

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
v.)	ID No. 1302002915
)	
JEFFREY KENT,)	
)	
Defendant.)	

Submitted: August 29, 2014
Decided: September 3, 2014

OPINION

Steven P. Wood, Esquire, and Daniel Logan, Esquire, Deputy Attorney Generals, Delaware Department of Justice, Wilmington, Delaware. Attorneys for the State of Delaware.

John S. Edinger, Esquire, and Sean A. Motoyoshi, Assistant Public Defenders, Public Defender’s Office, Wilmington, Delaware. Attorneys for the Defendant.

SCOTT, J.

Introduction

Before the Court is Defense Counsel's memorandum declaring a conflict of interest created for the Public Defender's Office by its representation of the Defendant in this case and its previous representation of one of the State's witnesses in this case. The Court has reviewed the parties' submissions. For the reasons set forth below, Defense Counsel's request to withdraw or otherwise preclude the State's witness from testifying is **DENIED**.

Statement of Facts

On February 18, 2013 Jeffrey Kent ("Defendant") was indicted in New Castle County on Murder in the First Degree. The Public Defender's Office was appointed to represent Defendant on this charge on February 22, 2013.

On February 26, 2013, Defense Counsel sent a Discovery letter to the State requesting the identity of State witnesses to conduct conflict checks. The State responded to Defense Counsel's request on July 29, 2014 and informed Defense Counsel that one of its witnesses, Thurman Boston ("Boston"), was formerly represented by an attorney in the Public Defender's Office.

The Public Defender's Office was previously appointed to represent Boston on April 11, 2013 and June 28, 2013. These matters were closed on June 28, 2013 and March 11, 2014, respectively. As part of Boston's defense, the Public

Defender's Office's psycho-forensic evaluator completed an assessment of Boston. The Public Defender's Office also accessed and reviewed Boston's medical records and prescription information. Boston's files are currently still located in the Public Defender's Office.

On August 1, 2014 this Court held an office conference to discuss this potential conflict of interest.

On August 26, 2014 Defense Counsel notified the Court via email of his discovery of a second State's witness that concurrently represented by the Public Defender's Office, Siron Chambers ("Chambers"). Chambers' case has been resolved, but Chambers was an existing Public Defender's Office client when Defendant's filed was opened.

The Court responded to the parties on the same day. In its response, the Court noted that the moving party, Defense Counsel, has the burden of presenting issues showing a conflict. Given that Boston's mental health history is public knowledge, the Court instructed Defense Counsel to file any additional helpful information to support his motion, based on personal knowledge and without referring to their files, for in-camera review by August 29, 2014.

On August 29, 2014, Defense Counsel declined to make such a filing on the basis that Boston had not given Defense Counsel permission to reveal confidential information.

On September 2, 2014, the Court reiterated its instruction for Defense Counsel to make the required in-camera filing, noting that Defense Counsel is permitted to reveal a client's confidential information upon Court order.

After Defense Counsel's failure to respond or comply with the Court's instructions, the Court denied Defense Counsel's motion to withdraw on September 3, 2014 via email to the parties.

Parties' Contentions

Defense Counsel contends that the Public Defender's Office's concurrent representation of Boston and Defendant from April 11, 2013 until March 11, 2014 constitutes an impermissible conflict under the Delaware Rules of Professional Conduct. Furthermore, Defense Counsel contends that as a result of this concurrent representation, the Public Defender's Office has become aware of confidential information concerning Boston's mental health history that would be material to Defendant's trial. Defense Counsel also contends that the interests of Boston and Defendant are materially adverse. As such, Defense counsel requests that the Court either allow Defense Counsel to withdraw from Defendant's case or to prohibit Boston from testifying in Defendant's trial.

The State asserts that the Public Defender's Office's previous representation of Boston does not create an actual and relevant conflict of interest, such that

would require Defense Counsel to withdraw or prohibit Boston from testifying. The State also asserts that Defendant's case shares no substantial relation to Boston as a potential State's witness and that Boston's interests are not materially adverse to Defendant's because Boston's testimony would not trigger self-incrimination. Furthermore, the State argues that Defense Counsel would be unable to properly use the alleged confidential information regarding Boston's mental health history on cross examination. Thus, the State argues that there is no significant risk Defense Counsel's representation of Defendant would be materially limited by his responsibility to Boston.

Discussion

Conflicts of interest are governed by the Delaware Rules of Professional Conduct. Specifically, Rule 1.9 provides the duties that lawyers owe to their former clients. Under Rule 1.9(c), a lawyer or lawyer's firm that has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to the client.

D.R.P.C. 1.9(c)(1)-(2). The United States Supreme Court in *Cyler* held that "an actual, relevant conflict of interest [exists] if, during the course of the

representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action." *Cyler v. Sullivan* 446 U.S. 335, 356 (1980). *See Lewis v. State*, 757 A.2d 701, 718 (Del. 2000) (regarding ineffective assistance of counsel as the result of a conflict of interest, prejudice is presumed "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected the lawyer's performance.'").

Under Delaware law, when analyzing a potential conflict between a former and current client, the Court must determine whether Defendant's matter is substantially related to the former client's matter. *State v. Sykes*, 2005 WL 1177567, at *2 (Del. Super. May 2, 2005). The Court should analyze conflicts under Rule 1.9(c) by making a "realistic appraisal of the possibility" that confidential information has been disclosed in one matter that could be harmful to the client involved in the other matter. *Id.* In other words, the Court should consider the nature and scope of the prior and present representations. *Id.*

In *Sykes*, the Public Defender's Office represented a State's witness prior to trial and that witness provided adverse information about the defendant to the Public Defender who was representing Sykes in his case. *Id.* In applying the analysis discussed above, the Court in *Sykes* found unpersuasive the Defendant's argument that a "potential [adverse] witness automatically create[d] an actual

conflict requiring disqualification.” See *State v. Ward*, 1991 WL 302635, at *4 (Del. Super. Dec. 18, 1991) (“[A] possible conflict [of interest] does not itself preclude the representation.”). Finding no actual conflict of interest, the Court found that the Public Defender’s continued representation of Sykes was appropriate.

Similarly, in *State v. Ward*, the defendant claimed there was a conflict of interest because one of the State’s witnesses had been represented by the Public Defender’s Office in connection with a separate charge, which was eventually dropped. 1991 WL 302635 (Del. Super. Dec. 18, 1991). The Court held that “[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...” *Id.* “[T]he degree of relation between the representation of the defendant and the other client is an important consideration in determining whether [a] possible conflict will materially interfere with the lawyer’s independent professional judgment.” *Id.*, at *5.

The *Ward* Court found that the two matters in which the Public Defender’s Office represented the State’s witness and the defendant were totally unrelated. Moreover, the defendant had failed to show that his representation by the public defender was limited in any significant way. *Id.* Finally, the defendant failed to make a concrete showing of actual prejudice against him because the defendant

made no showing that the public defender was limited in his representation of the defendant by the inability to use information gained in the former presentation. *Id.*

Moreover, the conflicts of one lawyer are imputed to the firm. Under Rule 1.10 of the Delaware Rules of Professional Conduct,

while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

This rule of imputation is triggered only if the movant first establishes an actual conflict of interest. *See State v. Rogers*, 744 S.E.2d 315, 324 (W.Va. 2013) (Court holding no actual conflict because the defendant's attorney from the Public Defender's Office had not personally represented the State's witness and he was not privy to any confidential information that could be used for impeachment purposes. A "'mere possibility' of a conflict is insufficient to disqualify defense counsel.").

As did the Court in *Ward*, this Court finds that the nature and scope of Boston's previous representation by the Public Defender's Office for Boston's offenses are unrelated to Defendant's matter. A New Castle County grand jury indicted Defendant on Murder in the First Degree in February 2013. Boston was arrested for Failure to Register on January 2013 and for Robbery in the First Degree in June 2013. Both of Boston's matters were resolved by March 2014.

Defense Counsel has not provided any evidence to suggest that either of Boston's offenses are related in any way to Defendant's matter. The only connection between Defendant and Boston regarding this matter is that Boston is a State's witness in Defendant's case. Thus, for purposes of Rule 1.9(c), the Public Defender's Office's representation of Boston and Defendant are not substantially related.

Furthermore, Boston was represented by a different Assistant Public Defender than the public defenders representing Defendant in this matter. As discussed above, the conflicts of one attorney in a firm are imputed to all others in the firm. *See* Rule 1.10. However, an actual conflict of interest must first be established in order for Rule 1.10 to be applicable. Here, Defense Counsel has failed to establish any such conflict of interest that would make Defendant's continued representation inappropriate. Thus, Rule 1.10 does not prohibit Defense Counsel's representation of Defendant in this matter.

Where the Court finds that Defendant's matter is substantially related to the former client's matter, the Court must determine whether Defendant's interests are materially adverse to the former client's. *Sykes*, 2005 WL 1177567, at *2. Using a realistic approach, the Court must determine whether the former client might have disclosed confidential information to counsel in the course of the prior representation that are relevant to the current action. *Id.* If so, then the Court must

further determine whether that confidential information could be detrimental to the former client through the current litigation.

Though under Delaware law the moving party bears the burden of proving that a substantial relationship exists, the movant is not required to divulge the confidences actually communicated. However, as discussed above, some evidence of *confidential information* must be provided in support of a motion to withdraw on the basis of a conflict of interest. This Court holds that where the only evidence to support a motion to withdraw on the basis of a conflict of interest under Rule 1.9(c) is protected by the attorney-client privilege, the moving counsel may disclose such information in camera at the direction of the Court. A disclosure of this nature is permissible under Delaware Rules of Professional Conduct Rule 1.6(b)(6), which provides that “[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to comply with ... a court order.”

In support of its motion, Defense Counsel offered a merely conclusory assertion that Defense Counsel was in possession of confidential information that would be materially adverse to Boston if used against him for impeachment purposes at Defendant’s trial. The only evidence of such potentially adverse information gained from the Public Defender’s representation of Boston that Defense Counsel has offered is Boston’s mental health history. However, this

Court determined that Boston's mental health history is public knowledge and informed the parties as such. For this reason, the Court instructed Defense Counsel to file, for in camera review, any additional evidence that supports his assertion that the Public Defender's Office is privy to confidential and materially adverse information to Boston as a result of the Public Defender's former representation of Boston.

Here, despite the Court's instruction to do so, Defense Counsel declined to provide actual evidentiary support for its motion on the basis that such evidence was confidential under the attorney-client privilege and the former client, Boston, had not waived that privilege. Moreover, Defense Counsel, when reminded that he could under the Rules file confidential information in camera, did not file any additional information.¹ Therefore, Defense Counsel has provided no evidence showing that its former client and Defendant's matters are substantially related or that Defendant's interests are materially adverse to its former client. Accordingly, there is no actual conflict of interest and Defense Counsel's continued representation of Defendant is appropriate.

¹ Subsequent to the Court's ruling, Defense Counsel filed supporting documentation in camera. On the record during trial, Defense Counsel made a tactical decision not to question Boston about his previous mental history.

Conclusion

For the reasons set forth above, Defendant's request to withdraw or otherwise preclude the State's witness from testifying is **DENIED**.

IT IS SO ORDERED

/s/Calvin L. Scott
Judge Calvin L. Scott, Jr.