Advisory Opinion 1986-1

FACTS: The attorney requesting this opinion was employed by the City of Albuquerque as an Assistant City Attorney until June 12, 1984. On May 8, 1984, an employee of the Albuquerque Police Department made an informal complaint to Chief E.L. Hansen alleging sexual discrimination by her supervisor. The attorney requesting this opinion was asked to speak to the employee's supervisor to determine if there was any basis to the claim. He did so, concluding that the supervisor had acted in good faith. He had no further involvement with this complaint, and does not know what disposition was made of it.

Nine months after leaving the City Attorney's Office on June 12, 1984, he was approached by the individual complaining of the sexual harassment who requested representation by the attorney in a retaliation claim she was filing against the Albuquerque Police Department. This involves alleged retaliation for having complained of sexual discrimination, but does not involve the merits of the discrimination claim.

The attorney advised that he would only represent the individual if Chief Hansen would consent. Consent was apparently given in a meeting between the attorney and Chief Hansen on March 7, 1985. A letter of March 11, 1985, from the attorney to Chief Hansen records the substance of the agreement. The attorney subsequently filed an Entry of Appearance with the Equal Employment Opportunity Commission on behalf of the employee. Shortly thereafter, the employee was notified that her position with the Albuquerque Police Department would be terminated. She then filed a separate retaliation claim with the EEOC, which also asserts a sexual discrimination claim.

The attorney proceeded with representation of the client. This involved contacts with city personnel, including Chief Hansen, with respect to finding other employment for the client, and an offer of settlement of the pending actions for a cash settlement on which no action was taken. on September 11, 1985, the EEOC investigator held a fact finding conference at which an Assistant City Attorney indicated that the City would be asserting a conflict of interest. A letter to that effect was received by the attorney on October 3, 1985. It is the City's position that permission to represent the employee was given the attorney on a limited and informal basis. The request for this opinion followed. The requesting attorney requires a response by January 1, 1986.

ADVISORY OPINION REQUESTED:

1. Is the attorney requesting this opinion disqualified from representing the employee as a result of his former employment as a City Attorney?

2. Has the City waived its right to assert a conflict of interest?

CONCLUSION:

1. The two cases do not appear to meet the "substantially related" test. Consequently, the attorney is not disqualified subject to certain caveats.

2. The Committee declines to take a position on the second question.

DISCUSSION:

Question 1: The first question raises the issue of the extent of the attorney's involvement with this matter during his association with the City. *The Model Rules of Professional Conduct and Code of Judicial Conduct* address this issue in Rule 1.11 which applies the "substantially related" test to matters affecting attorneys in successive government and private employment. Under this test:

> "Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation." Rule 1.11(a).

Substantiality has been defined by the Tenth Circuit as existing "if the factual contexts of the two representations are similar or related." *Smith v. Whatcott,* 757 F.2d 1098 (10th Cir. 1985).

The facts presented for this opinion do not appear to create a case for conflict of interest under the "substantially related" test. The two causes of action in which the attorney has been asked to represent the employee are for retaliation for her original complaint of sexual discrimination. While the attorney investigated the merits of that claim, the merits of that complaint supposedly are not in issue in either of the two proceedings for which he has been retained. Instead, the retaliation claims will focus on the issue of whether punitive action was taken against the employee for having made a complaint, rather than an alleged incident of sexual discrimination. While it is true that the discrimination complaint gave rise to the retaliation claims, the two factual contexts themselves are neither "similar nor related." The issues before the court will presumably focus on personnel issues occurring subsequent to the complaint, specifically, on action taken by the Police Department toward an employee who has complained of ill treatment.

Moreover, the objective of Rule 1.11 would not be served by requiring the attorney to withdraw from this case. The commentary to the Rule explains that it is designed to prevent attorneys from "exploiting public office for the advantage of a private client." This has been construed to apply to the usage of "specific information (as distinct from general agency expertise or contacts) that a former government lawyer may have had access to in one matter (and that are) likely to be useful in a subsequent matter
Brown v. District of Columbia Board of Zoning Adjustment, No. 13670 (D.C. Ct. App. 12/21/84). The retaliation issues in this case purportedly occurred subsequent to the alleged incident of sexual harassment. The attorney became aware of the claim nine months after leaving the City's employ. He is unlikely to have had "specific information" that would prove useful in the retaliation actions.

The foregoing analysis is subject to certain caveats. it essentially accepts the representation that the retaliation charge is factually and legally independent of the previous discrimination charge. The Committee notes, however, that the second retaliation charge contains two indications that the retaliation charge and the discrimination charge may be "substantially related" so as to preclude the attorney's continued representation of the client.

First, in the space provided on the form for designating the basis of the claimed discrimination, the box marked "sex" is checked in addition to the box marked "retaliation." Second, the Discrimination Statement reads, at paragraph III, "I believe that I am being discriminatorily laid off *because of my sex, female,* and in retaliation ..." (emphasis added). The identification of the issue in this manner raises concerns among some committee members about the independence of the issues. It appears that evidence tending to establish a discriminatory course of conduct by the City might be an issue in the retaliation case as it is framed in this charge. In such a context, the overlap between the original discrimination charge and the current retaliation charges would make them substantially related.

A further concern is the substance of confidential information gained by the attorney while an Assistant City Attorney and its relevance to the present claims. The Committee has no information on the content of the communication between the client's prior supervisor and the attorney when the attorney was still employed by the City and investigating the discrimination charge. The Committee likewise has inadequate information on the access that the attorney may have had too specific confidential information which will benefit his client in the retaliation claims and work to the disadvantage of the City. It is certainly possible that the attorney, during his previous employment, gained knowledge of confidential information that would cause disadvantage to the City, especially if the scope of the retaliation case includes a course of conduct component. An attorney may not use confidential information to a client's disadvantage even after termination of an attorney-client relationship. ABA Informal Opinion 1322 (1975).

The Committee advises the attorney to give thought to the nature of the case he plans to file 'and to the relationship between any information he gained in the discrimination investigation and the substantive aspects of the retaliation claims. The attorney is reminded that if there are doubts about, or a reasonable appearance of, a substantial relationship between the claims or access to relevant and specific confidential information, the prudent course is to resolve those concerns in favor of disqualification.

Question 2: The second question presents two issues. First, did the City consent to the representation? If the answer is yes, may the City withdraw its consent?

The City apparently contends that any consent given was limited to an informal resolution. The requesting attorney maintains that there was no such limitation. This question requires a factual determination which the Committee believes is appropriately made by a court.

The Committee declines to answer the second issue and believes it too is appropriately made by a court. The Committee has found conflicting results. "[I]t is well settled that a former client who is entitled to object to an attorney representing an

opposing party on the ground of conflict of interest, but who knowingly refrains from asserting it properly, is deemed to have waived that right." *Trust Corp. of Montana v. Piper Aircraft Corp.,* 801 F.2d 85 (9th Cir. 1983).

An opposite result was reached in ABA Informal Opinion 1125 (1969). There a wife gave permission to an attorney to represent the husband in a divorce action although the attorney had represented her three years earlier which resulted in a reconciliation with the husband. The wife some time thereafter withdrew her consent. Although the opinion noted the inherent unfairness of the wife's reversal, the conclusion, nevertheless, was that the lawyer should withdraw from representation of the husband.