

State Bar Association of North Dakota

Ethics Committee

Opinion No. 06-10

Issue

The issue is whether a part-time state's attorney's previous civil representation creates an ethical preclusion to the attorney prosecuting the former clients.

Information Provided by the Requesting Attorney

A part-time state's attorney [hereinafter attorney] prosecuting two former clients (a married couple) on possession of stolen property, "drug charges", and game and fish violations, had up until 2003, prepared the married couple's tax returns and in 2002, received a retainer from the couple to perform a bankruptcy filing. At the clients' request, the attorney never filed the bankruptcy, but by January 2003, the retainer was exhausted responding to the couple's other legal matters including persons filing suit against them.

In early 2004 and again in August 2004, the attorney orally informed the couple that the attorney wanted to withdraw from all representation. Despite the oral notices, the wife dropped off more legal documents. Still later in 2004, the husband was charged (not specified by whom) criminally and the attorney moved to withdraw from all civil matters with the couple. Withdrawal was granted. The attorney handled the 2004 criminal prosecution of the husband who pled guilty without objection to his one-time civil attorney prosecuting him.

In September 2005, the attorney gave written notice to the couple "to confirm that [the attorney] formally withdrew from all representation of [the couple]." Since the earlier civil legal work had not only consumed the \$1,000 retainer but also resulted in \$1,100 in unpaid bills for

further services, the attorney suggested to the couple clearing up the billing by listing the remainder of the bill on the couple's bankruptcy filing. Meanwhile, the attorney asserted that the attorney would "just cancel any remaining bill."

An early December 2005 incident and subsequent execution of a search warrant resulted in criminal charges being filed in February of 2006 against the couple by the attorney.

Discussion

Rule 1.9 of the North Dakota Rules of Professional Conduct follows.

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) Represent another person in the same matter in which that person's interests are materially adverse to the interests of the former client; or
- (b) Represent another person in a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (c) Use information relating to the representation to the disadvantage of the former client in the same or a substantially related matter except as Rule 1.6 would require or permit with respect to a client.

As to subparagraph (a) of Rule 1.9, the information the requesting attorney provided to this Committee gave no indication whether the prior representation was on the same matter as any of the current criminal charges. The requestor did offer that the prior representation involved regular filing of the couples' tax return, a request (later withdrawn) to file a bankruptcy petition, and later efforts to fend off ". . . various legal matters including persons filing suit against [the couple]." Meanwhile, the current prosecutions involve unspecified incidents of possession of stolen property, "drug charges", and game and fish violations.

Under subparagraph (b) of Rule 1.9, a lawyer can not ethically prosecute a former client if the prior representation is "substantially related" to the later criminal charge. The comment to Rule 1.9 instructs: "[t]he underlying question is whether the lawyer was so involved in the matter

that the subsequent representation can be justly regarded as changing sides in the matter in question."

This Committee has liberally construed the term "substantially related matter" when the prior representation involved family law. SBAND Ethics Committee Op. 2001-01. In the case now before this Committee, it appears from the limited information provided by the requesting attorney that the prior civil subject matter was primarily of a pecuniary nature, not familial.

The approach taken by a majority of the courts involves a comparison of the facts, circumstances, and legal issues of the past and present representations to determine whether they are related in some substantial way. Annotation, *Disqualification of Prosecutor*, 42 A.L.R. 5th 581, 646 (1996) (citing *State ex rel. McClanahan v. Hamilton*, 189 W.Va. . 290, 430 S.E.2d 569, 572-73 (1993) ("determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations."); *Lawyer Disciplinary Bd. v. Printz*, 452 S.E.2d 720, 723 (W. Va. 1994) (quoting *McClanahan*, "[u]nder Rule 1.9(a) of the Rules of Professional Conduct, determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations.").

The South Carolina Bar Ethics Advisory Committee, applying the similar Rule 1.9(a) of the *South Carolina Rules of Professional Conduct*, advised that a prosecutor's previous estate planning representation was not substantially related to and did not bar the lawyer from prosecuting the former client. South Carolina Bar Ethics Advisory Op. 03-02.

Similarly, in the *Gajewski* case, the Eighth Circuit Court of Appeals affirmed the U.S. District Court Judge's decision that then U.S. Attorney, John Garaas's, prior representation of the Gajewskis involving cancellation of oil leases was not conceivably related to their prosecution by the U.S. Attorney's office on defrauding the United States by defeating operation of the Agricultural Adjustment Act and conspiracy to file fraudulent tax returns. *Gajewski v. U.S.*, 321 F.2d 261, 267-268 (8th Cir. 1963); *see also*, 63C Am. Jur. 2d *Prosecuting Attorneys, disqualification* §§27 and 48 (1998); Annotation, *Disqualification or Recusal of Prosecuting Attorney Because of Relationship with Alleged Victim or Victim's Family*, 12 A.L.R.5th 909 (1993).

One cannot, however, conclude from these examples that prior representations of a pecuniary nature are irrelevant to later criminal prosecutions. In *State v. Allen*, for example, the Supreme Court of Louisiana applied the "substantially related matter" portion of Rule 1.9(a) of Louisiana's Rules of Professional Conduct to reverse and remand the lower courts' decisions that the prosecutor was properly allowed to continue with an arson prosecution where the defense was there was no monetary benefit to be gained by burning down the house the defendant had turned over to a bankruptcy trustee. *State v. Allen*, 539 So.2d 1232, 1234-35 (La. 1989).

In the case before this Committee, the requesting lawyer has supplied so little factual background on any of the prior representations or the current prosecutions that conducting a reasonably thorough factual analysis is impossible. We could conclude, that based on the limited information provided, no substantial relationship between the prior representations and the current prosecutions is apparent, but we have no information about the forces that drove the couple to bankruptcy, the types of claims that were being made against the couple and defended

by the lawyer; nor are we informed whether the "drug charges" involve dealing or simple possession, whether the possession of stolen property charge has any relation to the couple's historic financial problems or the claims brought against them, nor any indication of the character of the game and fish violations.

Under Rule 1.9(c) the prosecutor is precluded from using any information from a substantially related prior representation to the detriment of the former client. Based on the limited information provided, no apparent conflict exists, but if information obtained through the prior representation becomes necessary to the criminal prosecution, the attorney would need to withdraw. In the Arizona disciplinary case, *Ockrassa*, a former defense attorney-turned prosecutor was sanctioned for prosecuting a third DUI in five years when the prosecutor had represented the defendant in two prior DUIs. The Court found that even though the two prior DUI convictions were not needed to prove an element of the offense, the fact that the prosecutor had been the Defendant's attorney in the two prior DUI cases created a substantial relationship for purposes of 1.9(c) in that there was a substantial danger that confidential information the Defendant had revealed during the two prior cases would be used against him by his former attorney. *In re Ockrassa*, 799 P.2d 1350, 1352 (Ariz. 1990). *See also*, Texas Commission on Professional Ethics Opinion 538 (requiring little if any substantial relationship to constitute a conflict due to the inherent tension between zealous prosecution and maintaining prior confidences).

Note the related section for government lawyers in Rule 1.11(d) specifying " . . . a lawyer serving as a public officer or employee shall not participate in a *matter* in which the lawyer participated personally and substantially while in private practice or nongovernment employment

. . . unless all persons and entities involved in the former representation consent." The term *matter* is defined in Rule 1.7(e) to include, "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party." Rule 1.11(c) layers onto that list of possibilities the added circumstance of "any matter covered by the conflict of interest rules of the appropriate government agency." There is no indication that any provision of N.D.C.C. 11-16-05 "Restrictions on powers of state's attorney" applies to this case or that the attorney's county has its own conflict rules. Based on the limited information provided by the requestor, there is no proof that any of the earlier civil matters constitute the same matter as one of the current criminal charges.

Under Rule 1.7, the lawyer is precluded from prosecuting if the prior representation would or is likely to diminish the attorney's capacity to do the job. Even when the former representation simply "might" affect the attorney's capacity to zealously prosecute, the attorney must gain informed consent from the parties to continue.

As noted by this Committee in Opinion 97-01, where, as here, the Committee can based on the facts presented find no conflict, if the lawyer, subjectively feels there is an actual conflict, the lawyer ought to withdraw. The comments to rule 1.7 contain revisions effective on the first of August 2006. The requestor may wish to consider consulting those comments for guidance.

Conclusion

On the surface, no conflict is readily apparent. But analysis of these issues requires comparison of the facts of both the underlying prior civil matters and the current charges to determine whether they revolve around the same matter or are so interwoven as to create a

conflict. The requestor has provided insufficient facts to facilitate such a review.

This opinion was drafted by Fritz Fremgen and adopted by unanimous vote of the Committee on the 21st of June 2006.



Mark R. Hanson
Chair, SBAND Ethics Committee