NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 900 (12/28/11)

Topic: Assistant County Attorney as mediator in Child Permanency Mediation

Digest: An Assistant County Attorney ("ACA") may agree to serve as a paid or unpaid mediator in Child Permanency Mediations in which the County Department of Social Services ("DSS") is represented by another ACA, but the mediator should disclose and explain his connection to the County Attorney's Office. An ACA who is representing DSS in the mediation may have a personal conflict of interest, and that conflict will be imputed to all ACAs in the same office unless the conflict can be and is cured by DSS's informed consent, confirmed in writing. If the County Attorney's Office begins or continues working on a matter in which the inquiring ACA is serving or has finished serving as the mediator, then the office must timely and effectively screen the mediator and consider whether the circumstances give rise to any appearance of impropriety.

Rules: 1.0(e), (h), (j) & (*l*), 1.7(a), 1.10(a), 1.11(d), 1.12(b), (d) & (d), 2.4(a) & (b)

FACTS

1. While inquiring counsel ("Inquirer") was a paid employee of a Community Dispute Resolution Program ("CDRC"), he was trained as a Permanency Mediator for the New York State Unified Court System's Child Welfare Court Improvement Project ("CIP"). Inquirer then applied to be on the roster of Permanency Mediators for a county. After Inquirer filed his application to be on the roster but before his application was accepted, Inquirer became an Assistant County Attorney ("ACA") for the County Department of Law. After Inquirer became an ACA, his application to be a Permanency Mediator was accepted and he is now on the roster in the same county where he serves as an ACA.

2. Inquirer's inquiry states, by way of background, that (a) mediators must disclose to all mediation participants any relationship to any party that may impact the mediator's appearance of neutrality, and (b) if any participant objects to a mediator on such grounds, the mediator will not facilitate the case. Inquirer does not cite authority for these assertions, but we will accept them as true for purposes of this opinion.

3. Permanency cases may be referred to mediation by various individuals, including employees of DSS. In addition, DSS employees may be parties to the mediation process. DSS itself, as an agency, always has an interest in the outcome of the permanency mediation process and may choose to be a party to a permanency mediation. Inquirer personally does not represent the county Department of Social

4. Services ("DSS") in any matters in his capacity as an ACA, but another ACA does represent DSS in various matters, including permanency mediations.

5. Mediators are usually paid at the rate of $75 per hour. In some cases roster mediators are asked to mediate in the course of their employment. In that case the hourly rate is paid to the employer, with no financial benefit inuring to the mediator. However, Inquirer also mediates other cases either on a volunteer basis or in the course of Inquirer's employment with the mediation program, and neither Inquirer nor his employer are paid for such cases.

QUESTIONS

6. *Question A.* May Inquirer, who is employed as an Assistant County Attorney, ethically mediate a case, either on a paid or unpaid basis, if another Assistant County Attorney from the same county represents DSS in the mediation?

7. *Question B.* If Inquirer serves as the mediator in a matter in which another Assistant County Attorney represents the Department of Social Services, will Inquirer create a conflict of interest for the Assistant County Attorney representing DSS in the mediation and, by imputation, for other attorneys in the County Attorney's Office?

8. *Question C.* If Inquirer is currently serving as a mediator (or has completed service as a mediator) in a matter in which the County Attorney's Office represents DSS, must Inquirer be screened from other lawyers at the County Attorney's Office?

OPINION

Additional background regarding Permanency Mediation

9. The Child Welfare Court Improvement Project, a federally-funded initiative, supports the New York State Family Court's mandate to promote the safety, permanence and well-being of abused and neglected children. Recognizing the integral role courts play in charting the course for children who are the subject proceedings for abuse, neglect, foster care, termination of parental rights and adoption, CIP provides resources and technical assistance to enhance and promote innovation in court operations and practices, especially alternative dispute resolution.

10. As part of the New York State Unified Court System's Community Dispute Resolution Centers Program ("CDRCP"), the Unified Court System partners with local non-profit organizations known as "CDRCs" to provide mediation, arbitration, and other dispute resolution options as an alternative to court. CDRCs serve as neutrals in (among other things) landlord/tenant disputes, consumer/merchant disputes, and -- most relevant to this inquiry -- Child Permanency Mediation ("CPM"). CPM mediates child protective proceedings where the Family Court has placed children in foster care due to alleged parental abuse or neglect. *See, e.g.,* Cynthia A. Savage, *Recommendations Regarding Establishment of a Mediation Clinic*, 11 Cardozo J.

Conflict Resol. 511, 546 (2010). Children and families referred to CPM are usually at a stage in the Family Court proceeding when a decision must be reached about the child's permanent home. "CPM" provides a forum where parents, attorneys, social service agency staff, and other interested parties can focus on resolving problems that pose barriers to permanency for the child. It is always conducted under the auspices of a court – there is no such thing as a "private" CPM.

11. We addressed child protective proceedings in N.Y. State 800 ¶ 3 (2006), where we said: "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." DSS and the parents are thus always adverse to one another in a Family Court child protective proceeding. In John M. Zenir, *Litigating Neglect Cases in Nassau Family Court*, 60 Nassau Lawyer No. 9, at 11 (May 2011), the author stresses the adversarial nature of these proceedings, and the consequent necessity for "aggressive advocacy."

12. The parents in permanency proceedings may be represented or unrepresented.[1] In the Child Permanency Mediations contemplated here, the parents are typically either unrepresented or represented by an appointed lawyer. The parents have allegedly committed abuse and/or neglect and are attempting to mediate a determination as to the permanent placement of their child. In that volatile context, Inquirer could be selected to serve as a neutral, and DSS or its employees could be represented at the mediation by an Assistant County Attorney who works in the same office as Inquirer. Against that background, we turn to Inquirer's three questions.

Question A: May Inquirer facilitate if another ACA represents DSS in the mediation?

13. The first question is whether Inquirer may ethically mediate a case, either on a paid or unpaid basis, if another Assistant County Attorney from the same county is representing DSS in the mediation. The provision in the New York Rules of Professional Conduct (the "Rules") most relevant to our analysis is Rule 2.4 ("Lawyer Serving as Third-Party Neutral"), which expressly addresses lawyers serving as mediators and other neutrals.

13. Before applying Rule 2.4, we pause briefly to consider whether Inquirer, as a lawyer in the County Attorney's Office, is deemed to represent not only the County itself but also the County's DSS. Inquirer has told us that he does not personally represent DSS in any matters, but that another ACA in the County Attorney's Office does. The

[1] Zenir, *supra*, reports that in Nassau County Family Court, "the overwhelming majority of respondents … usually parents or other custodial parties, are represented by assigned counsel, either by attorneys employed by the Legal Aid Society of Nassau County or by 18-B Attorneys … because they are indigent." However, N.Y. City 2009-2 n. 2 cited informal surveys revealing that approximately 75% of litigants in New York City Family Court appeared without a lawyer for critical types of cases, including those involving domestic violence, child custody, guardianship, visitation, support, and paternity.

identity of a government lawyer's client is a question of law – see N.Y. City 1999-6 – but for purposes of this opinion, we will accept Inquirer's statement that he does not represent DSS. We will also assume that Inquirer, when acting as a mediator, will not be representing DSS (or any other client) in the mediation. Rather, he will be serving only as a third-party neutral. Rule 2.4(a) defines a "third party neutral" as one who "assists two or more persons ***who are not clients of the lawyer*** to reach a resolution of a dispute or other matter that has arisen between them." (Emphasis added.) Rule 2.4 thus specifically contemplates that lawyers serving as third-party neutrals do not represent the parties. As noted in SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 198-199 (West 2009), Rule 2.4(a) makes clear that a "third-party neutral" is not representing the parties.[2]

14. Nothing in Rule 2.4 (or any other Rule) prohibits an ACA from serving as a mediator, whether in a Child Permanency Mediation or any other type of mediation, paid or unpaid, even though another lawyer in the County Attorney's Office represents a party. But Rule 2.4(b) does impose special obligations on lawyer/mediators. Rule 2.4(b) provides as follows:

> A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

15. The import of Rule 2.4(b) is examined in Comment [3] to Rule 2.4, which says:

> Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process.… Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and as a client representative…. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

16. Thus, while Rule 2.4 does not prohibit Inquirer from serving as a mediator when another ACA is participating in a Child Permanency Mediation, Rule 2.4(b) does require certain disclosures to unrepresented parties. At a minimum, Inquirer "shall inform unrepresented parties" that he "is not representing them." Further, when Inquirer knows

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[2] Under Rule 1.7(a)(1), a lawyer generally "shall not *represent a client* if a reasonable lawyer would conclude that … the representation will involve the lawyer in representing differing interests." (Emphasis added.) Rule 1.7 will not apply to Inquirer because Inquirer will not "represent a client" in the mediation.

(or reasonably should know) that a party does not understand the lawyer's role in the matter, Inquirer "shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." In nearly all instances where parents are unrepresented by counsel and inexperienced in mediation and other legal matters, Inquirer "reasonably should know" that the parents do not understand Inquirer's role, and Inquirer therefore should explain that difference.

17. In addition, if another ACA is participating in the mediation as counsel for DSS, Inquirer should disclose that (i) Inquirer is an Assistant County Attorney, (ii) another ACA from the same office will be participating in the mediation, and (iii) the parents have the right to object to Inquirer serving as facilitator. These disclosures may enable participants who object to Inquirer on those grounds to have a different mediator assigned to the case.

18. Our answer to Question A is the same whether Inquirer is a paid mediator or an unpaid mediator. Rule 2.4 makes no distinction between paid mediators and volunteer mediators. Nor would payment trigger an analysis under Rule 1.7(a)(2), which provides that a lawyer generally "shall not represent a client if a reasonable lawyer would conclude that … there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.7 does not apply to Inquirer because a mediator does not "represent a client" in the mediation. As noted in Rule 2.4(a), the parties to a mediation "are not clients of the lawyer."

19. We do not know whether any court rules, mediation rules, or other guidelines outside the Rules of Professional Conduct would prohibit Inquirer from facilitating a case in which another lawyer from the County Attorney's Office represents a party or is otherwise participating in the mediation, or whether any such rules or guidelines would require more extensive disclosures by Inquirer than we have suggested. However, Comment [2] to Rule 2.4 expressly notes that a lawyer (as opposed to a nonlawyer) who serves as a third-party neutral – especially under court auspices – may be subject to rules and codes outside the Rules of Professional Conduct. Comment [2] says, in relevant part, as follows:

> [T]he lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as … the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

If any such rules, standards, or guidelines apply to Inquirer, we express no opinion on them because our jurisdiction is limited to interpreting the New York Rules of Professional Conduct. We therefore strongly suggest that Inquirer determine whether he is subject to any such authorities outside the Rules of Professional Conduct, that he also study the ethics codes and policies that govern the County Attorney's Office in

which he works, and that he consult with the County Attorney (if he has not done so already) before agreeing to serve as a mediator in any matter.

Question B: Will Inquirer create a conflict of interest for the ACA representing DSS?

20. The second question is whether Inquirer's service as the mediator in a matter in which another Assistant County Attorney represents DSS will create a conflict of interest for the ACA representing DSS, and (by imputation) for all other ACAs in the same office. At this point, Rule 1.7(a)(2) becomes relevant – not for Inquirer (who, as in Question B, does not "represent a client") but for the ACA who represents DSS in the mediation. Rule 1.7(a)(2) applies to a lawyer representing a client if "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." A determination under Rule 1.7(a)(2) depends on all the facts and circumstances, but we believe that the presence of a fellow ACA as mediator will ordinarily create a "significant risk" of an adverse impact on the professional judgment of any ACA who represents DSS in that mediation. For example, the ACA representing DSS may want to please Inquirer by reaching a settlement even if the settlement is not in the best interests of DSS.

21. Furthermore, under Rule 1.10(a), the conflict of any one ACA will be imputed to all other ACAs in the same County Attorney's Office. Rule 1.10(a) provides: "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 …." (The County Attorney's Office is a "firm" because Rule 1.0(h) defines "firm" to include "a government law office ….") Thus, every ACA in the County Attorney's Office will typically have the same conflict, and the conflict cannot be cured by substituting one ACA for another to represent DSS in the mediation.

22. However, a conflict arising under Rule 1.7(a)(2) can usually be cured by complying with Rule 1.7(b), which provides as follows:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> > (2) the representation is not prohibited by law;
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> > (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
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> > (4) each affected client gives informed consent, confirmed in writing.

23. Accordingly, any individual ACA who represents DSS in a mediation facilitated by Inquirer will have to determine as a threshold matter whether she "reasonably believes" that she can "provide competent and diligent representation" to DSS (a question dependent on all of the facts and circumstances of the particular mediation), and whether the representation of DSS when another ACA is serving as the mediator is "not prohibited by law" (a question beyond this Committee's jurisdiction). If the tests under Rule 1.7(b)(1) and (b)(2) are satisfied, then the ACA may proceed to represent DSS despite the conflict if the ACA obtains DSS's "informed consent" as defined in Rule 1.0(j), and that consent is "confirmed in writing" as defined in Rule 1.0(e). (Rule 1.7(b)(3) is irrelevant here because Inquirer is not representing any client, and the County Attorney's Office therefore is not representing clients on both sides of the same mediation.) If the ACA obtains the requisite informed consent, confirmed in writing, then the conflict will be cured and will not be imputed to other ACAs under Rule 1.10(a).

24. If the ACA fails either or both tests (*i.e.,* if the ACA does not reasonably believe she can competently and diligently represent DSS and/or if the representation is prohibited by law), then the ACA cannot proceed and consent from DSS cannot cure the conflict. Moreover, the conflict will be imputed to all other ACAs in the same office. However, this scenario may never occur, because as soon as the County Attorney's Office recognizes the conflict, it is likely to object to the inquiring ACA's participation as the mediator, requiring his withdrawal. Once he withdraws as the mediator, the conflict will evaporate.

Question C: Must the County Attorney's Office screen Inquirer?

25. The third question is whether the County Attorney's Office must screen Inquirer from other ACAs in the County Attorney's Office if that office begins or continues to participate in the matter after Inquirer has begun serving as the mediator in the matter. The relevant rule is Rule 1.12 ("Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals"). Rule 1.12(b) provides as follows:

> (b) [U]nless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer ***participated personally and substantially*** as:
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> (1) an arbitrator, ***mediator*** or other third-party neutral …. [Emphasis added.] [3]

[3] Rule 1.12(e), which concerns "an arbitrator selected as a partisan of a party in a multimember arbitration panel," creates an exception to Rule 1.12(b) that makes the consent of all parties unnecessary, but a Child Permanency Mediation involves neither a "multimember" panel nor an "arbitration," so the exception in Rule 1.12(e) is irrelevant here.

26. Plainly, Inquirer will have "participated personally and substantially as … mediator" in any matter in which Inquirer is currently serving (or has finished serving) as the sole mediator. Thus, once Inquirer has begun serving as a mediator in a particular matter, Inquirer is personally barred from working on that matter as a lawyer "unless all parties give informed consent, confirmed in writing …." If the County Attorney's Office does not seek such consent or cannot obtain it (and we doubt that any party would consent to let the current mediator work on the same matter as a lawyer for a party), then other lawyers in Inquirer's firm (the County Attorney's Office) cannot work on that matter unless Inquirer is timely and effectively screened from the matter. The screening condition derives from Rule 1.12(d), which provides as follows:

> (d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
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> (1) the firm acts promptly and reasonably to:
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> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
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> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
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> (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
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> (iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and
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> (2) there are no other circumstances in the particular representation that create an appearance of impropriety.

28. The term "matter" is defined in Rule 1.0(*l*) to include "any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, ***mediation*** or any other representation involving a specific party or parties." (Emphasis added.) Thus, once Inquirer has commenced service as a mediator – whether or not the mediation is over – Inquirer must be effectively screened from any involvement with the ongoing Family Court case. Unless the County Attorney's Office effectively screens Inquirer from any participation in the Family Court matter from the moment he begins serving as the mediator in the Child Permanency Mediation, the parties and the public have no assurance that Inquirer has not (even

inadvertently) shared the parents' confidential information with other ACAs, and that lack of assurance will usually (if not always) create an "appearance of impropriety" that should preclude the County Attorney's Office from representing DSS.

29. Furthermore, unless the County Attorney's Office screens Inquirer from participation in every Family Court matter that may ultimately result in a CPM in which Inquirer may serve as the facilitator, the public and the parties will have no assurance that Inquirer will not (intentionally or inadvertently) share DSS's confidential information with the parents during the mediation. This situation, too, will usually (if not always) create an "appearance of impropriety" that should preclude the County Attorney's Office from representing DSS. We offer no opinion as to whether the so-called "rule of necessity" embodied in Rule 1.11(d)(1) would, by analogy, permit the County Attorney's Office to continue representing DSS despite this appearance of impropriety. Rule 1.11(d)(1) provides that "[e]xcept as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not: (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless ***under applicable law*** no one is, or ***by lawful delegation*** may be, authorized to act in the lawyer's stead in the matter …." (Emphasis added.) Thus, the rule of necessity presents questions of law beyond our jurisdiction. We note, however, that Rule 1.12 does not contain any equivalent rule of necessity.

CONCLUSION

30. An Assistant County Attorney ("ACA") may agree to serve as a paid or unpaid mediator in Child Permanency Mediations in which the County Department of Social Services ("DSS") is represented by another ACA, but when serving as a mediator the Inquirer should disclose and explain to all parties his connection to the County Attorney's Office. The ACA who is representing DSS in the mediation may have a personal conflict of interest, and that conflict will be imputed to all ACAs in the same office unless the conflict can be and is cured by DSS's informed consent, confirmed in writing. If the County Attorney's Office begins or continues working on a matter in which the inquiring ACA is serving or has finished serving as the mediator, then the office must timely and effectively screen Inquirer and must consider whether the circumstances give rise to any appearance of impropriety.

[Inquiry 22-11]