



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1073 (11/13/15)

Topic: Conflict of interest; defense attorneys serving on a District Attorney’s conviction integrity committee

Digest: A defense attorney serving on a District Attorney’s conviction integrity committee is not prohibited from continuing to engage in the practice of criminal law since that defense attorney is not a member of the District Attorney’s firm and is not assuming a prosecutorial role.

Rules: Rules 1.0(h), 1.7(a) & (b), 1.10, 6.4

FACTS

1. Two criminal defense attorneys have been asked to serve on a committee of a conviction integrity unit established by a county District Attorney. The committee, which also includes members of the District Attorney’s office and county police, reviews wrongful conviction claims and then recommends a course of action to the District Attorney. The District Attorney ultimately decides what action to take. The criminal defense attorneys on the committee are unpaid volunteers invited to participate by the District Attorney. They are not under the control of the District Attorney, and they do not have access to information about cases other than those they are reviewing. No member of the committee is permitted to participate in the review of a claim related to a case in which the member was previously involved.

QUESTION

2. Is a defense attorney serving on a District Attorney’s conviction integrity committee permitted to continue to practice criminal law?

OPINION

3. This Committee has repeatedly opined, under both the current New York Rules of Professional Conduct (the “Rules”) and the prior Code of Professional Responsibility, that a part-time prosecutor who is also in private practice is barred from representing criminal defendants in any New York state court. *See, e.g.*, N.Y. State 859 (2011); N.Y. State 544 (1982). The Committee reasoned “that prosecutors have special responsibilities to the public that render the roles of prosecutor and defense counsel ‘inherently incompatible.’” N.Y. State 859. The Committee additionally expressed the concern that the public might perceive that a District Attorney would show favoritism to the clients of a part-time prosecutor. N.Y. State 859; N.Y.

State 683 (1996). This Committee has further expanded the part-time prosecutor ban to cover “matters involving law enforcement personnel with whom the lawyer works (or has worked) as a part-time prosecutor.” N.Y. State 859.

4. The rationales underlying the part-time prosecutor rule are not sensibly applied to the inquirers’ situation. A conviction integrity committee does not carry out the type of prosecutorial function that is “inherently incompatible” with criminal defense practice. Unlike the prosecution of a new case, the task of evaluating the weaknesses in a past conviction is not at odds with the defense function. Indeed, a criminal defense attorney’s skills should be well suited to evaluating the strength of a prior conviction. In the same vein, this Committee has previously limited the application of its part-time prosecutor rule to lawyers who serve in a prosecutorial capacity on an *ad hoc* basis, recognizing that functioning temporarily in a prosecutorial function does not trigger the same inherent incompatibility as a long term assumption of prosecutorial responsibilities. N.Y. State 564 (1984) (“a special district attorney, whose appointment is limited to a particular matter, has only a limited identification with the state, and does not present the same potential for public distrust and suspicion as would a regularly employed prosecutor representing criminal defendants in private practice”); *see also* N.Y. City Bar Op. 1996-4 (exempting *pro bono* prosecutorial work from categorical application of part-time prosecutor rule).¹

5. Even though the inquirers’ work on the conviction integrity committee is not prosecutorial in nature, their participation on the committee would, nonetheless, be problematic if it rendered them members of the District Attorney’s “firm.” For were the inquirers members of that firm, any conflict arising from the more traditional prosecutorial work of the District Attorney’s office would be imputed to them. *See* Rule 1.10(a). But not every association constitutes membership in a firm. *See* Comment [2] to Rule 1.0(h)(whether an individual is a member of a firm is a fact-specific inquiry); N.Y. City Bar Op. 1996-4 (*pro bono* attorneys handling appeal for District Attorney’s office are not members of the District Attorney’s firm); N.Y. State 1036 (2014) (focusing on whether the lawyers in question (1) were presented to the public in a way that suggested they were members of a firm and (2) had mutual access to client information). The inquirers here are unpaid volunteers, they are not under the control of the District Attorney, the decisions of the committee on which they serve are non-binding recommendations, and the inquirers do not have access to information about cases other than those the committee is investigating. Given those facts, the inquirers cannot be considered members of the District Attorney’s firm.

6. Based on the above, the Committee concludes that the inquirers are not categorically prohibited from serving on the conviction integrity committee and continuing to represent criminal defendants. Nonetheless, the inquirers must be on the lookout for particular conflicts that may arise from their work on the committee.

¹ Some of the work done by the committee may constitute “law reform activities” and thus be governed by Rule 6.4 (“A lawyer may serve as a . . . member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer.”). For any such work that would “materially benefit” the interests of a client of the inquirers, they “shall disclose that fact to the organization, but need not identify the client.” Rule 6.4.

CONCLUSION

7. A defense attorney serving on a District Attorney's conviction integrity committee is not prohibited from continuing to engage in the practice of criminal law since that defense attorney is not a member of the District Attorney's firm and is not assuming a prosecutorial position.

(24-15)