

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1986-2

The Committee has been asked by a member of the Delaware Bar (the "Inquiring Attorney") who represents a criminal defendant whether the Rules of Professional Conduct will allow him to accept the assistance of the public defender's office in researching and briefing an appeal even though the Public Defender's office was previously required to withdraw from the representation of the defendant in connection with an earlier and unrelated phase of the case.

FACTS

The Inquiring Attorney was retained to represent a criminal defendant in connection with a motion under Superior Court Criminal Rule 35(a) for post-conviction relief based, among other things, on the ineffectiveness of the Public Defender's representation of the defendant during trial and appeal.

The defendant was convicted of two counts of first degree murder and sentenced to death. He was represented at trial by an attorney employed by the Public Defender's office. The Public Defender appealed to the Delaware Supreme Court which affirmed both the conviction and the death sentence. Certiorari was denied by the United States Supreme Court.

Having exhausted the defendant's appellate remedies, the Public Defender applied to the Superior Court under Criminal Rule 35(a) for post-conviction relief alleging, among other things, her own ineffectiveness as defense counsel. Faced with the obviously awkward task of arguing her own ineffectiveness, the Public Defender withdrew. The Inquiring Attorney was appointed to prosecute the Rule 35(a) motion.

Subsequently, the defendant determined that he wished to withdraw the motion for post-conviction relief, and the Inquiring Attorney so informed the Court. On September 10, 1986, after considering evaluations of the defendant by psychologists appointed by the State and the defense, and after conducting its own interrogation of the defendant, the Superior Court entered an opinion and order holding, first, that the defendant was psychologically competent to withdraw his motion for post-conviction relief and, second, that the defendant's pro se application to do so would be granted.

The Inquiring Attorney promptly filed an appeal to the Delaware Supreme Court. He has been offered the assistance of the Public Defender's office in connection with the research and preparation of the brief on appeal. However, in view of that office's prior disqualification, he is concerned that he may not ethically accept its assistance.

DISCUSSION

The September 10, 1986 decision of the trial judge recites that the Public Defender withdrew from the representation of the defendant because she would have to testify regarding disputed facts, including her effectiveness as defense counsel. Accordingly, it would appear that the withdrawal was pursuant to Rule 3.7 of the Delaware Lawyers' Rules of Professional Conduct.

Rule 3.7 provides that a lawyer shall not act as an attorney at a trial in which the lawyer is likely to become a necessary witness except under certain circumstances not applicable to the Public Defender. However, the disqualification imposed by Rule 3.7 is not one which necessarily extends to disqualify vicariously all other lawyers in the witness/lawyer's firm, nor is it a disqualification which prevents the witness/lawyer from participating in other aspects of the matter. Thus, the fact that the Public Defender was disqualified in connection with the prosecution of the Rule 35 motion does not necessarily mean that the Public Defender's office may not participate in the appeal on the question of the defendant's competency to withdraw the motion.

The issues in connection with the defendant's competency are different from the substantive issues raised by the Rule 35 motion itself. Because the issues are different, and because the Public Defender will not be called on to testify in connection with the appeal, it is the opinion of a majority of the Committee

that there is no barrier to the participation of the Public Defender's office. This conclusion is especially true so long as the particular public defender who withdrew from the prosecution of the Rule 35 motion does not participate and so long as the Inquiring Attorney retains ultimate responsibility for making decisions as to the legal arguments and other strategic matters in connection with the appeal.

Certain members of the Committee who are employed by the Department of Justice have recused themselves and have not participated in any fashion in the rendition of this opinion.

DISSENTING OPINION

P. Clarkson Collins, Jr., a member of the Committee dissents because, in his view, the Rules of Professional Conduct prohibit the Public Defender's office from assisting the Inquiring Attorney on appeal.

The public defender who represented the defendant at trial was required to withdraw when the defendant filed a post-conviction relief motion alleging he was denied the effective assistance of counsel at trial and on the appeal of his conviction. Withdrawal was obviously appropriate and required under the conflict of interest proscriptions of Rule 1.7 of the Delaware Lawyers' Rules of Professional Conduct. This rule is intended to secure the lawyer's undivided loyalty to the

interests of his client. In pertinent part Rule 1.7(b) provides:

"(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's ... own interests ..."

The disability of trial counsel under Rule 1.7 extends to the other lawyers in the "firm" -- the office of the Public Defender. Rule 1.10(a).¹ The Inquiring Attorney was thus appointed to replace the public defendner and to advocate that the defendant's conviction should be set aside because trial counsel failed to provide minimally effective representation.

The proposed employment of the public defender's office by the Inquiring Attorney to assist him on appeal is improper because it would reintroduce the conflict of interest. On appeal the Inquiring Attorney contends that the lower court erred in allowing the defendant to withdraw his Rule 35 motion. The obvious strategy behind the Inquiring Attorney's appeal is to resurrect and pursue the defendant's ineffective assistance of counsel charges contained in the defendant's Rule 35 motion. If the Public Defender's office was precluded by its conflicting

¹The Comment to Rule 1.10 makes clear that the term "firm" includes lawyers in a legal service organization. The rule thus would appear to apply to the Public Defender's office and impute the disqualification of trial counsel to the other attorneys in the office. This interpretation is consistent with the practice of treating that office as a "firm" in applying Rules 1.7 and 1.9 and generally prohibiting the office from engaging in the multiple representation of codefendants in criminal matters.

self-interest from prosecuting ineffective counsel charges against one of its own members, it follows that it should be prohibited also from assisting the Inquiring Attorney in his efforts to resurrect that motion after it has been dismissed.

In short, the same conflicting self interest which required the defendant's public defender to withdraw would be present if the public defender's office advocated restoration of the defendant's Rule 35 motion on appeal. Accordingly, the Office of Public Defender should not represent the defendant by assisting the Inquiring Attorney in connection with his appeal.