New York State Bar Association
Committee on Professional Ethics

Opinion 1247 (11/21/2022)

Topic: Conflict of interest in representing county and serving subpoenas on county departments.

Digest: A lawyer who represents certain separate County Departments in diverse matters as an independent contractor for the County Attorney may request and serve subpoenas for documents and witnesses upon a County Department for which he does not perform legal services and which is not represented by the County Attorney without obtaining client consent, as each department is considered separate for purposes of analysis under Rule 1.7 (a)(1).

 Rules: 1.7 (a)(1)

FACTS:

1.   The inquirer works part time as an independent contractor for a County Attorney while maintaining a private practice. In his contract work, the inquirer represents the County's Department of Mental Health, seeking treatment over objection orders, the County's Department of Health, enforcing fines for violations of the County's Sanitary Code, and the County Sewer District, collecting unpaid sewer taxes. His duties do not extend to providing legal advice to County management or personnel. The inquirer determines his own legal strategy for each of his contract matters and his day-to-day work is not supervised by the County Attorney's office.

2.   In private practice the inquirer accepts assignments representing indigent individuals in child custody proceedings in Family Court. In those cases, it is occasionally required that the inquirer request that the Family Court issue subpoenas for records and witnesses from the County's Department of Social Services (DSS) and Child Protective Services (CPS), which is an arm of DSS.

3.   The County Attorney does not represent DSS or CPS. DSS has its own attorneys, including a director of legal services, all of whom are appointed under Section 66 of the New York State Social Services Law. While that section provides that DSS attorneys may be deputized by the County Attorney, this has not occurred in the county where the inquirer is employed and practices. The duties and responsibilities of the DSS legal unit are independent of the County Attorney's duties and responsibilities, and DSS attorneys, not the County Attorney, would represent DSS employees who may occasionally be subpoenaed by the inquirer should representation become necessary.

QUESTION:

4.   Do the inquirer's requests to the Family Court to issue subpoenas to the County Department of Social Services present a conflict-of-interest?

OPINION:

5.   Questions regarding conflicts of interest between part-time government lawyers and the interests they represent in their private practice have regularly come before this Committee, particularly when the lawyer is a part-time prosecutor. N.Y. State 1065 (2015) provides a thorough analysis of the conditions the Committee has set on part-time prosecutors' private practice. Issues have also arisen in cases where the part-time government lawyer practices civil law for the municipality. In those cases, the Committee has carefully reviewed the interests the lawyer represents in the lawyer's government service to ensure that the interests represented in the private practice do not conflict. Thus, in N.Y. State 1074 (2015), the inquirer was employed part-time by a county's Department of Social Services handling a wide variety of matters including paternity and child-support matters, liens, guardianships, and occasionally child abuse and neglect cases. The question was whether the lawyer could participate in his private practice in the County's Assigned Counsel Program by representing indigent individuals in Criminal and Family Court proceedings-but not child abuse and neglect matters. The Committee said that the lawyer could accept assignments in Criminal and Family Court matters, "provided that the Department or others in law enforcement with whom the lawyer works are not materially involved." The Committee went on to say that the lawyer could not accept assigned clients "in matters within the Department's jurisdiction" or in matters where the lawyer would "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."

6.   Here, the inquirer's work for the County is limited to (a) representing the County's Health Department enforcing fines imposed for violations of the County Sanitary Code; (b) representing the County Sewer District in collecting district-imposed sewer taxes, and (c) representing the County's Department of Mental Health in proceedings under the Mental Hygiene Law for court-ordered mental health treatment. In private practice, the inquirer declines representation in any Family Court matters in which the County is a party.

7.   This Committee has opined, "When a governmental body is organized into a number of separate departments or agencies, such department or agency, and not the parent governmental unit, should be treated as the client for purposes of the rule which forbids the concurrent representation of one client against another." N. Y. State 447 (1976.)

8.   The inquirer has asked if requesting and serving subpoenas for documents and witnesses from one department of County government -- the Department of Social Services – gives rise to a conflict of interest with inquirer's representation of other County departments, the Departments of Health and Mental Health, and the County Sewer District. However, since the inquirer does not represent DSS, this does not present a situation where the inquirer would be requesting documents and witnesses from a Department or from County employees for whom the inquirer provides legal services. Therefore, Rule 1.7(a)(1) is not implicated.

9.   Moreover, even if the inquirer did represent DSS, it is not clear that he would be prohibited from seeking information pursuant to subpoena from that Department under Rule 1.7(a)(1). Although we need not reach that issue on the facts presented, we recognize that subpoenaing documents or witnesses from a current client in a matter unrelated to the lawyer's current representation of that client can raise conflict issues. For example, N.Y. City 2017-6 (2017) dealt with the question of whether a conflict can arise should one lawyer be called upon to request discovery on behalf one client from a current client in an unrelated matter and determined that, "Issuing a subpoena to a current client to obtain testimony from that client will ordinarily give rise to a conflict of interest... But that said, the Committee can envision exceptional situations where

subpoenaing a witness will not be directly averse to the witness." The American Bar Association has similarly opined in Formal Opinion 92-367 (1992), that, "A lawyer who in the course of representing a client examines another client as an adverse witness in a matter unrelated to the lawyer's representation of the other client or conducts third party discovery of the client in such a matter, will likely face a conflict that is disqualifying in the absence of appropriate client consent."

10.   Here, however, the subject matters that are involved in the inquirer's representations are singularly disparate: on the one hand, treatment over objection orders under the Mental Hygiene law, the collection of sewer taxes, and the enforcement of fines for the Department of Health; and on the other hand, child custody matters. The Departments themselves and their employees appear sufficiently distinct that they would be different clients for purposes of the Rule 1.7(a)(1) analysis, and the inquirer, therefore, would not be representing differing interests.

CONCLUSION:

11.   A lawyer who represents certain separate County Departments in diverse matters as an independent contractor for the County Attorney may request and serve subpoenas for documents and witnesses upon a County Department for which he does not perform legal services and which is not represented by the County Attorney without obtaining client consent, as each Department is considered separate for purposes of analysis under Rule 1.7 (a)(1).

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