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DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS
OPINION 1992-4

May 8, 1992

A member of the Delaware Bar ("Attorney XI") has requested the opinion of the Committee on Professional Ethics of the Delaware State Bar Association (the "Committee"), as to whether a conflict of interest exists that would prevent Law Firm X from representing Attorney C, a member of the Delaware Bar, in the defense of a proceeding brought against Attorney C before the Delaware Office of Disciplinary Counsel ("Disciplinary Counsel"). Attorney C is engaged in an office sharing arrangement with Attorneys A and B. Although Attorneys A, B and C are not partners, they use joint letterhead that appears to identify them as members of firm "A, B and C." Law Firm X currently has a number of active matters in which A or B are adversary counsel, but Attorney C is not counsel of record in any of these cases and the matter out of which the Disciplinary Counsel charges arose is unrelated in any way to the type of litigation in which A and B are adversary counsel to Law Firm X. Law Firm X has no connection with any of the parties to the dispute underlying the proceeding before Disciplinary Counsel.

OPINION

It is the Committee's Opinion that there is no conflict of interest that would either bar Law Firm X from representing Attorney C in the Disciplinary Counsel proceeding or require Law Firm X to obtain the consent of its other clients to the firm's representation of Attorney C.

DISCUSSION

Rule 1.7 of the Delaware Lawyer's Rules of Professional Conduct (the "Rules") , which in general governs the issue of conflicts of interest, provides that:

(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. 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.

Thus, Rule 1.7 sets up two tests. The first, articulated in section (a), governs situations in which a lawyer is faced with representing clients with directly adverse interests. See In re Appeal of Infotechnology, Del. Supr., 582 A.2d 215, 219-220 (1990). Section (b) regulates instances when a direct conflict does not exist but when the representation might "materially limit" a lawyer's responsibilities to another client or to a third person. In the Committee's opinion, neither section is applicable to these facts.

A. Rule 1.7(a)

As is clear from its language, Rule 1.7(a) is inapplicable to this matter since there is no "directly adverse" relationship between Attorney C and Law Firm X's other clients. Simply put, Law Firm X's clients have no claim against Attorney C, and Attorney C has none against them. Rather, assuming that A and B's representation is imputed to Attorney C (a subject upon which the Committee does not express an opinion),¹ at most Attorney C has an imputed interested in

¹ But see Rule 1.10 and its Comments.

representing parties opposing Law Firm X's clients; he himself is not a party to the litigation. Thus, this matter does not involve directly adverse clients, and Rule 1.7(a) does not apply.

B. Rule 1.7(b)

A more troubling question is presented by Rule 1.7(b). That rule limits a lawyer's representation in those circumstances when representing one client "may be materially limited by the lawyer's responsibilities to another client or to a third person . . ." Two ethics opinions from other jurisdictions suggest that such a material limitation might occur in circumstances such as this.

In the first, Michigan Ethics Opinions Opinion CI-649 (1981), it was held that an attorney representing a second attorney in a divorce action could not represent a party in another divorce action when the opposing party in the second action was represented by the lawyer who was the client in the first action. The stated reason for this conclusion was that the litigation tactics, negotiating, and settlement techniques and other aspects of the first divorce action were secrets that could not be used against that attorney in his role as counsel in the second action. It was apparently assumed that if the first attorney learned how his client reacted to litigation in the first action, he could automatically use that knowledge in the second action. The opinion went on to hold that the conflict was of a type that could not be cured by informed consent of all concerned.

In the second opinion, New York State Ethics Opinion 579 (1987), a lawyer was asked to represent another lawyer even though "each lawyer frequently represents clients adverse to each other and each is presently involved in cases in which their clients are on opposite sides." The New York State opinion concluded that such representation was possible, but only if all clients consented.

Although the Committee has considered those opinions, we cannot conclude that they are controlling under these circumstances. First, both opinions were based upon the Code of Professional Responsibility, which has been superceded in Delaware, and whose provisions on

point differ somewhat with those of Rule 1.7. Compare Rule 1.7 with DR 5-105.² Second, the inquiry mandated by Rule 1.7(b) (and by DR 5-105) is fact intensive by nature. Rule 1.7(b) calls for an evaluation of the actual effects of the representation: Will it "materially limit" the lawyer's ability to represent a client? Similarly, DR 5-105 asks whether a client will be "adversely affected" by the representation. Thus, while opinions dealing with other factual circumstances can provide some guidance in analyzing whether a conflict of interest exists, the facts in each case must be independently weighed.

The New York opinion fits into this framework since it appears that under the facts recited it might have been possible for the other clients' interests to have been adversely affected by the representation, and thus their consent was required. The Michigan opinion is more problematic. It appears to conclude that confidences will necessarily leak or be used under such circumstances. To the extent that represents the Michigan opinion's view, the Committee does not accept it. Although there may well be occasions when there would be an unacceptable leak of client confidences, it would seem to be both contrary to experience and incorrect as a logical matter to suggest that inappropriate disclosure is a necessary consequence of such representation.

The logical failure of such an argument may be seen here. Even if the Committee were to assume that Attorney C was directly involved in the litigation against Law Firm X's clients, there is no basis to assume that Law Firm X in its representation of Attorney C would learn confidential information that X could later use against C's clients. Nor is there any reason to assume that Law Firm X's representation of C will provide C with material information that A and B can use against X's clients.³

² For example DR 5-105(a) prohibits a lawyer from representing different "interests," while Rule 1.7(b) is directed towards "clients." One could thus argue that DR 5-105 is broader in scope since an "interest" could extend beyond a client and subsume other factors.

³ Moreover, to the extent the concern is -- like the concern voiced in the Michigan opinion -- over the revelation of negotiation and strategic techniques, the Committee can think of many

The Committee also notes that any contrary conclusion might be unworkable in a small jurisdiction such as Delaware. Attorneys in Delaware communities often litigate against many, if not most of the other attorneys in that community, and thus a rule such as that suggested in the Michigan opinion might make it practically impossible for an attorney to obtain representation. Nor would a client-disclosure option solve the problem since proceedings before Disciplinary Counsel are confidential; client disclosure would necessarily waive that confidentiality. Finally, although the Committee bases its decision on the language of the Rule, it is aware that representations such as that proposed here have been routinely undertaken by prominent members of the Delaware bar over the years based upon the understanding that a lawyer's representation of clients is a professional role that does not make the lawyer an adverse party. While not dispositive, that history strongly suggests that there is no automatic materially adverse effect in such cases, for had there been, we doubt that the practice would have continued.

Accordingly, the Committee concludes that while conflicts might occur in cases such as this, their existence cannot be presumed, and that there is no evidence that one exists here.

other situations, such as cases in which attorneys serve as co-counsel and jointly plan strategy, in which an attorney can gain equally great insights into how another attorney operates. Thus, to the extent the Michigan opinion suggests that an insight into how another attorney's mind works constitutes confidential information by nature, we must disagree since such insights are routinely gained during the normal course of litigation.