

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2011-3
(November 2011)

In a multi-count civil action filed several years ago and currently pending, Plaintiff alleges as follows:

- that Defendant D engaged in a certain act;
- that Defendants A, B and C together, or A alone, requested D to engage in said act; and
- that A engaged in additional acts, both before and after D's alleged conduct.

The inquirer advises that while D's alleged conduct alone does not prove A's liability, that should the other allegations be proven, A's liability will be established.

C was dismissed from the case prior to the inquirer's filing an answer on behalf of A and B. In the inquirer's answer on behalf of A and B, the allegation that D engaged in the certain act was admitted. A and B denied knowledge of D's purpose in acting at the request of A, B and C.[did they admit or deny that they asked him to do?]

Almost three years after filing the Answer on behalf of A and B, the inquirer entered his appearance in the matter on behalf of D. D's Answer, filed by the inquirer specifically denied the allegation, already admitted by A and B, that D had engaged in the act in question. According to the inquirer, while the documentary evidence suggests that D engaged in the act, the inquirer believes the evidence does not suggest that D acted at the request of A alone or of A, B and C. The inquirer indicates that the inconsistencies in the Answers of A and B and D may affect A's, B's and D's credibility to the jury.

The inquirer indicates that ***without identifying any specific conflict***, his retention agreement with each defendant memorializes counsel's separate discussion with each concerning the possibility of and waiver by A, B and D of any conflicts which might arise in the representation. Each client's waiver is indicated by acceptance of counsel's retention agreement.

The inquirer asks 1) whether he has violated his duty of candor to the Court or any other Rule of Professional Conduct by denying the allegation on behalf of D, while having already admitted it on behalf of A and C; and 2) may he withdraw from representing all defendants without disclosure to the court of the inconsistent positions taken by his clients.

Pennsylvania Rule of Professional Conduct ("the Rules") 1.0 (e) **Terminology** provides that

(e) “Informed consent” denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.7, **Conflict of Interest: Current Clients**, provides in relevant part that:

(a) Except as provided in paragraph (b) a lawyer shall not represent a client if the representation involves a concurrent conflicts of interest. 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 . . .

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (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 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; and
(4) each affected client gives informed consent.

Comment 29 provides in part that:

...In considering whether to represent multiple clients in the same matter... Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails... Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained...

The first issue to be addressed is whether the admission by A and B of D’s act, and D’s denial of the act, and that at trial he would be presenting conflicting evidence constitutes a material limitation on the inquirer’s representation of all three clients under Rule 1.7a. Clearly it does. D’s denial of the conduct, and A’s and B’s admission of it places A, B and D in a conflict with each other. D’s denial could be used to impeach the credibility of A, and likewise, the admission of A and B could be used to impeach D’s credibility. Since the occurrence of the act is one of three components to finding liability on the part of A, clearly the inconsistency is material. While the inquirer advises that A,B and D acknowledge conflict waivers in their signed retention agreements, it is clear that there **could not have been any informed consent** to this particular conflict, since it did not

occur until the inquirer started his representation of D, which was three years after he started representing A and B. Thus, it is clear that the inquirer must withdraw from representation of A, B and D. This is further confirmed by that part of Comment 29 which addresses failed multiple representations.

Rule 1.16 **Declining or Terminating Representation**, provides, in part,

(a) ...a lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law. ...

Comment [3] to Rule 1.16 states that the "lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."

Prior to filing the motion to withdraw, the inquirer should speak with each defendant individually and advise that there was a conflict that arose three years ago, and that he now understands that it requires his withdrawal. He should advise A, B and D to each find new counsel within a stated period of time. If any one of them is unsuccessful in doing so, the inquirer must advise that he will have no choice but to file a motion to withdraw. Here, where the inquirer has filed answers with conflicting statements, the inquirer's motion should follow the guideline in Comment 3 above.

Rule 1.6. **Confidentiality of Information** provides in part that

(d) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Rule 3.3 **Candor to the Tribunal** provides that:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may

refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Based upon the ongoing confidentiality requirements under Rule 1.6, absent a direct order from the Court the inquirer is not permitted to disclose the inconsistencies in his clients' answers. The Committee hastens to point out that those inconsistencies are just that, and while they place a limitation on the inquirer's representations going forward, there is no indication that any of the criteria requiring disclosure to the Court under Rule 3.3 have been met.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.