DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1998-2

October 21, 1998

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

INTRODUCTION

A member of the Delaware Bar (the "attorney") has requested an opinion from the Committee regarding his continued representation of a defendant in a criminal prosecution (the "client").

FACTS

The client was indicted in November 1997 by a Grand Jury upon the charge of 1st Degree Murder of a Delaware individual in New Castle County. This latter individual shall be referred to as "Mr. Smith." Mr. Smith died in October 1997. The State intends to seek the death penalty for the client.

The attorney is currently in private practice, and has been since 1995. Before starting private practice, the attorney had served as a Deputy Attorney General for about six years. In February 1998, the Superior Court (the "Court") appointed the attorney, along with another member of the Delaware Bar, to represent the client. Discovery was exchanged between the attorney and the Attorney General's Office (the "State").

After the commencement of discovery, the attorney remembered Mr. Smith as someone he had prosecuted. He brought this to the attention of the State and the Court.

In 1993, the attorney prosecuted Mr. Smith for trafficking cocaine and related offenses. The attorney had at least one face-to-face meeting with Mr. Smith, although the attorney remembers nothing Mr. Smith told him, and further concedes that anything Mr. Smith told him would be inadmissible in court. During the prosecution of Mr. Smith, the attorney spoke with a Wilmington police detective and an FBI agent about Mr. Smith. The attorney learned from these law enforcement officers that Mr. Smith was known to rob Wilmington drug dealers at gunpoint, and had a reputation as a fearless and dangerous criminal.

During the 1993 prosecution of Mr. Smith, he provided "substantial assistance" to the State in that he provided the State with helpful information about other persons engaged in criminal activities. As a result, Mr. Smith received a lenient sentence pursuant to 16 Del. C.

§ 4753A(c).

It is not disputed that the client caused the death of Mr. Smith. The attorney has characterized his contemplation of the issues at his client's trial as follows:

> [T]his homicide is not a 'whodunit.' The trial will focus upon [the client's] state of mind. Did he fear [Mr. Smith]? Why did he fear [Mr. Smith]? Does [Mr. Smith] use firearms? Does [Mr. Smith] have access to firearms? Is [Mr. Smith] connected to muscle? Is he violent? Does he have the power to manipulate/control underlings?

If the prosecution reaches a penalty phase, the attorney will attempt to persuade the jury that Mr. Smith was less than a model citizen, and that therefore the attorney's client does not deserve the death penalty. Thus, in connection with both the guilt and penalty phase, the attorney will offer evidence of Mr. Smith's reputation as a criminal, a dangerous gunman, and other evidence of unflattering characteristics of Mr. Smith, all of which the attorney learned about through his conversations with the law enforcement officers during the 1993 prosecution of Mr. Smith.

The attorney asks the Committee for its opinion on whether the Delaware Rules of Professional Conduct prohibit him from continuing to represent the client. The attorney also asks whether certain prosecutorial disclosure requirements are relevant to the Committee's analysis. The attorney has submitted a letter memorandum to this Committee in support of his belief that the Rules do not prohibit him from representing the client. The State disagrees, and has submitted a letter memorandum in support of its position. The Court is aware of this situation, and has delayed trial until January 1999 in order to allow the Committee time to issue this advisory opinion. The Court has asked the Committee to give the request for an advisory opinion priority so that the trial date may be maintained.

CONCLUSION

The attorney is not precluded by the Delaware Rules of Professional Conduct from continuing his representation of the client.

ISSUES PRESENTED

1. Whether Rule 1.11(a) of the Rules of Professional Conduct prohibits the attorney from continuing to represent the client?
2. Whether Rule 1.11(b) of the Rules of Professional Conduct prohibits the attorney from continuing to represent the client?
3. Whether Rule 3.7(b) of the Rules of Professional Conduct prohibits the attorney from continuing to represent the client?

DISCUSSION

A. Whether the Committee Ought to Provide Advice in a Situation Such as This

The first question is whether the Committee ought to decide such an inquiry. See generally Opinion 1997-2. The attorney has brought the ethical issue to the attention of opposing counsel and the Court. There is a live controversy that could be submitted to the Court for decision. Moreover, that Court's decision would be binding on the interested counsel, unlike the nonbinding nature of an opinion issuing from this Committee. Nonetheless, the Committee will respond to the ethical inquiry. Under the circumstances here, any further delay in resolving the ethical issues might jeopardize the trial date, and inconvenience the Court and the attorneys involved in the trial. In the future, however, the Committee may promptly turn down a similar - request.

B. Issues Outside the Scope of this Opinion

The attorney believes that the information concerning Mr. Smith's past criminal conduct is Brady material and that therefore the State is obligated to turn this information over to him. Brady v. Maryland , 373 U.S. 83 (1963). The Committee understands that the attorney may ultimately request Brady material from the State, and that the Court will rule upon that Brady request. The Committee will not opine on the Brady issues, or any factual issue which the Committee believes might materially impact on the Brady analysis.

The attorney also believes that the information concerning Mr. Smith's past criminal conduct should be disclosed under Rule 3.8 of the Delaware Rules of Professional Conduct. The State has not asked for an opinion from the Committee on this issue, and the Committee will not opine on the Rule 3.8 issues, or any factual issue which the Committee believes might materially impact on the Rule 3.8 analysis.

While the attorney does not ask for this Committee's opinion on whether either of these two disclosure obligations apply, the attorney does ask whether the Committee believes either obligation is relevant to his ethical inquiry. For the reasons stated in Section D of this Opinion, the Committee does not believe the applicability of either obligation needs to be considered to answer the attorney's ethical inquiry.

C. Rule 1.11(a) does not prohibit the attorney from continuing to represent the client.

The attorney's inquiry appears to raise issues of first impression. The Committee has researched for decisions discussing a set of circumstances similar to those here, and has found little case law.

Rule 1.11(a) states:

> 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. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> > (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> >
> > (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

"Matter" is defined in Rule 1.11(d) to include:

> (1) any judicial or other proceeding, application, requests for a ruling or other determination, contract, claim, controversy, investigation. charge, accusation, arrest, or other particular matter involving a specific party or parties; and
>
> (2) any other matter covered by the conflict of interest rules of the appropriate government agency.
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> The comment to Rule 1. I I states:
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> This Rule prevents a lawyer from exploiting public office for the advantage of a private client . . . . Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to

> prevent the disqualification rule from imposing too severe a deterrent against entering public service.
>
> The State argues that Rule 1.11(a) prohibits the attorney from representing the client because the State believes the "matter" is the same. The 1993 matter was the prosecution of Mr. Smith, the defendant. The State argues under the language of Rule 1.11(d)(1), the present subject matter of the 1998 prosecution is still Mr. Smith, the victim. The attorney disagrees.

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. I I (d)(1) talks in terms of actual prior proceedings and controversies. In the Committee's view, Rule 1. I I (d)(1) 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. I 1, that situation is addressed by another portion of Rule 1. I 1. Thus, the State's attempt to broaden the definition of matter by emphasizing the factual connection between the identity of Mr. Smith and the 1998 prosecution is without merit.

In Flego . v. Philips, Appel & Walden, Inc., 514 F. Supp. I 1 78 (D.N.J. 198 1), the court considered what constituted the same "matter" for the purposes of interpreting DR9-1 01 (B), I the predecessor to Rule 1. I 1. 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 isolatible 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.

514 F. Supp. at I 1 82. If the Committtee were to apply the Flego definition, the result would be the same. The prosecution of the client for the murder of Mr. Smith is not the same matter as the 1993 prosecution of Mr. Smith.

D. Rule 1. I I (b) does not prohibit the attorney from continuing to represent the client..

> While a prosecutor, the attorney acquired information about Mr. Smith through law

enforcement officers about Mr. Smith's past criminal conduct and reputation (collectively, the "reputation evidence"). He intends to use this information in defense of his client. Rule 1. II, however, does not prevent a fon-ner government lawyer from taking advantage of knowledge that lawyer acquired during his employment with the government unless use of that information violates Rule 1. I I (b). That Rule states:

> (b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired

That Rule states: "A lawyer should not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

> 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.

The State believes Rule 1. I I (b) independently requires the attorney to withdraw from the representation.

I . <u>The information the attorney acquired is not confidential</u>.

The first question the Committee must answer is whether the reputation information is "confidential government information." Rule 1. I I (e) defines "confidential government information" as:

> information which has been obtained under governmental authority and which., at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

TheCommitteereadsthisdefinitiontoconsistofthreeconjunctiveparts.
Theinformationmust:(I) have been obtained under governmental authority; (2) be information that the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose; and (3) not otherwise be available to the public.

The attorney does not dispute that he obtained the reputation information under governmental authority. To date, the attorney has not uncovered the information by alternative means. The Committee will therefore assume the information is not otherwise available to the public. Therefore, the key issue is whether the second part of the above definition is satisfied.

The State argues that the reputation information concerning Mr. Smith is privileged. See Delaware Uniform Rules of Evidence, Rule 509. The attorney questions whether this privilege survives Mr. Smith's death.

The privilege against disclosing the identity of an informant is a qualified one, with several limitations. See generLIly Wheatley v. State, Del. Supr., 465 A.2d II 10, II 12 (1983); State v. Flowers, Del. Super., 316 A.2d 564, 567-68 (1973). Although the Delaware decisions do not directly address the issue of whether the privilege survives the death of the informant, the Flowers decision does cite with approval Roviaro v. United States, 353 U.S. 53 (1957).

The Roviaro case discussed the limitations of the privilege in the context of whether the Government could withhold from the criminal defendant Roviaro the identity of an informant John Doe. The United States Supreme Court stated:

> The scope of the [informant] privilege is limited by its underlying purpose. Thus where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.. . . The record contains several intimations that the identity of John Doe was known to petitioner and that John Doe died prior to trial. *In either situation, whatever privilege the Government might have had would have ceased to exist*, since the purpose of the privilege is to maintain the Government's channels of communication by shielding the identity of an informer from those who would have cause to resent his conduct.

353 U.S. at 60 & n.8 (emphasis added). The Roviaro footnote has been cited as a basis to hold that the informer privilege does not survive the death of the informant. Bergman v. United States, 565 F. Supp. 13 53, 1361 (W.D. Mich. 1983).2

Mr. Smith is deceased. The informant privilege pursuant to Delaware Rule of Evidence 502 does not survive his death. In summary, the second part of the definition of Rule 1. I I (e) is not satisfied. Therefore, Rule 1. I I (b) does not require the attorney to withdraw from representation of the client.

2. The confidential information cannot be used to the material disadvantage of Mr. Smith.

The Committee believes there is at least one additional reason why Rule 1. I I (b) does not require the attorney to withdraw from representation of the client. One of the other requirements of Rule 1. I I (b) for disqualification is that "the information could be used to the material disadvantage of that person." Here, the "person" about whom the attorney possesses information is Mr. Smith. As to this information, Rule 1. I I (b) does not disqualify the attorney unless this information could be used to the material disadvantage of Mr. Smith. The attorney points out that Mr. Smith is deceased, and argues therefore that the reputation information cannot possibly be used to Mr. Smith's material disadvantage. In response, the State argues that it sits in the shoes of Mr. Smith, and that the use of the information would materially disadvantage the State's case.

> This argument of the State has already been addressed by the Ethics Committee of the

2 The State has brought to the attention of the Committee the recent case of Swidler & Berlin v. United States, 1 18 S. Ct. 2081 (1998). That case held that the attorney-client privilege survives the death of the client. The reasoning of that decision is not applicable to the informant privilege and therefore does not affect the viability of the Roviaro reasoning.

American Bar Association, which stated:

> Under Rule 1. I I (b), a former government lawyer may be disqualified from representing a private party against any 'person' about whom she has acquired 'confidential government information' while working for the government.... The term 'person' in Rule 1. II (b) does not include the former government client, but refers only to third parties whom the former government lawyer may oppose on behalf of a private party after leaving government service.

ABA Ethics Opinion 97-409, at 2 & n.7 (August 2, 1997). Thus, the State's argument has already been specifically considered and rejected. The Committee concludes that the information the attorney intends to use at trial cannot be considered to be to "the material disadvantage" of Mr. Smith within the meaning of Rule 1. I I (b). 3 Thus, even assuming that the reputation information the attorney acquired was deemed "confidential government information," Rule 1.11(b) would not operate to disqualify the attorney.

One case that raises somewhat similar issues is United States v. Valdez, 149 F.R.D. 223 (D. Utah 1993). In that case, the Government intended to call Carter as a witness in the prosecution of Valdez for possession of a controlled substance. The defense attorney for Valdez had previously represented Carter in a prior drug prosecution. The Government moved to disqualify the defense attorney from representing Valdez

The Valdez court focused its ethical inquiry upon Utah's version of Model Rule 1.9, and ruled that the representation of Carter was not the same or a substantially related factual matter as the representation of Valdez. The court also ruled that while the defense attorney might have to cross-examine Carter on his drug activities for credibility purposes, this was a matter of public record. The court concluded that there was no violation of Rule 1.9.

E. Rule 3.7(a) does not prohibit the attorney from continuing to represent the client.

The State's last argument is that Rule 3.7 bars the attorney from representing the client. Rule 3.7(a) states:

Rule 3.7 Lawyer as witness

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
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> (1) the testimony relates to an uncontested issue;

3 The attorney points out that this analysis might be materially different if he was representing the client as a defendant in a wrongful death civil suit brought by the estate of Mr. Smith.

> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.

The State argues that: "[a]ssurning that the confidential information that [the attorney] learned while prosecuting [Mr. Smith] becomes relevant in the trial, [the attorney] may very well become a witness as to [Mr. Smith's] reputation for violence." The State concludes that the attorney should not be allowed to represent the client.

Although the attorney agrees with the State that the information concerning Mr. Smith's reputation may become relevant at trial, the attorney argues, and the Committee agrees, that Rule 3.7(a) does not bar the attorney from representing the client. The attorney has stated that there is no scenario under which he would testify. He is confident that there are sufficient alternative evidentiary sources to prove the reputation of Mr. Smith. The State has responded that it is possible that other law enforcement personnel will have no or different recollection of Mr. Smith's reputation, and that the attorney in that situation would have to testify. This is speculation based upon surinise. Moreover, the State has admitted in a supplemental letter to the Committee that the police detective has a present day recollection about Mr. Smith that is not inconsistent with the recollection of the attorney has about Mr. Smith. Based upon the facts provided to the Committee, the attorney is not likely to be a necessary witness.

CONCLUSION

While the attorney has raised other arguments as to why he is not disqualified under Rule 1. I I and Rule 3.7, they need not be discussed. The attorney's continued representation of the client
violates neither Rule 1. I I (a), Rule 1. I I (b), nor Rule 3.7(a) of the Rules of Professional Conduct.

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