



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1185 (04/22/20)

Topic: Conflicts of interest in defending multiple clients in prosecutions

Digest: It is likely an unwaivable conflict of interest exists for a lawyer or law firm concurrently to represent two individuals in separate criminal prosecutions that arise out of the same common nucleus of circumstances in which each client is a witness in each matter.

Rules: 1.7, 1.10

FACTS

1. The inquirer concurrently represents two individuals – for our purposes Client One and Client Two – in two separate but related criminal matters.
2. Client One has been charged with a crime in which Client Two is the alleged victim. Client One and Client Two are in a relationship; Client Two denies Client One committed any wrongdoing, opposed Client One’s arrest, and wishes to testify in favor of Client One. According to each Client, Client Two was intoxicated during the events at issue, and, following Client One’s arrest, Client Two was arrested for driving while intoxicated (DWI).
3. The inquirer’s firm proposes to represent each Client in the proceedings resisting the charges. The prosecution objects to the firm’s representing Client Two (its alleged victim in the charge against Client One), suggesting that the firm has co-opted the prosecution’s main witness against Client One. The inquirer asserts that no conflict exists because the prosecutions are separate, and that Client Two may testify in defense of Client One while invoking the Fifth Amendment on any questions probing intoxication.

QUESTION

4. Is the inquirer’s representation of the two clients in separate but related matters a conflict of interest and, if so, is the conflict subject to waiver?

OPINION

5. We reject the arguments of each side as described to us. In our view, no party has a possessory interest in a witness, so we consider the prosecutor’s position as inconsistent with the N.Y. Rules of Professional Conduct (the “Rules”). We also consider the fact of separate prosecutions as unpersuasive, because the two charges, though to be individually prosecuted, arise out of the same common nucleus of circumstances. Clients One and Two may be facing separate charges, but it is impossible to divorce the allegations of one from the allegations of the other.

6. Whether a conflict exists depends on Rule 1.7(a). Rule 1.7(a) says, in summary, that a conflict of interest exists for a lawyer concurrently to represent two clients if a reasonable lawyer would conclude that it will involve the lawyer in representing differing interests, or that a “significant risk” exists that the lawyer’s professional judgment will be adversely affected by the lawyer’s own financial, business, property or other personal interests. Rule 1.0(f) defines “differing interests” to “include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.”

7. We believe that Client One’s interests differ from those of Client Two, just as Client Two’s interests differ from Client One’s. For instance, a reasonable lawyer for Client One would have every incentive to establish that Client Two was indeed intoxicated based on eyewitnesses, the later arrest, behavior before the Client’ One’s arrest, and other evidence – all of which would be detrimental to Client Two in the DWI case. Similarly, a reasonable lawyer for Client Two might well advise Client Two not to testify in Client One’s defense, not just for the aforementioned damage to Client Two’s own legal status but also the risk of waiving Fifth Amendment rights. Likewise, a reasonable lawyer for Client One would have every incentive to advise Client One to testify against Client Two in the DWI case to justify the actions giving rise to Client One’s arrest. This is not intended as an exhaustive list of the ways the interests of the two clients diverge, but simply as common sense examples of the way they do.

8. Accordingly, in our judgment, advancing the legal interests of Client One would adversely affect the legal interests of Client Two, and vice-versa. “In order to be ‘differing,’ the interests need not arise in the same matter, and they need not arise in litigation.” N.Y. State 990 (2013). “For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer’s professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.” N.Y. State 867 (2011). We believe, too, that a significant risk exists that the firm’s fiduciary duty to one client would be compromised by its concurrent fiduciary duty to the other.

9. Even if separate lawyers in the inquirer’s firm would represent Client One and Client Two in their matters, Rule 1.10(a) imputes such lawyers’ representations, and thus the conflict, to the entire firm.

10. We are left, then, with the issue whether the conflict of interests may be waived for the law firm (one lawyer or different lawyers in that firm) to continue to represent both clients in their matters. Rule 1.7(a) is subject to Rule 1.7(b), which permits a conflict to be waived if the lawyer “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client” and if each client gives “informed consent confirmed in

writing.” Rule 1.0(j) defines “informed consent” to mean “the agreement by a person to a proposed course of action after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.”

11. Whether a conflict of interest is subject to waiver is very fact-intensive and depends on a variety of factors of which we have limited knowledge here. Among these factors are the relationship between Clients One and Two, the timing of their respective hearings, the sophistication of the clients, their respective familiarity with the judicial processes they confront, and other matters. These considerations render us reluctant to conclude that a conflict may never be waived on the facts as presented. Nevertheless, we are very skeptical that informed consent is possible here, among other reasons because (1) Client Two’s state of intoxication could be raised in both proceedings; (2) the possibility that inquirer’s firm might cross-examine Client Two in Client One’s proceeding (and vice versa); (3) the possibility that Client Two might have a change of mind about the content of testimony; (4) the judgment involved for both clients on questions such as which proceeding to push forward first, and whether to negotiate a plea; (5) the risk that the inquirer’s firm might be tempted to withhold complete explanations of the considerations and risks to either client out of concern for harming the other’s proceeding; (6) the ever-present possibility of negotiable plea options, which could adversely affect the legal interests of one client or the other; and (7) the inadvisability of Client One’s counsel advising Client Two of Fifth Amendment issues.

12. We stress, finally, that our opinion is confined to an interpretation of the Rules and does not address issues under the Sixth Amendment of the U.S. Constitution on effective assistance of counsel. *See United States v. Schwarz*, 283 F.3d 76 (2nd Cir. 2002) (reversing conviction despite common defendants’ informed consent to representation by one lawyer).

CONCLUSION

13. It would be a conflict of interest for the inquirer’s law firm concurrently to represent two clients in separate but related criminal matters in which each client would be a witness. Whether the two clients may provide informed consent to the concurrent representation is highly fact intensive subject to the considerations set forth in this opinion.

(02-20)