NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY NEW YORK 12207

Committee on Professional Ethics

Opinion #419 - 10/8/75 (82-75)

Clarified by #492

Topic: Conflict; prosecutor as former defense counsel in same case.

Digest: Improper for assistant district attorneys to prosecute cases defended by the Legal Aid Society of which the District Attorney, prior to his appointment, was Chief Attorney and attorney of record at the time these cases were pending.

Code: DR 4-101(B), 5-105(D), 9-101(B). EC 4-6, 9-3, 9-6. Canon 4, 5, 9

QUESTION

May assistants to a newly appointed district attorney prosecute cases defended from their inception by the Legal Aid Society of which the district attorney, prior to his appointment was the chief attorney and attorney of record at the time these cases were pending, if the new district attorney was not personally involved in defending cases and plans to disassociate himself completely from them, giving complete control to his assistants?

OPINION

Assistant district attorneys are appointed by the district attorney as his representatives and act under his authority. Therefore, any ethical or legal limitation of the district attorney's authority to prosecute, attaches to his assistants. N.Y. State 227 (1972); DR 5-105(D); cf. People v. Wilkins, 28 N.Y. 2d 53 (1971). Accordingly, since it would be improper for the newly appointed district attorney to prosecute these cases in which the defendants were represented by the Legal Aid Society at the time he was its chief attorney and attorney of record, his assistants, as representatives of the district attorney, could not properly prosecute them. In this connection, it is pertinent to note Section 701 of the County Law which provides in relevant part:

> "Whenever the district attorney of any county and his assistant, if he has one....is disqualified from acting in a particular case to discharge his duties at a term of any court, a superior criminal court in the county wherein the action is triable may, by order appoint some attorney at law having an office in or residing in the county, to act as special district attorney during the absence, inability or disqualification of the district attorney and his assistant...."

While it is not the function of this Committee to pass on questions of law, it should be observed that despite the ambiguous wording of

OVER---

part of this section which may appear to require the appointment of a special district attorney only when both the district attorney and his assistant are disqualified to act in a particular case, it is clear upon analysis of the section that the disqualification of the district attorney alone would require the appointment of a special district attorney. See, DR 5-105(D); N.Y. State 227 (1972). If it is improper for one member or associate of a firm to represent a client in a particular matter, then all members and associates of that firm are also subject to the same prohibition. N.Y. State 40 (1966); N.Y. State 118 (1969); N.Y. State 214 (1971); N.Y. State 227 (1972); N.Y. State 410 (1975). A district attorney's office is comparable to a legal partnership. N.Y. State 118 (1969); N.Y. State 227 (1972).

Although the chief attorney and attorney of record of the Legal Aid Society may not be expected to be personally involved in every case handled by the Society, he is, nevertheless, responsible for the operation of the defense organization, particularly the dispositions of the criminal cases assigned to it. These cases are defended in his name.

The responsibility of the chief attorney and attorney of record of the Legal Aid Society is similar to that of the district attorney in whose name prosecutions of criminal cases are conducted by his assistants. Although the district attorney is not expected to be directly and personally associated with most of the cases processed by his office, he is, nevertheless, responsible for the processing and disposition of all cases assigned to his assistants.

The district attorney, after leaving his office, is prohibited ethically and possibly legally from associating himself with the defense of any cases that was pending in the district attorney's office prior to his separation from the office.

DR 9-101(B) provides:

"A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

The rationale underlying DR 9-101(B) is provided by EC 9-3 in the following language:

"After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

Section 493 of the Judiciary Law provides in part:

"An attorney...who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court, as district attorney or other public prosecutor, afterwards

CONTINUED---

directly or indirectly advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise...is guilty of a misdemeanor."

It is the responsibility of the district attorney that creates the appearance of his awareness of the confidential information peculiar to the cases processed by his office. Similarly, the responsibility of the chief attorney and attorney of record of the Legal Aid Society causes the appearance of his awareness of the confidences of the defendants in cases defended by the Society. Since the assistants to the newly appointed district attorney would be required to prosecute these cases in his name, the appearance of impropriety would persist notwithstanding the apparent good faith precautions that the district attorney proposes to take by disqualifying himself and turning the prosecution over to his assistants. EC 9-6.

Accordingly, in the absence of waiver by the defendant, it would be improper for the assistants to prosecute these cases under the authority of the newly appointed district attorney. This, of course, does not prohibit the employment of special counsel or the use of a member of the staff of the district attorney from another county. However,in addition to being a matter of professional conduct, the disqualification of a public prosecuting agency is a matter of law to be determined by the courts, United States v. Standard Oil Co.,139 F. Supp. 345 (SDNY 1955); cf. People v. Wilkins, 28 N.Y. 53 (1971), upon which this Committee does not pass.

Even if the district attorney's staff is not disqualified as a matter of law, the district attorney has a minimal ethical duty to promptly notify the defendant and the court of the facts so that they may take what action they are advised.

We emphasize that our disapproval is based upon the correlative admonitions of Canons 4, 5 and 9 and the applicable DR's and EC's thereunder. It is not intended to reflect on the good faith or professional integrity of any lawyers who may have participated or may be participating in such a situation in good faith with no actual or apparent damage to the public interest or public image of the legal profession. Nevertheless the vice of changing sides in litigation is compounded in the criminal field and cannot be overlooked as a mere irregularity.
