NEW YORK STATE
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Committee on Professional Ethics

Opinion 925 (8/2/12)

Topic: Conflicts of interest arising from business relationships between defense counsel and prosecutors and imputation of the conflict to partners of defense counsel.

Digest: Criminal defense counsel may continue representation of a client being prosecuted by a part-time assistant district attorney even if his law partner is in a business relationship with another part-time assistant district attorney of the same county.

Rules: 1.7(a)(2), 1.7(b), 1.10(a), 1.10(d)

FACTS

[1] The attorney making this inquiry (the "Inquirer") works as a criminal defense lawyer and now is a partner in a firm (the "Firm") with two other lawyers. The Inquirer works in one office, and the other two partners work in the other office. The offices are in different counties. Before joining the Firm, the Inquirer represented a defendant (the "Client") in a criminal case brought in a third county (the "County"), and has continued the representation since joining the Firm.

[2] One of the Inquirer's partners (the "Partner") in the Firm has a business relationship with a part-time assistant district attorney (the "A.D.A.") working in the County where the charges are pending against the Client. Specifically, the Partner and the A.D.A. are members in two limited liability companies that operate a real estate business and restaurant venture. The Inquirer knows little about the business between the Partner and the A.D.A., such as whether it has more than one property, whether it has income or losses, whether it has obtained financing or commitments to build the restaurant, whether there are other investors are involved, who manages the investment, and so forth. The A.D.A. has a private law office in the same town and county as the Partner, but the A.D.A. does not practice criminal defense law anywhere. The Partner and the A.D.A. have separate law offices, do not share any office, and do not discuss criminal matters.

[3] After his business relationship with the A.D.A. arose, the Partner gave the County's District Attorney his assurance that the Partner would not practice criminal defense in the County. This assurance has been observed by the Firm's other partner as well. The Inquirer, upon learning of this assurance, wrote to the District Attorney to advise of her handling of the Client's case as well as her understanding that the Firm she joined was "unable to handle DWI and criminal cases, due to a potential conflict." Whether this understanding is correct is the issue that has been referred to us to address.

[4] A different assistant district attorney (the "Prosecutor") is prosecuting the Client, and raised a question at the Client's trial as to whether the Inquirer is prevented from representing the

Client because of the potential conflict (the Partner's relationship with the A.D.A.) The trial court allowed the Inquirer to proceed to trial on behalf of the Client, and charges were dismissed that day for procedural reasons. The accusatory instrument has been re-filed, and the Inquirer represented the Client at arraignment, when the Prosecutor again raised the potential conflict.

[5] The Client has been informed of all the foregoing facts, and is prepared to give his consent to the representation. However the Prosecutor objects, believing that the District Attorney's office must also consent but is unable to consent to a "dual representation," citing N.Y. State 603 (1989), 482 (1978), and 143 (1970). The judge hearing the matter directed the Inquirer and Prosecutor to seek the view of this Committee as to whether there is a conflict of interest, and if so whether the Client may consent to the representation.

QUESTION

[6] Does a business relationship between a lawyer's partner and a part-time assistant district attorney prevent the lawyer from representing a defendant on criminal charges brought by another prosecutor in the office of the part-time district attorney?

OPINION

[7] The inquiry deals with conflicts of interest due to the "personal interest" of a lawyer,[1] as contained in Rule 1.7(a)(2):

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that…
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> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

[8] This Rule serves to ensure that "[t]he lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client." Comment 10 to Rule 1.7. This Rule aims to prevent the risk that the lawyer will not "give a client detached advice," that a lawyer's personal relationship would "materially limit the lawyer's representation of the client" or would "affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest." *Id.* The risks also include "the risk that client confidences will be revealed" and that the lawyer's relationship will "interfere with both loyalty and professional judgment." Comment 11 to Rule 1.7.

[9] This inquiry presents a question of first impression for our Committee. We have addressed business relationships between criminal defense counsel and prosecutors in two of our

[1] This case does not involve a "dual representation" of the kind covered by Rule 1.7(a)(1) because the Firm has only one "representation" (that of the Client). The Partner's business interest is a personal interest, not a competing representation. It also does not involve a law firm business between the assistant district attorney and a criminal defense attorney.

prior opinions, but both examined the duties of the prosecuting lawyer, whereas here we examine the interests of the defense counsel.

[10] In N.Y. State 413 (1975), an assistant district attorney sought to enter into a business unrelated to the practice of law with an attorney who defends criminal defendants in a county where the assistant district attorney is employed. The nature of the business and extent of the relationship was not described in our opinion. We held that the assistant district attorney could not enter into a business relationship with a criminal defense attorney in the same jurisdiction because it violated two requirements of the former Code of Professional Responsibility (in effect before April 1, 2009). First, we stated that it violated Canon 5 and Ethical Consideration ("E.C.") 5-2, which provided that:

> A lawyer should not accept proffered employment if the lawyer's personal interests or desires will, *or there is a reasonable probability that they will,* affect adversely the advice to be given or services to be rendered the prospective client. After accepting the employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that *would tend* to make his or her judgment less protective of the interests of the client. (Italicized emphasis added.)

[11] E.C. 5-2, related to Canon 5's Disciplinary Rule ("D.R.") 5-101(A), was the forerunner of Rule 1.7(a) (2)). However, Rule 1.7(a)(2) does not contain an equivalent to the concept that a lawyer should decline a representation because of a "reasonable probability" that the lawyer's personal interests will affect the lawyer's advice or interests that "would tend" to make the lawyer's judgment less protective of the client.

[12] Importantly, we also noted that an assistant district attorney could not obtain consent to the conflict from his client because the "People" may not waive conflicts of interest. Even the assistant district attorney's agreement to remove himself from all cases which involved his business partner did not change the result.

[13] We also relied upon Canon 9, the former requirement of the Code of Professional Responsibility to avoid the "appearance of impropriety," specifically Ethical Considerations 9-2, 9-3, and 9-6. The Rules do not carry forward this "appearance of impropriety" concept.

[14] In N.Y. State 583 (1987), an assistant district attorney who was starting a business to advise prospective college students and their families with the college selection and admission process sought to rent office space for the business from an assistant public defender, and to employ the spouse of a criminal defense attorney practicing in the same jurisdiction as an employee in the business. Unlike the business relationship in N.Y. State 413, we declined to rule out these proposed arrangements, construing D.R. 5-101(A) (the predecessor to Rule 1.7(a)(2)).

[15] First, we concluded that that the facts determine the outcome in each case, that is, "the nature and extent of the particular involvement, e.g., the size of the investment, both relatively and absolutely, the degree of influence, etc., will determine whether the relationship is barred." The lawyer's personal interests "could come into conflict with his or her duty to exercise

professional judgment solely in the interests of his or her clients" because, "depending on the financial arrangements and other business and personal circumstances, a rented office situation might involve relatively little danger that professional judgment would be improperly influenced or, on the other hand, substantial danger." Accordingly, "we perceive[d] *no per se prohibition*" but at the same time we cautioned the lawyer to "avoid financial or other business or personal interests, including rentals that will or could reasonably affect the lawyer's exercise of professional judgment solely on behalf of his or her client."

[16] N.Y. State 583 is the better guide for our decision involving the criminal defense counsel and the Firm here. We construe Rule 1.7(a)(2) (and Rule 1.7(b)), the successor version of D.R. 5-101(A) and E.C. 5-2, but not the additional standard of "appearance of impropriety," which was not carried over from the Code to the Rules of Professional Conduct.

[17] We analyze the personal interest conflict from the point of view of the Partner because Rule 1.10 imputes the Rule 1.7(a)(2) "personal interest" of the Partner to the Inquirer and all attorneys associated in a firm. We must assess whether there is "a *significant* risk" that the Partner's "professional judgment on behalf of a client *will* be adversely affected" by the Partner/A.D.A. business relationship. N.Y. State 583 teaches that this is a function of the magnitude or extent of that relationship and of its connection to the Partner's professional judgment on behalf the Client.

[18] As Prof. Roy D. Simon wrote, a "significant" risk is "more than a possibility but less than a certainty." Simon's N.Y. Rules of Professional Conduct at 271 (2012 ed.). Nevertheless, we consider the possibilities. Like the Inquirer, we do not know if the Partner's sense of loyalty to or solidarity with his business partner, the A.D.A., is great, or if their financial inter-dependence is significant. Even if it were, it is difficult on the information we have been supplied to conclude that the Partner's business relationship with the A.D.A. will motivate the Partner to alter or diminish his professional judgment for his Client, or leak confidential information, or give less than detached advice. It is significant here that the prosecution is handled by the Prosecutor, a different assistant district attorney, whose win or loss probably has little effect on the fortunes of the A.D.A. business partner. A bad outcome for the Client (a "win" for the Prosecutor) would not redound to the benefit of the A.D.A. business partner or benefit the A.D.A.'s real estate and restaurant business with the Partner. A good outcome for the Client (a "loss" for the Prosecutor) is not a loss by the A.D.A., and probably would not harm any interest of the A.D.A. business partner of the Partner. Accordingly, we cannot conclude on the limited facts supplied in the inquiry that there is a "significant" risk that there "will" be a breach of confidential information, from Partner to A.D.A. to Prosecutor, or any disloyalty to the Client by the Partner.

[19] We are not a fact-finding body, however, and it would alter our opinion if the court here were to be supplied additional facts that showed that, due to the business relationship with the A.D.A., there is a significant risk that the Partner will not "give a client detached advice;" that the relationship will "materially limit the lawyer's representation of the client" or "affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest;" "that client confidences will be revealed;" or that the lawyer's relationship will "interfere with both loyalty and professional judgment."

[20] It may or may not be significant that the Partner has given his assurance to the District Attorney that he will not take on criminal matters in that County, and that another partner in the Firm observes this assurance as well. Both the Prosecutor and the Inquirer have perceived this assurance to reflect a concern for a "potential" conflict of interest. An *actual* conflict of interest, however, is what is relevant, and that is determined by the language of Rule 1.7(a)(2), which, as we said above, is shown by the magnitude and extent of the business relationship and its impact on the Partner's professional judgment on behalf of the Client.

[21] Even if an actual personal conflict were established, it does not end the inquiry. The question would turn to whether the Inquirer and the Client could conclude that the representation may proceed. Rule 1.10 provides that the imputed conflict may be waived:

> (d) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

[22] Rule 1.7(b), in turn, permits waiver of the conflict of interest and consent to the representation under four conditions:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
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> (4) each affected client gives informed consent, confirmed in writing.

[23] We assume that the representation is not prohibited by law, and does not involve the assertion of a claim by one client of a lawyer or firm against another client. We turn, therefore, to conditions (1) and (4). We cannot rule out the possibility that both of these conditions may be satisfied.

[24] As to the first condition of Rule 1.7(b), the Partner may be able to reasonably conclude, on the facts we have been supplied, that the Partner would provide competent and diligent representation of the Client because (for the reasons stated above) we cannot say that there is a "significant risk" the outcome of the Client's case "will" bear on the Partner's business ventures with the A.D.A. and therefore diminish the competence or diligence of the Partner's representation.

[25] If the *Partner* could provide a competent and diligent representation, then likewise the *Inquirer* could do so. The Inquirer does not have any business relationship with the A.D.A. or any interest in the relationship between the Partner and the A.D.A.. The Inquirer stands to gain or lose nothing depending upon the fortunes of the Partner's business venture with the A.D.A. In addition, the A.D.A. is not the assistant district attorney charging the Client, so it is difficult to imagine how even a bad outcome for the Client (a "win" for the Prosecutor) could have any impact on the fortunes of the A.D.A.'s real estate and restaurant business venture(s). There are

additional factors present here. The Inquirer has represented the Client since before joining the Firm. The Inquirer has little information about and no interest in the Partner's business venture with the A.D.A. The Inquirer has an office and maintains client files in a different office and in a different county from the Prosecutor, the A.D.A., the Partner, and the business ventures. Overall, on these facts, we see enough to conclude that the Inquirer can reasonably believe that the Inquirer can provide competent and diligent representation to the Client.

[26] As to the fourth condition of Rule 1.7(b), informed consent by the Client may be possible on the facts presented. Rule 1.1(j) defines ''Informed consent'' as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." As Comment 6 to Rule 1.7 points out, it is a flexible concept, depending upon the sophistication of the Client, the information to be supplied, and whether separate counsel should be recommended to advise the Client about the risks and benefits of giving consent. The Client sets the terms of the consent; if, as we believe, the Inquirer can reasonably conclude that the Inquirer will provide competent and diligent representation, it makes even more sense to respect the consent of a Client to choose to be represented by the Inquirer, who is free of any relationship to the A.D.A. or Prosecutor.

[27] Finally, Rule 1.10(d) requires consent from all "affected clients," that is, those who are affected by the personal interest conflict. Here, unlike N.Y. State. 413, we analyze the duties of the Partner, Inquirer, and their Firm, which are criminal defense counsel. They represent the Client and the only client affected by the Partner's personal interest is the Client, not the "People." The Partner (and the Inquirer) have never represented the People. *Cf* N.Y. State 862 (2011) ("If the conflict arises under Rule 1.7(a)(2) because of the conflicted Assistant Public Defender's personal interests, then consent is required only from the inquirer's own assigned client, because no other client is affected.") Therefore, the fact that the District Attorney's office is unable to give consent on behalf of the "People" is of no consequence to the duties of the criminal defense counsel.

CONCLUSION

[28] We conclude on the inquiry presented, limited to the facts supplied, that a lawyer may continue a criminal defense representation of a client after joining a firm which includes a partner who has a business relationship with a part-time assistant district attorney working in the same office where another part-time assistant district attorney is prosecuting the lawyer's client.

(23-12)