DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS
OPINION 1991-1

January 8, 1991

THIS OPINION IS MERELY ADVISORY AND IS NOT BINDING ON THE INQUIRING ATTORNEY, OR THE COURTS OR ANY OTHER TRIBUNAL.

The Committee has been asked by a Delaware law firm ("Firm") for an Opinion as to whether the Firm may accept a malpractice case from a prospective client. The prospective client wishes to sue her former attorney ("defendant") for legal malpractice. One associate of the Firm ("associate attorney") is presently under contract with the City of Wilmington ("City") to pursue several criminal prosecutions and civil actions against the defendant. The Firm also seeks an opinion as to whether the attorney can represent the City in future criminal and/or civil actions against the defendant.

FACTS

The associate attorney was formerly employed by the City Solicitor's Office. While he presently works full time for the Firm, he is under contract to represent the City in several pending criminal prosecutions and civil actions against the def endant. One of the criminal actions presently involves the assessment of fines against the defendant. The contract also provides that the City may ask the attorney to represent it in additional criminal or civil actions against the defendant. The attorney anticipates these future actions may involve seeking fines or damages from the defendant.

A prospective client has approached another member of the Firm ("partner") about pursuing a legal malpractice action against the defendant. The prospective client alleges the defendant missed the statute of limitations with respect to collecting a debt.

The Firm is concerned that there may be a conflict of interest, or an appearance of a conflict that would bar it from accepting the prospective client's case, even though the partner, and not the associate attorney, would be handling her case. The Firm is further concerned that if it can, and does, accept the case, similar ethical considerations would bar the associate attorney from accepting further contract work from the City. The Firm asks the Committee to assume that under any conceivable circumstances, the attorney's special investigatory powers as a prosecutor could not be used to gain information helpful to the Firm's representation of the prospective client.

CONCLUSION

The Firm but not the associate can represent the prospective client, provided that the prospective client and the city give informed consent in light of a possible conflict of interest. The attorney must maintain a "cone of silence" concerning his representation of the City, and the Firm must screen him from obtaining information about the malpractice case. The attorney can accept future cases from the City in accordance with the guidelines set forth herein.

DISCUSSION

The question of whether the Firm can represent the prospective client divides into the two following related inquiries: (1) Can the associate attorney represent the prospective client? and (2) If not, are the other members of the Firm also disqualified?

In addressing the first question, several Rules of Professional Conduct must be considered. Rule 1.7 (b) of the Delaware Lawyers' Rules of Professional Conduct states in pertinent part:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
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> (1) the lawyer reasonably, believes the representation will not be adversely affected; and
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> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.7 (b) (1) and (b) (2). In this case, the Firm's private client, if successful in the malpractice action, will be seeking to execute on the judgment. The Firm is unsure whether the defendant has malpractice insurance. If not, the private client will be seeking to satisfy the judgment from the same assets of the defendant that the City may be using to enforce the criminal fines.

This can limit associate attorney's ability to represent the prospective client in two ways. First, the defendant's attachable assets may be limited, and not sufficient to satisfy the fines owed to the City, and the malpractice judgment of the private client. A conflict between satisfying these two liabilities then results. Second, some assets may be more difficult to reach than others, forcing the prospective client to wait substantially longer for satisfaction of the judgment. Whether either of these two theoretical conflicts will materialize itself depends, of course, on the monies involved in each criminal and civil action. Presently, the City is seeking $7,500 in fines, and the prospective client is claiming damages of $35,000. The extent of the

defendant's reachable assets is unknown. The Committee concludes that if the associate attorney is unable to first ascertain that the defendant has malpractice insurance, his responsibilities as a lawyer for the City may materially limit his representation of the prospective client, and the attorney must comply with subsection (b)(1) and (b)(2) of Rule 1.7.

Assuming the associate attorney can comply with Rule 1. 7, the Committee next considers Rule 3.8. That Rule imposes additional ethical responsibilities on lawyers acting as prosecutors. While nothing in this rule is directly relevant here, the comment to that rule refers to the ABA Standards of Criminal Justice Relating to Prosection Function (2d. ed. 1986) (hereinafter "ABA Standards") for additional guidance on restrictions on a prosecutor's conduct. Our Supreme Court has specifically adopted these standards. Brokenbroug v. State, Del. Supr., 522 A.2d 851, 858 (1987). A review of the ABA Standards is required, therefore, to determine whether the associate attorney could represent the prospective client.

ABA Standard 3-1.2 states that "[a] prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties." This standard is based upon the policy of avoiding any implication of partiality that might cast a shadow over the integrity of the office of the prosecutor, in this case the City Solicitor's Office. ABA Standard 3-1.2 commentary. The public interest in avoiding the problem of conflicts where the government employs part-time prosecutors is reiterated in the commentary to ABA Standard 3-2.3 See also Nemours Found. v. Gilbane, D. Del., 632 F. Supp. 418, 426 (1986) (discussing importance of maintaining public confidence in the integrity of the legal system).

The Committee believes there are several circumstances here that create the appearance of a conflict of interest. First, as discussed previously, the associate attorney may be

representing two clients seeking to execute on the same assets. One of his clients is the City, and therefore the recovery of public funds is at stake.

Second, there is the appearance that the associate attorney can attempt to gain a civil advantage through a threat of refusing to negotiate on the present criminal prosecutions, or through a threat of future prosecutions. This latter example exemplifies a broader concern that the attorney could exploit the public office he serves for the advantage of his private client. This concern is reflected throughout Rule 1.11 and the comment thereto ("Successive Government and Private Employment"), and is discussed at greater length below, in connection with the issue of the Firm's imputed disqualification.

The Committee concludes that the aggregate appearance of a conflict of interest present here undermines the integrity of the office of the City Solicitor and of the legal system as a whole to an extent that requires the associate attorney to disqualify himself under ABA Standard 3-1-2. Ethics Committees of other states have used similar reasoning to disqualify a part-time prosecutor from accepting a private, civil case with a connection to his criminal prosecutions. E.g., AL Op. 81-550, ABA/BNA Lawyers' Manual on Professional Conduct 801:1025 (1980-85) (hereinafter "Manual") ; VA Op. 696, Manual at 801:8843; KY Op. E-275, Manual at 801:3908.

The Committee next considers whether the other members of the Firm, including the partner, are disqualified from representing the prospective client. Of relevance here, the associate attorney's disqualification is imputed to other members of the Firm when his disqualification is based on Rule 1.7. Rule 1.10(a). It is true that the Committee's reasoning in concluding that the attorney is disqualified is based in part on an appearance of a conflict deriving

from Rule 1.7(b). It does not follow, however, that the Firm should be disqualified. The modern trend is not to disqualify an entire firm solely because of an appearance of a conflict. Nemours, 632 F. Supp. at 424-428. Rule 1.10 itself allows the City to waive the disqualification. Rule 1.10(d). Moreover, the policies underlying Rule 1.7(b) can be promoted through less restrictive means than disqualifying the entire Firm. The Committee concludes that Rule 1.10(a) was not intended to absolutely disqualify the Firm in the present circumstances.

While the Delaware Lawyers' Rules of Professional Conduct do not disqualify the other members of the Firm from representing the prospective client, the Rules do restrict the involvement of the members with the associate attorney's representation of the City, and the associate attorney's involvement with the Firm's representation of the malpractice client. Rule 1.11 provides in relevant part:

> SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT
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> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
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> > (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
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> > (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
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> (b) Except as law may otherwise expressly permit, a lawyer having information that the a lawyer knows is confidential government information about a person acquired when the lawyer

> was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

Rules 1.11 comment. This concern is even more substantial when a lawyer simultaneously serves a public office and a private client. Therefore, the associate attorney should be screened from any participation in the representation of the malpractice client. The details of appropriate screening mechanisms are discussed at length in Nemours, 632 F. Supp. at 426-429. As the attorney is an associate, fee apportionment is not a consideration.[1] Id. at 429 n.14.

The appearance of a conflict is a two-way street. The possibility that the associate attorney could disclose to Firm members confidential information adverse to the defendant acquired as a City attorney will exist as long as the associate attorney remains employed by the Firm. Provided the prospective client and the City consent after consultation, the associate attorney should therefore maintain a "cone of silence" concerning all matters relating to his representation of the City against the defendant. Id. at 428-29. The Committee is confident that strict implementation of these restrictions will respect a litigant's right to retain counsel of her choice, will maintain public confidence in and the integrity of the legal system, but will not excessively hinder attorney mobility. See Id. at 425, 427 (citing the comment to Rule 1.10).

[1] To the extent that the associate may later become a partner with the Firm, the question may have to be revisited.

The Firm also asked the Committee whether the associate attorney can accept new criminal and/or civil cases from the City against the defendant. As long as the Firm adheres to the guidelines discussed in this opinion, the Committee sees no additional ethical problems arising from this anticipated situation.

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