New York State Bar Association
Committee on Professional Ethics

OPINION 1174 (10/15/2019)

TOPIC: Conflicts of interest; lawyer advocating as amicus for one side of litigation while other lawyers in same firm advocate as amicus for other side.

DIGEST: Attorneys at a law firm are not permitted to submit amicus briefs for both sides of a litigation when representing a client as amicus for one or the other side, but, in the absence of a represented client may do solely on a pro se basis.

RULES: 1.2(a); 1.7; 1.8; 1.9; 1.10(a); 1.7(b)(3); 1.7(a)(2),

FACTS

1. The inquirer is an attorney at a law firm. The law firm circulated a proposal for attorneys to volunteer pro bono legal services supporting a particular position, and preparing an amicus brief advocating that position, for submission to the Supreme Court of the United States.

2. The response of the attorneys at the firm was mixed. Some associates favored one side of the issue before the Court, while others wished to take the opposing view. The law firm proposed creating two mutually exclusive teams to work on their respective positions, with each group submitting its own amicus brief.

QUESTION

3. May attorneys from a single law firm submit amicus briefs on opposing sides of the same issue before the same court?

OPINION

4. Even with amicus briefs, an attorney is generally not submitting them on his or her own behalf, but, either individually or as a firm, is doing legal work for a client, be it for compensation or pro bono.

5. Once an attorney enters into an attorney-client relationship, then all the elements of the N.Y. Rules of Professional Conduct (the "Rules") applicable to such representations apply. These include Rule 1.2(a), which says that, subject to certain exceptions not apposite here, "a lawyer shall abide by a client's decisions concerning the objectives of representation." *See* Rule 1.2(a), Cmt. [1] ("[p]aragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation"). If, for instance, a client wants attorneys at the law firm to advocate a particular position as an amicus, in support of either an appellant or an appellee, debate within the firm may be had about how most effectively to do so. By way of example, the division

into two mutually exclusive teams to work on opposing sides may be a useful tool to hone a brief, test the strongest arguments for each position, and assess the weaknesses of relying on certain precedents or claims.

6. Equally applicable once a law firm establishes an attorney-client relationship are the Rules governing conflicts set out in Rules 1.7, 1.8, and 1.9, each of which is imputed to all lawyers in the firm under the standards set forth in Rule 1.10(a). N.Y. State 968 ¶ 18 (2013). Opinion 968 addressed a situation in which government attorneys inquired regarding their ability to defend their agency in proceedings challenging agency actions to which they themselves were subject, including challenges brought by their own fellow government attorneys. There, we concluded that the attorneys were permitted to do so, if consent were obtained, and if certain qualifications were met, including the defending attorneys not themselves being involved in challenging the agency actions.

7. The Opinion then continued: "There is one form of nonconsentable conflict that presents a different problem, and that is the situation presented by Rule 1.7(b)(3), which bars a lawyer from representing clients on both sides of the same litigation or other proceeding before a tribunal. Lawyer A cannot appear on both sides of a litigation, but can Lawyer A appear adverse to Lawyer B from the same law firm in that litigation? We think that such a situation would be governed by different considerations because litigation involves the interests not just of the affected client or clients but also of the public and the judiciary. For example, where a matter is in litigation, the appearance of lawyers from the same firm may deprive the judiciary and the public of the confidence that the adversary system, on which the development of the law depends, will function as it should." *Id.* ¶ 28. In Opinion 968, we did not address "that question with finality here, as the issue is not presented." *Id*. We explained in a footnote: "Rule 1.7(b)(3) by its terms only applies when lawyers are *representing clients* on both sides of the case. Here, the [opposing] lawyer . . . would be proceeding *pro se*, and would not be representing a client (other than him- or herself)." *Id.* fn. 11 (emphasis in original).

8. Here, we believe it necessary to resolve the issue left open in Opinion 968. Two scenarios occur to us as possibilities confronting the inquirer. One is that the inquirer's firm has one or more clients asking the firm to submit amicus briefs on opposing sides of the issue before the Court. We believe that the firm may not do so, for such a circumstance falls within the prohibition of Rule 1.7(b)(3). This is so whether the clients are outside clients or lawyers within the firm. A law firm may form an attorney-client relationship with one or more of its own lawyers. New York State 789 (2005). If the law firm forms such a relationship with one of its own attorneys for purposes of submitting an amicus brief, the same prohibition applies as if the client were an "outside" client.

9. The second scenario is the one to which the footnote in Opinion 968 referred, namely, that lawyers in a firm propose to appear *pro se*. "[L]awyers are as free as anyone else to pursue legal remedies . . . and they are not obligated . . . to retain other counsel in such pursuits. [Each] lawyer clearly may serve as [the lawyer's] own client." New York State 527 (1980). It is not for us to assess whether the firm's governing documents allow for such freelancing, but we see no ethical reason why attorneys may not appear in their own name (rather than in the name of the firm) as *pro se* amici on opposing sides of a question before the Court.

10. We suggest that the law firm consider whether the Supreme Court would expect attorneys appearing *pro se* on opposite sides of an issue to disclose that they are affiliated with the same firm, or at least disclose their law firm affiliation, for the affiliation could affect the Court's evaluation of the competing briefs.

CONCLUSION

11. Attorneys at the law firm representing clients may not submit amicus briefs on opposing sides of an issue before the Supreme Court of the United States, but attorneys at the firm may in their individual capacities submit amicus briefs for opposite sides of an issue *pro se*.

(13-19)