

DELAWARE STATE BAR ASSOCIATION

CONMUTTEE ON PROFESSIONAL ETHICS

OPINION 1997 - 5

November 25, 1997

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

INTRODUCTION

A member of the Delaware Bar (the "Inquiring Attorney") has requested an opinion from the Committee regarding his ethical obligation to provide his former client's new attorney with confidential information which the Inquiring Attorney received pursuant to a Joint Defense Agreement.

FACTS

The Inquiring Attorney previously represented criminal defendant A. While representing A, and with A's consent, Inquiring Attorney entered into a Joint Defense Agreement with counsel representing a co-defendant, B. Pursuant to the Joint Defense Agreement, the Inquiring Attorney received confidential information from B's attorneys.

Relevant paragraphs of the Joint Defense Agreement provide as follows:

AGREED, that defense materials obtained by any of the undersigned counsel to the extent that such materials, etc. were or are confidential and/or privileged under the applicable law of the jurisdiction in which such claim of confidentiality and/or privilege may be raised, shall remain confidential and shall be protected from disclosure to any third party notwithstanding their disclosure to the undersigned and/or their clients, except as provided herein . . .

AGREED, that neither counsel, nor our clients, will disclose defense materials, or the contents thereof, to anyone except our respective clients, attorneys within our firms, or our employees or agents, without first obtaining the consent of all counsel who are parties to this Agreement and whose clients or who themselves may be

entitled to claim any confidentiality and/or privilege with respect to such materials. It is expressly understood that nothing contained herein shall limit the right of any counsel to disclose any documents or information obtained exclusively from that counsel's client or any information which has been independently obtained by such counsel . . .

AGREED, that, in the event any of the undersigned counsel, determines his client no longer has, or no longer will have, mutuality of interest in a joint defense for any reason, he will promptly notify the other undersigned counsel of his withdrawal from this Agreement, which will thereupon be terminated as to that client; provided, however, that no such termination shall affect or impair the obligations of confidentiality with respect to defense materials previously furnished pursuant to this Agreement; and it is further

AGREED, that all documents containing information received from another party or his counsel pursuant to this Agreement shall be delivered back to counsel for the originating party immediately after any of the following events: the conclusion of the litigation as to that party; the disposition on behalf of the receiving law firm's client of any proceedings resulting from this matter; the termination of the receiving law firm's representation of its client; or the withdrawal of the receiving law firm from this Agreement

The Inquiring Attorney's representation of A was recently terminated. A's new attorney has asked the Inquiring Attorney to turn over all material in his file including material obtained from B's attorney pursuant to the Joint Defense Agreement. The new attorney, however, refuses to enter into the Joint Defense Agreement. Inquiring Attorney has advised B's attorney of the request for information; B's attorney objects to production. Accordingly, Inquiring Attorney has not turned information secured pursuant to the Joint Defense Agreement over to A's new attorney.

PERTINENT RULES

No direct authority in Delaware or elsewhere has been found. The Rules of Professional Responsibility contain two rules dealing with attorneys' professional obligations to former clients, Rule 1.9 and Rule 1.16.

Rule 1.9(b) provides, in pertinent part:

A lawyer who has formerly represented a client in a matter shall not thereafter: . . . (b) use information relating to the

representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require . . . or when the information has become generally known.

Rule 1.9(b) prohibits a lawyer from using information acquired in the course of representation to disadvantage a former client. Comment to Rule 1.9.

Rule 1.16(d) provides, in relevant part:

"[upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled ... ".

There is uncertainty under Rule 1.16(d) regarding the scope of "papers and property" to which a former client is "entitled". 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering §1.16:501 at 486.1 (2nd ed. 1997). Some jurisdictions distinguish between (1) papers to which the client is entitled and (2) papers that are the lawyer's work product. Id. at 486.2. For example, the Kansas Bar Ass'n. Prof. Ethics Advisory Committee, Op. 92-05, 8 Law. Man. Prof. Conduct 314 (1992), states that "client property," which must be returned by the lawyer includes documents received from the client, produced through the lawyer's efforts (such as pleadings and deposition transcripts), and other documents necessary to understand and interpret the foregoing. "Work product," on the other hand, meaning the lawyer's working notes, impressions and draft documents, remains the lawyer's property. Id. at 486.2 n.2; see also Corrigan v. Armstrong-, 824 S.W. 2d 92, 97-98 (Mo.Ct.App. 1992) (client not entitled to work product absent a showing of need); but see Kallen v. DeLug, 203 Cal.Rptr. 879, 885 (Calif.Ct.App. 1984) (attorney work product belongs to client).

Delaware courts have not specifically decided the scope of "papers and property" which must be surrendered under Rule 1.16(d). In Bailey v. State of Delaware, Del. Supr., No. 292, Moore, J. (Oct. 29, 1986) (Order), the Supreme Court directed the Public Defender's office to comply with its responsibilities under Rule 1.16(d) by "providing all documents and factual information, including any legal research" to a criminal defendant's new attorney. The Supreme Court's Order does not, however, analyze the scope of Rule 1.16(d) nor does it address whether there are any limitations inherent in the Rule. It does not appear that there were any objections to production of the Public Defender's files. Accordingly, the Order in Bailey does not provide much guidance in analyzing the issue here.

DISCUSSION

In the Committee's view, the Inquiring Attorney's obligations to his former client under Rule 1.16(d) do not, under the circumstances presented, include surrendering information which Inquiring Attorney received pursuant to the Joint Defense Agreement. First, it does not appear that the information is "papers and property to which the client is entitled." The information was provided to the Inquiring Attorney by counsel for B pursuant to express limitations set forth in the Joint Defense Agreement. Moreover, to the extent that the information includes the Inquiring Attorney's mental impressions and work product, it is not property to which A is automatically entitled.

Second, Rule 1.16(d) requires an attorney whose engagement is terminated to take steps that are "reasonably practicable" to protect the former client's interest. In the Committee's view, it would not be "reasonably practicable" for the Inquiring Attorney to breach the Joint Defense Agreement by providing the information to a person who is outside the scope of the Agreement. Doing so could be extremely prejudicial to B, who while not the client of the Inquiring Attorney, is still owed a duty of fairness. See Rule 3.4 (addressing fairness to opposing party in litigation

setting) and Rule 4.4 (prohibiting a lawyer from using methods of obtaining evidence that would violate the rights of third parties including adverse parties in litigation). Indeed, if the Inquiring Attorney revealed the information to A's new attorney, the Inquiring Attorney would violate B's right under the Joint Defense Agreement.

Third, A's new attorney presumably can gain access to the information by becoming a party to the Joint Defense Agreement. Thus, to the extent the new attorney needs the information, there appears to be a readily available way for him to get it without prejudicing B.

Finally, the Committee does not believe that Inquiring Attorney's refusal to surrender the information constitutes a violation of Rule 1.9. The failure to turn over the information does not constitute using the information to the former client's disadvantage as contemplated by Rule 1.9.

CONCLUSION

In sum, the Committee believes that the Inquiring Attorney is not ethically obligated to surrender information received under the Joint Defense Agreement to A's new attorney under the facts presented.

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