

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS
OPINION 1991-2

June 6, 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 whether an attorney in the criminal division of the City Law Department may prosecute an individual who is a member of City Council for alleged violations of city and state criminal ordinances. The City Law Department is obligated by law to represent and advise the council member in his capacity as such, and attorneys in the civil division of the City Law Department are presently defending the council member in one or more actions under §1983 of the Civil Rights Act of 1871 in which the council member, along with other council members, is being sued in both individual and official capacities.

FACTS

On May 3, 1991, an individual who is also a member of City Council was arrested by two officers of the City Police Department and charged with blocking the flow of traffic, offensive touching, resisting arrest and resisting or hindering a police officer.

Under the Home Rule Charter of the City, the City Law Department is given the responsibility to represent and advise all city officers and departments, and also to prosecute cases in the Municipal Court of the City. With respect to legal advice and legal representation, the Charter provides in pertinent part:

Sec. 4-300. Functions.

The law department shall have the power and its duty shall be to perform the following functions:

(a) Legal advice. It shall furnish legal advice to the mayor, to the council and to all officers, departments, boards and commissioners concerning any matter or thing arising in connection with the exercise of their official powers or performance of their official duties and except as otherwise expressly provided, shall supervise, direct and control all the law work of the city.

(b) Litigation. The department . . . shall represent the city and every officer, department, board of commission in all litigation

. . .

(e) Drafting and codification of ordinances and codification of Charter. Upon request of the council or any councilman, or of the mayor, the department shall prepare or assist in preparing any ordinance for introduction into council

§4-300. The Law Department's control over, and responsibility for, the law work of the City is further elaborated in §8-410 of the Charter which provides in pertinent part:

Sec. 8-410. Legal advice and services.

(1) Whenever any officer, department, board or commission shall require legal advice concerning his or its official business or whenever any legal question or dispute arises or litigation is commenced or to be commenced in which any officer, department, board or commission is officially concerned it shall be the duty of such officer, department, board or commission to refer the same to the law department.

(2) It shall be the duty of any officer, department, board or commission having requested

and received legal advice from the law department regarding his or its official duty, to follow the same;

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(4) It shall be unlawful for any officer, department, board or commission, except for the treasurer with the approval of council, to engage any attorney to represent him or it in any matter or thing relating to his or its public business without the approval in writing of the city solicitor.

At the same time, the Charter charges the City Law Department with the responsibility for prosecuting in Municipal Court, but the Charter also provides for appearances by the Office of the State Attorney General. Section 4-300(d) of the Charter states that the Law Department "shall investigate any violation or alleged violation within the city of statutes of the State of Delaware or the ordinances of the city which may come to its notice . . . and shall prosecute such violation in the Municipal Court.... 11 _4-300(d). The Charter goes on to provide that "the city solicitor and his assistants shall be the prosecuting officers in and for the Municipal Court . . . The attorney general of the state may, however, prosecute in person, or by his deputy." §4-302(a).

The pending charges against the council member do not arise out of the exercise of the council member's official duties, and, accordingly, the City Law Department has no obligation to defend him in that connection. However, pursuant to the above-referenced provisions of the City Charter, an Assistant City Solicitor in the civil division of the City Law Department is

We have been advised that the City Solicitor has requested that the Attorney General prosecute the council member, but that the Attorney General has declined to agree to

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currently defending the council member in one or more actions involving claims under §1983 of the Civil Rights Act of 1964 in which the council member, along with other council members, is named in both individual and official capacities. If the City Law Department were to prosecute the council member, one of the two Assistant City Solicitors in the criminal division who act as full-time prosecutors in Municipal Court would be the prosecuting attorney. The civil and criminal divisions of the City Law Department are staffed with separate attorneys and operate out of separate buildings. Nonetheless, the civil and criminal divisions both are ultimately under the supervision of the City Solicitor.

CONCLUSION

The ethical issue posed by the facts presented could be avoided entirely if the Attorney General would undertake prosecution of the matter as has been requested by the City Solicitor and as he is empowered to do by the City Charter. In the event he declines to do so, however, it is the Committee's view that the Delaware Lawyers' Rules of Professional Conduct do not prohibit attorneys in the criminal division of the City Law Department from prosecuting an individual who is a member of City Council for violations of city and state criminal codes that do not arise out of actions taken in his official capacity. Such a result is appropriate even though attorneys in the civil division of the City Law Department are presently defending the council member in both his individual and official capacities in unrelated civil litigation and despite the fact that both the criminal and civil divisions are ultimately under the supervision of the City Solicitor. In order to preserve any confidences imparted during the representation of the council

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member, however, the prosecuting attorney and the defending attorney must be screened from each other and the matters must be supervised within the City Law Department in a manner such that the matters are not being supervised by the same attorney.

DISCUSSION

Rule 1.7 of the Delaware Lawyers' Rules of Professional Conduct provides that:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(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:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(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.

The Comments to Rule 1.7 provide that "ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated."

Under the facts presented, the council member would be prosecuted by attorneys in the criminal division of the City Law Department, and not by the attorney who is currently defending him (together with the other members of City Council) in the action under §1983 (or indeed an attorney in the same division as the attorney defending him in such action) . Accordingly, there is no threat of a direct violation of Rule 1.7 by any particular attorney. Rule 1.10(a) of the Rules of Professional Conduct provides, in pertinent part, however, that “lawyers who are associated in a firm may not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule . . . 1.7” Thus, if the lawyer from the civil division presently representing the council member in the action under §1983 and the lawyer in the criminal division who would prosecute the council member are considered part of the same "firm," the provisions of Rule 1.7 would be implicated.

The Comment to Rule 1.10 states that “[f]or purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization." (emphasis added) The issue of whether a government legal department is an "other organization" within the meaning of the Comment to Rule 1.10 has been the subject of several judicial decisions outside of the State of Delaware. A majority of these decisions have concluded that the imputed disqualification rule does not apply to government legal departments. See, e.g., Humphrey v. McLaren, 402 N.W.2d 535, 542-543 (Minn. 1987) (applying Model Rules); State v. Fitzpatrick, 464 So.2d 1185, 1187 (Fla. 1985) (applying Model Code); but see McCall v. Twenty First Judicial District, 783 P.2d 1223 (Col. 1989). The decisions concluding that government legal departments are not subject to Rule 1.10 follow the reasoning set forth in the ABA Formal Ethics

Opinion 342 (Nov. 24, 1975), in which the American Bar Association concluded that the imputed disqualification rules set forth in the Code of Professional Responsibility should not be applied to government attorneys:

The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. This important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe D.R. 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of D.R. 4-101, D.R. 5-105, D.R. 9101(B), or similar Disciplinary Rules. Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussions with his colleagues concerning the relevant transaction or set of transactions is prohibited by these rules.

Here, there does not appear to be any reason to invoke the imputed disqualification rules. It is unlikely that any of the information obtained from the council member in connection with his defense in the action under §1983 would in any way assist in his prosecution in the criminal matter. Moreover, the attorneys handling the different matters are in separate departments located in separate physical locations. This is not a case, such as that presented in Texaco

Refining and Marketing Inc. v. Assessment Board, 579 A.2d 1137 (Del. Super. 1989), in which the same attorney was simultaneously representing adverse interests. Here, the representation is by different attorneys in different departments who have no personal conflict in performing their respective representations.

Accordingly, neither Rule 1.7 nor Rule 1.10 prevents attorneys in the criminal division of the City Law Department from prosecuting the council member for criminal acts committed in his individual capacity. The fact that the council member is currently being represented (along

The conclusion that the criminal division is not disqualified from prosecuting the council member in the criminal matter is supported by the provisions of Rule 1.13 of the Delaware Lawyers' Rules of Professional Conduct. Rule 1.13(a) provides that "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Rule 1.13(e) further provides that "A lawyer representing an organization may also represent any of its directors, officers, employees . . . or other constituents, subject to the provisions of Rule 1.7.11 The Comment to Rule 1.13 indicates that the provisions of that Rule apply to governmental organizations. The Comment goes on to note that the "client" of the government lawyer is generally the government alone, although under certain circumstances the "client" may be a specific agency or individual. In the event of a conflict between the government and the agency or individual, the Comment provides that the government lawyer's duty is to the government and not to the individual:

"There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interests the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, where there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the

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with other council members) by the civil division in the 1983 action, and that the ultimate supervisory responsibility for both the civil and criminal divisions rests with the City Solicitor, does not disqualify attorneys in the criminal division from prosecuting him. However, in order to preserve any confidences imparted during the representation of the council member, the prosecuting attorney and the defending attorney must be screened from each other. See ABA Informal Opinion 1413 (1978); see also Nemours Foundation v. Gilbane, 632 F. Supp. 418 (D.Del. 1986) (discussing appropriate screening mechanisms). Likewise, the City Solicitor must be screened from the matters and supervisory responsibility for those matters should be handled by the City Law Department so that the same attorney (be it the City Solicitor or some other attorney) is not supervising both matters. Given that the matters are being handled by different divisions of the City Law Department, implementation of such a procedure should not be difficult. We note again, however, that any problems posed by the facts presented could be eliminated entirely if the Attorney General would undertake to prosecute the council member. That, in our view, would be the best solution to the situation presented.

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organization and the individual may not be privileged."

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The Comment to Rule 1.13 indicates that even where a conflict exists between an organization and an employee of that organization, the attorney for the organization may undertake representation of the organization which is adverse to the employee.