DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 2003 – 2

February 14, 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 (the "Inquiring Attorney") has requested an opinion from the Committee regarding her prosecution of an administrative matter on behalf of the State of Delaware, when the target of that prosecution is a litigant that came before the Inquiring Attorney when she served as a state court judicial law clerk. Based on the facts presented, it is the Committee's opinion that the Inquiring Attorney is not barred from representing the State of Delaware in the administrative prosecution under the applicable Rules of Professional Conduct. One member of the Committee dissents from the analysis and conclusion of this Opinion (the "Dissent").

FACTS

The Inquiring Attorney formerly served as a law clerk to a Delaware state court judge. In that capacity the law clerk worked with the Judge in connection with a civil action. The civil action involved Party A who brought a libel action against multiple Parties B. Person C made allegations about Party A that were the subject of the libel lawsuit against Parties B**.** The law clerk prepared a bench memo, discussed the matter with the Judge, and assisted the Judge in preparing a written opinion with respect to the libel action.

This libel action is still pending in the state court system on the issue of damages. The Inquiring Attorney does not possess any confidential non-public information regarding Party A that

she acquired during her service as a law clerk.

Currently the Inquiring Attorney is a Deputy Attorney General representing the State of Delaware and is assigned to administrative prosecutions. Party A is subject to the jurisdiction of an administrative board. Person D has made factual allegations concerning Party A that may result in disciplinary action. These factual allegations are different than those made by Party C about Party A; however, there is a possibility that the factual allegations by Person C that were at issue in the pending libel action by Party A against Parties B may arise during the course of any contemplated administrative prosecution. As a result, for purposes of this opinion, the Committee assumes that the factual allegations by Person C will be referenced during an administrative prosecution of Party A.

The State of Delaware contemplates filing a complaint against Party A before the administrative board. The Inquiring Attorney has been assigned to this matter and would be responsible for the complaint against Party A and the prosecution of Party A (hereinafter referred to as the "Administrative Prosecution").

DISCUSSION

Rule 1.12(a) states in relevant part: "[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge . . . or law clerk to such a person, unless all parties to the proceeding consent after consultation." Inquiring Attorney has asked whether this section precludes her from undertaking the administrative prosecution of Party A. The Committee assumes that the Inquiring Attorney cannot obtain consent from all parties to the proceeding.

The Committee believes that for the purposes of Rule 1.12, the Inquiring Attorney has participated personally and substantially as a law clerk in the A versus B libel action. The question is whether the matter of the libel action A versus B should be deemed the same "matter" as the contemplated Administrative Prosecution of the Board against Party A for purposes of Rule 1.12.

The commentary concerning Rule 1.12 recognizes that Rule 1.12 "generally parallels Rule 1.11" (Successive government and private employment). Rule 1.12, Commentary. The Committee believes that case law construing "matter" within the context of Rule 1.11 can be used to construe "matter" within the context of Rule 1.12. The Committee recognizes that the Inquiring Attorney's present employment is not "private," but the Committee believes that the policies underlying Rule 1.11 apply equally to subsequent public employment as to subsequent private employment. Therefore, the language and principles of Rule 1.11 should be helpful (although not necessarily dispositive) in determining whether the matter of the libel action A versus B should be deemed the same "matter" as the contemplated Administrative Prosecution of the Board against Party A.

This Committee has previously opined on the meaning and scope of a "matter" within the context of Rule 1.11. In Opinion 1998-2, the Committee stated:

> Rule 1.11(a) is just one part of an overall rule addressing if and when an attorney formerly in government practice may represent a client in subsequent private practice. The definition of matter in Rule 1.11(d)(1) talks in terms of actual prior proceedings and controversies. In the Committee's view, Rule 1.11(d)(l) attempts to define a bright line standard as to the definition of matter. It is not intended to encompass all situations in which a set of circumstances has some facts in common with a later set of circumstances. If two sets of circumstances have some facts in common, and through those common facts, implicate the policies underlying Rule 1.11, that situation is addressed by another portion of Rule 1.11. . . .
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> In Flego v. Philips, Appel & Walden, Inc., 514 F. Supp. 1178 (D.N.J. 1981), the court considered what constituted the same "matter" for the purposes of interpreting DR9-101(B), the predecessor to Rule 1.11. The Flego court utilized a definition stated by the ABA Committee on Professional Ethics, which defined "matter" as follows:

> [T]he term seem[s] 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.

Committee on Professional Ethics, Opinion 1998-2; see also Opinion 1997-3 (lawyer formerly employed by the Office of Disciplinary Counsel may represent another lawyer in proceedings before the ODC, even though the former ODC lawyer worked on an investigation while employed at the ODC that resulted in the lawyer-client receiving a private admonition from the ODC, because the earlier private admonition and the current investigation were not the same "matter").

In consideration of the above-cited case law and past opinions of this Committee, it is not necessary to adopt the bright line standard of the Flego Court. There should be at a minimum, however, a substantial nexus between the two proceedings before those proceedings should be considered the same matter.

Applying this standard to the facts here, the libel action and the contemplated Administrative Prosecution are not the same matter. To be sure, there is a factual overlap in that the two matters both involve Party A, and there may be an additional overlap in that the two matters involve in part the same factual allegations. Nonetheless, this type of overlap does not rise to the level of a substantial nexus between the two proceedings to consider them the same matter. Similarly, applying the Flego test, the two proceedings arise out of different transactions and are substantially differently proceedings that should not be deemed to be the same lawsuit or litigation.

Moreover, the purpose of Rule 1.12 and Rule 1.11 to prevent abuse of the position held as a public employee in anticipation of future private employment would not be promoted by finding that the libel action and the contemplated Administrative Prosecution are the same matter. Rather, such a finding would unnecessarily hamper a law clerk in her ability to obtain subsequent private

employment.

The Inquiring Attorney has brought to the Committee's attention In re Tenure Hearing of Onorevole, 511 A.2d 1171 (N.J. 1986). In that case, Attorney Glickman previously served as an administrative law judge in the Office of Administrative Law and had presided in a case involving a budget appeal involving the Weehawken Board of Education ("Board"). After leaving the bench and entering private practice, Attorney Glickman was retained by the Board to bring tenure charges against Superintendent Dr. Richard E. Onorevole. Id. at 1173. Onorevole was a member of the Board during the budget appeal, and testified about issues relating to the budget. Onorevole sought to disqualify Glickman.

The New Jersey Supreme Court found that Glickman acquired no information from Onorevole relating to the tenure action against him. The Court considered whether the New Jersey Rule of Professional Conduct 1.12(a) (which is identical to the Delaware Rule 1.12(a)) disqualified Glickman from representing the Board. The Court concluded without specific analysis that the prior contested school board budget appeal in which Glickman presided as an administrative law judge was a different "matter" from the second tenure action against Onorevole. The Onorevole decision supports the Committee's conclusion that the mere overlap of certain facts and/or parties is insufficient in and of itself to find that two different proceedings are the same matter.

The Committee has also considered whether Rule 1.11(b) prevents the Inquiring Attorney from representing the Board in the contemplated Administrative Prosecution. That Rule states:

> 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.

Delaware Lawyer Rules of Professional Conduct, Rule 1.11(b).

Based upon the facts before the Committee, the Inquiring Attorney has not acquired any confidential information while the attorney was a public employee. Therefore, Rule 1.11(b) does not present a bar to the contemplated Administrative Prosecution.

Finally, the Committee has also considered whether the Inquiring Attorney's representation of the State creates an appearance of impropriety. This standard existed under Canon 9 of the Delaware Lawyer's Code of Professional Responsibility that previously applied in Delaware (and other jurisdictions), but was eliminated by the promulgation of the Delaware Rules of Professional Conduct, and specifically, Rule 1.11. See Delaware Lawyer's Code of Professional Responsibility, DR 9-101 (1980). The continued viability of the "appearance of impropriety" is uncertain, but the commentators of the Model Rules have observed that "nevertheless, the [appearance of impropriety] test refuses to die." *Annotated Model Rules of Professional Conduct (4th ed. 1999), Center for Professional Responsibility of the American Bar Association,* Rule 1.11, page 177. Therefore, for purposes of this opinion, the Committee assumes without deciding that the Delaware Supreme Court would alternatively consider whether the proposed representation of the State in connection with the contemplated Administrative Prosecution would create an appearance of impropriety.

The proposed representation of the State in connection with the contemplated Administrative Prosecution would not create an appearance of impropriety. The Inquiring Attorney did not acquire any confidential non-public information regarding Party A during her service as a law clerk. The factual allegations at issue in the Administrative Prosecution are different than those made by Person C about Party A in the libel action. There is no reasonable inference that the Inquiring Attorney could have anticipated that her subsequent employment would place her in a position of prosecuting

Party A. Party A will have unfettered choice of independent legal counsel to vigorously defend him in any Administrative Prosecution. Therefore, any such Administrative Prosecution should not be tainted by the mere fact that the Inquiring Attorney may have prior, publicly available knowledge about Party A.

The Dissent argues that the Committee is incorrect by "believ[ing] that case law construing 'matter' within the context of Rule 1.11 can be used to construe 'matter' within the context of Rule 1.12. The Dissent further suggests that the Committee reaches this conclusion "without support." Dissent, at one. The Committee respectfully disagrees with the explicit and implicit assertions of the Dissent.

First, as cited above, the Commentary to Rule 1.12 explicitly refers to Rule 1.11 and its commentary. Therefore, there is material support for the Committee's conclusion.

Second, the Dissent misstates the basis for the Committee's conclusion that the libel action and the contemplated Administrative Prosecution are not the same matter. The basis for that conclusion of this Committee is a review of the case law discussing the "matter" issue in the context of Rule 1.11, and also a careful analysis of the facts presented here by the inquiring attorney, and consideration of the policies of Rule 1.12 and 1.11 as reflected by the language of those rules and the commentary to those rules. Indeed, it bears emphasizing that the standard the Committee has applied here is a different and more stringent standard (more likely to lead to a finding that two matters are the same) than those articulated by Courts considering the "matter" issue under Rule 1.11.

The Dissent raises various policy arguments concerning the exercise of police power of the State. Without commenting on the general validity of those policy arguments, the Committee concludes that those policy arguments should not change the analysis or result here. Those

policy arguments were available to the Delaware Supreme Court when it promulgated Rules 1.12 and 1.11. To the extent that those policy arguments should be incorporated into the application of Rules 1.12 and 1.11, the Committee believes that the language and commentary to those Rules do so.

The Dissent appears to espouse the "same facts" standard to determine if two matters are the same. See Dissent at two (citing General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974)). To the extent this standard is different, the Committee believes that application of this standard to the facts before the Committee would result in the same conclusion– that the libel action and the contemplated Administrative Prosecution are not the same matter. The Dissent further quotes a portion of the decision in Cho v. Superior Court of Los Angeles County, 39 Cal.App.4th 113, 120 (Ct. App. Cal. 1995) that applies an appearance of impropriety standard. The Committee has expressly considered that alternative standard and has found no appearance of impropriety.

CONCLUSION

In summary, the Committee concludes that no Rule of the Delaware Rules of Professional Conduct prevents the Inquiring Attorney from representing the State of Delaware in the contemplated Administrative Prosecution. One member of the Committee dissents from the analysis and conclusion of this Opinion (the "Dissent"). The Dissent is attached to this Opinion.