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SUPERIOR COURT OF NEW JERSEY
COUNTY OF CAPE MAY
LAW DIVISION – CRIMINAL
SUPERSEDING IND. NO. 23-7-00109-S
CASE NO. CPM-22-000535

STATE OF NEW JERSEY, :

Plaintiff, :

v. :

ERNEST V. TROIANO, JR., et al., :

Defendants. :

CRIMINAL ACTION

STATE'S OBJECTION TO DEFENSE COUNSEL'S CONTINUED PARTICIPATION IN THE CAPTIONED MATTER

TO: HON. BERNARD E. DELURY, JR., P.J.Cr.
Cape May County Courthouse
Criminal Division
9 North Main Street
Cape May Courthouse, New Jersey 08210

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In response to the Court's request for submissions, please accept this letter in lieu of a more formal brief regarding the recent disclosure by defendant Ernest V. Troiano, Jr's attorney, Brian A. Pelloni, Esq., of his intention to accept an offer of employment as a Deputy Attorney General with the New Jersey Division of Criminal Justice. For the reasons set forth herein, given the clear conflict of interest posed by defense counsel's continued representation of defendant Troiano while not only seeking, but also accepting, an offer of employment with the very agency prosecuting his client, this Court should disqualify him from any further participation in the above-captioned matter.

BACKGROUND

During a status conference on January 26, 2024, Mr. Pelloni informed the Court and the State that he had been offered a Deputy Attorney General's position with the Office of the Attorney General's Division of Criminal Justice. He further stated that he intended to accept that offer while also continuing his representation of defendant Troiano in this matter. Defendant himself indicated for the record his interest in Mr. Pelloni's continued representation and his willingness to provide a formal waiver regarding the actual conflict of interest this would create. Mr. Pelloni then requested an expedited trial schedule so that he could try the matter before beginning his new position.

The new position apparently will be with an environmental crimes unit within the Division of Criminal Justice. Although that unit or bureau has no active involvement with this prosecution, which is being overseen by the Division's Office of Public Integrity and Accountability, both entities nevertheless are part of the same Division and answer to the same Attorney General.

LEGAL ARGUMENT

The circumstances described above create an actual conflict of interest, and a mere waiver under such circumstances would fail to adequately protect both defendant Troiano's constitutional rights and the public's interest in fair proceedings and the proper administration of justice. This would appear to be an un-waivable conflict that therefore requires Mr. Pelloni's disqualification from any continued representation of defendant Troiano in this matter.

A defendant's right to effective assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution and Article 1, Paragraph 10 of the New Jersey Constitution. Those provisions mandate that representation be both adequate and conflict-free in

order to be effective. State v. Hudson, 443 N.J. Super. 276, 283-84 (App. Div. 2015). Our courts have routinely held that "a defense attorney's representation must be 'untrammeled and unimpaired,' his loyalty undivided." State v. Sheika, 337 N.J. Super. 228, 244 (App. Div. 2001) (citations omitted). "There is no greater impairment of a defendant's constitutional right to counsel than that which can occur when his attorney is serving conflicting interests." Ibid. (citing State v. Bellucci, 81 N.J. 531, 538 (1980)). Courts have considered a conflicted attorney's continued representation in such situations to be even more harmful than the complete absence of a lawyer. Ibid.

This is especially true in criminal matters, where the trust between attorneys and clients have enhanced importance and an attorney's divided loyalty could completely undermine a defendant's right to effective assistance. Hudson, supra, 443 N.J. Super. at 284. See also State v. Cottle, 194 N.J. 449, 463-64 (2008). "[A]lthough a defendant must have a fair opportunity to have the counsel of his own choosing, that right must yield when an actual conflict is found." State ex rel S.G., 175 N.J. 132, 140 (2003) (citing United States v. Moscony, 927 F.2d 742, 749-50 (3d Cir. 1991)). In that respect, a "defendant does not enjoy an unencumbered right to counsel of his or her choice." State v. Crisafi, 128 N.J. 499, 517 (1991) (citing Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L. Ed.2d 140, 148 (1988)). The "right to choose counsel is [] circumscribed by the court's power to guard against conflicts of interest, and to vindicate the court's 'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" State v. Kates, 426 N.J. Super. 32, 45 (App. Div. 2012) (quoting Wheat, supra, 486 U.S. at 160), aff'd, 216 N.J. 393 (2014).

Whether a conflict of interest exists that requires disqualification of an attorney from representing a party is a question of law. J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 221-22 (App. Div. 2006). That question turns on a two-step approach. First, the court must determine whether there is a per se conflict because, in such cases, prejudice is presumed absent a valid waiver. Cottle, supra, 194 N.J. at 467-68. Only in cases where attorneys dually represent co-defendants, or where attorneys are being prosecuted by the same prosecutor's office that is prosecuting the defendant, have our courts found such a per se conflict. Id. at 452, 467. Second, in all other cases, the court must evaluate whether there is a potential or actual conflict, and "a great likelihood of prejudice must be shown in that particular case to establish constitutionally defective representation of counsel." Id. at 467-68.

The New Jersey Rules of Professional Conduct (RPC) address cases where a conflict of interest arises in a lawyer's representation of his client. RPC 1.7(a) generally provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." While our courts once required that attorneys avoid even the appearance of impropriety, that doctrine is no longer a factor to be considered in determining whether a prohibited conflict of interest exists under the RPCs. Hudson, supra, 443 N.J. Super. at 289. Instead, conflicts warranting disqualification must be actual and not merely appearance based. Id. at 292. RPC 1.7(a)(2) further provides that a conflict of interest exists if "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." In other words, RPC 1.7 makes clear that no attorney can have divided loyalty or serve two interests. See S.G., supra, 175 N.J. at 139.

The American Bar Association's (ABA) Model Rules of Professional Conduct and opinions from the ABA's Committee on Ethics and Professional Responsibility (the ABA Committee) offer similar instruction. As with RPC 1.7(a)(2), ABA Rule 1.7(b) likewise provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest." Regarding that provision, the ABA Committee has specifically addressed the ethical implications of job negotiations with adverse firms or parties in a formal opinion. See ABA Comm. On Ethics and Prof'l Resp., Op. 96-400.[1] That opinion reasoned that "[a] lawyer's pursuit of employment with an adversary firm may, depending on the stage of the discussions, materially limit the lawyer's representation of a client because the degree of the lawyer's interest in the prospective affiliation may affect the discharge of many of his ethical duties to his client." Id. at 3. Such a lawyer's judgment may be affected by his desire to curry favor, or at least not to antagonize a prospective employer and thus affect his duty to serve his client without limitations resulting from his own interests. Ibid.[2]

With regard to the possibility of waiver where a conflict of interest arises or exists, RPC 1.7(b) provides that a lawyer may still represent a client if:

> (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients

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[1] This opinion is attached as an exhibit.

[2] The RPC's take an even stronger approach when addressing government attorneys. RPC 1.11(d)(3) provides that, "[e]xcept as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government . . . shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially or for which the lawyer has substantial responsibility." And RPC 1.11(a)(3) additionally prohibits a former government lawyer, for a period of at least six months after leaving the government, from representing a private client in connection with a matter "when the interests of the private party are materially adverse to the appropriate government agency."

> in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
>
> (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (3) the representation is not prohibited by law; and
>
> (4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Despite this waiver provision, however, there are some conflicts that cannot be waived, even with full disclosure and informed consent. See, e.g., In re Garber, 95 N.J. 597, 613-14 (1984) (where the public has its own interest in the perception of fair proceedings and protection of all parties' rights, consent to continued representation despite a conflict of interest may not resolve that conflict). Our courts have routinely found that, in criminal matters, "the interests that are implicated transcend those of the immediate parties and their attorneys" because the "public itself has the greatest stake in the propriety of the legal relationships that are created to properly administer criminal justice." Id. at 614. In other words, even where there is consent or waiver, that still may not resolve a conflict of interest because the public's perception of fair and proper proceedings can outweigh a defendant's right to the counsel of his choice. Ibid. See also Wheat, supra, 486 U.S. at 160 (noting "independent interest" of courts to ensure criminal trials adhere to profession's ethical standards and "legal proceedings appear fair to all who observe them"). So, "it is incumbent on the courts to ensure that defendants receive conflict-free representation," even where a given defendant desires otherwise. S.G., supra, 175 N.J. at 140.

Simply put, a court can and should decline a waiver and disqualify an attorney from representing a defendant where, as here, an actual conflict exists. See Wheat, supra, 486 U.S. at 164. Courts should not be required to tolerate the inadequate representation of a defendant that

exists where there is an actual conflict of interest impairing an attorney's ability to conform with the rules of professional responsibility. See United States v. Dolan, 570 F.2d 1177, 1184 (1978). "Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceeding in his own court and the subtle problems implicating the defendant's comprehension of the waiver." Ibid.

Here, there is a significant risk that Mr. Pelloni's continued representation of defendant Troiano will be materially limited by his personal interest in his future employment by the very office that is presently prosecuting his current client, thus creating an actual conflict of interest. Even if the particular unit to which Mr. Pelloni will be assigned is not the unit actively prosecuting his client, both units fall within the same Division of Criminal Justice and answer to the same Attorney General. The situation involves obvious impermissible dual loyalties to both defendant Troiano and defense counsel's future employer. And it opens the door to inevitable questions as to how counsel's objectivity and professional judgment in representing his current client may be affected by an understandable desire to curry favor with his future employer and to avoid possibly jeopardizing in some way the new job.

Official misconduct cases against public officials such as this often involve defense assertions of politically motivated prosecutions, which, if so asserted, would potentially require defense counsel here to either condemn actions by his next employer or else compromise his defense by avoiding such intended arguments. Mr. Pelloni's continued representation would also draw into question the legitimacy of any possible resolution of the matter, and whether it has been improperly influenced by his relationship with his new employer, or by a desire to expedite

the proceedings to start the new job or begin on the required start date so as not to possibly lose the position. Mr. Pelloni's continued representation would further present the possibility of his client, if convicted, appealing that conviction based on alleged ineffective assistance resulting from the conflict, even if he provides a knowing and voluntary waiver. The Supreme Court has noted the willingness of courts to entertain claims of ineffective assistance even where the defendant has previously waived such claims based on the attorney's conflict of interest. See Wheat, supra, 486 U.S. at 179-80. This Court should not allow the defense, whether intentionally or not, to manufacture cause for appeal in such a manner.

Furthermore, despite defendant Troiano's indications of consenting to Mr. Pelloni's continued representation regardless of this actual conflict, such consent should be outweighed by the public interest not only in final resolutions, but also in the proper administration of justice with criminal proceedings conducted fairly and in accordance with prevailing ethical norms. The public's perception of defendant Troiano receiving not only a fair trial, but adequate and effective, meaning conflict-free, representation at every stage before and during, can and should outweigh the defendant's right to a counsel of his own choice. See In re Garber, 95 N.J. 597, 613-14 (1984). This is especially true in cases like this that involve relatively high-profile defendants and indisputable public attention and publicity.

Moreover, the State would note the lack of case law directly addressing this specific scenario, where a defense attorney seeks to continue representing a client who is being prosecuted by the very office with which that attorney has been seeking, and in which he has ultimately been offered and accepted, a position of employment. That one might characterize such a case as one of first impression perhaps itself speaks to the clear and obvious impropriety of the situation, one that just does not often, if at all, occur because it is plainly inappropriate and

issue-laden. In that respect, even if the argument could be made that this is somehow ethically permissible, there are various other considerations that should prevail. If nothing else, it does not look good. And it also begs the question as to whether, just because defense counsel may be able to do this, should he do this.

In short, given Mr. Pelloni's present employment relationship with the Office of the Attorney General's Division of Criminal Justice, which is prosecuting his current client, his continued participation in this matter implicates obvious impermissible dual loyalties. It will further likely generate inevitable public doubt as to both the actual and apparent fairness of the proceedings against defendant Troiano. The situation would thus appear to present an actual conflict of interest that under the circumstances cannot be waived. Mr. Pelloni should therefore be disqualified from any further participation in the matter.

CONCLUSION

Based on the foregoing, this Court should disqualify Mr. Pelloni from his continued representation of defendant Troiano and any further participation in this matter.

MATTHEW J. PLATKIN
Attorney General of New Jersey

By:

Niccole L. Sandora
Deputy Attorney General

Brian Uzdavinis
Deputy Attorney General

Dated: February 13, 2024

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 96-400 **January 24, 1996**

Job Negotiations with Adverse Firm or Party

A lawyer's pursuit of employment with a firm or party that he is opposing in a matter may materially limit his representation of his client, in violation of Model Rule 1.7(b). Therefore, the lawyer must consult with his client and obtain the client's consent before that point in the discussions when such discussions are reasonably likely to materially interfere with the lawyer's professional judgment. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to consult with his supervisor, rather than directly with the client. Generally, the time for consultation and consent will be the time at which the lawyer agrees to engage in substantive discussions of his experience, clients, or business potential, or the terms of a possible association, with the opposing firm or party. If client consent is not given, the lawyer may not pursue such discussions unless he is permitted to withdraw from the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. Lawyers in the law firm negotiating with the lawyer also have a conflict, requiring similar action to resolve, if their becoming associated with the lawyer would cause their firm's disqualification, or if the interest of any of those lawyers in the job-seeking lawyer's becoming associated with the firm may materially limit their representation of a client adverse to the job-seeking lawyer.

Introduction

Recognizing the increased frequency with which lawyers in private practice change associations, the Committee here addresses the constraints that the Model Rules of Professional Conduct (1983, as amended) place upon a lawyer who explores employment[1] with a law firm or party, while he represents a client in a matter adverse to a client of that firm or adverse to that party. [2]

A lawyer's actual employment by a firm which he has been opposing in a

1. For purposes of this Opinion, "employment" includes association as a partner or of counsel.

2. This Opinion does not address the ethical duties of lawyers in firms that are considering merger.

matter is squarely addressed by Rule 1.9. Model Rule 1.9(a) prohibits a lawyer from switching sides on a matter he is handling.[3] Even if a lawyer did not personally work on a particular matter in his former firm, Model Rule 1.9(b) provides that the lawyer may not represent a client at his new firm whose interests are materially adverse to a client of his former firm, if the matter is the same or substantially related to the former firm's representation of the client, and the lawyer has confidential information relating to that representation.[4] By reason of Rule 1.10, a lawyer's disqualification under Rule 1.9(a) or (b) is imputed to all lawyers in the new firm.[5]

As to discussions or negotiations that may lead to employment with an adverse firm or party, the Model Rules expressly address such discussions or negotiations by government lawyers, judicial officers and law clerks (see Rules 1.11(c) and 1.12), but not those by a lawyer in private practice. From the absence of such a rule, we infer only that negotiations for a new association between a lawyer and an opposing firm or party are not forbidden. However, such negotiations clearly raise ethical issues under Rule 1.7(b), which prohibits a lawyer, without consultation and consent, from representing a client when his personal interests may materially limit the representation. [6]

The Ethical Duties Implicated in Employment Discussions with an Adversary

Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another

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3. Rule 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or 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.

4. Rule 1.9(b) states:

A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter:

unless the former client consents after consultation.

5. In relevant part, Rule 1.10 states:

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 by Rules 1.7, 1.8(c), 1.9 or 2.2....

6. We cannot infer from the Model Rules' failure to address job negotiations by private lawyers, when it specifically treats job negotiations by government lawyers and judicial officers, that private lawyers have no ethical duties when negotiating new employment. Rule 1.7(b) applies in all cases in which a lawyer's personal interests may materially limit his representation of a client, allowing continued representation only after consultation and consent. Rules 1.11 and 1.12 are actually more rigorous than 1.7(b), in that they define circumstances in which negotiations for new employment cannot be pursued at all.

client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation....

In the terms of Rule 1.7(b), a lawyer's pursuit of employment with an adversary firm may, depending on the stage of the discussions, materially limit the lawyer's representation of a client because the degree of the lawyer's interest in the prospective affiliation may affect the discharge of many of his ethical duties to his client.

The first such duty is the lawyer's duty to serve his client without limitations resulting from his own interests. The judgment of a lawyer who is exploring job prospects with an opposing law firm may be affected by the lawyer's desire to curry favor with, or at least not to antagonize, the prospective employer.

A second duty implicated by employment discussions with an opposing party or firm concerns the vigor of the lawyer's representation. Rule 1.3 requires a lawyer "to act with reasonable diligence and promptness in representing a client"; Rule 3.2 requires a lawyer to "make reasonable efforts to expedite litigation consistent with the interests of [his] client." A lawyer's performance of these duties may be compromised by his attention to his job search, or his desire not to offend a prospective employer. This desire may lead the lawyer to recommend or pursue a course of action which does not best serve his client, or may prompt the lawyer to postpone work on the matter when such postponement is not in his client's interest.[7]

A third duty is the preservation of confidentiality under Rule 1.6. Job-seeking lawyers must guard against the risk that in the course of the interviews to determine the compatibility of the lawyer with the opposing firm, or the discussions between the lawyer and the firm about the lawyer's clients and business potential, the lawyer might inadvertently reveal "information relating to the representation" in violation of Rule 1.6.

Fourth, at some point, a lawyer pursuing employment with an adversary may have a duty, under Rule 1.4, to communicate such activities to the client, as significant information reasonably necessary to permit the client, to make informed decisions regarding the representation.

At What Point Are Consultation and Consent Required?

In seeking to identify the point at which the consultation and consent mandated by Rule 1.7(b) are required, the Committee has considered all of the foregoing duties, and also Comment [4] to Rule 1.7(b), which states that:

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate, and, if it does,

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7. As an example of a case in which the duties of loyalty and vigor were compromised by employment negotiations with the adverse firm, see McCafferty v. Musat, 817 P.2d 1039 (Colo.App.1990). In this legal malpractice case, it was found that a lawyer did not use reasonable care where he recommended that his client accept a very low settlement offer without having conducted adequate discovery but after he had sought and received a job offer from the opposing firm.

whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that should reasonably be pursued on behalf of the client.

The Committee believes that there are two overriding factors affecting the "likelihood that a conflict will eventuate" and "materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclosing courses of action": the nature of the lawyer's role in the representation of the client; and the extent to which the lawyer's interest in the firm is concrete, and has been communicated and reciprocated.

The likelihood that a lawyer's job search will adversely affect his "judgment in considering alternatives or foreclosing courses of action" is far greater when the lawyer has an active and material role in representing a client. Thus, if the posture of the case is such that there is no call on the lawyer's judgment in representing a client during the period of his job search, it is not likely that his search and negotiations will adversely affect his judgment. For example, for a lawyer who has fully litigated a case against the firm he wishes to join, who is awaiting the decision of the appellate court and who presently has no action to take or consider, we do not believe that Rule 1.7(b) comes into play during job explorations with the opposing firm, unless and until a point comes when the lawyer should consider some further action on the client's behalf.[8] Similarly, if a lawyer has played a limited, but now concluded role for a client, there is ordinarily no basis for concluding that the lawyer's job search will prejudice the interests of the client on whose matter he had worked, even though others in the firm are continuing the representation.

Whether the lawyer's interest in the opposing firm is concrete and has been communicated is also important in defining the time at which consultation and consent are required. In moments of frustration, stress or boredom, lawyers may consider working elsewhere. Some may read classified ads or give their names to placement services; others may have general discussions of other firms with friends who work elsewhere. The Committee does not suggest that such thoughts or conduct, without more, give rise to an obligation to consult and seek consent of a represented client. It seems unlikely that a lawyer's interest in an association with an opposing firm will materially affect his judgment in handling a matter before the lawyer has communicated that interest to the firm, during the pendency of the adverse representation, or the firm has initiated communication with the lawyer about a possible association.

Furthermore, if a lawyer's interest in another firm, or its interest in him, is not reciprocated, it seems unlikely, in most cases, that such unreciprocated interest will have a material effect on a lawyer's judgment in a matter between them. Thus, no obligation of consultation and consent arises for a lawyer who receives and promptly rejects an unsolicited offer of employment from the

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8. Cf. Informal Opinion 52-86 of the Committee on Professional Ethics, Bar Association of Nassau County (December 19, 1986) (lawyer who, during the pendency of a motion on appeal, has interviewed with the legal representative of the adverse party, may, with the informed consent of the client, continue to represent the client in the appellate process until he accepts the position with the adversary firm).

opposing firm or party. Similarly, if a lawyer requests to be interviewed by an opposing firm, but it declines, there is unlikely to be a duty to disclose.

The criteria of concreteness, communication and mutuality can be met early in any job search process. They are certainly met at the point that the lawyer agrees to participate in a substantive discussion of his experience, clients or business potential, or the terms of an association. While recognizing that the exact point at which a lawyer's own interests may materially limit his representation of a client may vary, the Committee believes that clients, lawyers and their firms are all best served by a rule which requires consultation and consent at the earliest point that a client's interest could be prejudiced. We, therefore, conclude that a lawyer who has an active and material role in representing a client in litigation must consult with and obtain the consent of that client, ordinarily before he participates in a substantive discussion of his experience, clients or business potential or the terms of an association with an opposing firm.[9] The consultation that

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9. The Committee has labored at extraordinary length to pinpoint this "trigger" point for the client consultation obligations of Rule 1.7(b). The Committee recognizes that in certain cases, the independent judgment of a job-seeking lawyer (or the lawyers in a hiring law firm, see pp. 13-14, infra) may be "materially limit[ed]" by his or their "own interests" either earlier or later than the point at which there is an agreement to have a substantive discussion. Indeed, such a situation might very early on invoke Rule 1.4 client disclosure obligations, even aside from Rule 1.7(b).

The degree of a lawyer's responsibility and involvement in a matter is one factor that may call for different timing of the duty of consultation and consent. Thus, a lawyer who is the lead lawyer in a matter should not even contact the adverse party or firm about a possible association, without consultation and consent, because such contact may materially prejudice the client's interest. Conversely, a lawyer on the team who lacks significant client contact of who plays a minor, limited role in the case, may have greater flexibility in engaging in substantive discussions before she/he is required to advise her/his supervisor of the job negotiations in order to permit proper consultation with the client. It also seems possible that on occasion, an initial, solely informational discussion might be agreed to and even occur without implicating Rule 1.7(b). Such a situation could arise where the job-seeking lawyer or the hiring law firm has many options and wishes to conduct an exploratory interview with a number of candidates before deciding whether to pursue seriously any particular option. It could also arise where one side or the other has no presently crystallized plans to form a new association and is simply exploring possibilities on an informal basis. For the lawyer or firm who is looking at options in a preliminary fashion, such purely informational discussions might well not "materially interfere with" his or their judgment and, therefore, would not trigger the consultation and consent required by Rule 1.7(b) (although the lawyer or firm on the other side might well consider the discussion more significant and thus be subject to Rule 1.7(b) immediately).

After thorough exploration, the Committee believes that the formulation in the text best captures the overall run of job-negotiation conflicts and is the most practical and specific description possible of when Rule 1.7(b) obligations generally arise. It would be the rare case, involving either the principal lawyer for the client who proposes to switch sides, or the lawyer with but a minor role in the client's matter and who has no confidential information, where deviation would be appropriate. But the Committee recognizes that there are such cases, and does not want to foreclose the application of different timing solely in order to provide a brightline test.

the Committee here concludes that a job-seeking lawyer should have with a client whom he is currently representing, before he participates in substantive employment discussions, should include all facts that the client should consider in making an informed decision. These include the posture of the case, the nature of the work that the lawyer could or should be doing, and the availability of others in the firm to assume the work that the lawyer is doing.[10]

Although compliance with Rule 1.7(b) requires consultation directly with the affected client, and obtaining that client's consent, the Committee recognizes that there may be circumstances in which it is inappropriate or unnecessary for the job-seeking lawyer to raise the potential conflict personally with the client, at least in the first instance. This would be true, for example, if the job-seeking lawyer does not have the principal relationship with, or any direct contact with the client. In such circumstances, the job-seeking lawyer should first make disclosure to his supervisor in the matter, or the lawyer who has the principal relationship with the client. That lawyer may then decide whether to relieve the job-seeking lawyer of further responsibility for the matter pending his employment discussions, or to disclose the job-seeking lawyer's interest in the opposing firm to the affected client, and, on behalf of the job-seeking lawyer, seek to obtain the client's consent to the job-seeking lawyer's continuing to work on the matter. Of course, the job-seeking lawyer cannot continue to work on the matter until he is informed that client consent has been obtained: "A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another lawyer." See Rule 5.2.

Withdrawal as an Alternative to Obtaining Client Consent

A means that may be available, in some circumstances, to avoid the conflict that would be presented by a lawyer's employment negotiations with a firm he opposes in a matter is for the lawyer to withdraw from the adverse representation before having a substantive discussion of employment with the firm. Such withdrawal is clearly permitted if the client consents. Alternatively, such withdrawal could be made without consent pursuant to Model Rule 1.16(b), if applicable. Under Rule 1.16(b), a lawyer may withdraw from a representation "if withdrawal can be accomplished without adverse effect on the interests of the client".[11] Rule 1.16(b) may be invoked, for example, in some situations in which the lawyer is one of several on the engagement, and not the one in charge. Note that although client consent is not required for a withdrawal which can be accomplished without adverse

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10. Contacting the clients of the present firm before a lawyer begins employment with a new firm for the purpose of soliciting their business is not permitted. See Informal Opinion 1457 (lawyer may announce withdrawal from firm and new association immediately after departure).

11. Under Rule 1.16(a)(1), a lawyer must withdraw if continuing the representation would result in violation of the rules of professional conduct. However, this does not mean that the lawyer can put himself in a position where he is violating Rule 1.7(b) and then use that violation as an excuse for withdrawing under Rule 1.16(a)(1).

effect on the client's interest, the lawyer managing the matter would be well advised to communicate to the client about the change in staffing and its reason. See Rule 1.4 and discussion infra at 10-11.

Imputation

We have stated that if a lawyer is permitted to cease working on a matter in order to pursue employment negotiations with the firm he is opposing in that matter, the lawyer has avoided a conflict of interest under Rule 1.7(b). The question then arises whether other lawyers in the firm would also be disqualified from working on the matter by virtue of imputation under Rule 1.10. See note 5 supra. Under a literal reading of Rule 1.10, it would appear that the interest of a job-seeking lawyer in association with an opposing firm, which would disqualify him from working on a matter against that firm, would also disqualify all of his colleagues even after he himself had withdrawn from the matter. Such a result would have the effect of severely limiting lawyers' ability to seek new employment, without serving any identifiable purpose under the Model Rules. Accordingly, we will not infer that the drafters of Rule 1.10 intended it to apply so broadly.

Rule 1.10 reflects the belief that when a client is represented by a firm, the client is entitled to the loyalty of the entire firm, even though only some of its members are actively participating in the representation. Similarly, it posits that every lawyer in the firm has access to and is similarly bound to maintain the client's confidences, even though only a few lawyers actually share them. In short, Rule 1.10 embodies certain presumptions that are intended to protect a client who has chosen a firm to represent him, automatically ascribing every lawyer in the firm the same duties of loyalty and confidentiality, whether or not every lawyer is, in fact, in a position to help or harm the client's interests. Thus, if one lawyer is disqualified because of a conflict, then all are disqualified, without regard to whether all, in fact, share the same disability.

In our view, the assumption of shared duties of loyalty and confidentiality embodied in Rule 1.10 is entirely appropriate, and consistent with the Model Rules' overarching interest in client protection, when applied to conflicts that are derived from a firm's representation of clients with differing interests. However, we do not believe it is either logical or practical to extend this same assumption of shared duties to a situation where the disabling conflict is a personal one involving the lawyer's interest in leaving his firm, since there is no reason necessarily to assume that this interest will be shared by his colleagues.

The Model Rules do not require that every lawyer who is associated with a firm demonstrate his loyalty to clients by staying with the firm indefinitely. Indeed, Rule 1.9 specifically contemplates that a lawyer may properly join a firm that he or his firm currently opposes in a matter, and provides protection for the former client in those circumstances. And, as stated above, Rule 1.7(b) protects the client while the lawyer is negotiating for a new association with a firm he is opposing in a matter, by requiring the lawyer either to obtain the client's consent to simultaneous representation and negotiation, or to with-

draw from the representation. But client protection is not furthered even in a theoretical sense, in this case, by imputing the negotiating lawyer's interest in new employment to others in the lawyer's present firm, and we conclude that Rule 1.10 should not be read to extend to this situation. In sum, the Rule 1.7(b) conflict that the negotiating lawyer would have if he continued to work on the matter while pursuing such discussions need not, through Rule 1.10, be imputed to others in the firm.

Although we conclude that Rule 1.10 cannot be construed so broadly as to require that all lawyers in a firm be presumed to share their colleague's personal interest in joining the opposing firm in a matter, a lawyer who proposes, without consultation and consent, to take on or continue a representation that his colleague cannot, must himself evaluate, under Rule 1.7(b), whether his "responsibilities to ... a third person"--i.e., his colleague--or his own interest in his colleague's interest, may materially limit the representation.

In many cases it is unlikely that a lawyer's job explorations will have any effect on his colleagues' continuing ability to represent client adverse to the firm with which he is negotiating. Illustrative of such situations are those involving a junior lawyer who has had a minor role in a complex matter or an associate on a team who has been urged to find another position. If the job-seeking lawyer's interest in association with an adverse party or firm is unlikely to materially limit the representation of a client by others in the lawyer's present firm, consultation and consent are not ethically required for those other lawyers to continue working on the matter.[12] Of course, as stated above, if a lawyer withdraws from a matter because of his job explorations with the opposing firm, his current firm may have to have some discussion with the client about the lawyer's withdrawal, depending on the level of responsibility of the withdrawing lawyer, his relationship with the client and the expense, if any, which the client may be asked to bear by reason of the staffing change. However, in such cases, the discussion will focus on the client's willingness to work with others in the firm, and not upon a conflict imputed to other firm lawyers by reason of the job negotiations of one of them.

Negotiations with an Opposing Party

The analysis of this opinion applies with equal, if not greater, force, if a lawyer engages in interviews or substantive discussion of his qualifications

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12. There are conceivably situations in which negotiations by a lawyer who has, up to the negotiations, been involved in a pending matter adverse to the recruiting firm, would materially limit the ability of one of his colleagues to represent the client. This would be true, for example, where the colleague has an interest in leaving the firm with the negotiating lawyer. In this situation, the colleague's personal interest in the success of the lawyer's negotiations triggers the requirement of Rule 1.7(b) that the colleague obtain client consent before continuing his representation while the lawyer pursues an association with the adverse party or firm. The colleague's actual interest, not an imputation of the lawyer's interest, is the factor that would trigger need for the consultation and consent.

with an opposing party, rather than the firm representing such party. A client is likely to be even more sensitive to its lawyer's job explorations with the client's adversary than to the same negotiations with the adverse firm. We note also that a lawyer who would explore employment with the adverse party must be careful not to violate Rule 4.2, which prohibits a lawyer, in representing a client, from communicating about the subject matter of the representation with a party known to be represented by counsel.

Lawyers in the Negotiating Firm Must Obtain their Client's Consent to an Association that Would Materially Limit the Firm's Representation of its Client

Lawyers in a law firm that pursues an association with a lawyer to whom they are adverse in a pending matter may also have an obligation to consult with their client at some point in the course of employment discussions with a lawyer who is opposing the firm in a matter. This obligation will arise when the firm's interest in hiring the lawyer becomes sufficiently intense to raise a question that such interest may materially limit the firm's on-going representation of its client, in any of the ways discussed supra at 6-7. For example, if the association between a firm and a new lawyer will cause the entire firm to be disqualified from representing its client, by reason of Rules 1.9 and 1.10, consultation with the client is compelled by Rule 1.4 and Rule 1.7(b). Here, the firm's interest in hiring the opposing lawyer would not only materially limit the representation, but it may lead to its termination altogether. Even if disqualification is only a risk, but not a certainty, because of the particular rule or jurisprudence of the jurisdiction, we believe that the hiring firm's client is entitled to consultation about the risk of losing its representation in the midst of an on-going matter, as well as the expense that litigating the issue may entail. Lawyers in the firm must fully review this risk with its client and obtain that client's informed consent early in the hiring process, before the firm engages in substantive discussions of the experience, clients, business potential or terms of association of a lawyer whose arrival could have this effect. Even in a situation in which disqualification is not an issue,[13] lawyers in the interviewing firm should, early on, pursue consultation with and consent of their client, if any lawyer handling a matter adversely to the prospect will be involved in, or is likely to be influenced by, the discussions with the prospect.

Conclusion

In sum, we conclude that, for the protection of clients, Rule 1.7(b) requires a lawyer who is actively representing a client in a matter, and who is considering an association with a firm or party to whom he is opposed in the matter, to consult with his client and obtain the client's consent to his continuing to work on the matter while the lawyer explores such association. Generally, the

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13. Such a situation would arise when the new association is not contemplated until the matter is concluded, or when the firm plans to, and may permissibly withdraw if and when the new association is formed.

required consultation should occur before the lawyer engages in a substantive discussion of his experience, clients, or business potential with the opposing firm or party. If the client consents, the lawyer may continue the representation. If the client does not consent, the lawyer must either discontinue the job search that created the conflict, or withdraw from participation in the representation and transfer his work to others in the firm, if withdrawal can be accomplished properly under Rule 1.16. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to inform his supervisor. The supervisor can then determine whether to relieve the lawyer of responsibility, or to seek the client's consent for the lawyer to continue to work on the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must each evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. The lawyers in a law firm seeking to employ a lawyer who is involved in a matter adverse to the firm have similar obligations to their client.

This Committee regularly addresses, as in this Opinion, important issues relating to conflicts of interest. We recognize that among all of the issues this Committee confronts, conflicts of interest decisions generate much attention from the bar because of the possibilities they present for the disqualification of counsel. While there are, undoubtedly, many situations in which disqualification on grounds of conflict is warranted if not compelled, the opportunities for mischief presented by disqualification motions are numerous as well. Thus, we conclude this Opinion with a cautionary note. We do not intend, by this Opinion, to provide additional opportunities for merely tactical or dilatory motions to disqualify where the role of the negotiating lawyer has been such that no real harm can arise by permitting the lawyer to secure a new position of employment. As stated in the Rules themselves, "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." See Scope paragraph [18]. It is our hope that members of the profession will approach motions to disqualify in this context, as in any other context, responsibly and with prudence.