

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Informal Opinion #1988-89/11
Conflict of Interest: Representation of Police Prosecutor
March 9, 1989

RULE REFERENCES:

- *Rule 1.6
- *Rule 1.7
- *Rule 1.7(a)
- *Rule 1.9
- *Rule 1.9(a)
- *Rule 1.10
- *Rule 3.8
- *Rule 8.4

ETHICS COMMITTEE RULES REFERENCES:

- *Rule 5

SUBJECTS:

- *Adverse Effect on Professional Judgement
- *Adverse Representation
- *Attorney-Client Privilege
- *Attorney-Client Relationship
- *Client Communications
- *Confidentiality
- *Conflict of Interest
- *Consultation
- *Criminal Representation
- *Disqualification
- *Domestic Relations
- *Law Firms
- *Multiple Representation
- *Prosecutors

ANNOTATION:

A Lawyer and the law firm having a police-prosecutor as a divorce client, will in most cases be prohibited from representing other clients in any criminal actions being prosecuted by the prosecuter-divorce client.

The Rules of Professional Conduct do not apply to prosecutors who are not members of the Bar (Rule 8.4; NH comments to Rule 3.8.)

A lawyer is prohibited from representing a client if the representation will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship and each client consents after consultation and knowledge of the results (Rule 1.7; Rule 1.7(a)).

A lawyer is prohibited from representing a client if the attorney's representation may be materially limited by the attorney's responsibilities to another client, unless the lawyer reasonably believes the representation will not adversely affect either attorney-client relationship and each client consents after consultation and knowledge of the results. (Rule 1.7(b)).

A lawyer may not act as an advocate against a person he or she represents in some other matter, even if it is wholly unrelated. (Rule 1.7).

Other members of an attorney's firm should not represent any client the attorney could not represent. (Rule 1.10).

Even after legal representation is terminated, a lawyer is under a continuing obligation not to reveal or use client confidences and other information derived from the representation, subject to specified exceptions (Rule 1.6; Rule 1.9).

BACKGROUND:

The inquiring attorney represents in a pending divorce a police officer who acts as the local, non-attorney prosecutor. To avoid possible conflicts of interest, the attorney and his firm have declined to be involved in any cases in which the police officer client is or was involved, whether as prosecutor or as witness. Moreover, attorney has advised all clients of his representation of the officer. No clients objected upon this disclosure.

The police department has assigned another officer to prosecute any cases involving attorney or his firm. Although the divorce is expected to be resolved soon, it remains pending. The police department now wants attorney's client to resume prosecutions involving attorney's firm. Attorney disagrees, believing that at present there would be an impropriety or the appearance of an impropriety if his officer client were to prosecute cases involving attorney's other clients.

QUESTIONS:

- 1) Would it be unprofessional conduct for the inquiring attorney or his firm to represent clients in cases prosecuted by his officer client while attorney continues to represent the officer on the pending divorce?
- 2) If so, under what circumstances may the attorney or his firm represent clients in cases involving the officer?

RESPONSE:

Although the inquiring attorney questioned the propriety of the officer prosecuting attorney's other clients, that question cannot be addressed by this Committee because the Rules of Professional Conduct do not apply to prosecutors who are not members of the Bar. *See* Rule 8.4 (misconduct applies to a "lawyer.") and N.H. Comments to Rule 3.8. This opinion is thus restricted to future conduct of the inquiring attorney. *See* Rule 5 of Committee Rules of Procedure.

Rule 1.7 sets out the general rules for conflicts of interest. Note that the present rules no longer use the former Code of Professional Responsibility's language about the "appearance of impropriety." Rather, Rule 1.7(a) prohibits a lawyer from representing a client if the representation will be "directly adverse" to another client unless the lawyer reasonably believes the representation will not adversely affect the relationship and each client consents after consultation and knowledge of the consequences.

Whether or not it would be "directly adverse" to the officer client for the inquiring attorney simultaneously to represent citizens prosecuted by that client, any such simultaneous representation must also comply with Rule 1.7(b), which prohibits the attorney from any representation of a client that may be "materially limited" by the attorney's responsibilities to the officer, unless the lawyer "reasonably believes" that representation will not be adversely affected and the prosecuting officer consents after consultation and with knowledge of the consequences. Although the rule does not absolutely bar such simultaneous representation and although it provides for case by case application, it seems that there would be few cases in which the representation of an accused would not be materially limited by the attorney's current attorney-client relationship with the prosecutor.

Rule 1.7 implements the lawyer's undivided loyalty to each client. Generally, a lawyer may not act as advocate against a person he or she represents in some other matter, even if it is wholly unrelated." ABA Model Code Comments to Rule 1.7. If the inquiring attorney were to represent clients criminally prosecuted by his officer client, his or her loyalties to each could be compromised. The attorney would most probably have cases in which trial or settlement strategies were affected by the existence of an attorney/client relationship with the prosecutor. The attorney would be placed in the untenable position of deciding whether to go easy with the prosecutor, perhaps out of sympathy due to the impending divorce, or whether perhaps to exploit information gained about the prosecutor to benefit the accused client.

It thus appears that the inquiring attorney should generally decline to represent clients in prosecutions by his officer client, although there could be exceptions permitted by Rule 1.7. Moreover, other members of the attorney's firm should not represent any client that he or she could not so represent. Rule 1.10 (Implied Disqualification).

Case law and prior ethical opinions support this conclusion. *Fiandaca v. Cunningham*, 827 F.2d 825 (First Cir., 1987), cited Rule 1.7 in holding that the adverse interests of counsel's clients mandated disqualification for conflict of interest. The Court concluded that in rejecting a proposed settlement offer to one client class because it was unacceptable to the other counsel could not have reasonably believed that the representation would not be adversely affected by a conflict. *Fiandaca* cited the ABA Comments to Rule 1.7 and emphasized the lawyer's duty of undivided loyalty to the client, 827 F.2d at 829. Construing the former Code of Professional Responsibility, this Committee has opined that an attorney was precluded from acting as town counsel when the firm with which the attorney was associated represented criminally charged clients in the local district court. NH Op 84-5/3.

For the above reasons, the answer to the first question is that it would be unprofessional conduct for the attorney or the attorney's firm to represent accused clients prosecuted by the officer client unless, pursuant to RPC 1.7, in a particular case the attorney reasonably believed that the representation of both clients could thereby be neither adversely affected nor materially limited and after consultation and with knowledge of the consequences each client were to give informed consent. See Opinion 597 of N.Y. State Bar Association, ABA/BNA Lawyers Manual on Professional Conduct 901:6102 (3/20/87), which allowed a lawyer who represented a party in a pending suit to represent the opposing party's lawyer in an unrelated matter provided that the attorney reasonably believed that the representation would not adversely affect independent professional judgment and provided that there was full disclosure to and informed consent from both clients. Given the presented facts, as noted above, it seems that it would be a rare case in which counsel could reasonably believe that his existing representation of the prosecutor would not adversely interact with representation of one of the prosecutor's targets.

Even after legal representation is terminated, Rule 1.6 and Rule 1.9 place the lawyer under a continuing obligation not to reveal or use client confidences and other information derived from the representation, subject to specified exceptions. Thus, even after the inquiring attorney has concluded his representation of the prosecuting officer, has been paid, and has closed the file, neither he nor members of his firm should represent a client in any case which might affect the on-going duty to preserve the prosecutor client's confidences and not to reveal or use undisclosed information relating to that earlier representation without the prosecutor's consent. However, so long as a particular criminal case and a closed divorce case are not the same or substantially related, there is no other bar to the inquiring attorney or his firm representing clients prosecuted by the former client. Rule 1.9. Cf. *Kevlik v. Goldstein*, 724 F.2d 844 (First Cir., 1984). (That the interests of the two clients are "materially adverse" under RPC 1.9(a) may be uncontroversial). The Courts which have applied the "substantial relationship" test have examined either the factual context of the two representations, including whether communications disclosed by the former client could be used in a later, adverse representation, *Kevlik v. Goldstein*, *supra*, or they have looked to the issues involved in the present and past representations, disqualifying the attorney when the relationship between the issues is clear, identical, or essentially the same. *Government of India v. Cook Industries, Inc.*, 569 F.2d 737 (2 Cir., 1979). See generally ABA/BNA Lawyers Manual on Professional Conduct, 51:201 *et seq.* Since it would appear that generally under either analysis the prosecutor's divorce and subsequent charges will be unrelated, there is no general bar to the inquiring attorney's subsequent representation of clients prosecuted by the officer. Neither the cases nor the Rules disqualify the attorney solely based on an appearance of impropriety. That the interest of the prosecuting officer and the later accused clients may be generally adverse does not in itself require disqualification. See ABA Model Code Comments to Rule 1.7. While not required by the Rules, it would not be unreasonable for the inquiring attorney to advise subsequent criminally accused clients of his former representation of the prosecutor. The attorney will have to disqualify himself and his firm from cases in which there is any possibility that protected information he gained as a result of his representation of the prosecutor could in any way be used to the benefit of the subsequent client.