



*Professional Ethics Committee*

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Informal Opinion 2012-10

**PROPOSED REPRESENTATION OF OPPOSING COUNSEL AS LITIGANT IN CASE UNRELATED TO MATTERS IN WHICH COUNSEL ARE CURRENTLY ADVERSE**

This opinion responds to two requests arising from the same proposed representation.

An attorney ("Plaintiff's Counsel") represents numerous clients claiming money damages from automobile and premises liability accidents. Plaintiff's Counsel informs us that over the last 18 years she has worked with another attorney ("Defense Counsel") who serves as in-house counsel for a large insurance carrier.<sup>1</sup> Over that period, Plaintiff's Counsel and Defense Counsel have had about 25 to 30 cases together, and have developed a good working relationship. They currently have two active cases with each other. Defense Counsel has approached Plaintiff's Counsel to represent him personally with respect to prosecution of a contemplated lawsuit alleging violations of federal privacy laws.

Plaintiff's Counsel asks: Does the proposed representation of Defense Counsel, in his capacity as a party to a lawsuit alleging violations of federal privacy laws, present a conflict of interest for Plaintiff's Counsel?

Defense Counsel asks: Does the proposed representation of Defense Counsel, in his capacity as a party to a lawsuit alleging violations of federal privacy laws, present a conflict of interest for Defense Counsel?

Plaintiff's Counsel's Inquiry

Rule 1.7 is applicable to the situation Plaintiff's Counsel describes. Rule 1.7 provides:

- (a) Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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<sup>1</sup>We understand this to mean that Plaintiff's Counsel represents clients in matters adverse to the insurance carrier in which Defense Counsel represents the insurance carrier and/or - as "captive" defense counsel employed by the carrier- the carrier's insureds.

- (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.
- (b) Notwithstanding the existence of a concurrent conflict of interest under subsection (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve assertion of a claim by one client against the client represented by the lawyer in the same litigation for the same proceeding before any tribunal; and
  - (4) each client gives informed consent, confirmed in writing.

Plainly, Plaintiff's Counsel's proposed representation of Defense Counsel will not be directly adverse to your existing clients. Therefore, it is not prohibited by subsection (a) (1) of Rule 1.7.

As to whether or not the proposed new representation presents a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client ... or by a personal interest of the lawyer", so as to fall within the purview of subsection (a) (2) and require further analysis under Rule 1.7(b), we note that the relevant inquiry is highly fact-specific. See, on the issue of "material limitation" as well as for additional general guidance on this matter, ABA Formal Opinion 97-406 (Conflicts of Interest: Effect of Representing Opposing Counsel In Unrelated Matter) (interpreting prior version of Rule 1.7) <sup>2</sup>

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<sup>2</sup>ABA Formal Opinion 97-406 states, in part:

*In determining ... whether the relationship between the lawyers may materially limit the representation that either lawyer provides to his "third party" client, a variety of considerations are relevant. These include: (1) the relative importance of the matter to the represented lawyer; (2) the relative size of the fee expected by the representing lawyer; (3) the relative importance to each lawyer and to his client, of the matter involving the "third-party" clients; (4) the sensitivity of each matter; (5) the substantial similarity between the subject matter or issues of the two representations; and (6) the nature of the relationship of one lawyer to the other and of each lawyer to his third-party client. No one of these considerations is necessarily dispositive, nor does this list encompass every circumstance that may create a material limitation. [FN3] One lawyer's duty to, or interest in the work of the other lawyer may materially limit the lawyer's representation of his third-party client in any case in which the relationship between the lawyers might*

Under the limited facts disclosed to us, we cannot definitively conclude whether or not a concurrent conflict exists.

We observe, however, that Connecticut authority instructs that: “[i]t is the attorney himself who is in the best position to determine whether there exists a conflict of interest in his representation of two clients.” *Jones v. Jones*, Superior Court, Judicial District of Stamford-Norwalk at Stamford FSTCV116009073S (October 1, 2003, Winslow, J.) 2003 Conn. Super. LEXIS 2699 at 7, citing *State v. Webb*, 238 Conn. 389, 420-421 (1986). See also, *Lopez v. Pannone*, Superior Court, Judicial District of Stamford-Norwalk at Stamford FSTCV116009073S (August 17, 2011, Adams, S.T.R.), 2011 Conn. Super. LEXIS 2139 at 7-8 (“Connecticut courts and the Rules of Professional Conduct place the primary responsibility for recognizing and resolving issues of conflict of interest on the involved attorney who is in the best position to determine whether a conflict exists.”(Citations omitted)).

Should you conclude that a concurrent conflict exists under Rule 1.7(a), the representation may be undertaken provided that all four of the requirements of Rule 1.7(b) are satisfied. We see no basis here to question that Plaintiff’s Counsel reasonably believes she will be able to provide competent and diligent representation to each affected client as required by subsection (b)(1). Moreover, the proposed representation is not prohibited by law, nor does it involve the assertion of a claim by one client against the other in the same proceeding; accordingly, subsections (b)(2) and (b)(3) provide no impediment to the proposed representation of Defense Counsel. [All that remains, then, is that, in accordance with subsection (b)(4),] Should you believe that a concurrent conflict exists, you should fully inform all of the affected clients (i.e., Defense Counsel, as well as the current active clients) of the circumstances and potential risks of the proposed representations, that those *clients* consent to the proposed representation, and that their consent be confirmed in writing. [Under those conditions, Plaintiff’s Counsel may properly undertake the proposed representation.]

In situations where counsel concludes that a concurrent conflict exists under Rule 1.7(a), the representation may be undertaken provided that all four of the requirements of Rule 1.7(b) are satisfied. We see no basis here to question that Plaintiff’s Counsel reasonably believes she will be able to provide competent and diligent representation to each affected client as required by subsection (b)(1). Moreover, the proposed representation is not prohibited by law, nor does it involve the assertion of a claim by one client against the other in the same proceeding; accordingly, subsections (b)(2) and (b)(3) provide no impediment to the proposed representation of Defense Counsel. All that remains, then, is that, in accordance with subsection (b)(4), you fully inform all of the affected clients (i.e., Defense Counsel, as well as the current active clients)

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*cause either or both of them to temper advocacy on behalf of their opposing third-party clients. For example, a material limitation may exist if a representing lawyer is unwilling to seek sanctions against his opponent, who is also his client, because he is solicitous of the represented lawyer's reputation. [FN4] Similarly, a material limitation may exist for a represented lawyer if she is unwilling to relay her third party client's demand to advance a transaction closing out of concern that to do so would distract her opponent--who is also her lawyer--from working on the matter in which he represents her.*

of the circumstances and potential risks of the proposed representations, that those parties consent to the proposed representation, and that their consent be confirmed in writing. Under those conditions, Plaintiff's Counsel may properly undertake the proposed representation.

Defense Counsel's Inquiry

We recognize that Defense Counsel will not be acting as an attorney with respect to the proposed new representation. Nevertheless, Rule 1.7 still applies to Defense Counsel in this situation because Rule 1.7(a) (2) expressly requires consideration of personal interests of a lawyer that could impact attorney/client relationships. Those relationships include existing attorney client relationships, as well as proposed new attorney client relationships. Thus Defense Counsel must be mindful of the possible effect of the proposed relationship with Plaintiff's Counsel on his existing attorney/client relationships.

In that regard, we observe that "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. Rule 1.13 (a), Connecticut Rules of Professional Conduct. Thus Defense Counsel has an existing attorney/client relationship with his insurance company employer. Apart from that, to the extent Defense Counsel has been appointed to represent the insurance company's insureds in liability insurance matters, he also owes professional obligations to those insureds.<sup>3</sup> It is in the context of those preexisting relationships that the proposed new relationship should be analyzed for purposes of Rule 1.7.

As in the case of Plaintiff Counsel's inquiry above, under the limited facts disclosed to us, we cannot definitively conclude whether or not a concurrent conflict exists here. Defense Counsel is therefore advised to consider carefully whether his representation by Plaintiff's Counsel with respect to Defense Counsel's federal privacy act claim presents a "significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer." If Defense Counsel can reasonably conclude that no such risk is presented, then the representation would be permissible under Rule 1.7. In the event that Defense Counsel was to conclude that there was a significant risk of material limitation, then he should proceed to consider whether all four of the elements of Rule 1.7(b), as set forth above, can be satisfied. If so, the representation may proceed.

THE COMMITTEE ON PROFESSIONAL ETHICS

By

John R. Logan, Chair

<sup>3</sup> In the liability insurance situation Connecticut law is clear that the lawyer hired by an insurer owes primary and unwavering loyalty to the insured - to the detriment of the insurer when conflicts arise. *Metropolitan Life Ins. v. Aetna Casualty and Surety*, 249 Conn. 36, 61; *Novella v. Hartford Accident and Indemnity Co.*, 163 Conn. 552 (1972); CBA Informal Opinions 97-37, 92-07, 87-13, 83-5.