NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 654 (9-93)

Topic: Prosecutors; disqualification; conflict of interest; family members

Digest: District Attorney's spouse or sibling may not represent a defendant in a case prosecuted by District Attorney; whether District Attorney may prosecute case in which defendant is represented by another lawyer in law firm of District Attorney's spouse or sibling or by District Attorney's former unofficial advisor depends upon circumstances; which lawyer is disqualified depends on who was employed by client first.

Code: Canon 6; Canon 9; DR 1-102(A)(2), 5-101(A), 5-105, 8-101(A)(2), 9-101; EC 7-13

QUESTIONS

(1) May a district attorney prosecute a case in which the defendant is represented by the district attorney's spouse or the spouse's law firm?

(2) May a district attorney prosecute a case in which the defendant is represented by the district attorney's sibling or the sibling's law firm?

(3) May a district attorney prosecute a case in which the defendant is represented by a lawyer who recently served as co-chairman of the district attorney's unofficial transition team and who interviewed prospective assistant district attorneys and other staff and made recommendations to the district attorney concerning whom to hire?

(4) If the district attorney is disqualified from prosecuting a case on one of these grounds, may the district attorney's office prosecute the case if the district attorney has no personal involvement in the prosecution and turns over all supervisory responsibility to the first assistant district attorney?

OPINION

Because the criminal justice system pits the power of the state against an individual on pain of loss of liberty or even life, fairness as well as the appearance of fairness is especially important. *See, e.g.*, N.Y. State 616 (1991); N.Y. State 615 (1991); N.Y. State 513 (1979); N.Y. State 492 (1978); N.Y. State 409 (1975); N.Y. State 397 (1975); N.Y. State 336 (1974) (all emphasizing this value).

Our opinions also have recognized the unique and important position of the district attorney in the criminal justice system.

> The district attorney stands at the fulcrum of our system of criminal justice. He is a very unique advocate, whose role is tempered by an overriding ethical obligation to deal fairly with all those accused of criminal conduct. Under the Code of Professional Responsibility, his primary duty is not to convict but to see that justice is done and, to that end, he is vested with exceedingly broad discretion in his representation of the People. See, EC 7-13.

N.Y. State 492, at 2 (1978).

Because of the power and authority with which the district attorney is invested, both actual and perceived fairness in carrying out the duties of public prosecutor are vital to the fairness of the criminal justice system as a whole. *See People v. Zimmer*, 51 N.Y.2d 390, 395, 434 N.Y.S.2d 206, 414 N.E.2d 705 (1980). The Committee's opinions therefore consistently have guarded against situations that might appear to compromise prosecutorial impartiality. "The public's confidence in the integrity of the district attorney's office should not needlessly be so tested. Its confidence in the proper administration of justice should not be compromised or unnecessarily put at risk." N.Y. State 492, at 2. For example, to protect prosecutors' impartiality from possible taint, a district attorney or other public official with prosecutorial responsibilities, even if permitted to engage in the private practice of law, may not represent defendants in criminal cases. *E.g.*, N.Y. State 544 (1982); N.Y. State 184 (1971). This rule is grounded on the prohibition against a lawyer serving clients with conflicting interests, DR 5-105(A), together with the appearance of impropriety that may arise from serving simultaneously in the incompatible roles of prosecutor and defense lawyer, DR 9-101. N.Y. State 544 (1982); N.Y. State 397 (1975) . Inasmuch as a conflict of interest is implicated, the prohibition extends to all of the partners and associates in any law firm with which the prosecutor may be affiliated. DR 5-105(D).

The present inquiry raises similar considerations. The inquirer, who was previously in private practice, was elected as the district attorney of a small upstate county. The district attorney's spouse is a name partner in a two-partner law firm in the county seat, a city with a population of about 50,000. The spouse represents defendants in criminal cases. The district attorney's sibling is a partner in a different four-partner law firm in the same city and also represents defendants in criminal cases. Finally, the co-chairman of the district attorney's "transition team," who interviewed applicants for assistant district attorney and other staff positions and made recommendations on whom to hire, also represents defendants in criminal cases. The

district attorney asks whether, because of possible conflicts of interest or appearance of impropriety, the district attorney is ethically permitted to prosecute cases in which any of these lawyers or their firms represents the defendant, and, if not, whether the impropriety is cured by the district attorney declining to participate personally in the prosecution and turning over all supervisory responsibility to the first assistant district attorney.[1] Our consideration of these questions requires that we consider the corollary ethical limitations on the practice of law by the lawyers who have these relationships with the district attorney.

1. The Prosecutor/Adversary-Spouse Relationship

The professional and financial success of one spouse necessarily benefits the other. N.Y. State 340 (1974); *see also* ABA 340 (1975) . Where a client's interest conflicts with that of the lawyer's spouse, or the spouse's client, we previously have analyzed the situation as involving a possible conflict with the lawyer's self-interest under DR 5-101(A) and as creating a potentially impermissible appearance of impropriety under Canon 9. *E.g.*, N.Y. State 583 (1987); N.Y. State 493 (1978) (lawyer may not represent party to real estate transaction in which lawyer's spouse was the broker); N.Y. State 409 (1975) (assistant district attorney and assistant public defender spouses cannot be adversaries in same case); N.Y. State 378 (1975) (defense lawyer and probation officer who are spouses may not be involved in same criminal case); N.Y. State 368 (1974) (assistant county attorney and spouse may not be adversaries in same case).

Amendments to the New York Lawyer's Code of Professional Responsibility, effective September 1990, added a new DR 9-101(D) :

> A lawyer related to another lawyer as a parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

DR 9-101(D) provides a more explicit textual basis in the Code for the above-cited opinions that, prior to its enactment, the Committee based on DR 5-101(A) and Canon 9. Thus, the district attorney may not represent the People in the same case in which the district attorney's spouse represents a defendant.[2]

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[1] Because this Committee's jurisdiction extends only to questions of ethics, we express no opinion on any legal issues that may bear upon the questions presented.

[2] Even before the enactment of DR 9-101(D), we held that spouses could not represent adverse parties even in civil matters. The standard cannot be lower in a criminal matter. The interests of both lawyer-spouses' clients -- the People and the defendant, respectively -- will be adverse. Therefore, the interests of each lawyer's client will be adverse to the lawyer's self-interest in the spouse's professional success. *See* DR 5-101(A).

DR 9-101(D) permits a lawyer to accept employment by a client in matters where a relative already represents the opposing party if the client consents and the lawyer concludes that the lawyer can adequately represent the client's interests.[3] We hold, however, that neither the district attorney nor the district attorney's spouse can reasonably reach the latter conclusion where the two would be the adversaries in a criminal case.[4] Moreover, even if both conditions of DR 9- 101(D) could be satisfied, this would not satisfy the public's legitimate concern for the evenhanded discharge of the public prosecutor's duties. Indeed, the public's concern is not limited to the one articulated in DR 9-101 (D): whether the district attorney's spouse could give independent, zealous representation to the defendant. Rather, a competing interest is whether a defendant may gain an unfair advantage by retaining the district attorney's spouse. *Cf*. DR 8-101(A)(2); N.Y. State 492, at 4 (1978); N.Y. State 368 (1974).

DR 9-101(D) also makes clear that the temporal order in which the two related lawyers are engaged by clients, or are approached by prospective clients, determines which lawyer must decline, or consider declining, proffered professional employment. Therefore, in cases where the district attorney's spouse represented a defendant *before* the district attorney was elected or appointed, the new district attorney ethically cannot represent the People. Conversely, after the new district attorney assumed office, and thereby became counsel to the People for all criminal prosecutions in the county, County Law §701, the district attorney's spouse ethically cannot accept *new* professional employment from defendants or suspects in cases prosecuted or investigated by the district attorney.

In interpreting the temporal requirement of DR 9-101(D), we considered, and rejected, resolving the conflict in all cases in favor of the defendant's choice of private counsel, which would require disqualification of the district attorney any time a defendant engaged the district attorney's spouse. While defendants in criminal cases generally have the right to engage qualified counsel of their choice, that right is not absolute. It does not embrace a right to employ a lawyer who is ethically or legally prohibited from accepting the engagement, such as where the lawyer or another in the

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[3] Where both conditions are met as to the second lawyer and client, DR 9-101(D) does not, on its face, require that the client of the first lawyer be informed of the situation and consent to the adverse party being represented by the lawyer's close relative. Notwithstanding, we believe that the first lawyer's duty of competent representation, Canon 6, and duty to permit the client to make informed decisions concerning the matter, require that the first lawyer candidly discuss with his or her client the facts, including any effect that having the lawyer's parent, child, spouse or sibling as an adversary might have on the lawyer's ability to exercise independent professional judgment and to represent the client with vigor.

[4] This committee recently held that a governmental entity may consent to be represented by a lawyer who also represents a client with differing interests in circumstances where a private party would be permitted to consent to the representation under DR 5-105(C). N.Y. State 629 (1992). We conclude that client consent under DR 9-101(D) is not available in this case because there is no mechanism by which the People, whom the district attorney represents in prosecuting criminal cases, may meaningfully consent. *See* N.Y. State 629, at 6.

lawyer's firm represents a client with conflicting interests. *E.g., Wheat v. United States*, 486 U.S. 153, 159 (1988); *United States v. Locascio*, 1993 U.S. App. Lexis 26472 (2d Cir. 1993). Furthermore, if we disregarded the fact that, upon assuming office, the district attorney is employed by the People to represent them in all criminal cases in the county, then any defendant in a criminal case automatically could disqualify the district attorney simply by hiring the district attorney's spouse as counsel. Defendants in criminal cases who were able, financially and otherwise, to retain the district attorney's spouse thus would be able at will to displace the elected district attorney, and thereby subject the county to the additional expense of having a special district attorney appointed in every such case. *See* County Law §702.

Where the district attorney's spouse is disqualified from appearing opposite the district attorney, a further question is whether the spouse's partners and associates also are disqualified. Disqualification under DR 5-105(D) is automatic in certain situations. DR 9-101(D), which is the most explicit provision in the Code for prohibiting two spouses from representing adverse parties, is not enumerated in DR 5-105(D). Therefore, disqualification of the district attorney's spouse in a particular case does not result in automatic disqualification of other lawyers in the spouse's firm under DR 5-105(D). Thus, whether others in the firm are disqualified will turn on the particular facts and circumstances, including the basis for the primary disqualification and the underlying policies and interests to be served. N.Y. State 638, at 8-11 (1992); N.Y. State 632, at 2-3 (1992); *see generally* ABA 342 (1975) (Code provision's language "should be interpreted so as to be consistent, insofar as practicable, with the underlying policy considerations") . Relevant facts would include the size of the spouse's firm, the spouse's position in the firm, whether the spouse will derive direct or indirect financial or other benefit as a result of the defendant's employment of the firm, and whether the spouse played any role in the defendant's seeking representation by the firm.

Other Code provisions may make it improper for another lawyer in the firm of the district attorney's spouse to appear opposite the district attorney. For example, where a defendant's employment of the spouse's partner or associate would involve either spouse's "financial, business, property, or personal interests" to a degree that reasonably may affect either spouse's "exercise of professional judgment," DR 5-101(A), disqualification of the partner or associate would be automatic under DR 5-105(D). Also, where a defendant's employment of the spouse's partner or associate is intended to circumvent the spouse's own inability ethically to accept the same employment, the proffered employment must be declined. *See* DR 1-102(A)(2).

On the facts presented here, we conclude that where a defendant in a criminal case is or seeks to be represented by another lawyer in the district attorney's spouse's firm, either the district attorney or all lawyers in the spouse's firm will be disqualified. Since the firm of the district attorney's spouse is quite small, the public would be likely to see the potential for abuse whether the defendant were represented by the district attorney's spouse's partner or associate, or by the district attorney' s spouse.

We would reach the opposite conclusion on facts very different from the ones presented by this inquiry. For example, if a district attorney's spouse were a junior

associate in a large law firm and did not practice criminal law, we do not believe that the public reasonably could take exception if others in the spouse's firm continued a pre-existing practice in criminal law, where the district attorney's spouse does not share in fees earned from criminal defense matters, had no direct or indirect involvement in the defendant's employing the law firm, does not participate in representing defendants in criminal cases, and is not in a position to learn any defendant's confidences or secrets, and if the defendants consent to representation by the spouse's firm after full disclosure of the facts.

2. The Prosecutor/Adversary-Sibling Relationship

The interests of adult siblings are not as closely intertwined as those of spouses. For example, while most spouses benefit directly from their mates' economic success, most adult siblings are not joined in a common economic unit. Nevertheless, DR 9-101(D) disqualifies a lawyer from representing a client where another party with differing interests is represented by the lawyer's sibling. Thus, the district attorney may not represent the People in the same case where the district attorney's sibling represents the defendant. DR 9-101(D).

In cases where the district attorney's sibling represented a defendant before the district attorney was elected or appointed, the new district attorney ethically cannot represent the People. Conversely, after the new district attorney is elected or appointed, the district attorney's sibling ethically cannot accept professional employment from defendants or suspects in cases being prosecuted or investigated by the district attorney.

For many of the reasons expressed above, we reach the same conclusions, on the specific facts presented here, where a defendant is or would be represented by another lawyer in the district attorney's sibling's firm.

3. The Prosecutor/Adversary-Advisor Relationship

A district attorney and the co-chairman of a district attorney's unofficial ''transition team'' are not ethically prohibited *per se* from appearing as adversaries in all criminal cases. *See* DR 9-101(D) (providing automatic disqualification only where there is a familial relationship). Whether disqualification of one or the other is required in a particular case depends upon an examination of the relevant facts, including both lawyers' personal and professional relationship, the amount of service donated by the advisor, the degree to which the district attorney may be, or reasonably may be perceived to be, beholden for the advisor's services, and the degree to which some or all of the assistant district attorneys may be indebted to the advisor for their positions.

In making this determination, due consideration must be given to the importance of preserving the perceived and actual integrity of the district attorney's office. The fairness of the criminal justice system in the county would be jeopardized if members of the public reasonably could conclude that the district attorney or assistant district attorneys might give preferential treatment to the advisor or the advisor's clients when

exercising prosecutorial discretion. On the other hand, where the circumstances would give the public no reasonable basis to question that the district attorney's office will act impartially in cases where the advisor represents a defendant, lawyers in private practice should not be discouraged from serving as unpaid advisors to district attorneys and other public officials by unnecessary and unreasonable restrictions on their practices.

The Committee is not able to make this fact-specific determination on the basis of the facts stated in the inquiry. Furthermore, we would be reluctant to attempt such a determination based solely on the facts presented by an inquirer *ex parte*, without the safeguards provided by the adversary system.

If it is determined that the circumstances raise substantial question about whether the district attorney and the former advisor, as adversaries, could adequately represent the interests of their respective clients, it does not follow that disqualification of one or the other should last forever. Rather, the district attorney and the former advisor should not be on opposite sides of the same case so long as a disinterested objective observer with full knowledge of the facts would reasonably question either the district attorney's impartiality or the former advisor's ability to represent the defendant with uncompromised independent professional judgment and zeal. *Cf*. N.Y. State 574, at 7-8 (1986).

The same analysis applies to the question of whether the former advisor's partners or associates may represent a defendant in a case that is being investigated or prosecuted by the district attorney and, if not, for how long such disqualification should continue. In all cases such as these, the principal criterion should be whether the actual or perceived impartiality of the district attorney's office is reasonably called into question and whether there is any reasonable question concerning the defense lawyer's ability to represent the defendant with independent professional judgment and zeal.

4. The District Attorney Cannot Delegate Prosecutorial Responsibility

While the Committee is not authorized to give opinions on matters of law, we call attention to County Law §701. We understand that under this statute, it is settled law that the district attorney has responsibility for the prosecution of all crimes committed in the county. *See Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 467 N.Y.S.2d 182, 454 N.E.2d 522 (1983).

Therefore, where the district attorney is disqualified from a case under the principles set out above, the problem cannot be cured by the district attorney refusing to participate personally in the prosecution. Rather, the district attorney must be lawfully superseded. Either the Attorney General must take charge of the case on order of the Governor under Executive Law §63(2) or a "special district attorney" must be appointed under County Law §701. *See Matter of Schumer v. Holtzman, supra.*

CONCLUSION

For the reasons stated, and as more fully set forth and qualified above, questions 1 and 2 are answered in the negative; the answer to question 3 depends upon a detailed examination of all the relevant facts based upon the analysis outlined above; and we do not answer question 4 as a matter of ethics because the law does not permit the district attorney to delegate prosecutorial responsibility where the district attorney is personally disqualified.