NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 638 - 12/7/92 (4-92)

Modifies: N.Y. State 492 (1978), State 502 (1979)

Topic: Prosecuting attorneys; conflict of interest; former private attorney N.Y. as newly elected prosecutor.

Digest: 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 a confidence or secret relevant to the matter; vicarious disqualification of the district attorney's staff depends upon application of the rule of necessity and source of primary disqualification.

Code: DR 2-110(B)(2), 4-101(B) - (C), 5-105(D), 5-108(A), 7-101(A), 9-101(B)(3)(a).

Lawyer, an associate at Firm A, which has a large criminal law practice, is elected district attorney for a small upstate county. The district attorney is the only full-time position in the office of the district attorney, but there are several part-time assistants. As an associate in Firm A, Lawyer has no voting authority or other partnership responsibilities. After the election, Lawyer immediately undertakes to sever ties with Firm A in anticipation of assuming office on January 1 of the following year. Shortly after the election, and before leaving the firm, Lawyer complies with the request of the outgoing district attorney to come to the scene of an alleged murder, to observe the scene and to assist in directing local law enforcement officials in the investigation of the alleged crime.

Following Lawyer's visit to the scene, Lawyer learns that a suspect in the murder investigation, X, subsequently requested a partner in Firm A to represent the suspect in anticipation of grand jury and trial proceedings relating to the alleged murder. In requesting our opinion, Lawyer also informs us that prior to leaving Firm A, Lawyer had no contact with X, that no reference to the underlying facts of the case had occurred, and that Lawyer avoided speaking with anyone in the firm on the subject of the representation except in conversations addressed to whether Lawyer has a conflict of interest. No confidential or other communications of X were disclosed to Lawyer.

QUESTIONS

(1) Is Lawyer disqualified from prosecuting X?

(2) Is Lawyer disqualified from prosecuting any other defendant who is represented by Firm A and whose representation in the matter began before Lawyer resigned from Firm A?

(3) If Lawyer is disqualified in any case, is the entire office of the district attorney similarly disqualified?

OPINION

Before the 1990 amendments to the New York State Code of Professional Responsibility, the Code did not directly address these questions.[1] In 1990, however, the Code was amended in several particulars relevant to this inquiry. First, DR 9-101 was revised to provide specific rules for a lawyer moving from

---

[1] The subject was governed generally by the principles of Canons 4, 5, and 9. In N.Y. State 492 (1978), we held that a district attorney who, while in private practice, had represented a defendant in a criminal matter could not represent the People in defending an appeal of defendant's conviction or in prosecuting a new, but related, felony charge against the defendant. This opinion was based on two grounds: (1) the potential that public confidence in the impartial administration of justice might be compromised, *see* EC 9-2, and (2) the possibility that the prosecutor had learned information in the course of the prior representation that might be used to the former client's detriment, *see* EC 4-5, EC 4-6, DR 4-101(B). On the first issue, we reasoned that a result favorable to the defendant in either matter inevitably would diminish public confidence in the impartiality of the office of the district attorney. On the second, we noted that a lawyer is forbidden to switch sides in litigation. *See, e.g.*, N.Y. State 410 (1975). We also held that, since the district attorney's office was relatively small, the district attorney's disqualification should be extended to all members of the staff. Accordingly, we advised that a special prosecutor should be appointed under County Law § 701. Finally, we held that the willingness of the defendant to waive the conflict and consent to the representation pursuant to DR 4-101(C)(1) was, in view of the public nature of the office of a prosecutor, insufficient to accommodate the independent "appearance of impropriety" concerns of EC 9-1 and EC 9-2.

private practice to a government position. Second, DR 5-108 was added as a general rule dealing with a lawyer's conflicts of interest with a former client. Third, the vicarious disqualification rule of DR 5-105 (D) was amended to provide specific situations where a lawyer's disqualification would be extended to the lawyer's partners and associates.

A. The Personal and Substantial Participation Test

Under DR 9-101(B)(3)(a), except as provided in that rule, Lawyer may not prosecute X or any other client of Firm A if Lawyer participated "personally and substantially" in the matter while in private practice.[2] Former DR 9-101(B) addressed only "substantial responsibility." Thus the addition of the phrase "participated personally and substantially,"[3] makes it clear that the disqualifying circumstance must involve personal participation to a significant extent. The new provision requires more than an inferred or simply vicarious element of participation in the matter while serving the client in practice. For example, a lawyer who had nominal supervisory responsibility for a matter while in private practice, but who did not personally become involved in the representation in a substantial way, is not disqualified from public employment in the matter after leaving practice.[4]

---

2 The personal and substantial participation standard was added to the Code by the 1990 amendments to both DR 9-101(B)(1) and (3). Previously, the test of DR 9-101(B) applied only to lawyers going from public to private practice and was phrased in terms of whether the lawyer had "substantial responsibility" for the matter while a public employee.

3 This term is derived from ABA Model Rule 1.11(a) and 18 U.S.C. § 207(a)(1)(B) ("in which the person participated personally and substantially as such officer or employee").

4 In addition to this interpretation of the personal involvement criterion, we adhere to the prior interpretations of the "substantial responsibility" test under former DR 9-101(B). "Substantial responsibility" has been described as follows:

> [S]ubstantial responsibility" envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question.

ABA 342 (1975), text at nn 28-29 (footnote omitted) (quoted in N.Y. State 502 [1979]) . Although the opinions in ABA 342 and N.Y. State 502 involved the reverse situation, switching to private employment from public employment, they are useful in defining the substantial participation aspect of the test under DR 9-101(B)(3)(a). To the extent that N.Y. State 502 suggests that personal involvement is not a necessary prerequisite to disqualification, we modify our view consistent with the 1990 amendments to the Code which add the "personal" involvement criterion.

As a general matter it will be for the government lawyer to determine, in the first instance, whether he or she "personally and substantially" participated in the former firm's representation while in private practice. On the facts stated, we believe Lawyer reasonably could conclude that he did not personally and substantially participate in Firm A's representation of the murder suspect. Lawyer did not have any contact with the client or with any relevant firm file while at Firm A, and Lawyer had no discussions with any of the firm partners other than one concerning the possibility of a conflict of interest that did not include revelation of any client confidences. This is neither personal nor substantial participation in the representation. With regard to other defendants who were represented by Firm A and whose representation in the matter began before Lawyer resigned from the firm to assume public office, Lawyer must determine whether Lawyer's participation in any matter was personal and substantial. If the participation was not personal and substantial, Lawyer is not disqualified under DR 9-101(B)(3)(a) from the matter and no question of vicarious disqualification of the entire district attorney's office arises under DR 5-105(D) due to a DR 9-101(B)(3)(a) primary disqualification. If, on the other hand, Lawyer concludes that his participation in the former representation was personal and substantial within the meaning of DR 9-101(B)(3)(a), then Lawyer must consider the "rule of necessity" contained in DR 9-101(B)(3)(a), which addresses whether, "under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter." The vicarious disqualification provision of DR 5-105(D) also would apply. See Part C, below.

B. Other Disqualifying Circumstances when Personal and Substantial Participation is not Present

Notwithstanding the specific provisions of DR 9-101(B)(3)(a), this Committee believes that a lawyer who survives the "personal and substantial responsibility" test also must consider whether he or she either is disqualified under DR 5-108(A) or must withdraw under DR 2-110 .

1. The Application of DR 5-108

Despite the specific rule of DR 9-101(B)(3), DR 5-108 would seem to literally apply to a government official's prosecution of a former client. DR 5-108 provides

> A. Except with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not:
>
> 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

2. Use any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret has become generally known.

We conclude that not only does DR 5-108(A) apply, but it achieves the same result required by the personal and substantial participation test of DR 9-101(B)(3)(a).

Because the murder case to be prosecuted by Lawyer as district attorney is substantially related to the murder case undertaken by Firm A before Lawyer departed Firm A – indeed it is the same case – the issue under DR 5-108(A) turns upon whether Lawyer "has represented the former client in …. [the] matter." *Id*. DR 5-108(A) would operate to disqualify Lawyer only if the preamble ("a lawyer who has represented the former client in a matter") is interpreted to mean that any representation of the former client by Firm A triggers the operation of DR 5-108(A), even if Lawyer did not have personal contact with the client or the representation. The Code does not expressly answer the question whether Lawyer is deemed to have vicariously represented the murder suspect when he had no contact with the representation undertaken by another member of Firm A. The vicarious disqualification rule of DR 5-105(D), which incorporates DR 5-108(A), speaks only to the imputation of Lawyer's personal disqualification at the new firm or office; it fails to address explicitly whether knowledge of the murder suspect's confidences, or the representation itself by a Firm A partner, should be imputed to nonparticipating former firm members and associates.

We recognize that DR 5-108(A) was derived from ABA Model Rule 1.9(a) which, with former MR 1.10(b)(now transferred by the 1989 amendments of the Model Rules to MR 1.9[b]), specifically addresses this problem. Model Rule 1.9(b) calls for disqualification of a lawyer from representing a client in the same or a substantially related matter in which the lawyer's former firm represented a client with materially adverse interests only if the lawyer had acquired confidences or secrets from the former client.[5] We believe that the drafters of the New York Code intended to limit the operation of DR 5-108(A) to instances in which Lawyer either personally represented the former client or acquired confidences and secrets (see discussion in 2. below). We note that in the preamble no reference is made to the lawyer's former firm. This argument is strengthened by the observation that the authors of the 1990 Code stated that DR 5-108(A) was drawn from ABA Model Rule 1.9 "to incorporate the standards which the courts have been applying to lawyers in conflict of interest situations involving former clients," Draft of Lawyer's Code of Professional Responsibility at page facing 69 ("Source of Change") (Oct. 5, 1987). The intended effect of Model Rule 1.9 (and former 1.10[b]) has been summarized as follows:

---

[5] See also Comment [9] to Model Rule 1.9 ("Paragraph [b] operates to disqualify the lawyer only when the lawyer involved has actual knowledge …").

> [S]ince [a lawyer] did not personally "represent" the client, the question arises whether the former client rules should apply to her after she has departed the firm, or whether she should shed her disability at the old firm's door.
>
> This set of problems was debated during the drafting of the Model Rules. Indeed, it was an important area of controversy, for there were powerful arguments in favor of as many as three separate solutions. They were: (1) that no bar should be imputed to the new firm, even if the incoming lawyer was clearly tainted, so long as the incoming lawyer was screened from participation in any adverse matter in the new firm; (2) that the incoming lawyer should be charged with both actual knowledge and knowledge imputed to him from the previous firm, and that all of this knowledge should in turn be imputed to all members of the new firm; and (3) that the moving lawyer should be deemed to carry his actual knowledge only, and the new firm's status should be determined accordingly. . . . the combined effect of Rules 1.9 and 1.10(a) is to adopt the third view, which is also the prevailing judicial view in the disqualification context.

G. Hazard & W. Hodes, *The Law of Lawyering,* § 1.10:207, at 333 (2d ed. 1991) (footnote omitted). This is also the view taken in two seminal cases on the issue, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975); *Gas-A-Tron of Arizona v. Union Oil Co.,* 534 F.2d 1322 (9th Cir. 1976).[6] The text of the 1990 Code would be expected explicitly to have signaled a retreat from this view if there were a different intention for application of DR 5-108(A)(1).

Thus, we find that DR 5-108(A)(1) produces substantially the same result as does DR 9-101(B)(3)(a).[7] Lawyer is not disqualified under DR 5-108(A)(1)

---

6 The proper allocation of the burden of proof in a court of law with respect to a lawyer's knowledge of confidences and secrets when a lawyer's current representation is called into question, either on a motion to disqualify the lawyer or perhaps in a subsequent malpractice suit, is a question of law that this Committee does not answer. *See, e.g., Cheng v. GAF Corp.*, 631 F.2d 1052, 1056-57 (2d Cir. 1980)(rebuttable inference guided by a standard of proof which "should not become 'unattainably high"')(quoting *Laskey Bros of W. Va.. Inc. v. Warner Bros. Pictures Inc.*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied* 350 U.S. 932 [1956]).

7 In N.Y. State 628 (1992), we abandoned the view that undertaking a proposed representation against a former client shortly after termination of that client's representation might create the appearance of disloyalty to the former client "even in the absence of a substantial relationship and of impending client confidences." N.Y. State 628, at p. 5. We reasoned that, although the duty to preserve confidences remains, the duty of loyalty ends with the termination of the lawyer-client relationship. *Id.,* text at n.3. A recent decision of the Fifth Circuit Court of

from the murder prosecution. Lawyer must determine for each other individual defendant whether a disqualification arises, and if so apply the vicarious disqualification provisions according to the discussion in Part C, below.

2. Disqualification Arising Out of the Duty to Preserve Confidences

Even if Lawyer concludes that he or she has satisfied the personal and substantial participation test of DR 9-101(B)(3)(a) and the substantial relationship test of DR 5-108(A)(1), Lawyer nevertheless must determine whether a disqualification arises because the proposed prosecution against Firm A's client would require the use of any confidences or secrets in violation of DR 5-108(A)(2) and DR 4-101(B). Lawyer must carefully examine whether he obtained relevant confidences in any case to be prosecuted against a Firm A client. DR 9-101(B)(3)(a) and DR 5-108(A)(1) do not sweep within their terms all cases in which Lawyer might have obtained relevant confidences and secrets while at Firm A. The requirements of Canon 4 and DR 5-108(A)(2), however, might require Lawyer to withdraw under DR 2-110(B)(2).

Although a lawyer may not have participated personally or substantially in a matter, he or she might have obtained a confidence or secret inadvertently. For example, if Lawyer possesses a confidence and secret within the meaning of DR 4-101(A), which is not otherwise permitted to be disclosed by one of the several preconditions of DR 4-101(C), but which nevertheless must be used under Canon 7 to discharge faithfully and zealously the current proposed representation in a governmental capacity, Lawyer unquestionably cannot represent the government zealously under Canon 7 without violating DR 5-108(A)(2) and DR 4-101(B).[8] In such a case, Lawyer must withdraw under DR 2-110 (B)(2). N. Y. State 628 (1992); N. Y. State 605 (1989); N. Y. State 525 (1980). This impediment exists without regard to whether Lawyer satisfied the personal and substantial participation test of DR 9-101 or the substantial relationship test of DR 5-108. An example is the case in which Lawyer stumbles upon information concerning a client while at Firm A that might embarrass or otherwise be detrimental to the client in the prosecution and sentencing proceedings if made known to the trier of fact or sentencing judge. Zealous representation by the prosecutor would require disclosure, DR 7-101(A)(l), but DR 5-108(A)(2) and DR 4-101(B) would prohibit

---

Appeals concluded otherwise, but that decision construed the Texas version of ABA Model Rule 1.9. *In re American Airlines. Inc.*, 972 F.2d 605, 617-19 (5th Cir. 1992). We do not find the Fifth Circuit's view that a loyalty obligation survives the termination of the lawyer-client relationship persuasive and, for the reasons expressed in N.Y. State 628, adhere to the conclusion reached there.

8 In such a circumstance, as explained in N.Y. State 628, text at n.4, Lawyer will be disqualified because Lawyer cannot obtain the consent of the governmental client to undertake the proposed current representation, even if otherwise available, *see* N.Y. State 629 (1992), because Lawyer will be unable to make the requisite disclosure for the purpose of obtaining consent.

disclosure.

Again, whether Lawyer possesses relevant confidences or secrets of Firm A's clients who may be prosecuted in Lawyer's new employment as district attorney is for Lawyer to determine in the first instance. If Lawyer possesses such relevant information, Lawyer must withdraw from the current prosecution. Whether any Disciplinary Rule operates to disqualify every member of the district attorney's staff when withdrawal under DR 2-110(B)(2) occurs is analyzed in Part C.2 below.

3. Canon 9 Duty to Avoid the Appearance of Impropriety

If Lawyer determines that disqualification is not required under DR 9-101(B)(3)(a) and DR 5-108(A)(1), and that withdrawal is not required under DR 2-110(B)(2), the Canon 9 exhortation to avoid the appearance of impropriety will not alone require disqualification in the usual case. With respect to the murder case, on the facts stated, we see no obvious reason why there would be an appearance of impropriety in undertaking the representation. Lawyer must assess each case on its own facts, and where such a reason exists, Lawyer may be disqualified. The basic purpose of this Canon is, however, to exhort a lawyer to make an extremely careful assessment of the circumstances when analyzing his or her position under the various disciplinary rules described above. We adhere to our observation in N.Y. State 492 that every effort must be made to avoid a public perception that the administration of justice is not fairly and impartially served. One obvious step might be for Lawyer to assign the case to an assistant district attorney even though Lawyer is not technically disqualified, and to put into place appropriate screening mechanisms during the prosecution. We do not believe Canon 9 requires this measure on a *per se* basis, recognizing that each case must be assessed according to its peculiar circumstances.

C. Vicarious Disqualification

If Lawyer finds that any of the above-described provisions requires Lawyer's disqualification, Lawyer also must determine whether the entire district attorney's office is similarly disqualified. The application of the vicarious disqualification rules to Lawyer's situation depends upon the source of the primary disqualification.

1. Primary Disqualification Under DR 9-101(B)(3)(a)

Where Lawyer's disqualification is based upon personal and substantial participation in Firm A's representation of a defendant whom Lawyer now has a responsibility to prosecute as district attorney, Lawyer faces the complicated task of determining whether other members of the staff may undertake the prosecution. Whether another member of the district attorney's staff, who is not tainted, may undertake the prosecution is governed by two independent provisions of the Code which operate quite differently. First, DR 9-101(B)(3)(a) has a "rule of necessity" clause that allows the public lawyer, even the tainted one, to undertake the prosecution if, "under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter." The disqualification created by DR 9-101(B)(3)(a) depends on the availability as a matter of law of a special prosecutor. Thus, DR 9-101(B)(3)(a) creates no ethical requirement of disqualification if an alternate prosecutor is not approved by a court on a proper application. *See* N.Y. County Law §701; N.Y. Executive Law §63 (subdiv. 2).

We believe that the terms of DR 9-101(B)(3)(a) virtually require Lawyer, if Lawyer personally and substantially participated in the representation of any client while at Firm A, to institute a §701 proceeding to determine whether another lawyer "is, or by lawful delegation may be, authorized to act" in the place of Lawyer.[9] *Cf. Matter of Shumer v. Holtzman,* 60 N.Y.2d 46, 53, 55-56 (1983)(district attorney cannot delegate prosecution to another, but must either proceed with the prosecution or move "for the judicial appointment of a special prosecutor"). The rule of necessity thus recognizes that, as a matter of ethics, Lawyer should not be disciplined for undertaking a prosecution that the law requires and a court directs Lawyer to undertake, even if Lawyer personally and substantially participated in the matter while in private practice. *See Matter of Balter v. Regan*, 63 N.Y.2d 630 (1984)(underscoring the duty of lawyer to follow an order of the court despite the fact that the order is premised upon an erroneous view of the conflict of interest provisions of the Code), *cert. denied* 469 U.S. 934, 105 S.Ct. 333 (1984).

The §701 application for a special prosecutor is likely to focus on whether, conceding Lawyer's personal conflict of interest, any other member of the district attorney's staff may undertake the prosecution despite Lawyer's exposure in private practice at Firm A. The ultimate resolution of that issue by the New York court is one of law beyond the purview of this Committee. The issue of vicarious disqualification of the entire district attorney's staff is, therefore, in the first instance one for the courts to decide on a §701 application.[10]

---

9 A primary disqualification under DR 9-101(B)(3)(a) that triggers the automatic disqualification rule of DR 5-105(D) cannot occur without a court determination that no one in the district attorney's office may undertake the prosecution. That is the inevitable result of strictly following the terms of DR 9-101(B)(3)(a).

10 The New York courts have not spoken with one voice on this issue. Since the issuance of N.Y. State 492 (1978), the New York Court of Appeals adopted a *per se* rule of disqualification of the newly elected or appointed prosecutor in the circumstances, and a blanket rule of vicarious disqualification of the entire district attorney's staff. *People v. Shinkle*, 51 N.Y.2d 417 (1980). As recently detailed in *State v. Commacho*, 329 N.C. 589, 406 S.E.2d 868 (1991), the *per se* nature of the *Shinkle* rule that requires disqualification of the entire district attorney's staff has been rejected in a number of other jurisdictions because it "results in unnecessary interference with constitutional officers in the performance of their constitutional and statutory duties." *Id.,* 329 N.C. at 600, 400 S.E.2d at 875. There is recent evidence that the New York courts will limit application of the *per se* disqualification rule to the facts of *Shinkle. Matter of Shumer v. Holtzman,* 60 N.Y.2d 46, 55 (1983). In the course of its opinion in *Shumer* which, like *Commacho*, observed that the district attorney might only be disqualified "under limited circumstances" because she "is a constitutional officer chosen by the electorate and whose removal by a court implicates separation of powers considerations," *id.* at 55, the court invoked the "demonstrated conflict of interest" or "abuse of confidence" disqualification standard employed in a series of federal court decisions, including *United States v. Newman*, 534 F. Supp. 1113 (S.D.N.Y. 1982), *aff'd without opinion*, 722 F.2d 729 (2d Cir. 1983), *cert. denied* 464 U.S.

If the court insists that a member of the district attorney's staff undertake the prosecution notwithstanding Lawyer's conflict, no issue of vicarious disqualification is present because no primary disqualification under DR 9-101(B)(3)(a) exists. We deem it appropriate and necessary, however, that Lawyer assign the task of prosecution to an assistant prosecutor who is not tainted, and that Lawyer ensure that the assistant is insulated properly from Lawyer or any other tainted member of the office. *See e.g., United States v. Goot*, 894 F.2d 231, 235-36 (7th Cir. 1990), *cert. denied* 111 S. Ct. 45, 112 L. Ed. 22 (1990).

If on the other hand, the court determines that Lawyer and every member of Lawyer's staff may not undertake the prosecution, the disqualification under DR 9-101(B)(3)(a) will occur, thereby triggering automatic vicarious disqualification under DR 5-105(D). We observe, however, that the decision of the court on a §701 application to appoint a special prosecutor has as a necessary concomitant the disqualification of the entire district attorney's staff as a matter of law.

2. Primary Disqualification under DR 5-108(A)(1)

If the primary disqualification results from DR 5-108(A)(l), the vicarious disqualification analysis should be the same as that under DR 9-101(B)(3)(a). If DR 5-108 applies, there is automatic vicarious disqualification under DR 5-105(D). DR 5-108(A)(1), however, does not contain a "rule of necessity" clause similar to that contained in DR 9-101(B)(3)(a). Nevertheless, we believe the Code was not intended to achieve different results in the same situation depending on the fortuitous selection of the particular disciplinary rule as the primary basis of disqualification. In this instance, the more specific provision of DR 9-101(B)(3)(a) should be applied and its "rule of necessity" must be examined as provided above before any question of applying DR 5-105 (D) arises.[11]

863, 104 S.Ct. 193 (1983). *Newman* explicitly rejected a *per se* rule of the kind seemingly endorsed in *Shinkle*. Recent Appellate Division cases also have declined to adopt a per se rule of disqualification of the district attorney's staff in similar circumstances, *People v. Rankin*, 149 A.D.2d 987, 540 N.Y.2d 628 (4th Dept. 1989); *Matter of Morganthau v. Crane*, 113 A.D.2d 20, 22-23 (1st Dept. 1985), even in cases not involving a major metropolitan district attorney's office. *People v. Early*, 173 A.D.2d 884, 569 N.Y.S.2d 756 (3d Dept. 1991)(refusing to apply a *per se* rule involving a newly appointed assistant district attorney of rural Greene County who previously represented the defendant in connection with unrelated criminal matters completed prior to defendant's commission of the crimes presently being prosecuted).

11 Even if we demanded rigid adherence to DR 5-108(A)(1) and DR 5-105(D) and required vicarious disqualification of the entire district attorney's office by reason of the primary disqualification of Lawyer under DR 5-108(A)(1), though that might not be required under DR 9-101(B)(3)(a), a "rule of necessity" presumably would apply as a matter of law. Quite obviously, there is a rule of necessity applicable as a matter of law to these other provisions of the Code, though not expressed as set forth in DR 9-101(B)(3)(a).

3. Primary Disqualification under DR 2-110

If the primary disqualification arises because Lawyer must withdraw under DR 2-110(B)(2), our Committee does not believe that vicarious disqualification of the entire district attorney's office is necessary or appropriate unless the withdrawal is required because Lawyer would otherwise violate one of the specific disciplinary rules covered by DR 5-105(D) . Although DR 5-105(D) provides for automatic disqualification in specific circumstances, vicarious disqualification may be appropriate in other circumstances. N.Y. State 632 (1992). In the situation where Lawyer's Canon 4 and Canon 7 duties conflict and Lawyer must withdraw, we do not believe the entire district attorney's staff is disqualified in the absence of circumstances suggesting that an appearance of impropriety exists or that cross pollination of the disqualifying confidences and secrets has occurred at the new firm or office. We note that even if vicarious disqualification is required, a rule of necessity by operation of law would come into play. *See* fn. 11.

CONCLUSION

Subject to the qualifications stated above, the first question is answered in the negative. The second question is answered according to the specific facts of the matter found by lawyer as stated above. The third question of vicarious disqualification is answered according to the source in the Code of the primary disqualification and any relevant court orders.