ADVISORY ETHICS OPINION 84-01

SYNOPSIS:

Where a law firm represents an association comprised of police officers employed by a municipality in the association's contract negotiations with the municipality, it is a conflict of interest for the firm to represent on a retained or assigned basis criminal defendants in cases involving the municipal police department or in cases where a police association member is a witness for the state.

OPINION:

A law firm has asked our opinion as to whether it is a conflict of interest for the firm to represent criminal defendants while representing a municipal police association in contract negotiations with a municipality. We find no conflict in the firm's representation of criminal defendants whose cases are unrelated to the municipal police department or any of it s members.[1] However, cases in which members of the municipal police association are involved require more detailed analysis and lead to a different result.

The applicable provisions of the Code of Professional Responsibility are EC 5-1, 5-14 and 5-15; DR 5-101(A) and DR 5-105(A), (B), (C) and Canon 9.[2] DR 5-105(A), (B) and (C) provide that an attorney shall not accept employment which will or is likely to impair "the exercise of his independent professional judgment on behalf of a client," except with the consent of each affected client after full disclosure of the potential for conflict and then only "if it is obvious that he can adequately represent the interests of each." It follows, a fortiori, that a lawyer may not undertake the representation of a client where such representation is likely to place the lawyer in an adversary role with respect to another client. Canon 9 provides that "a lawyer should avoid even the appearance of professional impropriety."

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[1] See Opinion No. 76-8 (it would be proper for a police commissioner/attorney to represent criminal defendants when other municipal police departments are involved and there is no relation at all with the commissioner's police department.)

[2] In addition to these Code provisions governing the conduct of counsel, consideration must also be given to the Sixth Amendment right of every criminal defendant to the effective assistance of counsel. This right has been construed to include "representation free from conflicting interest." United States v. Bernstein, 533 F.2d 775, 787 (2nd Cir. 1976). In situations where a defendant's attorney has previously represented a witness for the prosecution the potential for prejudice to the defendant exists and courts have scrutinized closely the potential for prejudice before permitting the attorney's representation of the accused to proceed. United States v. RMI, 467 F.Supp 915 (W.D.Pa. 1979); United States v. Alberti, 470 F.2d 878 (2d Cir. 1972); In Re Grand Jury Investigation, 436 F.Supp 818 (W.D.Pa. 1977). In Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974) Judge Wisdom wrote for the Court:

> When there is a conflict of interest such as exists in this case [defendant's attorney had previously represented a key prosecution witness in an unrelated civil matter] the prejudice may be subtle, even unconscious. It may elude detection on review.

Castillo v. Estelle, 504 F.2d at 1245. The Court went on to rule that in such instances the Court would find a denial of the defendant's right to the effective assistance of counsel as a matter of law, even if no specific prejudice to the defendant were shown. Id.

The conflict and the resulting potential for prejudice is aggravated where the attorney has an ongoing relationship with an adverse witness. In such a situation disqualification of counsel may be required to protect the Sixth Amendment guarantee. In United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975), cert. denied, 86 S.Ct. 805 (1976) the Court denied a defendant's challenge to his conviction based on a claim that his attorney had previously represented a Government witness. Former Judge, now Justice, Stevens wrote for the Court:

> We also emphasize at the outset that this is not a case involving an existing personal relationship between Cohen [the attorney for the defendant] and the witness Berry. Consequently, the numerous cases involving an on-going relationship between an adverse witness and a lawyer are inappropriate.

Id. at 1263-4.

In a footnote to the portion of the opinion quoted above, the Court went on to note:

> The courts have frequently held that the existence of such a relationship, with the inherent attendant hesitancy of counsel to completely cross-examine a current client, creates a very real conflict of interest and requires a mistrial if the conflict is covered only later. See Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974); Porter v. United States, 96 U.S.App.D.C. 379, 226 F.2d 337 (1955); District of Columbia v. Scott, 94 U.S.App.D.C. 227, 244 F.2d 860 (1954); United States ex rel Williamson v. LaVallee, 282 F.Supp. 968 (E.D.N.Y. 1968); United States ex rel Miller v. Myers, 253 F.Supp. 55 (E.D. Pa 1966); People v. Stoval, 40 Ill 2d 109, 239 N.E.2d (1968); of Randazzo v. United States, 339 F.2d 79 (5th Cir. 1964). But see Weaver v. United States, 263 F.2d 577 (8th Cir. 1959), cert denied, 359 U.S. 1014, 79 S.Ct. 1154, 3 L.Ed. 2d 1038, Hayman v. United States, 205 F.2d 894 (9th Cir. 1953), cert. denied, 349 U.S. 959, 75 S.Ct. 889 99 L.Ed. 1282.

United States v. Jeffers, 520 F.2d at 1264 n. 13.

This is not to say that in all cases where an attorney has an ongoing attorney-client relationship with a potential prosecution witness disqualification is mandated, since the Sixth Amendment also guarantees a criminal defendant the right to counsel of his choice. A Court enforced disqualification of his counsel might well run afoul of this aspect of the defendant's Sixth Amendment right. United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982); United States v. Curcio, 680 F.2d 881 (2d Cir. 1982) (Curcio I); United States v. Curcio, 694 F.2d 14 (2d Cir. 1982) (Curcio II). A balancing is required and great deference is due a defendant's choice of counsel. The Court, however, is the final arbiter of conflicts in representation in cases before the Court and the Court has authority to order the withdrawal of counsel, even over the objections of the defendant. United States v. Bernstein, 533 F.2d 775, 787 (2d Cir. 1976); United States v. Flanagan, 679 F.2d 1072 (3rd Cir. 1982) (Court affirmed trial court's refusal to accept the defendant's consent to joint representation and the concededly valid waiver by each defendant to any decision which might arise from the firm's conflict of interest and upheld the trial court's order disqualifying the firm from representing any of the defendants in light of the "conflicts that joint defense counsel will very likely face in presenting an adequate defense for each defendant); In Re Gopman, 531 F.2d 262 (5th Cir. 1976); See also Rule 44(c) Fed.R.Cr.P. This removal authority extends to instances of ethical violations. Pirillo v. Takiff, 341 A.2d 896, aff'd. 352 A.2d 11 (Pa. 1975), cert. denied, 423 U.S. 1083 (1976).

The requirements of the Sixth Amendment are separate and distinct from the commands of the Code of Professional Responsibility, but the concerns expressed by courts with respect to conflicts under the Sixth Amendment are similar to the conflict of interest issues presented under the Code.

The conflict of interest in representing both a criminal defendant and the bargaining unit of a police officer appearing as a witness against the defendant is readily apparent. In cases investigated and referred for prosecution by members of the municipal police department, firm members will face the prospect of challenging the accuracy and thoroughness of the investigatory work and trial testimony of the officers whose interests they separately represent as attorneys for the police association. Counsel may have to attack the competency or integrity of an officer for whom they are seeking employment benefits. Additionally, the firm's own pecuniary interest may be at stake: Too thorough a cross-examination of a police association witness may jeopardize the firm's continuing status as the association representative.[3] A different but no less significant potential for conflict may arise if the firm learns information about a particular police witness during the course of attorney/client consultations with the association which would be protected from disclosure under the attorney/client privilege. Firm attorneys may conduct a less vigorous cross-examination than they might otherwise pursue to avoid compromising the privileged information.[4] A client will never be sure he has received conflict-free representation.

Such potential conflicts fall within the DR 5-105(B) proscription against continuing multiple employment where "the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by [the attorney's] representation of another client. . . ." Here, the interests of each client may be diminished by the conflicted representation. Less than vigorous challenge to the state's case, including its police witnesses, will prejudice the criminal defendant, while a full and aggressive defense may expose deficiencies attributable to police performance which may have a direct and adverse bearing on the contract negotiations and could undercut the association's bargaining position and the firm's effectiveness as an advocate for the association.

The question remains whether, notwithstanding the obvious conflict, the consent of both clients would make the representation appropriate under DR 5-105(C). It is our opinion that dual representation under these circumstances would not satisfy the Code. DR 5-105(C) makes multiple representation contingent not only to the consent of the clients but also on a determination that "it is obvious that [the attorney] can adequately represent the interest of each." It is clear if not obvious that the firm cannot adequately represent the interest of each. The cross purposes of the two clients are too direct.

Further, it is not clear that an adequate consent could be obtained from the association. The firm represents the entity known as the police association, but this representation involves, as a practical matter, the representation of the employment and salary interests of each member.

It is unlikely that an effective consent would be recognized from a defendant for whom the firm was assigned as counsel. This barrier to an effective consent would extend to all defendants represented by virtue of the firm's proposed contract with the Vermont Defender General's Office. As to clients represented on a retained basis, such clients' consent to representation, while satisfying, perhaps, the mandates of the Sixth Amendment, would in no way remove the obvious of the Sixth Amendment, would in no way remove the obvious conflict that would preclude representation under the Code.

This opinion follows from past opinions of this committee dealing with conflict questions. In Opinion No. 82-3 we advised that:

> Partners of a firm in which an associate is City Grand Juror and whose functions as such include prosecution of misdemeanors and traffic violations within municipal limits, may not represent clients in actions against members of the same municipality's police department.

We found that:

> Counsel's working relationship with the city police department must inevitable bring him in contact with those members facing litigation. Certain of his prosecutions may indeed be built upon their expected testimony. In these circumstances, even assuming that no direct conflict of interest exists, the private litigants may well question the zeal with which their own cases are being pursued. An attorney should not place himself in a situation in which his loyalties are divided or one wherein a perception of such division may arise. (EC 5-1).[5]

Similarly, in Opinion No. 76-8, we stated that:

> …It would be unethical for [a Police Commissioner] to handle a civil matter wherein a member of the Commissioner's police department is directly involved or involved as a witness.

The representation of both the police association and criminal defendants in cases in which association members are involved appears also to conflict with EC 5-14 and 5-15. EC 5-14 states that a lawyer is precluded from accepting or continuing employment that will:

[3] See DR 5-101.
[4] See Canon 4 "A lawyer should preserve the confidences and secrets of a client."
[5] Opinion No. 82-3 at p. 2

> Adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15 states that:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation.

Here, the strong adversarial position of the members of the association represented by the firm and the criminal defendants it proposes to represent precludes the firm from undertaking to represent them both. Although the association is not a party to the criminal litigation and the association members are technically only witnesses, the investigating officer's role in documenting a criminal violation and referring it for prosecution puts him close to a party in interest. Under Vermont criminal discovery obligations.[6] To the extent that the firm's representation of the association is equivalent to the representation of each of its members in matters related to the bargaining talks, the situation presented comes close to that discussed in Grievance Committee v. Rottner[7]. In that case junior members of a firm brought suit on behalf of a new client against a person represented by the firm in an entirely unrelated matter. The attorneys and their senior partners were reprimanded by the Court and ordered to withdraw from the representation of both clients. In upholding the disciplinary action of the lower court, the Supreme Court of Errors of Connecticut noted that the firm's handling of the two unrelated cases might not involve an actual conflict of interest, but cited with approval an opinion of the committee on professional ethics of the New York County Lawyer's Association which stated in part:

> While under the circumstances *** there may be no actual conflict of interest *** 'maintenance of public confidence in the Bar requires an attorney who has accepted representation of a client to decline, while representing such client, any employment from an adverse party in any matter even though wholly unrelated to the original retainer.'[8]

The Court then went on to observe:

> We feel that this rule should be rigidly followed by the legal profession. When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of one upon whom he looks as his advocate and his champion.[9]

It is therefor our opinion that the firm should decline to undertake the representation of criminal defendants in cases where police association members have a role as witnesses or investigating officers.

[6] Vt.R.Cr.P. 16(c).
[7] Grievance Committee v. Rottner, 203 A.2d 82 (Conn. 1964).
[8] See Question and Answer No. 350 N.Y. County L. Assn., Question and Answer No. 450 (June 21, 1956). Grievance Committee v. Rottner, 203 A.2d at 84.
[9] Id.