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Standing Committee on Professional Ethics

March 15, 2023

Informal Opinion 2023-01
Whether Prior Co-counsel Relationship Presents a Conflict

The Committee has been asked whether a criminal defense lawyer (the “Requester”) who periodically serves as co-counsel with another defense attorney in serious criminal cases may represent an individual charged with conspiracy to commit murder, where the other attorney with whom he has co-counseled has been retained to represent a co-defendant in the same alleged conspiracy. The Requester explains that he and the other attorney maintain separate law practices in separate office locations. The request presents the following questions:

1. Would the representation create a conflict of interest or potential conflict of interest in violation of Rule 1.7 of the Rules of Professional Conduct (the “Rules”)?¹
2. If so, are there procedures to avoid violation of the Rules?

Rule 1.7(a) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, unless the conflict is waivable and the client provides his or her informed consent in writing to that representation. “A concurrent conflict of interest exists if: (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.”

Rule 1.7(a)(1) would typically prohibit the same lawyer from representing both co-defendants in a criminal case, since there is significant risk that the defendants might have incompatible defense strategies. As we have previously explained, “generally speaking, the risks attendant to such dual representation in a criminal case are so grave that ordinarily a lawyer should decline to represent more than one co-defendant...” Informal Opinion 94-09; *see also* Revised Formal Opinion 26 (1988) (concluding that it would be inappropriate to undertake common representation of co-defendants in a criminal matter given the risk that one defendant may elect to cooperate with the prosecution and become a witness against the other).

¹ The Requester also asks whether the representation violates Rule 1.6 of the Rules of Professional Conduct regarding confidentiality of information. Given that the Requester does not share office space with the co-defendant’s counsel, and there is no indication that the Requester and the other lawyer share any office staff or that they plan to jointly engage investigators and/or experts who may become privy to client confidences, we do not perceive any issue under Rule 1.6 that would bar the representation. Of course, the Requester remains obligated to maintain the confidentiality of information relating to the representation, as he would in any case (absent, for instance, client consent to share information with co-defendant’s counsel based on a determination that there is a common interest in defending the matter).

Here, however, there are two lawyers—one representing each defendant. The issue presented under Rule 1.7(a)(1) is thus whether the potential adversity between the two codefendants is imputed to the lawyers based on the fact that the two lawyers have served as co-counsel together in various other criminal cases. Rule 1.10 governs imputation of conflicts and provides that “while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so.” The term “firm” is defined under the Rules as “a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation of other organization.” Rule. 1.0(d). The Commentary further explains:

Whether two or more lawyers constitute a firm . . . can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. . . . A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer should be attributed to another.

Thus, the Commentary suggests that there may be some informal arrangements among lawyers that may rise to the level of constituting a “firm” for purposes of imputation. However, the Commentary also explains that, even where two practitioners share office space and consult with one another from time to time, this would ordinarily *not* be regarded as a firm unless other factors were present—such as operational integration or if they held themselves out to the public in a way that suggested that they were a firm. Here, the Requester indicates that he and the other lawyer maintain separate office space and periodically work together as co-counsel to clients in specific cases (approximately two cases per year). In the Committee’s view, this type of co-counseling arrangement does not transform the lawyers into a “firm” for purposes of imputation under Rule 1.10. Thus, based on the facts presented, the Committee concludes that there is no conflict under Rule 1.7(a)(1) that would preclude the Requester from taking on the representation.

The representation is therefore permissible unless, under Rule 1.7(a)(2), there is a significant risk that the Requester’s representation of his client would be materially limited by the lawyer’s responsibilities to his former co-counsel or by his personal interest in his relationship with this other attorney. In the absence of unique factors (such as reliance on the other lawyer for a significant portion of the Requester’s business or an extremely close personal relationship), the Committee’s view is that a periodic co-counseling arrangement such as the one described here would not rise to the level of creating a material limitation conflict. In fact, in some circumstances, it may benefit the client for a lawyer in the Requester’s position to have knowledge about a co-defendant’s counsel. Ultimately, however, as described below, the Requester is in the best position to make the determination of whether the relationship with the other lawyer creates a material interest conflict.

While not directly analogous, this Committee previously addressed the question of whether one attorney’s representation of his opposing counsel in another lawsuit would violate the “material limitation” provision of Rule 1.7(a)(2). *See* Informal Ethics Opinion 2012-10. There, the Committee noted that “the

relevant inquiry is highly fact-specific” and explained that, given the limited factual record, it could not offer an opinion. Nevertheless, in pointing out the factual circumstances that might be relevant to that analysis, the Committee cited ABA Formal Opinion 97-406 (Conflicts of Interest: Effect of Representing Opposing Counsel In Unrelated Matter), in which the ABA addressed whether a conflict in violation of Rule 1.7(a)(2) would arise “when one lawyer has formed or proposes to form a lawyer-client relationship with another lawyer, at a time when the two lawyers represent clients whose interests are adverse.” The ABA pointed to the following considerations to determine whether the relationship between the two lawyers would present a conflict for the representation of their third-party clients:

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. 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 cause either or both of them to temper advocacy on behalf of their opposing third-party clients.

These factors should also bear on the analysis of how the lawyers' relationship might affect their ability to represent the co-defendants in question.

Moreover, the Commentary to Rule 1.7 provides that “[w]hen lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment.” It therefore recommends that the lawyers' seek clients' informed consent to proceed with representation in these circumstances. Similarly, while there are no facts in this request that would suggest that the relationship between the two attorneys here would give rise to a violation of Rule 1.6 (concerning confidentiality), the possibility of improper disclosures given the proximate working relationship between the two attorneys should also be considered in assessing whether the representation of the co-defendants would be materially limited by the lawyers' prior engagement.

Ultimately, however, “Connecticut authority instructs that it 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.” Informal Ethics Opinion 2012-10 (internal quotations omitted). The requesting attorney must therefore undertake the analysis of whether his historic co-counsel relationship with the other attorney presents a material limitation to the representation of his client in the case at hand, with all of these considerations in mind.

Should the requesting attorney conclude that the relationship between the lawyers would create such a material limitation, he may seek his client's informed consent to proceed with the representation only if he reasonably believes that he can provide competent and diligent representation in spite of his relationship with his former co-counsel, pursuant to Rule 1.7(b). *See* Informal Opinion Number 2013-06. Any such consent must be in writing. Moreover, assuming that the Requester concludes there is no material limitation and thus no



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conflict requiring consent, the Requester could still, out of an abundance of caution, disclose the relationship; explain that he does not believe there is a conflict; and advise the client if he or she has any concerns, the client may: (1) retain other counsel in the criminal case, and/or (2) obtain the advice of other counsel regarding the decision whether to continue with the Requester as counsel. As an additional precaution, it would be advisable to provide this information in writing, with the client's acknowledgement that he or she has received the information from the Requestor.

THE COMMITTEE ON PROFESSIONAL ETHICS

Kim E. Rinehart

BY Kim Rinehart, Chair

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