NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #502 - 1/15/79 (58-78) Topic: Disqualification of counsel; appearance of impropriety; former assistant district attorney

Modifies #313

Digest: Former assistant district attorney may represent persons who were indicted during his employment by district attorney's office where assistant had no access to confidential information and took no part in prosecution of accused; under certain circumstances, former assistant's firm may undertake representation from which he would be disqualified.

Code: Canons 4, 5 and 9; EC 4-5, 4-6, 9-3, 9-6; DR 4-101(B), 5-101(A), 5-105(D), 7-101(A) and 9-101(B).

QUESTION

A law firm which is actively engaged in the private practice of criminal law has employed a former assistant district attorney. Under the circumstances stated:

(1) May the firm continue its representation of defendants, indictments against whom were obtained during the assistant's employment by the district attorney's office, where the assistant had no access to confidential information concerning the defendants and took no part in their prosecution?

(2) May the firm undertake the representation of a defendant who was arrested for the alleged commission of crimes subsequent to the assistant's departure from the district attorney's office, but who was then known to the assistant as the subject of a police investigation concerning incidents relevant to the allegations underlying the arrest?

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OPINION

Answering the first of the two questions posed requires us initially to examine the validity of a prior opinion of this Committee which interpreted the following language of DR 9-101(B):

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

That opinion, N.Y. State 313 (1973), held:

> "Within the meaning of [DR 9-101(B)] an assistant district attorney is considered to have substantial responsibility in connection with matters resulting in indictments during the period he held that office."

The reason which formed the basis for the somewhat mechanistic approach adopted by this Committee in N.Y. State 313 was twofold. First, the rule was easy to apply and certain in its application. Second, and no less important, a rule of such breadth served to dispel any doubt concerning the former assistant district attorney's actual responsibility or possible access to relevant non-public information during the period of his association with the district attorney's office.

At this point, a word of explanation seems appropriate with respect to our concern for the former assistant's possible access to relevant non-public information. It will be noted that DR 9-101(B) does not expressly refer to such access. Nowhere in Canon 9 is this subject addressed. Rather, the matter is generally treated under the Ethical Considerations and Disciplinary Rules of Canon 4 ("A lawyer should preserve the confidences and secrets of a client"), which Canon does not by its terms, however, deal with the subject of disqualification. Indeed, the only reference contained in the Code to disqualification by reason of a possible violation of client confidences is set forth in the last sentence of EC 4-5, which reads:

> "Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure." (Emphasis supplied)

Notwithstanding this conceptual hiatus in the Disciplinary Rules of the Code, over the years a substantial body of authority has developed which mandates disqualification as a matter of law

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where it appears that counsel has placed himself in a position to use the confidences of a former client in connection with a matter for which he is subsequently retained. See, e.g., Government of India v. Cook Industries, Inc., 569 F.2d 737 (2d Cir. 1978); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977); Silver Chrysler Plymouth Inc. v. Chrysler Motor Corp., 518 F.2d 751 (2d Cir. 1975) and Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 564-565 (2d Cir. 1973).

The opinions of this Committee have generally followed the substantive law of disqualification evolved by the courts of this State and the Second Circuit. Hence, in considering disqualification of former government counsel, our Committee has generally tended to amalgamate principles of Canons 4 and 9 in a manner consistent with the substantive rules evolved by the courts. Cf., e.g., General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) with United States v. Standard Oil Co., 136 F. Supp. 345, 362 (S.D.N.Y. 1955) (disqualification on the basis of "actual personal knowledge or action").

Despite the salutary objectives which underlie the rule established by N.Y. State 313, we now believe that the public's confidence in the administration of criminal justice can be served by a more carefully defined rule and one which is less restrictive of the careers of former assistant district attorneys. To be sure, the approach adopted in N.Y. State 313 may still be valid and serve to avoid an appearance of impropriety in a case involving a district attorney's office with a very small staff. Cf., N.Y. State 52 (1967) with N.Y. State 492 (1978).

We can no longer accept as valid, however, a rule which would make DR 9-101(B) inflexibly applicable to all former assistant district attorneys, regardless of how obvious it may be that a particular former assistant could have had no access to relevant confidential or non-public information during the period of his association with the district attorney's office. Thus, for example, it would seem as unfair as it is manifestly unnecessary to apply the broad brush rule established by N.Y. State 313 to lawyers who were formerly employed in a large metropolitan district attorney's office with a substantial number of assistants. As is often the case, many of those assistants are assigned to various specialized areas of responsibility and can have no access to confidential information obtained by those working in other areas.

Where such isolation can be shown, it serves no useful purpose to mandate disqualification on the theory that some may unreasonably suspect that the circumstances of the former assistant's employment were otherwise. Indeed where, as on the facts of the first question posed, the firm already enjoyed an active criminal

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practice and had undertaken to represent the accused prior to the assistant's association with it, there would appear to be much less basis in reason to suspect any impropriety. And, of course, even if such suspicions were entertained by some uninformed members of the general public, that would in no way affect the quality of the former assistant's representation of his present clients or interfere with the district attorney's prosecution of the accused. Most especially, the unreasonable character of such suspicions could not justify the very real adverse impact of a less discriminating rule upon the careers of assistant district attorneys.

In focusing on the management, operation and size of the district attorney's office, we are well aware that generally such considerations are without relevanceto an application of the principle set forth in Canon 5. Hence, regardless of the size or relative isolation which attends the work of lawyers in private practice, any conflicting interest which would serve to disqualify one member or associate of a firm will perforce disqualify all others practicing in that firm. DR 5-105(D). The principle involved in the matter now before our Committee, however, does not truly relate to a conflict between present interests or indeed even to an appearance of any such conflict. Rather, the principle is one which bears upon the consequences of a prior professional relationship and, herein, it will be observed that the draftsmen of the Code were careful to limit the proscription to "a matter in which [the former assistant district attorney] had substantial responsibility while he was a public employee." DR 9-101(B).

Accordingly, we believe that our opinion in N.Y. State 313 should be modified to the extent of disqualifying a former assistant district attorney pursuant to the provisions of DR 9-101(B) with respect to matters pending in the district attorney's office during the period of his employment by that office only where he had access to confidential or non-public information relating to the matter in which he is later retained to act in private practice or where the circumstances attendant upon the management and operation of the district attorney's office, as well as the character of his former employment, reasonably suggest that he had such access.

The term "substantial responsibility" should not be confused with personal involvement or actual knowledge of relevant information. As was stated in ABA 342 (1975), the term "substantial responsibility":

> "... contemplates a responsibility requiring the official to become personally involved in an important, material degree, in the investigative

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> or deliberative processes regarding the transactions or facts in question.... Yet it is not necessary that the public employee or official shall have personally and in a substantive manner investigated or passed upon the particular matter, for it is sufficient that he had such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantively involved in the investigative or deliberative processes regarding that matter." (Emphasis supplied)

Consistent with the views expressed in ABA 342, where the former assistant district attorney had no official responsibility and clearly appears to have had no access to relevant information, disqualification should not be required by the Code. Cf., N.Y. State 419 (1975) with People v. Wilkins, 28 N.Y.2d 53 (1971); People v. Washington, 52 A.D.2d 984, 985 (3d Dept. 1976); and, People v. Loewinger, 37 A.D.2d 675, 676 (3d Dept. 1971), aff'd, 30 N.Y.2d 587 (1972).

Since the former assistant district attorney on the facts of the first of the two questions posed would not be disqualified from personally representing the defendants, none of his partners or associates in private practice would be disqualified by reason of his previous employment. See, DR 5-105(D).

With respect to the second question posed, we believe the former assistant district attorney's knowledge of a police investigation concerning incidents relevant to the allegations underlying the arrest should serve to disqualify him from undertaking the proposed representation. Although he may have had no responsibility for the investigation, he has nevertheless by virtue of his previous employment gained relevant confidential or non-public information and should therefore be disqualified from undertaking to represent one whose present interests would be adverse to those of his former employer. While this result does not appear to be required by a literal application of DR 9-101(B), we believe that the principles articulated by Canon 4 concerning the preservation of a former client's confidences and secrets compel this result when coupled with the lawyer's ethical obligation to pursue zealously the interests of his present client while avoiding an appearance of impropriety. See, DR 4-101(B), DR 5-101(A) and DR 7-101(A); see also, EC 4-5, EC 4-6, EC 9-3 and EC 9-6.

Since the former assistant district attorney is disqualified from undertaking the proposed representation, we must consider whether DR 5-105(D) operates to disqualify his partners and associates in private practice.

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ABA 342 recognized that "[p]ast government employment creates an unusual situation in which an inflexible application of DR 5-105(D) would actually thwart the policy considerations underlying DR 9-101(B)." The ABA Committee then observed:

> "The question of the application of DR 5-105(D) to the situation in which a former government employee would be in violation of DR 9-101(B) should be considered in light of those policy considerations, viz: opportunities for government recruitment and the availability of skilled and trained lawyers for litigants should not be unreasonably limited in order to prevent the appearance of switching sides, yet confidential information should be safeguarded, and government lawyers should be discouraged from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service. The desire to avoid the appearance of evil, even though less important, must be considered. A realistic construction of DR 5-105(D) should recognize and give effect to the divergent policy considerations when government employment is involved." Id.

Hence, the ABA Committee concluded:

> "The purpose of limiting the mandate [of DR 9-101(B)] to matters in which the former public employee had a substantial responsibility are to inhibit government recruitment as little as possible and enhance the opportunity for all litigants to obtain competent counsel of their own choosing, particularly in specialized areas. An inflexible extension of disqualification throughout an entire firm would thwart those purposes. So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter, the problem of his switching sides is not present; by contrast, an inflexible extension of disqualification throughout the firm often would result in real hardship to a client if complete withdrawal of representation was mandated, because substantial work may have been completed regarding specific litigation prior to the time the government employee joined the partnership, or the client may have

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> relied in the past on representation by the firm." Id.

We concur in the views expressed by the ABA's Standing Committee on Ethics and Professional Responsibility in construing the operation and effect of DR 9-101(B) on the principle embodied in DR 5-105(D).

We here refer to the "principle embodied in DR 5-105(D)" because the New York State version of DR 5-105(D) is literally different from that of the ABA. Thus, while the ABA version expressly requires disqualification of an entire firm when any lawyer associated with it would be required to decline or withdraw from employment "under a Disciplinary Rule," the New York State version of the Code expressly mandates disqualification of the firm only where a lawyer associated with it is required to decline or withdraw from employment "under DR 5-105" by reason of conflicting interests. Although the problem of harmonizing the language of DR 5-105(D) with DR 9-101(B) which confronted the ABA Committee would not appear to be of concern to this Committee in view of the relatively narrow ambit of proscription set forth in the New York State Code, both this Committee and the Court of Appeals of the State of New York have generally applied the principle stated in DR 5-105(D) in a manner consistent with the ABA Code so as to require disqualification of a firm when any lawyer associated with it would be obliged to decline or withdraw from employment under any Disciplinary Rule. See, e.g., N.Y. State 497 (1978) and Cardinale v. Golinello, 43 N.Y.2d 288, 295 (1977); cf., Laskey Bros., Inc. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 826 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976); Handelman v. Weiss, 368 F. Supp. 258, 264 (S.D.N.Y. 1973); and, Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 229 n.10 (2d Cir. 1977).

Our regard for those policy considerations which serve to limit the mandate of DR 9-101(B), however, must not obscure the ultimate purpose of Canon 9. In this latter connection, while on the facts of the matter presently before our Committee we believe that screening or isolation of the former assistant would permit other members of his firm to undertake the proposed representation, we hasten to add that there will undoubtedly be situations in which the appearance of impropriety cannot be removed by any amount of screening or isolation. See, N.Y. City 889 (1976). Thus, where the former assistant's relationship to the matter was of a significantly greater degree than that which is here present, consistent with the ultimate purpose of Canon 9, disqualification of all his partners and associates in private practice may well be required without regard to his subsequent isolation from the matter.

In permitting the former assistant's firm to undertake the

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proposed representation, we assume that he has not communicated the confidential or non-public information he acquired while in public service to his partners or associates in private practice. Obviously, if he has in fact communicated such information to members of his firm, his subsequent isolation from the matter would be of no consequence and disqualification of the entire firm would be required.

For the reasons stated, subject to the qualifications hereinabove set forth, each of the questions posed is answered in the affirmative.
