

**DELAWARE STATE BAR ASSOCIATION COMMITTEE ON
PROFESSIONAL ETHICS OPINION 2003-1
January 28, 2003**

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

A member of the Delaware Bar has requested an opinion from the Committee as to whether two attorneys employed by the Office of the Wilmington City Solicitor may, in a manner consistent with the Rules of Professional Conduct, provide legal advice to the City of Wilmington Police Trial Board (the "Trial Board") and to the City of Wilmington Police Office of Professional Standards (the "OPS") regarding the same disciplinary case.

Based on the facts presented, it is the Committee's opinion that such a simultaneous representation cannot be undertaken in a manner consistent with the Rules of Professional Conduct.

FACTS

The OPS and the Trial Board are both units within the City of Wilmington Police Department. The OPS investigates, and if appropriate, charges officers with violations of the Police Rules of Conduct. The OPS assigns an individual officer from the OPS staff to prosecute those cases where the police officer under investigation has not retained counsel. The Trial Board hears the individual disciplinary cases and determines whether a violation has occurred, and if so, determines the appropriate punishment. Punishments range from written warnings to termination of employment. The Trial Board is convened on an ad hoc basis and consists of high ranking, non-attorney administrative staff of the City Police Department.

When requested to do so by the Trial Board, the Office of the City Solicitor provides legal advice to the Trial Board regarding the disciplinary rules and the interpretation of the rules. The Office of the City Solicitor is also charged with providing the OPS with legal advice regarding the disciplinary rules, and is charged with prosecuting those disciplinary cases where the police officer under investigation has

retained counsel.¹ Thus, it is possible that the Office of the City Solicitor could be called upon to provide legal advice to both the prosecutorial and adjudicative arms of the Police Department in the same disciplinary hearing.

Currently, the City Solicitor's office has nine attorneys and all of the attorneys are located in the same office building. The attorneys have individual offices and share conference rooms. The attorneys maintain their files in their individual offices. One Assistant Solicitor, Lawyer A, advises the Trial Board, and a different Assistant Solicitor, Lawyer B, advises the OPS. Lawyer A also has the responsibility for supervising three of the attorneys in the Office of the City Solicitor, including Lawyer B. This supervisory role requires that Lawyer A and Lawyer B discuss the specifics of Lawyer B's case load.

DISCUSSION

The Committee has been asked to opine on whether Lawyer A and Lawyer B may, consistent with the Rules of Professional Conduct (the "Rule" or "Rules"), represent the Trial Board and the OPS respectively, in the same disciplinary hearing. Specifically, the Committee has been asked whether such dual representation violates Rules 1.6, 1.7, 1.9, 1.10, 1.13 and/or 3.1. The Committee was also asked whether any violation of the Rules could be cured through the use of ethical screens and/or waivers of conflict from the clients.

We begin with Rules 1.10 and 1.7(b), which the Committee finds to be dispositive.

Rule 1.10

Rule 1.10 provides in relevant part:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

...

¹ The Office of the City Solicitor could be called upon to prosecute disciplinary cases where the officer is appearing "pro se," but this is not the usual case.

(d) A disqualification prescribed by this Rule may be waived by the client under the conditions stated in Rule 1.7.

As an initial matter it must be determined whether the Office of the City Solicitor qualifies as a "firm" under the Rule. The Comment to the Rule states that the term "firm" includes lawyers in "a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization." As the comment to the Rule states, "whether two or more lawyers constitute a firm within this definition can depend on specific facts."

In a prior opinion, 1991-2, the Committee concluded that the Office of the City Solicitor was not a firm under Rule 1.10. In reaching that conclusion, the Committee relied on the ABA Formal Ethics Opinion 342 (1975) which concluded that the imputed disqualification rules of the Code of Professional Responsibility should not apply to a government agency, citing the differing attorney compensation structure between government attorneys and attorneys in private practice, and the additional duty of the prosecution to seek justice rather than a conviction. The Committee also cited the fact that at that time, the Office of the City Solicitor was divided into civil and criminal divisions housed in two different locations, and the issue involved whether a lawyer in the criminal division could prosecute a client represented by a lawyer in the civil division in an unrelated matter.

We believe Opinion 1991-2 is distinguishable from the instant case and conclude that under the facts set forth above, the Office of the City Solicitor should be considered a firm within the meaning of Rule 1.10(a). Unlike the situation in 1991, the Office of the City Solicitor no longer has multiple divisions and all of the attorneys now work in the same location. Moreover, if the difference between the compensation structure for government and private attorneys were a determinative factor, then not-for-profit organizations providing legal services should not be considered firms under the Rule, and those types of organizations are subject to Rule 1.10(a). Finally, the Comment to the Rule expressly states that imputed disqualifications arising by virtue of lawyers moving

between private practice and government practice are governed by 1.11, not Rule 1.10:

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. . . . In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government.

Since the Comment carves out the application of 1.10 to governmental lawyers under certain limited circumstances, the implication is that there is no blanket exemption from Rule 1.10 for government lawyers currently employed by government agencies.

²

Because we view the Office of the City Solicitor as a Firm under Rule 1.10, Lawyer A and B cannot simultaneously represent the OPS and the Trial Board in the same hearing unless a single lawyer could do so under Rule 1.7.

Rule 1.7

Rule 1.7(b)³ provides:

(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. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

With respect to Rule 1.7(b), it appears to the Committee that the duty to provide impartial advice to the Trial Board would materially limit and would adversely affect a single lawyer's ability to perform the role of advocate for the OPS. Similarly, a lawyer's role as advocate for the OPS could adversely affect his or her ability to give impartial

² The Preamble to the Rules does provide that the Rules do not abrogate any authority given to government lawyers under constitutional, statutory or common law. We have found no precedent, however, suggesting that the Office of the City Solicitor has the authority to represent both the prosecutorial entity and the adjudicative entity in the same administrative hearing. In fact, Delaware authority suggests the contrary. See Texaco Refining and Marketing, Inc. v. Assessment Board, Del. Super., 579 A.2d 1137 (1989)(counsel for Delaware City could not, consistent with the requirements of due process, serve as prosecutor and provide legal advice to the assessment board in the same hearing).

³ Rule 1.7(a), involving a directly adverse interest, is not implicated by these facts.

advice to the Trial Board.

Moreover, a single lawyer appears to be prohibited from representing both the OPS and the Trial Board because of a responsibility owed to a third person, namely, the police officer. In Texaco Refining and Marketing, Inc. v. Assessment Board, Del. Super., 579 A.2d 1137 (1989), the Court held that the due process rights of a litigant were violated when the same lawyer served as prosecutor and provided legal advice to the assessment board during an assessment hearing.

Client consent will not cure the problem. For the waiver exception to apply, the single lawyer must "reasonably believe" the representation of the OPS and the Trial Board will not be adversely affected. Rule 1.7(b)(1). The OPS and the Trial Board have different interests and the Committee believes that representing both simultaneously in the same hearing would adversely affect the representation of both clients. Moreover, Texaco prohibits a single lawyer from simultaneously acting as prosecutor and legal advisor to an adjudicatory body in the same hearing, out of concern for the due process rights of the defendant. Texaco, 579 A.2d at 1142. Under these circumstances, the Committee concludes that a single lawyer could not reasonably believe that he or she could undertake such a dual representation. Therefore, Rule 1.10(a), combined with Rule 1.7(b), prevents Lawyer A and Lawyer B from simultaneously representing the Trial Board and the OPS in the same hearing.

With respect to Rules 1.6 and 3.5, the Committee believes any potential confidentiality issue could be cured.

Rule 1.6

Rule 1.6 provides in relevant part: "(a) a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation except for disclosures that are impliedly authorized in order to carry out the representation."

For the purposes of this analysis, the Committee believes that the Trial Board and

the OPS should be viewed as separate clients because they are performing two distinctly different roles in the context of the hearing. Because Lawyer A supervises Lawyer B, it is likely that Lawyer B will disclose information obtained from the OPS to Lawyer A. Normally, a lawyer's consultation with a supervising lawyer would be a communication impliedly authorized to carry out the representation. Here, however, the situation is complicated by Lawyer A's representation of another entity in the same proceeding. Conceivably, the discussions between Lawyer A and Lawyer B could be detrimental to the interests of the Trial Board or the OPS. Under these circumstances, the Committee deems it advisable either to erect an ethical screen⁴ between Lawyer A and Lawyer B or to obtain the written consent of both the OPS and the Trial Board to the disclosure of information relating to the respective representation .

Rule 3.5

Rule 3.5 provides in pertinent part: "A lawyer shall not communicate ex parte with [a judge, juror or prospective juror] except as permitted by law." The dual representation outlined above has the potential to run afoul of this Rule. Because Lawyer A is giving legal advice to the Trial Board, it is prudent to consider Lawyer A to be the equivalent of a law clerk under this Rule. Given Lawyer A's supervisory responsibility over Lawyer B, there are multiple ways an ex parte communication could occur - either in the context of Lawyer B soliciting advice as to how to handle a matter, or in the context of Lawyer A reviewing Lawyer B's work. If the Office of the City Solicitor obtains all of the parties' consent to the dual representation of the OPS and the Trial Board, to avoid a violation of this Rule, it would be advisable to ethically screen the attorneys representing the OPS and the Trial Board from each other, and ensure that neither attorney has supervisory responsibility over the other.

⁴ The Committee uses the term "ethical screen" to refer to the steps taken to ensure that two lawyers in the same firm do not share or inadvertently learn information regarding two or more clients. Such steps usually involve: the lawyers not discussing their matters with lawyers on the other side of the screen; segregating the clients' files; making sure that the lawyers on either side of the screen do not have access to the others' files; and, notifying others in the firm that they may not discuss certain matters with the screened lawyers.

It is the opinion of the Committee that no other Rules are materially implicated by the posited facts. The other Rules brought to the Committee's attention by the inquiring attorney are discussed below.

Rule 1.9

Rule 1.9 states, in pertinent part, that 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 interest 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...

It appears that the repeated representations of the Trial Board and the OPS has been undertaken by the same lawyer. That is, it is the Committee's understanding that Lawyer A consistently represents the Trial Board and Lawyer B consistently represents the OPS. Therefore, it does not appear that Rule 1.9 is implicated.

Rule 1.13

Rule 1.13 speaks to a lawyer's duty when representing an organization. The facts presented do not implicate Rule 1.13.

Rule 3.1

Rule 3.1 outlines a lawyer's duty to bring only meritorious claims and contentions. There is nothing in the dual representation of the OPS and the Trial Board by the Office of the City Solicitor which would implicate this Rule.

CONCLUSION

Because the Committee views the Office of the City Solicitor as a firm under the facts presented, the Committee is of the opinion that the posited conduct would violate Rule 1.10, because under Rule 1.7(b) a single attorney could not represent the OPS and the Trial Board in the same proceeding. Moreover, the disqualification is one which cannot be cured solely by obtaining a waiver of conflict from the OPS and the Trial

Board.

The factual scenario posited by the inquiring attorney does not appear to implicate Rules 1.9, 1.13 or 3.1. The potential problems associated with Rules 1.6 and 3.5 could be addressed by using ethical screens and by obtaining client consent.