New York State Bar Association

Committee on Professional Ethics

Opinion 776 – 5/13/04

Topic: Former prosecutor; conflict of interest

Digest: It is a *per se* prohibited conflict of interest for a former prosecutor to defend an accused if the lawyer participated personally and substantially in prosecuting the defendant on the same charges while serving as a prosecutor.

Code: DR 4-101; DR 5-101; DR 5-105; DR 9-101(B)(1); Canon 7

QUESTION

May a former prosecutor ethically serve as defense counsel for an accused if the lawyer participated personally and substantially in prosecuting the defendant on the same charges while serving as a prosecutor?

OPINION

Analysis Under the Code of Professional Responsibility

The Code provision most applicable to the conduct in question, Disciplinary Rule 9-101(B)(1) of the Lawyer's Code of Professional Responsibility (the "Code"), states that 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" and, unlike DR 5-101 or DR 5-105, does not allow for waiver of the conflict by informed consent. It would therefore be a *per se* prohibited conflict of interest for the lawyer in question, as a former public officer, to defend the same defendant on the same charges.[1]

[1] We note, without any determination as to applicability, that an attorney "who, having himself prosecuted or in any manner aided or promoted any action [or] proceeding in any court, as district

Moreover, as we stated in N.Y. State 748 (2001), a former prosecutor has a duty to protect confidences and secrets learned as a result of the former employment. The former prosecutor is prohibited from representing a criminal defendant where to do so would violate either the duty under DR 4-101 to protect the confidences and secrets of a former client (the People) or the duty under Canon 7 of the Code to represent the new client (the defendant) zealously, which would require the use of such confidences and secrets for the benefit of the new client.

Application of the Code of Professional Responsibility by the Courts

While the Disciplinary Rules in the Code "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action," the "Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct." Preliminary Statement. Although the state[2] and federal courts[3] in New York look to the Code for guidance on issues of attorney conduct, a violation of the Code does not automatically lead to disqualification or other civil or criminal sanctions. *See, e.g., People v. Abar*, 99 N.Y.2d 406 (2003); *People v. Smart*, 96 N.Y.2d 793 (2001); *People v. Longtin,* 92 N.Y.2d 640 (1998); *GD Searle & Co., Inc. v. Pennie & Edmonds LLP*, N.Y.L.J., Jan. 26, 2004, at 18 (N.Y. Sup. Ct.); *Gidatex, S.r.L. v. Campaniello Imports*, *Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999). Indeed, this Committee frequently has noted that conduct that is legal may nevertheless be unethical. *See* N.Y. State 714 (1999); N.Y. State 572 (1985) ("[W]e believe it is appropriate . . . to consider whether there is anything in the [Code] that prohibits the proposed contingent fee arrangement, assuming arguendo that this type of agreement is otherwise valid").

The very existence of the Lawyer's Code of Professional Responsibility implies that lawyers are subject to a standard of conduct higher than what is merely "legal." It follows that conduct that escapes sanction in court may still be subject to professional discipline. *See* Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship – a Response to Mr. Fox*, 29 Hofstra L. Rev. 971, 984 (2001) ("[A] rule that eliminates disqualification as a sanction is vastly different from giving ethical approval to the underlying conduct and does not obviate the ethical breach in representing one current client against another.")

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attorney or other public prosecutor, afterwards directly or indirectly advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise . . . is guilty of a misdemeanor." N.Y. Jud. Law §493 (Consol. 2004).

[2] *See, e.g., GD Searle & Co., Inc. v. Pennie & Edmonds LLP*, N.Y.L.J., Jan. 26, 2004, at 18 (N.Y. Sup. Ct.) ("[A] violation of the disciplinary rules may constitute evidence of malpractice").

[3] *See, e.g.,* S.D.N.Y & E.D.N.Y. Local Civ. R. 1.5(b)(5) (violation of New York Code of Professional Responsibility is one ground for discipline or other relief).

The case law is to the same effect. For example, in *People v. Abar*, 99 N.Y.2d 406 (2003), a defendant sought to set aside his conviction, claiming that he had been denied effective assistance of counsel because his lawyer, the St. Lawrence County Public Defender, had prosecuted him on several of the charges involved in the plea bargain during her prior employment as an assistant district attorney in St. Lawrence County. The New York Court of Appeals refused to set aside the conviction holding that, even if a conflict of interest existed, the conflict "did not operate on the conduct of the defense." *Id.* at 408. *See also People v. Smart*, 96 N.Y.2d 793 794 (2001) ("Under these circumstances, we see no basis to conclude that any potential conflict of interest 'operated on' the defense"); *People v. Longtin,* 92 N.Y.2d 640, 642 (1998) ("To prevail, defendant must demonstrate that 'the conduct of his defense was in fact affected by the operation of the conflict of interest,' or that the conflict 'operated on' counsel's representation"). Significantly, the Court of Appeals in *Abar* acknowledged that "[New York's] disciplinary rules as well as the American Bar Association standards cited by the dissent wisely caution against such potential conflicts." *People v. Abar, supra*, at 408.

In another example, a New York Supreme Court recently declined to grant summary judgment in an action alleging a law firm's breach of fiduciary duties and breach of DR 5-105, notwithstanding that the court did find "a violation of DR [5-]105 has occurred and by a copy of [its] order will report its findings to the Disciplinary Committee." *GD Searle & Co., Inc. v. Pennie & Edmonds LLP*, N.Y.L.J., Jan. 26, 2004, at 18 (N.Y. Sup. Ct.) (order denying summary judgment).

The Court in *GD Searle* also observed that "there is no private right of action to enforce the disciplinary rules." *Id.* at 1. Utilizing similar reasoning, the United States district court in *Gidatex, S.r.L. v. Campaniello Imports*, *Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999) refused to exclude evidence that had been obtained in violation of disciplinary rules:

> The Second Circuit Court of Appeals has ruled that a court is not obligated to exclude evidence even if it finds that counsel obtained the evidence by violating ethical rules. . . . Likewise, New York State Courts will admit evidence procured by unethical or unlawful means in violation of the [Code].

Id. at 126 (citation omitted).

Although courts may be reluctant to enforce the disciplinary rules in the litigation context absent a showing of actual trial taint, the Code of Professional Responsibility remains the primary authority defining ethical conduct for New York lawyers.

CONCLUSION

A former prosecutor may not ethically serve as defense counsel for an accused if the lawyer participated personally and substantially in prosecuting the defendant on the same charges while serving as a prosecutor.

(20-03)
