

State Bar of South Dakota

Ethics Opinion 2003-3

- **Rules: 1.7, 1.16. 3.1**
- **Subject: Conflicts of Interest in Criminal Appeal**
- **Summary: Court appointed trial counsel may continue to represent clients on appeal when ineffective assistance of counsel is asserted as an issue on appeal.**

FACTS

A is employed as a public defender. Among A's duties and responsibilities is the court appointed representation of the criminally accused. Upon conviction, it is not uncommon for clients to request an appeal from the judgment of conviction. An issue which clients normally want raised on appeal is ineffective assistance of counsel. A asks whether it is a conflict of interest under Rule 1.7 for trial counsel to serve as appellate counsel when the client directs counsel to raise this issue on appeal.

DISCUSSION

Rule 1.7(b) provides:

(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;
- ...
- (4) each affected client gives informed consent, confirmed in writing.

Rule 1.16 provides in pertinent part:

...

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- ...
- (6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

A similar fact pattern and issue were discussed in Ethics Opinion 96-3. We believe that the resolution of the facts which you have presented to us is consistent with that opinion and the revised Rules of Professional Responsibility.

Rule 1.7(b) does not prohibit the representation if subparagraphs 1, 2 and 4 can be satisfied. Should A be able to satisfy the requirements of Rule 1.7, withdrawing from representation may still be appropriate under Rule 1.16(b)(3), (6) or (c). Withdrawal is permissive rather than mandatory under this rule. This Rule should be read in conjunction with Rule 3.1 which provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for a defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

You have questioned whether the cases of *State v. Korth*, 650 NW2d 528 (SD 2002) and *State v. Cochran*, 434 NW2d 370 (SD 1989), prohibit representation under the facts you have described. While the inquiry is relative to resolving the requirement of Rule 1.7(b)(2), this Committee is prohibited by its guidelines from opining on issues of substantive law, therefore, we can not provide you with any assistance in addressing the impact of *Korth* and *Cochran* on this issue.

The Rules do not prohibit A from representing client. However, the circumstances under which A may continue representing client create an understandable concern. Therefore, Rule 16 provides the means by which A may withdraw, subject to court approval.

Brad A. Schreiber
Chair, Ethics Committee
State Bar of South Dakota