

Utah Ethics Opinions

1976.

29. USB EAOB Opinion No. 29

Utah State Bar

Ethics Advisory Opinion No. 29

Approved October 24, 1976

Summary: An attorney may not represent a client in a suit against a former client when the suit involves the same subject matter.

Facts: You have inquired concerning the propriety of an attorney acting on behalf of City A in litigation involving water rights, when the same attorney previously represented Water Company B. City A seeks to condemn water rights owned by Water Company B. The water rights of Water Company B were adjudicated in 1934 in a suit with City A and the state engineer.

Subsequently, City A filed an application to change the point of diversion, and in litigation of this issue, Attorney Y represented City A and Water Company B. This litigation, which was financed by City A, was finally settled by a stipulation. He was paid by City A and represented Water Company B by agreement of City A and authorization of the Board of Directors of Water Company B. This litigation was concluded in November, 1975.

In the litigation, Attorney Y had full access to all records of Water Company B and full cooperation of Water Company B officials in asserting the ownership rights of Water Company B in the water which City A was using by contract and the diversion point of which City A was seeking to change. City A has now begun a suit to condemn the water rights of Water Company B, and Attorney Y is acting as counsel on behalf of City A. Attorney Y is also a minor shareholder in Water Company B.

At a meeting of Water Company B, he informed other shareholders that the condemnation proceeding would be expensive to them and also informed the shareholders that in the condemnation proceedings it may develop that Water Company B does not own the amount of water which was decreed to it in the suit with City A and the state engineer in 1934.

Opinion: It appears to us that in the representation of City A and Water Company B in the 1975 suit, Attorney Y was representing Water Company B in more than a nominal capacity; and that he had full access to all of the records of

the company, and its full cooperation in asserting the rights of that company from which the rights of City were derived.

He is therefore bound under Canon 4 to preserve the confidences of his client, Water Company B. It would appear that the interdiction of DR 4101(A) and (B) Attorney Y cannot ethically proceed against Water Company B in the present matters on behalf of City A.

This position is consistent with the holding in American Bar Association Informal Opinion 493 in which it said:

"Canon 6 is also designed to make it unethical to divulge confidences in situations where there may be a conflict of interest between clients. This has been interpreted to prevent a lawyer from representing a client when there has been a prior disclosure of confidences to him and other members of his firm by a person who has an adverse interest to the proposed client in the litigation which the client proposes to undertake."

It is true also, that it is not just what the lawyer may have learned in his prior lawyer-client relationship, but the appearance of impropriety which arises from the prior relationship in terms of what the Bar and the public may think was learned which prevents him from establishing a new lawyer-client relationship in conflict therewith.

DR 9-101.

A substantial number of opinions of the American Bar Association Ethics Committee have dealt with various aspects of the problem of presentation of new clients against former clients. The holding of these cases has uniformly been that while an attorney may undertake a suit against a former client, he cannot involve himself in matters against the former client which involves the same subject matter. In this case, water rights is the common subject matter.

We conclude that Attorney Y cannot ethically represent City A in a suit involving the water rights of Water Company B.

Rule Cited:

Canon 4