

New York State Bar Association

Committee on Professional Ethics

Opinion 800 – 11/3/06

Topic: Conflicts of interest, appearance of impropriety; part-time prosecutor serving as appointed counsel for indigent respondents in Family Court proceedings.

Digest: A part-time prosecutor is not precluded from accepting all assignments as court-appointed counsel in Family Court. In specific types of cases and specific situations, including cases in which law enforcement personnel with whom the prosecutor works as a prosecutor are involved, and cases that are quasi-criminal in nature, the prosecutor is barred from accepting assignments. In other cases, the part-time prosecutor must carefully consider whether conflicts or the appearance of impropriety would preclude the assignment. Any doubt must be resolved against accepting an assignment.

Code: DR 2-110, DR 5-101, DR 5-105, DR 9-101
EC 5-15, EC 9-1

QUESTION

1. May a part-time prosecutor accept assignment to represent indigent persons in Family Court proceedings of a neighboring county?

OPINION

2. A part-time prosecutor seeks appointment to a panel authorized to accept assignment of cases on behalf of indigent respondents in the Family Court in a neighboring county. Attorneys appointed to serve on the assigned counsel program in the Family Court can be assigned to represent either petitioners or respondents (except in child protective proceedings, proceedings involving allegations of willful failure to pay court-ordered support, and paternity proceedings, in which program attorneys are only assigned to represent respondents).

3. The Family Court hears matters involving children and families, including child protective proceedings, adoption, custody and visitation, support, family offense, guardianship, delinquency, paternity, persons in need of supervision (PINS), and foster care approval and review. While certain Family Court matters are more likely to involve related criminal matters, virtually all types of proceedings heard by the Family Court are likely to have some involvement of law enforcement agencies or similar governmental entities. In neglect and abuse cases, for example, multiple government entities are often involved. The local child protective service¹ investigates allegations and the county attorneys present (“prosecute”) the case in the Family Court. Family offense cases by their nature pose a great risk of criminal charges being brought. In custody and visitation cases, the practices may vary by county, but many Family Courts request reports from probation departments, in addition to (or instead of) reports from local child welfare officials. Child support cases, too, could involve law enforcement and/or prosecution. In these and other cases, the Family Court may also request reports from other governmental agencies, including the probation department.

4. Whether a part-time prosecutor from a neighboring county can accept assignments to represent indigent people in a Family Court depends on all the relevant facts and circumstances. No *per se* rule prohibits all such assignments. Nonetheless, the attorney seeking appointment must carefully consider a number of factors in each type of proceeding and in each individual matter. The attorney must avoid all conflicts of interest, ensuring that neither the attorney’s own interests² nor the attorney’s simultaneous work as a prosecutor³ preclude the attorney from

¹ In some situations, local police departments may also be involved in child protective investigations.

² DR 5-101 of the New York Lawyer’s Code of Professional Responsibility (the “Code”) provides: .

A. A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer’s own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer’s interest.

³ DR 5-105 of the Code provides, in relevant part:

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer

exercising independent judgment on behalf of his or her clients. In many cases, a conflict might not be apparent at the outset of the case. For this reason, the attorney must be careful to avoid those cases where a conflict is likely to occur. *Cf.* EC 5-15 (“the lawyer should resolve all doubts against the propriety of representation”).

5. In at least three situations, the attorney, in our view, would be barred from accepting any assigned cases: matters in which officers or other law enforcement personnel with whom the prosecutor works (or has worked) as a prosecutor are involved; juvenile delinquency proceedings; and Persons in Need of Supervision (PINS) proceedings.

6. As we have previously noted, a part-time prosecutor should not accept defense work in any proceeding in which “investigating officers and law enforcement personnel are those with whom the attorney associates as prosecutor.” NY State 544 (1982). We perceive no difference in the Family Court setting.

7. We have previously held that a part-time prosecutor is barred from representing defendants in juvenile delinquency proceedings. N.Y. State 171 (1970). The defense function in juvenile delinquency proceedings, although not categorized as “criminal,” is indistinguishable from defense in an adult criminal proceeding. See N.Y. State 544 (1982) (“an attorney who has prosecutorial responsibilities as an incident of part-time employment by a local governmental unit is disqualified from the private practice of criminal law in all courts of the state”);⁴ N.Y. State 427 (1976) (private criminal defense work by a part-time prosecutor is improper).

8. We believe PINS proceedings are functionally indistinguishable from juvenile delinquency proceedings and the same rule should apply. PINS proceedings bear most, if not all, of the hallmarks of defense work. The child is being “charged” with specific conduct, law enforcement personnel are inextricably involved in the proceeding, and the child has a liberty interest in the outcome of the proceeding.

in representing differing interests, except to the extent permitted under DR 5-105(C) [regarding consent].

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 (C).

⁴ N.Y. State 544 rests on DR 5-105 and DR 9-101:

The theory is that “since a prosecutor represents the people of the state, it is improper for him [or her] to represent individual clients charged with criminal violations.” And “[a]cting as a prosecutor on one case one day, and appearing the next day even in a different court representing a private citizen who had been charged with a criminal act or violation or law would give rise to an appearance of improper conflict of interest.”

Quoting N.Y. State 184 (1971).

Also, the charges must be sustained by proof beyond a reasonable doubt. Although locked detention is no longer a permissible disposition in a PINS proceeding, children adjudicated to be PINS can be removed from their home and placed in facilities where their liberty is severely constricted.

9. Representation of respondent parents in child protective proceedings (Family Court Article X, neglect and abuse) bears special mention. In child protective proceedings, respondent parents are answering to charges from the government regarding their parenting. Ultimately, the parent could temporarily or permanently lose custody of the child as a result of this proceeding. Here, too, even if the government personnel charging the parents are not those with which the part-time prosecutor would be involved, a part-time prosecutor must be particularly sensitive to the appearance of impropriety that may arise from his or her attempting to appear adverse to authorities conducting proceedings very similar to those of a prosecutor.

10. In all cases, the attorney must carefully evaluate the individual facts and circumstances prior to accepting appointment and, consistent with DR 2-110, will often need to withdraw if a conflict arises during the course of the representation.⁵ Assigned clients ordinarily have no choice in the assignment. Moreover, clients are likely to be prejudiced if counsel must be substituted during the course of a proceeding. Therefore, the attorney must resolve any doubt against accepting an assignment.⁶

11. The attorney must also strive to ensure that dual roles – part-time prosecutor and part-time advocate for poor people in Family Court – do not give rise to an appearance of impropriety. DR 9-101; EC 9-1. In addition to issues relating to conflicts, the part-time prosecutor would need to ensure that the assigned counsel plan’s clients and the public at large do not perceive the attorney’s dual roles to be improper.⁷

CONCLUSION

12. While a part-time prosecutor from a neighboring county may accept assignment to represent indigent people in certain Family Court proceedings, careful

⁵ Client consent, in a case where a conflict is consentable, is often not possible. Consent can only be sought where the prospective client would be empowered to withhold consent freely. Assuming *arguendo* that the prosecutor’s office would consent, it would be difficult to obtain voluntary consent from an assigned client. See, e.g., N.Y. State 490 (1978) (When seeking consent, the attorney “should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and, such requests should be made only under circumstances where the [attorney] is satisfied that [his or her] clients could refuse to consent without any sense of guilt or embarrassment.”).

⁶ Because of the high likelihood that conflicts will arise even in cases in which a part-time prosecutor may take on the representation, it may be administratively impractical for the part-time prosecutor to serve on the assigned counsel panel. The administrative burden that would be entailed might lead the panel administrator to establish a policy to exclude part-time prosecutors from the assigned counsel panel.

⁷ Of course, the attorney cannot suggest that his or her status as a part-time prosecutor would enable the attorney to influence the court or obtain better results for an assigned client. See DR 9-101(C).

analysis must be undertaken in each case. No appointment can be accepted where the appointment would lead to a conflict of interest or create the appearance of impropriety.

(8-06)
