



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1074 (11/13/15)

Topic: Conflict of interest; part-time lawyers working for a Department of Social Services

Digest: A part-time lawyer for a county Department of Social Services may not accept appointments as assigned counsel for indigent persons in which the Department of Social Services is involved.

Rules: Rules 1.0(h), 1.7(a) & (b), 1.8(f), 1.10(a)

FACTS

1. A county Department of Social Services has a legal unit that employs a part-time attorney. In this capacity, the attorney handles paternity and child support matters, liens, Medicaid issues, and guardianships, and on occasion is able to assist others on the Department's legal staff in child abuse and neglect cases. In addition to part-time work at the Social Services Department, the attorney maintains a solo practice in which, among other things, the attorney participates in the County's Assigned Counsel Program representing indigent individuals in criminal matters as well as Family Court proceedings. The attorney wishes to continue to accept assignments in criminal and Family Court matters from the County's Assigned Counsel Program, for which the County pays. The attorney does not intend to accept any such assignments in child abuse and neglect cases.

QUESTION

2. May a part-time attorney for a county Department of Social Services accept assignments from the same county's Assigned Counsel Program to represent clients at the County's expense in criminal and Family Court matters?

OPINION

3. In N.Y. State 859 (2011), a part-time lawyer at the Department of Social Services wished to represent, in a criminal proceeding, a private client who was also simultaneously a respondent in what the inquirer described as "unrelated" proceedings involving allegations of child abuse and neglect. Citing a long line of decisions in which this Committee opined that a part-time prosecutor who engages in private practice is ethically barred from representing criminal defendants in any New York state court, we said that a Department of Social Services attorney

“is subject to these same principles.” N.Y. State 859 (2011). We reasoned that 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,” because in both “the attorney represents the interests of the state in matters with grave consequences,” including the possible loss of liberty. Accordingly, we determined that the proposed representation presented a non-waivable conflict of interest under Rule 1.7 of the N.Y. Rules of Professional Conduct (the “Rules”).

4. Earlier, in N.Y. State 800 (2006), we addressed whether a part-time prosecutor could accept an assignment to represent indigent persons in Family Court proceedings in an adjacent county. There, we concluded that no *per se* rule prohibited all such assignments, but identified three types of proceedings in which the neighboring part-time prosecutor should not be involved: matters in which the prosecutor was then working or had previously worked with the law enforcement officials involved; juvenile delinquency proceedings; and cases involving Persons in Need of Supervision (known as “PINS” actions). The first of these concerns arose from prior opinions that a currently-serving prosecutor should not accept defense work in which “investigating officers and law enforcement personnel are those with whom the attorney associates as prosecutor.” N.Y. State 800 (2006) (quoting N.Y. State 544 (1970)). The other two related to our view that such proceedings were “functionally indistinguishable” from adult criminal proceedings, and thus occasioned the same conflicts that animated the opinions underlying N.Y. State 859. *See, e.g.*, N.Y. State 788 (2005); N.Y. State 657 (1993); N.Y. State 184 (1971); N.Y. State 171 (1970). We also mentioned the special sensitivity required in child abuse and neglect cases. Nevertheless, in the context of part-time prosecutor accepting assignments in a different county, and providing appropriately stringent caveats, we adopted a “facts and circumstances” test to assess whether a conflict exists.

5. We conclude that the same test ought to apply here, with many of the same caveats. We cannot say that the Rules invariably forbid a lawyer to accept the representation of, say, an indigent defendant in a traffic violation merely by virtue of the lawyer’s role as a part-time lawyer handling Medicaid, paternity, or child support issues for the Department of Social Services. Likewise, we cannot say that the Rules invariably forbid a lawyer to accept a representation in a Family Court proceeding between, say, two private individuals in which the Department of Social Services has no involvement.

6. The inquiring lawyer does not intend to accept child abuse and neglect cases from the County Assigned Counsel Program. We believe that this decision is well-advised and compelled by the rationale of N.Y. State 800 as falling within the areas that are off-limits to a non-resident part-time prosecutor, which are equally applicable to a resident part-time Department of Social Services attorney. This accords not only with N.Y. State 859 but also with the imputation rules of Rule 1.10, which imputes the conflicts of the lawyer to the entire legal unit of the Department by virtue of the lawyer’s part-time affiliation with it. N.Y. State 975 (2013) (imputation in Public Defender’s Office); N.Y. State 788 (2004) (same with respect to a DA’s office); Rule 1.0(h) (the term “law firm” includes lawyers in “the legal department of a corporation of other organization”); Rule 1.10 (lawyers associated in a firm shall not knowingly represent a client when one of them practicing alone would be prohibited from doing so by Rule 1.7). Thus, the lawyer’s involvement in such matters as a private lawyer could lead to the disqualification of the entire legal unit of the Social Services Department.

7. The attorney’s work in other Family Court matters depends on the facts and circumstances. The Family Court is the central venue for resolution of disputes that fall within the jurisdiction of the Department of Social Services. The interaction among the Department of Social Services, law enforcement, and the Family Court is a constant fact of life. In N.Y. State 800, we noted:

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 or similar government entities. . . . The local child protective service investigates allegations and the county attorneys present (“prosecute”) the case in 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 [*i.e.*, the Department of Social Services]. 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

8. Consistent with N.Y. State 800, we do not see the need to adopt a *per se* ban on the inquirer’s participation in Family Court provided that the matter there does not implicate the concerns set out above. Although it is true that many Family Court proceedings implicate the Department of Social Services, there are certain proceedings there that typically do not. For instance, a couple in a dispute over custody, or the occupancy or possession of marital assets, would not ordinarily excite the interest of the Department of Social Services. This is why we believe that the issue is best left to the facts and circumstances of particular matter, in which the lawyer may assess whether the lawyer’s part-time employment in the Department of Social Services would be an issue. If the Department is to play any meaningful role in the Family Court proceeding, then the lawyer should decline the assignment; if not, then we see no reason why the lawyer may not appear in the Family Court on matters in which the Department plays no meaningful role.

9. This same reasoning applies when the County Assigned Counsel Program selects a part-time lawyer for the Social Services Department to defend an indigent person in a criminal case. We can envision certain criminal cases that implicate none of the issues that cause us concern or implicate the conflicts issues that engendered the opinions cited above. Rule 1.7(a)(1) prohibits concurrent representations – that is, here, the lawyer’s role at the Department of Social Services and the lawyer’s role as assigned counsel in criminal cases – only when the representations involve “differing interests.” The question, then, is whether the lawyer’s representation qualifies for exemption under Rule 1.7(b).

10. The most important element of the analysis is the lawyer's reasonable belief "that the lawyer may provide competent and diligent representation to each affected client." We cannot negate the possibility that a part-time lawyer for the Department of Social Services may reach such a reasonable belief in undertaking the defense of a criminal defendant provided that the matter is one in which the lawyer is not then working or has not recently worked with the law enforcement officials involved, and does not involve any issue within the jurisdiction of the Department of Social Services. For example, a DWI or a larceny charge against a stranger to the Department, in which none of the law enforcement officials with whom the lawyer works or has recently worked, cannot readily be said to entail the serious issues that a lawyer in the inquirer's position might otherwise raise. But for the lawyer to be engaged in matters within the Department's jurisdiction, which a Family Court appearance would inevitably invoke, or for the lawyer to be required to cross-examine law enforcement officials with whom the lawyer is now engaged as a part-time lawyer at the Department of Social Services or has recently done so, would present exactly the problems that our earlier opinions found impermissible. In all events, the informed consent of the Department of Social Services and of the lawyer's client, confirmed in writing, is essential to the undertaking.

CONCLUSION

11. A part-time lawyer for a county Department of Social Services may accept appointments as assigned counsel for indigent persons in Family Court and in criminal matters provided that the Department or others in law enforcement with whom the lawyer works are not materially involved.

(25-15)