



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

Opinion 1210 (12/02/2020)

Topic: Conflicts of interest; definition of law firm; public defender; part-time justice

Digest: A county attorney’s office represents and advises the county public defender’s office on grant funding and other financial and administrative matters. However, the county attorney’s office has no access to information concerning the public defender’s clients, the two offices do not share common office space or file systems, and the lawyers in the county attorney’s office do not supervise or control the legal services provided by the public defender’s office. Although the county attorney’s office and the public defender’s office are not, on these facts, considered a single law firm, an attorney in the public defender’s office may nonetheless have a personal conflict of interest in representing clients in criminal cases before a part-time town justice who is also a full-time assistant county attorney. The conflict may arise if lawyers in the county public defender’s office have an institutional incentive to curry favor with the part-time justice.

Rules: 1.0(h), 1.7(a)(2), 1.7(b), 1.10(a) & (d), 8.4(f)

FACTS

1. The inquirer is an attorney in a county public defender’s office. The public defender’s office is represented and advised by the county attorney’s office, which represents and advises all county departments, principally with respect to administrative and financial matters such as office leases and applications for grants to fund the public defender’s office. The county attorney’s office is not involved in the handling of individual public defender cases, does not share office space with the public defender’s office, and does not have access to public defender case files or its case management system.

2. A full-time assistant county attorney was recently elected to serve as a part-time town justice but will continue to serve as an assistant county attorney. As a part-time town justice, the full-time assistant county attorney will preside over criminal cases in which assistant public defenders can be expected to appear.

QUESTION

3. Is an attorney in the public defender’s office ethically permitted to represent clients in front of a town justice who also works as an assistant county attorney in the county attorney’s office—an office that represents and advises the public defender principally on financial and administrative matters?

OPINION

4. Three potential conflicts of interest are presented by this inquiry. First, are the county attorney's office and the public defender's office considered to be a single "law firm" for the purpose of Rule 8.4(f) of the New York Rules of Professional Conduct (the "Rules"), which prohibits a lawyer from causing a judge to violate the judge's ethical obligations under the Rules of Judicial Conduct? Second, as an assistant public defender, does the inquirer have a personal conflict of interest under Rule 1.7(a)(2) arising from an incentive to please or at least avoid antagonizing the county attorney's office? Third, if the inquirer has such a conflict, is that conflict imputed to all attorneys in the public defender's office?

Are the County Attorney's Office and the Public Defender's Office the Same "Law Firm" for Purposes of Rule 8.4(f)?

5. Section 100.6(B)(3) of the Rules of Judicial Conduct prohibits the partners and associates of a part-time judge from practicing law in the court in which the part-time judge presides. Rule 8.4(f) of the Rules of Professional Conduct prohibits a lawyer from causing a judge to violate ethical obligations under the Rules of Judicial Conduct. Accordingly, attorneys in the town justice's law firm—the county attorney's office—may not appear in front of the town justice. *See* N.Y. State 1115 (2017) (attorney in the public defender's office may not represent a client in the same court where another attorney in the public defender's office serves as a part-time judge). Here, if the public defender's office and the county attorney's office are a single law firm under the Rules, then Rule 8.4(f) would apply to the lawyers in the public defender's office and the inquirer would not be permitted to appear before the part-time town justice.

6. Determining whether a group of lawyers is a single firm "is a fact-intensive inquiry." N.Y. State 1186 (2020); N.Y. State 1105 (2016). Rule 1.0(h), in the "Terminology" section of the Rules, provides that a "firm" or "law firm" "includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers engaged in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization."

7. With respect to legal organizations that consist of more than one component or section, Comment [4] to Rule 1.0 recognizes that, depending on organizational structure, the entire organization may constitute one single firm or each component may constitute a separate firm. Comment [2] to Rule 1.0 identifies two factors to be considered: (1) whether the group presents itself to the public in a way that suggests it is a single firm; and (2) whether the lawyers in the group have mutual access to information concerning the clients they serve. Our opinions focus on similar factors and place particular emphasis on access to client information. Thus, in N.Y. State 794 (2006), we concluded that the various divisions of a law school clinic constituted a single firm for purposes of the conflict rules where the clinic shared common office and file space, notwithstanding that each division maintained computer databases that were inaccessible to other divisions.

8. Our opinions also look to a third factor: the independence of the lawyers. Thus, in N.Y. State 914 (2012), we concluded that the members of a panel of lawyers established to provide legal assistance to clients who had conflicts with the local Legal Aid Society did not comprise a single firm. We focused in Opinion 914 on the independence of the members of the panel, noting that: "Neither the Society nor its lawyers may exercise any supervision or control over the legal services provided by Conflicts Panel Lawyers."

9. Here, consistent with these guiding principles, we conclude that the county attorney's office and the public defender are not a single firm. We base this conclusion on several factors --- (a) the county attorney's office has no access to information concerning the public defender's clients, (b) the two offices do not share a common office or file space, and (c) the lawyers in the county attorney's office do not exercise any supervision or control over the legal services provided by the lawyers in the public defender's office.

Does the Inquirer Have a Personal Conflict of Interest Under Rule 1.7(a)(2)?

10. Rule 1.7(a)(2) provides:

(a) Except as provided in paragraph (b), 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.

11. Whether a reasonable lawyer would conclude that such a "significant risk" exists here depends on the "personal interests" that flow from the advisory and representational relationship between the county attorney's office and the public defender's office. (We have no jurisdiction to address whether those same interests might obligate the part-time town justice to recuse himself when lawyers from the public defender's office appear in front of him. *See* Judiciary Law § 14 (forbidding judges from sitting in matters in which they are interested)).

12. Because the county attorney's office advises and represents the public defender's office to secure funding for its operations and with respect to other financial and administrative matters, the inquirer might have an incentive to curry favor with a full-time assistant county attorney. If strong enough, this incentive might create a significant risk that the inquirer's independent professional judgment on behalf of a client will be adversely affected.

13. Various factors might magnify the risk of an adverse effect on the independent professional judgment of the inquirer. Does the part-time town justice supervise, or is he personally and substantially involved in the legal services provided by the county attorney's office to the public defender's office? Have the inquirer and the part-time town justice worked together on public defender grant applications or on other significant fiscal matters such as the public defender budget? Are they likely to continue or renew that collaboration? Were their interactions positive and productive, or were they hostile and acrimonious? Have the part-time justice and the inquirer become social friends or professional antagonists? Does the part-time justice have a reputation for vindictive or retaliatory behavior?

14. The inquirer will need to consider these and other relevant factors to determine whether a reasonable lawyer would conclude that the incentive to please or at least not antagonize the part-time town justice is strong enough to create "a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected." Rule 1.7(a)(2).

15. If the inquirer determines that a reasonable lawyer would conclude that there is a significant risk that the inquirer's judgment might be affected by a desire to please or at least not antagonize the part-time town justice, then under Rule 1.7(b)(1) the inquirer must determine if,

notwithstanding that risk, the inquirer reasonably believes he can provide competent and diligent representation despite the conflict. If so, then the conflict is consentable, and the inquirer may proceed if he obtains the client's informed consent, confirmed in writing pursuant to Rule 1.7(b)(4). *See* N.Y. State 968 ¶¶ 21-27 (2013) (describing process for analyzing whether a government lawyer's conflict is consentable).

Is The Inquirer's Conflict Imputed to All Attorneys in the Public Defender's Office?

16. If the inquirer has a personal interest conflict under Rule 1.7(a)(2), then Rule 1.10(a) will impute that conflict to all other lawyers in the law firm (the public defender's office) with which the inquirer is "associated." Thus, Rule 1.7(b) will require all other assistant public defenders to determine consentability and obtain informed consent from their clients whenever they appear before the part-time justice.

17. But even if the inquirer's conflict is non-consentable, that does not automatically make the imputed conflicts non-consentable, because Rule 1.10(d) permits consent to an imputed conflict. *See* N.Y. State 968 ¶ 25 (2013) ("We do not believe that this condition of nonconsentability extends to all lawyers in the agency").

CONCLUSION

18. On the facts and circumstances presented by this inquiry, the county attorney's office and the county public defender's office are not a single law firm. Whether Rule 1.7(a)(2) prohibits a lawyer in the public defender's office from representing a client before the part-time town justice depends on whether, in light of the relationship between the two individuals and their respective offices, there is a significant risk that the independent professional judgment of the lawyer in the public defender's office on behalf of a client will be adversely affected. Rule 1.7(b) explains how and when such a personal conflict can be waived, if it exists. If a conflict exists under Rule 1.7(a), then it is imputed to all other lawyers in the public defender's office.

(30-20)