THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2012-6
(October 2012)

The inquirer joined a law firm ("the Firm") while a lower court denial of a Post Conviction Relief Act petition filed on behalf of a client of the Firm ("the Client") was on appeal. The inquirer was not employed by the Firm during the lower court adjudication of the original PCRA petition nor was the inquirer involved in the subsequent appeal. However, the Firm did assign the inquirer to assist in preparing a Federal court *habeas corpus* petition for the same client. In the process of preparing the *habeas* filing, a "new claim" was discovered. Although the nature of the "new claim" is not explained, the Committee understands that it entails an argument that the Firm failed to raise an available claim for post-conviction relief relating to ineffective assistance of counsel in the lower court, thereby compounding the existing ineffective assistance of counsel claims.[1] The inquirer thereafter resigned from the Firm but was then appointed by the federal court to continue, in conjunction with the Firm, to represent the Client in the ongoing federal *habeas* matter. At some point, the Client's state court appeal from the denial of PCRA relief was likewise denied.

The inquirer represents that the United States Supreme Court has allowed "new claims"; i.e., those not raised in state court post conviction relief proceedings, to be asserted in the *habeas* contest if they relate to ineffective assistance of counsel at the first stage of the post-conviction relief process; otherwise, such claims are barred.[2] The inquirer now faces the prospect of asserting via the "new claim" that the Firm (inquirer's co-counsel and former employer) provided ineffective assistance of counsel. Accordingly, the inquirer asks if the assertion of the "new claim" will place him in a conflict of interest position and, if so, whether the conflict thus engendered is waivable based upon the informed consent of the Client.

This inquiry implicates Pennsylvania Rule of Professional Conduct (the "Rules") 1.7(a)(2). According to Rule 1.7(a)(2), a "concurrent conflict of interest" exists if there is a "significant risk that the representation [of the Client] will be materially limited by the lawyer's responsibilities to...a third person or by a personal interest of the lawyer." Presumably, the inquirer's concern is that his former employment by the Firm and/or his status as the Firm's co-counsel will limit his ability to prosecute so much of the *habeas* petition as depends on the "new claim"; i.e., the ineffective assistance of the Firm in its handling of the original PCRA petition at the lower court level.

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[1] 42 Pa.C.S.A. §9543(a)(2)(ii).

[2] The inquirer does not identify the case but this would appear to refer to the March 20, 2012 decision of the Court in Martinez v. Ryan dealing with "initial collateral review."

The Committee cannot glean from the inquiry whether the inquirer has any responsibilities to the former Firm (or third persons) or any residual personal interest in the Firm's business such that there is a "significant risk" that his ability to prosecute the "new claim" on the Client's behalf might actually be "materially limited." Based on the inquirer's representations that he was not at the Firm when the actionable conduct took place and did not participate in the state court appeal, it does not seem as if a "significant risk" exists of some kind of "material limitation" which affects the inquirer's ability to provide the requisite representation. Nevertheless, this is a threshold judgment that the inquirer must make in light of the relevant facts and circumstances known to him. It is possible, for example, that even if the inquirer has no formal responsibility to the Firm or any of its partners or employees, he may have a personal relationship that could interfere with his ability to prosecute zealously the "new claim". Only the inquirer can know the answer to that question. Obviously, should the inquirer conclude that the risk of such a material limitation is significant, then a conflict is present and the inquirer is obligated either to resign from the engagement or obtain a waiver from the Client founded upon informed consent; i.e., consent 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 1.0e["Terminology"] . In order to even seek such a waiver, the inquirer is reminded that he must reasonably believe that he can continue to afford the client diligent [Rule 1.3]and competent [Rule 1.1] representation, notwithstanding the conflict. And, as per Rule 1.7(b)(3), the representation must not be one that is prohibited by law.[3]

The Committee wishes, however, to address a related issue that is implicit in the inquiry. Specifically, the Committee is troubled by the Firm's continued representation of the Client in the ongoing *habeas* litigation. Assuming, as appears to be the case, that the "new claim" now being asserted in that litigation is premised upon the Firm's ineffectiveness in the lower court PCRA proceeding, the interests of the Firm and the client are thus directly adverse. In other words, the Firm itself has a "concurrent conflict of interest" under Rule 1.7(a)(2). In view of the inquirer's status as co-counsel with the Firm, this adversity threatens to taint the inquirer's representation of the Client. This is so because the Firm must either (a) resist the claim, which could include revealing Client's confidences in order to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" and/or "to respond to allegations in any proceeding concerning the lawyer's representation of the client..."; see Rule1.6(c)(4); or (b) accede to the claim, thereby tending to establish that the Firm violated its duties of diligence and/or competence and potentially subjecting the Firm and/or its lawyers to actions for civil liability and/or professional discipline. In the view of the Committee, this situation potentially brings RPC 5.1(c)(1) to bear on this inquiry. Rule 5.1(c)(1) provides that "[A] lawyer shall be responsible for another lawyer's violation of the Rules of

[3] Seeing as this is not a "client versus client" conflict, Rule 1.7(b)(2) is not germane.

Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved..."[4] As far as the Committee has been made aware, there is undifferentiated joint responsibility between the inquirer and the Firm for the representation. Assuming this to be the case, the duties of competence and diligence imposed by the Rules are shared by both. Accordingly, the Committee advises that the inquirer should, at a minimum, confirm that the Firm has sought and obtained the Client's informed consent to its continued representation. If this has not happened, the inquirer should remonstrate with the Firm to withdraw or seek consent, as necessary, in accordance with Rule 1.7(b). Further, if the inquirer determines that the conflict cannot be waived based on informed consent, in the Committee's judgment, the inquirer should seek the Firm's disqualification, or in the alternative, if not successful in that regard, the inquirer himself should seek to withdraw from the representation in favor of substitute counsel.

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.

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[4] While Rule 5.1 generally addresses the professional responsibilities of lawyers *inter se* in a law firm, subparagraph (c) of the Rule is not so limited. See. Richmond "Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions In a Bottle," 98 Ky.L.J. 461,505 (2009-2010) citing to Neilson v. McCloskey, 186 S.W.2d 285,287 (Mo. Ct. App. 2005).