

ETHICS OPINION

RO-95-07

[REDACTED]

QUESTION BY [REDACTED]:

"I wish to thank you for your response on Tuesday when I called you concerning a conflict of interest question. Judge [REDACTED], at my request when defense counsel did not withdraw, has asked that I write you to see if I could get a formal opinion on this issue so as to guide our next steps. In case you don't remember, I am involved in the case because I am still working part time in the District Attorney's Office trying felony cases as I am needed and was assigned to try this case this week.

The issue is whether an attorney may ethically represent a defendant in a murder case who is charged with killing the brother of a former criminal client of the attorney when that former client was the only eye-witness to the incident giving rise to the murder charge and will be the key witness for the State and the Defense.

The facts, as I understand them are that some years ago [between 1991 & 1993], prior to the incident that gave rise to this charge, Attorney John [REDACTED] represented [REDACTED], in a DUI case in municipal court in [REDACTED]. There is a dispute whether he represented him in anything else, but for the sake of this argument I will assume that he did not. At the preliminary hearing docket of September 15, 1994, [REDACTED] told Chief Assistant [REDACTED] that the victim and his brother were part of a pitiful situation and he knew them from having represented [REDACTED] in the past. He seemed at that time to be familiar with their situation. He told [REDACTED] that he might have a conflict and may need to withdraw from the case, but he did not do it at that time. When I began my preparation for the trial of the case, I came across the memo and when I called [REDACTED] to come to my office to be interviewed I asked him whether [REDACTED] had represented him in the past. He said that he had. I told him that anything he told [REDACTED] in the course of that representation was privileged and not to tell me any details of that communication unless he wanted to waive the privilege. He told me he did not want to waive the privilege and only told me that there were things that he told [REDACTED] in the course of his representation that he did not want to become known outside of the attorney-client privilege.

I do not know what, if any, information [REDACTED] gave [REDACTED] in the course of his representation which may amount to impeachable material and have been careful not to breach the privilege to find out. It is my opinion that an actual conflict exists and that [REDACTED] will have to be removed from the case if he does not withdraw voluntarily. [REDACTED] position is that he did not learn anything in the course of his representation that would be suitable for impeachment and that he would absolutely keep any confidences he had with [REDACTED] private. He further says that he has associated another lawyer, a [REDACTED] from [REDACTED], AL to be co-counsel in the case and that he has kept any information he knows about [REDACTED] confidential as regards [REDACTED]. Although the Motion to Remove was filed yesterday, [REDACTED] has been in the case for two months.

I have not enclosed the Motion to Remove, the supporting affidavit or brief which was filed in this case, but I can forward it to you if you like. The preliminary hearing information I spoke of is also documented in a file memo that I have not sent, but will if you want me to do so. The thing we need now is an opinion from you discussing the ethical ramifications of this situation. The Judge, as I understand it, would like the following questions answered:

1. Whether [REDACTED] continued representation of the Defendant constitutes an actual conflict of interest considering his former representation of [REDACTED], the key prosecution witness?
2. Can [REDACTED] be compelled to make known to the court what part of the communications with [REDACTED] he considers privileged and why?
3. If this is an actual conflict of interest, is there any way [REDACTED] can remain in the case representing the Defendant?
4. Whether [REDACTED], under the facts of this case, can undertake the representation of the Defendant on his own, with or without [REDACTED] assistance or whether his involvement in the case so far has resulted in his being tainted by any ethical duties [REDACTED] owes to [REDACTED]?

I appreciate your attention in this matter. At this time, I believe Judge [REDACTED] is going to reset the case for September, so the sooner we have your answer the matter."

ADDITIONAL FACTS PROVIDED BY [REDACTED]

"I represented [REDACTED] on a charge of driving under the influence of alcohol in [REDACTED] Municipal Court. This was before the murder charge was made against [REDACTED], my current client. I never met face to face with [REDACTED], all of our discussions were over the telephone. At that point in time he resided in [REDACTED], Florida.

Zealously guarding the confidentiality of his statements to me I shall state only in general terms the subject of our communications. I discussed the details of the driving under the influence offense and he communicated to me his criminal history.

I was compelled to withdraw as counsel for [REDACTED] when the case was called for trial and he failed to appear. I also listed another reason to the court. That reason was my refusal to move for a continuance upon representations from my client I knew to be false (the case was continued two times previously).

I have never represented or advised [REDACTED] in any matter other than described above. About six months ago he had another driving under the influence case and called up my office to represent him. I told him I would not take his case and the discussion lasted less than a minute yielding no details of anything except the fact he was charged with DUI.

During the chambers hearing [REDACTED] told Judge [REDACTED] that because I was familiar with [REDACTED] criminal history I would be in a position to impeach him if he denied under oath parts of that history. I was astounded at his statement. If a district attorney places a witness on the stand and has in his file an NCIC sheet showing that history and such witness lies about his criminal history I hope that that district attorney would inform the court that the witness was swearing falsely. I hope no district attorney in this state would allow what he personally knew to be perjury to go to a court and jury as fact.

At the hearing in chambers I stated on the record that my previous representation of [REDACTED] yielded knowledge of only two things (1) the details of the DUI (2) his criminal history. The district attorney has not alleged I possess any other knowledge."

ADDITIONAL FACTS PROVIDED BY [REDACTED]

"I am [REDACTED] and I have entered an appearance on behalf of [REDACTED], in the above referenced case. [REDACTED], a deputy dis-

trict attorney for ██████ County Alabama, has requested a formal opinion about ██████ continued representation of ██████. I would like to address additional facts regarding this matter and correct some of the statements of facts that ██████ has made in his correspondence dated June 28, 1995.

I represented ██████, in a hearing before Judge ██████, concerning ██████ continued representation of him. ██████ gave a statement in open court and on the record: he had in fact represented ██████ in the past on a D.U.I. charge and had received no confidential information of an impeaching nature from him. He had informed ██████, he had represented ██████ in the past. ██████ confirmed ██████ statement. ██████ made it clear he wants ██████ to represent him in this case.

Approximately two months prior to this hearing, ██████ contacted me pertaining to this case. We discussed the possibility of trying this case together. During the course of our discussions, over the next two-months, it was evident I was not going to be able to try the case. I had a capital murder case pending in ██████ County, which was scheduled on the same date. ██████ did not to enter [sic] my name in the case.

It became apparent Monday, I would be available to aid in the defense of ██████, after the capital murder case in ██████ County was settled. I contacted Hon. ██████. He informed me he had received a motion from the District Attorney's Office, ██████, specifically, asking that he be removed the Lawyer [sic] for ██████. On learning this, I informed ██████ I would be glad to serve as co-counsel for ██████ and proceeded to ██████.

On my arrival, I discussed my Pro Bono representation with ██████. He requested I represent him with the objective of keeping ██████ as his lawyer. Additionally, if ██████ could not for some reason represent him, he requested that I would represent him in the murder case.

My Notice of Appearance was entered to the Court on the afternoon of Tuesday, the 27th of June 1995. A hearing was set on the motion to disqualify ██████. The Court insisted on an in chambers hearing. Present was myself, ██████, ██████, ██████, Judge ██████ and a Court Reporter. I made requested [sic] the State to make a proffer, of the confidential information which might disclosed by ██████ [sic], because of his representation of ██████. They were unable to do so. I asked to conduct an examination of ██████ for the Court to determine whether or not there was in fact anything that would be discoverable or could be construed to be confidential, which ██████ might use to impeach the witness. The Court denied this motion. Further, the Court was informed I would examine ██████. ██████ would not participate in the examination of ██████.

I have never represented ██████, nor had ██████ divulged any information which could be remotely thought to be confidential concerning ██████.

██████████ makes the assertion, ██████████ by knowing something or possibly knowing something, or speculatively knowing something, there would be a taint to ██████████ which would somehow flow to me. That is absolutely ludicrous. Once I agreed to do the examination of ██████████, any claim that could arise from ineffective assistance of counsel based upon ██████████ representation of ██████████ in the past became moot. I have never represented ██████████, I am not a legal partner with ██████████. It would be no for any other lawyer representing ██████████ to examine ██████████. The allegations of ██████████ are absolutely spurious."

ANSWER QUESTION ONE:

Yes, ██████████ has a conflict of interest that disqualifies him.

ANSWER QUESTION TWO:

No, ██████████ cannot be compelled to reveal past attorney-client communications in an effort to determine whether ██████████ has a present

conflict.

ANSWER QUESTION THREE:

No, if there is a conflict of interest, then [REDACTED] is disqualified from the case. He could not participate short of cross-examining his former client.

ANSWER QUESTION FOUR:

[REDACTED] can continue on the case unless confidential information about [REDACTED] has, in fact, been communicated to him by [REDACTED]. He says that nothing has been communicated.

DISCUSSION:

There is a presumption that during the course of his prior representation of the victim's brother that [REDACTED] obtained confidential information. "Confidential information" as it is used in the context of the Rules of Professional Conduct is broader in scope than information subject to the attorney-client evidentiary privilege. It extends to all information about a client acquired by the lawyer during the course of the representation. Rule 1.9(b) precludes the adverse disclosure of a former client's confidential information. Therefore, [REDACTED] cannot disclose any information about [REDACTED] if he learned of it from [REDACTED] or during the prior representation.

[REDACTED] states all he knows about [REDACTED] is his criminal history (at the time of the DUI), and facts about that offense. If it is likely that there would be a disclosure of this information, that is enough. The rule is not violated only when a lawyer actually uses confidential information to a former client's disadvantage. Whenever there is a real risk of disclosure, there should be a disqualification. In the setting of a trial, an adverse disclosure can be inadvertent as well as intentional.

There is no question that being impeached or having your credibility attacked is a disadvantageous use of information, as far as [REDACTED] is concerned. [REDACTED] has a duty to provide his present client with an effective criminal defense. However, he may be limited in his ability to cross-examine an eyewitness. Therein lies a true conflict, and [REDACTED] must withdraw as defense counsel.

[REDACTED] should not be compelled to make any disclosure regarding communications with his lawyer in the prior case. Legally, he cannot be

compelled, but he is in a difficult situation. Professor ██████ points this out.

"As discussed earlier, if a client was required to offer evidence on the contents of confidential communications in order to have the client's former lawyer disqualified, the confidentiality of the information would be lost in the very process of attempting to protect it. That point has been appreciated both by courts, in the development of the common law rules that disqualify lawyers because of a former client conflict, and by the framers of the 1983 Model Rules." Wolfram, Modern Legal Ethics, Section 7.4.3, p. 369 (1986).

There is no limited way that ██████ can remain in the case if he is subject to disqualification. His remainder in the case, in any fashion, would only continue the risk that there would be an unauthorized disclosure of his former client's confidences.

██████ is co-counsel with ██████. If he were a member of ██████ law firm, he too, would be disqualified because there is a presumption of shared confidences among firm members. That presumption does not exist with respect to co-counsel arrangements between lawyers from separate firms. In order for ██████ to be disqualified, there must be proof that he has acquired actual knowledge of confidential information from ██████. ██████ can remain in the case subject to that. He states that nothing has been related to him. In view of anything to rebut that, he can continue to represent the murder defendant.

MLM/vf

8/15/95