NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 660 (39a-93)

Topic: Conflict of interest; appearance of impropriety; defense counsel dating prosecutor; imputed disqualification of firm.

Digest: Lawyer associate of defense counsel firm may not defend cases prosecuted by assistant district attorney whom associate is dating; associate's firm not necessarily disqualified.

Code: DR 5-101(A); 5-105(D); 9-101 (D); EC 5-15; 7-13.

QUESTIONS

(1) May a lawyer undertake the representation of someone being prosecuted by an assistant district attorney who the lawyer is dating frequently and with whom the lawyer has a close personal relationship?

(2) If not, may another lawyer in the firm of which the lawyer is an associate undertake the representation?

(3) May the lawyer represent criminal defendants prosecuted by other members of the district attorney's office?

OPINION

(1)

DR 4-101 provides:

> Except with the consent of the client after full disclosure, a lawyer shall 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.

An associate in a law firm that has a significant criminal defense practice is dating an assistant district attorney in the county in which the firm is located. Although the associate and the prosecutor in question are not married, they date frequently and have a close personal relationship. Under the circumstances, it would not be unreasonable to assume that they each have a personal interest in one another's reputation, success and welfare. This is an interest within the meaning of DR 5-101(A). and ordinarily would operate to disqualify the lawyers from undertaking an adverse representation without the consent of their respective client.

While the proscription contained in DR 5-101(A) is expressly waivable by client consent, such consent will not always be deemed effective. This Committee has held (by analogy to DR 5-105, the Disciplinary Rule addressing representation of multiple clients with differing interests) that it must be obvious to the lawyer that notwithstanding the potential conflict, the lawyer can adequately represent the client. N.Y. State 621 (1991); N.Y. State 619 (1991). For example, where conflicting interests relate to matters in litigation, even with respect to purely private matters, the implied "obviousness test" of DR 5-101(A) may or may not be satisfied; if not, the clients' consent would be deemed ineffective. *See, e.g.*, N.Y. State 621 (1991); *see also* EC 5-15.

A fortiori, where the matter relates to the criminal justice system, consent usually is deemed unavailing. N.Y. State 654 (1993). As this Committee often has observed, public prosecutors are different from other advocates in that they are vested with broad discretion in exercising the responsibilities of their office. *See* EC 7-13; N.Y. State 492 (1978). A scintilla of partiality, which might be waivable by private parties in other contexts, is intolerably suspect and prejudicial to the public's regard for the criminal justice system. *See, e.g.*, N.Y. State 588 (1987); N.Y. State 450 (1976).

Irrespective of the subjective intent of the prosecutor and defense counsel, and regardless of howsoever scrupulous they may be in the conduct of their professional obligations, the appearance of partiality in the administration of justice is so strong that a couple who date frequently should not be permitted to appear opposite one another in criminal cases.[1]

We leave for another day the issue of how to determine when friendship and warm regard become so fraught with emotion as to provide a basis for disqualification under DR 5-101(A). Whatever hereafter may be said of friendships in varying degrees, we believe that a frequent dating relationship is clearly over the line that separates ethically cognizable conflicting interests from those which are not. A dating relationship between adversaries is inconsistent with the independence of professional judgment required by DR 5-101(A).

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[1] We express no view whether an identical rule would apply in civil cases.

(2)

The issue as to whether defense counsel's firm would be disqualified raises what appears as something of an anomaly in applying the provisions of DR 5-105(D). Because disqualification of the associate is based on DR 5-101(A), a literal reading of DR 5-105(D), as amended effective September 1, 1990, would automatically impute the associate's disqualification to the entire firm. *See* N.Y. State 632 (1992). DR 9-101(D) expressly prohibits spouses from undertaking adverse representation. The only operative difference between the general rule of DR 5-101(A) and the more specific prohibition of DR 9-101(D) is that the latter does not trigger automatic imputed disqualification under DR 5-105(D), for reasons bearing more on sociology and economics than traditional notions of conflicting interests.[2]

It should be evident that a spousal relationship is significantly closer than that of a dating couple. Among other things, a dating relationship is usually devoid of the community of financial interests present in the spousal relationship. Consequently, and most anomalously, if the Code were to be applied literally, the closer relationship of spouses would not require automatic disqualification of the entire firm, while the more casual relationship of a dating couple would seem to impute firm-wide disqualification. This result would be as illogical as it is manifestly inconsistent. Notwithstanding that the dating relationship invokes the proscriptions of DR 5-101(A), for purposes of applying standards of imputed disqualification, we believe that it should not be subject to greater constraint than the relationship of spouses addressed by DR 9-101(D). Thus, whether other lawyers in the firm will be disqualified depends on the facts and circumstances. *See* N.Y. State 638, at 8-11 (1992); N.Y. State 632, at 2-3 (1992); *see also* N.Y. State 654, at 5 (1993)(discussion of appropriate factors to be considered). If the lawyer concludes that another lawyer in the firm may undertake or continue the representation of a defendant prosecuted by the assistant district attorney in question, the associate must be effectively screened from any participation in the matter and must be apportioned no part of the fee therefrom.

(3)

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[2] Indeed, prior to the most recent amendment of DR 9-101(D), the spousal relationship traditionally was addressed under DR 5-101(A). *See also* N.Y. State 409 (1975); N.Y. State 368 (1974). Other jurisdictions have issued ethics opinions to the same effect. *See, e.g.*, Colo. Op. 75 (1987)(indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 901:1902); N.J. Op. 604 (1987), 120 N.Y.L.J., Aug. 13, 1987; Pa. Op. 86-2 (indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 901:7302); Me. Op. 70 (1986)(indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 901:4202); Mo. Op. 102 (1985)(indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 801:5108); Ky. Op. E-305 (1985)(indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 801:1608); Mich. Op. C-213 (indexed in Maru's Digest at 11456; *contra*, Calif. Op. 1984-83 (indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 801:1608).

The authorities generally recognize that the conflicts of subordinates in the public sector can be avoided through the mechanism of screening. See, e.g., N.Y. State 502 (1978). Thus, if the assistant district attorney is screened from all contact with the prosecution of cases defended by the lawyer whom the ADA is dating, it would not be improper for the lawyer to undertake or continue such representations.

We hasten to distinguish the third question presented from the situation that would obtain if the dating relationship had been between a District Attorney and defense counsel. While the Committee is not authorized to give opinions on questions of law, we call attention to County Law §701. We understand that under this statute, it is settled law that the District Attorney has responsibility for the prosecution of all crimes committed in the county. *See Matter of Shumer v. Holtzman*, 60 N.Y.2d 46, 467 N.Y.S.2d 182, 454 N.E.2d 522 (1983). Therefore, where the District Attorney is disqualified from a case under the principles set out above, the problem cannot be cured by the District Attorney refusing to participate personally in the prosecution. Rather, the District Attorney must be lawfully superseded. Either the Attorney General must take charge of the case on order of the Governor under Executive Law §63(2) or a special district attorney must be appointed under County Law §701. *See Matter of Shumer v. Holtzman, supra.*

CONCLUSION

For the reasons stated, subject to the qualifications hereinabove set forth, the first question posed is answered in the negative; the second and third questions are answered in the affirmative.