

Advisory Opinion 1988-5

Twelve years ago, the attorney drafted an antenuptial agreement on behalf of husband. The attorney has now been contacted by wife to represent her in a divorce action. Property mentioned in the agreement is still in existence. The attorney states that wife will not contest the antenuptial agreement and wishes to know if he may now represent wife.

The answer is no unless husband consents after consultation and even then the lawyer should be extremely careful not to use any confidential information gained during the drafting of the agreement. SCRA 1986, 16-109 states:

A lawyer who had 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 16-106 would permit with respect to a client or when the information has become generally known.

We believe that the matter of the divorce and its necessary involvement with division of the parties' property is substantially related to the drafting of the prior agreement. The agreement mentions two items of property the lawyer informs us are still in existence. These two items appear to be husband's business and the real estate on which it sits. Although the agreement states specific amounts representing husband's payments to date on these items of separate property, we cannot be sure that there will never be an issue in the case concerning the separate character of the property or the amount of separate property represented. Therefore, unless husband consents, we do not believe that the lawyer should undertake to represent wife. We believe this is particularly true if the lawyer has confidential information relating to the amounts set forth in the agreement.