Committee Opinion
January 11, 2006

LEGAL ETHICS OPINION 1821

POTENTIAL CONFLICT OF INTEREST WHERE AN ATTORNEY IS SUING A CORPORATE BOARD WITH A MEMBER THAT IS A PARTNER OF THE ATTORNEY.

You have presented a hypothetical situation in which Attorney A represents a Trust Company, governed by a board of directors. Attorney B sits on the board. Attorney C has now joined Attorney B's firm. Attorney C represents several remainder beneficiaries of a trust administered by Trust Company regarding their complaints regarding the administration of that trust. Attorneys B and C wrote a letter to the President of the Trust Company requesting that the President and other board members screen Attorney B from any information or discussion of the dispute between Attorney C's clients and the Trust Company. The letter proposed that the board excuse Attorney B from the board meetings when this agenda item would be discussed. Specifically, the letter stated:

> Completely screening Local Attorney [i.e., Attorney B] from all information and discussion, if any, to or by members of the board of directors of your company is consistent with the Rules of Professional Conduct imposed on him and at the same time enables him to continue to discharge his duties as a director of your company with respect to all other matters.

Attorney C then filed the law suit against the Trust Company on behalf of the remainder beneficiaries. Several members of the board have raised objections to this arrangement with Attorney A, the board's attorney.

With regard to this hypothetical scenario, you have asked the following questions:

1) Is it a conflict of interest for Attorney C to sue Trust Company if his partner, Attorney B, serves on the board of directors of Trust Company?

2) If so, can the conflict be rectified by screening Attorney B from discussion and information concerning the lawsuit?

3) If there is a conflict, can the conflict be eliminated by the resignation of Attorney B from the board, or must Attorney C withdraw from his representation of the beneficiaries?

The pertinent legal authority for resolving these questions is Rule 1.7, governing concurrent conflicts of interest. Rule 1.7 states as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict 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 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 paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:
>
> (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) the consent from the client is memorialized in writing.

Your first question asks whether Attorney C has a conflict of interest in bringing this action on behalf of a client against the Trust Company, when C's partner, Attorney B, sits on the Trust Company's board.[1] Critical to evaluating this issue is the imputation effect of Rule 1.10. Specifically, Rule 1.10 (a) states as follows:

> 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 1.6, 1.7, 1.9 and 2.10(e).

[1]The Committee stresses that the analysis in this opinion rests on the facts provided; the hypothetical presents Attorney B as serving on the board but not representing the Trust Company. However, the committee notes that even if B does not consider himself counsel for the Trust Company, if his actions and statements gave fellow board members a reasonable impression that he was providing them with legal advice and protecting the legal interests of the board and company, then Attorney B would find himself with the duties and conflicts associated with legal representation. *See* LEO 1819. Those duties and conflicts would include, among other things, the duty to maintain confidentiality as prescribed by Rule 1.6. That duty of confidentiality, if owed to the Trust Company, could constitute a conflict of interest as a "responsibility to a third person" under Rule 1.7, in addition to the other sources of conflict of interest discussed in this opinion. However, as the limited facts presented do not include such a scenario, the analysis in this opinion rested on the provided premise that Attorney B does not represent the board or the Trust Company.

Therefore, the starting point for analysis of this question is actually whether Attorney B could represent a party suing the Trust Company. If Rule 1.7 would preclude him from taking such a case against the company upon whose board he serves, then Rule 1.10 would preclude all members of his firm, including Attorney C, from representing that client in that matter. Accordingly, the Committee will first analyze whether Attorney B could represent the remainder beneficiaries against the Trust Company.

Rule 1.7(a) establishes concurrent conflicts of interest in two types of situations. The first is not applicable here; the representation of the beneficiaries would not be directly adverse to another client of Attorney B. *See* Rule 1.7(a)(1). While the party adverse to the remainder beneficiaries *is* the Trust Company, Attorney B serves only as a board member and not as counsel to the company. Thus, Attorney B would not have a direct adversity concurrent conflict.

It is the second type of concurrent conflict that is at issue here. Rule 1.7(a)(2) establishes a concurrent conflict when certain kinds of interests of the attorney may materially limit the representation. Here, "responsibility to a third person or personal interest of the lawyer" results in this scenario from Attorney B's fiduciary duty to the Trust Company as a board member. Is there a "significant risk" that the fiduciary duty will materially limit the representation of the claimant? The Committee thinks so. The specifics of this fiduciary duty are determined by corporate law generally and the company's articles of incorporation specifically and thus those parameters are outside the purview of this Committee. Nevertheless, this Committee assumes a general duty of loyalty and protection would be part of that fiduciary duty, yet Attorney B would be bringing a suit to collect money damages from the Trust Company. In the simplest of terms, in one role, Attorney B would be seeking damages from the Trust Company, and in another role, Attorney B would be working to avoid paying such damages as part of a general goal of maximizing the assets/profits of the Trust Company. It is also possible that Attorney B's own personal interest could give rise to the conflict. If the subject matter of the litigation is related to decisions that Attorney B has made personally as a Board member, then he may have a natural inclination to defend the Board's (and his own) decision.

Courts have repeatedly found this tension between corporate fiduciary duty and the duty to a client as the source of a conflict of interest. *See, e.g., Berry v. Saline Memorial Hospital*, 322 Ark. 82, 907 S.W.2d 736 (Ark. 1995) (court disqualifies firm of former hospital board member from representing patient against the Board); *Allen v. Academic Games Leagues of America, Inc.,* 831 F.Supp. 785 (C.D. Calif. 1993)(court disqualifies firm of organization's advisory board member from representation of party suing that entity); *Graf v. Frame,* 177 W.Va. 282, 352 S.E.2d 31 (1986)(court disqualifies attorney who serves on a university's board of regents from representing persons with claims against faculty members); *William H. Raley Co. v. Superior Court,* 149 Cal.App.3d 1042, 197 Cal.Rptr. 232 (1983)(court disqualifies firm of bank trustee from representation of plaintiff adverse to the bank). In line with those authorities, and its own interpretation of Virginia's Rule 1.7, the Committee opines that it would be a concurrent conflict of

interest for Attorney B to represent the remainder beneficiaries against the Trust Company.

As the Committee has determined that Attorney B would have a conflict of interest with this representation, the Committee must look to Rule 1.10 to determine the effect of that prohibition on Attorney C, his partner. As highlighted above, Rule 1.10(a) prohibits an attorney from accepting a representation if any other member of his firm is precluded from that representation. Therefore, as Attorney B would have conflict in representing this plaintiff, so would Attorney C.

The Committee notes that Rule 1.7 *does* have a curative provision, allowing for the "cure" of some conflicts. Rule 1.7(b) will allow a lawyer to continue with a representation that met the definition of a concurrent conflict of interest under paragraph (a) of the rule so long as each requirement of (b) is met. The second and third of your questions ask just what might cure a conflict in the present scenario.

The first requirement in Rule 1.7(b) is that the affected client must provide consent after consultation. In this instance, the "affected client" is the remainder beneficiaries, as the company is not a client. For Attorney B to be able to represent these plaintiffs, among other things, he must explain the consequences of the conflict to the plaintiffs and the plaintiffs must then consent. Rule 1.7(b)(4) requires that the attorney memorialize in writing that the consultation and consent occurred. Comment 10 to Rule 1.7 clarifies that while best practice is to actually have the client provide the consent in writing, any written memorialization (such as a note to the file) will suffice.

While consent is a requirement to cure this conflict, it is not alone sufficient. Assuming the plaintiffs provide the consent after consultation, the additional requirements of Rule 1.7(b) must be met. Rule 1.7(b)(1) requires that the lawyer must reasonably believe he can provide competent, diligent representation to the client.[2] Comment 1 to Rule 1.3 ("Diligence") elaborates upon what is required:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

As stated above, the Committee believes that Attorney B may not sue a company on whose board he serves. That conflict is imputed to Attorney C by operation of Rule 1.10. Question Two suggests Attorney B could recuse himself from all discussion and voting on the matter as a possible cure to the conflict. While such recusal is not mentioned in the rule itself, it certainly is a factor to consider in Rule 1.7(b)(1). In this instance, would

[2] The Committee notes that the duty of competent, diligent representation is present for all clients, regardless of the existence of a potential conflict. *See* Rules 1.1, 1.3.

recusal resolve the tension between the attorney's fiduciary duty to the board and his professional obligation to his clients? The Committee thinks that this is possible, if the board has approved of the recusal strategy, after consultation with its attorney. Presumably the Board would consider such matters as whether the litigation is "routine" or "non-routine" in the course of the board's business; whether the claim goes to matters that have been determined by the board, or by lower level administrative staff; and whether the claim involves matters on which Attorney B has voted or has been involved in. Under the right circumstances, the risk of diluted loyalty to this client could be significantly reduced. Attorney B's recusal could be effective in two ways. First that recusal would substantially reduce the opportunity for improper influence between Attorney B and the board. Similarly, Attorney B's recusal lessens the risk that Attorney C would be improperly loyal to the corporation at the expense of his clients. Attorney B's recusal could facilitate the competent, diligent representation of the plaintiffs.

Rule 1.7(b) has two additional requirements for an effective conflict "cure": that the conduct is legal and that the representation not involve the assertion of a claim against another client in the same proceeding. *See* Rule 1.7(b)(2) and (3), respectively. Nothing in the facts suggests that Rule 1.7(b)(2) would in any way preclude curing this particular conflict; illegality does not seem to be an issue here. The requirement of Rule 1.7(b)(3) is similarly not a block to curing this conflict. The potential conflict of interest was not between two clients, but instead between client interest and duty to a third person, namely the board. Accordingly, the requirement of Rule 1.7(b)(3) does not impede a consent cure to this conflict. If Attorney B and his board create a proper screen for him, including recusal from all discussion of the matter, then Attorney C can properly seek consent from his clients to cure what would otherwise be a conflict of interest preventing that representation.

Question Three raises two other possible cures for Attorney C's conflict. First, would the resignation of Attorney B from the board cure the conflict for Attorney C? The Committee opines that such an action is likely, but not guaranteed, to cure this conflict. The end of Attorney B's role as a board member presumably would end his fiduciary duty to the Trust Company. As he never represented the company, Rule 1.9's requirements regarding duty of loyalty to former clients would not be triggered. However, if the corporate documents establishing the specifics of the duties of Trust Company board members included some duty to avoid adverse business actions regarding the Trust Company for some period after board membership, then Attorney B's resignation would not necessarily cure this conflict. That lingering duty could possibly create the sort of conflict already established for current board membership. Similarly, if the corporate documents establish a duty to keep certain corporate information confidential, that duty may also continue beyond the term of the attorney's service on the board. The factual scenario lacks sufficient detail to make that determination. The Committee notes that absent any such fiduciary duty, Attorney B and, in turn, Attorney C would not be precluded from this representation once Attorney B resigned. However, the presence of any such duties would render Attorney B's resignation alone ineffective in curing this conflict. Nevertheless, as with the recusal option discussed with Question 2,

if this resignation were combined with proper consent from the plaintiffs, Attorneys B and C could effectively cure this conflict.

The final suggestion in Question Three is that Attorney C withdraw from the representation. If Attorney C withdraws from representing the plaintiffs, no conflict would remain in need of a cure. The firm of Attorneys B and C would no longer have any members representing a party against the Trust Company.

The Committee wants to respond to two points that, while not presented as a formal question, were discussed in the materials provided with this request. The first issue is whether the income beneficiaries would have cause to object to Attorney B's firm representing the remainder beneficiaries, whose interest are adverse to the income beneficiaries. The implication is that Attorney B's firm has a special connection to the Trust Company, via Attorney B's board membership, that could give Attorney B and C's firm an unfair advantage over the income beneficiaries. The Committee notes that neither Attorney B nor Attorney C represents, nor has ever represented, the income beneficiaries in this matter. Therefore, neither attorney has ethical obligations of loyalty, competence or diligence with regard to the income beneficiaries. Accordingly, the interest of those parties is not a factor in the analysis of the potential conflicts of interest for Attorneys B and C.

Finally, the Committee wishes to note that there is an Attorney *A* in this scenario. Attorney A represents the Trust Company. The facts suggest that Attorney B and C together sent a letter to the company president and each board member regarding the potential conflict of interest providing advice as to what would cure the conflict. The facts do not include any contact by Attorney C with Attorney A, the company's attorney, prior to sending that letter regarding the litigation. Rule 4.2 requires that:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

With an entity client, like this company, a lawyer should treat anyone within the entity's "control group" as within the protection afforded by Rule 4.2. *See* Rule 4.2, Comment 4. The company president and board members are without question within that group. Attorney C should have only sent this letter regarding his client's litigation against the company if Attorney A had consented in advance to the communication.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.