



New York State Bar Association Committee on Professional Ethics

Opinion 935 (9/18/12)

Topic: Public Defender; private practice

Digest: A Public Defender or Assistant Public Defender can represent private clients as part of a separate private practice in the same Criminal Court in which he or she appears in a public defender capacity.

Rules: 1.11

FACTS

1. An appointed county Public Defender has a staff that includes part-time and full-time assistants. He has created a practice policy for both the part-time and full-time attorneys, including himself, that permits them to practice law privately in criminal or civil cases within and outside the county as long as no conflict of interest is involved. The full-time attorneys must do their private case work outside of normal business hours.
2. The Public Defender seeks guidance on whether his attorneys can represent private clients in the same Criminal Court in which they appear in their public defender capacity.

QUESTION

3. May a Public Defender or Assistant Public Defender represent private clients as part of a separate private practice in the same Criminal Court in which he or she appears as a member of the Public Defender's Office?

OPINION

4. No rule expressly prohibits a Public Defender or Assistant Public Defender from separately representing private clients. Indeed, in the past this Committee has issued opinions, under both the current Rules and the prior Code of Professional Responsibility, addressing specific questions involving scenarios where a public defender undertakes to represent a private client, and in none of those opinions did we suggest that there is any *per se* prohibition against a public defender separately representing private clients. *See, e.g.*, N.Y. State 862 (2011) (imputing conflict of interest in Public Defender Office to Assistant Public Defender acting in private practice capacity); N.Y. State 587 (1987) (concluding that it is proper for part-time Public Defender to represent, privately, individual found ineligible for Public Defender's assistance where individual unable to find other retained counsel and stating that "a part-time Public Defender may engage in private criminal defense work, at least when 'the client had never

requested the services of the public defender's office"); N.Y. State 518 (1980) (concluding that part-time Public Defender can represent private clients in litigation against county by which he is employed).

5. Other than Rule 3.8, which addresses the conduct of prosecutors and other government lawyers acting in a prosecutorial capacity, only Rule 1.11 establishes special obligations for former and current government officers and employees. The title of this rule refers to special conflicts of interest for former and current government officers and employees. Parts of the rule address how traditional kinds of conflicts can arise for such lawyers. *See* Rule 1.11 (a)(1), (b), (c). This aspect of Rule 1.11 has no bearing on the inquirer's question because the inquirer has acknowledged that his attorneys will abide by conflict-of-interest rules in determining whether to accept a retained case.

6. Rule 1.11 also limits a former government lawyer's ability to represent a private client in a matter in which the lawyer participated substantially as a public officer or employee. *See* Rule 1.11(a)(2). This rule, although it literally applies to "former" government lawyers, would limit a Public Defender's ability to successively represent a client on a single matter first as a public employee and subsequently – for example, because of a change in financial circumstances of the client – as a private lawyer. Under the prior Code of Professional Responsibility, this Committee expressed the concern that "the office of Public Defender not be perceived as a feeder in building a private law practice," N.Y. State 587, and closely circumscribed the situations in which an individual who contacts a Public Defender Office for representation can end up represented privately by a lawyer in that office. *Compare* N.Y. State 165 (1970) (prohibiting private retainer of part-time Public Defender whose office had previously been contacted by client for assigned representation) with N.Y. State 587 (modifying N.Y. State 165 to allow for limited exceptions). But there is no suggestion here that the inquirer permits his lawyers to direct potential public defender clients to their private practice, or that any of those lawyers would otherwise represent clients in violation of Rule 1.11(a)(2). Accordingly, Rule 1.11(a)(2) does not control this inquiry.

7. Finally, Rule 1.11 also prohibits lawyers who hold public office from improperly using the influence that their office carries. Rule 1.11(f)(2) specifically prohibits lawyers who hold public office from using their public office "to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client." It is this rule that comes closest to bearing on Public Defenders' appearances in a private capacity in the same tribunal where they appear in a public capacity. It is difficult, however, to discern how Public Defenders acting in a private capacity would use their public position to influence a tribunal. In both private and public capacities, the lawyer who is also a Public Defender is typically seeking to accomplish the same legitimate purpose – effective client representation. There is nothing attendant to the Office of Public Defender that carries with it the power to exert influence over a tribunal in which the Public Defender appears other than by means of appropriate and effective advocacy. Accordingly, Rule 1.11(f) does not prohibit the inquirer's practice model.

8. Our position with respect to Public Defenders contrasts with our opinions on part-time prosecutors. We have long held that the rules against representation of differing interests prevent a part-time prosecutor from representing criminal defendants in New York State courts or in

suing the governmental entity that employs them and that these conflicts are not waivable. N.Y. State 788 (2005); N.Y. State 657 (1993); N.Y. State 544 (1982); N.Y. State 218 (1971). In N.Y. State 544, we held that a part-time municipal attorney should not permit himself to represent an interest adverse to that of the locality. He should, therefore, not undertake a matter that would require him to appear before a judicial official of the locality or with respect to a violation of one of its ordinances. In that opinion, we explained that

“A part-time local attorney may undertake a criminal defense without conflict of interest . . . if (1) his statutory or other responsibility to prosecute criminal proceedings on behalf of the locality does not require him, in any case, to prosecute any crimes or offenses designated as such by the Penal Law or any other law enacted by the Legislature of the State of New York, (2) the defense does not require him to appear before a judicial or other official of the locality he publicly represents, (3) the local government unit by which he is employed, or a violation or a construction of one of its ordinances, is not involved, (4) the offense charged is unlike any of those which he prosecutes, and (5) the investigating officers and law enforcement personnel involved are not those with whom he associates as prosecutor.”

Notably, we have treated Public Defenders differently than prosecutors and other municipal attorneys, reasoning that a Public Defenders’ true clients are “indigents accused of crime rather than the county” for which they work. N.Y. State 518.

9. Of course, in carrying out the inquirer’s practice model, the lawyers must, as noted above, comply with all relevant ethical considerations such as conflict-of-interest rules. Because shouldering a full-time Public Defender position and a separate private practice may be burdensome, special attention must be paid to Rule 1.3’s requirement that a lawyer act with diligence and promptness in representing a client. *See* Rule 1.3(a). Such lawyer must give diligent and equal priority to both private and public clients. *See* N.Y. State 260 (1987) (Public Defender must “exercise great care not to permit his personal or professional interests to appear to influence his judgment with respect to the priority to be assigned as between his public defender and private matters.”).

CONCLUSION

10. A Public Defender or Assistant Public Defender can represent private clients as part of a separate private practice in the same Criminal Court in which he or she appears in a public defender capacity.

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