Opinion No. 2003 - 4

Synopsis

Under strictly limited circumstances, an attorney who is "of counsel" to a law firm may work part time as an Assistant Attorney General, when the law firm and the Attorney General's office represent adverse parties in litigation not related to the work of the attorney for the State. The circumstances of a particular case must satisfy the following criteria: (1) In accepting a case in which it will oppose the Attorney General's office, the law firm must avoid all litigation involving the practice areas customarily handled by the attorney in his role as Assistant Attorney General. (2) The law firm must reasonably conclude, based on the facts of each such case, that the attorney's dual role as "of counsel" and Assistant Attorney General will not have an adverse impact on the State or the client for whom the firm is opposing the State. (3) The law firm must make full disclosure to the client and to the State and obtain the consent of each after consultation. (4) The attorney will not participate in the matters, either as a private attorney or as an Assistant Attorney General, and will be shielded from any knowledge of the matters by both the Attorney General's office and the law firm. (5) The attorney will not receive any portion of the fee generated by the matter.

Facts

The requesting attorney (the "Attorney") works on a half-time basis in one division of the Attorney General's office. In addition to working for the State of Vermont, the Attorney maintains a solo practice and maintains an "of counsel" relationship with a private law firm (the "Firm"). The Attorney signs correspondence and pleadings for the Firm and also appears at depositions and court proceedings on behalf of the Firm's clients. The Firm represents clients in courtroom, administrative and appellate litigation directly adverse to the State and its political subdivisions in which the Attorney General's Office is opposing counsel. The attorney is paid as an independent contractor and receives no portion of the proceeds of fees related to cases adverse to the State.

Questions Presented

1. Is the Attorney associated with the Firm within the meaning of Rule 1.10 in cases where the Firm, through other attorneys, litigates against the State or any branch of state government represented by the AG's office?

2. Is the Attorney subject to the requirements of Rule 1.11 by analogy in cases where the AG's office, through other attorneys, litigates on behalf of the State or any branch of state government against a client of the Firm?

3. If both of the preceding questions are answered affirmatively, under what circumstances (if any) may the Firm represent a client against the State or any branch of state government represented by the AG's office?

Analysis

First Question

Rule 1.10(a) makes clear that the conflicts identified in Rule 1.7 are imputed to the entire firm:

> (a) While lawyers are associated with a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

Rule 1.10(c), however, states that this disqualification can be waived: "A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7."

Although the Attorney is a contractual "of counsel" to the Firm, in our opinion he or she is "associated in" the Firm for the purposes of Rule 1.10. The Attorney does a variety of work for clients of the Firm and utilizes resources of the Firm in doing such work. Similar "of counsel" relationships are fairly common in Vermont law firms. Association for the purposes of Rule 1.10 must be liberally construed so that improper conflicts of interest may be prevented.

We have a relevant precedent on the question. In Opinion No. 1995-05, this Committee concluded that an attorney could simultaneously maintain a solo private practice and an "of counsel" relationship with another private law firm, but emphasized that for purposes of imputed disqualification under Rule 1.10, "the two firms must be considered as one entity." The Attorney has posed a scenario that goes one step further, in that the Attorney practices privately and is also an Assistant Attorney General for the State of Vermont.

As to the first question, we conclude that the Attorney is associated with the Firm so that the prohibition against conflicts contained in Rule 1.7 is applicable to all of the attorneys practicing on behalf of the Firm. We shall reach the exceptions to Rule 1.7 in discussing the third question.

Second Question

The Vermont Rules of Professional Conduct provide no explicit guidance for resolving conflicts arising from the activities of attorneys presently in government service. The best analog is Rule 1.11 which addresses special conflicts of interest for former and present government officers and employees. Under Rule 1.11 attorneys in the firm in which the requesting attorney is "of counsel" are prohibited from participating in matters in which the requesting attorney "participated personally and substantially as a public officer or employee", unless the requesting attorney is screened from any participation in the matter and is apportioned no part of the fee therefrom. The appropriate government agency must also consent after consultation. The application of Rule 1.11 in the current inquiry is important not only for the specific rule, but for the policy and practical reasoning behind the rule. The draftspersons of the Rule acknowledged

that there must be a balance between (i) creating the appearance of impropriety where the transition between public and private practice results in one attorney having contact with the same matter in public and private practice, and (ii) the ability of attorneys to move between public and private practice.

The AG's office clearly is one large law firm in its representation of the State and branches of state government. Its own website describes its "current status as the State's largest law firm." See http://atg.state.vt.us. There are five divisions in the AG's office, and teams for different subjects within the divisions, but none of the attorneys practice in isolation from the others. Most of the attorneys are designated as Assistant Attorneys General. In the rare instances when state agencies litigate against each other, the AG's office does not represent both agencies.

In the situation at hand the Attorney holds the title of Assistant Attorney General, thereby having the apparent authority of the Attorney General. We believe that the Attorney should be treated as if he or she previously participated personally and substantially on behalf of the Attorney General in any case where the AG's office and the Firm are on opposite sides. Since the Attorney is currently an Assistant Attorney General, we think that this standard should apply whether or not the case is in the practice area in which the Attorney works in the AG's office.

As to the second question, we conclude that Rule 1.11 is an appropriate analog to be applied to the circumstances under discussion. We shall reach the limitations contained in Rule 1.11 in discussing the third question.

Third Question

Rule 1.7 states:

> (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.

The comments to Rule 1.7 make clear that "Paragraph (a) prohibits representation of opposing parties in litigation," and further state: "Ordinarily a lawyer may not advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated." Rule 1.7, however, does permit representation adverse to an existing client, particularly where litigation is not involved or where the matters at issue are unrelated to each other.

What a lawyer "reasonably believes" for the purpose of Rule 1.7(a)(1) is an objective rather than subjective test. It is our opinion that the Firm cannot reasonably believe that representation of a client against a client of the AG's office will not adversely affect the Attorney's relationship with the client of the AG's office when the case involves the Attorney's

area of practice as an Assistant Attorney General. Nor can the Firm believe that the representation of its client will not be adversely affected .

We turn to consideration of cases which do not involve the Attorney's area of practice as an Assistant Attorney General. Rule 1.7 does not provide any specific standards for determining in such cases when an attorney may entertain a reasonable belief that the representation of a client will not adversely affect the relationship with the other client. The issue is discussed extensively in ABA Formal Opinion 95-390 and DC Bar Opinion 268, which note that various factors must be considered to determine whether an adverse impact arises, including:

1. If "a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."

2. If "the lawyer's concern for remaining in the good graces of Client A was likely to impair the independence of judgment or zeal that the lawyer could bring to bear on behalf of Client B."

3. The "client would resent the lawyer's undertaking any representation that threatened, even indirectly, any adverse effect on either the financial well-being or the programmatic purposes" of the client.

4. Inquiry required into "the relative importance of the representation to the respective clients or to their lawyers and the directness of adverseness between them."

5. "It may require inquiry into the nature of the issues, the amount of money at stake, and the likelihood that either client will otherwise be substantially and foreseeably affected by the outcome of the other's matter."

6. "Sometimes the . . . inquiry will also involve the particular role the . . . lawyer is expected to play in the matter, and the 'intensity and duration' of her relationship . . ."

We conclude that in cases unrelated to the Attorney's work for the Attorney General's office, there may be circumstances where the potential conflict could be sufficiently remote for a reasonable attorney to conclude that the representation of the client by the private firm will not "adversely affect the relationship with the other client" and thus allow the firm to proceed to the question of disclosure and obtaining informed consent of both adversaries to the continued representation.

Under Rule 1.7(a)(2) the consent after consultation of both the client of the AG's office and the client of the Firm is required.

In addition, as a result of our reliance of Rule 1.11 in reaching this result, the Attorney must be screened from any participation in matters adverse to the State and must not receive any part of the fee therefrom.

Conclusion

The Committee concludes that we believe thatthe Firm and Attorney General's office may not represent adverse parties in the same litigated matters unless the following requirements can be met: (1) In accepting a case in which it will oppose the Attorney General's office, the Firm must avoid all litigation involving the practice areas customarily handled by the Attorney in his role as Assistant Attorney General. (2) The Firm must reasonably conclude, based on the facts of each such case, that the Attorney's dual role as "of counsel" and Assistant Attorney General will not have an adverse impact on the State or the client for whom the firm is opposing the State. (3) The Firm must make full disclosure to the client and to the State and obtain the consent of each. (4) The Attorney will not participate in the matters directly, either as a private attorney or as an Assistant Attorney General and will be shielded from any knowledge of the matters by both the Attorney General's office and the Firm. (5) The Attorney will receive no portion of the fees generated for the Firm by the matter.Accordingly, we answer questions #1 in the affirmative and question #2 in the negative. As we do not believe that the conflict presented is waivable, we do not address question #3.