

**DELAWARE STATE BAR ASSOCIATION COMMITTEE
ON PROFESSIONAL ETHICS
OPINION 1991-4**

August 21, 1991

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

A member of the Delaware Bar ("Attorney") requested an opinion as to whether he may represent a client in a malpractice suit against a second attorney ("Second Attorney"). Attorney may also be subject to a malpractice claim, however, as a result of the alleged negligence of Second Attorney. The relevant facts are as follows:

Client retained Attorney in 1988 to handle a claim for personal injuries sustained in a motor vehicle accident. The accident occurred in Pennsylvania. Attorney sought the services of Second Attorney, who was not associated with Attorney's firm, but who was a member of the Pennsylvania Bar. Second Attorney was to file appropriate papers in Pennsylvania to protect against the running of the statute of limitations. Compensation for Second Attorney was to be based on the time and expenses incurred.

Although Second Attorney filed the appropriate papers in Pennsylvania, proper service was never accomplished, and the docket sheet reveals that a writ of summons was never reinstated. Attorney has been advised that the case in Pennsylvania can not be saved. Attorney believes that the failure to properly preserve the case was due to the negligence of Second Attorney.

Attorney advised the client of the problem with the Pennsylvania case and discussed with the client the fact that due to Attorney's role in the case, a claim for professional negligence

would extend to Attorney as well as to Second Attorney. Attorney also suggested to the client that one alternative the client could pursue was to seek the advice of other counsel.

Attorney represents the client in other unrelated matters, and the client wishes Attorney to continue representation in those other matters. The client also now wants Attorney to pursue a professional negligence claim against Second Attorney.

CONCLUSION

Although Attorney is not per se disqualified from representing the client in a professional negligence action against Second Attorney, the Committee believes that Attorney should not undertake such representation. For the reasons discussed below, there is a substantial likelihood that Attorney will not be able to zealously represent the interests of the client in such an action, or that an impermissible conflict will later arise that would make such representation improper.

DISCUSSION

The two fundamental issues to be examined are:

1. Whether Attorney has an impermissible conflict of interest that precludes his representation of the client; and/or
2. Whether Attorney is a necessary witness in any action against Second Attorney-

Pursuant to Rule 1.7 of the Delaware Lawyers' Rules of Professional Conduct:

(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 interest, unless:

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

(2) The client consents after consultation
(emphasis added)

The central purpose of this Rule "is to ensure a lawyer's duty of loyalty to the client." In Re Appeal of Infotechnology, Inc., Del. Supr., 582 A.2d 215, 220 (1990). To the extent that loyalty is or may be compromised, representation of the client is improper.

The comments to Rule 1.7 indicate that in assessing the impact of a conflict of interest, the critical inquiry is:

whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably - should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

* * *

If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. (emphasis added)

Since Attorney believes that he is subject to a claim for professional negligence with respect to the actions of Second Attorney, Attorney's ability to give the client detached and independent advice as to whether to pursue such a claim is questionable.

At least one source indicates that the existence of a potential malpractice claim should result in Attorney's disqualification. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 51:407 ("Lawyers faced with threatened or real malpractice actions in the course of representing a client should disqualify themselves from the case.") The authority cited for this statement, however, is less than clear that disqualification is mandatory.

Inasmuch as the client has every right to waive any claim against Attorney and to only pursue an action against Second Attorney, disqualification should not be automatic. The comment to Rule 1.7 indicates, in fact, that "consideration" should be given to the client's desire to have Attorney pursue the claim against Second Attorney and to forgo any claim against Attorney. The comment goes on, however, to note that client consent may not be sufficient "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances" Accordingly, the client's decision not to pursue a claim against Attorney should only be made on the basis of detached legal advice. For this reason, Attorney should strongly recommend to the client that the client seek independent legal advice before determining what course of action to take with respect to the claims for professional negligence.

Even if client chooses not to seek advice from another lawyer, Attorney may be aware of facts that should preclude the representation, or circumstances may arise in the future that would create an impermissible conflict. For example, if Second Attorney does not have sufficient resources or insurance to satisfy a judgment obtained for professional negligence, the client may feel differently about pursuing a claim against Attorney. To the extent Attorney is brought in as a third-party defendant to any action filed against Second Attorney, continued representation of the client would be difficult, if not impossible. In Greene v. Greene, N.Y. App., 391 N.E.2d 1355 (1979), the court addressed the inherent conflict with an attorney representing a plaintiff in an action where two other members of that attorney's firm were third-party defendants. The two other members of the firm were former partners of the defendant firm, and they were subsequently added as third-party defendants to the case. The court disqualified the plaintiff's attorney on other grounds, but stated

the following with respect to the conflict issue:

Plaintiff's counsel, the Eaton firm, has strong interests on both sides of the litigation. It has undertaken to represent plaintiff, owing her the highest duty of loyalty and professional skill in carrying on the legal action. At the same time, Grutman and Bjork, members of the firm, are manifestly liable, jointly and severally, for all tortious conduct which might have occurred during their tenure with defendant, Finley, Kumble (Partnership Law, ss 24-26). That a possibility of their being cast in damages exists is demonstrated by their status as third-party defendants in this lawsuit. Hence, the firm representing plaintiff has a direct and substantial stake in the outcome of the litigation. Id. at 1358.

The same concern would exist if Attorney was named as a third party to any suit against Second Attorney. His status as a party would, based on an objective "reasonable attorney" standard, materially interfere with Attorney's independent professional judgment. For these reasons, the Committee believes that Attorney should not undertake the representation.

To the extent Attorney, contrary to the advice of this Committee, does represent the client in an action against Second Attorney and recommends a settlement of the claims against Second Attorney, which may have the effect of absolving Attorney of any liability, Attorney would be required to first advise the client in writing that independent legal representation is appropriate in considering such a settlement. Rule 1.8(h).

A separate concern that must also be addressed is whether Attorney is likely to be a necessary witness if a claim against Second Attorney should go to trial. Rule 3.7 of the Delaware Lawyers' Rules of Professional Conduct provides that:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

As the comment to Rule 3.7 indicates, a lawyer's combination of roles as both advocate and witness may create an improper conflict of interest:

For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved.

Accordingly, Attorney must consider whether he will be called as a necessary witness and whether his testimony relates to a contested issue or may be in conflict with the client's position or testimony, such that an impermissible conflict is present. Under such circumstances, representation of the client would be impermissible. The Committee, however, does not have sufficient facts to render an opinion as to whether a conflict does, in fact, exist.

In conclusion, the Committee believes that Attorney should not undertake the representation due to the substantial likelihood that Attorney will not be able to zealously represent the interests of the client and due to the potential for an impermissible conflict in the future that would make such representation improper.

384968