Delaware State Bar Association
Committee on Professional Ethics
Opinion 1997-2

September 2, 1997

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

Members of the Delaware Bar have requested an opinion on whether a law firm (the "Firm") may continue to represent the plaintiffs in a personal injury action when a partner in the Firm is the chairman of a State commission that has supervisory responsibilities over the defendants' business.

Facts

Counsel for both the plaintiffs and the defendants in this matter have agreed to submit a question involving professional ethics to this Committee "with the goal in mind of avoiding extensive motion practice before the Court." The facts of this matter are simple; it is the possible complications posed by those facts that create the underlying dispute that we have been asked to resolve.

As noted above, the Firm has brought a personal injury action on behalf of an individual and his wife against the defendants. The essence of their claim is that the individual was injured on the defendants' premises while engaged in normal activities, that the cause of those injuries was a defect in certain fixtures, and that the defendants had an enforceable duty to repair the defect before the facility was used. Although not discussed by the parties, we assume that the Firm has been retained on a contingent basis, and thus will not be paid if it does not prevail. The defendants are regulated by a State commission that, among other things, allegedly conducts yearly inspections of their premise to determine whether those premises are safe for their intended purpose. The chairman of that State commission is a partner in the Firm, and while he is not directly involved in the litigation, he presumably stands to share in the Firm's fee if the plaintiffs prevail.

A. The Parties' Contentions.

It is useful here to quote from the contentions of the parties. According to counsel for the defendants, the defendants are concerned that:

> "[I]n the discovery process [the chairman] may be deposed by the parties, which would involve [the chairman's] partner [plaintiffs' counsel] questioning [the chairman] directly regarding matters that may concern the defenses of the plaintiffs' claims. This conflict could also arise at trial if [the chairman] is called as a trial witness by either party. Likewise commission agents or employees will be deposed (and/or serve as trial witnesses) and [the chairman's] position as Chairman and a partner at [the Firm] could serve to chill the agents' ability or desire to provide testimony that may bolster the defense.
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> Further, a discovery dispute may arise involving actual production of documents or testimony by the Comnuission during which [the chairman] may be the decision-maker on whether documents will be produced or Commission employees will be made available for depositions. That would place [the chairman] in the position of having control over the defendants' ability to obtain information that may be helpful to its defense."

The defendants go on to note that:

> "These examples are not cited to demonstrate that [the chairman and his partner] would, in fact, act in concert to [the defendants'] disadvantage. Rather, the scenarios are listed simply to illustrate several of the obvious conflict situations that would place [the Firm] in the awkward position of areas of the defendants' defenses."

In response, counsel for the plaintiffs makes the following, uncontested, assertions: (1) the commission is not a defendant in this action and its members are immune from any liability from negligence in discharging their officail duties; (2) there is no evidence that the commission or any of its members, including the chairman, ever conducted an inspection of the fixture in question during the chairman's tenure on the commission, and thus there is no reason to believe that the chairman will be a witness in this case; (3) "the high probability is that specific facts will

be the subject of the testimony of persons other than [the chairman] or will be the subject of a stipulation of counsel as to those facts;" and (4) the plaintiffs are aware of the situation and have consented to the continued representation by the firm. In addition, counsel for the plaintiffs argues that even if the chairman is deposed or testifies at trial, that fact alone would not disqualify the Firm under Rule 3.7(b) of the Rules of Professional Conduct.

As may be seen above, the parties' arguments do not squarely meet one another. Althoug defendants' counsel properly refuse to engage in a personal attack on the character of plaintiffs' counsel or the chairman, they note the many potential conflicts of interest that could arise, and submit that only disqualification (here, given the advisory nature of this Committee's work, voluntary disqualification) can eliminate those risks. The defendants themselves presumably have ever sharper concerns, given that they are now facing a lawsuit in which their adversary is represented – presumably on a contingent basis by a law firm in which the chairman of one of their principal regulators is a partner. While those concerns might be somewhat assuaged by their lawyers' assurances that both the chairman and his partner are honorable and respected attorneys, no business person can be expected to feel fully comforted by that fact.

The essence of plaintiffs' counsels' reply is that there is no evidence of such a risk here and that the Firm's actions have been, and will continue to be, well within the letter and spirit of the Rules of Professional Conduct. With those contentions in mind we turn to our opinion and the reasons that lead us to the conclusions it presents.

Opinion

Based upon the foregoing and the analysis presented below, it is the Committee's Opinion that the Firm is not disqualified from continuing to represent the plaintiffs if the chairman acts in accordance with the conditions set forth at the end of this opinion.

Discussion

This matter presents the Committee with a factual situation considerably different from those it normally encounters. Under ordinary circumstances, the Committee is asked to provide guidance by an attorney or firm about their own conduct. In so doing, the Committee accepts the factual representations made by the requesting party; its function is to provide its judgment on the likely application of the Rules of Professional Conduct to those facts. By contrast, this matter is brought to the Committee by the parties to a litigation who ask for the Committee's guidance in order to avoid the expense and burden to the Courts that litigating the matter would entail.

A. Whether The Committee Ought To Provide Advice In Situations Such As This.

The first question presented to the Committee is whether it ought to decide such matters, which take it outside the scope of its customary role. Although the Committee reserves the right to reconsider this decision in future matters, it currently believes that it is within the ambit of the Committee's traditional responsibilities to provide advice in such situations so long as the parties can agree between themselves on the facts that the Committee will be asked to consider, which we understand to be the case here. The Committee lacks the ability to make "findings" of fact, however, and thus will reject future requests that ask it to choose between competing versions of the facts. With that in mind, we turn to an analysis of the matter presented here.

B. The Nature of the Issues Presented Here.

We believe that there are two discrete issues presented here. The first is whether the Firm is operating under a conflict of interest that requires disqualification because the chairman might be a witness in this matter. The second, and more substantive, issue is whether the chairman's position as the chairman of a State commission requires his, and hence the Firm's, disqualification. We note that the defendants do not argue that the Finn should be disqualified because of any possible harm to the plaintiffs. In addition, the possible harm that defendants do see involves potential prejudice to the fairness of the proceedings, which the Supreme Court has held may properly be raised by a party in litigation. *In re Appeal of Infotechnology, Inc.,* Del. Supr., 582 A. 2d, 215, 221 (1990); see also *Scattered Corporation, et al. v. Chicago Stock Exchange,* Del. Ch., C.A. No. 1401 0, Jacobs, V. C. (April 16, 1997).

C. Is the Firm Disqualified Because the Chairman Might Become a Witness?

Under the Rules of Professional Conduct, a firm may act as counsel in a case even if one of its partners is a witness at trial. Under the former Disciplinary Rules, such representation was normally considered improper. See DR 5-102. Rule 3.7 of the Rules of Professional Conduct now permits such representation so long as the witness does not act as an advocate at trial and Rules 1.7 and 1.9 are followed.[1] Thus, the fact that the chairman might become a witness in the litigation would not serve to disqualify the Firm.

D. Does the Chairman's Service With the Commission Disqualify the Firm?

The more substantial question is whether the chairman's service with the

[1] Rule 1.7 is the general rule for conflicts of interest, which ordinarily prevents a lawyer from representing a client if such representation is directly adverse to another client or if the representation might be materially limited by the lawyer's responsibilities to a party other thanthe client. Rule 1.9 deals with former clients.

commission serves to disqualify the Firm from representing the plaintiffs. As discussed earlier, significant concerns are raised by the fact that the chairman both supervises a principal regulator of the defendants and is a partner in a law firm that stands to profit if it prevails in litigation against them. The question presented to the Committee is how the Rules of Professional Conduct deal with such concerns.

1. Rule 1.11

Unfortunately, the guidance given by the Rules is limited. The closest that the Rules come to directly addressing this situation is Rule 1.11, which concerns successive government and private employment. Rule 1.11 provides as follows:

> "(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
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> > (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
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> > (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
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> (b) 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 private client whose interests are adverse to that person in a matter in which the information could be used to the 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.
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> (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.2(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, requests for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

2. Does the Rule Govern Concurrent Service?

As may be seen, Rule 1.11 expressly deals with successive government and private employment rather than concurrent service, such as that found here. The initial question that this raises is whether Rule 1.11 governs concurrent service. The Committee believes that it does. First, the language of the rule, although usually phrased in a way that indicates that the drafters were contemplating successive employment, does not rule out concurrent service, although in such cases, the Rule's provisions relating to actions as a private attorney (generally set forth in sections (a) and (b)), as well as those regulating conduct as a goverrunent official (Section (c)) would both apply. Second, in explaining the purpose of the Rule, the explanatory Comment

states that, "[t]his Rule prevents a lawyer from exploiting public office for the advantage of a private client." It then goes on to opine that:

> "A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service."

Those concerns apply with as much, if not more, force to concurrent service as to cases of subsequent employment. But, if the Rule does not deal with concurrent service, then there would be no provision in the Rules that would deal with situations such as this. We do not believe that the Delaware Supreme Court would endorse such a result. Finally, we note that the Committee has previously taken the view, without discussion of the issue, that the Rule deals with concurrent employment. *See* Opinion 1991-1.

3 . The Rule's Application Here.

What then does the Rule say about the facts present here? As may be seen from its text, it attempts to balance the interests of allowing attorneys to hold various positions with the public interest of preventing the abuse of such multiple representations. Functionally it does that by permitting representation except in those circumstances in which it is clear that a conffict of interest exists, and by requiring recusal of an individual, rather than disqualification of a firm, in cases where that should be sufficient to prevent harm to the public interest. Thus, for example, Rule 1.11(c) allows a lawyer to serve in a government agency considering a matter on which he or she has worked in private practice, but requires that lawyer under most circumstances to refrain from participating in that consideration.

Thus, Rule 1.11 does not expressly bar representation in all circumstances where the potential for a conflict of interest exists. Rather, it requires a review of the particular factual setting to see if disqualification is required. Based upon our reading of the Rule and the Comment

to it, the Committee is of the view that Rule 1.11 would allow the Firm to continue to represent the plaintiffs if the following conditions are met:

(a) Recusal From Participation. First, the chairman recuses himself from all future participation in any of the commission's actions regarding the matter.[2] This would include not only his recusal from any formal proceeding before, or decisions of, the commission, but his isolation from any informal discussions, contacts or the like, including any conversations relating to the discovery issues that concern the defendants. The chairman should not be in a position to know how the commission or any of its agents or employees are dealing with the situation or to influence their actions in any way. We believe that this is required by Rule 1.11(c)(1), which provides that "[e]xcept as law may otherwise expressly permit, a lawyer serving as a public officer . . . shall not . . . participate in a matter in which the lawyer participated personally and substantially while in private practice." Although we find no conclusive support for such a step in the Rule, the Committee also believes that the chairman should recuse himself from any matter that directly relates to the defendants for the pendency of the litigation in order to avoid the appearance of impropriety.

(b) Actions That Must Be Taken If The Chairman Has A Participated In The Matter. To the extent that it is subsequently discovered that the chairman has already participated "personally and substantially" in actions by the commission relating to issues in the litigation, the chairman must then gain the commission's approval for the Firm's continued representation, take steps to ensure that he receives no part of any fee earned by the Firm, and provide written notice of these steps to the commission. See Rule 1.11(a). In order for the commission to determine if it believes that the Chairman has participated in the matter, the Chairman should provide it written notice as soon as possible of the situation in order so it can determine whether he has complied with the Rules. Rule 1.11(a)(2).

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[2] The Committee assumes that the law does not require the chairman to participate in such decisions.

(c) Information. To the extent that the chairman has previously learned of any confidential information relating to this matter, he must refrain from disclosing it to the Firm or its clients. Indeed the Committee recommends that the Firm impose a "cone of silence" on the chairman in keeping with *Nemours Foundation v. Gilbane*, 632 F. Supp. 418 (D. Del. 1986).

If those conditions are met, then it is the opinion of the Committee that the Firm may continue its representation of the plaintiffs.

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