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CASE COMMENT

Attorney and Client: Conflict of Interest—Professional Ethics—Government Attorneys

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The United States brought a civil suit to recover funds from an oil company for alleged overcharges in sales financed under the Economic Co-operation Act. The Government moved to disqualify the law firm representing the defendant on the ground that one of its partners, who was actively working on the case, had been employed by the Economic Co-operation Administration for more than two of the years during which the alleged overcharges were made. The attorney had worked in the Paris Office of the ECA but had not been connected with the particular activities giving rise to the suit. The court *held* that the canons of professional ethics of the American Bar Association did not prohibit the firm from representing the oil company. *United States v. Standard Oil Co.*, 136 F. Supp. 345 (S.D.N.Y. 1955).

Plaintiff brought a civil suit against the United States to recover a sum allegedly due pursuant to contracts between the plaintiff and the Veterans Administration. The Government moved to disqualify the attorney representing the plaintiff on the ground that he had been formerly employed as a government attorney by the V. A. and had actually passed upon a number of matters involved in the present suit. The court *held* that the canons of professional ethics of the American Bar Association prohibited the attorney from representing the plaintiff. *Empire Linotype School, Inc. v. United States*, 143 F. Supp. 627 (S.D.N.Y. 1956).

The instant cases involve the principles laid down by Canons 6,[1] 36[2] and 37,[3] of the American Bar Association's canons of professional ethics. These canons are based on the theory that when a client entrusts an attorney with the handling of a particular matter, he should be encouraged to reveal to that counsel all the information at his disposal, including confidential matter. Once confidence has been reposed, the client must be secure in his belief that the lawyer, without the client's consent, will be forever barred from disclosing such confidences, even after termination of the

[1] Canon 6 provides, in part: "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." Cf. 1 Colo. Rev. Stat. Ann. 141 (1953).

[2] Canon 36 provides, in part: "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ." *Id.* at 148.

[3] Canon 37 provides, in part: "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment . . ." *Ibid.*

attorney's employment.[4] In addition, courts have interpreted the canons as imposing a duty upon attorneys to avoid not only the actuality but the appearance of evil.[5]

When disqualification of any attorney has been sought on the ground that his continued representation of a present client will violate the confidence of a former client, the complainant normally is required to prove only a "substantial relationship," not identity, between the subject matter of the present employment and matters in which the attorney acted for the former client.[6] The complainant need not show that the attorney had actual knowledge of such substantially related material, but a showing of access to it is sufficient.[7] Such a showing gives rise to an inference that confidential information was reposed by the former client and the attorney can thereby be disqualified.[8] Thus, it has been held repeatedly that the knowledge of one member of a law firm will be imputed to all members and associates of that firm.[9] In the majority of cases involving this question, the offending attorney has either accepted a retainer from the other side in a retrial of the same case in which he had formerly represented the complainant,[10] or he has taken a position adverse to a former client in a specific matter in which he had previously represented that client.[11]

In the *Standard Oil* case the court had to determine whether the government attorney employed by the Paris office of the ECA could be said to have access to substantially related confidential information in the files of the Washington office. Further, the judge was required to determine whether the "imputed knowledge" rule

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[4] Stockton Theatres, Inc. v. Palermo, 121 Cal. App. 2d 616, 264 P. 2d 74, 80 (D. C. A. 3d D. 1953); Note, 64 Yale L. J. 917, 927 (1955).

[5] See Drinker, Legal Ethics 130-1 (1954).

[6] T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

[7] Consolidated Theatres, Inc. v. Warner Bros Circuit Management Corp., 216 F. 2d 920, 927 (2d Cir. 1954).

[8] *Ibid.*

[9] *E. g.*, Laskey Bros. v. Warner Bros. Pictures, Inc., 224 F. 2d 824, 826-7 (2d Cir. 1955); see note 7 *supra*.

[10] *E. g.*, United States v. Bishop, 90 F. 2d 65 (6th Cir. 1937); Porter v. Huber, 68 F. Supp. 132 (W.D. Wash. 1946); In re Maltby, 68 Ariz. 153, 202 P. 2d 902, 903 (1949); In re Themelis, 117 Vt. 19, 83 A. 2d 507 (1951).

[11] *E. g.*, General Contract Purchase Corp. v. Armour, 125 F. 2d 147 (5th Cir. 1942); Thatcher v. United States, 212 Fed. 801 (6th Cir. 1914); Sheffield v. State Bar, 22 Cal. 2d 627, 140 P. 2d 376 (1943); Federal Trust Co. v. Damron, 124 Neb. 655, 247 N. W. 589 (1933); Watson v. Watson, 171 Misc. 175, 11 N.Y.S. 2d 537 (Sup. Ct. 1939).

applying to ordinary law partnerships should be as strictly applied when the partnership is in fact the government. However in the *Empire Linotype* case the court had to decide only whether the former government attorney actually had passed on some of the matters involved in the action. It is significant to note that when an attorney is employed by the government, the latter is in the dual position of being the partnership and also the client. Therefore, even though the "conflicting interests" and "confidential communications" rules of Canons 6 and 37, respectively, still bind the former government attorney with a duty of fidelity to his client, that duty should not be applied without reference to the practical problems encountered when government employed attorneys are involved. In the *Standard Oil* case the court recognized these practical problems by holding that the "access to substantially related information" rule should not be applied to a government attorney working for a vast agency where it is shown that he actually did not receive, investigate or pass upon such confidential information.[12]

As to the imputed knowledge rule, the court in *Standard Oil* held that the rule could not be applied to the entire agency in which the former government attorney had been employed. Rather its application should be restricted to the particular office of employment and the specific matters investigated and passed upon by that office. This rationale was applied in the *Empire Linotype* case.

As the instant cases point out, ethical problems cannot be viewed in a vacuum, but must be given a practical approach. This is important for the benefit of the government which must constantly recruit attorneys from private practice. If service with the government would tend to disqualify an attorney in too large an area of law for too long a time, or would prevent his engaging in the practice of the very specialty for which the government sought his service, and if that disqualification would infect the firm with which he becomes associated, the sacrifices of entering government service would be too great for most men to make. As for men willing to make these sacrifices, not only would they and their firms suffer restricted practice thereafter, but clients would find it difficult to obtain specialized counsel.

[12] 136 F. Supp. at 363.

Criminal Law—Habitual Criminal Act—Offense Punishable by Reformatory Sentence Not Felony

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Theodore William Smalley was convicted in 1932 of burglary and larceny. At the time of this conviction he was nineteen years of age and was sentenced in accordance with a state statute requiring, with certain exceptions, that all male persons over sixteen and under twenty-one years of age who are for the first time convicted of a felony be sentenced to the state reformatory.[1] Smalley was later convicted of grand larceny in 1933, of burglary and grand larceny in 1936, and of burglary in 1946. He was sentenced to the state penitentiary for each of the latter convictions. As a result of these four convictions, Smalley was sentenced to life imprisonment under the Colorado habitual criminal act.[2] The latter statute provides life imprisonment for one convicted of four felonies. Smalley filed a motion to set aside his life sentence on the grounds that it was void and erroneous. The Colorado Constitution defines a felony as "any criminal offense punishable by death or imprisonment in the penitentiary and no other."[3] It was Smalley's contention that since a reformatory sentence was mandatory by statute he could not have been sentenced to the state penitentiary and, therefore, his first conviction was not a felony conviction as defined by the Colorado Constitution. The district court overruled the motion, but was reversed by the Supreme Court on the grounds that under the Colorado Constitution the test of a felony is the possible form of punishment and place of confinement in case of conviction. Since the place of confinement prescribed by statute in this case was the reformatory, the offense could not have been a felony. *Smalley v. People*, 304 P.2d 902 (Colo. 1957).

It is well established in Colorado that the test of whether or not an offense is a felony as defined in the constitution depends on the punishment prescribed by the legislature and not on the sentence actually imposed on the defendant in a given case.[4] If an offense is punishable by death or imprisonment in the penitentiary, it is a felony even though the legislature allows the court to prescribe a lesser punishment at its discretion and the court does, in fact, impose such lesser punishment on the defendant.[5] In its position on this point, the Colorado Supreme Court seems to be in accord with the majority of other jurisdictions having similar definitions of felony.[6]

An analysis of the briefs in the *Smalley* case indicates that what was in effect presented was the question whether an objective

[1] Colo. Rev. Stat. Ann. § 39-10-1 (1953).
[2] *Id.* § 39-13-1.
[3] Colo. Const. Art. XVIII, § 4 (1876)
[4] People v. Godding, 55 Colo. 579, 136 Pac. 1011 (1913) (cited with approval in *Smalley*).
[5] *Ibid.*
[6] See, e.g., Barde v. United States, 224 F.2d 959 (6th Cir. 1956); Jackson v. State, 37 Ala. App. 335, 68 So.2d 850 (1953); State v. DiPaglia, 71 N.W.2d 601 (Iowa 1956); Olsen v. Delmore, 295 P.2d 324 (Wash. 1956).

or a subjective test should be applied to each case in determining if the individual involved has committed a felony. If an objective test were to be applied, the individual involved would be ignored and only the offense committed would be considered. If the statute making the act a crime provides for punishment by death or imprisonment in the state penitentiary, the offense would be classified as a felony and the fact that a certain defendant could not be sent to the penitentiary because of age would be immaterial. If a subjective test be applied, each individual defendant would be considered and whether a felony has been committed would not depend on the offense committed but would depend on the maximum sentence which could be imposed on that individual taking into consideration all of the statutes governing the sentencing of that individual.

In the *Smalley* case the majority of the court chose to follow the latter of these alternatives thus establishing that a person can commit a felony only if the maximum sentence which may be imposed upon *him* is death or imprisonment in the state penitentiary. It should be stressed that the decision in this case does *not* make the sentence actually imposed on an individual the test of a felony. The test is what sentence could have been imposed on that individual.

As a result of the *Smalley* case, the statute dealing with reformatory sentencing[7] was amended by the 1957 session of the legislature.[8] As amended, it leaves to the trial court's discretion whether a person between the ages of sixteen and twenty-five years of age who has been convicted of a felony should be sentenced to the reformatory or to the penitentiary. Since the test is the sentence which can be imposed and not the sentence actually imposed, the result of this amendment is to make future offenders sixteen years of age and older guilty of felonies if the crimes for which they are convicted carry possible penitentiary sentences even if the judge, in his discretion, actually imposes reformatory sentences. As to anyone presently serving a sentence as a habitual criminal because of any "felony" conviction before he reached the age of twenty-one, the amendment does not affect his right to be released because he could not have been sentenced to the penitentiary at the time of his conviction under the statute then in effect and, therefore, his offense was not a felony.

[7] See note 1 supra.
[8] Sen. Bill 19 (1957).