

New York State Bar Association

Committee on Professional Ethics

Opinion 810 – 4/3/07

Modifies: N.Y. State 165 (1970),
260 (1972)

Topic: Representation of private clients by a government contract attorney

Digest: An attorney who provides legal services to clients on behalf of a county agency and maintains a private practice may not represent clients in the private practice in a matter in which the attorney participated as a government lawyer so long as the client is entitled to representation by the public agency. The lawyer may, however, represent the client in the private practice with respect to a different matter so long as the lawyer did not solicit the client to engage the lawyer.

Code: DR 2-103(A); DR 5-108(A); Canon 9;
DR 9-101(B)

QUESTION

1. Under what circumstances may a lawyer who serves as a contract attorney for a county office represent clients in the lawyer's private practice where the lawyer previously had contact with the client in the lawyer's capacity as a government attorney?

OPINION

2. The inquirer is a contract attorney for a county Office for Aging and maintains a private practice in the same county. The county office provides a range of legal services for elderly clients who qualify. In some circumstances the client who is eligible for representation with respect to a specific matter nevertheless may choose to seek private representation, or a client may not qualify for representation by a county attorney because the matter is outside the scope of services that the county office provides or the client does not qualify for such services. In either case, whether the client seeks private representation by choice or necessity, it may be necessary for the lawyer to refer the client to a private, fee-for-services legal practice. This opinion discusses situations in which a client who has met with the county lawyer may subsequently seek representation by the county lawyer in his or her private practice.

3. DR 9-101(B) of the Lawyer's Code of Professional Responsibility provides that a "lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee." An initial issue is whether DR 9-101(B) applies to the attorney. The attorney in question is technically not an employee of the county, but rather an independent contractor who has contracted to perform services in exchange for a fee. While the Code uses the term "employee," which is not defined, we believe that the intent is to include within the ambit of DR 9-101(B) independent contractors who perform legal services for a public entity, such as the county.¹ A second issue is whether DR 9-101(B) is limited to the case where the attorney has left public employment. We have opined that DR 9-101(B) also applies when the attorney is a public employee and simultaneously continues a private practice.²

4. A third issue is whether DR 9-101(B) applies when the county attorney's client is not the government but a third party. While DR 9-101(B) often applies when the attorney subsequently represents a party in a matter adverse to the government agency for which the attorney worked, the language of DR 9-101(B) is not so limited. By its terms, the rule applies when the attorney represents a private client in a matter in which the lawyer participated personally and substantially while working for the government regardless of whether the attorney is now adverse to the government. Numerous authorities have so noted.³

¹ Cf. N.Y. State 630 (1992) ("special counsel who regularly represents the town . . . would be the functional equivalent of a member of the town attorney's staff"); N.Y. State 708 (1998) (private lawyer hired to represent public agency subject to DR 9-101[B]).

² N.Y. State 506 (1979) ("the use of the past tense in DR 9-101(B) is without relevance to a resolution of the question").

³ See Restatement (Third) of the Law Governing Lawyers § 133 cmt. d (2000) ("adverse involvement is not required"); ABA Model Rule of Professional Conduct 1.11 cmt. 3 (rule applies to congruent interest situations); *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d. Cir. 1974) (switching sides not required). Cf. DR 5-108(A)(1) (barring representation "materially adverse" to a former client in same or a substantially related matter); N.Y. State 708 (1998) (DR 9-101[B] is principally intended to ensure the public's confidence in the integrity of public agencies and public processes, whereas DR 5-108[A] is principally intended to protect against the misuse of the former client's confidences).

5. We have also previously opined that DR 9-101(B) applies when the government lawyer represented a third party. For example, in N.Y. State 506 (1979) we opined that an assistant county attorney who represented a wife in proceedings brought against her husband under the Uniform Support of Dependents Law could not subsequently privately represent the wife in an action to recover arrearages under a separation agreement. We considered it “immaterial” that the objectives of the contemplated private employment would be fully consistent with those of the lawyer’s prior representation. We noted that the impropriety that DR 9-101(B) addresses is that of using a public office to secure private advantage and that the ethical proscription exists regardless of whether the private employment is consistent with the public representation.

6. In an analogous situation the Committee looked to DR 9-101(B) for guidance to determine whether a Legal Aid Society lawyer could continue to represent in private practice those whom the attorney represented while employed by the Society. In N.Y. State 534 (1981), the Committee opined that while DR 9-101(B) literally did not apply because the Legal Aid Society was not a government agency, the former staff attorneys could not undertake to represent for a fee those whom they previously served in connection with matters for which they had substantial responsibility so long as such clients remain eligible to receive representation without charge.

7. In N.Y. State 708 (1998) we opined that an attorney who represented a foster care agency in extra-judicial surrender proceedings may not represent prospective adoptive parents who seek to adopt the child involved in those proceedings. Again, we opined that although DR 9-101(B) did not literally apply because the foster care agency was a private entity, the strong public policy concerns underlying the rule were implicated. We noted:

DR 9-101(B) should be seen as providing an illustration of a general policy underlying much of Canon 9. It is a policy which may be seen to develop from the Code's expressed purpose to promote public confidence in our system of justice and the various mechanisms, or agencies, which have been created to serve that system. Where the public might reasonably perceive that such agencies are being used for the personal advantage of [its] attorneys, consistent with the broad purposes of Canon 9, the attorneys have been prohibited from undertaking various kinds of private employment.⁴

8. We follow the same approach here. Where the attorney has represented a client under the auspices of the county Office for the Aging, the attorney may not subsequently represent the client in the attorney’s private practice in connection with the same matter so long as the client is eligible to receive representation from the county

⁴ N.Y. State 708 (quoting N.Y. State 534 [1981]). See also N.Y. State 514 (1979) (a court-appointed guardian ad litem representing a proposed conservatee may not, after the conclusion of the conservatorship proceeding, accept employment as counsel for the conservator); *Mendicino v. Whitchurch*, 565 P.2d 460 (Wyo. 1977) (lawyer employed in legal aid office disciplined for representing a legal aid client in a private practice in the same matter).

office. This properly guards against the concern that the government attorney not use the attorney's public office to private advantage.

9. We next consider situations in which the attorney had contact with the prospective client through the attorney's position with the county office but did not represent the client with respect to the matter for which the client now seeks representation. For example, the lawyer may have met with the client but did not provide representation with respect to a matter either because the matter was not within the scope of services provided by the county office or because the client was not eligible for services. The client subsequently seeks the lawyer's representation with respect to the matter. Alternatively, the lawyer may have represented the client with respect to a matter under the auspices of the county office but the client now seeks representation with respect to a different matter. In each case the lawyer may represent the client provided the lawyer has not solicited the representation and provided the lawyer tells the potential client about the availability of the services the county offers if the client would be eligible for the services.

10. DR 2-103(A) provides:

A. A lawyer shall not engage in solicitation:

1. by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

2. by any form of communication if:

a. the communication or contact violates DR 2-101(A), DR 2-103(G) or DR 7-111;

b. the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

c. the solicitation involves coercion, duress or harassment;

d. the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

e. the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

11. Ordinarily a lawyer may engage in in-person or telephone solicitation of representation from a very limited class of people that includes existing or former clients.

Nevertheless we believe it would not be appropriate for the attorney working under contract with the county Office for the Aging to solicit either current or former clients in any of the situations described above. This Committee has repeatedly held that lawyers in the public's employ, whether full or part-time, must scrupulously avoid using their public offices to promote their private interests and practices.⁵

12. In N.Y. State 165 (1970) and N.Y. State 260 (1972), the Committee opined that it would be unethical for a public defender to represent in his or her private practice anyone who had contacted the public defender's office for assigned representation. The Committee subsequently modified those opinions and opined that the public defender could represent the accused in a private representation where the contact with the attorney was the result of independent factors and not merely the contact with the public defender's office.⁶ The latter opinion left intact the opinions in N.Y. State 165 and N.Y. State 260 that a public defender should not represent a private client where the potential client originally sought public defender representation and was found to be unqualified for public assistance. This portion of N.Y. State 165 and N.Y. State 260 should be limited to the criminal context discussed in those opinions. The concern for the integrity of the criminal justice system calls for a more stringent rule for public defenders than is necessary for civil matters.

13. Where the client is not eligible for representation by the county office, we believe there is not likely to be any perception that the attorney is using the public office to obtain clients so long as the attorney does not solicit the private representation. Particularly with respect to the types of matters handled by the county Office for the Aging, the client may have difficulty obtaining representation and there is no reason to prevent the attorney from undertaking the matter simply because the client consulted the Office for the Aging first in order to determine that the client was not eligible for public representation.

CONCLUSION

14. A lawyer employed by a government agency may represent in his or her private practice a client who has previously been served by the government agency except where the representation is with respect to a matter in which the government lawyer participated and the client remains eligible for representation by a lawyer for the government agency.

(30-06)

⁵ See, e.g., N.Y. State 457 (1977) (state estate tax attorney); N.Y. State 435 (1976) (county legislator); N.Y. State 392 (1975) (state estate tax attorney).

⁶ N.Y. State 587 (1987).