

Chapter 2: Ethics and Law
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Newman, J. dissenting: I would grant the State's application to disqualify the Sufrin law firm from representing S.G. Simply stated, an attorney shall not represent an accused who is charged with murdering the attorney's client and to do so is in violation of R.P.C. 1.7. R.P.C. 1.7 is the general rule involving conflict of interest and provides as follows: (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless: (1) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and (2) each client consents after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation. (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or 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, except that a public entity cannot consent to any such representation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

R.P.C. 1.7(a) and (b)].

R.P.C. 1.7 illustrates what is absent in this case, which renders the conflict of interest incurable; namely, that the deceased is in no position to consent to his attorney's representing the person accused of killing him, even if all of the circumstances were fully disclosed. Interestingly, R.P.C. 1.7 carves an exception to consent, depriving a public entity from the ability "to consent to any such representation" even after full disclosure, R.P.C. 1.7(a)(2) and (b)(2). If a public entity is precluded from entering into a consensual arrangement, I fail to see why a client who lacks the capacity to consent should be treated any differently. With this background of R.P.C. 1.7 in mind, it is well to consider the remainder of the rule, which reads: (c) This rule shall not alter the effect of case law or ethics opinions to the effect that: (1) in certain cases or categories of cases involving conflicts or apparent conflicts, consent to continued representation is immaterial, and (2) in certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible, that is, in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.

R.P.C. 1.7(a) and (b)].

There are certain categories of cases involving apparent conflicts in which consent to representation is immaterial. In my view, this is one of those cases because consent cannot be forthcoming from a deceased client who lacks the capacity to consent. Usually, the client may be a witness in a proceeding involving the former attorney and a court could fully explore the circumstances and each of the client's could make a knowing, intelligent, and voluntary decision to consent. Where the client is a victim, it is unlikely that consent will be

permitted because the attorney may have to cross-examine his own client. The result should be no different where the client is unable to consent by reason of death.

The appearance of impropriety rather than an actual conflict, viewed from the perspective of an ordinary knowledgeable citizen acquainted with the facts, would likewise result in disqualification. The fact that the present scenario appears to be a random shooting, described by the majority as the victim being "in the wrong place at the wrong time" makes no difference. No matter how the public is assured that the attorney may not trade on confidential information acquired through the attorney-client relationship, there is no way of knowing with any reasonable certainty that has not been done because the client's voice cannot be heard. Similarly, the attorney's effectiveness could be compromised by reason of the former attorney-client bond, and there is no meaningful way to measure whether this has occurred. The end result is a disservice to the administration of criminal justice. The public should not have to harbor any lingering doubts. The sure way to eliminate this from happening is to preclude an attorney from representing the accused charged with killing his client.

On a practical level, I do not understand why an attorney would place himself or herself in a position of representing an accused charged with murdering that attorney's client. If an acquittal is obtained, there will be suspicions that the attorney traded on confidential information from the decedent, which may have assisted the accused. If there is a conviction, doubts will persist that the attorney's effort may have been affected by the prior relationship with the decedent. In colloquial terms, it is a "no win" situation.

Overshadowing this entire discussion is the accused's constitutional right to counsel of his choice. As the majority has pointed out, that right is not absolute. Here, it would have to yield to the ethical requirements applicable to all lawyers. Had an opinion on this subject already been a fixture in the legal precedents, the attorney would have declined to represent S.G. That not being the case, it should be so now. The Sufrin law firm's representation of S.G. should be terminated. R.P.C. 1.16(a)(1).

CASE 2 of 2

State of New Jersey in the Interest of S.G.
814 A.2d 612
New Jersey Supreme Court
January 27, 2003, Decided

The opinion of the Court was delivered by LaVECCHIA, J. In this case we consider whether a law firm may represent a defendant accused of shooting and killing another of the firm's clients. Our Rules of Professional Conduct (RPCs) prohibit an attorney from undertaking representation of a client when that representation will be directly adverse to the interests of another client. RPC 1.7 (a). For a two-week period, members of the law firm involved here served as the attorney of record for the accused defendant and the victim. That simultaneous representation occurred because a deceased client continues to have interests that are entitled to the protection of the attorney-client relationship until the representation is terminated consistent with our professional and procedural rules. We hold that, during the period of dual representation that occurred here, the interests of the two clients were adverse, resulting in a prohibited actual conflict. Accordingly, the firm may not proceed with the defense, notwithstanding the defendant's desire to consent to the representation.

I. Defendant, S.G., was charged with purposely or knowingly causing death or serious bodily injury resulting in death in violation of N.J.S.A. 2C:11-3(a). The charge arises out of the shooting death of Theodore J. Hilton (Hilton). We summarize the facts underlying that charge as presented by the investigating officer and accepted by the parties solely for the purpose of addressing the disqualification issue.

On August 1, 2001, a group of people congregated in the City of Camden at the intersection of Morton Street and Mt. Ephraim Avenue. The group had been at the intersection for approximately two hours when an altercation erupted between a man identified as "Woo" and a woman identified as "Shirley." Shirley left, only to return twenty minutes later accompanied by five men, one of who is alleged to be S.G. The men demanded that Woo apologize to Shirley. Woo apologized, and then Shirley and her five companions left. Approximately thirty minutes later, the person alleged to be S.G. returned to the intersection with a firearm and began shooting into the crowd, hitting Hilton in the neck. The assailant was not apprehended at the scene. The Camden Police commenced an investigation into the incident, considering the event to constitute an aggravated assault.

Hilton survived for seven days after the shooting. He died as a result of the gunshot wound on August 8, 2001. Coincidentally, on the same day, the Office of the Camden County Prosecutor intervened in the investigation and arrested S.G., who was seventeen years old at the time of the shooting. A Juvenile Delinquency Complaint was filed and shortly thereafter, on August 13, 2001, the State moved to transfer the matter to the Law Division, Criminal Part, in order to prosecute S.G. as an adult.

On August 14, 2001, Saul Steinberg, Esquire, of Sufrin, Zucker, Steinberg, Waller & Wixted (the Sufrin firm), entered his appearance of record on behalf of S.G.

According to Steinberg, S.G.'s sister approached him about representing S.G. in connection with the shooting charge, and he agreed to do so before he learned the identity of the victim. In a certification, Steinberg informs us that he had a long-standing relationship with S.G.'s family, and had represented S.G.'s aunt and grandmother in civil matters. In addition, one of S.G.'s aunts had provided housekeeping and babysitting services to Steinberg's family.

At the time Steinberg entered his appearance on behalf of S.G., Dennis Wixted, Esquire, also of the Sufrin firm, was serving as the attorney of record representing Hilton in connection with a narcotics charge that had been pending in the Law Division, Criminal Part since May 18, 2001. That criminal charge was not dismissed until August 30, 2001, more than three weeks after Hilton's death and two weeks after Steinberg had entered his appearance commencing representation of S.G. Wixted remained counsel of record on behalf of Hilton until dismissal of the charge.

The Sufrin firm had represented the victim on a previous occasion. Several years earlier, Steinberg represented Hilton on another narcotics charge. The representation in that matter commenced on September 13, 1996, and continued through Hilton's plea and later sentencing on January 13, 1997.

In summary, the Sufrin firm represented Hilton in two separate criminal matters over a period of five years. The firm was in the midst of representing him on one of those criminal charges at the time he allegedly was killed by S.G., and continued representation of his interests for three weeks thereafter until that charge was dismissed due to his death. While that narcotics charge was still pending, the Sufrin firm undertook representation of S.G., who stood accused of Hilton's murder.

The State moved to disqualify the firm from representing S.G. on the basis of its current and prior representation of the victim. The trial court held a hearing and denied the motion, stating that "the representation clearly is over, [because] the victim, defense counsel's former client is now obviously deceased." The trial court did not address further the State's argument that an actual or potential actual conflict existed by virtue of the firm's representation of both S.G. and Hilton. Having found that no actual conflict was present, the court concluded that, at that time, there was no other conflict-of-interest ground that supported overriding defendant's right to counsel of his choice. The trial court left open, however, the prospect of addressing the conflict issue again as the case progressed.

On August 20, 2001, the trial court entered an order denying both the motion and the State's request for a stay. The State moved for leave to file an emergent interlocutory appeal, which was denied by the Appellate Division. The State then filed with this Court a motion for leave to appeal. We granted the motion and summarily remanded the matter to the Appellate Division for consideration on the merits. In addition, all further proceedings in the trial court were stayed.

On remand, a divided panel of the Appellate Division affirmed the denial of the motion to disqualify. *State ex rel. S.G.*, 348 N.J. Super. 77, 98, 791 A.2d 285 (2002). The Appellate Division majority regarded the case as involving "successive" representation. *Id.* at 91. It concluded that due to S.G.'s death the Sufrin firm did not represent Hilton and S.G. simultaneously, and that no actual conflict of interest existed. *Id.* at 95. The majority also concluded that the circumstances presented only a potential for a conflict, and not a serious one at that, because there was no evidence that the Sufrin firm had obtained from Hilton any confidential information relevant to S.G.'s representation. *Id.* at 96. Accordingly, the risk of a potential conflict was not found to outweigh S.G.'s right to counsel of his choice. *Ibid.*

The dissent would have disqualified the Sufrin firm on the basis that the representation would amount to a violation of RPC 1.7. *Id.* at 98 (Newman, J., dissenting). Judge Newman noted the inherent risk of conflict presented by an attorney's representation of a defendant accused of committing a crime against another client, specifically, the fact that the attorney might be required to cross-examine the victim/client. *Id.* at 99. In his view, the deceased client's inability to either grant or deny consent to the representation should not alter the prohibition on representation in such circumstances. *Ibid.* Indeed, Judge Newman characterized the representation in this case as a "disservice to the administration of criminal justice." *Ibid.*

We granted leave to appeal the interlocutory decision, 172 N.J. 172, 796 A.2d 890 (2002), and now reverse and remand for entry of an order disqualifying the Sufrin firm from representation of defendant.

II. "One of the most basic responsibilities incumbent on a lawyer is the duty of loyalty to his or her clients." *In re Opinion No. 653 of the Advisory Comm. on Prof'l Ethics*, 132 N.J. 124, 129, 623 A.2d 241 (1993). The first version of the ABA Canons of Ethics, promulgated in 1908 and adopted that year in New Jersey, prohibited representation of a client when that undertaking would require an attorney to take a position adverse to another client's interests. Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244 (1981); see also *In re Kamp*, 40 N.J. 588, 595, 194 A.2d 236 (1963). Our Rules of Professional Conduct continue unabated that prohibition. A lawyer may not represent a client if the representation would be directly adverse to another client, RPC 1.7, and that conflict is imputed to all members of a law firm, disqualifying all if any one would be disqualified. RPC 1.10. The only exception to the rule's prohibition that might arise, subject to common law restrictions on disabling conflicts, is when an attorney: (1) reasonably believes that representation will not adversely affect the relationship with the other client; and (2) secures the consent of both clients, after full disclosure. RPC 1.7(a), (c)(1).

The attorney-client relationship is grounded in the fundamental understanding that an attorney will give "complete and undivided loyalty to the client" so that ". . . the attorney should be able to advise the client in such a way as to protect the client's interests, utilizing his professional training, ability and judgment to the utmost." *In re Dolan*, 76 N.J. 1, 9, 384 A.2d 1076 (1978). RPC 1.7 is rooted in the concept that "no man can serve two masters," Raymond L. Wise, *Legal Ethics* 272-73 (1970), and, it has been suggested that employment should be declined if there is a question whether the representation will create an adversity of interest between two clients. *Ibid.*

The judiciary bears the responsibility of "preserving the fiduciary responsibility that lawyers owe their clients." *Cohen v. Radio-Electronics Officers Union, Dist. 3, NMEBA*, 146 N.J. 140, 155, 679 A.2d 1188 (1996).

There are very few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably or faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

[*In re Loring*, 73 N.J. 282, 289-90, 374 A.2d 466 (1977) (quoting *Stockton v. Ford*, 52 U.S. (11 How.) 232, 247, 13 L.Ed 676, 682-83 (1850)).]

In criminal matters, in which the trust between attorney and client has enhanced importance, special vigilance is required because an attorney's divided loyalty can undermine a defendant's

Sixth Amendment right to effective assistance of counsel. See, e.g., *United States v. Moscony*, 927 F.2d 742, 748 (3d Cir. 1991) (noting that defendant's right to effective assistance of counsel includes both adequate representation and right to attorney's conflict-free, undivided loyalty). The Sixth Amendment right to effective assistance of counsel, binding on the States by the Fourteenth Amendment, *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1931), requires a defense [*18] attorney's representation to be "untrammelled and unimpaired." *State v. Bellucci*, 81 N.J. 531, 538, 410 A.2d 666 (1980). Therefore, although a defendant must have a fair opportunity to have counsel of his own choosing, that right must yield when an actual conflict is found. *Moscony*, 927 F.2d at 749-50.

Accordingly, in the criminal setting we have reinforced that it is incumbent on the courts to ensure that defendants receive conflict-free representation. *State v. Loyal*, 164 N.J. 418, 433, 753 A.2d 1073 (2000) (emphasizing trial court's responsibility for "assuring the fairness and reliability of the trial"). The federal courts similarly act to protect the integrity of their proceedings when a defendant's Sixth Amendment rights are placed at risk by an attorney's conflict of interest. See, e.g., *United States v. Dolan*, 570 F.2d 1177, 1184 (3d. Cir. 1978). As the Third Circuit Court of Appeals has explained, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court

[*Ibid.*]See also *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 1698, 100 L. Ed. 2d 140, 149 (1988) (observing independent nature of judiciary's interest in ensuring conflict-free representation, stating, "federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them").

III. Our starting point in this analysis is our disagreement with the conclusion of the courts below that the Sufrin firm's representation of Hilton ended on his death. Our rules do not support that view of the nature of the relationship between counsel and a criminal defendant who dies in the midst of that representation. An attorney's responsibility, as attorney of record in a criminal proceeding, terminates upon expiration of the time in which to appeal from the final judgment or order. R. 1:11-3. Absent the client's consent, an attorney may not withdraw from a criminal matter without leave of court. The grant or denial of that motion is a matter of discretion with the trial court. *State v. Johnson*, 274 N.J. Super. 137, 643 A.2d 631 (App. Div.), certif. denied 138 N.J. 265 (1994).

Neither of those two possible events operated here to terminate the Sufrin firm's duty to continue to represent Hilton's interests in connection with the final disposition of the charges for which it was retained. Until the charges were dismissed by order of the court, typically on the prosecution's motion *nolle prosequere* or *nolle prosequi* (literally "will no further prosecute"), the Sufrin firm, as counsel of record for Hilton's interests, remained obligated to answer to the court and to the prosecutor for Hilton. The firm owed a continuing duty of loyalty to him throughout the duration of that representation. In fact, the charges against Hilton remained pending for three weeks after his death, during which time the firm undertook the defense of his alleged killer. That rendered the representation of the two interests simultaneous.

Thus, this was not successive representation of clients with adverse interests where the possibility of breach of client confidences becomes a focus of the conflict analysis. Members of the Sufrin firm were serving simultaneously as counsel of record on behalf of the victim and on behalf of his alleged assailant within our court system for a period of weeks. That one of them

died does not negate the actual conflict that arose and persisted during the entire period of the actual representation of the interests of both men. Here the Sufrin firm's dual representation of clients with patently adverse interests caused a conflict of interest that was direct and actual.

The adversity of the two interests simultaneously being represented is apparent on multiple levels. RPC 1.7 prohibits an attorney's representation of a client when that representation will be directly adverse to another client. The proscribed representation need not be directly related to the representation currently underway on behalf of the first client. As stated in the Comment to Rule 1.7 of the Model Rules of Professional Conduct, on which our rule is modeled, "a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." Although the Sufrin firm's representation of Hilton at the time concerned the defense of a narcotics charge, its fiduciary responsibility to him and its obligation to avoid taking on representation of matters directly contrary to his interests, was not limited to parochial concerns adverse only to that specific charge. The firm must not take on any matter involving a direct conflict with Hilton's interests.

As the victim who died as a result of the shooting that occurred on August 1, 2001, Hilton plainly had a general interest in seeing his alleged attacker brought to justice. Had Hilton survived, he would have been an obvious choice as a witness in a later criminal trial against the perpetrator(s) of the attack that caused him injury, as the dissent noted below. Although Hilton cannot now testify, that does not mean that his interests were not adverse to those of S.G. during the two weeks of the firm's simultaneous representation.

The Sufrin firm's representation of S.G. is adverse on yet another level to its representation of Hilton. Upon entering his appearance on behalf of S.G., Steinberg became the attorney of record for the person accused of a crime that constituted also a patently tortious act against Hilton. Hilton died, after lingering several days, as a result of the assault allegedly visited on him by S.G., giving rise immediately to an incipient Survivor's Act action on his behalf. N.J.S.A. 2A:15-3. His interest in pursuing such an action (obviously later and through his estate acting on his behalf) is directly contrary to the firm's representation of his alleged shooter. The pointedly direct and adverse position inherent in defending Hilton's accused killer is exactly the sort of conflict that the professional rules of conduct ought not and do not permit.

Finally, we note that this matter does not admit of the possibility of exemption from the proscription against representation of clients with adverse interests. Even if Hilton's consent, after death, somehow could be expressed effectively, S.G.'s waiver would not be dispositive. Given the actual conflict that existed in this case and the obligation to ensure that defendant receives a fair trial, S.G.'s proffered consent is immaterial because an actual and direct conflict may not be waived in this setting. RPC 1.7 (c)(1); *Loyal*, supra, 164 N.J. at 433. In *Loyal*, we noted the United States Supreme Court's recognition of the "apparent willingness of Courts of Appeals to entertain ineffective-assistance claims from defendants who have specifically waived the right to conflict-free counsel." *Id.* 164 N.J. at 434 (citing *Wheat*, supra, 486 U.S. at 164, 108 S.Ct. at 1698-99, 100 L. Ed. 2d at 149-51). Although S.G. did have had a long-term relationship with the Sufrin firm, the presumption of counsel of one's choice is overcome where, as here, the counsel chosen by defendant is disqualified by an actual conflict of interest.

IV. The judgment of the Appellate Division is reversed and the matter remanded for entry of an order disqualifying the Sufrin firm. Our stay of further proceedings is dissolved, subject to the issuance of the disqualification order we have directed.

Chief Justice Poritz and Justices Coleman, Long, Verniero, Zazzali, and Albin join in Justice LaVecchia's opinion.