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

Committee on Professional Ethics

NYSBA

Opinion #492 - 9/13/78 (45-78)

Clarifies #'s 227 and 419

Topic: Conflict of interests; appearance of impropriety; part-time district attorney; former defense counsel as public prosecutor.

Digest: Improper for newly elected part-time district attorney or any member of his legal staff to defend appeal or prosecute felony charge involving person formerly represented by district attorney and one of his assistants in private practice.

Code: EC 4-5, 4-6, 7-13, 9-1, 9-2, 9-6;
DR 4-101(B), 4-101(C)(1), 5-105(D).

QUESTION

A part-time district attorney and one of his two assistants represented a defendant in a number of criminal cases, all of which had been concluded at the time of the district attorney's election to office with the exception of one case that is pending in the Court of Appeals. The same defendant now also faces prosecution on a felony charge which was brought after the district attorney had been elected. It is believed that the defendant, if asked, would waive whatever right he may have to require disqualification of his former counsel.

Under the circumstances stated, may the district attorney or any member of his legal staff represent the People in connection with either the appeal or the felony prosecution?

OPINION

The question posed presents three issues. Initially, we must determine whether the past representation of the defendant should disqualify the district attorney and the one of his two assistants who had represented the defendant. If these persons should be disqualified, we must then examine whether the disqualification ought to attach to the remaining member of the district attorney's staff so as to require the retention of special counsel. The third issue is whether the defendant can meaningfully waive any right that he might have to insist upon disqualification.

We recognize that disqualification of counsel often presents many complex issues of law. The resolution of such issues is, however, beyond the jurisdiction of this Committee. As elsewhere,

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in this opinion, we address only what we perceive to be required by the ethics of our profession.

With respect to the first issue, we believe that it would be improper for the district attorney and the assistant who had previously represented the defendant to handle either the appeal or the latest felony charge. Placing all other considerations aside for the moment, the risk of speculation adversely reflecting upon their integrity in opposing a former client under the circumstances here present is in itself sufficient to preclude their involvement in either matter. A result favorable to the defendant in either matter would almost inevitably tend to diminish public confidence in the office of the district attorney and the system of criminal justice of which he is a most essential part. See, EC 9-2.

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.

Because of the broad discretion with which the district attorney is vested, prosecution of persons that he has personally represented in private practice immediately prior to the assumption of his new office presents an unacceptably high risk that the prior representation will bias the manner in which he will discharge the functions of his office and, at the very least, may give rise to speculation concerning the propriety of his motives. Such speculation, or a reasonably high probability of such speculation, would understandably place unwarranted pressure upon the district attorney in the performance of his official duties. 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.

Indeed, disqualification of the district attorney and his assistant might well be required even without reference to the character of the district attorney's office or the unique nature of his duties. Thus, both the district attorney and his assistant would be disqualified from handling the appeal simply because all lawyers are forbidden to switch sides in litigation. See, e.g., N.Y. State 410 (1975), N.Y. State 329 (1974) and N.Y. State 227 (1972); see also, ABA 342 (1972). And, considering the subject, the scope, as well as the temporal proximity, of their prior representation, it would also seem improper for them to prosecute their former client in connection with his most recent felony charge, since, absent considerations of waiver or client consent, no lawyer may ever undertake to represent an adverse party where information

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acquired in the course of a prior representation might be used to his former client's detriment. See, EC 4-5, EC 4-6 and DR 4-101(B); see also, N.Y. State 303 (1973).

Turning to the second issue, bearing in mind the relative size of the district attorney's office, we also believe it appropriate to extend disqualification to all members of his staff. We would thereby require the retention of special counsel pursuant to the provisions of Section 701 of the County Law. As we observed in N.Y. State 419 (1975), construing Section 701:

> "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 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. [Citations omitted] 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. [Citations omitted] A district attorney's office is comparable to a legal partnership."

The analogy of a district attorney's office to a law firm in private practice would seem to determine the issue, at least on the facts of the matter here present. Cf., DR 5-105(D) ("If a lawyer is required to decline employment ... no partner or associate of his ... may accept ... such employment"). Whether that analogy is appropriate vel non to the structure and operation of a district attorney's office in a major metropolitan community is a matter upon which we need not presently pass. The size of the district attorney's staff in the question posed would perforce render suspect any attempt to disassociate those persons who are disqualified by reason of their prior representation of the defendant from the balance of his staff.

Finally, with respect to the third issue, we note that if the only reason for disqualifying the district attorney or his staff related to the possible use of client confidences, theoretically it would be possible for the defendant to waive any right that he might otherwise have to insist upon disqualification. See, DR 4-101 (C)(1). But, as we have seen, disqualification in this case rests upon other considerations; and, herein, it would seem appropriate to clarify two earlier opinions of this Committee.

When announcing our decisions in N.Y. State 227 and 419, supra, we seemed to condition our finding of disqualification in each case upon "the absence of waiver by the defendant." Our reference to "the absence of waiver", however, should neither be understood to mean that the defendant could in all instances avoid disqualification

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of his former counsel through the mechanism of consent nor that consent would have solved all ethical problems raised by the circumstances of each case then before us. Rather, the reference was merely intended to underscore the confidential nature of the information previously imparted to counsel, thereby buttressing our conclusion that counsel should be disqualified.

Where disqualification derives only from the possible use of client confidences, the client can effectively absolve his former counsel. But, where the public interest in the avoidance of improprieties that address conduct other than a breach of client confidences is involved, any attempt at waiver must be deemed ineffective. See, EC 9-1. In the present context, this principle would also apply to situations that merely raise an appearance of such improprieties. See, EC 9-2. Hence, the defendant in question may not effectively absolve the district attorney and his assistant by purporting to waive his right to insist upon disqualification.

For the reasons stated, the question posed is answered in the negative.
