

State Bar of South Dakota

Ethics Opinion 95-15

September 22, 1995

- *Rules: 3.7*
- *Subject: Office sharing; Client Confidentiality; Sexual harassment claim; Attorney as witness*
- *Summary: Attorney A who shares office space with Attorney B may not represent B in a case where an employee sues B. If A reviews the pleadings for B, A cannot reveal any information learned during the preparation of those documents without a waiver of the attorney-client privilege. A cannot represent either B or employee if A has confidential information and may be called as a witness.*

FACTS

Attorneys A and B share office space. Attorney A has a secretary whose salary is paid entirely by him and she is considered an employee of Attorney A. The secretary worked for Attorney A for a year, at which time the employment relationship broke down, and the secretary was terminated on the same day as she submitted her resignation.

Directly after this time, the ex-secretary filed a sexual harassment claim with the South Dakota Department of Commerce and Regulation, Division of Human Rights, against Attorney A. In response, Attorney A filed an answer to the claim. Attorney B looked over, and edited Attorney A's answer, but at no time was retained as counsel for Attorney A. It was, and is currently understood, that Attorney A is acting as his own counsel.

Subsequently, the Division of Human Rights has initiated an investigation into the ex-secretary's claims. During the course of the investigation, an interview has been requested of Attorney B, who was a witness to the claims made. Attorney B has concerns about the propriety of his answering any questions in light of the confidential nature of the attorney-client relationship, if any, that may exist between Attorney A and Attorney B.

OPINION

The answer to your question turns on whether or not an attorney-client relationship has been formed between Attorney A and Attorney B. This Committee has previously defined "client" and "confidential communication" in Ethics Opinion 93-15 adopting the definitions contained in SDCL 19-13-2. In light of the above, it is the opinion of this Committee that the only confidential communication that could have been in the attorney-client context in this matter was when Attorney A asked Attorney B for assistance in reviewing the answer to the charge. Any information which Attorney B learned while assisting Attorney A in preparing his answer is protected by the attorney-client relationship and fits within the definition of a confidential communication. This information should not be revealed to the Division of Human Rights without Attorney A first waiving the attorney-client privilege.

You have also asked this Committee relative to the applicability of Rule 3.7. The only application of Rule 3.7 under these facts is that Attorney B cannot represent Attorney A nor the former secretary if, in fact, Attorney s has information and may be called as a potential witness.

Michael S. McKnight
Chair, Ethics Committee
State Bar of South Dakota