



Committee on Professional Ethics

Opinion 615 - 1/29/91 (37-90) Topic: Conflict of interest; vicarious disqualification.

 Digest: As it is improper for a lawyer who is a police officer to engage in a criminal law practice, it is also improper for the members of the police officer's firm to do so.

 Code: DR 5-101(A)-(C), 5-105(A), (D), 5-108, 9-101(B), 9-101(B)(1)(a); EC 8-8.

QUESTION

May the members of a law firm with which a lawyer who is a police officer is associated practice criminal law?

OPINION

A lawyer is employed on a full-time basis as a town police officer and is also "of counsel" to a law firm.

Members of the law firm with which the police officer is associated¹ are prohibited from engaging in criminal defense work only if the police officer individually would be prohibited from representing criminal defendants by virtue of DR 5-101(A)-(C), DR 5-108, or DR 9-101(B). DR 5-105(D). DR 5-105(A)-(C) and DR 5-108 have no apparent application here.

DR 9-101(B), which provides rules for a lawyer who was formerly a public employee, states that a lawyer cannot represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. Thus, a former police officer could not as lawyer represent a criminal defendant in any matter in which the lawyer had personally

¹ A lawyer who is "of counsel" to a law firm is "associated" with the members and associates of the firm for the purposes of DR 5-105(D). See ABA Inf 1315 (1975); N.Y. City 83-3 (1983).

participated as a police officer. In that circumstance, however, members of the firm with which the lawyer is associated may undertake representation in the matter, but only if the erstwhile police officer is "effectively screened from any participation, direct or indirect, including discussion, in the matter" and is not apportioned any part of the fee. DR 9-101(B)(1)(a). The Code goes on to provide that there must, in addition, be no other circumstances in the particular representation that create an appearance of impropriety. *A fortiori*, rules no less stringent must govern private employment of a lawyer who is still a public officer.

Since the lawyer-police officer continues to serve as a public employee, DR 5-101(A) is also implicated. We find that it is impermissible for the firm to practice criminal law in the town and village courts because it would be inappropriate for the police officer personally to represent criminal defendants.

DR 5-101(A) provides that "a lawyer should not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." We have previously held that "no lawyer holding a public office should represent private interests which are adverse or potentially adverse to the public body which he serves or represents." N.Y. State 435 (1976). All police officers and other public employees owe a clear duty to perform their assigned duties free of compromising influences and loyalties. *See* N.Y. State 226 (1972) (city council member should not represent private clients with interests adverse to the city). Similarly, a criminal defendant is entitled to a defense and representation of undivided loyalty within the limits of the law.

No matter how earnest and complete a defense the lawyer provides, there is an obvious danger that a convicted defendant will believe that his defense was inadequate because of the lawyer's bias as a police officer. Conversely, the public might lose faith in the criminal justice system if it believes that the lawyer was employed in the hope that the lawyer's position as a police officer might enable the lawyer to obtain more lenient treatment for the defendant. A police officer is widely viewed as a representative of the people. We believe that the representation of a criminal defendant by a police officer could lessen public confidence in the integrity of the criminal justice system. *See* N.Y. State 397 (1975) (member of state investigation agency may not practice criminal law); N.Y. State 367 (1974) (part-time county attorney may not represent private clients in criminal matters). Furthermore, the dual roles of police officer and defense attorney could find the lawyer challenging in the latter capacity the very laws the police officer is sworn to enforce in the former capacity.

Thus we find that DR 5-101(A) renders impermissible the lawyer's representation of criminal defendants.² Since the lawyer-police officer is not permitted to represent criminal defendants by virtue of DR 5-105(A), the lawyers with whom the lawyer is associated are likewise prevented from doing so. DR 5-105(D). We note that DR 5-105(D) does not provide an exception that would permit a firm to avoid disqualification by screening the individually disqualified lawyer from participation in the proposed representation.

CONCLUSION

The question posed is answered in the negative. Since a lawyer who is a police officer is not permitted to represent criminal defendants, the lawyers with whom the lawyer-police officer is associated are likewise prohibited from doing so.

² See also EC 8-8, which provides in pertinent part: "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with the lawyer's official duties."