

# Advisory Opinion 1987-4

An attorney has requested an opinion regarding the attorney's obligations to a former client in a situation where the attorney has been informed that he may be called as a witness in a case in which the firm he is presently employed by represents the defendant and the attorney's former client is the plaintiff.

## Factual Situation

Attorney X practiced law for a few years at firm A. While at firm A, attorney X had a client by the name of Zastrow. Attorney X left firm A and joined firm B. A few years later, attorney Y began representing Zastrow, attorney X's former client, and filed a lawsuit against Clark, who is represented by firm B.

Attorney Y, knowing attorney X now works for firm B, contacted attorney X at his office in firm B. Attorney Y told attorney X that attorney X may have information from his former representation of Zastrow relevant to the lawsuit by Zastrow against Clark. Attorney X works in a separate part of firm B and had no knowledge of or involvement in the lawsuit by Zastrow against Clark.

Attorney Y and attorney Y's client, Zastrow, want attorney X to speak to them about the case without attorney X's employer, firm B, being notified that attorney X may be a witness in the case. Zastrow's file is with attorney X's former employer, firm A, and the file is not immediately accessible to attorney X.

## Questions Presented

1. Is attorney Y's recent communication to attorney X that "you may be a witness in the case" a privileged communication subject to Zastrow's attorney-client privilege?
2. Is it ethical for attorney X not to talk to attorney Y and Zastrow until firm B is notified that attorney X may be a witness in the lawsuit by Zastrow against Clark?
3. Is it ethical for attorney X not to tell his employer, firm B, that he may be an opposing witness in a case defended by firm B?
4. Would the answers above be any different if firm B were a government agency?

## Discussion

1. Is attorney Y's recent communication to attorney X that "you may be a witness in the case" a privileged communication subject to Zastrow's attorney-client privilege?

Rule 4-101 of the New Mexico Code of Responsibility provides in pertinent part:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to 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.

Since confidence is defined in terms of "the attorney-client privilege under applicable law" and secret refers to "other information gained in the professional relationship," the question of whether the statement to attorney X is a privileged communication is answered by reference to Rule 4-101 of the New Mexico Code of Professional Responsibility and Rule 503 of the New Mexico Rules of Evidence.

Rule 4-101 of the New Mexico Code of Professional Responsibility suggests that the privilege only applies to information gained in the professional relationship. Rule 503(B) of the New Mexico Rules of Evidence indicates that the privilege arises when communications are made for the purpose of facilitating the rendition of professional legal services to the client. Since attorney X is no longer the lawyer for Zastrow, it does not appear that the statement that attorney X may be a witness in the lawsuit is privileged since there is no longer a professional relationship involving attorney X, and attorney X

is not rendering professional legal services to Zastrow. See, generally, *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901 (1981).

2. Is it ethical for attorney X not to talk to attorney Y and Zastrow until firm B is notified that attorney X may be a witness in the lawsuit by Zastrow against Clark?

Although attorney X is still required to preserve any confidences or secrets which were disclosed to him during his representation of Zastrow as required by Rule 4-101 of the New Mexico Code of Professional Responsibility, there is nothing in the New Mexico Code of Professional Responsibility that requires attorney X to talk with attorney Y or Zastrow now that Zastrow is a former client of attorney X, and attorney X is merely a witness.

3. Is it ethical for attorney X not to tell his employer, firm B, that he may be an opposing witness in a case defended by firm B?

Assuming that attorney Y's communication to attorney X that "you may be a witness in this case" is not a privileged communication, there is nothing to preclude attorney X from telling firm B about the fact that he may be a witness in the case. In fact, it would probably be advisable for attorney X to tell firm B that he may be a witness in the case since firm B may have an ethical obligation to withdraw as counsel for Clark if there is a substantial relationship between the subject matter of firm B's representation of Clark and attorney X's prior representation of Zastrow. Basically, the substantial relationship standard, which arises from Rule 4-101 of the New Mexico Code of Professional Responsibility, requires disqualification "where an attorney represents a party in a matter in which the adverse party is that attorney's former client ... [and] the subject matter of the two representations are substantially related." *United Nuclear Corp. v. General Atomic Co.*, at 243.

Additionally, firm B will have to evaluate whether it is obligated to withdraw as attorney for Clark pursuant to Rule 5-102(B) of the New Mexico Code of Professional Responsibility, which states:

If, after undertaking employment, in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

Since Rule 1-102 of the New Mexico Code of Professional Responsibility says that a lawyer shall not violate a disciplinary rule, if attorney X believes that his firm, firm B, may violate Rule 4-101 or Rule 5-102(B) by continuing to represent Clark, it is incumbent upon him to tell his employer about the potential problem, without revealing any confidences or secrets of the prior representation.

Without additional facts, of course, this committee is not in a position to evaluate the precise applicability of the above rules, nor to consider whether any extenuating circumstances may bear on the application of the rules.

4. Would the answers above be any different if firm B were a government agency?

Because the Advisory Opinions Committee has concluded that the communication in issue was not a privileged communication and Attorney X should probably talk to his employer, the above answers would not be any different if firm B were a government agency.