

# New York State Bar Association

## Committee on Professional Ethics

Opinion 811 – 4/13/07

Topic: Conflicts of interest; public defender

Digest: Where a public defender cannot be assigned due to a conflict, the public defender may not review billing vouchers of the counsel assigned to the matter to determine or recommend whether they should be paid.

Code: DR 5-101, 5-105(C), (D), 7-101(A)(1);  
EC 5-1, 5-15.

### QUESTION

1. May a public defender employed by the county perform a review of billing vouchers submitted by counsel assigned pursuant to Article 18-B of the County Law where the 18-B lawyer is appointed because the public defender has a conflict?

### OPINION

2. New York law requires each county to establish a plan to provide attorneys for people who are entitled to legal representation in criminal and family matters but who cannot afford to pay for counsel.<sup>1</sup> Counties are permitted to use any of four methods to provide such counsel: a public defender, a private legal aid bureau, a bar association plan for rotation of private counsel, or a combination of these.<sup>2</sup> In many cases, counties that have chosen to establish a public defender in accordance with County Law Article 18-A rely on private attorneys under Article 18-B in cases in which the public defender is unable to represent an indigent litigant because of a conflict of interest with another client of the office (co-defendants in a criminal proceeding, for instance).

3. A number of counties do not have a separate program or coordinator that would have responsibility for reviewing bills submitted by attorneys assigned to represent poor

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<sup>1</sup> N.Y. County Law § 722.

<sup>2</sup> *Id.*

people under Article 18-B. Some counties may require the public defender to review billing vouchers of assigned conflict counsel. Some of these counties go further and include the assigned counsel budget in the appropriation for the public defender's office.<sup>3</sup>

5. The Committee concludes that if the public defender's office is barred from representing a party because of a conflict, it would similarly be barred from reviewing the billing vouchers of assigned counsel to determine whether they should be paid by the county. In reviewing those billing materials, the public defender's office would not only likely be exposed to work product about the trial preparation activities of assigned counsel, but would be called upon to determine or advise the county whether those expenditures were excessive. The office owes a duty of loyalty, EC 5-1, and of zealous advocacy, DR 7-101(A)(1), to its client in the matter that conflicts with the expectation of the county that the office provide impartial advice on whether the bills of the 18-B lawyer are appropriate. This may be viewed as a conflict under DR 5-105 between two clients of the office -- the county, which hires the office to provide legal advice on the appropriateness of the 18-B lawyer's bills,<sup>4</sup> and the client in the matter that creates a conflict. Alternatively, it may be viewed as a conflict under DR 5-101 between the interests of the client in the matter and the office's own interest in properly carrying out its obligation to provide impartial review of the bills.<sup>5</sup> Under either view, the result is the same. This prohibition would prevent any member of the public defender's staff from engaging in the review of billing submissions.<sup>6</sup> In short, if the public defender's office is conflicted from representing a party in litigation, the office may not get back involved in the representation by participation in determining whether the assigned counsel's bills should be paid.<sup>7</sup>

6. Conflicts under DR 5-101 and DR 5-105 can often be waived with the informed consent of the affected clients, DR 5-105(C), but several circumstances make it unlikely that consent will cure the conflict here. First, we have noted that it is often difficult to obtain informed consent to waiver of a conflict from indigent clients who have been

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<sup>3</sup> See Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services at 57-58 (Spangenberg Group, June 2006).

<sup>4</sup> See N.Y. City 2004-3 (assuming that a government lawyer's client is the government agency that employs the lawyer).

<sup>5</sup> See N.Y. State 767 (2003) (lawyer may not represent parents in hearing before impartial hearing officer where such officer is separately appearing on behalf of private clients before the lawyer acting as impartial hearing officer); N.Y. State 682 (1996) (a lawyer may not accept a referral fee from an investment advisor because of the potential impact on the lawyer's advice to the client).

<sup>6</sup> DR 5-105(D) (conflicts under DR 5-105 and DR 5-101 are imputed to all lawyers in a law firm or law office). See also EC 5-15 (the lawyer "should resolve any doubts against the propriety of the representation"); N.Y. State 788 (2005) (the conflicts of prosecutors in a small D.A.'s office are imputed to a part-time prosecutor).

<sup>7</sup> Our view is limited to the facts here, involving conflicting interests of criminal defendants. We express no view with respect to other circumstances, such as the review of bills in other contexts submitted by counsel for parties whose interests differ only slightly or only potentially from those of the reviewer's client.

assigned counsel.<sup>8</sup> Moreover, a lawyer or law office (such as the public defender's office) rarely can represent multiple criminal defendants.<sup>9</sup> Indeed, in seeking the appointment of 18-B counsel because of a conflict, the public defender is likely to have concluded that the conflict was not consentable. If the conflict that precluded the public defender from representing the defendant was not consentable, the same conflict would prevent the public defender from reviewing the bills of the defendant's 18-B counsel and would presumably not be consentable.

## CONCLUSION

8. Where counsel is assigned to represent a criminal defendant because the public defender has a conflict, the public defender may ordinarily not review the bills submitted by assigned conflict counsel so as to determine or recommend whether they should be paid.

(35-06)

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<sup>8</sup> N.Y. State 800 (2006) ("Client consent, in a case where a conflict is consentable, is often not possible. Consent can only be sought where the prospective client would be empowered to withhold consent freely. . . . [I]t would be difficult to obtain voluntary consent from an assigned client."); N.Y. State 490 (1978) (When seeking consent, the attorney "should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and such requests should be made only under circumstances where the [attorney] is satisfied that [his or her] clients could refuse to consent without any sense of guilt or embarrassment.").

<sup>9</sup> See EC 5-15 ("there are few situations in which the lawyer would be justified in representing in litigation multiple clients with potentially differing interests"); Restatement (Third) of the Law Governing Lawyers §129 cmt. c (2000) ("joint representations in criminal cases often has a material and adverse effect on the representation of each defendant"); ABA Model Rule 1.7 cmt. 23 ("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 co-defendant."); *Wheat v. United States*, 486 U.S. 153 (1998) ("[M]ultiple representation of criminal defendants engenders special dangers of which a court must be aware" and a court confronted with possible conflicts "must take adequate steps to ascertain whether the conflicts warrant separate counsel.").