ORIGINAL

Louisiana Attorney Disciplinary Board FILED by: Sym Clemato

Docket# 11-DB-082

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LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: J. PHIL HANEY

NUMBER: 11-DB-082

RULING OF THE LOUISIANA ATTORNEY DISCIPLINARY BOARD

INTRODUCTION

This is a disciplinary matter based upon the filing of formal charges by the Office of Disciplinary Counsel ("ODC") against J. Phil Haney ("Respondent"), Louisiana Bar Roll Number 06516. The formal charges, which consist of one count, allege violations of Rules of Professional Conduct ("Rule(s)") 1.7(a) (concurrent conflict of interest), 1.11(d) (conflict of interest for government officers), and 8.4(d) (conduct prejudicial to the administration of justice). ODC also alleges that Respondent violated Louisiana State Bar Association Formal Ethics Opinion 07-011 (issued February 15, 2007). The Hearing Committee assigned to this matter concluded that Respondent did not violate the Rules and recommended that the formal charges be dismissed.

For the following reasons, the Board adopts the factual findings and conclusions of the Hearing Committee. The Board also adopts the recommendation of the Committee and dismisses the formal charges.

PROCEDURAL HISTORY

ODC filed the formal charges against Respondent on September 6, 2011. On September 27, 2011, Respondent filed an answer to the charges through counsel, Richard C. Stanley,

¹ The text of the Rules can be found in Appendix A.

² As will be discussed in greater detail below, Ethics Opinions issued by the Louisiana State Bar Association's Rules of Professional Conduct Committee are not binding on any person or tribunal. However, this opinion may be considered by the Board as persuasive argument. The opinion is attached as Appendix B.

Michelle M. West, and Bernard E. Boudreaux, Jr.³ In his answer, Respondent admitted to certain factual allegations in the formal charges but denied violating the Rules. This matter was assigned to Hearing Committee No. 31 ("the Committee").⁴

On January 25, 2012, the parties filed a Joint Stipulation of Fact and Joint Agreement on Exhibits.⁵

After one continuance, the hearing of this matter was set for February 28, 2012. ODC filed its pre-hearing memorandum on February 16, 2012, in which it argued that Respondent violated the Rules as charged and should be suspended from the practice of law for one year and one day, with all but 90 days deferred, subject to certain conditions. Respondent filed his pre-hearing memorandum on February 17, 2012, in which he argued that the formal charges should be dismissed.

The hearing was held as scheduled. Deputy Disciplinary Counsel G. Fred Ours appeared on behalf of ODC. Richard C. Stanley and Michelle M. West appeared on behalf of Respondent. Respondent filed his post-hearing memorandum on March 8, 2012. ODC filed a reply memorandum on March 15, 2012. Respondent filed a reply memorandum on March 21, 2012. ODC filed an objection to Respondent's reply memorandum on March 22, 2012. Respondent filed an opposition to ODC's objection on March 28, 2012.

The Committee filed its report on July 2, 2012. The Committee concluded that Respondent did not violate the Rules of Professional Conduct and recommended that the formal charges be dismissed. ODC filed an objection to the Committee's report on July 5, 2012. Respondent filed a response to ODC's objection on July 20, 2012.

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³ Harry T. Lemmon and William M. Ross subsequently enrolled as additional co-counsel.

⁴ The Committee was composed of Stephanie L. Cochran (Chair), Ian A. McDonald (Lawyer Member), and Richard A. Hinton (Public Member).

⁵ These pleadings are also contained in the record as Respondent Exhibit 14.

In advance of oral argument of this matter, ODC filed a pre-argument brief on August 27, 2012. Respondent filed a pre-argument brief on September 14, 2012. Oral argument of this matter was held on September 27, 2012, before Board Panel "A".

FORMAL CHARGES

The formal charges filed on September 6, 2011, state in pertinent part:

J. Phil Haney was at all times relevant hereto the District Attorney for the 16th Judicial District. On May 20, 2007, Stephanie Provost was injured in a boating accident when she fell out of an inner tube connected to a boat being driven by Shane Roberts within the jurisdiction of the 16th Judicial District. Mr. Roberts was issued a citation by the investigating State Wildlife and Fisheries agent for misdemeanor criminal violations of reckless operation of a watercraft (La.R.S. 34:851.5) and no waterskiing observer (La.R.S. 34:851.15). The citation lists an August 8, 2007 arraignment date at the Iberia Parish Courthouse. On August 17, 2007, on motion of the Attorney General's office, Mr. Robert's arraignment was continued to October 26, 2007, in order to include the additional charges of negligent injuring (La.R.S. 14:39) which the attorney general had filed. Between May 20, 2007 and August 10, 2007, Ms. Provost retained Mr. Haney as her lawyer, on a contingency fee basis, to represent her in recovering damages from Mr. Roberts for her injuries from the May 20, 2007 accident. Shortly after Mr. Haney was retained to represent Ms. Provost, he recused his office from prosecuting the criminal charges against Mr. Roberts, and the Attorney General's office assumed the prosecution of Mr. Roberts. Mr. Haney continued to represent Ms. Provost in the civil case against Mr. Roberts, settled that case in December 2007, and received a \$20,000.00 legal fee. Mr. Roberts was subsequently convicted of some of the criminal charges, and was sentenced.

Mr. Haney pursued the private civil matter for Ms. Provost, which conflicted with his public duty as District Attorney to prosecute Mr. Roberts, in violation of Rules of Professional Conduct 1.7(a), 1.11(d), 8.4(d), and LSBA Formal Ethics Opinion 07-011 (issued February 15, 2007).

HEARING COMMITTEE REPORT

The hearing of this matter was held on February 28, 2012. Deputy Disciplinary Counsel G. Fred Ours appeared on behalf of ODC. Respondent appeared with counsel, Richard C. Stanley and Michelle M. West. Respondent was the only witness to testify at the hearing, but the parties submitted the video deposition of Stephanie L. Provost in lieu of live testimony. *See*

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⁶ Board Panel "A" was composed of R. Steven Tew (Chair), Carl A. Butler (Lawyer Member), and Linda P. Spain (Public Member).

Respondent Exhibit 16. ODC introduced exhibits ODC1 – ODC6; Respondent introduced exhibits R1 – R16.

Based upon the testimony and documentary evidence, the Committee made the following findings and conclusions:

EVIDENCE

...Of significance, Provost testified that she was referred to Respondent by a close family friend, Katherine Boudreaux, who was also Respondent's former private office secretary. She testified that she contacted Respondent to obtain legal advice relating to letters she was receiving from her insurance company as a result of the boating accident, her outstanding medical bills and subrogation claims.

According to Provost, she was not aware of Roberts receiving any citations and was not told by Respondent that Roberts received any such citations. In fact, Provost first learned that citations were issued to Roberts when she was contacted by the Attorney General's Office. According to Provost, she was unconscious after the accident and had no knowledge of what occurred at the scene of the accident. The only time she discussed Robert's citation and criminal matter was when she was notified by the Attorney General's Office and she subsequently contacted Respondent to inquire about it. At that point, Respondent advised her that the Attorney General's Office was handling the matter.

Additionally, Provost testified that Respondent never implied that he could use his position as District Attorney to assist her in her civil case nor did he imply that he could [use] his position as District Attorney to assist her "in any way, shape or form". Furthermore, she testified that she also did not want Respondent to use his position as District Attorney to assist her in the civil suit.

Regarding Provost's intentions in the civil matter, she testified that she told Respondent that she did not want to sue Mr. Roberts.

Provost's testimony corroborated Respondent's testimony at the hearing. According to Respondent, he first meet [sic] with Provost around June 23, 2005. Respondent testified that the focus of this initial meeting with Provost was the issue of subrogation. He further testified that there was no mention of any related criminal issues. Within 1-2 days of this meeting, but before Respondent was retained, he had a records conflict check run which yielded no pending charges. Thereafter, Respondent entered into an agreement with Provost. Recognizing his continued obligation to update the initial conflict's check, Respondent testified that he had a second check run in July, 2007 which revealed the Wildlife and Fisheries ticket issued to Roberts. Of significance, is that although the ticket was issued to Mr. Roberts at the time of the accident, the citation was not filed with the Clerk of Court's Office for the 16th JDC until July 13, 2007. See Joint Stipulation of Fact. At this time, he recused his Office and forwarded the matter to the Attorney General's Office for handling. Respondent testified that, thereafter, he was no longer involved in the prosecution of the ticket against Mr. Roberts.

FINDINGS OF FACT

For the following reasons, the hearing committee finds no violation of the Rules of Professional Conduct. As it relates to Rule 1.7, the hearing committee finds that Respondent did not violate Rule 1.7 as no conflict existed at the time Respondent accepted civil representation of Stephanie Provost. Furthermore, the hearing committee finds no violation in as much as Respondent resolved any potential conflict by recusing his Office from Mr. Roberts criminal matter once he discovered the conflict. Therefore, Respondent acted in accordance with the Rules of Professional Conduct.

As it relates to Rule 1.11(d), the hearing committee similarly finds no conflict existed such as to require Respondent to withdraw from both the criminal prosecution of Mr. Roberts and the civil representation of Mrs. Provost. The hearing committee questions the appropriateness of a finding of disciplinary misconduct based upon a non-binding Ethics Opinion but rather looks to published caselaw interpretation of the Rules of Professional Conduct. Therefore, based upon a strict reading of Rule 1.11(d) and the opinions in In re Toups, 773 So.2d 709, 2000-0634 (La. 11/28/00) and In re Caillouet, 800 So.2d 367, 2001-2461 (La. 11/9/01), the hearing committee finds no violation. No criminal actions were pursued against Mr. Roberts by Mrs. Provost or by Mr. Roberts against Mrs. Provost. Once Respondent learned of a potential conflict involving criminal charges submitted to his Office by the State of Louisiana, Department of Wildlife Fisheries against Mr. Roberts, he recused his Office from prosecution of said charges. There was no evidence presented of his participation, personally or substantially, thereafter.

As it relates to Rule 8.4(d), the hearing committee finds no such violation for the reasons set forth above. However, the committee did have concerns regarding Respondent's actions in the civil representation of Mrs. Provost as it relates to his public office. As recognized by the Louisiana Supreme Court in In re Toups, supra, and of which is evident herein, dual representations by an attorney who is a district attorney present potential and actual conflicts. Prosecutors are given vast discretion to decide who to prosecute, when to prosecute, what crimes to charge etc. Along with such vast power and discretion comes a higher ethical standard. As such, the committee questions the reasonableness of the research performed by a simple conflicts check at his Office alone. Based upon Respondent's extensive legal background, knowledge and experience as an Assistant District Attorney and District Attorney, he should have taken additional steps to the assure himself that no potential conflict existed. Nevertheless, based upon the above stated findings as it relates to Rules 1.7 and 1.11(d), no violation is found.

The hearing committee similarly had concern regarding the possible appearance of impropriety when, in correspondence to Allstate Insurance Company on behalf of Mrs. Provost, he provided his contact information as the District Attorney's Office in New Iberia and corresponding phone number. While this did leave a questionable impression on the committee, the record was void of any evidence that said comment resulted in a manipulation of any civil or criminal

proceedings or that Respondent obtained any advantage in the civil matter. As such, the hearing committee finds that said conduct was not prejudicial to the administration of justice.

Hearing Committee Report, pp. 3-6. Based upon the foregoing, the Committee recommended that the formal charges be dismissed.

ANALYSIS OF THE RECORD BEFORE THE BOARD

The powers and duties of the Disciplinary Board are defined in §2 of Louisiana Supreme Court Rule XIX. Rule XIX, §2(G)(2)(a) states that the Board is "to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges ... and petitions for reinstatement, and prepare and forward to the court its own findings, if any, and recommendations." Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest error." *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a *de novo* review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004, Recommendation of the Louisiana Attorney Disciplinary Board (1/22/92).

I. The Manifest Error Inquiry

The factual findings of the Committee are not manifestly erroneous and are supported by the record. Before discussing the alleged Rule violations, a recitation of the pertinent facts is helpful. The parties stipulated to the vast majority of these facts. *See* Respondent Exhibit 14.

Respondent is the District Attorney of 16th Judicial District of Louisiana. Respondent also maintains a private law practice.

On May 20, 2007, Stephanie Provost and a minor child were injured in a boating accident. Shane Roberts was operating the boat at the time of the accident. The accident

occurred within the jurisdiction of the 16th JDC. On the day of the accident, Mr. Roberts received a citation from the Louisiana Department of Wildlife and Fisheries for misdemeanor criminal violations of reckless operation of a watercraft (La. R.S. 34:851.5) and no waterskiing observer (La. R.S. 34:851.15). Ms. Provost was not aware of citation because she was unconscious after the accident. *See* Respondent Exhibit 16 (Deposition of Stephanie L. Provost), p. 21.

A family friend of Ms. Provost, Kathryn Boudreaux, referred her to Respondent. At some point between June 14 and June 22, 2007, Ms. Provost first met with Respondent to discuss the insurance implications of the accident. After first meeting with Ms. Provost, Respondent conducted his first conflicts check, which showed no charges pending against Ms. Provost or Mr. Roberts. Respondent testified that he ran the conflicts check before accepting the representation. Hearing Transcript, pp. 28-29.

Subsequent to their initial meeting and the first conflicts check, Respondent agreed to represent Ms. Provost on contingency fee basis. *See* Respondent Exhibit 2. The focus of the representation was to pursue any recovery from Mr. Roberts' insurer. Ms. Provost did not want to sue Mr. Roberts' personally. *See* Respondent Exhibit 16 (Deposition of Stephanie L. Provost), p. 14.

After the representation commenced, on July 13, 2007, the citation issued to Mr. Roberts by the Louisiana Department of Wildlife and Fisheries was filed with District Attorney's Office for prosecution. A second conflicts check conducted by Respondent in mid-July 2007 revealed the existence of the citation. Upon learning of the conflict, Respondent recused the District Attorney's Office and referred the matter to the Louisiana Attorney General's Office for prosecution. Neither Respondent nor his office participated in the prosecution of Mr. Roberts.

Respondent continued to represent Ms. Provost in her insurance matter after the recusal of his office from the prosecution of the Roberts matter. He settled Ms. Provost's matter with Mr. Roberts' insurer in December of 2007. Respondent received a \$20,000 contingency fee from the settlement. (The settlement was for the policy limit, which was \$100,000.) *See* ODC Exhibit 5e (the settlement check), Exhibit 6a (the disbursement checks to Respondent and Ms. Provost), and Exhibit 6b (the receipt and release).

Mr. Roberts' criminal matter proceeded to trial on March 6, 2008. He was convicted of some, but not all, of the charges.

II. De Novo Review

The Committee correctly applied the Rules of Professional Conduct. The record indicates that Respondent did not violate the Rules as charged. Before addressing each Rule, the influence of the Louisiana State Bar Associations Public Opinion 07-RPCC-011 ("the Ethics Opinion") must be addressed. In the formal charges, ODC states that Respondent

pursued the private civil matter for Ms. Provost, which conflicted with his public duty as District Attorney to prosecute Mr. Roberts, in violation of Rules of Professional Conduct 1.7(a), 1.11(d), 8.4(d), and LSBA Formal Ethics Opinion 07-011 (issued February 15, 2007).

Formal Charges (filed 9/6/11), p. 2. Respondent argues that the Ethics Opinion is not binding law. Respondent is correct. The Ethics Opinion states:

The comments and opinions of the Committee – public or private – are not binding on any person or tribunal, including – but not limited to – the Office of Disciplinary Counsel and the Louisiana Attorney Disciplinary Board.

LSBA-RPCC Public Opinion 07-RPCC-011 (2/15/07), p. 1 n.1. ODC concedes that the Ethics Opinion is not binding on any tribunal. Post Hearing Reply Memorandum (filed 3/15/12), p. 5. However, ODC argues that the Ethics Opinion is persuasive and its analysis should not be dismissed. *Id.* at p. 6. *See also* Initial Brief of Disciplinary Counsel (filed 8/27/12), p. 2.

While the Ethics Opinion is not binding on any tribunal, which includes this Board, the Ethics Opinion could be considered as persuasive argument in determining whether or not the Rules of Professional Conduct were violated.⁷ Nevertheless, even in light of the Ethics Opinion, the record does not indicate that Respondent violated the Rules as alleged in the formal charges.

Rule 1.11(d): Rule 1.11(d) states, in pertinent part, that a lawyer currently serving as a public officer or employee shall not "negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially." Rule 1.11(d)(2)(ii). Here, at the time Ms. Provost retained the services of Respondent, he was the elected District Attorney for the 16th Judicial District of Louisiana. Thus, he falls within the scope of Rule 1.11(d). However, the facts of this case fail to meet the other elements of the Rule quoted above. First, Ms. Provost was not a party to the criminal matter involving Mr. Roberts. While she was the victim of his negligent acts and was a witness at the criminal trial, she was not a party to the action. The parties to the criminal action were Mr. Roberts and the State of Louisiana, who was represented by the Louisiana Attorney General's Office. Second, Respondent did not participate in the criminal matter personally and substantially because he recused his office upon learning of the conflict. Based upon the language of Rule 1.11(d) and the facts of this matter, the Committee correctly concluded that Respondent did not violate this Rule.

Rule 1.7(a) and In re Toups & In re Caillouet: Rule 1.7(a) states, in pertinent part, that a lawyer "shall not represent a client if the representation involves a concurrent conflict of

⁷ As argued by ODC, the Board and the Court have referenced Louisiana and American Bar Association Ethics Opinions in the past. *See In re Dowden*, 00-DB-028, Ruling of the Louisiana Attorney Disciplinary Board (5/4/01); *In re Sledge*, 10-DB-059, Recommendation of the Louisiana Attorney Disciplinary Board (4/5/12); *In re Ashy*, 98-0662 (La. 12/1/98), 721 So.2d 859.

⁸ The criminal trial was held on March 6, 2008, which was several months after Respondent settled Ms. Provost's civil matter and concluded the representation. *See* ODC Exhibit 1g (minutes from Mr. Robert's criminal trial).

interest." According to the Rule, a concurrent conflict of interest exists if "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." Rule 1.7(a)(2). Rule 1.11(d)(1) states that Rule 1.7 applies to lawyers currently serving as public officers or employees. Here, the facts of this matter do not constitute a violation of Rule 1.7(a). First, arguably there was a significant risk that Respondent's representation of the District Attorney's Office, the State of Louisiana, and the citizens of the 16th JDC was materially limited by his representation of Ms. Provost and/or by his own personal interests. However, upon closer inspection, this does not appear to be the case. First, as District Attorney of the 16th JDC, Respondent had a duty to prosecute criminal matters within that jurisdiction. However, prior to learning of the criminal matter, Respondent had already accepted the representation of Ms. Provost. Thus, Respondent could not have participated in the prosecution of Mr. Roberts even if he so desired because he had already represented the victim in the criminal matter for which Mr. Roberts was being prosecuted. Second, ODC argues that Respondent neglected and/or ignored his duties as District Attorney by pursuing his personal interest in the legal fees associated with Ms. Provost's civil matter. However, Respondent was not aware of any conflict at the time he accepted the representation of Ms. Provost. Thus, he was not aware that his duties as District Attorney would be impacted by the representation of Ms. Provost. Additionally, while ODC and the Committee question the reasonableness of Respondent's conflicts check prior to accepting the representation of Ms. Provost, there is no evidence in the record that suggests his initial conflicts research was unreasonable. In other words, there is no evidence that

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⁹ As mentioned above, Respondent was allowed to accept the representation because he was allowed to have a private law practice.

Respondent intentionally remained ignorant of the Roberts matter in order to pursue a legal fee in the Provost matter.

Furthermore, ODC argues that the facts of this matter are analogous to the matters of *In re Toups* and *In re Caillouet*. *In re Toups*, 2000-0634 (La. 11/28/00), 773 So.2d 709; *In re Caillouet*, 2001-2461 (La. 11/9/01), 800 So.2d 367. In those matters, the Louisiana Supreme Court ("the Court") addressed circumstances where the duties of two prosecutors conflicted with their duties to their private clients. ¹⁰ Mr. Toups and Mr. Caillouet were both assistant district attorneys in the Parish of Lafourche. They both also maintained private law practices. They came to represent opposing parties in a domestic matter. In March of 1997, Mrs. Ordoyne retained Mr. Toups to represent her in connection with a divorce and community property matter as well as a motion for protective order against her husband. Mr. Ordoyne was represented by Mr. Caillouet. The following events ensued:

Sometime in late March, Mrs. Ordoyne complained to respondent that her husband had hit her during their marriage. Respondent advised his client that she could file a criminal complaint on these grounds. On April 1, 1997, Mrs. Ordoyne appeared before a Lafourche Parish Justice of the Peace and signed an affidavit attesting that her husband had battered her on a number of occasions between December 1996 and March 1997. It is unclear whether respondent knew that Mrs. Ordoyne had taken this action. [FN4] Nevertheless, a simple battery charge against Mr. Ordoyne was ultimately referred to the District Attorney's office in the judicial district where respondent and Mr. Caillouet are Assistant District Attorneys.

FN4. According to Mrs. Ordoyne, she telephoned respondent's office the same day she filed the criminal complaint to tell him that she had done so. Respondent denies this.

On April 3, 1997, respondent and Mr. Caillouet met with Mr. and Mrs. Ordoyne to discuss the domestic matters. The subject of Mrs. Ordoyne's criminal complaint against her husband was not raised at this time. [FN5] By all accounts, however, the parties left the meeting with the impression that all of the issues discussed that day between Mr. and Mrs. Ordoyne had been resolved.

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 $^{^{10}}$ Although the Court ultimately decided *Toups* and *Caillouet* separately, the matters arose out of the same operative facts.

FN5. Mrs. Ordoyne testified that respondent expressly instructed her not to bring up the subject. Respondent claims that he was unaware of the criminal complaint and thus could not have brought it up at the meeting.

Mr. Ordoyne was never arrested in connection with the criminal charge. Instead, a notice of arraignment was served at his mother's home in early May 1997. Mr. Ordoyne's mother telephoned Mr. Caillouet and asked him whether her son would have to miss work to appear in court. Mr. Caillouet told her that he would try to determine who had filed the complaint, but advised that Mr. Ordoyne would have to find other representation for the criminal matter.

On May 7, 1997, Mr. Caillouet examined the record in the criminal case and learned, apparently for the first time, that Mrs. Ordoyne had filed a criminal complaint against her husband. Mr. Caillouet determined that the conduct forming the basis of the criminal complaint was essentially the same as the conduct forming the basis of Mrs. Ordoyne's motion for a protective order. Believing that all issues between Mr. and Mrs. Ordoyne had been resolved during the April 3rd meeting, including Mrs. Ordoyne's allegations of physical abuse during the marriage, Mr. Caillouet suggested to respondent that the criminal case against Todd Ordoyne be continued without date. Mr. Caillouet claims that he made this suggestion in order that Mr. Ordoyne would not have to miss a day of work for arraignment on charges which Mr. Caillouet understood would be mooted by the parties' settlement agreement. At no time, however, did Mr. Caillouet suggest, discuss, or recommend to respondent that the criminal case against Mr. Ordoyne be dismissed.

There is conflicting testimony in the record concerning respondent's reaction to Mr. Caillouet's proposal. According to Mr. Caillouet, respondent confirmed that all issues between Mr. and Mrs. Ordoyne had been settled, and respondent agreed that the criminal case be continued without date. However, respondent claims that he told Mr. Caillouet that this was the first he had heard of the criminal charge, and stated that he had not spoken with Mrs. Ordoyne and did not know what she would want to do about the matter, i.e., whether she would agree to drop her criminal complaint because all other issues involving her husband had been resolved. Nevertheless, despite respondent's asserted disagreement with the course of action Mr. Caillouet had proposed, respondent did not bring the matter to the attention of his client, the court, or his superiors in the District Attorney's office. For his part, Mr. Caillouet asked one of the clerical workers in the District Attorney's office to make an entry in the computer concerning Mr. Ordoyne's arraignment: "CWOD [continued without date] pending civil matter per SEC [Mr. Caillouet]. He says Thad [respondent] has agreed to this."

Mr. Ordoyne was scheduled to be arraigned the following day, May 8, 1997, in the 17th JDC, Division "A." This was the division of court normally handled by Mr. Caillouet; however, he could not be present on that day because he was recovering from a heart attack. As a result, respondent was asked to handle

the criminal docket in Division "A" that day. Respondent saw a notation on the docket sheet that the Ordoyne case was to be "CWOD—pending civil matter per SEC." Respondent claims he told his assistant that he could not handle anything related to the Ordoyne matter, and that he passed over the case without calling it. However, the court's minutes reflect that "on motion of the State, the court ordered that this matter be continued without date."

Several days later, when Mrs. Ordoyne telephoned the District Attorney's office to inquire about the status of her husband's criminal case, she was told that respondent and Mr. Caillouet had agreed to continue the case without date. Mrs. Ordoyne was angered by this news and demanded an explanation from respondent. Respondent thereafter instructed the District Attorney's office to change the "CWOD pending civil matter per SEC" notation in the computer to include "Thad advised his client will not agree to this." Not satisfied with respondent's answer, Mrs. Ordoyne confronted the Lafourche Parish District Attorney, Walter "Butch" Naquin, Jr. Mr. Naquin subsequently ordered both respondent and Mr. Caillouet to withdraw from the Ordoyne civil matter. [FN6]

FN6. On May 19, 1997, Mr. Ordoyne was issued a new notice of arraignment on the criminal charges, and in October 1997, he pled no contest to simple battery.

In re Toups, 773 So.2d at 711-713. Based upon these facts, the Court concluded that Mr. Toups violated Rules 1.13(b), 3.3, 8.3, and 8.4(a). ¹¹ Mr. Caillouet was found guilty of violating Rules 1.7(a) and 8.4(d). Furthermore, the Court held:

After considering the important policy reasons behind avoiding conflicts of interest between a district attorney's prosecutorial rule 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 criminal charges are unrelated to the civil representation.

Id. at 716. The Court publicly reprimanded Mr. Toups for failing to report the conflict of interest. ¹² Mr. Caillouet was suspended from the practice of law for six months, fully deferred, subject to a probationary period of six months. ¹³

¹¹ See Appendix C for the text of these Rules. Mr. Toups was also charged with a conflict of interest in an unrelated matter for which he was found guilty of violating Rules 1.7 and 8.4(d).

While the facts of *Toups* and *Caillouet* are somewhat similar to the facts of the present matter, there are significant differences. Both Mr. Toups and Mr. Caillouet failed to address the conflict once it became known. Mr. Toups failed to withdraw from the civil representation after his client initiated a criminal matter that would be prosecuted within Mr. Toups' jurisdiction. Similarly, Mr. Caillouet did not withdraw from the civil representation after he learned of criminal charges pending against his client. Neither Mr. Toups nor Mr. Caillouet notified the District Attorney's Office of the conflict. Furthermore, Mr. Caillouet took action in the criminal matter that was beneficial to his civil client. In the present matter, Respondent addressed the conflict once it became known to him. Additionally, Respondent's client was not the party who initiated the criminal proceeding nor was she the subject of criminal charges, as was the case in Toups and Caillouet. In fact, the Court's holding in Toups and Caillouet is narrowly tailored to those specific circumstances: "[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." (Emphasis added.) In re *Toups*, 773 So.2d at 716.

Accordingly, the Committee correctly concluded that Rule 1.7 was not violated. The facts of this matter do not demonstrate a conflict of interest that violates the Rules of Professional Conduct or that falls within the scope of the Court's holding in *Toups* and *Caillouet*.

¹² Mr. Toups was also suspended for six months, fully deferred, subject to a probationary period of two years, for the unrelated misconduct noted above. *In re Toups*, 773 So.2d at 718. *See also In re Caillouet*, 800 So.2d at 370 n.5.

¹³ Prior to *Toups* and *Caillouet*, the Louisiana Attorney Disciplinary Board considered a somewhat analogous case. In *In re Dowden*, the Board publicly reprimanded a city prosecutor for representing an individual in a child support

In *In re Dowden*, the Board publicly reprimanded a city prosecutor for representing an individual in a child support matter when the individual had criminal charges pending before the city prosecutor's office. *In re Dowden*, 00-DB-028, Recommendation of the Louisiana Attorney Disciplinary Board (5/4/01). Mr. Dowden obtained a written waiver of the conflict from his client, but the Hearing Committee and the Board held that Mr. Dowden could not obtain a waiver from his other client – the citizens of the city he represented as a prosecutor. The Hearing Committee and the Board relied on ABA Informal Opinion 922.

Rule 8.4(d): Rule 8.4(d) states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Based upon the analysis above, it does not appear that Respondent engaged in conduct prejudicial to the administration of justice. There is no evidence in the record that Respondent intentionally neglected or ignored his duties as District Attorney to pursue financial gain. Also, as discussed above, regardless of whether he withdrew from the Provost matter, he would have had to withdraw from the Roberts matter anyway. Thus, there is no evidence that his recusal in the criminal matter or his continued representation of Ms. Provost harmed the prosecution of Mr. Roberts.

RULING

Based upon the foregoing, the Board adopts the factual findings and legal conclusions of the Committee. Accordingly, the Board hereby dismisses the formal charges filed against Respondent, J. Phil Haney, bearing docket number 11-DB-082. The costs and expenses of this proceeding are to be borne by the Disciplinary Board.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Carl A. Butler
John T. Cox, Jr.
George L. Crain, Jr.
Jamie E. Fontenot
Tara L. Mason
R. Lewis Smith, Jr.
R. Steven Tew

BY:

Linda P. Spain

FOR THE ADJUDICATIVE COMMITTEE

Edwin G. Preis, Jr.-Recused.

APPENDIX A

RULE 1.7. CONFLICT OF INTEREST: CURRECT CLIENTS

- (a) 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.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

RULE 1.11. SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES (in pertinent part)

- (d) 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; and
- (2) shall not:
- (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
- (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

RULE 8.4. MISCONDUCT (in pertinent part)

It is professional misconduct for a lawyer to: ***

(d) Engage in conduct that is prejudicial to the administration of justice;

APPENDIX B

Louisiana State Bar Association Rules of Professional Conduct Committee

PUBLIC Opinion 07-RPCC-011¹

February 15, 2007

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

¹ The comments and opinions of the Committee—public or private—are not binding on any person or tribunal, including—but not limited to—the Office of Disciplinary Counsel and the Louisiana Attorney Disciplinary Board. Public opinions are those which the Committee has published—specifically designated thereon as "PUBLIC"—and may be cited. Private opinions are those that have not been published by the Committee—specifically designated thereon as "NOT FOR PUBLICATION"—and are intended to be advice for the originally-inquiring lawyer only and are not intended to be made available for public use or for citation. Neither the LSBA, the members of the Committee or its Ethics Counsel assume any legal liability or responsibility for the advice and opinions expressed in this process.

² See, e.g., <u>State v. Facemire</u>, 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.

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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. 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.

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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 rule [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...

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 <u>Toups</u>, 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, <u>Toups</u> and <u>Caillouet</u> 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 <u>State v. McNeal</u>, 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 <u>McNeal</u>, 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). 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 <u>State v. Gray</u>, 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.

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.

APPENDIX C

RULE 1.13. ORGANIZATION AS CLIENT (in pertinent part)

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

RULE 3.3. CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

RULE 8.3. REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel.

- (b) A lawyer who knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a question as to the judge's honesty, trustworthiness or fitness for office shall inform the Judiciary Commission. Complaints concerning the conduct of federal judges shall be filed with the appropriate federal authorities in accordance with federal laws and rules governing federal judicial conduct and disability.
- (c) This rule does not require the disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program or while serving as a member of the Ethics Advisory Service Committee.

RULE 8.4. MISCONDUCT (in pertinent part)

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another ...