New York State Bar Association

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 788 – 10/21/05

Topic: Part-time prosecutor represents criminal defendant in a civil matter, conflict of interest, imputation.

Digest: A lawyer who has a private practice and serves as a part-time assistant district attorney may not represent a client in a civil matter where the client is being prosecuted by the district attorney's office. The conflict cannot be cured by consent.

Code: DR 2-110(B)(2), 5-105(B), 5-105(D), 5-108(A)(1).

QUESTION

1. The inquirer is a lawyer in private practice who also serves as a part-time assistant district attorney in a small district attorney's office. He shares an office in the district attorney's office and attends staff meetings at which cases are discussed. In his private practice, the inquirer represents a husband and wife in revising their wills. After an initial interview, which resulted in the inquirer requesting certain additional information, the inquirer learns that the district attorney's office in which he works has begun a prosecution of the husband. May the inquirer continue to represent the husband? If there is a conflict of interest, may the conflict be cured by consent?

OPINION

2. The Committee concludes that the inquirer may not continue the representation of the husband when the district attorney's office in which the inquirer works is prosecuting the husband. We also conclude that the conflict cannot be cured by consent of the district attorney's office and the private client.

3. DR 5-105(B) bars a lawyer from concurrent representation of two or more clients if it would "involve the lawyer in representing differing interests," unless each client consents. We have held that part-time prosecutors are limited by DR 5-105 from undertaking certain kinds of work in their private practice: for example, they

may not represent criminal defendants in New York State courts[1] or in suing the governmental entity that employs them.[2] Such conflicts are imputed to partners and associates of the part-time prosecutor.[3] This inquiry involves the reverse situation: whether the conflicts of other prosecutors in the office are imputed to the part-time prosecutor so as to bar the part-time prosecutor from conflicting representations in his or her private practice.

4. DR 5-105(D) imputes conflicts under DR 5-105(B) to all lawyers "associated in a law firm." A law firm is defined in the Code of Professional Responsibility (the "Code") to include "the legal department of a corporation or other organization." This Committee has repeatedly held that a district attorney's office should be treated as a law firm for purposes of DR 5-105(D).[4] We recognize that a part-time prosecutor's affiliation with the district attorney's office may not be as extensive as that of a typical partner or associate in a law firm. However, the part-time prosecutor has full access to the office's information, attends staff meetings and carries on the work of the office in much the same way that other prosecutors do. His or her affiliation with the district attorney's office is at least as extensive as most of-counsel lawyers' affiliation with their law firms,[5] which this committee and others have held gives rise to imputation.[6] *A fortiori*, because of a greater need

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1 N.Y. State 544 (1982).

2 N.Y. State 218 (1971).

3 *See, e.g.*, N.Y. State 450 (1976) ("If the [part-time] town attorney is unable to represent private clients by reason of the foregoing considerations, his partners and associates would similarly be disqualified"); N.Y. State 40 (1966); *see also* N.Y. State 672 (1995) (part-time prosecutor who is partner of judge's law clerk cannot appear before that judge, conflict not imputed to other prosecutors where conflict did not arise from one of enumerated provisions in DR 5-105[D]).

4 N.Y. State 672 (1995) ("the District Attorney's office is the functional equivalent of a law firm"); N.Y. State 670 n.3 (1994); N.Y. State 638 (1992); N.Y. State 492 (1978) (disqualification for a small DA's office, did not reach the question of "[w]hether that analogy is appropriate *vel non* to the structure and operation of a district attorney's office in a major metropolitan community"); N.Y. State 476 (1977) ("all public offices which exercise prosecutorial duties are treated as private law firms" for purposes of DR 5-105(D) disqualification); N.Y. State 419 (1975); *see also* N.Y. City 2003-03 (the Code's definition of law firm "of course encompasses large law firms, corporate legal departments, government legal departments, and non-profit law firms"); ABA Model R. 1.0 cmt. 3 ("With respect to the law department of an organization, *including the government*, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct") (emphasis added).

5 "We have interpreted the 'of counsel' relationship to mean that the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis.'" N.Y. State 773 (2004) (*quoting* N.Y. State 262 [1972]).

6 N.Y. State 773; *see also* ABA 90-357; N.Y. City 1995-8; *Nemet v. Nemet*, 112 A.D.2d 359, 360, 491 N.Y.S.2d 810, 811 (2nd Dep't) (of counsel relationship leads to imputed disqualification), *appeal dismissed*, 66 N.Y.2d 602, 490 N.E.2d 554 (1985); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. c(ii) (1998) (same). *But see Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 135 (2d Cir. 2005) ("Given the wide variation in the nature and substance of relationships lumped together under the title 'of counsel,' a *per se* approach is ill-equipped to respect appropriately 'both the individual's right to be represented by counsel of his or her choice

to avoid the appearance of impropriety in government, the imputation of conflicts that applies to most "of counsel" lawyers applies to a part-time prosecutor.[7]

5. Given that there is a conflict of interest, may it be waived?[8] In N.Y. State 657 (1993), we stated that the conflict arising from a part-time prosecutor's acting as criminal defense counsel in New York State courts was not waivable. In that opinion we said, "Because the role of the prosecutor and the defense lawyer are inherently incompatible and the prosecutor has special responsibilities to the public, consent cannot cure the conflict because it is not obvious that the lawyer can adequately represent the Town and the private client."[9] While the inquirer does not seek to act as defense counsel in criminal cases, we believe the same conclusion applies. The risk of the public perceiving favoritism at the prosecutor's office precludes waiver of the conflict.

6. The Code does not prescribe which representation a lawyer must withdraw from when presented with a non-waivable conflict,[10] but we have said that "[a]s a general rule, disqualification of the entire District Attorney's office is warranted only upon a finding of actual prejudice, a real conflict of interest or the risk of misusing confidences."[11] In this case, where the withdrawal of the entire district attorney's office would require appointment of a special prosecutor to prosecute the husband, and where the estate-planning representation is at an early stage, we believe the inquirer should withdraw from representing the husband. If the facts

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and the public's interest in maintaining the highest standards of professional conduct.'") (*quoting Hull v. Celanese Corp.*, 513 F.2d, 568, 569 [2d Cir. 1975]).

7 *Accord* Vermont 2003-4 (conflicts of all attorneys in Attorney General's office imputed to part-time Assistant Attorney General).

8 N.Y. State 629 (1992) (governmental entity is capable of giving consent).

9 *See also State v. Schrager,* 74 Misc. 2d 833, 346 N.Y.S.2d 101 (Crim Term., Queens Cty. 1973) (court approved appointment of Special District Attorney when Assistant District Attorney was criminal defendant); N.Y. State 683 (1996) (The prosecutor's "special duty" to seek justice "imposes a responsibility on prosecutors not only to ensure the fairness of the process by which a criminal conviction is attained, but also to avoid the public perception that criminal proceedings are unfair.").

10 DR 2-110(B)(2) (requiring lawyer to withdraw from employment if "continued employment will result in violation of a Disciplinary Rule"). *See also* N.Y. City 2005-05 (describing factors to be considered in deciding which matter a lawyer should withdraw from in the case of unforeseeable concurrent client conflicts).

11 N.Y. State 672 (1995); *accord* N.Y. State 670 (1994). While New York law provides for appointment of special prosecutors where an entire county office is disqualified, *see* N.Y. County Law § 701(1)(a) (2005) ("Whenever the district attorney of any county and such assistants as he or she may have… are disqualified from acting in a particular case to discharge his or her duties… a superior criminal court in the county may… appoint some attorney at law… to act as special district attorney"), the New York courts have shown reluctance in recent years to disqualify an entire office absent demonstrated prejudice. *Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182 (1983) (district attorney should be disqualified only "under limited circumstances"); *People v. Rankin*, 149 A.D.2d 987, 540 N.Y.S.2d 628 (4th Dept. 1989); *Matter of Morgenthau v. Crane*, 113 A.D.2d 20, 22-23, 495 N.Y.S.2d 164, 166 (1st Dept. 1985); N.Y. State 638 n.10 (1992) (reviewing cases).

were different, as when withdrawal from representing the private client would cause substantial prejudice to the client, the lawyer may be required to withdraw from the district attorney's office.

7. There are also situations in which withdrawal from representing the husband or withdrawal from the district attorney's office might not be sufficient, so that the district attorney's office would be required to withdraw from the prosecution. Under DR 5-108(A)(1), if the representation of the husband and the criminal prosecution are "substantially related," the inquirer would have a disqualifying conflict of interest that would be imputed to the district attorney's office under DR 5-105(D) and would prevent the entire district attorney's office from proceeding against a former client of one of its prosecutors. "The most important factor [in determining whether two matters are substantially related] is whether the . . . lawyer did or could have obtained confidences and secrets in the former representation that should be used against the former client in the current representation."[12] If the criminal prosecution involves allegations of secreting assets, for example, an estate-planning representation might be substantially related to that prosecution, requiring appointment of a special prosecutor.[13] If the alleged crime is a traffic offense, however, that is unlikely.

CONCLUSION

8. The questions are answered in the negative.

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[12] N.Y. State 723 (1999). Other factors include "an identity of issues in the two matters or a significant overlap of . . . contested facts," and whether "the issue in controversy in the second matter arose out of a transaction in which the lawyer represented the former client." *Id.*

[13] We have said in the civil context that a lawyer's general knowledge of his or her former client's financial exposure does not make the two representations substantially related unless "there are peculiar aspects of the current representation making such information particularly relevant." N.Y. State 628 (1992); *accord* N.Y. State 723.