NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1255 (05/26/2023)

Topic: Romantic Relationship Between Criminal Defense Attorney and County Deputy Sheriff

Digest: Where a criminal defense attorney is in a romantic relationship with a county deputy sheriff, the attorney must determine if a reasonable lawyer would conclude there is a significant risk that the attorney's independent professional judgment on behalf of the client will be adversely affected. If such a significant risk exists but the attorney reasonably believes he or she can provide competent and diligent representation, the attorney may request client consent to the conflict. If the attorney's belief would be unreasonable, the conflict would be nonconsentable. If the attorney has a nonconsentable conflict, then the conflict is imputed to the attorney's firm, but the imputation may be waived with client consent, even if the inquirer's conflict is nonconsentable as to the individual lawyer, so as to allow other lawyers in the firm to accept or continue the representation. If the attorney has a consentable conflict but fails to obtain consent, then the conflict is imputed to the attorney's entire firm.

Rules: 1.0(j), 1.7(a) and (b), 1.10(a), (d) and (h)

Partially modifies N.Y. State 660

FACTS

1. The inquirer is a criminal defense attorney who is in a romantic relationship with a county deputy sheriff. She states that the deputy sheriff was a "secondary or supporting officer" in two prior cases against her clients, both of which ended in negotiated non-criminal dispositions. The inquirer is currently representing a client accused of a double homicide in a prosecution in which the deputy sheriff is again a "supporting officer."

QUESTIONS

2. Where a criminal defense attorney is in a romantic relationship with a county deputy sheriff, may the attorney represent clients in cases in which the deputy sheriff was involved?

3. If the attorney is disqualified from the representation, will the other lawyers in the inquirer's firm also be disqualified by imputation?

OPINION

<u>A Romantic Relationship Presents a Rule 1.7(a)(2) Personal Interest Conflict.</u>

4. We have previously opined on the rules governing disqualification based on personal interest under Rule 1.7(a)(2) of the New York Rules of Professional Conduct ("Rules"). See N.Y. State 1119 (2017) (former work colleagues). Here, the romantic relationship between the

inquirer and the deputy sheriff is clearly such a personal interest and we revisit Rule 1.7(a)(2) in that context.

5. Rule 1.7 (a)(2) provides that a lawyer may not represent a client if a reasonable lawyer would conclude that "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 . . . personal interests" unless the conflict is consentable under Rule 1.7(b) and the conflicted lawyer obtains the client's informed consent, confirmed in writing.

6. Here, whether such a significant risk exists will depend, among other factors, upon (i) the closeness of the relationship between the inquirer and the deputy sheriff, (ii) whether the deputy sheriff played a significant role in investigating the matter, (iii) whether the actions of the sheriff's department are an issue in the case, and (iv) whether the deputy sheriff will be a trial witness subject to cross-examination by the inquirer.

7. Concern would arise if the deputy sheriff played a significant role in investigating the matter, or if the deputy sheriff would be subject to cross-examination, because the inquirer might be tempted to "pull her punches" in defending her client. The inquirer might also be inclined to accept a negotiated plea of guilty to resolve the matter without exposing deficiencies in the investigation or implausible testimony given by the deputy sheriff or others in the sheriff's office.

8. Concern would also arise that the inquirer might reveal client confidential information to the deputy sheriff. Rule 1.7, Comment [11] addresses matters where related lawyers are involved on opposite sides of a case, but we believe it is also relevant here:

> [11] When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j).

But see N.Y. State 409 (1975) (citing ABA 340 to the effect that it should not be assumed that a lawyer whose husband or wife is a lawyer will not obey all disciplinary rules, and thus it should not be assumed that one spouse will disclose confidences or secrets of the client to his or her spouse in violation of the ethical proscription).

A Personal Interest Conflict Arising from a Romantic Relationship May be Consentable

9. As Comment [11] to Rule 1.7 suggests, if a reasonable lawyer would conclude that there is a significant risk that the attorney's professional judgment on behalf of the client would be adversely affected, then the attorney may still represent the client as long as the waiver and consent provisions of Rule 1.7(b) are met. These require that:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the

same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

10. Rule 1.0(j) in the terminology section of the Rules) defines informed consent as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct 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. Accordingly, the lawyer must explain both the risks that his or her professional judgment could be adversely affected and the reasonably available alternatives (including representation by other lawyers in the firm, or in other firms).

12. Under Rule 1.7(b), a conflict of interest is sometimes nonconsentable:

> Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. ***"

Rule 1.7, Comment [15].

13. Determining whether a conflict is nonconsentable depends on the facts and circumstances. Here, for example, we believe the conflict would be nonconsentable if the deputy sheriff was significantly involved in the investigation of the matter and is expected to be called as a prosecution witness at trial. In that circumstance (and there may well be others), client consent would not be effective because the inquirer could not reasonably conclude that she could provide competent and diligent representation to her client to defend against the murder charges.

14. Our conclusion that the inquirer, based on particular facts and circumstances, might ethically continue her representation – either because there is not a "significant risk" under Rule 1.7(a)(2) or because the conflict is consentable and the lawyer has obtained informed consent pursuant to the requirements of Rule 1.7(b) – is dependent on the fact that the inquirer and the deputy sheriff are not opposing attorneys in the matter. The conflict would be nonconsentable if the romantic relationship were between the prosecutor and the defense attorney, not the defense attorney and the deputy sheriff.

15. Thus, in N.Y. State 660 (1994), decided under the former New York Code of Professional Responsibility, an associate in a law firm with a significant criminal defense practice was dating an assistant district attorney in the county in which the associate's firm was located. They dated frequently and had a close personal relationship. The Committee concluded that "[u]nder the circumstances, it would not be unreasonable to assume that they each had a personal interest in one another's reputation, success and welfare" that "ordinarily would operate to disqualify the lawyers from undertaking an adverse representation without the consent of their respective clients."

16. Noting that a "scintilla of partiality, which might be waivable by private parties in other contexts, is intolerably suspect and prejudicial to the public's regard for the criminal justice

system," we stated:

> Irrespective of the subjective intent of the prosecutor and defense counsel, and regardless of howsoever scrupulous they may be in the conduct of their professional obligations, the appearance of partiality in the administration of justice is so strong that a couple who date frequently should not be permitted to appear opposite one another in criminal cases.
>
> We leave for another day the issue of how to determine when friendship and warm regard become so fraught with emotion as to provide a basis for disqualification under DR 5-101(A). Whatever hereafter may be said of friendships in varying degrees, we believe that a frequent dating relationship is clearly over the line that separates ethically cognizable conflicting interests from those which are not. A dating relationship between adversaries is inconsistent with the degree of professional judgment required by DR 5-101(A).

N.Y. State 660 (emphasis added).

<u>Personal Conflicts of Interest Are Imputed to Other Lawyers in the Firm.</u>

17. If the inquirer's personal conflict is nonconsentable under Rule 1.7(b), or if the client declines consent, may another lawyer in the inquirer's firm handle the representation with the consent of the client? Rule 1.10(a) is the basic rule on imputation of conflicts of interest. With exceptions not here relevant, Rule 1.10(a) provides:

> (a) 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 ….

18. Because the disqualification here would be under Rule 1.7, and no exceptions apply, there would be imputed disqualification of the inquirer's entire firm under Rule 1.10(a).

19. Notably, the Rules of Professional Conduct in New York differ from the Model Rules of the American Bar Association (the ABA) on whether personal interest conflicts are imputed within a law firm. Rule 1.10 of the ABA Model Rules specifically provides that personal conflicts of interest of one lawyer in a firm are not imputed to other lawyers in the firm unless the conflict presents a significant risk of materially limiting representation by the other lawyers in the firm. Comment [11] to Section 1.7 of the ABA Model Rules contains a sentence not included in the same Comment to Rule 1.7 of the New York Rules, namely: "The disqualification arising from a close family relationship is personal and not imputed to members of firms with whom the lawyers are associated." In New York, however, the conflict here would be imputed to all lawyers in the firm under Rule 1.10(a).

20. In N.Y. State 660, decided under the former New York Code of Professional Responsibility, we noted the paradox that conflicts with non-spouses would be imputed while conflicts with spouses, which are now covered by Rule 1.10(h) would not be imputed. We said:

> The issue as to whether defense counsel's firm would be disqualified raises what appears as something of an anomaly in applying the provisions of DR 5-105(D) [the predecessor to Rule 1.10(a)]. Because disqualification of the associate is based on DR 5-101(A) [the predecessor to Rule 1.7(a)],

> a literal reading of DR 5-105(D), as amended effective September 1, 1990, would automatically impute the associate's disqualification to the entire firm. See N.Y. State 632 (1992). DR 9-101(D) [now Rule 1.10(h)] expressly prohibits spouses from undertaking adverse representation [without client consent]. The only operative difference between the general rule of DR 5-101(A) and the more specific prohibition of DR 9-101(D) is that the latter does not trigger automatic imputed disqualification under DR 5-105(D), for reasons bearing more on sociology and economics than traditional notions of conflicting interests.
>
> It should be evident that a spousal relationship is significantly closer than that of a dating couple. Among other things, a dating relationship is usually devoid of the community of financial interests present in the spousal relationship. Consequently, and most anomalously, if the Code were to be applied literally, the closer relationship of spouses would not require automatic disqualification of the entire firm, while the more casual relationship of a dating couple would seem to impute firm-wide disqualification. This result would be as illogical as it is manifestly inconsistent. Notwithstanding that the dating relationship invokes the proscriptions of DR 5-101(A), for purposes of applying standards of imputed disqualification, we believe that it should not be subject to greater constraint than the relationship of spouses addressed by DR 9-101(D). Thus, whether other lawyers in the firm will be disqualified depends on the facts and circumstances. See N.Y. State 638, at 8-11 (1992); N.Y. State 632, at 2-3 (1992); see also N.Y. State 654, at 5 (1993) (discussion of appropriate factors to be considered). If the lawyer concludes that another lawyer in the firm may undertake or continue the representation of a defendant prosecuted by the assistant district attorney in question, the associate must be effectively screened from any participation in the matter and must be apportioned no part of the fee therefrom.

21. In the nearly 30 years since N.Y. State 660 was issued, New York has amended its ethics rules many times – yet no amendments have been made to the provisions imputing personal interest conflicts. Indeed, in 2008 when the New York State Bar Association recommended replacing the Code of Professional Responsibility with a version of the Model Rules, the Bar Association recommended amending Rule 1.10 to eliminate imputed disqualification for personal conflicts of interest absent special circumstances. The New York Administrative Board of the Courts declined to adopt this recommendation in favor of the language quoted above. In 2020, the State Bar again recommended an amendment to Rule 1.10 that would eliminate imputation of personal conflicts of interest, but that proposal is still pending before the Administrative Board. In light of the failure to adopt this proposal by the Administrative Board in 2008 and its failure to act on the most recent proposal, we must conclude that Rule 1.10(h) and Comment [11] to Rule l.7 mean what they say, no matter how inconsistent. We therefore partially modify N.Y. State 660, to the extent that it concludes that whether other lawyers in the firm will be automatically disqualified depends on the facts and circumstances. The imputation of the personal conflict to the inquirer's entire firm is automatic and would not be dependent on facts and circumstances.

A Nonconsentable Rule 1.7(a)(2) Personal Conflict of Interest May be Waived

22. Despite the imputation of the nonconsentable conflict to other lawyers in the inquirer's firm, Rule 1.10(d) allows the client to waive the imputed disqualification and consent to the representation by other lawyers in the firm. Rule 1.10(d) provides:

> A disqualification prescribed in this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

23. Thus, if another lawyer in the inquirer's firm reasonably believes he or she will be able to provide competent and diligent representation to the client and the client gives informed consent, confirmed in writing, then that other lawyer may undertake the representation. In other words, the client may waive the conflict imputed to other lawyers in the inquirer's firm even if the inquirer's own conflict would be nonconsentable. See N.Y. State 994 (2013), N.Y. State 975 (2013), N.Y. State 973 (2013), N.Y. State 968 (2013) (only the underlying conflict, and not the nonconsentability of that conflict, is imputed).

CONCLUSION

24. Where a criminal defense attorney is in a romantic relationship with a county deputy sheriff, the attorney must determine if a reasonable lawyer would conclude there is a significant risk the attorney's independent professional judgment on behalf of the client will be adversely affected. If such a significant risk exists but the attorney reasonably believes he or she can provide competent and diligent representation, the attorney may request client consent to the conflict. If such a belief would be unreasonable, the conflict would be nonconsentable. If the lawyer is disqualified, the disqualification is imputed to the lawyer's firm, but the imputed conflict may be waived with client consent, even if the inquirer's conflict is nonconsentable as to the inquirer, so as to allow other lawyers in the firm to accept or continue the representation.

(07-23)