



Committee on Professional Ethics

Opinion 859 (3/25/11)

Topic: Part-time government attorneys: conflicts of interest, imputed conflicts, non-consentable conflicts.

Digest: A part-time Department of Social Services attorney's representation, in a criminal proceeding, of a private client who is also a respondent in unrelated child abuse and neglect proceedings brought by Social Services, creates an incurable conflict of interest that is imputed to the other members of the Social Services legal unit.

Rules: 1.0(f) & (h), 1.7, 1.8, 1.9, 1.10, 1.11.

FACTS

1. A County's Department of Social Services ("Social Services") has a legal unit ("Legal Unit") that employs one full-time attorney (the inquirer) and one part-time attorney. The full-time attorney supervises the Legal Unit and has an office at Social Services. The part-time attorney is in private practice and does not have an office at Social Services. However, the part-time attorney frequently visits Social Services and its Legal Unit to retrieve and discuss files, to conference cases, and to obtain supplies.

2. Social Services brought a child neglect petition against an individual (the "Respondent"), and the Legal Unit assigned the case to the part-time attorney. Upon assignment, the part-time attorney realized that the Respondent is the part-time attorney's client in an "unrelated" local criminal proceeding.¹

¹ The inquirer has informed the Committee that the criminal proceeding is "unrelated." We accept that representation for purposes of this opinion and we understand it to mean that the criminal proceeding involves a different factual setting, although it is difficult to imagine how the existence of a criminal proceeding, and the facts relating to the criminal proceeding, would not be potentially germane to Social Services in prosecuting a neglect and abuse proceeding involving the Respondent. *Cf.* Rule 1.9, cmt. [3] (explaining meaning of "substantially related").

QUESTIONS

3. These facts raise four related questions:
 - a. May the part-time attorney represent the Respondent in the child neglect proceedings brought by Social Services?
 - b. Would consent (waiver) by the Respondent (or Social Services) cure the conflict?
 - c. If the conflict cannot be cured by consent, may the full-time attorney in the Legal Unit prosecute the child neglect proceedings?
 - d. Would a screening process avoid or cure the conflict?

OPINION

4. To represent Social Services against the Respondent, and simultaneously to act on behalf of the Respondent in an unrelated criminal proceeding, will involve the lawyer in representing “differing interests,” a phrase defined by Rule 1.0(f) to include “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.”

5. Rule 1.7(a)(1) of the New York Rules of Professional Conduct prohibits concurrent representations involving “differing interests,” unless they are permitted by Rule 1.7(b). Rule 1.7(b) provides as follows:

(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.

6. The first of these four conditions – the lawyer’s reasonable belief that the lawyer can competently and diligently represent each affected client – is the “by far the most important” element in the analysis. ROY D. SIMON, SIMON’S NEW YORK RULES OF

PROFESSIONAL CONDUCT ANNOTATED 102 (West 2009 ed.). It determines whether a conflict can or cannot be cured by disclosure and consent. (A conflict is also non-consentable when a representation is “prohibited by law” or when the same lawyer is representing both sides in the same proceeding before a tribunal, but those situations are not presented here.) “The consentability language in Rule 1.7(b) is somewhat different but nevertheless essentially equivalent to language formerly found in DR 5-101(A) and DR 5-105(C).” *Id.*

7. This Committee has repeatedly opined that a part-time prosecutor who is also in private practice is barred from representing criminal defendants in any state court New York. See N.Y. State 544 (1982) (“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.”); N.Y. State 657 (1993) (if part-time attorney for Town prosecutes traffic violations, then he is “precluded from representing, in criminal cases, a defendant in any court of the State,” and consent cannot cure the conflict); N.Y. State 788 (2005) (part-time prosecutor may not act as criminal defense counsel in New York State courts, “risk of the public perceiving favoritism at the prosecutor’s office precludes waiver of the conflict”). We have also said that a part-time prosecutor is barred from representing a criminal defendant in a civil matter and that the conflict “cannot be cured by consent.” *Id.* Here we determine that the Department of Social Services attorney is subject to these principles.

8. In N.Y. State 788, a part-time prosecutor, as part of her private practice, had begun revising wills for a husband and wife when the lawyer learned that another attorney in the same prosecutor’s office was bringing criminal charges against the husband. Applying the Disciplinary Rules then in effect in New York, the Committee concluded that (i) a prosecutor (including a part-time prosecutor) may not represent a private client in a civil matter if the private client is also a criminal defendant in a matter brought by the same prosecutor’s office, (ii) the part-time prosecutor’s conflict could not be cured by consent, and (iii) the conflict was imputed to the entire prosecutor’s office. We advised the part-time prosecutor to withdraw from representing the client in the civil matter if withdrawal could be accomplished without prejudice to the client. However, if withdrawal would prejudice the civil client, and if the civil matter was “substantially related” to the criminal matter, then the entire prosecutor’s office should be disqualified and a special prosecutor appointed. “If the criminal prosecution involves allegations of secreting assets, for example,” we said, “an estate-planning representation might be substantially related to that prosecution, requiring appointment of a special prosecutor. If the alleged crime is a traffic offense, however, that is unlikely.”)

9. N.Y. State 657 and 788 both noted that prosecutors have special responsibilities to the public that render the roles of prosecutor and defense counsel “inherently incompatible.” In addition, there are significant risks of an actual or perceived miscarriage of justice because a prosecutor’s office may show favoritism to persons who hire part-time prosecutors to represent them in other matters. See also N.Y. State 683 (1996) (a prosecutor’s “special duty” to seek justice “imposes a responsibility on prosecutors not only to ensure the fairness of the process by which a criminal conviction

is attained, but also to avoid the public perception that criminal proceedings are unfair.”).

10. N.Y. State 800 (2006) dealt with a situation closer to the one here. A part-time prosecutor sought to represent indigent persons in Family Court matters. We held that “a part-time prosecutor is not precluded from accepting all assignments as court-appointed counsel in Family Court.” Yet we also said that “[i]n 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.” We emphasized that the attorney “must avoid all conflicts of interest, ensuring that neither the attorney's own interests nor the attorney's simultaneous work as a prosecutor preclude the attorney from exercising independent judgment on behalf of his or her clients....”

11. N.Y. State 800 also focused on ways in which law enforcement matters may be intertwined with Family Court matters (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). We said: [V]irtually 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 service 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...

12. Therefore, the Committee concluded in N.Y. State 800 that the part-time prosecutor was barred from accepting assigned cases in three situations: (a) matters involving law enforcement personnel with whom the lawyer works (or has worked) as a part-time prosecutor; (b) juvenile delinquency proceedings; and (c) PINS proceedings. The Committee then singled out representation of respondent parents in abuse and neglect proceedings (*i.e.*, child protective proceedings) for “special mention,” saying:

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.

13. The role of the Social Services attorney when prosecuting child abuse and neglect proceedings is comparable to the role of the D.A.’s office in criminal prosecutions. In both, the attorney represents the interests of the state in matters with grave consequences (incarceration in one, custody and parentage in the other). Like the D.A. in criminal prosecutions, the Social Services prosecutor has a special role that is

“inherently incompatible” with the role of defense counsel. See N.Y. State 657 and N.Y. State 788.

14. The public can assume that individuals will be driven by great forces to do everything they can to avoid the consequences of a prosecution or a finding of child abuse and neglect. That urge may include -- or so the public might believe -- hiring a part-time Social Services attorney in an unrelated proceeding to secure an advantage in the child abuse and neglect case. This creates significant risks of an actual or perceived miscarriage of justice due to potential favoritism shown to persons who hire part-time prosecutors to represent them in other matters.

15. Moreover, the personnel with whom the part-time Social Services attorney will work in neglect and abuse proceedings will often include law enforcement personnel. See N.Y. State 800. Those same personnel may oppose the part-time Social Services attorney when representing the defendant in the criminal matter. In the criminal defense role, therefore, the part-time Social Services attorney might have to impeach the same law enforcement personnel on whom Social Services relies in abuse and neglect proceedings. Accordingly, a part-time Social Services attorney prosecuting an abuse and neglect case cannot “reasonably believe[.]” that he or she will be able to “provide competent and diligent representation to each affected client” within the meaning of Rule 1.7(b)(1).

16. Regarding our first and second questions, therefore, we conclude that the part-time attorney may not represent the Respondent in the child neglect proceedings brought by Social Services, and we further conclude that informed consent (waiver) by the Respondent or by Social Services (or by both) cannot cure the conflict.

17. That brings us to our third question: May the full-time Social Services attorney who works in the same office with the inquiring attorney prosecute the abuse and neglect case against the Respondent while the part-time attorney defends the Respondent in the “unrelated” criminal matter? We also answer no to this question. Under Rule 1.10(a): “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.” The full-time and part-time Social Services attorneys are “associated in a firm” under Rule 1.10(a) because Rule 1.0(h) defines a “firm” to include “lawyers employed in ... a government law office” This conclusion is consistent with N.Y. State 788, which reiterated our long-held view that a D.A.’s office must be treated as a “law firm” for purposes of imputation of conflicts.

18. Thus, the part-time lawyer’s conflicts are imputed to the entire Social Services Legal Unit. The part-time Social Services attorney has access to information about the office and its cases. This access is comparable to the access enjoyed by a lawyer who is “of counsel” to a law firm. An of counsel lawyer’s conflicts are imputed to all lawyers in the firm. See N.Y. State 773 (2004) (if lawyer who serves on municipal board is disqualified from a particular representation, the disqualification is imputed to a law firm with which that lawyer has an “of counsel” relationship). Therefore, under Rule 1.10(a),

the part-time attorney's conflicts are imputed to all attorneys in the Social Services Legal Unit.

19. Conversely, the part-time attorney's conflicts of interest arising from government service are imputed to (and therefore disqualify) the part-time attorney's partners and associates in private practice. See N.Y. State 450 (1976) (if part-time town attorney is disqualified, then his firm is also disqualified from representing private clients in matters where clients may need building permits, zoning variances, etc., from the town).

20. Turning to our fourth question, can a screening mechanism prevent imputation of the conflict? No. Under Rule 1.11(b)(1), screening mechanisms apply only to *former* government employees moving to private practice. Screening cannot prevent imputation of a *current* employee's conflicts to the other attorneys in the government office.

21. However, screening is not the only solution. If the part-time attorney stops working at Social Services, then the imputation will cease. Social Services may then continue prosecuting the parents for abuse and neglect as long as Social Services lawyers do not possess confidential information about the Respondent that the part-time attorney represents in private practice. See Rule 1.10(b) (when a lawyer terminates an association with a firm, the firm may not oppose any client of the terminated lawyer if any lawyer in the firm still has confidential information about the terminated lawyer's client).

22. Alternatively, if the part-time attorney can and does ethically withdraw from representing the Respondent in the unrelated criminal matter, Social Services may continue to prosecute the Respondent (who would now be the part-time attorney's former client) for abuse and neglect. Since the facts state that the criminal matter is not substantially related (and is indeed unrelated) to the abuse and neglect proceedings, Social Services would not need the consent of the part-time attorney's former client pursuant to Rule 1.9. See N.Y. State 788 (D.A.'s office may continue prosecuting former client of part-time D.A. as long as criminal prosecution is not substantially related to matter in which part-time prosecutor represented defendant in private practice.)

CONCLUSION

23. The part-time Social Services attorney may not represent the Respondent in abuse and neglect proceedings brought by Social Services. The full-time attorney is disqualified from representing Social Services in the child neglect and abuse proceedings against the Respondent while the part-time attorney is representing the Respondent in the unrelated criminal matter. These conflicts of interest are not curable by consent or by screening, but may be cured if the part-time attorney either terminates his association with Social Services or withdraws from representing the Respondent in the unrelated criminal matter.

(14-10)