

**Louisiana State Bar Association
Rules of Professional Conduct Committee**

PUBLIC Opinion 07-RPCC-011¹

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Conflicts of Interest and the Part-time Prosecutor

Prior to undertaking a civil representation, a lawyer who also serves as a part-time prosecutor should conduct a reasonable investigation into whether the facts of the civil matter would support the filing of criminal charges and, if so, decline the civil representation. In the event the conflict of interest arises only after the civil representation is undertaken, the prosecutor should withdraw from the matter in all respects.

District attorneys in many parishes permit their assistant prosecutors to maintain private practices, notwithstanding their position as public officials. The policy is a useful one. Especially with respect to rural areas, it increases the availability of competent prosecutors, as well as the likelihood that longer tenures of office will be served by the prosecutors.² Provided the public and private dimensions of the prosecutor's practice remain separate, the criminal

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² See, e.g., *State v. Facemire*, 413 S.E. 2d 183, 184-185 (W. Va. 1991): “...In response to the arguments raised by petitioners, respondents point out that legislation permitting part-time prosecutors and their part-time assistants to engage in civil practice aside from their public duties was designed to enable sparsely-populated counties to attract competent legal counsel as prosecutors and assistants...”

justice system is not harmed by the “part-time” nature of the prosecutor’s employment.³ On the other hand, serious conflict of interest issues are presented when the lawyer’s two roles unexpectedly intersect. This opinion will explore the duties of a part-time prosecutor when faced with such conflicts and the prophylactic steps a prosecutor should take to avoid—or, at the least, minimize—the potential for a conflict of interest.

A. The General Landscape

Conflicts of interest of every kind and character, because they implicate the touchstone principles of client loyalty and confidence, should be resolved in strict accordance with the Louisiana Rules of Professional Conduct so that public trust in the legal profession is reinforced and not undermined. The importance of those issues is magnified when the conflict involves a part-time prosecutor.

For these reasons, the courts that have addressed this question of legal ethics have carefully scrutinized the appropriate limits of the part-time prosecutor’s civil practice. The starting point of the analysis is two-fold and centers upon the prosecutor’s unique role in the legal system. First, unlike typical civil practitioners, prosecutors are entrusted with powerful discretion to determine, among other things, whether criminal charges will be pursued and, further, whether plea negotiations are appropriate. The discretion is tolerated based on the assurance, rooted in the fundamental nature of the prosecutor’s office, that this duty will be discharged solely with reference to the public interest, unfettered by the prosecutor’s own interests or those of his or her civil clients.

³ Of course, this statement, from a time-management standpoint, further assumes that the prosecutor’s public duties are not neglected due to commitments to civil clients, or *vice versa*. The part-time prosecutor’s duty in that regard, however, is beyond the scope of this opinion.

Second, and similarly, the public rightfully expects impartiality of the part of prosecutors. As a general proposition, public trust is hindered whenever private interests are injected into the process. Moreover, as a specific proposition, civil parties are entitled to litigate on fair terms. In situations where opposing counsel is also the prosecutor in a related criminal proceeding (especially a criminal proceeding against the civil litigant), the civil litigant is at an obvious disadvantage. At best, the civil litigant may harbor a mere apprehension that the course of the civil litigation may influence decisions in the criminal proceeding. At worst, the prosecutor may: (1) affirmatively use the pending criminal charges to gain a civil advantage; (2) allow the wishes of the civil client to supplant independent prosecutorial judgment; and/or (3) use the criminal proceeding to adduce evidence—at public expense—for use in the civil litigation.

Not surprisingly, then, for many years the courts have imposed bright-line standards governing a part-time prosecutor's professional obligations regarding conflicts of interest. In short, the prosecutor's public and private practices simply cannot overlap. Prior to assuming a civil representation, the prosecutor should investigate whether there exists a "reasonable" potential for a conflict of interest, *i.e.*, whether the relevant facts would support an assertion of criminal charges against either the client or the client's opponent in litigation.⁴ If the investigation reveals a potential conflict, the prosecutor should decline the civil representation. In the event the conflict of interest becomes apparent only after the civil representation is commenced, the

⁴ The scope of impermissible conflicts of interest may be even broader. The dissenting judge in *Pennsylvania v. Dunlap*, 377 A. 2d 975 (Pa. 1977), whose opinion was cited with approval by the Supreme Court of Louisiana in the companion cases discussed below, remarked that a part-time prosecutor was conflicted out of a civil representation due to a related criminal proceeding, despite the fact that the criminal defendant was not a named defendant in the civil action.

prosecutor should withdraw in all respects, and a special prosecutor should be appointed to handle the criminal matter.⁵

B. The Louisiana Jurisprudence

The Supreme Court of Louisiana explored this issue relatively recently in companion disciplinary cases: *In re Caillouet*, 2001-2461 (La. 11/9/01), 800 So. 2d 367; and *In re Toups*, 2000-0634 (La. 11/28/00), 773 So. 2d 709. Messrs. Caillouet and Toups were part-time assistant district attorneys for Lafourche Parish who also maintained civil practices, including family law representations. In the matter underlying the disciplinary cases, they represented opposing spouses in the same divorce and community property matter.

Mr. Toups' client (the wife) filed a criminal complaint alleging domestic abuse against her estranged husband while the civil matter was ongoing. Thereafter, the parties, along with their counsel, met and supposedly resolved all their differences, including the allegations of physical abuse. Based upon that compromise agreement, Mr. Caillouet suggested to Mr. Toups that the criminal case against Mr. Caillouet's client (the husband) be "continued without date". Mr. Toups reported that he did not acquiesce to the request, claiming that he wished to confer with his client. Mr. Caillouet's recollection was different. He alleged that Mr. Toups confirmed that the settlement agreement encompassed the allegations forming the criminal complaint and agreed to the continuance.⁶

At the conclusion of the disciplinary proceedings that followed, the Supreme Court of Louisiana disciplined both lawyers. It was determined that Mr. Caillouet violated Rule 1.7 of the Louisiana

⁵ See *Facemire*, 413 S.E. 2d 183, 185.

⁶ The charges against Mr. Toups included a second count. In an unrelated matter, Mr. Toups was accused of "continuing without date" criminal charges filed against another of his civil clients.

Rules of Professional Conduct⁷ by representing his civil client while criminal charges were pending against him. Mr. Toups, likewise, was sanctioned for providing inadequate representation to his organizational client (the Parish), exhibiting a lack of candor toward a tribunal, assisting Mr. Caillouet in connection with his rule violation, and failing to report the professional misconduct of Mr. Caillouet.⁸ As to the duties of part-time prosecutors confronted with conflicts of interest, the Court instructed as follows:

...After considering the important policy reasons behind avoiding conflicts of interest between a district attorney's prosecutorial role [ed., "role"?] on behalf of the state and his duty to protect the interests of his civil clients, we find that, in order to comply with the Rules of Professional Conduct, a district attorney must immediately withdraw from the civil representation of a client when there is substantial reason to believe that charges of criminal conduct have been or will be filed by or against the civil client. When criminal charges have been filed against a civil client, this rule applies even if the charges are unrelated to the civil representation...⁹

⁷ Rule 1.7(a) of the Louisiana Rules of Professional Conduct states: "...Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest 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..."

⁸ Specifically, the Court found violations, respectively, of Rules 1.13(b), 3.3, 8.4(a) and 8.3 of the Louisiana Rules of Professional Conduct. With respect to the second count, the Court held that Mr. Toups ran afoul of Rule 1.7 (Conflicts of Interest) and engaged in conduct prejudicial to the administration of justice, in violation of Rule 8.4.

⁹ See *Toups*, 773 So. 2d 709, at 716.

In reaching this conclusion, the Court referenced the general rule of concurrent client conflicts of interest set forth in Rule 1.7, which is expressly applicable to “*public officers and [government] employees*” pursuant to Rule 1.11.¹⁰

Thus, the conflicts standard for part-time prosecutors in Louisiana seems to be closely in line with the national view. First, as all lawyers should do, the prosecutor should assess the potential for conflict at the outset of the matter, and accept or reject the civil representation accordingly. Second, if the facts giving rise to the civil action later give rise to criminal charges, the prosecutor must withdraw, regardless of whether the charges are filed by or against the client. Third, when charges are pending against the prosecutor’s own client, the duty to withdraw persists even though the charges may be completely unrelated to the civil matter. Stated differently, it is never permissible for a part-time prosecutor to represent a civil client who is, at the same time, a criminal defendant within the prosecutor’s jurisdiction.

Because the holdings were limited to their facts, *Toups* and *Caillouet* leave two questions unaddressed, namely: (1) whether a conflict of interest involving one part-time prosecutor is imputed to the entire office of the district attorney; and (2) whether the civil litigation must directly involve the criminal defendant in order to trigger the rule. The answer to the first question is uncertain. On the one hand, depending upon the manner in which they are structured, indigent defender boards may be considered “firms” for purposes of imputation under Rule 1.10. See *State v. McNeal*, 594 So. 2d 876 (La. 1992) (reversing decision predicated upon erroneous finding that Rule 1.10 does not apply to the Orleans Indigent Defender Program). On the other hand, the Supreme Court of Louisiana recently distinguished *McNeal*, holding that a district attorney’s office is not an “association” under La. Code Cr. P. Art. 671(A)(3), which

¹⁰ Rule 1.11(d) of the Louisiana Rules of Professional Conduct states, in pertinent part: “...*Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee: ... (1) is subject to Rules 1.7 and 1.9; ...*”

mandates the recusal of a judge formerly associated with another lawyer employed in the matter. *State v. Connolly*, 930 So. 2d 951, 954 (La. 2006).¹¹ Given the uncertainty, it still may be prudent in such situations to appoint a special prosecutor depending upon the size of the prosecutor's office and the likelihood that confidential information may have passed from the directly-conflicted prosecutor to his or her fellow prosecutors. Such decisions should be made on a case-by-case basis.

With respect to the second question, the criminal defendant probably need not be a named party to a related civil action in order to trigger the rule. Once again, even when the prosecutor does not also civilly represent the criminal defendant and the criminal defendant is not a named civil party, there would still exist a temptation to use the criminal proceeding to develop evidence beneficial to the prosecutor's civil client. This consideration, coupled with the elevated ethical standard to which prosecutors are held,¹² suggests that a prudent prosecutor should avoid any civil litigation with any link to a pending criminal proceeding.

C. Summary

The rules pertaining to conflicts of interest set forth in the Louisiana Rules of Professional Conduct apply to part-time prosecutors with equal, if not more, force. Under those rules, the prosecutor should conduct a reasonable investigation into whether a conflict exists prior to undertaking a civil representation. If there is potential for a conflict of interest, the civil

¹¹ See also *State v. Gray*, 526 So. 2d 1268 (La. App. 3d Cir. 1988): "...However, the recusal or disqualification of an Assistant District Attorney does not require the recusal of a District Attorney or his other assistants..." (citations omitted). Nonetheless, the "tainted" prosecutor probably would need to be screened from the matter, as described, for example, in Rule 1.12.

¹² *Toups*, at 715-716: "...In our system of justice, we entrust vast discretion to the prosecutor in deciding which cases to pursue, what crimes to charge, and how to allocate limited resources. Because the prosecutor is given such great power and discretion, he is also charged with a high ethical standard..."

representation must be declined. By the same token, if the conflict of interest does not manifest until after the representation is commenced, the prosecutor is duty-bound to withdraw from the civil representation and withdraw from the matter entirely.