains Attorney to represent him in an arbitration against GC and others regarding these further items in dispute. Attorney accepts the retainer and files a demand for arbitration. GC now demands that Attorney withdraw as counsel for owner because of Attorney's involvement in drafting the agreement which resolved the dispute between GC and plumbing subcontractor, and in mediating the earlier dispute between Owner and GC.

ANALYSIS

It is not completely clear from the Attorney's description of the factual circumstances what the relationship is between Owner and GC. It is important for Attorney to first determine whether GC is a current or former client. If the GC is a current client, Attorney owes an undivided duty of loyalty to the GC and is obligated to withdraw from any representation in opposition to the interests of GC, regardless of the subject matter or issues involved, unless GC expressly consents to Attorney's representation. *United Nuclear Corporation v. General Atomic Corporation, 96* N.M. 155, 629 P.2d 231 (1980); Code of Professional Responsibility, Canon 5; Advisory opinion 1983-5. Under this assumption, Attorney must withdraw from representation of the Owner in the arbitration because GC has objected to the representation.

If Attorney determines that GC is a former client, Attorney still has an obligation to preserve the confidences and secrets of GC. Code of Professional Responsibility, Canon 4. In New Mexico, an attorney may not represent a party in a matter in which the adverse party is that attorney's former client and the *subject matter* of the two representatives are substantially related. *United Nuclear Corporation v. General Atomic Corporation, supra*. The determination of whether there is a substantial relationship turns on the possibility, or appearance thereof, that confidential information might have 'been given to the attorney in relation to the subsequent matter in which disqualification is sought. The rule does not necessarily involve any inquiry into the imponderables involved in the degree of relationship between the two matters, but instead involves the realistic appraisal of the possibility that confidences had been disclosed in the one matter which will be harmful to the client in the other. The effect of the Canon, therefore, is to restrict the inquiry to the possibility of disclosure and not whether actual confidences were disclosed. *Westinghouse Electric Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311 (7th Cir. 1978).

Attorney points out that the items of dispute in the arbitration are completely different from the earlier items in dispute between Owner and GC, which Attorney mediated, and the items in dispute between GC and the plumbing subcontractor. The only common element is that they involve the same building. Attorney's attempt to limit the scope of "subject matter" to the items in dispute is a tenuous ground on which to justify representation of the owner and an unduly restrictive interpretation of the meaning of subject matter as contemplated under the substantial relationship test. The Committee believes that the subject matter of the representations is the construction of the office building and that each representation raises an issue of defective work and who will be responsible for it. On that basis, the Committee concludes that the subject matter of the two earlier representations is substantially related to the subject matter in the arbitration; therefore Attorney should withdraw from representation of the Owner in the arbitration.

This conclusion is strengthened by two other considerations. EC 5-20 says:

> 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 an act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

The Committee believes that a broad interpretation should be given to the word dispute in the above quote and that in Attorney's situation it refers to claims of defective work (and the responsibility for them) arising from the construction of the office building and is not limited to certain items of defective work.

Attorneys are also admonished to avoid even the appearance of impropriety. Code of Professional Responsibility, Canon 9; Model Rules of Professional Conduct, Rule 1.9 (August 2, 1983). Doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification. *Westinghouse Electric Corp. v. Kerr-McGee Corp., supra.*

Attorney advances a second justification in support of his continued representation of the Owner. Essentially, any information learned by Attorney was not privileged information because the information was disclosed by GC at a face to face mediation meeting at which Owner was present. The argument seems to be that nothing said by GC in the mediation meeting was confidential because it was disclosed to a third person, namely the Owner, or if there was privileged information, GC waived any right to assert the Attorney-client evidentiary privilege. Presumably no confidential information was conveyed to Attorney in the dispute with the plumbing subcontractor. The Committee does not have enough information to analyze this argument in detail. In any event, there exists in addition to the attorney-client evidentiary privilege, an ethical duty.

> The evidentiary privilege and the ethical duty not to disclose confidences both arise from the need to encourage clients to disclose all possibly pertinent information to their attorneys, and both protect only the confidential information disclosed .... Not only do clients at times disclose confidential information to their attorneys; they also repose confidence in them. The privilege is bottomed only on the first of these attributes, the conflicting-interests rule, on both.
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> The dual basis for the rule against representing conflicting interests is implicit in its statement as formulated in Canon 6 of the American Bar Association's Canons of Ethics.
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> > The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed.
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> > This Canon has recently been construed not to require proof of the acquisition, use or misuse of the confidential information as a condition for disqualification. The court held that a person seeking to disqualify his former counsel from continuing to appear against him need show only (1) the former representation, (2) a substantial relation between the subject matter of the former representation and the issues in the later lawsuit, and (3) the later adverse representation...
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> > (T)he ethical standards for attorneys must be formulated and construed in that way which will best protect the interests of clients and uphold the dignity of the legal profession. A strict construction of a lawyer's duties in cases like this one would give clients cause to feel that they had been mistreated. If an attorney is permitted to defend a motion to disqualify by showing that he received no confidential information from his former client, the client, a layman who has reposed confidence and trust in his attorney, will feel that the attorney has escaped on a technicality.

*E.F. Hutton & Company v. Brown,* 305 F. Supp. 371 (S.D. Tx. 1969) (citations omitted). GC, and Owner too, undoubtedly placed confidence and trust in Attorney when they agreed to have him mediate their earlier dispute. Although there are no indications that Owner will have any unfair advantage in the arbitration if Attorney represents him, nevertheless that possibility exists. For Attorney to now represent Owner when GC disclosed information to Attorney during the earlier mediation which he might not have had he anticipated the present situation, will discourage clients to place confidence and trust in attorneys and will not enhance the dignity and reputation of the legal profession. The Committee does not believe that Attorney's second justification for representation of the Owner is well taken.