



COMMITTEE ON PROFESSIONAL ETHICS

Opinion 748 – 11/5/01

Topic: Former prosecutors; conflict of interest.

Digest: A former prosecutor may represent criminal defendants investigated and prosecuted during former prosecutor's tenure with a district attorney's office if he or she did not participate personally and substantially in the investigation or prosecution of the defendant, and where doing so violates neither the duty to represent the new client zealously nor the duty to protect the former client's (the government's) confidences and secrets.

Code: DR 9-101(B); DR 4-101; Canon 7.

QUESTION

May a former prosecutor who handled white collar criminal prosecutions, appellate work, post-conviction motions, investigations, and occasionally covered for other prosecutors in a twenty-attorney district attorney's office, and who now works in the appeals unit of a Legal Aid office, represent criminal defendants who were indicted and charged during the prosecutor's tenure with the district attorney's office if such representation is limited to defendants in matters in which he or she had no role in the prosecution or investigation of the case and received no confidential or non-public information regarding the matter?

OPINION

DR 9-101(B)(1) of the Lawyer's Code of Professional Responsibility (the "Code") provides that, except as otherwise expressly permitted by law, a lawyer "shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee." All lawyers in the firm are disqualified from "knowingly" undertaking or continuing

such representation unless the disqualified lawyer is effectively screened from any participation in the matter, is apportioned no part of the fee, and there are no other circumstances that create an appearance of impropriety.

In this Committee's Opinion 502, we concluded that a former Assistant District Attorney ("ADA") is disqualified from representing someone indicted during the ADA's tenure as a prosecutor only "where he had access to confidential or non-public information relating to the matter in which he is later retained to act in a 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." N.Y. State 502 (1978). Opinion 502 quotes the "substantial responsibility" language in a prior version of DR 9-101, and cites ABA Opinion 342, in which the ABA Standing Committee on Ethics and Professional Responsibility defined the phrase "substantial responsibility" as follows:

"substantial responsibility" envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question. . . . it is not necessary that the public employee or official shall have personally and in a substantial 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 substantially involved in the investigative or deliberative processes regarding that matter . . .

ABA Op. 342 (1975)

In 1990, DR 9-101 was amended to require that a former government lawyer be disqualified from representing a criminal defendant investigated and prosecuted when the lawyer was a government prosecutor only if he or she "participated personally and substantially" in the matter.¹ The amendment of DR 9-101 made clear that disqualification must be based on the lawyer's "personal participation to a significant extent." Thus, where an ADA has participated substantially in the investigation or prosecution of a related matter involving a person that he or she wishes to represent in private practice, DR 9-101(B) disqualifies the lawyer from taking on such representation. See, e.g., *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974) (lawyer who was

¹ This language is derived from ABA Model Rule 1.11(a) and 18 U.S.C. § 207(a)(1)(B).

substantially involved in antitrust action against plaintiff while working for the Department of Justice was disqualified from representing municipality in similar antitrust action against General Motors); *Flushing Savings Bank v. Ahearn*, 465 N.Y.S.2d 574 (2d Dep't 1983) (lawyer disqualified from representing bank in foreclosure action where as an ADA he supervised a related extensive investigation and prosecution involving some of the same parties); see also *Board of Education of City of New York v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979).

The fact that a former government lawyer was counsel for the government in unrelated matters at the same time that the defendant's case was investigated or prosecuted is not enough to demonstrate personal and substantial participation under DR 9-101 or to require disqualification under that rule. See N.Y. State 638 (1992). At the same time, a former prosecutor must still carefully assess the circumstances of his or her service in the prosecutor's office to determine whether he or she may be deemed to have participated "personally and substantially" in the investigation or prosecution of a criminal defendant. Relevant facts include, but are not limited to, (1) the extent to which the former prosecutor served in a more than nominal supervisory role; (2) the extent to which the former prosecutor had knowledge of government confidences and secrets relevant to the proposed representation of the same defendants; (3) the extent to which the former prosecutor provided coverage for other ADAs; (4) the extent to which the former prosecutor was kept apprised of cases in the office; and (5) the extent of the former prosecutor's access to the case files and other information regarding cases in the prosecutor's office. As we noted in Opinion 638, "the appearance of impropriety will not, standing alone, require disqualification in the usual case." N.Y. State 638(1992).

Even where a former government prosecutor did not participate personally and substantially in the investigation or prosecution of the criminal defendant that the lawyer now wishes to represent, he or she has a duty to protect confidences and secrets that he or she learned as a result of her former position as a government prosecutor. The former prosecutor is prohibited from representing a criminal defendant where to do so would require a violation of either the duty to protect the former client's (here, the government's) confidences and secrets under DR 4-101, or the duty to represent the new client (the defendant) zealously under Canon 7. As we explained in Opinion 638:

[A lawyer who] possesses a confidence and secret within the meaning of DR 4-101(A), which is not otherwise permitted to be disclosed by one of the several preconditions of DR 4-101(C), but which nevertheless must be used under Canon 7 to discharge faithfully and zealously the current proposed representation

unquestionably cannot represent the [new client] zealously under Canon 7 without violating . . . DR 4-101(B)

N.Y. State 638 (1992).

If a former prosecutor is disqualified from representing a defendant under DR 9-101(B), other attorneys in the Legal Aid office may represent the defendant *provided* that the office effectively screens the former ADA from any participation in the matter pursuant to DR 9-101(B) and that there are no other circumstances attendant to the particular representation that create an appearance of impropriety in the defendant's representation by any attorney in the office.

We note that Opinion 638 also analyzed the conflict that you present under a prior version of DR 5-108. DR 5-108 concerns conflicts of interest involving former clients generally. The version of DR 5-108 discussed in Opinion 638 provided that "[e]xcept with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not . . . [u]se any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19] (C) or when the confidence or secret has become generally known." Based on this language, the Committee concluded that former government attorneys had a duty under DR 5-108 and DR 4-101 to protect a former client's confidences and secrets. In 1999, DR 5-108 was amended to direct former government lawyers to the personal and substantial participation test in DR 9-101(B). The rule now provides that "[e]xcept as provided in DR 9-101 [1200.45] (B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure . . . [u]se any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19](C) or when the confidence or secret has become generally known." DR 5-108(A) [N.Y.C.R.R. § 1200.27(A)] (emphasis added). Although the current version of DR 5-108 does not eliminate the need to analyze the former government lawyer conflict issue under DR 4-101 and Canon 7, the amendment of DR 5-108 appears to have obviated the need to analyze the conflict under DR 5-108.

CONCLUSION

A former ADA may represent a criminal defendant charged or indicted while the ADA was in the prosecutor's office if he or she did not participate in a material way in the investigation or prosecution of the defendant or learn confidences and secrets relevant to the defendant's case such that the proposed representation necessarily would lead to a violation of either DR 4-101 or Canon 7. If the former prosecutor is disqualified under DR 9-101(B) or DR 4-101, his or her current law office may represent the defendant provided that the office screens the former prosecutor in accordance with 9-101(B), the former

prosecutor is apportioned no part of the fee earned from the representation, and there is no circumstance attendant to the defendant's representation that creates an appearance of impropriety.

(12-01)
