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

Opinion 1216 (01/15/2021)

Topic: Government lawyer doing consulting work for private company

Digest: A government agency lawyer, doing work on behalf of the government in connection with a software contract between the agency and a private company, may not also work as a consultant to the private company to help it provide such software to other agencies unless there is law expressly allowing such work. Such consulting work could also be prohibited by rules on conflicts of interest or by the rule prohibiting a lawyer from accepting benefits intended to influence the actions of public officials.

Rules: 1.01(a) (h) & (l), 1.7(a)(1)-(2), 1.7(b), 1.11(d)(2) & (f)(3), 5.7(a) & (d)

FACTS

1. The inquirer is an assistant county attorney who played a significant role in the county's successful acquisition and implementation of software to manage the county's contracts and insurance. The county paid a one-time fee and pays an annual maintenance fee for the software. The inquirer continues to provide technical support to county staff on the use of the software.

2. The outside vendor who supplied, customized and installed the software for the county, and who worked closely with the inquirer on the software contract with the county, has offered to employ inquirer as a consultant. In that role, the inquirer would provide "implementation and support services" to other counties that purchase its software. As described by the inquirer:

> Implementation involves discovery of what the entity's contract/insurance process is, consulting with the software company to redesign the software so it best works with the county process, uploading county vendors, users and standard form contracts into the software, training on the software and then go-live with the software. Support of the software primarily consists of answering questions as to how the software works, questions/issues with the software and coordinating with the software developer regarding the same.

QUESTIONS

3. If the inquirer were to provide such consulting services, would it give rise to a conflict of interest and, if so, would the conflict be waivable?

4. In the event of a dispute between the county and vendor arising from or related to the sale and implementation of the software, would the inquirer's role as a paid consultant to the vendor disqualify the county attorney's office from representing the county and, if so, would the conflict be waivable?

5. Would the answers be different if the inquirer were paid directly by other counties that are clients of the vendor, rather than by the vendor itself?

OPINION

Rule 1.11

6. Rule 1.11 governs special conflicts of interest for former and current government officers and employees. In relevant part it provides:

> (d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not: …
>
> > (2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

7. A "matter" includes "any … contract, . . . negotiation, … or any other representation involving a specific party or parties." Rule 1.0(*l*).

8. The contractual relationship between the county and the vendor in which inquirer has participated and will continue to participate, is thus a "matter" subject to Rule 1.11(d)(2). As such, "[e]xcept as law may otherwise expressly provide," the inquirer is ethically prohibited from negotiating for private employment with the vendor. *See* N.Y. State 1187 ¶7 (2020) (lawyer personally and substantially involved in one matter as a public officer may not negotiate to represent a party to that matter, even in another matter "wholly unrelated" to the first matter). This prohibition is not waivable, and it continues until conclusion of the matter in which the inquirer is participating. N.Y. State 1205 ¶¶ 8-9 (2020).

9. Whether there is a local law or policy that falls within the "law" exception of Rule 1.11(d)(2) and which would authorize or provide a procedure for securing county approval of the proposed consulting services arrangement presents an issue of law rather than of ethics, and is therefore a question beyond the committee's jurisdiction.

10. Even if the inquirer's proposed consulting conduct with the software vendor complies with Rule 1.11, the inquirer must also comply with any local laws and policies that govern county employees in general, including any provisions of the municipality's code of ethics relating to outside employment. *See* N.Y. State 1169 ¶¶ 6-7 (2019). For examples of such laws and policies (from counties other than the one where the inquirer works), *see*, *e.g.*, Rensselaer County Personnel Policy § 2.12 (before beginning outside employment, employees must obtain

advance written approval from their department head; outside employment must not interfere with work performance or schedule; and employees may not use County property, time, or IT systems in connection with outside employment); Suffolk County Standard Operating Procedure A-15(5) (outside employment may not be undertaken on regularly scheduled work time or on sick time, and "may not involve or appear to involve a conflict of interest or a potential conflict of interest").

11. Such local laws and policies could significantly limit the ability of inquirer to provide the outside consulting services, even beyond a requirement that the work be approved by the county attorney's office. For example, an assistant county attorney prohibited from outside employment during regular business hours could find it hard to provide software implementation and support services for other counties that have similar regular business hours. However, we do not opine as to how such local laws and policies might limit the proposed conduct, as our advisory role is limited to interpreting the rules of legal ethics.

Rule 1.7(a)(2)

12. Rule 1.7 sets forth the general rules for conflicts with current clients. It provides, in pertinent part:

> (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.

13. Here, there would be a conflict of interest if a reasonable lawyer would find a "significant risk" that the inquirer's professional judgement as an assistant county attorney would be "adversely affected" by the inquirer's own "financial, business, property or other personal interests" in establishing and maintaining a paid consultancy arrangement with the vendor. *See* Rule 1.7(a)(2).

14. The inquirer's personal interests could adversely affect the inquirer's professional judgment in representing the county in various ways. For example, if the county were to consider replacing the vendor's software or terminating the vendor's annual contract -- actions that would hurt the vendor financially -- the inquirer might be inclined (or might even be pressured by the vendor) to advocate for maintaining the relationship with the vendor, unchanged, for fear of being terminated as an outside consultant by the vendor and losing substantial outside income.

15. If a personal interest conflict exists under Rule 1.7(a), the conflict would preclude the inquirer's proposed consulting relationship with the vendor unless the conflict is waivable and is waived by the county in compliance with Rule 1.7(b), which provides, in pertinent part:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; ... and (4) each affected client gives informed consent, confirmed in writing.

16. Thus, waiver can only occur upon the satisfaction of the elements of Rule 1.7(b), including the lawyer's reasonable belief that the lawyer "will be able to provide competent and diligent representation" and the informed consent of the county, confirmed in writing.

17. We do not have sufficient facts to determine whether, in fact, the inquirer's employment as an outside consultant for the vendor would present a personal interest conflict, or if so, whether that conflict would be waivable, but if such a conflict exists, waivability under Rule 1.7(b)(1) seems doubtful in light of the likely nature of the inquirer's divided loyalties. We question that a lawyer with such strong financial interests in maintaining good relations with the vendor could "reasonably believe[]" that the lawyer could provide competent and diligent representation to the client (the county).

18. If the inquirer determines that no local law or policy precludes the proposed consulting arrangement or that such local law or policy "expressly" permits it, and if no personal interest conflict exists, that it is waivable, then the inquirer would still have to consider other ethical issues. In particular, Rule 1.11(f)(3) provides that a lawyer who holds public office shall not "accept anything of value from any person when the lawyer knows or it is *obvious* that the offer is for the purpose of influencing the lawyer's action as a public official." (Emphasis added.) In determining whether such a purpose is "obvious," relevant factors could include (i) the significance to the inquirer of the amount of money to be paid to the inquirer as a consultant; (ii) the value to the vendor of the inquirer's consulting; and (iii) whether there will be county matters within the inquirer's discretion that could significantly benefit vendor. If the proposed conduct would violate this Rule, then the conduct would be absolutely barred, because the Rule contains no provisions for waiving this conflict.

Rule 5.7

19. As a consultant, the inquirer might be providing only "nonlegal services" (defined by Rule 5.7(c) as "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer"). However, the inquirer's consulting work for the vendor could cross the line into legal services to the vendor (or the vendor's other county customers). In that case, the provisions of Rule 5.7(a) would govern the extent to which such services would be subject to the Rules. For an explanation of Rule 5.7, *see, e.g.,* N.Y. State 1200 (2020) (applying Rule 5.7 to lawyer who was also a wealth advisor) and N.Y. State 1178 (2019) (applying Rule 5.7 to a lawyer serving as a third-party neutral).

Rule 1.7(a)(1)

20. Moreover, if the inquirer's nonlegal consulting work veers into legal services, the inquirer would have at least one law client other than the county that employs inquirer, the proposed conduct would have to comply with the conflicts provision of Rule 1.7(a)(1) (a lawyer shall not represent a client if a reasonable lawyer would conclude that "the representation will involve the lawyer in representing differing interests," absent effective waiver under Rule 1.7(b)).

Payments Made by the Other County Clients

21. The inquirer asks whether revising the proposed arrangement so that the inquirer would be paid directly by the vendor's other county customers would affect the ethical analysis.

In our view, revising the source of payment would not cure problems under Rule 1.11(d)(2), since the other counties would also be parties to a "matter" (the software contract) in which the inquirer would be participating. Likewise, if the inquirer's proposed conduct would violate Rule 1.7(a)(2), the conflict could not necessarily be avoided by obtaining payment directly from the vendor's other county customers because the inquirer would still have a financial interest in the consultancy arrangements. However, if the conduct would violate Rule 1.11(f)(3), then revising the payment arrangements might avoid the violation, because it seems less likely that the vendor's other county customers would pay consulting fees for the purpose of influencing the inquirer's official conduct on behalf of the county that employs inquirer.

Disputes between the County and the Vendor

22. Since we find it doubtful that the Rules of Professional Conduct would permit the inquirer to engage in the proposed conduct, we will only briefly address the conflicts that would arise if a dispute arises between the county and the vendor. If the inquirer were to represent the county in that dispute against the vendor, it would magnify the risk that the consultancy arrangement could adversely affect the inquirer's professional judgment on behalf of the county as the likelihood of alienating the vendor by aggressive advocacy on behalf of the county (or seeking to please the vendor with conciliatory advocacy) would be higher. This would be so even if the inquirer were paid by the other counties rather than by the vendor. Thus the inquirer's personal conduct of such litigation would likely give rise to a conflict, and perhaps an unwaivable conflict, under Rule 1.7(a)(2) and 1.7(b).

23. A conflict under Rule 1.7 would be imputed to other assistant county attorneys under Rule 1.10(a), which 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 county law department is a "firm." *See* Rule 1.0(h) (defining "firm" to include "a government law office"); N.Y. State 968 ¶19 (2013) (citing Rule 1.0(h) for proposition that a "firm" is defined to include a federal government law office). However, if the inquirer has a conflict under Rule 1.7 that is imputed to those other assistant county attorneys via Rule 1.10(a), the conflict could be waivable even if the inquirer's own conflict were not. *See* Rule 1.10(d) ("A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7"; Rule 1.7(b) (setting forth conditions for conflict waiver); N.Y. State 968 ¶26 (2013) ("where the nonconsentable nature of Lawyer A's conflict is personal to Lawyer A, the circumstances may well allow the client to consent to representation by Lawyer B" in the same firm).

CONCLUSION

24. A lawyer who personally and substantially participates in implementing and maintaining management software sold to the county where the lawyer is employed as an assistant county attorney may negotiate terms with and provide consulting services as an outside software implementation consultant to the vendor who provided and maintains that software, in order to assist the vendor's other county clients who are acquiring and implementing the same or similar management software, provided the inquirer complies with local law and policy regarding outside employment, and provided that the consulting arrangement satisfies the requirements of Rule 1.7(a)(1) regarding conflicts arising from differing interests, Rule 1.7(a)(2) regarding personal

interest conflicts, and Rule 1.11(f)(3) regarding influence on public officials. Although a review of all the facts and circumstances will determine whether the requirements of these Rules can be satisfied, based on the limited information made available to the committee, it appears doubtful that any conflict would be waivable under Rule 1.7(b)(1). Our conclusion regarding the likelihood of overcoming a possible personal interest conflict would be magnified if a dispute arose between the county and the vendor. Our analysis would not be affected if the vendor's other county clients engaged and paid the inquirer in place of a direct contract with, and direct payments from, the vendor.

(29-20)