

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1978-4

The firm ("the Firm") in which the Attorney General elect of Delaware ("the Attorney General") is now a partner has requested certain opinions of this Committee.

THE FACTS

The Attorney General is now a partner in the Firm. The firm consists of six attorneys other than the Attorney General. The Attorney General will assume the duties of Attorney General on January 2, 1979.

The Attorney General has been on a leave of absence from the Firm since July 1, 1978. Since his election, the Attorney General's cases involving the State have been transferred to other members of the Firm. It is believed by the Firm that after he assumes his office, the Attorney General will not be involved in any matter of interest to the State where the Firm had entered its appearance prior to January 1, 1979. Furthermore, the Firm has written to the clients which it represents before State Administrative Agencies and has notified them of a potential conflict once the Attorney General assumes office.

It is the intention of the partners of the Firm to determine and settle the Attorney General's value in the practice prior to his termination with the Firm. The Attorney General will be paid for a portion of that value prior to the date of termination. A note will be taken for the unpaid portion of that value. The note will be executed jointly and severally by the Firm and the partners of the Firm.

Furthermore, the Steering Committee for the Election of the Attorney General ("Steering Committee") proposes to pay off a campaign debt from the campaign through various political fund raising activities. The Steering Committee wishes to solicit members of the Delaware State Bar as one method of obtaining funds to pay off the campaign debt.

QUESTIONS PRESENTED

The Committees' Opinion is requested as to the following questions arising from the election of the Attorney General in the context of the facts presented above:

(1) May the Firm continue to represent clients before various State Administrative Agencies and in other areas where the State has an interest?

(2) May the Steering Committee solicit members of the Delaware Bar as a part of its fund raising activities to cancel the campaign debt?

THE COMMITTEE'S ANSWERS

Subject to the conditions set forth below, our answers to both questions raised above are "yes".

DISCUSSION

While no Disciplinary Rule bears specifically on the issues presented here, Canon 9 provides:

"A LAWYER SHOULD AVOID EVEN
THE APPEARANCE OF PROFESSIONAL
IMPROPRIETY."

EC 9-2 states in part:

"When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

Also of assistance is EC 9-3 which deals with a situation reverse to that here, namely, a lawyer leaving judicial office or other public employment. That paragraph states:

"After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

In addition, reference should be made to Opinions numbered 1 and 2 of the Supreme Court Advisory Committee on Litigation Ethical Problems.

Briefly, to summarize the conclusions of this Committee:

(1) The Attorney General is still a member of the Firm and the Firm continues in its practice of representing clients before various State agencies and before the Criminal Courts of this State; the Attorney General should take no substantial role in the affairs of the Attorney General's office prior to January 2, 1979;

(2) All of the Attorney General's ties with the Firm must be severed as of January 2, 1979, unless the Firm discontinues its practice in the Criminal Courts and before the State Administrative Agencies;

(3) Depending on how it is handled, the giving of a note by the Firm to the Attorney General for his outstanding interest in the Firm may raise an appearance of professional impropriety. Accordingly, the Attorney General should be paid as much of the full value of his interest in the Firm as possible prior to the date that he assumes his duties unless the Firm discontinues its activities before the State Administrative Agencies and Criminal Courts;

(4) On the subject of solicitation of attorneys, we refer to a letter opinion dated March 18, 1975, in which we advised the then Attorney General on proper post-campaign fund raising. Relying on Canon 7B(2) of the Code of Judicial Conduct, ABA Formal Opinion 226 and DR 8-101, we, by our then Chairman, Alexander Nichols, Esquire, advised as follows:

"(1) Any further solicitations or fund raising efforts on your behalf should be handled by a committee of your sponsors. Your name, of course, will have to be used in connection with any such activities, but your participation, I think, should be limited to social intermingling and greetings at dinners, receptions or other public events.

"(2) It would, of course, be desirable that the donors be kept anonymous or at least not reported to you.

"(3) No donation should be accepted from anyone under investigation or prosecution by your office or seeking affirmative action from any agency of the State represented by your Department, insofar as the identity of such persons can be ascertained. Should it develop that persons in any such relationship to your office have made contributions, it would seem best that such contributions be returned unless, in the meantime, they have been expended.

"(4) Your sponsors should make clear to prospective donors that you have imposed such limitations on contributions. Beyond this, I question the wisdom of making any public disclaimer that your decisions as Attorney General can be influenced by anyone contributing to your campaign expenses, since any such possibility is absolutely precluded by DR 8-101(A)(3) cited above.

"(5) Within these boundaries, I see no reason why your sponsors should not solicit lawyers, individually or as a group.'

We reaffirm these guidelines.

The basis of this Committee's opinion lies in the extremely sensitive position of the Attorney General. His powers and duties are set forth in Chapter 25 of Title 29 of the Delaware Code. Pursuant to that statute, the Attorney General has direct supervision of all matters involving the Department of Justice including civil and criminal duties. He has broad powers of investigation and may make recommendations regarding the Constitution and statutes of the State of Delaware. His duties also include assisting the various State Administrative Agencies.

The Attorney General may delegate those duties to deputy attorneys general of the civil and criminal division. The civil division is headed by the State Solicitor and the criminal division is headed by the State Prosecutor who are appointed by the Attorney General. However, while the Attorney General may delegate certain duties to his deputies and assistants,

he may not effectively delegate the power conferred on him by the Constitution and by the statutes of the State of Delaware.

The Firm has not indicated the extent of its involvement in active litigation involving State Agencies or either the civil or criminal divisions of the Attorney General's office. However, until January 1, 1979, the anticipated date of separation of the Attorney General from the Firm, he will have had an active interest in the success or failure of that involvement. The Firm may continue in such involvement until the date of separation only if the Attorney General has nothing whatsoever to do with any substantive or administrative matters regarding the Attorney General's office. Once the Attorney General assumes his duties as Attorney General, the Firm may continue in its representation of clients before the State agencies and in the Criminal Courts only after the Attorney General's participation in the Firm has terminated.

The Firm has indicated that it intends to issue a note to the Attorney General signed jointly and severally by the Firm and the partners of the firm individually as to any outstanding balance of the value of his private practice. This procedure will not totally cut the Attorney General's ties with the Firm inasmuch as theoretically, the successes or the reverses of the Firm or of the partners in the Firm may have an effect on the Firm's capacity to pay the note. The Firm may only continue its practice in the Criminal Courts or before any State Administrative Agency if all ties and professional relationships between the Attorney General and the Firm are severed prior to the date that the Attorney General assumes his duties. Compare: Supreme Court Advisory Committee Opinion 1, p.6. It is suggested that the Attorney General be paid his full value in the firm before he assumes his duties as Attorney General. If the Firm must obtain a note to settle with the Attorney General, then the note should be obtained from a third party.

If these solutions are not possible and a Firm note is necessary, we do not view it as desirable that the Firm continue practice adverse to the State or its agencies while indebted to the Attorney General. We believe the situation differs from that in which judges from time to time go on the bench remaining to be fully paid or still entitled to pension benefits. Compare

Opinion 1970-71 Fla. Ops. 55 (Opinion 7130 October 8, 1971). In those cases the judge may disqualify himself when his old firm comes before him or waivers may be obtained from the litigants. Even in the case of judges, however, the ABA has expressed a policy in favor of prompt payment. ABA Informal Opinion #676 (August 8, 1963) provides as follows:

"In dividing fees with a judge for work done in cases before his appointment, agreement should be reached as to the portion of the services rendered by the judge, and in the absence of such agreement, appropriate steps should be taken to obtain their current valuation under the partnership contract. This sum should then be paid to the judge as rapidly as possible."

December 18, 1978