

**DELAWARE STATE BAR ASSOCIATION**  
**COMMITTEE ON PROFESSIONAL ETHICS**  
**OPINION NO. 1997-3, SEPTEMBER 11, 1997**

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

A member of the Delaware Bar has requested that the Committee on Professional Ethics issue a legal ethics opinion on an emergency basis regarding whether a former Disciplinary Counsel may represent another member of the Delaware Bar who is the subject of an investigation by the Office of Disciplinary Counsel ("ODC"). The member requesting the emergency opinion investigated the potential client during the former's tenure as Disciplinary Counsel. This opinion has been requested and is being issued on an emergency basis and, thus, has not had the review and consideration of the entire Committee on Professional Ethics.

**FACTS**

A member of the Delaware Bar ("Lawyer A") is being investigated by the ODC on several charges of misconduct. Lawyer A has requested that a former Disciplinary Counsel ("Lawyer B") represent him defending against the ODC's investigation.

Lawyer B served as Disciplinary Counsel for three years. Lawyer A, during Lawyer B's tenure, received a private admonition. In addition, Lawyer A also received a public reprimand in a case which occurred after Lawyer B had left the ODC.

ODC has now raised the question of whether Lawyer B may represent Lawyer A without violating Rule 1.11(a) of the Delaware Lawyer's Rules of Professional Conduct ("DLRPC"). Specifically, the ODC has stated that because Lawyer A's prior disciplinary history, including that related to the private admonition in 1991, will likely be relevant to any ultimate disposition of the matters currently under investigation, ODC has concluded that Lawyer B has a disqualifying conflict of interest under DLRPC on Rule 1.11(a).

### **QUESTION PRESENTED**

May Lawyer B, a former Disciplinary Counsel, represent Lawyer A in matters currently pending before the ODC where Lawyer B previously participated in an unrelated disciplinary proceeding against Lawyer A resulting in a private reprimand?

### **DISCUSSION**

The operative rule in this instance is Rule 1.11 of the DLRPC which 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.

(Emphasis added.)

Here, there is no question that Lawyer B "personally and substantially" participated in the disciplinary proceedings against Lawyer A while Lawyer B was Disciplinary Counsel. There is also no question that ODC has refused to waive any conflict which may arise from the current representation by Lawyer B of Lawyer A.

The issue is whether Lawyer B's conduct as Disciplinary Counsel can in any way be considered relevant to the currently pending disciplinary proceedings. ODC contends that because the prior discipline, a private reprimand, may be considered in connection with the discipline, if any, ultimately invoked in the current proceedings, that creates a conflict under Rule 1.11.

Rule 1.11 is not as confining as the ODC suggests. As the comment under the Rule states, ". . . the rules governing lawyers presently or formerly employed by a government

agency should not be so restrictive as to inhibit transfer of employment to and from the government." If this Rule were interpreted as ODC suggests, such an inhibition would be inevitable.

The current investigations are taking place at least six years after the disciplinary actions occurred in which Lawyer B was involved. Unquestionably, the current investigations are not related to the earlier investigation. Indeed, all parties concede that the only possible relationship might occur where the degree of current discipline, if any, may be affected by the discipline previously invoked.

The Rule does not prevent a former government lawyer from taking advantage of any knowledge the former lawyer may have acquired during his tenure, assuming the knowledge is not "confidential government information." See Rule 1.11 (b). Since Lawyer A was disciplined publicly after he received a private admonition, it may be that the earlier private admonition is already part of the public record. In any event, even assuming that the 1991 discipline is not public, a reasonable reading of Rule 1.11 does not create a single "matter" from the two investigations merely because of the earlier, non-public discipline. Yet, that is all Rule 1.11 prohibits: a former government lawyer representing a private client in connection with a "matter" in which the former government lawyer had previously participated on a personal and substantial basis.

In Flego v. Philips. Appel & Walden, Inc., 514 F.Supp. 1178 (D.C.N.J. 1981), the court considered what constituted the same "matter" for the purposes of interpreting the predecessor to Rule 1.11. The court specifically referred to Opinion No. 342 (1976) of the ABA Committee on Professional Ethics, in which "matter" was defined as:

[T]he term seemed to contemplate a discreet and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated best by examples. The same lawsuit or litigation is the same matter.

514 F. Supp. at 1182. The Flego court also referred to the "same facts" test formulated by the Second Circuit Court of Appeals. Id. at II 83.

Applying the Flego analysis to the instant case leads to the conclusion that Lawyer B's representation of Lawyer A in the current investigations does not violate DLRPC Rule 1.11 because it does not involve Lawyer B representing a private client in connection "with a matter in which (Lawyer B) participated personally and substantially" as Disciplinary Counsel.

This analysis is consistent with the analysis which was previously employed in Delaware. See Board Case No. 11, 1988, in which a former government lawyer was disciplined for representing a private client in connection with matters stemming from the very same conduct which the government lawyer had previously investigated.

#### **CONCLUSION**

Lawyer B's representation of Lawyer A will not involve representation of a private client "in connection with a matter in which (Lawyer B) participated personally and substantially" as Disciplinary Counsel. Since the matters are factually distinct (as illustrated, in part, by their distinct chronological separation), there is no violation of DLRPC Rule 1.11.

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