

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1986-3

The Committee has been asked by a member of the Delaware Bar (the "Inquiring Attorney") whether the Rules of Professional Conduct permit the Inquiring Attorney to represent the defendants in a pending Chancery Court matter involving issues previously considered by a governmental agency (the "Agency") during the Inquiring Attorney's tenure as counsel to the Agency.

FACTS

Plaintiffs in the Chancery Court litigation seek to enjoin defendants from engaging in certain allegedly illegal conduct. During the Inquiring Attorney's tenure as counsel for the Agency, a representative of the Agency (not the Inquiring Attorney) rendered legal advice concerning the propriety of the conduct which is now at issue in the Chancery Court litigation. The Committee has been advised that although the Inquiring Attorney has no present recollection of involvement in that matter, the Inquiring Attorney did receive copies of certain correspondence from the representative of the Agency to defendants. The Committee further understands that the Agency has taken the position that the conduct is not unlawful. The Agency is not a party to the Chancery Court litigation and the Inquiring Attorney has advised the Committee that both the current attorney

for the Agency and defendants have agreed to waive any potential conflict of interest.

The question of the propriety of the Inquiring Attorney's representation of defendants in the Chancery Court litigation requires consideration of Rules 1.9, 1.11 and 3.7 of the Rules of Professional Conduct. Rule 1.9 provides as follows:

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 interests 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 except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Based upon the facts supplied to the Committee and recited above, the interests of defendants in the pending action do not appear to be materially adverse to the interests of the Agency such that the Inquiring Attorney's representation of the defendants would violate Rule 1.9. In all events, the consent of the Agency* would cure any potential conflict.

* The Committee has assumed that the current counsel to the Agency is duly authorized to consent on its behalf to the proposed representation and did so "after consultation."

Because the Inquiring Attorney served as counsel to the Agency when the question of the propriety of defendants' conduct was considered by the Agency, Rule 1.11 of the Rules of Professional Conduct is also relevant to the inquiry. That Rule provides in relevant part as follows:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

Here again, while the facts known to the Committee do not suggest that the Inquiring Attorney was "personally and substantially" involved in this matter, the consent of the Agency* to the proposed representation of defendants satisfies Rule 1.11 and makes it unnecessary to resolve that question.

Finally, the Committee notes that Rule 3.7 of the Rules of Professional Conduct provides, subject to certain exceptions, that a lawyer shall not act as advocate at a trial in which the lawyer "is likely to be a necessary witness." Based upon the facts known to the Committee, it does not appear that the Inquiring Attorney is likely to be a necessary witness and, accordingly, Rule 3.7 would not render the representation of the defendants improper under the Rules of Professional Conduct.

* See footnote on page 2.

In conclusion, although the Inquiring Attorney's tenure as counsel for the Agency during a period when that office rendered legal advice concerning the propriety of the prospective clients' conduct constitutes a potential conflict of interest under Rules 1.9 and 1.11 of the Rules of Professional Conduct which could preclude representation of defendants in the pending Chancery Court litigation, it is the opinion of the Committee that the consent of the Agency to that representation* effectively eliminates any potential conflict and, accordingly, that the representation will not violate the Rules of Professional Conduct.

* See footnote on page 2.