



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

Opinion 1119 (4/7/17)

Topic: Former partner or associate of district attorney; criminal law; conflict of interest

Digest: A lawyer who is a former associate of the newly elected district attorney may represent criminal clients being prosecuted by the district attorney, provided that (i) the district attorney has severed all ties with the firm and (ii) a reasonable lawyer would not conclude that there is a significant risk that the lawyer’s professional judgment on behalf of the clients will be adversely affected by the lawyer’s former relationship with the district attorney (or the lawyer’s personal interest conflict is consentable and the client has consented, confirmed in writing).

Rules: 1.0(e), 1.7(a) & (b), 1.11(d), 8.3

FACTS

1. The inquirer is an attorney who works in the law firm where the newly elected district attorney of the county was once a partner. The inquirer seeks to represent defendants in criminal matters in the county.
2. The office of district attorney is a full-time position and the district attorney no longer works at the firm.

QUESTION

3. May a lawyer who practices in the law firm where the newly elected district attorney of the county was formerly a partner represent defendants in criminal matters in that county?

OPINION

4. The New York Rules of Professional Conduct (the “Rules”) regulate the conduct of the inquirer as well as the district attorney. We answer questions only if they concern the conduct of the inquirer and do not give opinions about the conduct of third parties such as the district attorney here. Nevertheless, in representing defendants in criminal matters, the inquirer should be familiar with the rules applicable to the prosecutor.

Rules Governing the Inquirer’s Conduct

5. Rule 1.7(a)(2) prohibits a lawyer from representing a client if “a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s . . . personal interests”, unless, under Rule

1.7(b), the conflict is consentable and the lawyer has obtained client consent, confirmed in writing. Thus, the inquirer must determine whether a reasonable lawyer would conclude that the inquirer's personal relationship with the district attorney (by virtue of being a former associate of the district attorney) would adversely affect the representation of clients in criminal matters for which the district attorney's office is responsible.

6. If the inquirer reasonably believes that a reasonable lawyer would *not* reach such a conclusion, then there is no conflict under Rule 1.7 and the inquirer may proceed without seeking consent from any client. If the inquirer believes that a reasonable lawyer *would* conclude that the inquirer's prior personal relationship with the district attorney creates a "significant risk" that the inquirer's professional judgment on behalf of a criminal defendant in the county where the former partner is now the district attorney will be adversely affected, then a conflict exists under Rule 1.7(a)(2).

7. If a conflict exists under Rule 1.7(a)(2), then the inquirer make not undertake the representation unless the inquirer determines, under Rule 1.7(b)(1), that the conflict is consentable, because:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; [and]
- (2) the representation is not prohibited by law.

8. If the inquirer determines that the conflict is consentable, then the inquirer may proceed with the representation, as long as the inquirer obtains the consent of each affected client and the consent is "confirmed in writing" within the meaning of Rule 1.0(e).

Rules Governing the District Attorney's Conduct

9. Rule 1.11(d)(1) addresses the conduct of the district attorney as a public official. It provides:

Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not . . . participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter

10. If the inquirer knows that the district attorney participated personally and substantially in a matter while in private practice, the inquirer may wish to explore the provisions of applicable law and may have an obligation or discretion under the Rules to report such knowledge to the tribunal. *See* Rule 8.3(a). However, since the inquiry does not state that the newly elected district attorney, while at the firm, was involved in any of the matters on which the inquirer proposes to work, we assume that the matters that are the subject of this inquiry do not include any matters on which the district attorney "participated personally and substantially" while at the firm. *See* N.Y. State 638 (1992) (proper for newly elected district attorney to prosecute a client of the prosecutor's former law firm in the same case if the prosecutor had no personal and

substantial participation in the firm's representation and did not otherwise obtain confidential client information relevant to the matter; whether the district attorney's staff is disqualified depends upon application of the rule of necessity and on the source of the district attorney's disqualification).

11. This inquiry is distinguishable from our prior opinions concerning part-time government lawyers with prosecutorial responsibility, which are based on the rules against representing differing interests in governmental and private practice (currently found in Rule 1.7(a)). We have consistently held that a part-time prosecutor who is also engaged in private practice is barred from representing defendants in criminal matters anywhere in New York State. *See, e.g.*, N.Y. State 1073 (2015), N.Y. State 859 (2011); N.Y. State 544 (1982). We also have extended that disqualification to a partner or associate of the part-time prosecutor. *See* N.Y. State 859 (2011), N.Y. State 40 (1966) (applying the former Canons). But those opinions do not apply here because the district attorney here is not part-time and has severed all ties with the inquirer's law firm.

CONCLUSION

12. A lawyer may represent criminal defense clients being prosecuted by the district attorney who was once a partner at the lawyer's firm, provided that the district attorney has severed all ties with the firm and that a reasonable lawyer would not conclude there is a significant risk that the lawyer's professional judgment on behalf of the clients will be adversely affected by the former relationship with the district attorney (or the lawyer's personal interest conflict is consentable and the client has consented, confirmed in writing).

(3-17)