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Right to Counsel

and New York courts agree that a request for counsel must be unambiguous and unequivocal.

People v. Herr[71]
(decided November 30, 1995)

Defendant Raymond Herr was convicted in the Supreme Court, Erie County[72] of several offenses, including first-degree sodomy and sexual abuse. The Appellate Division, Fourth Department affirmed,[73] and an appeal was permitted. On appeal, the defendant contended that his attorney's role as a part-time village prosecutor created an unacceptable appearance of impropriety in violation of his right to counsel[74] as guaranteed under the Federal and New York State Constitutions.[75] The court of appeals held that, even though the defense counsel was a part-time village prosecutor, the defendant was not deprived of his right to counsel.[76]

Daniel J. Henry, Jr., a part-time village prosecutor for the Village of Blasdell, represented the defendant at trial.[77] As a village prosecutor, Mr. Henry's authority was limited to "the prosecution of all non-misdemeanor traffic violations, violations

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71. 86 N.Y.2d 638, 658 N.E.2d 1032, 635 N.Y.S.2d 159 (1995).

72. People v. Herr, 158 Misc. 2d 306, 600 N.Y.S.2d 903 (Sup. Ct. Erie County 1993).

73. People v. Herr, 203 A.D.2d 927, 611 N.Y.S.2d 389 (4th Dep't 1994).

74. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*; N.Y. CONST. art. I, § 6. This provision provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . ." *Id.*

75. *Herr*, 86 N.Y.2d at 641, 658 N.E.2d at 1032, 635 N.Y.S.2d at 159-60. The defendant specifically cited to the court's language in People v. Shinkle, 51 N.Y.2d 417, 415 N.E.2d 909, 434 N.Y.S.2d 918 (1980), that criminal defendants have "the right to both the fact and appearance of unswerving and exclusive loyalty on the part of attorneys who represent them." *Id.* at 421, 415 N.E.2d at 911, 434 N.Y.S.2d at 920.

76. *Herr*, 86 N.Y.2d at 641, 658 N.E.2d at 1033, 635 N.Y.S.2d at 160.

77. *Id.* at 640, 658 N.E.2d at 1032, 635 N.Y.S.2d at 159.

of the Village ordinance, and violations under the Penal Law not including felonies and misdemeanors."[78] Although he had the authority to prosecute select violations of state law, Mr. Henry was not considered to be an employee of the Erie County District Attorney's office.[79] Mr. Henry did not have access to any of the district attorney's files, and likewise, the district attorney did not have access to Mr. Henry's files.[80] Moreover, Mr. Henry was not empowered to prosecute felonies and misdemeanors, which included the crimes charged against the defendant.[81]

Defendant moved to vacate his conviction on grounds that it was obtained in violation of his right to counsel.[82] The trial court and the appellate division rejected the defendant's arguments and the court of appeals affirmed.[83]

In his motion to the court, the defendant cited to *People v. Shinkle,*[84] where the court of appeals reversed a conviction based on grounds that the chief assistant of the prosecution, who initially represented the defendant and helped to prepare his defense, "inescapably gave both the defendant and the public an unmistakable appearance of impropriety and, therefore, created a continuing opportunity for abuse of confidences."[85] In *Shinkle,* the court overturned a criminal conviction when the defendant's right to counsel was violated since the Public Defender "actively participated in the preliminary stages of a defendant's defense [and subsequently] became employed as Chief Assistant District Attorney by the office that was prosecuting that defendant's ongoing case."[86] Despite the district attorney's efforts to insulate

78. *Id.*

79. *Id.* In addition "[h]is salary, office and staff were all supplied by the Village and not the District Attorney's office." *Id.*

80. *Id.*

81. *Id.*

82. *Id.* The trial court characterized the defendant's representation as "outstanding and beyond reproach." People v. Herr, 158 Misc. 2d 306, 308, 600 N.Y.S.2d 903, 904 (Sup. Ct. Erie County 1993).

83. *Herr*, 86 N.Y.2d at 641, 658 N.E.2d at 1033, 635 N.Y.S.2d at 160.

84. 51 N.Y.2d 417, 415 N.E.2d 909, 434 N.Y.S.2d 918 (1980).

85. *Id.* at 420, 415 N.E.2d at 910, 434 N.Y.S.2d at 920.

86. *Herr*, 86 N.Y.2d at 641, 658 N.E.2d at 1033, 635 N.Y.S.2d at 160. *See Shinkle*, 51 N.Y.2d at 419, 415 N.E.2d at 910, 434 N.Y.S.2d at 919. In

the attorney in question from the defendant's case, the court of appeals concluded that the office should have been disqualified anyway.[87] The court further held that the fact that no impropriety occurred is not dispositive.[88] Rather, what is dispositive is "[t]he inherent impropriety of the situation."[89] Thus, the rule that emerged from *Shinkle* is that "disqualification is required when there is a 'risk of prejudice attendant on the abuse of confidence.'"[90] The rationale behind this rule is the need to

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Shinkle, the Executive Director of the Legal Aid Society became actively involved in the early stages of the defendant's criminal proceeding. *Id.* at 419, 415 N.E.2d at 910, 434 N.Y.S.2d at 919. The Director's duties included extensive interviewing of the defendant, becoming intimately familiar with the case and assisting in the shaping of defense tactics. *Id.* Subsequently, the director left his position at Legal Aid and was appointed Chief Assistant District Attorney for Tom M. Sullivan County where he continued in that capacity during the trial of this action. *Id.* at 419-20, 415 N.E.2d at 910, 434 N.Y.S.2d at 919.

87. *Shinkle*, 51 N.Y.2d at 421, 415 N.E.2d at 911, 434 N.Y.S.2d at 920. To protect against any potential conflicts of interest problems, "CONFLICT" stickers were placed on the files for all cases "in which the defendants were or had been represented by the Legal Aid Society during his tenure of office, and the members of the staff of the District Attorney's office were ordered to refrain from discussing any of such cases with the attorney in question, and further he was denied access to the files in such cases." *Id.* at 420, 415 N.E.2d at 910, 434 N.Y.S.2d at 920. Despite the use of these precautions, the court held that there had been "the unmistakable appearance of impropriety and created the continuing opportunity for abuse of confidences entrusted to the attorney during the months of his active representation of defendant." *Id.*

88. *Id.* at 420-21, 415 N.E.2d at 910, 434 N.Y.S.2d at 920. "It is no answer that the defendant offers no evidentiary proof of actual prejudice." *Id.* at 420, 415 N.E.2d at 910, 434 N.Y.S.2d at 920. "[S]uch proof would most likely be out of defendant's reach." *Id.* at 421, 415 N.E.2d at 910, 434 N.Y.S.2d at 920.

89. *Id.* "In an attempt to show that the insulation was practically effective, the People circuitously resorted to an affirmation from [the attorney in question]." *Id.* "In defendant's perception it was his former attorney who was personally championing the People's cause against him." *Id.*

90. *Herr*, 86 N.Y.2d at 641, 658 N.E.2d at 1033, 635 N.Y.S.2d at 160 (quoting *Shinkle*, 51 N.Y.2d at 421, 415 N.E.2d at 910, 434 N.Y.S.2d at 920). This rule "affords no basis to deny defendants the right to both the fact and appearance of unswerving and exclusive loyalty on the part of attorneys who represent them." *Id.*

prevent cases "in which former clients depend on the good faith of their former lawyers turned adversaries to protect and honor confidences shared during the now extinct relationship."[91]

However, the court explained that the mere existence of a possible appearance problem does not per se require disqualification.[92] The standard for removal of a public prosecutor is met only when it is necessary to protect the defendant "from actual prejudice arising from a demonstrated conflict of interest or a *substantial risk of an abuse of confidence.*"[93] In addition, the *Shinkle* court recognized that the application of this rule "may impede the transfer of attorneys between the offices of Legal Aid or Public Defender and of District Attorney,"[94] yet the court found this was not dispositive and the defendant ultimately deserves his attorney's loyalty.[95] An "objector" should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored.[96]

In *Schumer v. Holtzman,*[97] the petitioner alleged that Elizabeth Holtzman, the District Attorney of Kings County, "violated

91. *Id.* at 641, 658 N.E.2d at 1033, 635 N.Y.S.2d at 160. According to the court, the risk of impropriety is crystal clear in these situations. *Id.*

92. *Id.*

93. *Id.*

94. *Shinkle*, 51 N.Y.2d at 421, 415 N.E.2d at 911, 434 N.Y.S.2d at 920.

95. *Id.*

96. *Herr*, 86 N.Y.2d at 641, 658 N.E.2d at 1033, 635 N.Y.S.2d at 160 (quoting Schumer v. Holtzman, 60 N.Y.2d 46, 55, 454 N.E.2d 522, 526, 467 N.Y.S.2d 182, 186 (1983) (emphasis omitted). *See* People v. Jackson, 60 N.Y.2d 848, 850, 458 N.E.2d 377, 378, 470 N.Y.S.2d 136, 137 (1983) (holding the removal of an attorney is unnecessary when "there is no 'significant possibility' of an actual conflict").

97. 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182 (1983). In *Schumer*, the petitioner was a United States Congressman and a former member of the New York State Assembly. *Id.* at 49-50, 454 N.E.2d at 523, 467 N.Y.S.2d at 183. While petitioner was still a member of the State Assembly, he was elected to Congress and obtained the seat formerly held by Elizabeth Holtzman. *Id.* Shortly thereafter, newspapers began to run articles in which petitioner was accused of improper use of state employees during his campaign. *Id.* The Department of Justice "determined that the matter was not appropriate for Federal prosecution. Respondent Holtzman, by then the District Attorney of Kings County, decided local officials should pursue the charges." *Id.* Holtzman then asked Governor Cuomo to supersede her because

canon 9 of the Code of Professional Responsibility . . . [because] her continuing participation in the investigation present[ed] an appearance of impropriety" and, therefore her disqualification was required as a matter of law.[98] The court disagreed with petitioner's contention that "the ethical propriety of her conduct [was] sufficiently presented" for disqualification.[99] Subsequently, the court held that "[a] court may intervene to disqualify an attorney only under limited circumstances. Particularly this is so in the case of a District Attorney who is a constitutional officer chosen by the electorate and whose removal by a court implicates separation of powers considerations."[100]

The *Schumer* court noted that federal courts have adopted a similar rules to the rule which requires the objector to demonstrate actual prejudice.[101] That rule calls for disqualification due to the appearance of impropriety if:

> (1) an attorney's conflict of interest in violation of canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client, or (2) where the attorney is at least partially in a position to use privileged information concerning the other side through prior representation, thus giving his client an unfair advantage.[102]

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she believed that "she might be accused of bias or the appearance of bias against petitioner based upon past political differences with him and because she thought some of her former congressional staff might be witnesses in such an investigation." *Id.* After the Governor refused her request, Holtzman appointed respondent Trager as a "Special Assistant District Attorney" and "in a written memorandum of understanding, gave him broad powers to control the investigation and prosecution." *Id.*

98. *Schumer*, 60 N.Y.2d at 54, 454 N.E.2d at 526, 467 N.Y.S.2d at 186. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980) (stating that "[a] Lawyer should exercise independent professional judgment on behalf of a client"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980) (stating that "[a] Lawyer should avoid even the appearance of professional impropriety").

99. *Id.*

100. *Id.* at 54-55, 454 N.E.2d at 526, 467 N.Y.S.2d at 186.

101. *Id.* at 55, 454 N.E.2d at 526, 467 N.Y.S.2d at 186.

102. *Id.* at 55, 454 N.E.2d at 526-27, 467 N.Y.S.2d at 186-87.

In *Herr*, the defendant relied on the New York State Bar Association Committee on Professional Ethics Opinion No. 544 to support his claim of attorney impropriety.[103] However, the *Herr* court looked to *Niesig v. Team I*,[104] noting the difference between a statute and a disciplinary rule.[105] In *Niesig*, the court of appeals disagreed with the appellate division and the trial court when it held that "the employees of a corporate party [are] also considered 'parties' under Disciplinary Rule 7-104 (A)(1) of the Model Code of Professional Responsibility, which prohibits a lawyer from communicating directly with a 'party' known to have counsel in the matter."[106] In *Niesig*, the plaintiff wished to have his attorney interview the employees of a corporate defendant who were witnesses to the accident in which he was

103. People v. Herr, 86 N.Y.2d 638, 642, 658 N.E.2d 1032, 1033, 635 N.Y.S.2d 159, 160 (1995). *See* 1982 WL 31698 (N.Y. St. B. A. Com. Prof. Eth.). In Opinion Number 544, the Ethics Committee of the New York State Bar Association attempted to determine when it would be appropriate for a part-time local attorney employed by a local governmental unit to engage in private criminal practice. The Committee was "of the opinion that it would be unfair to permit the private practice of criminal law by part-time local attorneys who regularly prosecute violation of local law while prohibiting it by those who prosecute such violations only occasionally and sporadically." *Id.* at *4. The Committee went further, stating that a part-time local attorney should not engage in the private practice of criminal law "when his responsibilities . . . include prosecution of any offenses designated as such by the Penal Law or other statute of the State of New York." *Id.* The Committee used the following example to illustrate their holding: "For example, part-time local attorneys responsible for prosecuting offenses designated as such under the Vehicle and Traffic Law may not act as defense counsel in cases prosecuted by the district attorney even if the latter customarily declines to prosecute offenses thereunder." *Id.*

104. 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990).

105. *Herr*, 86 N.Y.2d at 642, 658 N.E.2d at 1033, 635 N.Y.S.2d at 160.

106. *Niesig*, 76 N.Y.2d at 367-68, 558 N.E.2d at 1031, 559 N.Y.S.2d at 494. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) provides in pertinent part:

> During the course of [the] representation of a client a lawyer shall not . . . [c]ommunicate or cause another to communicate with a party [the lawyer] knows to be represented by a lawyer in that matter unless [the lawyer] has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Id.

injured.[107] The court held that Niesig's counsel could conduct ex parte interviews of any employee whose acts or omissions are not binding on the corporate defendant.[108] The court reasoned that because the Code of Professional Responsibility is "essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline . . . the Code does not have the force of law."[109]

As such, the *Herr* court relied on *Niesig's* distinction between the importance of disciplinary rules and statutes as applied in *Shinkle* and *Schumer* by holding that "statutes are to be applied as they are written or interpreted to effectuate the legislative intention" and disciplinary rules are to be used "as guidelines to be applied with due regard for the broad range of interests at stake."[110] Further, the court added that even though the "defendant's attorney may have been in technical violation"[111] of

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107. *Niesig*, 76 N.Y.2d at 367-68, 558 N.E.2d at 1031-32, 559 N.Y.S.2d at 494-95. In *Niesig*, the plaintiff was injured after falling off scaffolding erected at a building construction site. *Id.* He was employed by DeTrae Enterprises, Inc.; defendant J.M. Frederick was the general contractor and defendant Team I was the property owner at the time of the accident. *Id.* Plaintiff brought an action for damages, claiming that the defendants violated Labor Law § 240. *Id.* Subsequently, the defendants brought a third-party action against DeTrae. *Id.* Plaintiff's counsel sought to conduct "ex parte interviews of all DeTrae employees who were on the site at the time of the accident, arguing that these witnesses to the event were neither managerial nor controlling employees and could not therefore be considered 'personal synonyms for DeTrae.'" *Id.* DeTrae claimed that the "disciplinary rules barred unapproved contact by plaintiff's lawyer with any of its employees." *Id.* The New York Supreme Court denied plaintiff's request, and the appellate division modified the ruling by only allowing interviews of DeTrae's current employees. *Id.* at 368, 558 N.E.2d at 1031-32, 559 N.Y.S.2d at 494-95.

108. *Id.* at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

109. *Id.* at 369, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495. The court also indicated that the Code of Professional Responsibility is approved "by the New York State Bar Association and then enacted by the Appellate Divisions" as opposed to statutes being enacted through the legislative will with which the courts "are of course bound to implement." *Id.*

110. *Id.* at 369-70, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495.

111. People v. Herr, 86 N.Y.2d 638, 642, 658 N.E.2d 1032, 1033, 635 N.Y.S.2d 159, 160 (1995).

a disciplinary rule, those rules "do not have the effect of law."[112]

In *People v. Jackson*,[113] the court of appeals held that although defendant's counsel was to take a position at the District Attorney's office in the near future,[114] the defendant's sentence should be affirmed since the "record reveals that the Trial Judge assured himself that [the] defendant was aware of his attorney's future employment and was satisfied with everything that the attorney had done for [the defendant]."[115]

Jackson can be distinguished from *Herr* because in *Jackson*, the defendant's attorney was planning to join the prosecution after the defendant's case. The *Jackson* court stated that "[a] distinction must be drawn between conflict of interest cases involving representation of several defendants by one attorney and the potential for conflict resulting when a defendant's attorney accepts the offer of a position with the prosecutor's office."[116] In addition, the *Jackson* court noted that since "the consequences [of the former situation] will not be readily apparent to the average defendant . . . careful probing [is required] by the Trial Judge of each defendant's 'awareness of the potential risks involved in that course and that each has knowingly chosen it.'"[117] Furthermore, the court added that the risks of the latter situation "may be clear even to a layman."[118]

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112. *Id.*

113. 60 N.Y.2d 848, 458 N.E.2d 377, 470 N.Y.S.2d 136 (1983).

114. *Id.* The defendant's attorney joined the prosecutor's office after the defendant entered a guilty plea. *Id.* at 850, 458 N.E.2d at 378, 470 N.Y.S.2d at 137.

115. *Id.* at 850-51, 458 N.E.2d at 378, 470 N.Y.S.2d at 137. According to the court, the fact that defendant was sentenced to one year in jail "resulted not from anything his original attorney did or failed to do, but from the fact that the probation report revealed seven prior convictions, rather than the one or two admitted by defendant during the plea proceeding." *Id.* at 851, 458 N.E.2d at 378, 470 N.Y.S.2d at 137.

116. *Id.* at 850, 458 N.E.2d at 378, 470 N.Y.S.2d at 137.

117. *Id.* (citing People v. Macerola, 47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908 (1979)).

118. *Id.*

The *Herr* court utilized the tests as set out in *Shinkle* and *Schumer*. These tests are similar in that they both allow for disqualification when there is the appearance of impropriety.[119] Yet, the court of appeals explained that appearance alone does not automatically compel such action.[120] Relying on the federal rule expounded in *Schumer*, the court explained that there must be a demonstration of "actual prejudice or so substantial a risk as [can]not be ignored" in order to compel disqualification.[121] Thus, the same rule applies under both the Federal and State Constitution in determining when there has been a conflict of interest which undermines the protected right to effective assistance of counsel. However, if *Shinkle* is not to become watered down, New York State courts should keep in mind the difficulty a defendant has in making a showing of "actual prejudice" or "substantial risk." If state courts have taken it upon themselves to police the profession, they should keep in mind that this task is part and parcel of protecting the constitutional right to effective assistance of counsel. Therefore, courts should safeguard the legitimacy of their trials as well as constitutional rights by applying the "actual prejudice - substantial risk" test in a manner that truly protects the right to effective assistance of counsel.

119. *See generally* People v. Shinkle, 51 N.Y.2d 417, 421, 415 N.E.2d 909, 910-11, 434 N.Y.S.2d 918, 920 (1980); *see also* People v. Schumer, 60 N.Y.2d 46, 54, 454 N.E.2d 522, 526, 467 N.Y.S.2d 182, 186 (1983).

120. People v. Herr, 86 N.Y.2d 658, 641, 658 N.E.2d 1032, 1033, 635 N.Y.S.2d 159, 160 (1995).

121. *Id.*