

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 2020-02**

THIS OPINION IS ADVISORY ONLY

FACTS

A state's attorney ("attorney") in a North Dakota county previously worked as a public defender. Periodically, the attorney encounters criminal cases in which the suspect or defendant is a former indigent defense client.

QUESTION PRESENTED

Is it a conflict of interest for a state's attorney to prosecute a person whom the attorney previously represented as an indigent defense client, where the new criminal case is completely unrelated to the prior case?

OPINION

I. APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 1.9 of the North Dakota Rules of Professional Conduct addresses the ethical duties owed to former clients. The Rule states in pertinent part:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or 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 in writing.

....

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client in the same or a substantially related matter except as these Rules would require or permit with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

II. DISCUSSION

The question presented is whether a state's attorney who formerly worked as a public defender may prosecute a former client for charges unrelated to the subject of the prior representation. N.D. Rule Prof. Conduct 1.9 does not prohibit an attorney from representing a new client in matter that is entirely unrelated to the former client's case. Therefore, the first issue to consider is whether the new criminal matter has any connection with the previous case(s) in which the attorney represented the former client. Subsection (a) of Rule 1.9 pertains to representation of a new client in the "same or substantially related matter." Comment 3 to Rule 1.9 explains that matters are "substantially related for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

The Oregon State Bar Association Board of Governors provided an example to illustrate the distinction between the "same" and "substantially related" matters in the context of criminal law:

If [a district attorney] endeavored to bring a robbery prosecution against a former client and the robbery appeared to be part of a pattern of robberies, and if [the district attorney] had previously participated in the defense of the former client in one of those robberies, the new prosecution would be substantially related to [the district attorney]'s prior defense of the former client and would constitute a former client conflict under Oregon RPC 1.9(a). Conversely, if the robbery defendant previously had been defended by [the district attorney] in a DUII matter, there would be a conflict only if [the district attorney] acquired confidential information while representing the former client that could materially advance the prosecution of the robbery case.

OR Eth. Op. 2005-120 (June 2007).

It is important to note, however, that the analysis is not as simple as whether the new charge and prior charge are the same. The attorney must also determine whether the cases share

any similarities or interrelated issues. In Commonwealth v. Ford, the Pennsylvania Superior Court considered the question of whether the trial court properly disqualified an assistant district attorney who had previously represented the defendant. 122 A.3d 414, 417 (Pa. Super. Ct. 2015). The defendant was charged with crimes related to the delivery of heroin. Id. at 415. The assistant district attorney previously represented the defendant on a theft charge and “in connection with a revocation matter incident to a prosecution where [the defendant] was also charged with possession with intent to distribute controlled substances.” Id. at 415-16. The State argued that the prior cases were unrelated to the new drug case. Id. at 416. However, the Court held that “[u]pon review of the plain language of Rule 1.9 and its comment, we conclude that a conflict of interest exists.” Id. at 417. The Court concluded that because the assistant district attorney was directly involved in the defendant’s prior drug case, “his subsequent representation of the Commonwealth in this drug case—with its materially adverse interests—‘clearly is prohibited.’” Id. at 417.

But see State v. Bryan, 227 So. 2d 221, 223 (Fla. Dist. Ct. App. 1969) (holding in a new criminal case unrelated to the prior representation that “the State Attorney can only be disqualified if it were shown that as Public Defender he had actually gained confidential information from a prior attorney-client relationship with the defendant, which information would be useable in the new matter to defendant’s prejudice”); Gatewood v. State, 880 A.2d 322, 335 (2005) (concluding that the lower court did not abuse its discretion in rejecting the defendant’s motion to disqualify a prosecutor, noting that the lower court found no “close relation between the present case and the past representations”).

If the attorney determines that the new case and the prior case are the same or substantially related, Rule 1.9(a) still allows the attorney to represent the new client if the former client

consents in writing. In the context of a criminal case, however, the idea of obtaining consent to prosecute a former client is fraught with problems. As the Supreme Court of Texas Professional Ethics Committee noted, “[t]o obtain the consent of the former client to criminally prosecute him requires full disclosure of the existence, nature and implications of the conflict of interest and the many possible adverse consequences of consenting to such a prosecution.” TX Eth. Op. 538 (June 2001). Certainly, “consent should not be obtained with an inappropriate expectation of leniency.” Id. The prosecutor should also keep in mind that “there may be occasions where the lawyer should not even ask for the former client’s consent.” Id. “Where a disinterested lawyer would conclude that the client should not agree to give the requested consent, the Rules discourage, if not prohibit, the lawyer from even asking for the former client’s consent.” Id. The Committee agrees with this analysis and urges extreme caution when seeking consent from a former client to prosecute him or her.

Subsection (c) of Rule 1.9 prohibits use of information relating to a former client to the disadvantage of the former client “in the same or a substantially related matter except as these Rules would require or permit with respect to a client, or when the information has become generally known.” It also prohibits an attorney from revealing information related to the representation of the client except as the Rules permit or require. N.D.R. Prof. Conduct 1.9(c). To avoid the disclosure of confidential information about the former client, the prosecutor would need to “proceed cautiously, ignoring any fact known by the new prosecutor about the former client as a result of the former representation.” TX Eth. Op. 538 (June 2001). Prosecutors have “the responsibility to see that justice is done and not simply be an advocate.” Id. However, prosecutors are “still obligated to act with competence, commitment and dedication on the State’s behalf.” Id.

The Supreme Court of Texas Professional Ethics Committee aptly explained the ethical conundrum that a state's attorney would face in prosecuting a former client:

Adherence to the Rules places an impossible burden on an effective prosecutor and creates an almost certain probability that in the adversarial trial setting, confidentiality will be compromised. Similarly, to obtain and ensure protection, the objecting former client is forced to divulge the very same confidential information he seeks to prevent from disadvantageous use, thus defeating the purpose of the rules. These conflicting obligations impose conflicting duties on both the prosecutor and the former client and thus requires prohibition of this practice, absent the former client's consent.

Even if consent from the former client is obtained to prosecute him, the Committee believes that the new prosecutor's use in evidence, in a new criminal proceeding of a prior conviction in which she was defense counsel, for purposes of impeachment, or for use against a former client as character evidence or punishment evidence is prohibited.

TX Eth. Op. 538 (June 2001). The American Bar Association (ABA) standards go even further, completely prohibiting the prosecution of a former client. According to the standards, a "prosecutor should not be involved in the prosecution of a former client" and "should not use information obtained from that representation to the disadvantage of the former client." ABA Criminal Justice Standards, Prosecution Function, Standard 3-1.7(d), 4th ed. 2017.

The New York State Bar Association Committee on Professional Ethics warned that prosecuting a former client could create an appearance of impropriety:

Because of the broad discretion with which the district attorney is vested, prosecution of persons that he has personally represented in private practice immediately prior to the assumption of his new office presents an unacceptably high risk that the prior representation will bias the manner in which he will discharge the functions of his office and, at the very least, may give rise to speculation concerning the propriety of his motives. Such speculation, or a reasonably high probability of such speculation, would understandably place unwarranted pressure upon the district attorney in the performance of his official duties. The public's confidence in the integrity of the district attorney's office should not needlessly be so tested. Its confidence in the proper administration of justice should not be compromised or unnecessarily put at risk.

NY Eth. Op. 492 (Sept. 13, 1978).

The Florida Supreme Court has also recognized the danger of negative public perception when a prosecutor brings charges against a former client. In Reaves v. State, a state's attorney prosecuting the defendant for murder had previously represented the defendant as an assistant public defender on grand larceny charges. 574 So. 2d 105, 106–07 (Fla. 1991). The defendant appealed his murder conviction, contending that “many of the issues involved in the present case—particularly mitigating factors during the penalty phase—were similar to issues raised in this prior criminal proceeding.” Id. at 106. The defendant claimed that “an appearance of impropriety was created that demanded the disqualification of [the] prosecutor.” Id. The Court agreed, holding that reversal of the defendant's conviction was necessary “[t]o implement these ethical considerations and prevent the perception or actuality of a breach of confidentiality.” Id. at 107.

III. CONCLUSION

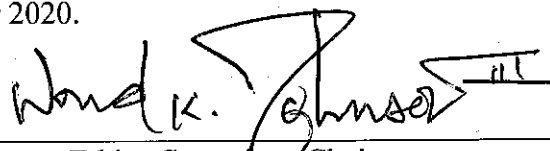
A state's attorney may handle a criminal case involving a former client, but only after conducting the proper analysis under N.D.R. Prof. Conduct 1.9 and ensuring that certain ethical safeguards are in place. First, the attorney must consider whether the new case is “the same or a substantially related matter” in which the State's interests are “materially adverse to the interests of the former client.” N.D.R. Prof. Conduct 1.9(a). If the answer is yes, then the attorney must not be involved in the new case unless the former client consents in writing. If the attorney decides it is appropriate to request consent, the attorney must exercise great caution. The attorney should fully disclose “the existence, nature and implications of the conflict of interest and the many possible adverse consequences of consenting to such a prosecution.” TX Eth. Op. 538 (June 2001).

Second, before undertaking the new case, the attorney must evaluate whether it is possible to meet the requirements of N.D.R. Prof. Conduct 1.9(b). That is, the attorney must ensure that he or she will not use information obtained during the prior representation to the former client's disadvantage or reveal information relating to the representation, unless there is an applicable exception under the Rules of Professional Conduct.

Finally, the attorney should also avoid involvement in the new case if it would create an appearance of impropriety or erode public trust in the prosecutor's office. Prosecutors have special responsibilities, including "the responsibility of a minister of justice and not simply that of an advocate." N.D.R. Prof. Conduct 3.8, Comment 1.

If the attorney concludes that prosecuting the new case would be inappropriate, then a different prosecutor in the office should be assigned. The attorney with the conflict should be screened out of any involvement in the case. If none of the other attorneys in the office can handle the case, or the state's attorney is a solo practitioner, then the state's attorney should appoint a special prosecutor to perform all prosecutorial duties with respect to the case.

This opinion was drafted by Renata Olafson Selzer and was unanimously approved by the Ethics Committee on the 27th day of October 2020.


Ethics Committee Chairperson

This opinion is provided under Rule 1.2(B), North Dakota Rules for Lawyer Discipline,
which states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.