NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion 605 - 11/17/89 (14-89)

Topic: Conflict of Interest; Former Client Conflicts.

Digest: Improper for public defender or any assistants to represent a defendant in a criminal proceeding when a prosecution witness who was a former client will testify, except if no relevant confidences and secrets were imparted and there is no substantial relationship between the prior litigation and the current litigation; consent may cure conflict; under the circumstances stated, all members of a small public defender's office are disqualified if any member is disqualified.

Code: Canons 4, 5, 6, 7, 9;
EC 4-5, 4-6, 5-1;
DR 4-101, 4-101(B),(C), 4-101(C)(1), 5-105, 5-108(A).

QUESTIONS

(1) Is it ethically permissible for an assistant public defender or legal aid attorney in a small office to represent a defendant in a criminal case when the public defender or legal aid office has formerly represented a prosecution witness in an unrelated criminal matter?

(2) May any disqualification resulting from the situation described above be absolved by the consent of each client after full disclosure?

(3) For cases in which consent is not obtained, is knowledge of the closed file imputed to each attorney in a small legal aid or public defender's office?

OPINION

In N.Y. State 592 (1988), we addressed the problem of a public defender's office providing simultaneous representation of two criminal defendants charged in distinct indictments, where one of the defendants had offered to testify against the other. *See* DR 5-105. Although the criminal charges applicable to each indictment were wholly separate, we opined that withdrawal from both representations was required because the offer of one client to testify against the other created an irreconcilable conflict. Similarily, in N.Y. State 290 (1973) we concluded that a lawyer may not simultaneously represent a defendant and a witness in a criminal proceeding in which the witness may invoke the privilege against self-incrimination. The present inquiry requires us to consider the related, but clearly distinct, problem of conflicting representation by a public defender's office of a criminal defendant in a case that involves a prosecution witness who had previously been represented by that office in another criminal matter.

A. Former Client Conflicts in Litigation

It has been said that the problem of conflicting successive representation, or of so-called former client conflicts, "is not treated explicitly" in the present Code of Professional Responsibility, and that "none of the ethical considerations or Disciplinary Rules associated with Canon 5 refer even indirectly to successive representation." Lowenthal, *Successive Representation by Criminal Lawyers*, 93 Yale L.J. 1, 18 (1988). ABA Model Rule 1.9 (Conflict of Interest: Former Client) and the Jones Committee's Proposed DR 5-108(A), adopted by the House of Delegates, and which is derived from Model Rule 1.9, directly address the issue. Our effort in this opinion, however, is to give guidance on the proper resolution of this issue under the current Code in effect in New York. As to that, we disagree with the view that it fails to address this issue.

The problem arises out of one of the primary duties owed to a lawyer's client: the duty to maintain the confidences and secrets of the client. DR 4-101. A lawyer unquestionably owes a duty to preserve the confidences and secrets of a client after the representation has concluded, unless one of the

exceptions in DR 4-101(C) applies. EC 4-6. We recognized in N.Y. State 492 (1978) that, "absent considerations of waiver or client consent, no lawyer may ever undertake to represent an adverse party where information acquired in the course of a prior representation might be used to his former client's detriment." *See* EC 4-5, EC 4-6; DR 4-101(B); N.Y. State 303 (1973). *See also* N.Y. State 592 (1988) (explicating the term "confidences and secrets").

If the office does not possess such client confidences, the question arises whether any other circumstance might prohibit the later representation. This question in turn requires us to consider the reach of the loyalty principle expressed in Canon 5 and the question of the "appearance" (Canon 9) of using former client confidences. In the context of simultaneous conflicting multiple representations in which no client confidences are involved, the loyalty principle reaches out to prohibit the multiple representation "even if the proposed simultaneous representations are entirely unrelated." N.Y. State 580 (1987). In the context of representations against a former client, however, the rule is often stated that where no concrete problem of the potential use of confidences or secrets can be identified, an impermissibility arises only if there is a "substantial relationship" between the current matter and the prior matter such as to create the likelihood or appearance that relevant confidences or secrets were obtained. *See, e.g., United States* v. *Ditommaso*, 817 F.2d 201, 219 (2d Cir. 1987); *Evans* v. *Artek Systems Corp.*, 715 F.2d 788, 791 (2d Cir. 1983); *Government of India* v. *Cook Industries*, 569 F.2d 737, 739-40 & n.1 (2d Cir. 1978); *T.C. Theatre Corp.* v. *Warner Brothers Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953).

This "common law of disqualification" has typically "invoked the Canon 4 duty of confidentiality and the Canon 9 duty to avoid the appearance of impropriety. . . . Less often, courts have relied on Canon 5, concerning interference with the lawyer's judgment." G. Hazard & W. Hodes, *The Law of Lawyering* 176-176.1 (1989 Supp.). Although we do not interpret the law, we find this common law development of the "substantial relationship" test to be an accurate interpretation of the Code. N.Y. State 502 (1979): "The opinions of this Committee have generally followed the substantive law of disqualification evolved by the courts of this State and the Second Circuit." *See also* ABA 84-351 (1984) (although the "Code has no similar provisions [,c]ases have, however, developed a 'common law' of successive representations").

In so stating, we adhere to N.Y. State 303 (1973) and N.Y. State 139 (1970), in which we set forth a multi-factor test to govern successive representation situations. In those opinions, we opined that successive representation is permissible where (1) the subject matter of the new employment is totally unrelated to the subject matter of the former representation (i.e., the underlying facts of each representation must be wholly distinct), (2) the new employment does not require the lawyer to use or attempt to use confidences and secrets obtained in the former representation, and (3) the new representation does not create an appearance of actually conflicting interests with, or professional disloyalty to, the former client.

We believe that use of the fiction of an "independent source" for impeachment material also gained in confidence during the prior representation does not square with the current Code formulation. DR 4-101(C). Moreover, the use of artificial devices in litigation, particularly in criminal litigation, does not mitigate the presence of the conflict. For example, limiting cross-examination to the crime for which the current client is on trial, *Thomas* v. *Municipal Court*, 878 F.2d 285, 290 (9th Cir. 1989), or to what was contained in a former client's criminal "rap sheet," *United States ex rel. Tineo* v. *Kelly*, 870 F.2d 854, 857 (2d Cir. 1989), or the expedient of using another lawyer to cross-examine the former client, *United States* v. *Cheshire*, 707 F. Supp. 235, 240 (M.D. La. 1989), are devices held by the cited cases to be inconsistent with the current client's right to the effective assistance of counsel and the due process right to a fair trial. We believe such devices also impermissibly compromise a lawyer's duty under Canons 6 and 7 to represent the current client competently and zealously within the bounds of the law. *Thomas* v. *Municipal Court*, 878 F.2d at 290 (permitting the conflicted attorney to remain "would have subverted the basic purposes of the professional responsibility standards and would have denied Dr. Thomas a fair trial"); Lowenthal, *supra*, 93 Yale L.J. at 19-20 (describing the duties owed to the current client).

B. Client Consent

Viewing this situation as a so-called Canon 4 conflict as we do, it is clear from the Code and our prior opinions that client consent may purge the conflict. DR 4-101(C)(1); N.Y. State 555 (1984); N.Y. State 490 (1978). If the matter concerns client confidences only, we permit the informed consent of each client to "effectively absolve" the lawyer in the successive representation context. N.Y. State 492 (1978).

At the same time, we alert practitioners in criminal matters that the deference given in prior cases to the current client's consent to the successive representation, *e.g.*, *United States* v. *Cunningham*, 672 F.2d 1064, 1070-73 (2d Cir. 1982), *cert. denied*, 466 U.S. 951 (1984); *People* v. *Lombardo*, 61 N.Y.2d 97, 102 (1984), does not, in light of the Supreme Court's recent opinion in *Wheat* v. *United States*, ______ U.S. ______, 108 S. Ct. 1692 (1988), reflect the current approach by the courts. In *Wheat* the Supreme Court held that a trial court has "an independent duty to ensure that criminal defendants receive a trial that is fair." 108 S. Ct. at 1697. Accordingly, client consent is often not considered enough to vitiate the "serious potential for conflict" presented in the successive representation context. 108 S. Ct. at 1699. *See United States ex rel. Tineo* v. *Kelly*, 870 F.2d at 857 (rejecting *Cunningham* and questioning the "knowing" nature of the current client's consent). We have no occasion to question or treat these authoritative statements of constitutional law, as we are here concerned solely with the ethical considerations raised by this assistant public defender's inquiry. Yet we are equally concerned that the consent of each client be a "knowing" one obtained after full disclosure of the relevant facts. We only conclude that, if valid consents are given, there is no ethical impropriety in the proposed representation.

C. Vicarious Disqualification

If valid consents are not obtained, the question arises whether all members of the inquirer's office are precluded from undertaking the proposed representation. It is generally the rule that, when one lawyer in a law office is disqualified because the lawyer may possess confidences and secrets of a client, such disqualifying knowledge is imputed, and all members of such firm or office are similarly disqualified. We have applied this rule to public defender's or legal aid offices. N.Y. State 502 (1979) (p. 7). *Cf.*, N.Y. State 489 (1978) ("There should be but one standard bearing upon the manner in which a lawyer is expected to pursue the interests of his client, whether the client be indigent or otherwise.") *But see*, *People* v. *McDonald*, 68 N.Y.2d 1, 11 n.4 (1986) (large legal aid office may negate conflict);, *People* v. *Wilkins*, 28 N.Y.2d 53, 56 (1971) (same);, *People* v. *Mattison*, 67 N.Y.2d 462 (1986) (leaving question open, but in the context of simultaneous representation of co-defendants by legal aid office).

CONCLUSION

For the reasons stated above and subject to the qualifications described, the first question is answered in the negative. The second question is answered in the affirmative. The third question is answered in the affirmative.