

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1993 - 2

April 20, 1993

Disclaimer: This opinion is merely advisory and is not binding on the inquiring attorney or the courts or any other tribunal.

Statement of Facts

A County Official is under investigation by the State Attorney General's Office in connection with an audit that is being performed by the State Auditor. The activities of the County Official's office come under the auspices of County government. The inquiring attorney has been approached by the County Official concerning representation of the County Official and members of his department individually with regard to the Attorney General's investigation.

A partner in the inquiring attorney's office (the "Partner") is a member of the governing body of the County government. The Partner serves in that capacity as any other member of the public, and does not act in his capacity as an attorney.

As a member of the governing body of the County government, the Partner was approached by a former employee of the County Official's department concerning the improprieties now under investigation. The Partner met with the disgruntled ex-employee and his attorney, and then referred the entire matter to the State Auditor and Attorney General for investigation.

The inquiring attorney has requested an opinion as to whether his representation of the County Official and employees of his department in the ongoing criminal investigation would violate the Delaware Rules of Professional Conduct.

Conclusion

The inquiring attorney is not precluded from representing the County Official in the pending criminal investigation, so long as he complies with the requirements of Rules

1.7(b) and 1.11(b). The inquiring attorney may not, however, represent the County Official or his employees in any proceedings before any arm of the County government.

Discussion

Pursuant to Delaware Lawyer's Rule of Professional Conduct (hereafter "Rule")

1. 7(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 the 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 limitations of Rule 1.7 may be imposed upon lawyers who are associated in a firm under the imputed disqualification provisions of Rule 1.10.¹ Rule 1.10 provides:

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

A critical aspect of this analysis is the fact that the Partner does not represent the County government in his capacity as an attorney. Accordingly, there is no issue of a direct conflict between the interests of two clients. The inquiry is whether: (1) an attorney's representation of his client will be "adversely affected" by responsibilities to a third person; and

¹ The Comment to Rule 1.10 calls into question whether this imputed disqualification applies in the context of government employment or whether the situation is governed completely by Rule 1.11. ABA/BNA Lawyers' Manual on Professional Conduct, 51:2004.

(2) the client is aware of and consents to the representation after being informed of the potential limitations.

As long as the inquiring attorney "reasonably believes the representation will not be adversely affected", and the client consents to the inquiring attorney's representation after being informed of the Partner's position with the County government, Rule 1.7 does not prohibit the representation.

In addition to Rule 1.7, the proscriptions of Rule 1.11 must also be examined. Since the Partner was approached by the former employee of the County Official's department that reported the alleged improprieties, the Partner possesses "confidential government information", as defined by Rule 1.11(e). Accordingly, the provisions of Rule 1.11(b) are applicable:

Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a client whose interests are adverse to that person in a matter in which the information could be used to a 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.

Under Rule 1-11(b), the Partner must be screened from any participation in the inquiring attorney's defense of the criminal investigation.² Additionally, steps must be taken to ensure that the Partner is not apportioned any part of the fee that is obtained through the representation.

Based on the facts as given in requesting this opinion, the Committee does not believe that the Partner's participation in the matter, his one meeting with the former employee of the County Official's department, constitutes "personal and substantial" participation in the matter,

² This opinion is premised on the assumption that no confidential information was previously disclosed to the inquiring attorney by the Partner.

as defined under Rule 1.11(a). This is obviously a factual determination that the Partner must make. If, in fact, the meeting is deemed to be "substantial participation," then the

attorney must also comply with the additional requirement of Rule 1.11(a)(2), requiring written notice to the County government.

The foregoing analysis applies to the pending criminal investigation involving the State Auditor and the State Attorney General. To the extent that proceedings before the County government arise out of the pending criminal investigation, the inquiring attorney could not represent the County Official or his employees with respect to such matters. Since the Partner is a member of the governing body of the County, the inquiring attorney should not represent any client appearing before that body. Illinois State Bar Assoc. Opinion 90-17 (1/29/91) (law firm that employs lawyer who is member of city council may not represent clients before that body, even if lawyer does not participate in matter); Iowa State Bar Assoc. Opinion 91-49 (5/28/92) (neither lawyer on planning commission, nor his law partners, may represent clients before the commission); Kentucky Bar Assoc. Opinion E-347 (6/91) (lawyer who has partner or associate on planning board or zoning commission may not represent clients before that body even if partner or associate disqualifies himself from participation in matter); Maryland State Bar Assoc. Opinion 91-15 (4/91) (members of lawyer's firm disqualified from representing clients before public board on which lawyer serves, even if lawyer recuses himself from decision. Lawyer's position on board raises implication firm's client will receive deferential treatment).*

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* A member of the Committee dissents from this Opinion.