

State Bar of South Dakota

Ethics Opinion 99-1

February 24, 1999

- *Rules: 1.7(b)*
- *Subject: Conflict of interest; Government employee; Subsequent representation of mutual client*
- *Summary: Attorney who has moved from one agency to another may represent client of former employer if the representation will not be materially limited and the lawyer obtains informed consent*

FACTS

A South Dakota attorney was formerly employed by a public defender office. Attorney is currently employed by a second public defender's office and is asked to represent persons previously defended by attorney's former employer. Attorney presents the following hypothetical:

A was charged and convicted years ago while defended by attorney's former employer. Attorney did not personally handle the defense, nor provide advice to handling counsel. A is in prison and seeking a Writ of Habeas Corpus on grounds of ineffective assistance of counsel. Attorney may have discussed some aspect of the case with A's previous lawyer while working with the former employer.

Attorney asks whether and under what circumstances, he/she can ethically represent A in the habeas action.

OPINION

It appears to the Committee that your request is governed by SDCL 16, 18 Appx. Rule 1.7(b). In pertinent part, 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 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. ...

The implication of Rule 1.7(b) to the facts is the potential that some duty, real or perceived, to Attorney's former employer or the former counsel for A would "materially limit" Attorney's representation of A. If Attorney "reasonably believes" neither exists and A provides informed consent, Attorney would comply with Rule 1.7(b).

A Comment to Rule 1.7(b) suggests that Attorney would be "materially limited" "when a lawyer cannot consider, recommend, or carry out an appropriate course of action because of the lawyer's other responsibilities or interests. The conflict, in effect, forecloses alternatives that would otherwise be available to the client." Under very similar circumstances, the Pennsylvania Ethics Committee cautioned a lawyer to carefully "consider whether [a] sense of loyalty to [the] former

employer would materially limit the representation. If the lawyer can overcome this ‘very difficult hurdle,’ [lawyer] must then obtain a waiver from the client after full consultation." ABA/BNA *Manual on Prof. Conduct*, § 1101:7310 (Reporting Pennsylvania Opinion 97-24). This Committee agrees.

*Lonnie R. Braun*

Chair of the Ethics Committee