

**Delaware State Bar Association
Committee on Professional Ethics
Opinion 1997 -1**

August 18, 1997

This Opinion is merely advisory and is not binding on the inquiring attorneys, the courts or other tribunal.

A member of the Delaware Bar has requested that the Committee issue a Legal Ethics Opinion regarding the necessity of obtaining the consent of the clients of his law firm to his acting as an expert witness on behalf of another law firm in a legal malpractice action.

Facts

A member of the Delaware State Bar Association ("Lawyer A") has been requested by Law Firm B and Law Firm C to serve as an expert witness in a legal malpractice action on behalf of Law Firm B. This action was brought by a former client of Law Firm B ("Plaintiff") against Law Firm B and certain of its members. Plaintiff alleges that Law Firm B was negligent in the manner it carried out its professional duties in representing Plaintiff in a commercial real estate refinancing transaction. Law Firm C represents Law Firm B in defense of the action brought by Plaintiff. Lawyer A is a partner in Law Firm D. Law Firm D represents clients who have claims against, or are being sued by, parties represented by Law Firm B and Law Firm C. Such claims do not relate to the dispute between Plaintiff and Law Firm B or the malpractice issues involved in such dispute, including the issues which will be the subject of Lawyer A's proposed expert testimony.

Question Presented

The specific question raised by this request is whether Lawyer A may give expert testimony in court favorable to Law Firm B, which represents persons in unrelated cases who are adversaries of clients of Law Firm D, without seeking the consent of the clients of Law Firm D which are adverse to the clients of Law Firm B.

Discussion

Rule 1.7 of the Delaware Lawyer's Rules of Professional Conduct ("DLRPC") addresses attorney conflicts of interest. Rule 1.7 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.

Rule 1.7(a) is inapplicable to the question presented since Law Firm B is not a "client" of Lawyer A; rather, Lawyer A is acting only as an expert witness. See Kabi Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957, 961 (D. Del. 1992) ("The threshold question in determining the applicability of subsection (a) is whether an attorney-client relationship existed . . ."). Furthermore, Rule 1.7(a) is also inapplicable because Law Firm B is not "directly adverse" to any of Lawyer A's clients. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-406 (1997) (reasoning that clients adverse to another party are not "directly adverse" to the lawyer for that other party); Delaware State Bar Assoc. Comm. on Professional Ethics, Op. 1992-4 (1992) (equating "directly adverse" to being a party to the litigation as opposed to representing a party in the litigation).

Nevertheless, the question of the necessity of client consent is raised by Rule 1.7(b) if Lawyer A's representation of clients adverse to clients of Law Firm B would be

"materially limited" by Lawyer A's own interest in rendering expert testimony to Law Firm B. Any limitation imposed on Lawyer A by Rule 1.7(b) is imputed to Law Firm D under DLRPC 1.10(a).

The Comment to Rule 1.7 focuses the inquiry on "the likelihood that a conflict will eventuate and, if it does, 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." In ABA Formal Op. 97-406, the ABA Committee considered the ethical propriety of one lawyer representing another lawyer when both lawyers represent clients who are adverse to each other. The ABA Committee began its analysis with the conclusion that the representing lawyer has a "personal financial interest" with respect to the represented lawyer, and that interest "may materially limit or adversely affect the [representing lawyer's] representation of his third-party client[s]." See ABA Formal Op. 97-406 at 2-3. The ABA Committee noted that determinations under Rule 1.7(b) are extremely fact specific, and set out six considerations for guidance in determining whether a lawyer-client relationship between attorneys may materially limit either lawyer's representation of his clients. These are:

- (1) the relative importance of the matter to the represented lawyer;
 - (2) the relative size of the fee expected by the representing lawyer;
 - (3) the relative importance to each lawyer and to his client of the matter involving the clients;
 - (4) the sensitivity of each matter;
 - (5) the substantial similarity between the subject matter or issues of the matters;
- and

(6) the nature of the relationship of one lawyer to the other and of each lawyer to his client.

ABA Formal Op. 97-406 at 3 (although 97-406 dealt with one lawyer representing another lawyer, these considerations would also seem applicable to other lawyer-lawyer relationships). The Opinion concludes that in circumstances where application of the foregoing factors indicates that the interests are such that either lawyer would feel constrained in the representation of the third-party client, the representation is prohibited by Rule 1.7(b).

In most cases, acting as an expert, at least in a legal malpractice action, will involve a much more limited role in litigation than acting as counsel. An expert's role in a legal malpractice action is "to opine on factual issues regarding the manner in which lawyers practice law." Stephen C. Krane, When Lawyers Represent Their Adversaries: Conflicts of Interest Arising Out of the Lawyer-Lawyer Relationship, 23 Hofstra L. Rev. 791, 794 (1995). As such, the personal financial interest of an expert witness in a matter is typically much less than that of a representing lawyer.

It has been noted, however, that a lawyer's representation of clients may be materially limited by that lawyer's service as an expert witness to opposing counsel in an unrelated matter. See San Diego County (CA) Bar Assoc. Ethics Op. 1989-4. In the San Diego County opinion, the Committee expressed their view that these situations would be very rare, and the only example the Committee gave is where the lawyer rendering the expert testimony harbors an expectation of future employment as an expert by opposing counsel. In this situation, the San Diego Committee felt that the lawyer's personal financial interest might materially limit the lawyer's representation of his clients who are adverse to opposing counsel's clients, and that the lawyer would have to seek client consent under Rule 1.7(b).

In Delaware State Bar Assoc. Comm. on Professional Ethics Op. 1992-4, this Committee noted some special considerations which should be taken into account in Rule 1.7(b)

determinations in Delaware. There this Committee was faced with a situation similar to that in ABA Formal Op. 97-406 and felt that taking too broad a view of conflicts of interest resulting from the lawyer-lawyer relationship "might make it practically impossible for an attorney to obtain representation" considering the small size of the Delaware bar. This Committee considered persuasive the fact that lawyer-lawyer representations are "routinely undertaken by prominent members of the Delaware bar . . . based on the understanding that a lawyer's representation of clients is a professional role that does not make the lawyer an adverse party."

These special considerations are equally applicable where a lawyer is acting as an expert for, rather than representing, another lawyer. It may be practically impossible for a member of the Delaware bar faced with a malpractice claim to find another reputable lawyer to act as an expert witness if the expert is required to first seek the consent of, or otherwise inform his clients which are adverse to the other lawyer. Lawyers may be hesitant to approach clients, since some clients may not appreciate the ability of their attorney to provide zealous representation on their behalf while also providing opposing counsel with expert testimony in an unrelated matter. Coupled with the fact that in some cases attorneys may be opposing counsel in several unrelated matters at once, a rule requiring consent or a duty to inform, as the this Committee stated in Op. 1992-4, "might be unworkable in a small jurisdiction such as Delaware." See Delaware State Bar Assoc. Comm. on Professional Ethics Op. 1992-4 at 6.

Conclusion

Rule 1.7(b) determinations are extremely fact sensitive, and each attorney knowing the particular facts of his case must evaluate the proximity and degree to which material limitations on representation may occur due to a conflicting personal interest. The considerations set forth in ABA Formal Op. 97-406 are useful in reaching a conclusion regarding whether a material limitation may occur, subject to the considerations set forth in this Committee's Opinion 1992-4. The Committee has not been provided with any financial information regarding expected fees from the expert testimony or the materiality of those fees to Lawyer A or Law Firm D, and likewise has been provided with no information regarding the nature of the matters in which Law

Firm D represents clients with interests adverse to those of Law Firm B from which the sensitivity of such matters to Law Firm D or the similarity of the matters to the expert testimony requested can be assessed. Accordingly, the Committee is unable to form a definitive judgment regarding whether the proposed expert testimony requires the consent of Law Firm D's third party clients. However, for the reasons set forth in Opinion 1992-4, so long as the circumstances of the various representations are such that Lawyer A and Law Firm D reasonably do not feel that Lawyer A providing expert testimony on behalf of Law Firm B would constrain Law Firm D's ability to represent its third party clients, the Committee is of the opinion that Law Firm D does not need to obtain the consent of the clients of Law Firm D who are adverse to clients of Law Firm B prior to Lawyer A agreeing to act as an expert for Law Firm B.

While Law Firm D is thus not required to obtain consent of its clients to provide expert testimony on behalf of Law Firm B, a question is raised whether Law Firm D is required in any event to inform its clients of that engagement. DLRPC Rule 1.4(b) provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The Comment to Rule 1.4 indicates that the information to be provided to a client is that appropriate for a "comprehending and responsible adult." In addition, the Comment makes clear that "[a] lawyer may not withhold information [from a client] to serve the lawyer's own interest or convenience." In ABA Formal Opinion 97-406, one committee member expressed the view that Rule 1.4(b) requires an attorney to inform his clients that he is representing the opposing attorney. *Id.* at 9 (Fox, concurring). Even assuming that analysis to be correct under the facts presented in ABA Formal Opinion 97-406, the Committee does not believe it to be controlling here. As noted above, acting as an expert is in most cases materially different than representing a law firm as a client. Moreover, requiring disclosure may "make it practically impossible" to find a Delaware law firm to provide expert testimony. For these reasons, the Committee does not believe Law Firm D is required to disclose to Law Firm D's clients its engagement to act as an expert on behalf of Law Firm B absent the special circumstances outlined above.

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