



Committee on Professional Ethics

Opinion 862 (5/10/11)

Topic: Imputed conflict of interest in a public defender office

Digest: A part-time Assistant Public Defender cannot, in his private practice, represent a client that another full-time or part-time Assistant Public Defender in the same Public Defender office cannot represent because of a conflict of interest unless the conflict can be and is waived.

Rules: 1.0(h) & (p); 1.7, 1.9, 1.10(a) & (d); 7.2(b).

FACTS

1. An attorney with a solo private practice located in County A is also a part-time Assistant Public Defender in the Public Defenders Office of County B. The County B Public Defenders Office includes five full-time Public Defenders and four part-time Assistant Public Defenders, two of whom are assigned to the Criminal Courts and two of whom are assigned to the Family Court in County B. The inquirer is one of the two part-time Assistant Public Defenders assigned to the Family Court.
2. When a lawyer in the County B Public Defenders Office has a conflict of interest in a criminal case, a common method of resolving the conflict is to ask the County B Criminal Courts to appoint an attorney from its Assigned Counsel list. The inquirer would like to be added, in his private practice capacity, to the County B Criminal Courts Assigned Counsel list. If he is added to that list, he would be assigned to represent criminal defendants in matters where another Assistant Public Defender (full-time or part-time) has a conflict of interest. However, the inquirer is uncertain whether the other Assistant Public Defender's conflict of interest would be imputed to him.

QUESTION

3. May a part-time Assistant Public Defender in a county Public Defenders Office accept an assignment from the Criminal Courts of that county to represent a defendant when another full-time or part-time Assistant Public Defender in the same county Public Defenders Office cannot represent that defendant because of a conflict of interest?

OPINION

4. The factual premise of this inquiry is that another Assistant Public Defender in the county Public Defenders Office has a disqualifying conflict of interest that prevents him from representing a particular client in the county's Criminal Court. We will assume for purposes of this opinion that the other Assistant Public Defender's conflict arises under one of three provisions: (i) it arises under Rule 1.7(a)(1) because of a conflict with another current client (*e.g.*, the Assistant Public Defender already represents a co-defendant in the same matter), or (ii) it arises under Rule 1.7(a)(2) because of the Assistant Public Defender's personal interests (*e.g.*, the Assistant Public Defender is related to the alleged crime victim), or (iii) it arises under Rule 1.9 because of a conflict with a former client (*e.g.*, the Assistant Public Defender would need to cross-examine a prosecution witness who is his former client in a substantially related matter).¹ The question before us is whether any of those conflicts would also disqualify the other Assistant Public Defenders in the same office, including the inquirer. The answer depends on whether the conflict is imputed to the inquirer under the New York Rules of Professional Conduct (the "Rules") and, if so, whether the imputed conflict can be cured by consent.

A. Is the other Assistant Public Defender's conflict imputed?

5. To determine whether a conflict of interest is imputed, we look at New York's imputation rule, Rule 1.10(a), which provides as follows:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

6. We have assumed that the other Assistant Public Defender is "prohibited ... by Rule 1.7, 1.8 or 1.9" from taking on the matter in question. Therefore, whether Rule 1.10(a) imputes the other Assistant Public Defender's conflict to the inquirer depends on whether the inquirer and the disqualified Assistant Public Defender are "associated" in a "firm."

7. Is the Public Defender's Office a "firm"? We conclude that it is. Rule 1.0(h) defines "firm" or "law firm" to include "lawyers employed in a qualified legal assistance organization." Rule 1.0(p), in turn, defines a "qualified legal assistance organization" to mean "an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof." A "public defender office ... operated or sponsored by a government agency" is one of the four types expressly listed in Rule 7.2(b)(1)-(4). Thus, the attorneys in the inquirer's Public Defender Office constitute a "firm."

¹ We recognize that conflicts could conceivably arise under other rules. For example, if the conflicted Assistant Public Defender is in the midst of negotiating media rights with the defendant with respect to the alleged crime, or if the conflicted Assistant Public Defender is a former prosecutor, or if the conflicted Assistant Public Defender witnessed the alleged crime, then a conflict could arise under Rule 1.8(d) (addressing media rights), or Rule 1.11 (governing conflicts for former government employees), or under Rule 3.7 (the advocate-witness rule). Conflicts of that type are relatively rare, however, and the inquirer did not mention any of them, so we will not address them in this opinion.

8. Is the inquirer “associated” in the firm (the Public Defender’s Office) with the disqualified Assistant Public Defender? We conclude that he is. The phrase “associated” includes part-time attorneys as well as full-time attorneys. See N.Y. State 173 (1970) (part-time public defender cannot privately represent one of two co-defendants with conflicting interests where the other co-defendant is represented by the public defender office). The fact that the inquirer appears as a Public Defender only in Family Court rather than in the Criminal Courts does not change the result. The inquirer still is “associated” with the disqualified Assistant Public Defender in the same “firm” (the County B Public Defenders Office) even though his area of practice is different from that of the conflicted Assistant Public Defender. Rule 1.10(a) imputes conflicts to all lawyers in a firm, in all practice areas, not just to lawyers in the same department or practice area.

9. Therefore, under Rule 1.10(a), the other Assistant Public Defender’s conflict is imputed to the inquirer. This result is consistent with our past opinions. See, e.g., N.Y. State 592 (1988) and N.Y. State 462 (1977) (applying the imputation rule to all attorneys in a public defender office). Although those opinions were decided under DR 5-105(D) of the former Code of Professional Responsibility, we continue to follow them because Rule 1.10(a) is nearly identical to DR 5-105(D).

B. Can the imputed conflict be waived?

10. Rule 1.10(d) provides an avenue for curing the inquirer’s imputed conflict. Rule 1.10(d) provides: “A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.” Thus, if the inquirer can satisfy the conditions in Rule 1.7(b) for waiving conflicts of interest, then the inquirer’s imputed conflict will be cured. To qualify to seek a waiver from the affected clients pursuant to Rule 1.10(d), a lawyer (here, the inquirer) must meet all of the following four conditions set forth in Rule 1.7(b):

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. each affected client gives informed consent, confirmed in writing.

11. We will assume that the inquirer’s representation would not be “prohibited by law” within the meaning of Rule 1.7(b)(2) and that the inquirer’s representation would not involve the assertion of a claim by one client against another client in the same litigation within the meaning of Rule 1.7(b)(3). Therefore, the key to determining whether the conflict can be waived is whether the inquirer “reasonably believes” that he “will be able to provide competent and diligent representation” to the assigned client within the meaning of Rule 1.7(b)(1) despite the other Assistant Public Defender’s conflict of interest, and whether informed consent to the conflict, confirmed in writing, can be obtained from the necessary client(s) or former client.

12. Whether the inquirer could reasonably believe that he “will be able to provide competent and diligent representation” to the client in question depends on all of the facts and circumstances. Since the inquirer has not yet been appointed to a case pursuant to the Assigned Counsel program, we do not have those facts and circumstances and cannot make a determination regarding Rule 1.7(b)(1). However, assuming that the imputed conflict is consentable, we can provide some general guidance about obtaining consent under Rule 1.7(b)(4).

13. To cure a conflict, Rule 1.7(b)(4) requires informed consent from “each affected client.” Which clients are affected depends on why the conflict arises. If the imputed conflict arises under Rule 1.7(a)(1) because of another current client, then the inquirer (or some other attorney in the Public Defender’s office) must obtain informed consent, confirmed in writing, from both the inquirer’s assigned client and the conflicted Assistant Public Defender’s current client. If the conflict arises under Rule 1.7(a)(2) because of the conflicted Assistant Public Defender’s personal interests, then consent is required only from the inquirer’s own assigned client, because no other client is affected. If the conflict arises under Rule 1.9 because of the conflicted Assistant Public Defender’s former client, then the inquirer must obtain consent from the conflicting former client. (Since the inquirer did not personally represent the former client, we assume that the inquirer does not personally possess any confidential information of the former client. If the inquirer were in possession of any of the former client’s confidential information that has not become generally known, further analysis would be necessary.) In any case, each affected client’s consent must be confirmed in writing. If all required consents are obtained and confirmed in writing, then the inquirer’s disqualification by imputation will be cured and the inquirer may represent the assigned criminal defendant.

CONCLUSION

14. A lawyer who is a part time Assistant Public Defender in a county Public Defender office may not agree to represent a criminal defendant when another full-time or part-time Assistant Public Defender in the same Public Defender Office is prohibited from representing that defendant because of a conflict of interest arising under Rule 1.7 or 1.9 unless the lawyer’s imputed disqualification can be and is waived as provided in Rule 1.10(d).

(1-11)