Blair Leah Hornstine *
Richard L. Vanderslice *◇Δ†
Buneka J. Islam *◇
Louis F. Hornstine *◇ϑ□

* Licensed in PA
◇ Licensed in NJ
ϑ Licensed in NY
¤ Licensed in FL
Δ Licensed in CA

□ Counsel to the Firm
† NJ Managing Attorney

501 Cambria Avenue, Suite 300, Bensalem, PA 19020
P: 609-523-2222 www.Hornstine.com F: 609-964-1849

February 14, 2024

VIA eCOURTS FILING

Hon. Bernard E. DeLury, Jr., P.J.Cr.
Cape May County Courthouse
9 North Main Street, 2nd Floor
Cape May Court House, NJ 08210

RE: State v. Ernest V. Troiano
Case Number: CPM-22-000535

Dear Judge DeLury:

Please accept this letter in response to the State's Objection filed yesterday regarding any potential conflict posed by my pending job offer. For the reasons explained below, there is no actual conflict of interest present, any potential appearance of conflict can be addressed/waived, and to take action that precludes my continued representation would significantly and unfairly prejudice my client in this matter.

As noted by the State, there is limited published case law on point in New Jersey addressing the fact pattern presented here. This is not, as the State suggests, because of the "clear and obvious impropriety of the situation." More likely, it is because there is no actual conflict here that requires Court intervention or review in the first place. While most of the published cases addressing claims of conflict come by way of claims by defendants on appeal after a matter is tried, the closest matter directly addressing *this particular fact situation* is a 2014 unpublished decision in State v. McCargo, 2014 WL 3953107 (copy attached hereto as Exhibit A pursuant to R. 1:36-3).

In that matter, the Honorable Michele M. Fox, J.S.C., evaluated whether a defense attorney's application to and interview with a county prosecutor's office, while simultaneously representing a defendant against that same office, constituted either an ethical violation or a conflict of interest. Judge Fox noted that "the situation did not present a 'per se conflict of interest,' and therefore, quoting *State v. Norman*, 151, N.J. 5, 25 (1997), the court must assess 'the potential or actual conflict of interest' and 'if significant, a great likelihood of prejudice must be shown … to establish constitutionally defective representation of counsel." After performing that assessment, she concluded that the attorney's conduct neither resulted in an ethical violation nor created a conflict of interest that was likely to prejudice the defendant. That decision was ultimately affirmed by the Appellate Division.

Here, as the State correctly notes in its Objection, there is no "per se" conflict of interest, because that only occurs in cases where attorneys dually represent co-defendants, or where an attorney is being prosecuted by the same prosecutor's office that is prosecuting the defendant. Further, if the Court believes that there is a potential or actual conflict of interest and follows the required analysis, the State bears the burden of showing that such an issue is both significant and poses a great likelihood of prejudice sufficient to require my removal as counsel.

The general rule regarding attorney conflicts of interest derives from the New Jersey Rules of Professional Conduct, specifically RPC 1.7. That rule states "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," and specifies that such concurrent conflicts occur where "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." N.J. RPC 1.7(a). Here, as explained below, the office prosecuting Mr. Troiano is separate and distinct from the office that I would ultimately be working with, and therefore they are not "directly adverse" to each other. Further, there is nothing about the pending job offer that would "materially limit" my responsibilities to Mr. Troiano or in any way preclude my continued representation of him.

The problem with the State's analysis of this situation is in its conclusion that the "office" prosecuting my client is the same "office" that I would be working with, simply because they "answer to the same Attorney General." Indeed, the Attorney General himself has found such a position to be unfounded and inappropriate. Our former New Jersey Attorney General, Gurbir Grewal, previously addressed the issue of "Identifying Government Clients for Purposes of Conflicts of Interest" in an advisory opinion to his eventual successor, and current NJ Attorney General, Matthew Platkin. (Exhibit B, attached)[1]. In that 2019 letter, he acknowledged that "the State is 'so varied, so multifaceted, so extensive that to regard it as one unitary monolithic employer/client is unrealistic."

AG Grewal noted that the Attorney General's Office itself has multiple units, and that those units "do not necessarily share confidential information as part of their day-to-day operations, engage in the same functions, or have the same management teams." Further, he concluded that "the representation of one subsidiary unit within a Department or Authority while being adverse to another subsidiary unit will not necessarily create a conflict." Moreover, AG Grewal noted that whether employment by one unit in the Attorney General's Office creates a conflict is a fact-sensitive inquiry. One key factor he stated that must be considered is "Whether the matter involves an operation or responsibility that is unique to a particular government unit and is distinct from the operations of the other units within the relevant Department or the Authority."

---

[1] The advisory opinion references the unreported decision of Correctional Medical Services v. State, Docket No. MER-L-2771-08 (Law Division, Mercer County 2008). In that matter, the court found no conflict in a law firm representing one unit of the Treasury Department while simultaneously representing a private client against another unit of the Treasury. Further, "The court implicitly rejected the notion that the Treasurer or the Department of the Treasury were the clients for conflicts analysis in all cases where a firm represented one Division in the Department."

Following the logic expressed in AG Grewal's opinion, there is no conflict created by the facts before this Court. The NJ Attorney General's Office is divided into various Divisions, Offices, and Commissions.[2] The matter against Mr. Troiano is being handled by the independent Office of Public Integrity & Accountability (hereinafter "OPIA"). My potential employment, on the other hand, would be within a standalone unit in the Division of Criminal Justice: the Environmental Crimes Bureau (hereinafter "DCJ"). OPIA and DCJ have different Directors, Chiefs of Staff, Management & Executive Teams, Attorneys, and Investigators. There is no apparent relationship between those two separate and distinct units of the Attorney General's Office, and they do not engage in the same functions or types of prosecutions. Therefore, based upon a review of the specific facts before this Court and an analysis of who the "clients" are here, there is no apparent conflict in my continued representation of Mr. Troiano.

With respect to the State's suggestion that the defense should not be allowed "to manufacture cause for appeal" in this case, such an allegation can only be characterized as ironic considering the timing of what has occurred. Having received absolutely no response to my initial application with the Attorney General's office for several months, I was first contacted for an interview five (5) days after the May 19, 2023 oral argument on our first motion to dismiss in this matter. After that interview, this matter was dismissed, and there was again no follow-up regarding any potential employment for a significant period of time. At our December 8, 2023 appearance, DAG Uzdavinis raised the issue of my "pending" job application with the AG's office, at a time when the position I had applied for was no longer likely to be created, and I indicated that I believed that application to be dead. Four (4) days later, I was contacted for a second interview. Then, shortly after notifying DAG Uzdavinis that we would be filing a Motion to Sever, and after filing the associated Declaratory Judgment matter, I was contacted for a third interview and ultimately offered a position. Only now, after having a potential trial date assigned, has the State formally objected to my continued participation in this matter. If, as the State argues here, it is one big office with the same people involved, then by that logic it would be the State that is "manufacturing" this suggested conflict. I simply don't believe that to be the case, and the timing simply highlights the actual separation and disconnect between DCJ and OPIA.

Finally, this matter should be evaluated in light of my role as an independent contract attorney for the firm of Hornstine & Vanderslice LLC. Although I was brought in to specifically handle this matter, I am not a member or employee of the firm. The only other attorney associated with the firm who is intimately familiar with the details of the discovery and Mr. Troiano's defense is Louis F. Hornstine, Esq. Mr. Hornstine, a retired NJ Superior Court Judge, serves the firm in an "of counsel" role and is limited in his participation in contested matters pursuant to Directive #5-08 issued by the Administrative Office of the Courts. (Exhibit C, attached).

Specifically, Guidelines 1 and 2 of that Directive allow Mr. Hornstine's involvement with all administrative aspects of the case, including the drafting and preparation of briefs and other papers, but prohibits him from signing those pleadings, serving as trial counsel, or appearing before the Court on any contested proceedings in the matter. Therefore, in the event that the Court were to find a conflict in my continued representation as Mr. Troiano's designated counsel, there is no one from the firm that would be both familiar with the facts *and* able to step into my place.

---

[2] See https://www.njoag.gov/about/divisions-and-offices/

Therefore, if the Court accepts the State's argument and precludes my further representation, Mr. Troiano would have to find a new attorney that would be starting from the beginning, after having this matter already languish for twenty (20) months. That attorney would have to review more than 22,000 pages of discovery, listen to hours of witness interviews, and the likely result would be to delay this matter for another year or more. This would serve as a significant prejudice to Mr. Troiano considering the stage we are at in these proceedings.

I thank Your Honor in advance for considering these issues, and for any courtesies extended in allowing this matter to proceed to a swift conclusion.

Respectfully,

Brian A. Pelloni, Esq.

cc: Brian Uzdavinis, DAG (via eCourts notification)

2014 WL 3953107
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Victor McCARGO, Defendant–Appellant.

A-5124-11T2
|
Submitted Feb. 25, 2014.
|
Decided Aug. 14, 2014.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 95–04–0862.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (William Welaj, Designated Counsel, on the brief).

Warren W. Faulk, Camden County Prosecutor, attorney for respondent (Nancy P. Scharff, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Before Judges MESSANO and ROTHSTADT.

Opinion

PER CURIAM.

***1** Defendant Victor McCargo was convicted of murder and related charges in the August 27, 1994 death of Ronald Shaw. The trial judge sentenced defendant to a term of life imprisonment with a thirty-year period of parole ineligibility. In an unpublished opinion, we affirmed defendant's conviction and sentence. *State v.. Victor McCargo,* No. A–0998–98 (App.Div. Nov. 21, 2000). The Supreme Court denied defendant's petition for certification. 167 *N.J.* 634 (2001). Defendant thereafter filed a petition for post-conviction relief that was denied by the Law Division without an evidentiary hearing. In an unpublished opinion, we reversed and remanded the matter for further proceedings. *State v. Victor McCargo,* No. A–5691–06 (App.Div. Nov. 16, 2009) (slip op. at 10).

We provide some background before turning to the events that followed our remand and led to the present appeal. Defendant's PCR petition, filed in 2001, was supported by a certification by Jaime Kaigh, Esq., from the Office of the Public Defender, "lead counsel during [the] pre-trial, trial and sentencing phases" of defendant's case. Kaigh further certified that he "believe[d][he] discussed the possibility of raising an intoxication defense with Jeffrey Klavens, ... who served as co-counsel...." Because Klavens handled the direct examination of defendant at trial, Kaigh believed Klavens would discuss the issue with defendant, and Kaigh had no recollection of ever speaking to defendant about "the possibility or feasibility of raising an intoxication defense in this matter[,]" or discussing it with Klavens. In light of the certifications filed by defendant, his brother and a friend, we concluded that Kaigh's certification alone was inadequate to determine, as the PCR judge had, that "counsel considered the issue and selected one avenue of defense over another." *McCargo, supra,* slip op. at 8.

We also noted that defendant raised an additional allegation in his petition that PCR counsel failed to present, and the PCR judge failed to address. *Ibid.*

> [T]he attorney who served as co-counsel at trial had a conflict of interest in that he had submitted an employment application to the prosecutor's office which was prosecuting defendant. In his papers, [defendant] alleged that co-counsel did not appear at sentencing because he was attending a job interview that day with the prosecutor's office. In our review of the record on appeal, we have noted that the trial transcripts indicate that co-counsel appeared every day of the trial except for the day of sentencing. The transcript for that day contains no mention of his presence.
>
> [*Ibid.*]

We concluded defendant's allegation in this regard "raise[d] troubling issues of conflict of interest which we [could] not disregard." *Id.* at 9. However, "[b]ecause there [was] no record on th[e] question, we [were] unable to conclude whether it [was] entirely devoid of merit or whether defendant [was] entitled to further relief." *Ibid.*

***2** On November 14, 2011, Judge Michele M. Fox, who was not the trial or PCR judge, conducted an evidentiary hearing

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

on our remand. At the start, PCR counsel informed Judge Fox that he intended to call Klavens as his only witness and that after fully discussing the matter with defendant, it was defendant's decision not to testify at the hearing.

We synopsize Klavens' testimony, deferring as appropriate to the factual findings made by Judge Fox, and set forth in her oral opinion of January 6, 2012, from which we quote as necessary. *See State v. Feaster,* 184 *N.J.* 235, 278 (2005) (noting appellate courts defer to the factual findings made by the PCR judge following an evidentiary hearing when they are supported by adequate, substantial and credible evidence).

Judge Fox found Klavens to be a credible witness. Klavens was brought into the case by Kaigh and first met with defendant approximately three weeks before trial. He "carefully reviewed the discovery with his client, and ... discussed with him the fact that asserting an intoxication defense would weaken and undermine [the] self-defense scenario[ ] suggested by ... defendant's statement to the police." Klavens also discussed with defendant "those aspects of discovery that would have been inconsistent with an intoxication defense [,]" and he also spoke to Kaigh about it. "[B]oth agreed that ... that type of a defense would not be as feasible as a self[-]defense assertion." Judge Fox concluded

> based upon the testimony given by ... Klavens under oath at the evidentiary hearing, as well as a review of th[e] file, that trial counsel adequately discussed the possibility of intoxication as a defense with co-counsel and ... defendant, and only after such discussions with co-counsel and ... defendant, an election was made to pursue a self[-]defense assertion.

Turning to the second issue, Klavens' possible conflict of interest, Judge Fox found that Klavens had sent out several resumes seeking employment in December 1996, one of which was sent to the Camden County Prosecutor's Office (CCPO), the same office that represented the State at defendant's trial, and for which Klavens had worked a decade earlier. Sometime during the week before trial commenced on May 20, 1997, Klavens was invited for an interview. Klavens contacted the CCPO and selected June 9, 1997 as the interview date, believing defendant's trial would be completed by then. Before the interview, the CCPO contacted Klavens and asked if he was willing to accept a position at the entry salary level, with a substantial increase the following year. Klavens responded by saying he was unwilling "to accept a position under those circumstances."

Klavens nevertheless intended to go to the interview, and he advised defendant of his intention on the morning of June 9, 1997. The transcript of the June 9 court session reveals that Klavens was present in court that day when the jury was charged and deliberated; he also was present when the judge responded to a jury question.

***3** When he spoke with defendant, Klavens told his client that he was not accepting any position with the CCPO, and that the interview would not affect his representation of defendant. Klavens told defendant that the best thing he (Klavens) could do to enhance his job prospects would be to secure an acquittal for defendant. According to Klavens, defendant raised no concerns and found it humorous that Klavens intended to turn down any entry level offer. Klavens denied defendant's assertion that he was absent from defendant's sentencing, or that Klavens' pending application and interview with the CCPO "compromise[d] his representation of ... defendant."

Judge Fox noted that the situation did not present a "per se conflict of interest," and therefore, quoting *State v. Norman,* 151 *N.J.* 5, 25 (1997), the court must assess " 'the potential or actual conflict of interest' " and " 'if significant, a great likelihood of prejudice must be shown ... to establish constitutionally defective representation of counsel.' " Judge Fox observed that no reported New Jersey decision was specifically on point.

She therefore considered *ABA Comm. on Ethics & Prof'l Responsibility,* Formal Op. 96–400 (1996), entitled "Job Negotiations with Adverse Firm or Party." ("*ABA Formal Opinion* "). Judge Fox noted that critical to whether a lawyer's continuing representation was "materially limited" by pursuit of employment with an adversary firm was consideration of whether the lawyer might seek to "curry favor with or not ... antagonize [a] prospective employer." She accepted Klavens' credible testimony that he had no intention of accepting the entry-level position, and knew before any interview that "he would not take a position with the [CCPO]."

The judge also noted that defendant failed to "identify" how Klavans' representation was in any way "materially limit[ed]" by his pending application and interview. She concluded that Klavans had not committed an ethical violation, that his application and interview with the CCPO did not create a conflict of interest that was likely to prejudice defendant. She entered an order on January 6, 2012, denying defendant's PCR petition, and this appeal followed.

Exhibit A - Page 2 of 6

Before us, defendant raises the following points:

POINT I: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST [-]CONVICTION RELIEF SINCE THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF TRIAL COUNSEL'S FAILURE TO THROUGHLY INVESTIGATE AND PRESENT AN INTOXICATION DEFENSE ON THE DEFENDANT'S BEHALF AT TRIAL, EITHER IN CONJUNCTION WITH THE DEFENSE OF SELF DEFENSE ACTUALLY ASSERTED AT TRIAL, OR IN LIEU OF SUCH A DEFENSE, WHICH WAS UNTENABLE UNDER THE CIRCUMSTANCES OF THE CASE.[1]

POINT II: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST [-]CONVICTION RELIEF AS A RESULT OF TRIAL COUNSEL'S APPLICATION FOR EMPLOYMENT WITH THE PROSECUTOR'S OFFICE WHICH WAS IN EFFECT DURING THE COURSE OF THE DEFENDANT'S TRIAL, THEREBY CREATING AN INHERENT CONFLICT OF INTEREST.

***4** In a pro se supplemental brief, defendant raises the following argument:

POINT ONE

THE PCR COURT ERRED IN DENYING THE DEFENDANT'S CLAIM THAT HE WAS SUBJECTED TO AN ADVERSE CONFLICT OF INTEREST, AND BY APPLYING AN ERRONEOUS STANDARD OF REVIEW BY NOT ADDRESSING THE CONFLICT UNDER PRESUMPTION OF PREJUDICE STANDARD, THEREFORE THE CONVICTION SHOULD BE REVERSED.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test formulated in *Strickland v. Washington,* 466 *U.S.* 668, 687, 104 *S.Ct.* 2052, 2064, 80 *L. Ed.*2d 674, 693 (1984), and adopted by our Supreme Court in *State v. Fritz,* 105 *N.J.* 42, 58 (1987). First, a defendant must show " 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment.' " *Fritz, supra,* 105 *N.J.* at 52 (quoting *Strickland, supra,* 466 *U.S.* at 687, 104 *S.Ct.* at 2064, 80 *L. Ed.*2d at 693). Second, a defendant must prove that he suffered prejudice due to counsel's deficient performance. *Strickland, supra,* 466 *U.S.* at 687, 104 *S.Ct.* at 2064, 80 *L. Ed.*2d at 693. Defendant must show by a "reasonable probability" that the deficient performance affected the outcome. *Fritz, supra,* 105 *N.J.* at 58.

"In determining whether defense counsel's presentation was deficient, '[j]udicial scrutiny ... must be highly deferential', and must avoid viewing the performance under the "distorting effects of hindsight." *State v. Arthur,* 184 *N.J.* 307, 318–319 (2005) (quoting *Norman, supra,* 151 *N.J.* at 37).

> Because of the inherent difficulties in evaluating a defense counsel's tactical decisions from his or her perspective during trial, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."
>
> [*Id.* at 319 (quoting *Strickland, supra,* 466 *U.S.* at 689, 104 *S.Ct.* at 2065, 80 *L. Ed.* at 694–95).]

"Counsel's 'strategic choices made after a thorough investigation of [relevant] law and facts ... are virtually unchallengeable.' " *State v. Petrozelli,* 351 *N.J.Super.* 14, 22 (App.Div.2002) (alterations in original) (quoting *Strickland, supra,* 466 *U.S.* at 690–91, 104 *S.Ct.* at 2066, 80 *L. Ed.*2d at 695).

Defendant argues that trial counsel provided ineffective assistance because self-defense was not a viable defense, and intoxication, although not a complete defense, would have potentially negated the mental state necessary to have found defendant guilty of purposeful or knowing murder, or felony murder. This argument, however, is a textbook example of second-guessing the strategic decisions of trial counsel made after adequate investigation and preparation.

***5** At trial, defendant testified and explained that the victim had approached defendant and others armed with a gun. Although the victim left and entered his car, defendant believed he still had the gun and intended to use it. When the victim approached in his car and engaged defendant again, defendant shot first. At the remand hearing, Klavens explained that he did not pursue an intoxication defense because he believed the assertion of such a defense would undermine the self-defense claim. He further testified that

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

he discussed this fully with defendant. As already noted, there was no other evidence adduced at the remand hearing, since defendant chose not to testify or produce any other witnesses. Under these circumstances, we concur with Judge Fox, who concluded that defendant failed to establish a claim of ineffective assistance of counsel on this point.

We turn to defendant's second argument. Defendant contends that, despite Judge Fox's finding to the contrary, it was unlikely that Klavens actually spoke to him about the interview with the CCPO on June 9, and, in fact the interview most likely occurred earlier in the trial. Defendant claims there was no "legitimate justification" why Klavens waited to tell him of the interview, and the delay indicates that Klavens was aware of "at the very least, an appearance of impropriety." Defendant contends there was "a substantial likelihood of prejudice," once again citing only Klavens' failure to raise the intoxication defense.

In *Norman,* the Court reaffirmed its earlier holding in *State v. Bellucci,* 81 *N.J.* 531, 538 (1980).

> *Bellucci* ... created a two-tier system for evaluating conflict-of-interest claims, an approach to which we have continued to adhere. If a private attorney, or any lawyer associated with that attorney, is involved in simultaneous dual representations of codefendants, a per se conflict arises, and prejudice will be presumed, absent a valid waiver. Otherwise, the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice must be shown in that particular case to establish constitutionally defective representation of counsel.
>
> [*Norman, supra,* 151 *N.J.* at 24–25 (citations omitted).]

Here, since there was no dual representation, Judge Fox properly concluded there was no per se conflict with presumed prejudice to defendant.

Nevertheless, "[t]he paramount obligation of every attorney is the duty of loyalty to his client." *State v. Cottle,* 194 *N.J.* 449, 463 (2008). This basic maxim finds its voice in *RPC* 1.7. At the time of trial, *RPC* 1.7(b) provided that "[a] lawyer shall not represent a client *if the representation of that client may be materially limited* ... by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after a full disclosure of the circumstances and consultation with the client...." (Emphasis added).[2] The latest iteration of the *RPC* provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if ... there is a *significant risk* that the representation of one or more clients will be *materially limited* ... by a personal interest of the lawyer." *RPC* 1.7(a)(2) (emphasis added).

***6** *RPC* 1.7(a)(2) "is typically implicated when the lawyer stands to derive some benefit, in addition to a legal fee, from the matter or transaction with respect to which he or she is advising the client." Michels, *New Jersey Attorney Ethics* 19:3–2 (2013). However, the *RPC* has been applied in other circumstances where the benefit to the attorney was not financial in nature, or tied to the particular matter in which he or she was representing the client.

For example, in *Cottle,* defense counsel never disclosed to the defendant that he too was a criminal defendant being prosecuted by the same county prosecutor's office. 194 *N.J.* at 452. The attorney was enrolled in the Pretrial Intervention Program and was required regularly to report to the prosecutor's office. *Ibid.* The Court held this presented a "per se conflict of interest," such that "[w]ithout an informed waiver made in court and on the record, *prejudice will be presumed, rendering the representation ineffective.*" *Ibid.* (emphasis added). As the Court noted,

> An attorney should never place himself in the position of serving a master other than his client or an interest in conflict with his client's interest. Surely, the attorney must never be perceived as having a reason to curry some personal favor with the prosecutor's office at the expense of his client.
>
> [*Id.* at 463–64.]

The Court has since recognized *Cottle* to be one of only two cases decided since *Fritz* in which prejudice was presumed. *State v. Miller,* 216 *N.J.* 40, 60 (2013).

On the other hand, in *State v. Davis,* 366 *N.J.Super.* 30, 42 (App.Div.2004), we concluded that an attorney's civil suit against the Office of the Public Defender did not present a disqualifying conflict of interest to his continued representation of a criminal defendant as a pool attorney. We rejected the State's concerns about the potential for ineffective assistance of counsel claims as "speculative and thus insufficient to constitute grounds for [the attorney's] disqualification." *Id.* at 37.

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

In *Davis, id.* at 40, we cited with approval the district court's opinion in *Essex County Jail Annex Inmates v. Treffinger,* 18 *F.Supp.*2d 418 (D.N.J.1998). The court there noted,

> Because of the virtually limitless cases in which a "conflict" may theoretically arise when a lawyer's self-interest is implicated, there is a very real danger of analyzing these issues not on fact but on speculation and conjecture. Accordingly, when a conflict of interest issue arises based on a lawyer's self-interest, a sturdier factual predicate must be evident than when a case concerns multiple representation. Only by requiring a more specific articulation of the facts giving rise to a conflict situation can courts refrain from effectively "straightjacket[ing] counsel in a stifling, redundant ... code of professional conduct." Supposition and speculation, therefore, will simply not do.
>
> ***7** [*Treffinger, supra,* 18 *F.Supp.*2d at 432 (quoting *Beets v. Scott,* 65 *F.*3d 1258, 1270 (5th Cir.1995), *cert. denied, sub nom Beets v. Johnson,* 517 *U.S.* 1157, 116 *S.Ct.* 1547, 134 *L. Ed.*2d 650 (1996)).]

Noting there was no reported case precisely on point, Judge Fox utilized the ABA *Model Rules of Professional Conduct,* and commentary thereto, for guidance. Our "Court adopted the ABA ... Model Rules ... in 1984 'to harmonize New Jersey's standards with the Model Rules and to provide clear, enforceable standards of behavior for lawyers.' " *In re Opinion No. 17–2012 of the Advisory Comm.,* —— N.J. ——, —— (2014) (quoting *State v. Rue,* 175 *N.J.* 1, 14 (2002)).

In this case, the question is whether, under the former *RPC* 1 .7(b), Klaven's representation of defendant may have been "materially limited" by any personal interest Klavens had in obtaining employment with the CCPO, or, under current *RPC* 1.7(a)(2), whether there was an actual or potential conflict of interest that posed a "significant risk" his representation of defendant would "be materially limited." *See Norman, supra,* 151 *N.J.* at 25 (holding that *the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice* must be shown to establish constitutionally defective representation) (emphasis added).

Commentary to ABA *Model Rule* 1.7 addresses what constitutes "a significant risk of a material limitation." *In re Opinion No. 17–2012, supra,* —— *N.J.* at ——.

> [T]here must be "a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." To identify such a risk, "[t]he critical questions are the likelihood that a difference in interests" will arise, and "if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."
>
> [*Ibid.* (quoting ABA *Model Rule* 1.7, comment 8).]

Of course in this case, the issue presented did not involve the competing interests of two clients, as was the case in *In re Opinion No. 17–2012.* The commentary to ABA *Model Rule* 1.7 recognizes that "when a lawyer has discussions concerning possible employment with ... a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client." ABA *Model Rule* 1.7, comment 10.

However, as Judge Fox noted, the ABA *Formal Opinion* provides that "[a] possible conflict does not itself preclude the representation," and "[t]he critical questions are the likelihood that a conflict will eventuate, and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose course of action that should reasonably be pursued on behalf of the client." *Id.* at 3–4. These two issues are informed by "two overriding factors," i.e., "the nature of the lawyer's role in the representation of the client; and the extent to which the lawyer's interest in the firm is concrete, and has been communicated and reciprocated." *Id.* at 4. "[I]f a lawyer has played a limited, but now concluded role for a client, there is ordinarily no basis for concluding that the lawyer's job search will prejudice the interests of the client...." *Ibid.*

***8** Additionally, "an initial solely informational discussion might be agreed to and even occur without implicating *Rule* 1.7(b)." *Id.* at 5 n. 9. "For [a] lawyer ... who is looking at options in a preliminary fashion, such purely informational discussions might well not 'materially interfere with' his or her judgment and, therefore, not trigger the consultation and consent required by *Rule* 1.7(b)." *Ibid.*

We cannot conclude on this record that Klavens actually secured defendant's consent pursuant to former *RPC* 1.7(b). However, Judge Fox found that there was not a significant risk that Klavens' representation of defendant would be materially limited, because Klavans decided before going to the interview that he would not accept the position,

Exhibit A - Page 5 of 6

if indeed one was offered. Moreover, defendant failed to establish the "great likelihood of prejudice," *Norman, supra,* 151 *N.J.* at 25, because the only specific, substantive claim of ineffective assistance was Klavens' failure to assert the intoxication defense, something Judge Fox already decided was not evidence of deficient performance. We agree with Judge Fox's analysis of the issue.

Affirmed.

All Citations

Not Reported in A.3d, 2014 WL 3953107

Footnotes

1 We have omitted the sub-points of this argument.

2 At the time, our *RPC* mirrored the language of ABA *Model Rule* 1.7 which provides, "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's ... own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation...."

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 081
TRENTON, NJ 08625-0080

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

GURBIR S. GREWAL
Attorney General

May 15, 2019

Matthew Platkin, Esq.
Chief Counsel, Office of the Governor
State House, Box 001
Trenton, NJ 08625

Re: *Identifying Government Clients for Purposes of Conflicts of Interest*

Dear Mr. Platkin:

You have asked for our advice regarding whether and when special counsel appointed to represent specific New Jersey state government entities can represent private parties with interests adverse to other New Jersey state government entities. This Office first addressed this issue in an August 2, 1984 letter from then Attorney General Irwin I. Kimmelman (the "Kimmelman Letter," a copy of which is attached). Subsequent case law has confirmed and expanded upon the position the Kimmelman Letter espoused. In short, the Rules of Professional Conduct ("RPCs") require a determination regarding whether special counsel is simultaneously representing and adverse to the same specific government client. The relevant government client may be a particular Department or Authority, or it may be a specific subsidiary unit within that Department or Authority. While identification of the particular government client is inherently fact bound, this letter provides general guidance for conducting that conflicts analysis.

An attorney who represents a public body has the same obligation as any other attorney to comply with RPCs regarding conflicts of interest. See, e.g., In re Advisory Comm. On Prof'l Ethics Opinion 621, 128 N.J. 577, 592 (1992); Michels, New Jersey Attorney Ethics § 20:1-1 (2017). As relevant here, RPC 1.7(a) provides that an impermissible conflict exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer. In other words, RPC 1.7 establishes that no attorney can serve two masters. See State ex rel. S.G., 175 N.J. 132, 139 (2001). A government entity—unlike private clients—cannot waive such conflicts of interest. RPC 1.7(b)(1); RPC 1.8(l); RPC 1.9(d).

The question thus becomes which government entity qualifies as the represented "client" for conflicts purposes. Longstanding Attorney General guidance and New Jersey case law make clear the State is "so varied, so multifaceted, so extensive that to regard it as one unitary monolithic

HUGHES JUSTICE COMPLEX · TELEPHONE: (609)292-9660 FAX: (609)292-4299
New Jersey is an Equal Opportunity Employer · Printed on Recycled Paper and Recyclable

employer/client is unrealistic." In re Opinion 621, 128 N.J. at 597. Indeed, the Kimmelman Letter advised that counsel appointed to represent a specific "agency" may not appear on behalf of private parties before that agency or take adversarial positions against it on behalf of other clients. The Kimmelman Letter recognized that representation of a particular government entity while being adverse to a different government entity does not necessarily create a conflict of interest. The Department has consistently taken that position in the years since.

Subsequent case law has further established that the retention of special counsel for discrete engagements on behalf of one government unit subsidiary to a Department or Authority does not necessarily disqualify the lawyer from being adverse to another unit within the same Department or Authority. In In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. 549 (2006), the Court considered whether a law firm was precluded from serving simultaneously as bond counsel for the governing body of a municipality and representing a private client before one of the municipality's boards or agencies. Id. at 555. The Court held that "an attorney who plenarily represents an agency subsidiary to the governmental entity's governing body is barred from representing private clients before that subsidiary agency only." Id. at 553. The analysis was based on an examination of the relationship between the entity represented and the municipality to determine whether counsel for the entity in fact has the municipality as a client for purposes of determining the existence of a conflict with the interests of the attorney's private client. Id. at 560. The Court concluded that a law firm is "not *per se* precluded from serving simultaneously as bond counsel for the governing body of a municipality and representing a private client before one of [its] boards." Id. at 568.

The Superior Court's ruling in the unreported decision in Correctional Medical Services v. State, Docket No. MER-L-2771-08 (Law Division, Mercer County 2008), also confirms that the government client may be a subsidiary component of a Department or Authority. In that case, the court considered whether representation of the Treasury Department's Division of Pensions and Benefits by Ballard, Spahr, Andrews and Ingersoll, L.P. and that same law firm's representation of a private party in contract litigation with the Treasury Department's Division of Purchase and Property created a conflict of interest. Id., slip op. at 1. The court found no conflict. Among other things, the court found that the firm did not represent the Treasurer. Instead, the court concluded that the firm's representation extended only to the pension plans and the Division of Pensions and Benefits. Id., slip op. at 31-40. The court recognized that the firm was adverse to the Division of Purchase and Property, but that matter was "substantially different and discreet" from the firm's representation of the Division of Pension and Benefits. Id., slip op. at 50. The court implicitly rejected the notion that the Treasurer or the Department of the Treasury were the clients for conflict analysis in all cases where a firm represented one Division in the Department.

That longstanding conclusion makes sense. The observation that the State is "so varied, so multifaceted, so extensive that to regard it as one unitary monolithic employer/client is unrealistic" is applicable to many Departments within the State. Several Departments have various functions that are distinct and essentially unrelated. For example, Treasury includes, among other entities, the Division of Pensions and Benefits, the Division of Purchase and Property, and the Division of Taxation. The Department of Health includes, among other entities, the Office of the Chief State Medical Examiner and the Office of Health Care Financing. And my own Department includes,

among other entities, the Division of Consumer Affairs, the Division of Gaming Enforcement, and the Division on Civil Rights. The units in a Department do not necessarily share confidential information as part of their day-to-day operations, engage in the same functions, or have the same management teams. Moreover, such units generally retain outside counsel to perform discrete functions that do not involve all of the operations of the larger entity to which that unit belongs. See Fitzgerald v. Linnus, 336 N.J. Super. 450, 470-71 (App. Div. 2001) (recognizing that an attorney and client may limit the scope of representation). In light of the complexity and diversity of the government entities within a single Department or Authority, the representation of one subsidiary unit within a Department or Authority while being adverse to another subsidiary unit will not necessarily create a conflict.

As a result, the RPC conflict analysis requires identifying with particularity which unit is truly the party in interest and is therefore the relevant government client. In some instances, the client may be a Department or an Authority, but in other cases the client may be a subsidiary unit other than a Department or an Authority.

As the above discussion makes clear, the identification of the particular government client is a fact sensitive process that must rely upon a careful analysis. Based on longstanding practice and the relevant case law, factors that may be considered include but are not limited to:

- Whether the matter involves an operation or responsibility that is unique to a particular government unit and is distinct from the operations of the other units within the relevant Department or the Authority.

- Whether retention of outside counsel is limited to a circumscribed and well-defined role. For example, counsel's retention is limited to serving as bond counsel, or providing tax advice to a pension fund.

- Whether outside counsel is dealing primarily with personnel inside the unit when providing advice or formulating litigation and settlement strategy.

- Whether resolution of the matter will directly affect the authority, funding, or privileges of another government unit within the relevant Department or Authority.

The following factors provide additional evidence that a subsidiary unit is the government client, but these factors are not necessary for reaching such a conclusion:

- The represented unit has "sue and be sued" authority.

- The represented unit is "in but not of" the relevant Department.

Please let me know if I can be of further assistance.

Very truly yours,

Gurbir S. Grewal
Attorney General

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY

PHILIP S. CARCHMAN, P.J.A.D.
ACTING ADMINISTRATIVE
DIRECTOR OF THE COURTS

RICHARD J. HUGHES
JUSTICE COMPLEX
PO BOX 037
TRENTON, NEW JERSEY 08625-0037

[Corrected Copy]

Directive # 5-08
(supersedes Directive #7-04)

To: **All Judges and Justices, Including Retired Judges and Justices**

From: **Philip S. Carchman, P.J.A.D.**

Subject: **Guidelines on the Practice of Law by Retired Judges – Reissuance (with One Revision)**

Date: **March 24, 2008**

This Directive reissues the **Guidelines on the Practice of Law by Retired Judges**, which previously were most recently issued by Directive #7-04 (May 17, 2004). This supersedes that prior Directive.

In 2006 the Supreme Court adopted amendments to Rule 1:40-4(b) to change the initial number of hours of mediation provided at no cost to the parties from three hours to two hours. That amendment necessitated a conforming amendment to Guideline 7, simply changing the word “three” to “two”. That word change is the only substantive revision to the Guidelines effected by this Directive (albeit a bit belatedly).

The Supreme Court has authorized reissuance of these Guidelines, which set out the limitations on the practice of law by former judges who have retired under the provisions of the Judicial Retirement System Act (N.J.S.A. 43:6A-1 et seq.).

Guideline 1. A retired judge may be associated in the practice of law with other attorneys. A retired judge’s name may appear on the letterhead, on the office door, but not in the firm name. A retired judge may not sign any papers filed in court, including pleadings. In any cases tried by the firm before a jury, the retired judge’s name should not be referred to in the presence of the jury. The restrictions on the practice of law by the retired judge are personal and do not extend to those with whom the judge may be associated in the practice of law; R. 1:15-4 does not apply to retired judges. Retired judges

should be aware of N.J.S.A. 52:13D-17.2c, which prohibits any representation of, appearance for, or negotiation on behalf of a casino licensee or an applicant to be a casino licensee by a firm, partnership, or corporation with which a retired judge is associated for a period of two years from the date of retirement unless (a) the retired judge is associated with the firm, partnership or corporation in a position considered "of counsel" that does not entail any equity interest in the firm, partnership, or corporation; and (b) the retired judge is screened for that two-year period from personal participation in any such representation, appearance, or negotiation.

Guideline 2. A retired judge may not serve as an attorney in any contested matter in any court of the State of New Jersey. This prohibition includes participating in the actual conduct of any proceeding before the court, appearing at counsel table during the course of a court proceeding, and serving therein either as associate counsel or counsel of record.

Office work in connection with pending or proposed litigation is not prohibited. Thus, pleadings may be drafted, interrogatories framed and answered, and briefs, motions and other papers may be prepared. It is not permissible, however, for the retired judge's name to appear on any papers, including any indication that the judge is "of counsel," "on the brief," or is connected in any way with the litigation. Similarly, a retired judge may participate in out-of-court settlement discussions, or in the taking of depositions prior to trial, but may not participate in any settlement conference before the court (whether in open court or in chambers), nor should reference be made in any courthouse conferences to the fact that the judge has personally been involved in such negotiations, nor should the judge participate in any court proceeding with regard to any depositions that he or she may have taken.

Guideline 3. Subject to the provisions of Guideline 7 infra, a retired judge is not precluded from serving as attorney for a decedent's estate or as an executor, guardian, trustee, or in any other fiduciary capacity, provided that in any litigation that may develop in the course of the performance of such duties the judge is represented by other counsel, who may be a member of the firm with which the judge is associated. A retired judge may not handle any other uncontested matters in any court, including those that require only approval of ex parte orders or other papers which may be considered pro forma and require little if any exercise of judicial discretion.

Guideline 4. A retired judge may not serve as attorney in any contested or uncontested matters before either State or local administrative agencies, boards, or tribunals exercising a discretionary or quasi-judicial function, except before the Transfer Inheritance Tax Bureau when acting as attorney for the estate and not specially retained. A retired judge may not represent parties before auto arbitration panels.

Guideline 5. A retired judge may not serve as attorney for any person before a District Ethics Committee, a Committee on Character, or any other committee or body appointed by the Supreme Court.

Guideline 6. A retired judge may practice before the federal courts or federal agencies, whether within or without the State.

Guideline 7. A retired judge may not accept fee-generating court-initiated appointments, e.g., appointments to serve as a receiver, condemnation commissioner, guardian ad litem, mediator, arbitrator, or discovery master except as set forth below.

A retired judge may accept fee-generating court-initiated appointments in the following circumstances only:

(a) as an arbitrator in the statutory or Court-approved arbitration programs, as set forth in R. 4:21A-1 et seq.;

(b) as a mediator in the Statewide Civil Mediation Program, and in the Court-approved presumptive mediation pilot program, provided that the retired judge meets the experiential and training requirements set forth in Rules 1:40-12(a), 1:40-4(e)(1) and 1:40-12(b) and provided that the retired judge agrees to be subject to the same conditions that are applicable to all other mediators in the program, e.g., providing the first two hours of mediation at no cost to the litigants pursuant to R. 1:40-4(b) and Appendix XXVI ("Guidelines for the Compensation of Mediators Serving in the Civil Mediation Program").

This guideline is not intended to preclude a retired judge from accepting a fee-generating position as a mediator, arbitrator, or discovery master where the parties to the case initiate the appointment, select the retired judge who is to be appointed, establish the fee arrangement, and the court's only participation is to memorialize their agreement in an appropriate order. Such memorialization shall be by the Assignment Judge. A retired judge may accept fiduciary appointments at the specific request of interested family members (e.g., Administrator C.T.A.) provided such appointments do not contravene any of the other restrictions set forth in this Directive.

Guideline 8. It is improper for a retired judge to appear in a New Jersey court as an expert witness (such as to testify as to reasonableness of attorney fees) or in any court as a character witness.

Guideline 9. It is improper for a retired judge to appear in court to testify as an expert witness in legal malpractice cases or as to a standard of conduct by a lawyer in related matters.

Guideline 10. A retired judge may serve as legal adviser to a public agency, if the duties and responsibilities of such position do not contravene these Guidelines. Generally, the role of a retired judge associated with a public agency should be of the same nature as that of a retired judge acting as "of counsel" to a law firm. A retired judge should not act as chief counsel to a public agency (e.g. county counsel), since such a role would directly involve the judge in the conduct of litigation involving the agency. Further, it would be inappropriate for a retired judge to appear at a public meeting as an adviser to a public agency. Such an appearance may give rise to a suspicion that the judge is attempting to use the judge's status to advance the position of the agency.

P.S.C.

cc: Chief Justice Stuart Rabner
Christina P. Higgins, Acting Deputy Admin. Director Designate
AOC Directors and Assistant Directors
Clerks of Court
Trial Court Administrators
Helen E. Szabo, Esq., Judge Support Services
Steven D. Bonville, Esq., Special Assistant
Francis W. Hoeber, Special Assistant