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THE INQUIRING ATTORNEY, OR THE COURTS OR ANY OTHER TRIBUNAL.**

DELAWARE STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS

Opinion-1992-1  
January 14, 1992

A member of the Delaware Bar has requested the Committee's advice on whether he can continue to represent a client or if such continued representation would be barred under the Rules of Professional Conduct.

**FACTS**

Lawyer A and Lawyer B work for the same law firm. Client A was involved in an automobile accident with Client B, for which Client A was given a traffic citation. Client A went to Lawyer A shortly after the accident and asked Lawyer A to represent him for the traffic citation. One week after the accident, Lawyer B was contacted by Client B seeking to have Lawyer B represent him in presenting a personal injury claim against Client A. Neither Lawyer A nor Lawyer B was aware that the other had become involved in the matter when they initially agreed to represent their respective clients. Lawyer A immediately called Lawyer B when it was recognized that a conflict existed. After becoming aware of the conflict, Lawyer A received the previously requested retainer and written fee agreement from Client A. Other than the conflict issue, there have been no discussions between the lawyers relative to this case. The attorneys agreed that Lawyer A should write to Client A to inform him that they would be unable to represent him and returned the fee to the client and then asked Client A to consent to the firm's continued representation (excluding Lawyer A) of Client B. Client A responded by not signing the requested consent but by saying "I am going to let your firm decide which is the right thing to do regarding . . . ." the representation of Client B.

## **ISSUES PRESENTED**

The first issue presented is the circumstances under which an attorney in a firm can continue to represent a party in litigation when another attorney in the same firm, unaware of the other attorney's representation, initially agreed to represent the other adverse party, but terminated the relationship when the dual representation was recognized. The second issue presented is whether on the facts present here, the appropriate consent of both clients to such continued representation has been obtained.

## **CONCLUSION**

On the facts presented, the firm no longer represents Client A. The matter as to Client A is therefore controlled by Rule 1.9 of the Rules of Professional Conduct. Under Rule 1.9, if both clients consent, the firm may still represent Client B even though the firm initially represented adverse parties in the same or substantially related matters. This result is, however, dependent upon three conditions. First, the consent would only be effective upon full disclosure to both clients. See commentary to Rule 1.7. Since only the last page of the letter is provided in the request for an opinion, no opinion is expressed whether full disclosure has been made by Client A. Second, even though the attorney-client relationship has been terminated as to Client A, Rule 1.16 must still be followed and all confidences conveyed from Client A to Lawyer A must be retained and a "Chinese Wall" or a "Cone-of-Silence" should be built around Lawyer A and Lawyer A should not discuss the matter with any other attorney in the firm. Third, Under Rule 1.7 since the client relationship continues to exist with Client B, the consent of Client B must also be obtained.

However, in the opinion of the Committee, the response of Client A does not constitute consent. The response merely indicates that the firm should do whatever was the "right thing." Since clear consent has not been obtained from A, the representation of Client B should not continue. Further, since the request for this opinion does not provide any information on whether

Client B has consented, continued representation would be improper until such consent, after disclosure, has been obtained from Client B.

### **DISCUSSION**

Even though the firm has already terminated its representation of Client A, Client A must still be considered a "client" since confidential information was conveyed during the initial discussions with Lawyer A. Rule 1.7 of the Rules of Professional Conduct prohibits the representation of the two clients with interests adverse to each other. Under the imputation rule of Rule 1.10, Lawyer A and B are treated as the same, and since they are in the same firm, neither can represent clients with adverse interests absent consent. Rule 1.7 prohibits the dual representation of clients with interests that are directly adverse unless the lawyer reasonably believes the representation will not adversely affect the relationship of the other client and each client consents after consultation. However, as the comment to Rule 1.7 makes clear, that rule prohibits the undertaking of such dual representation, but if the conflict arises after the representation has been undertaken, whether a lawyer may continue to represent any of the clients is governed by Rule 1.9.

Rule 1.9 governs the conflict of interest with respect to former clients and dictates that a lawyer who has formerly represented a client may not undertake or continue the representation of another person in the same or a substantially related matter unless the former client consents after consultation. See also, Rule 1.10(d) and Hazard and Hodes, The Law of Lawyering, (2nd ed. 1990) at p. 302. Rule 1.9(b) further provides that even if such representation of the other person is allowed, the information conveyed by the prior client cannot be used.

A significant difference exists between Rule 1.7 and Rule 1.9 in that Rule 1.7 allows for dual representation with consent after consultation but only if the lawyer reasonably believes the representation will not adversely affect the relationship with the other client. This requirement is not present in Rule 1.9.

The request for an opinion did not provide the Committee any information regarding whether Client B was made aware of the conflict, provided complete disclosure, or consented to the continued representation. Since the firm seeks to have Client B remain as a client, Rule 1.7 requires that Client B also consent after full disclosure. In addition, Rule 1.7(a) further requires that Lawyer B must reasonably believe that the continuing representation of Client B will not adversely impact Client B. Since no information is provided on whether Lawyer B reasonably believes there will not be an adverse impact or that Client B has consented, the Committee cannot conclude that even the consent of Client A would allow the continued representation of Client B.

If, however, the consent of both clients is obtained, after full consultation and disclosure, then the firm may continue to represent Client B. Of course, even though the relationship has terminated, the confidential information given by Client A to Lawyer A must remain confidential and a "Chinese Wall" or "Cone-of-Silence" must be built around Lawyer A. Nemours Foundation, Inc. v. Gilbane Building Co., D.Del., 632 F.Supp. 418 (1986).

Since it is the opinion of the Committee that if the consent is obtained from both clients, Lawyer B and the firm (excluding Lawyer A) may continue to represent Client B; it is necessary to determine if "consent" was given by Client A after full disclosure.

The Committee cannot express any opinion as to whether a full disclosure has been provided to Client A since only the last page of the letter to Client A has been provided to the Committee. Such disclosure must be complete and fair and should not be reasonably construed as an effort to compel Client A to consent.

It is the opinion of the Committee, however, that the facts presented do not show the necessary "consent" from Client A. Lawyer A wrote to Client A apparently explaining the situation and returning the check and signed retainer agreement. The letter asked Client A to acknowledge receipt of the check and he did so. The letter to Client A further requested that Client A sign the statement "I am not opposed to [Lawyer B] continuing his representation of

[Client B]." Client A did not sign this, but instead wrote "Dear [Lawyer A], I am going to let your firm decide which is the right thing to do regarding the representation of [Client B]". It would have been a simple matter for Client A to simply sign the consent form but he chose not to do so, stating that he was going to let the firm decide what is the right thing to do. This is not consent. Absent such consent by Client A, the representation should not continue.

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