

## Ethics Opinion 2025-01

Question Presented: May a lawyer, who has been appointed to represent one criminal defendant regarding a habeas petition, represent a co-defendant regarding other post-conviction matters related to the same case?

Short Answer: The representation is not per se impermissible but is so likely to result in a concurrent conflict, either now or in the future, that the lawyer should decline the second representation.

Rules Implicated: 1.7

### **FACTS**

Lawyer has been appointed to represent a convicted Defendant on a habeas petition. The Defendant's Co-Defendant has approached Lawyer about representing Co-Defendant on a motion related to Co-Defendant's sentence. Lawyer inquires whether this is a conflict under Rule 1.7 of the South Dakota Rules of Professional Conduct, or whether the fact the representations would occur post-conviction would eliminate any potential conflict.

### **ANALYSIS**

Rule 1.7(a) of the South Dakota Rules of Professional Conduct provides that a Lawyer may not, without a conflict waiver as defined by Rule 1.7(b), represent a client if it will result in a concurrent conflict. A concurrent conflict arises when either (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.

Comment [23] to Rule 1.7 states that the "potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant." An oft-cited reason for this policy is the risk that one co-defendant may turn against another. Another is that the co-defendants may have differing levels of culpability.

The Committee does not believe this grave potential for conflict has dissipated because the case is now in the post-conviction stage. The Committee does not know what potential arguments the two clients are planning to marshal in favor of their positions, but it seems likely, if not inevitable, that the Defendant and Co-Defendant would each want to at least consider pointing to the other as being either solely or more culpable for whatever events led to their prosecutions and convictions. This would place the Lawyer in an impossible conflict situation that would likely not be waivable under Rule 1.7(b)(1). The Lawyer would not be able to reasonably believe that the Lawyer could provide competent and diligent representation to both Defendant and Co-Defendant in that circumstance.

Consequently, although the Rules do not strictly prohibit the concurrent representation presented by Lawyer's inquiry, the Committee strongly urges the Lawyer not to represent the Co-Defendant. That representation would present an unreasonably high risk of an unwaivable conflict of interest.