NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 973 (6/26/13)

Topic: Conflicts in arguing ineffective assistance; imputation of conflicts within legal aid organization

Digest: Appellate lawyer in a legal aid organization may not represent a defendant on an appeal that will assert ineffective assistance by trial counsel employed in the same organization unless circumstances allow defendant's waiver of the appellate lawyer's conflict of interest.

Rules: 1.7(a); 1.10(a)

FACTS

1. The inquirer is a member of the appeals unit of a legal aid organization. A lawyer in the trial unit of the same legal aid organization represented a certain defendant at trial, and the trial resulted in a conviction. The inquirer proposes to prosecute the defendant's criminal appeal even though ineffective assistance of trial counsel will be asserted as a basis of the appeal. It is presupposed that that there is at least a colorable basis for arguing ineffective assistance of counsel, and that such argument will reflect adversely on trial counsel.[1]

QUESTION

2. May an appellate legal aid attorney prosecute the appeal of a criminal defendant who was represented at trial by another lawyer in the inquirer's legal aid organization, when the appeal will argue that the defendant was denied effective assistance of trial counsel?

OPINION

3. The touchstones for our analysis are Rules 1.7 and 1.10 of the New York Rules of Professional Conduct. The answer to the inquiry will depend on whether the inquirer, under those Rules, is subject to a "personal-interest" conflict that precludes the inquirer's prosecution of the appeal. The basic standard for personal-interest conflicts is set forth in Rule 1.7(a):

[1] There may be circumstances in which the assertion of ineffective assistance of trial counsel would not reflect adversely on that counsel. An example might be a case in which trial counsel requests a continuance, claiming that more preparation is needed to represent the defendant effectively, and the judge denies that request. The analysis in this opinion is not intended to address such cases.

> Except as provided in paragraph (b) [governing waiver], a lawyer shall not represent a client if a reasonable lawyer would conclude that ... (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

4. On the facts of the inquiry, a personal-interest conflict could arise either directly or by imputation. A conflict could arise directly because the inquirer has an interest in the reputation of the legal aid organization that employs both the inquirer and the inquirer's allegedly ineffective colleague. Moreover, the inquirer presumably has an interest in collegiality within the office, and may not wish to alienate a colleague by attacking his work. The risk of an adverse effect on the inquirer's professional judgment would be magnified if the inquirer has a friendship or close professional relationship with trial counsel whose work would be criticized on appeal; if trial counsel has a high-level position within the legal aid organization or has a role in evaluating the inquirer's job performance; or if trial counsel had consulted the inquirer for advice during the trial. These kinds of considerations would be factors in applying the Rule 1.7(a)(2) standard directly to the inquirer. More detailed facts would be needed for a definitive application of that standard, but on the facts as presented, it seems not unlikely that a reasonable lawyer would perceive a significant risk that the lawyer's professional judgment on behalf of the appellant would be adversely affected.

5. However, even if the presence of a direct conflict could be denied on some fuller set of facts, there is no question about the existence of an imputed conflict. Clearly if *trial counsel* were prosecuting the appeal, a reasonable lawyer would perceive a significant risk that the lawyer's professional judgment on behalf of the appellant would be adversely affected by the lawyer's interest in his or her own reputation. *See* N.Y. State 533 (1981) ("Where a lawyer, as the basis for an appeal, must attack his own competence as trial counsel there is obviously a personal interest that is fundamentally at odds with the client's right to impartial and zealous representation – and the spectre of malpractice litigation strains such a relationship even further."). Thus it would present a personal-interest conflict for trial counsel to prosecute the appeal by asserting ineffective assistance at the trial level.

6. The inquirer, as a colleague of the trial counsel in the same legal aid organization, is burdened with the same conflict. Rule 1.10(a) provides: "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." A legal aid office is a "firm" as defined by the Rules.[2] Because the inquirer is associated in the same legal aid organization as the trial counsel whose conflict arises under Rule 1.7, that conflict would be imputed to the inquirer. *See*, *e.g.*, N.Y. State 862 ¶¶ 5-9 (2011); N.Y. State 592 (1988); N.Y. State 533 (1981); N.Y. State 462 (1977).

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[2] *See* Rule 1.0(h) (defining "firm" to include "lawyers employed in a qualified legal assistance organization"); Rule 1.0(p) (defining "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"); Rule 7.2(b)(1) (expressly listing "a legal aid office" when operated or sponsored by various specified entities).

7. We turn to the question whether these conflicts may be waived by the client's informed consent. Both Rule 1.7(a) and Rule 1.10(d) allow for waiver by consent of the affected client(s) if the conditions of Rule 1.7(b) are met. Of particular relevance in the circumstances under consideration are the first and fourth of the conditions set forth in Rule 1.7(b). The first is that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." Rule 1.7(b)(1). The fourth condition is that "each affected client gives informed consent, confirmed in writing." Rule 1.7(b)(4). Since there is only one client in this case, only he or she is affected and, accordingly, only his or her consent would be required.

8. As noted above, *trial counsel* would have a direct conflict in prosecuting the appeal on the basis of ineffective assistance below, and in our view that conflict would not be readily waivable. Trial counsel's interest in a personal reputation for competence would typically be strong and at sharp odds with the appellate needs of the client. Accordingly, any belief by trial counsel that he or she could provide "competent and diligent representation" would be unlikely to be reasonable. Moreover, for client consent to be informed, trial counsel would need to help the client understand issues surrounding the potential waiver, which would in turn put trial counsel in the further conflicted position of giving advice as to the quality of his or her own legal services at trial and ability to prosecute the appeal effectively. Trial counsel's conflict thus appears nonconsentable.[3]

9. The analysis proceeds differently, however, for the imputed conflict of the inquirer. Only the underlying conflict, and not the nonconsentability of that conflict, is imputed. In other words, whether the inquirer's imputed conflict is waivable is to be judged from the position of the inquirer, and not from the position of the trial counsel whose conflict gave rise to the imputation. *See* N.Y. State 968 ¶¶ 25-26 (2013). And because consentability of the imputed conflict is judged from the position of the inquirer, the analysis for the imputed conflict is the same as it would be for waivability of any direct conflict that may apply to the inquirer.

10. Thus, although trial counsel's conflict appears nonconsentable, there may be a greater prospect that the inquirer's conflict could be waived. The kinds of considerations that could interfere with the inquirer's professional judgment, see paragraph 4 above, may well be less distortive than those applicable to trial counsel. Just as they would be less sure to create a conflict in the first place, they would also, in the event of a conflict, tend to be more allowing of a reasonable belief in an ability to give the client competent and diligent representation. And the inquirer would be in a better position than trial counsel to provide the client with fair and complete advice as needed for any properly informed consent.

11. To say that the imputed conflict might be waivable, however, is not to say that waivability would be inevitable or even common. We note a few considerations bearing on this question. First, it requires a detailed factual analysis. We again refer to the kinds of

[3] *Cf.* N.Y. State 865 (2011) (to permit lawyer who planned estate to undertake representation of executor with colorable malpractice claim would put place lawyer in "manifestly untenable position of having to counsel the executor on whether to sue himself (the lawyer)," and thus lawyer could not reasonably believe that the lawyer could provide competent and diligent representation to executor, and conflict would be unwaivable).

considerations that factor into the existence of a conflict, see paragraph 4 above, because they also factor into consentability.

12. Second, there may be a widespread perception that waiver of such conflicts is typically inappropriate. Standards promulgated by the National Legal Aid and Defender Association, while not controlling, seem to reflect such a view. Those standards adopt a per se approach to the existence of a conflict:

> Each office shall have a written definition of situations which constitute a conflict of interest ….. Those situations shall include ...
> b. When the defendant was represented by the trial division of that same defender agency and it is asserted by the client or appears arguable to the appellate attorney that trial counsel provided ineffective representation….[4]

Furthermore, the standards could be taken to reflect a view that the conflict is unwaivable.[5] *See also* N.Y. State 533 (1981) (decided under Code of Professional Responsibility, and on similar facts finding preclusive conflict without discussing possibility of waiver).

13. Third, even if the inquirer deems the conflict waivable, the requirement of informed consent requires particular care in the context of a defendant whose alternatives to assigned appellate counsel may be limited.[6] We also note, without opining on, potential constitutional implications under the Sixth Amendment of the United States Constitution. *See* N.Y. State 605 (1989) (citing *Wheat* v. *United States*, 486 U.S. 153 (1988)).

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[4] Nat'l Legal Aid and Defender Ass'n, *Standards and Evaluation Design for Appellate Defender Offices, II. Criteria for Assuring the Efficiency of the Legal Representation, E. Procedures for Handling Conflict of Interest Cases,* ¶1 (1980), found at http://www.nlada.org/Defender/Defender_Standards/Standards_For_Appellate_Defender_Offices?printable=yes

[5] *Id*. ¶ 1 (written definition to include conflicts "requiring the assignment of outside counsel"), ¶2 ("If a conflict of interest exists, it exists for the entire office, and assigning the case to another attorney within that entire agency will not cure the conflict.") & ¶3 ("As soon as a case is identified as meeting the definition of 'conflict of interest case' the case shall be immediately identified and assigned to counsel outside the defender office.").

[6] The fact that appellant has been assigned counsel is not preclusive of voluntary consent, but the appellant's ability to exercise choice is among the factors to be taken into account. *See* N.Y. State 811 (2007) (citing N.Y. State 800 (2006) and N.Y. State 490 (1978)).

CONCLUSION

14. An appellate lawyer in a legal aid organization needs to consider conflicts of interest before undertaking to represent a defendant on an appeal that asserts ineffective assistance by trial counsel employed in the same organization. The pursuit of appellate claims that would reflect adversely on a colleague in the same organization would give rise to a personal-interest conflict at least by imputation and perhaps directly as well. The appellate lawyer may undertake the representation only when the circumstances allow, and the defendant makes, an effective waiver of the appellate lawyer's conflict.

(52-12)