

DELAWARE STATE BAR ASSOCIATION
COMMITTEE OF PROFESSIONAL ETHICS

OPINION 1998 - 1

April 21, 1998

**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 "Attorney") has requested an opinion from the Committee regarding his continued representation of a prisoner (the "Client"), who is suing a former correctional officer for alleged civil rights violations (the "Civil Rights Action").

FACTS

Attorney is currently employed by a departmental body of the State of Delaware (the "Department"). Prior to that employment, Attorney began representation of Client in the Civil Rights Action. Client is suing the former correctional officer in his individual capacity; as a result, any judgment would be against him as an individual. Delaware law does provide for indemnification of state employees adjudged to be liable in certain circumstances. Accordingly, the State may ultimately be responsible to pay any judgment obtained by Client.

Attorney's current employment with the Department is wholly unrelated to Client's Civil Rights Action. However, Attorney was previously employed as a Deputy Attorney General for Delaware. In that capacity, he at times represented the Department of Correction, and specifically handled prisoner suits against correction officials alleged to have violated prisoners' rights.

Attorney has advised his supervisors at the Department of his representation of Client and the potential State indemnification obligation. Attorney's supervisors consented to Attorney's continued representation of Client, so long as it does not interfere with his employment responsibilities. Attorney has also advised Client of the potential conflict of

interest in pursuing a claim on Client's behalf that could result in an entry of a money judgment against the State of Delaware. Client has also consented to Attorney's continued representation.

ANALYSIS

Attorney's current employment by the Department implicates Rule 1.7, which provides in relevant part:

- (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.

In analyzing the applicability of Rule 1.7, it is important to determine exactly who is considered to be Attorney's employer and client.

If Attorney's present employer is deemed to be the State of Delaware, as opposed to the Department, the scope of the limitations contained in Rule 1.7 is much broader than if Attorney's present employer is deemed to be limited to the Department. Typically, "the identity of the government client is a matter to be decided between the lawyer and authorized representatives of the client under Rule 1.2." ABA Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee"), Formal Opinion 97-405, 4/19/97, released 7/1/97. The best practice would be to have the scope of the representation defined at the beginning of the relationship. If not, the identity of the client "may be inferred from the reasonable understandings and expectations of the lawyer and responsible government officials."

Id.

In this case, Attorney's responsibilities are limited to the Department, and his supervisors are also employed by the Department. As a practical matter, Rule 1.7 is intended to ensure a lawyer's loyalty to his client. Del. R. Prof C. 1.7 comments ("Loyalty is an essential element in the lawyer's relationship to a client"). If a lawyer's duties are limited to a specific agency, then concerns over loyalty to a client are mitigated when the potentially adverse representation involves a separate agency for which the lawyer has no responsibilities. Under such circumstances, it appears reasonable to identify Attorney's employer and client as the Department.

Other authorities support this interpretation and recognize the propriety of a lawyer representing interests that may be adverse in the context of large enterprises or governmental entities. For example, the comments to Rule 1.7 provide:

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both parties consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party.

The comments to Rule 1.7 imply, if not explicitly recognize, that a lawyer's employment by a governmental agency does not necessarily disqualify the lawyer from taking positions adversarial to other agencies of the same governmental entity. There may, of course, be instances where taking a position adverse to a separate agency could impact the lawyer's

responsibilities towards the agency employing the lawyer. For this reason, informed consent to the adverse representation becomes very important.

Decisions from other states dealing with the issue of a lawyer's representation of a distinct arm of a governmental body are also instructive on this point. In a decision from South Carolina, a lawyer in private practice who represented a county Department of Social Services was permitted to represent a local town in a dispute with the State's Department of Corrections. Interpreting Rule 1.7, the South Carolina Ethics Committee deemed the two agencies to be distinct, and not the same client. South Carolina Ethics Opinion 94-28 (12/94).

In a decision from South Dakota, a lawyer who practiced in a small town and served as a part-time lawyer for the town was permitted to represent a bar owner in a misdemeanor prosecution by the town, where both parties consented to the representation and the lawyer believed that his representation of the bar owner would not be adversely affected by his status as lawyer for the town. South Dakota Ethics Opinion 92-1 (2/12/92).

Similar results were reached in two Rhode Island decisions. In the first case, a lawyer employed by a state agency was permitted to represent clients before state agencies other than the agency by which he was employed, so long as no conflict existed between his potential clients and the state agency by which he was employed. Rhode Island Ethics Opinion 91-63 (9/19/91). In the other case, a lawyer with a part-time position with a state agency could represent an employee of another agency in a matter unrelated to the agency employing him. Rhode Island Ethics Opinion 94-43 (7/27/94).

The ABA Ethics Committee's Formal Opinion 97-105, supra, also follows this line of reasoning. The ABA Ethics Committee dealt with the question of whether a lawyer in private practice performing legal services for one governmental entity could represent private clients against another component of the same government in an unrelated matter without notifying either or both of the clients, and seeking their consent as required by Rule 1.7. The opinion dealt with whether consent was required, implicitly recognizing that the dual nature of the relationship was otherwise acceptable, so long as Rule 1.7's requirements relating to consent

and possible material limitation were complied with. See also, Delaware State Bar Association Committee on Professional Ethics Opinion 1985-2 (former lawyer for County Council, who was employed by City Solicitor, permitted to represent City in suit against County).

Attorney in this case obtained the consent of both the Department and Client to the questioned representation. Attorney's inquiry did not mention any concerns with respect to (i) an adverse effect on the relationship with the Department resulting from representation of Client (Rule 1.7(a)); or (ii) any material limitation on his responsibilities to Client resulting from employment by the Department (Rule 1.7(b)). To the extent such concerns do exist, Attorney would have to satisfy the specific requirements of Rule 1.7(a) and (b). Absent such concerns, Rule 1.7 does not prohibit continued representation of Client.

Attorney's prior employment as a Deputy Attorney General, with responsibilities to the Department of Correction, is more problematic. This prior employment implicates two separate Rules -- Rule 1.9 and Rule 1.11.

Under Rule 1.9:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(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 with respect to a client or when the information has become generally known.

Rule 1.11 provides in relevant part:

(a) Except as the 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

(b) Except as the 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.

These two Rules present an apparent conflict with regard to the activities of a former government attorney. Rule 1.9(a) prohibits representation "in the same or a substantially related matter" Some decisions interpret the language "substantially related" in broad terms, to include the same subject matter as opposed to simply factually related matters. See, e.g., Kaselaan and D'Angelo Associates, Inc. v. D'Angelo, D. N.J., 144 F.R.D. 235, 239 (1992). This broad definition brings Rule 1.9(a) into conflict with Rule 1.11 (a), which only prohibits a former government attorney from representing a client in a matter in which he "participated personally and substantially as a public officer or employee."

A recent ABA Ethics Committee opinion addresses the conflict that exists between Rule 1.9 and Rule 1.11. Because the two Rules can overlap and sometimes conflict with one another, the ABA Ethics Committee concluded that both Rules were not intended to apply in the same situation. "Because Rule 1.11 was plainly intended to define the conflict of interest obligations of former government lawyers, the Committee concludes that Rule 1.11 occupies the

field to the exclusion of Rules 1.9(a) and (b)."¹ ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 97-409, released 11/11/97. The Committee adopts the reasoning of ABA Formal Opinion 97-409 on this point. Accordingly, the narrower restriction of Rule 1.11 -- "personally and substantially" involved in matter -- governs subsequent employment by a government lawyer. The ABA Ethics Committee did note, however, that Rule 1.9's provisions relating to use of information gained during the representation still applied. Rule 1.9's limitations in this regard are in harmony with similar limitations found in Rule 1.11 (b).

Attorney has not indicated that he had personal and substantial involvement in the claims against the defendant in Client's case. Accordingly, Attorney's continued representation of Client would not implicate Rule 1.11 (a) in the present matter. However, to the extent that Attorney obtained information during his tenure with the Attorney General's office relevant to the claims against the defendant in Client's Civil Rights Action, Rule 1.9(b) and Rule 1.11 (b) would be implicated. Rule 1.11 (b) would impose a blanket prohibition against representation of Client in such circumstances. Accordingly, Attorney must carefully consider whether he did, in fact, obtain "confidential government information" about the defendant or the defendant's defense of the case in the Client's Civil Rights Action while employed as a Deputy Attorney General. If so, continued representation of Client would be prohibited. If Attorney has no such information, then representation of Client is permissible. See also, DSBA Ethics Committee Opinion 1985-2,

¹ ABA Model Rule 1.9 differs in language from Del. R. Prof. C. 1.9, although the underlying purpose of each is similar enough to allow comparison.

supra, (receipt of confidential information during prior governmental employment would require withdraw from representation).

CONCLUSION

Attorney advised both Client and the Department of the potential conflict resulting from Attorney's continued representation of Client. Inasmuch as both consented, Attorney's continued representation of Client does not violate Rule 1.7, so long as Attorney believes that the representation of Client will not adversely affect his relationship with the Department and that his employment will not adversely affect his representation of Client. In addition, Attorney's representation of Client does not violate Rules 1.9 and 1.11 so long as Attorney was not personally and substantially involved in Client's case while employed as a Deputy Attorney General, and did not obtain information relevant to Client's case while so employed.

*Committee member Elizabeth M. McGeever abstained from consideration of this Opinion.

414426