DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 2008-3
September 30, 2008

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

Nature of the Inquiry

The inquirer is a Delaware attorney (hereinafter "Attorney") who is employed by the City of Wilmington (the "City") as an Assistant City Solicitor. The Attorney has commenced a lawsuit against the City and two individuals who he claims have engaged in discriminatory and/or retaliatory conduct as a result of his filing an age discrimination charge with the Delaware Department of Labor. The Attorney seeks an opinion as to whether his continued employment by the City as an Assistant City Solicitor, while simultaneously pursing the lawsuit, violates Rule 1.7 of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC"). The Committee is of the opinion that Attorney's continued employment by the City as an Assistant City Solicitor does not constitute a violation of DLRPC 1.7. As explained below, we reach this conclusion because there is no reason to believe that Attorney's future representation of the City will be limited by his pursuit of the lawsuit.

Background Facts

Since January 2002, Attorney has been employed as an Assistant City Solicitor by the City. On January 7, 2007, Attorney filed an age discrimination charge against the City with the Delaware Department of Labor/Equal Opportunity Commission (the "Department of Labor"). In February 2007, Attorney was assigned temporarily to work at the U.S. Attorney's Office, where he commenced full-time work in March 2007. It is not clear to the Committee whether this assignment was related in any way to Attorney's having filed a discrimination charge. In September 2007, the Department of Labor concluded its inquiry and sent Attorney a "right to sue" letter.

On December 26, 2007, Attorney filed an action in the Superior Court of the State of Delaware (the "Superior Court Action"). The Superior Court Action names as defendants the City and two of its employees who allegedly are Attorney's supervisors. Attorney alleges that the City, through the defendant supervisors, engaged in discriminatory and/or retaliatory conduct against Attorney, causing him personal and economic injury. In the Superior Court Action, Attorney asserts various claims under federal, state and city codes, as well as related common law claims. The defendants in the Superior Court Action are represented by outside counsel.

Attorney was scheduled to return to his position with the City in February 2008. After being sued by Attorney and before his return to the City Solicitor's office, defendants raised the issue whether Attorney's return to work would create an ethical issue in view of the Superior Court Action. They further suggested that Attorney obtain an advisory opinion from

this Committee. Thereafter, Attorney and defendants, through counsel, exchanged correspondence relating to the merits of their respective positions. Attorney maintains that his continued employment with the City Solicitor's office does not violate Rule 1.7. Additionally, Attorney sought and obtained an "expert" opinion to the same effect from a Delaware lawyer (Charles Slanina, Esquire) who is recognized as having expertise in matters of legal ethics. According to Attorney, despite this exchange of views and his receipt of an expert opinion, the City has insisted that he seek an opinion from this Committee that his return to work will not constitute a violation of Rule 1.7.

Discussion

Subject to 1.7(b), Rule 1.7(a) prohibits a lawyer from representing a client "if the representation involves a concurrent conflict of interest." DLRPC 1.7(a). The Rule states that "[a] concurrent conflict of interests exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." DLRPC 1.7(a).

As a preliminary matter, it does not appear that Rule 1.7(a)(1) applies. Attorney is not representing himself in the dispute with the City and therefore his representation of the City is not adverse to another client. Rather, the issue arises under Rule 1.7(a)(2), because, arguably, "there is a significant risk that the representation of" the City (*i.e.*, the client) will be "materially limited" by Attorney's personal interest due to his lawsuit against the City. Also, Rule 1.7(b) does not offer a resolution because, presumably, the City has not consented to the representation.

There does not appear to be any Delaware case law helpful to the question at hand. In their correspondence regarding their respective positions on this issue, Attorney and the City have referenced authorities from other states, including the following: *Santa Clara County Counsel Attorneys Ass'n v. Woodside,* 869 P.2d 1142 (Cal. 1994); *Chiles v. State Employees Attorneys Guild,* 734 So. 2d 1030 (Fla. 1999); *Coyle v. Board of Chosen Freeholders of Warren County,* 787 A.2d 881 (N.J. 2002); and *New Jersey v. Davis,* 840 A.2d 279 (N. J. Super. Ct. App. Div. 2004). Each of these cases is discussed briefly below.

In *Santa Clara County,* an association of attorneys employed by Santa Clara County, California (the "County") gave notice of its intent to file a petition for writ of mandate to enforce wage-related rights under a California statute. The County took the position because of a conflict that the attorneys could not maintain the writ unless they resigned or the County consented. *Santa Clara County*, 869 P.2d at 1146. Since the County did not consent, the association filed an action in California state court seeking declaratory and injunctive relief. *Id.* The trial court held mostly in favor of the attorneys, but the California Court of Appeal reversed, finding in essence that the attorneys' suit breached their duty of loyalty. *Id.* On appeal, the Supreme Court of California considered, among other issues, whether the filing of the writ would create a conflict of interest for the attorneys in violation of California's Rules of Professional Conduct.

Under California Rule of Professional Conduct 3-310(B)(4), an attorney is precluded from representing a client, without disclosure, when "the member has had a legal, business, financial, or professional interest in the subject matter of the representation." CAL. RULES OF PROF'L CONDUCT, RULE 3-310. [1] Significantly, the Court noted that Rule 3-310(B)(4) implies a duty to resign if, after disclosure, the client refuses to consent to the representation. *Santa Clara County*, 869 P.2d at 1153. The Court held, however, that Rule 3-310(B)(4) was not applicable in that case because it addressed only conflicts relating to "the subject matter of the representation." *Id.* As the Court explained:

> In this case, the lawsuit by the Association does not, in general, present a conflict with the client on matters in which the Attorneys represent the County. Stated concretely, when deputy County Counsel attorneys represent the County in a nuisance abatement action, or advise the County in a land use matter, they will face no temptation to compromise their representation of the County in order to further their own interests. The outcome of most of the matters for which the Attorneys have undertaken representation will not affect, nor be affected by, the outcome of the Association's lawsuit. The lawsuit will not disable the Attorneys from objectively considering, recommending, or carrying out an appropriate course of action in their representation of the County. An attorney/employee may experience ill will towards the client/employer, and vice versa, as is sometimes the case when employer/employee relations deteriorate. Rule 3-310(b)(4), however, addresses not the existence of general antagonism between lawyer and client, but tangible conflicts between the lawyer's and client's interests in the subject matter of the representation. The record below supports the trial court's implicit conclusion that no such conflict of interest is present within the meaning of rule 3-310(B)(4).

Id. at 1153-54.

In *Chiles v. State of Employees Attorneys Guild*, 734 So. 2d 1030 (Fla. 1999), the Supreme Court of Florida reviewed a Florida statute that effectively prohibited government lawyers from engaging in collective bargaining. The case is relevant for present purposes because the State of Florida argued, in support of the statute, that collective bargaining by government attorneys was incompatible with the attorney-client relationship. *Id.* at 1036. More

[1] Although California Rule of Professional Conduct 3-310(B)(4) is not identical to Delaware Professional Conduct Rule 1.7(b), it is similar, and appears to address the same underlying objective: to ensure a lawyer's loyalty and independence in the attorney-client relationship. *See* Comment [1] to Rule 1.7.

specifically, the State asserted that lawyers could not unionize without first securing the State's (*i.e.*, the client's) consent under Florida Rule of Professional Conduct 4-1.7(b).[2] *Id.*

The Supreme Court of Florida adopted the reasoning of the lower courts, which had declared the statute unconstitutional. It observed that "[t]he State has failed to demonstrate that its interest in preserving the attorney-client relationship justifies an absolute prohibition against collective bargaining by public sector lawyers." *Id.* In reaching this conclusion, the Court cited with approval the decision of the Supreme Court of California in *Santa Clara County, supra. Id.* at 1037.

The Superior Court of New Jersey considered New Jersey's counterpart to Rule 1.7(a)(2) in *State of New Jersey v. Davis,* 840 A.2d 279 (N.J. Super. Ct. App. Div. 2004). The issue in *Davis* was whether an attorney retained by the Office of the Public Defender ("OPD"), who was representing two defendants in separate capital murder cases, was disqualified from the representation because he had sued the OPD. The Court noted that it was significant that the attorney represented the capital murder defendants, not the OPD. *State of New Jersey v. Davis.* 840 A.2d at 285. For this reason, the Court held that a disqualifying conflict of interest did not exist. *Id.* at 285-86.

Finally, in *Coyle v. Board of Chosen Freeholders of Warren County,* 787 A.2d 881 (N.J. 2002), the Supreme Court of New Jersey considered whether an attorney employed by Warren County was entitled to maintain his position when a newly-constituted County board discharged him prior to the expiration of his term. A statute governing the board provided for a 3-year term, but a New Jersey disciplinary rule required a lawyer's withdrawal from employment if "discharged by his client." *Coyle,* 787 A.2d at 884-85. The Supreme Court of New Jersey resolved the issue in favor of the attorney, concluding that the disciplinary rule "was never intended to apply to public counsel with statutory terms ...." *Id.* at 886. Because *Coyle* dealt with circumstances differing from those presented here and construed a disciplinary rule not altogether comparable to Rule 1.7(a)(2), it is of marginal utility to the analysis required in this case.

The state authorities discussed above are helpful in understanding the policy considerations. But none appear to be sufficiently on point to warrant complete deference,

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[2] Rule 4-1.7(b) is entitled "Duty to Avoid Limitation on Independent Professional Judgment," and states:

> A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in 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 interest, unless:
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> (1) the lawyer reasonably believes the representation will not be adversely affected; and
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> (2) the client consents after consultation.

although we find the rationale of the *Santa Clara County* case to be compelling. Rather, we base our opinion on a practical and fair reading of Rule 1.7(a)(2) under the circumstances present here. The Committee believes that such a reading of the Rule does not require a finding that Attorney will violate it if he returns to work with the City. That is because it does not necessarily follow that Attorney's suit against the City will materially limit his representation of the City in unrelated matters.

As an initial matter, it should be observed that a strict application of Rule 1.7(a)(2) is likely to have a much more severe impact on a lawyer employed by a governmental entity compared to a lawyer engaged in private practice. If a concurrent conflict exists under that Rule, the lawyer must ordinarily withdraw from the representation. DLRPC 1.7, Comment [4]. For a lawyer in private practice who has numerous clients, withdrawal from the representation of one client normally would not cause hardship. For the governmental lawyer, however, he or she would not be able to represent the City if the City does not consent to the representation.

Comment 10 to Rule 1.7 (which addresses "Personal Interest Conflicts") observes that "[t]he lawyer's own interest should not be permitted to have an adverse effect on representation of a client." DLRPC, Comment [10]. That Comment also cites example of situations where a lawyer's personal interest could have an adverse effect on the representation of a client. Those examples are helpful to a better understanding of the rule, but do not address the situation here, where Attorney is employed in the public sector. What is more informative is the underlying purpose of Rule 1.7 as a whole, which is to ensure that a lawyer exercises loyalty and independence in the representation of his or her client. *See* DLRPC, Comment [1]. *See G. M. V. E. T. W.,* 2006 Del. Fam. Ct. LEXIS 153 (Del. Fam. Ct. Sept. 12, 2006).

A lawyer employed by a municipality who performs services solely on behalf of his or her employer has just one client, which may have a variety of legal needs. It seems incongruous with the intent of Rule 1.7 to conclude that a lawyer who has a grievance with his or her employer is *a fortiori* incapable of exercising loyalty and independence on behalf of the employer (also the client) with respect to unrelated matters within the scope of the lawyer's duties. The Supreme Court of California recognized as much in *Santa Clara County,* where it stated that "[t]he lawsuit will not disable the Attorneys from objectively considering, recommending, or carrying out an appropriate course of action in their representation of the County."[3] *Santa Clara County*, 869 P.2d at 1164. Similarly, here, we have no reason to believe that Attorney is incapable of exercising loyalty and diligence in the performance of his duties on behalf of the City.

Certainly, if Attorney's duties include representing the City in age discrimination cases or other areas of labor law that raises issues that significantly overlap with the issues raised in his lawsuit, then there may be a "significant risk that the representation of [the City] will be materially limited by . . . a personal interest of the lawyer." The Committee, however, has not been informed that such circumstances exist here. Moreover, the City can and should take steps

[3] The disciplinary rule at issue in *Santa Clara County* expressly addressed conflicts relating to the "subject matter of the representation." Rule 1.7(a)(2) does not contain such a limitation. Nevertheless, we think that *Santa Clara County* is still persuasive authority under the circumstances present here.

to ensure that such a set of circumstances does not develop in the future. Attorney is subordinate to more senior City lawyers. Those senior lawyers have the authority to delegate assignments to Attorney and should implement appropriate safeguards to avoid implicating Rule 1.7(a)(2). *See generally*, Rule 5.1(a) (a lawyer with managerial authority in a law firm shall make reasonable efforts to effect measures that reasonably ensure compliance by other lawyers with the Rules); Rule 5.1(b) (stating similar obligation). Also, Attorney and the defendants in the Superior Court action are represented by outside counsel, which should help to ensure that both Attorney's and the defendant's confidences and strategy in the lawsuit are protected. *See also Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173, 182 (3d Cir. 1997) (suggesting procedural safeguard courts may employ to permit an attorney plaintiff to attempt to prove a claim while protecting client confidences and strategy.).

The preamble to the DLRPC states that they are "rules of reason" and "should be interpreted with reference to the purpose of the legal representation and of the law itself." Preamble to DLRPC, Comment [14]. A fair reading of Rule 1.7(a)(2) does not compel a finding of a concurrent conflict of interest in the circumstances presented. Were it otherwise, the Rule would all but preclude a public sector lawyer from ever pursuing an employment-related grievance while in the employment of a government or municipality. Certainly, that could not have been the intent behind Rule 1.7.

This Committee's review is limited to expressing an opinion on the narrow ethical issue raised by the inquiry; namely, whether Attorney's continuing employment by the City Solicitor's Office while he pursues a claim against the City violates Rule 1.7. In expressing this opinion, the Committee assumes that, as suggested, the City will take appropriate measures to minimize the risk of a conflict, such as avoiding the assignment to Attorney of cases and projects involving the same or similar factual or legal issues raised in his lawsuit. We express no opinion on Attorney's claim against the City, nor do we address the respective legal rights of Attorney and the City with respect to any continuing employment he may have with the City.