NEW YORK STATE BAR ASSOCIATION

ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion 592 - 6/9/88 (9-88)

Topic: Confidences & Secrets; Public Defender; Conflict of Interest.

Digest: A public defender cannot continue to represent two criminal defendants in unrelated cases, where one defendant has confessed to the other, who then requests that the public defender use this information to obtain a favorable plea to the detriment of the confessing client. The entire office of the public defender is likewise disqualified from representing either client, and the public defender cannot reveal the reason for withdrawing.

Code: DR 4-101(A), (B), (C)(1); 5-105(B), (C), (D); 7-101; Canon 4, 9; EC 4-4, 5-1, 5-15.

QUESTIONS

While representing two clients on unrelated criminal charges, the chief public defense lawyer of a local legal aid society was approached by one of those clients (Client 1), who advised the public defender that the other client (Client 2) had confessed to the crime with which Client 2 was charged. Client 1 wants the public defender to approach the District Attorney to obtain favorable consideration in Client 1's case, in exchange for his testimony against Client 2.

The following questions are posed:

(1) Is the public defender ethically obligated to withdraw from either or both cases and, if so, are other attorneys in the public defender's office also disqualified?*

(2) Should the public defender reveal the reason for withdrawing?

OPINION

WITHDRAWAL

DR 5-105(B) of the Code of Professional Responsibility ("Code") states: "A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests ...." In the Definitions section at the end of the Code, "differing interests" are defined as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

The factual situation clearly presents an actual and apparent conflict, placing the lawyer in an untenable position for the continued representation of either or both clients. The zealous representation (DR 7-101) of the interests of either client *ipso facto* would cause the lawyer to forego his duty of undivided fidelity and loyalty to the other client.

Under DR 5-105(C), a lawyer is permitted to "represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment of behalf of each." It is obvious to the Committee that in this case the continued representation of both Client 1 and Client 2 necessarily adversely affects the lawyer's professional judgment, complete loyalty toward, and the duty to maintain secrets and confidences of a client. Moreover, the lawyer cannot adequately protect the differing interests of either client and, therefore, must forego the representation of both.

* For a discussion of the constitutional considerations of the effective assistance of counsel arising out of the simultaneous representation of a criminal defendant and a prosecution witness, *see People v. Mattison*, 67 N.Y.2d 462 (1986); *People v. Wilkins*, 28 N.Y.2d 53 (1971).

"If the lawyer in the course of his representation acquired confidential information from one of the parties that would operate to the disadvantage of either party in any matter where their interests were conflicting, he would have to withdraw from representation of both clients unless they consented to continued representation after full disclosure." N.Y. County 646 (1975).

Similarly, this Committee held that where a lawyer represented two defendants in a medical malpractice action, and one of the defendants wished to pursue a cross-claim against the other, the conflicting interests of the lawyer's clients results in the lawyer having to withdraw from any further representation in that case. "[I]n the absence of consent (DR 4-101(C)(1)), if the attorney has received confidential information from the client who has requested separate counsel, the firm must withdraw from representation entirely so as not to be put in the position of using against a former client confidential information received from that client ....." N.Y. State 560 (1984).

The lawyer's knowledge of, and his ability to use confidences and secrets to the disadvantage of one client (DR 4-101(A) and (B)), not to mention the appearance of impropriety (Canon 9), prevents the continued representation by the lawyer of either client. For example, if the lawyer were in this case to continue to represent Client 2, the lawyer would, in all probability, be faced with the dilemma of having immediately to gather and use material with which he could impeach Client 1 and subsequently to cross-examine Client 1 with secrets and confidences that the lawyer had shared or otherwise acquired in the former representation of Client 1, while fulfilling his continuing duty of loyalty to Client 1. Plainly, the lawyer cannot possibly carry out the duty of undivided loyalty toward both clients or to either client, without violating the Code.

In an earlier opinion, we held that where a lawyer jointly represented two clients (two partners) in the same matter, and one client disclosed to the lawyer confidential information that was detrimental to the other (the client was actively breaching the partnership agreement), the resulting conflict of interest compelled the lawyer to withdraw from further representation of both clients. N.Y. State 555 (1984); *see also* Monroe County 87-2.

In an American Bar Association Informal Opinion, an attorney was required to withdraw completely from joint representation in the defense of both a manufacturer and a dealer-distributor in a products liability claim where a conflict of interest arose. The ABA committee considered:

> [W]hether the lawyer, after a differing interest becomes actual and apparent, and after terminating representation of the dealer, can properly continue to represent the manufacturer, and in doing so can advocate positions adverse to the dealer, using information acquired in the course of the attorney-client relationship with the dealer. We conclude that he should not do so, even under the circumstances presented, if in the course of the attorney-client relationship with the dealer the lawyer acquired any information that will or may be used against the dealer in the litigation ..... In our view, however, the lawyer's switch from defending the dealer to asserting positions adverse to the dealer in the same litigation, and in doing so using information (including information which could be a confidence or secret within the meaning of the Model Code), is fundamentally inconsistent with the essential nature of the attorney-client relationship. ABA Inf. Op. 1441 (1979).

Thus, we conclude under the facts of this case that, because of the differing interests of the two clients, the lawyer must withdraw from both representations.

VICARIOUS DISQUALIFICATION

Once determining that the public defender is disqualified from representing either client, the next issue is whether anyone else in the public defender's office can carry either representation forward. In reaching its decision, this Committee looks to DR 5-105(D): "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment." As our Committee noted in N.Y. State 533 (1981) "[T]he public defender and his staff are considered as one continuing firm; if it is improper for one staff member to represent a client in a particular matter, all are subject to the same prohibition. See, *e.g.*, N.Y. State 497 (1978), N.Y. State 462 (1977) and N.Y. State 313 (1973); *see also*, DR 5-105(D)."

We also point out that Canon 9 provides that "a lawyer should avoid even the appearance of professional impropriety;" and EC 5-15 states in pertinent part that where there is any question relating to the representation of multiple clients, the lawyer "should resolve all doubts against the propriety of the representation."

Accordingly, we believe that the entire public defender's office should eschew further representation of both clients in order to avoid even the appearance that the interests of one or the other might be compromised.

DISCLOSURE OF THE REASON FOR WITHDRAWAL

Canon 4 compels a lawyer to guard and preserve the secrets and confidences of the client. " 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client." DR 4-101(A) (emphasis added). EC 4-4 further provides that the ethical obligations of a lawyer to guard the confidences and secrets of the client "exists without regard to the nature or source of information or the fact that others share the knowledge."

The confidential disclosure made by Client 1 is a "confidence" vis-a-vis Client 1 that is protected by the attorney-client privilege, and as such, cannot be divulged to Client 2, or to anyone else, without Client 1's consent. The same disclosure, however, is a "secret" vis-a-vis Client 2, which was acquired in the course of representing Client 2, and cannot be revealed by the lawyer to anyone without Client 2's consent.

DR 4-101(B) provides:

> Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> 1. Reveal a confidence or secret of his client.
>
> 2. Use a confidence or secret of his client to the disadvantage of the client.
>
> 3. Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Interpreting the intent of DR 4-101(B), ABA Inf. Op. 1282 (1973) stated "DR 4-101(B) prohibits the disclosure of, or the use of confidences received from any client to the disadvantage of the client." In N.Y. State 525 (1980), a

lawyer, while representing an employer experiencing recent thefts, was consulted in good faith by an employee of the employer. The employee confessed to the thefts and sought to retain the lawyer. Our Committee concluded "that the lawyer cannot inform the client [the employer] who first consulted him of the employee's confession ....." This Committee further held that because of the conflicting interests of the employer and the employee, the attorney must decline the retainer of the confessing employee, and had "no choice but to withdraw from the representation of the [employer] ....."

Whether and to what extent either client may wish the secret disclosed should be explored by each client's new counsel. In the interim, the withdrawing attorney should simply opine that the continued representation of either client would violate the Code of Professional Responsibility.

For the reasons stated, the first question posed is answered in the affirmative and the second question posed is answered in the negative.