NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

OPINION 708 – 9/15/98 (52/52a-97)

TOPIC: Representation of both foster care agency and adoptive parents

DIGEST: A lawyer representing a foster care agency in extra-judicial surrender proceedings or termination of parental rights proceedings may not concurrently or subsequently represent prospective adoptive parents who are seeking to adopt the child involved in such proceedings.

CODE: DR 5-101(A), 5-105(A), 5-108(A), Canon 9, DR 9-101(B)(1).

QUESTION

May an attorney who represents a foster care agency in extra-judicial surrender proceedings under Soc. Serv. Law § 383-c(4) or termination of parental rights proceedings under Soc. Serv. Law § 384-b represent prospective adoptive parents who are seeking to adopt the child involved in those proceedings?

FACTS

Until a child is adopted, a foster care agency with custody of the child has the duty to supervise the foster care placement, ensure that appropriate services are provided for the child and pay for these services. Under certain circumstances, the foster care agency may bring proceedings to make a child in its custody eligible for adoption. Often, the foster parents will then apply to adopt the child.

One way that an authorized foster care agency may seek to enable a child in its custody to become eligible for adoption is for it to commence a proceeding pursuant to Soc. Serv. Law § 384-b to terminate the rights of the child's natural parents. *See* N.Y. Soc. Serv. Law § 384-b(3)(b) (McKinney 1992). The grounds for terminating parental rights are set forth in the statute and, in essence, require a finding that the natural parents are unable to care for the child adequately. *See* Soc. Serv. Law § 384-b(4).

A child in foster care may also become eligible for adoption if the child is surrendered to the care of the foster care agency for purposes of adoption pursuant to Soc. Serv. Law § 383-c. Where the surrender does not take place in court, the foster

care agency to which the child was surrendered must file an application for court approval of the extra-judicial surrender. Soc. Serv. Law § 383-c(4).

After the entry of a court order terminating the natural parents' rights, the prospective adoptive parents may petition the court to adopt the child. To facilitate adoptions, Soc. Serv. Law § 384-b(11) requires the judge, upon issuing an order terminating parental rights, to inquire whether the child's foster parents wish to adopt the child and if so, to receive their adoption petition and preside over the adoption proceeding. Soc. Serv. Law § 384-b(10) requires the attorney of the agency that has obtained the termination order to "serve upon the persons who have been approved by such agency as the child's adoptive parents, notice of entry of such order and advise such persons that an adoption proceeding may be commenced." This provision also requires the agency to advise the prospective adoptive parents of adoption procedures and to cooperate with them in providing necessary documentation.

Adoption proceedings are governed by Article VII of the New York Domestic Relations Law. Natural parents whose rights have been terminated play no role in these proceedings. Although it is not technically a party to the proceeding, a foster care agency that has become the legal guardian of the child pursuant to the order terminating the natural parents' rights must consent to the adoption and furnish information to the Court. N.Y. Dom. Rel. Law § 111(1)(f) (McKinney 1988). The court may grant the adoption petition, and issue an order of adoption, if it determines that the adoption will promote the best interests of the child. Dom. Rel. Law § 114(1). Before making this determination, the court must obtain a home study "by a disinterested person or by an authorized agency specifically designated..." that will provide "adequate basis for determining the propriety of approving the adoption." Dom. Rel. Law § 112(7). The court must also "give due consideration to any assurance by a commissioner of social services that he will provide necessary support and maintenance for the child pursuant to the social services law." Dom. Rel. Law § 114.

The social services law provides for the payment of monthly subsidies to the adoptive parents of "handicapped or hard to place" children and for the payment of adoption expenses, including legal fees, to the adoptive parents of children with "special needs." Soc. Serv. Law §§ 453, 453-a, 454. Most adoptive parents of children who have been in foster care in New York City will qualify for some form of payment.

OPINION

1. Concurrent representation of foster care agency and prospective adoptive parents

In the proceedings leading to the adoption of a child who is in foster care, the foster care agency's interests differ from those of the prospective adoptive parents, who may be, but are not necessarily, the foster parents. Although the foster care agency is not a public entity, it works in conjunction with a public agency pursuant to statutory authority to achieve public objectives. Its mandate is to promote the best interests of

the child in its custody, whether in the context of supervising foster care placements, initiating proceedings to make the child eligible for adoption, or adoption proceedings. The need to preserve public confidence in the integrity of the foster care and adoption processes makes it important that the foster care agency and its representatives remain free of influences that might compromise their ability to act in the child's best interests. The interests of the adoptive parents, in contrast, are private ones: typically, their goal is to adopt the child. These differing interests of the agency and individuals will often lead them to pursue the same objective, but this will not invariably be true.

In *In re Adoption of Vincent*, 158 Misc. 2d 942, 602 N.Y.S.2d 303 (Fam. Ct. 1993), the court recognized that there is invariably a risk that the respective interests of a foster care agency and the adoptive parents will conflict such that the lawyer's exercise of independent professional judgment on behalf of one or both clients would be impaired if the lawyer were to represent such clients jointly. The court identified a number of ways in which a conflict between the interests of the foster care agency and the adoptive parents might manifest itself. In some cases, it may initially appear to be in the child's best interests for the natural parents' rights to be terminated and for the foster parents to adopt the child, but it may later appear to be otherwise. In light of new information or changed circumstances, a lawyer representing exclusively the agency might be expected to counsel the agency to change its plans, to advocate for the agency on behalf of a different outcome, or to present information to the court about problems relating to the adoptive parents that cast doubt on the appropriateness of their adopting the child. The lawyer who simultaneously represented the adoptive parents could not do any of these things, however, without acting disloyally to the individual clients. In other cases, a lawyer representing exclusively the adoptive parents might advocate for an increased level of services from the foster care agency or might call attention to the agency's deficiencies, whereas the lawyer who represented both clients might be discouraged from doing so out of loyalty to the agency.

The court's analysis led to the conclusion, with which we agree, that a lawyer may not simultaneously represent the foster care agency and the adoptive parents. This is true even if the agency and individual clients offer to consent to the representation after being fully apprised of the risks. The dual representation is impermissible because it "would be likely to involve the lawyer in representing differing interests," DR 5-105(A), and it would not be "obvious that the lawyer can adequately represent the interest of each [client]." DR 5-105(C). Further, as the court noted, "[a]ll lawyers are enjoined to promote public confidence in our judicial system and in the legal profession and to 'avoid even the appearance of professional impropriety. '" *In re Adoption of Vincent*, 158 Misc.2d at 947, 602 N.Y.S.2d at 306.

2. Successive representation of foster care agency and adoptive parents

For the reasons discussed below, under DR 9-101(B)(1) and Canon 9 of the Code, it would also be impermissible for a lawyer to represent a foster care agency in

termination of parental rights proceedings or extra-judicial surrender proceedings, to end the representation, and then to begin representing the prospective adoptive parents. *Compare* N.Y. State 514 (1979) (a lawyer who served as guardian *ad litem* in a conservatorship proceeding may not, a few days after the conclusion of the proceeding, accept employment as counsel for the conservator).

DR 9-101(B)(1), which categorically forbids a lawyer from "represent[ing] a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee," is intended, in large part, to protect the integrity of the lawyer's work while in public employ by preventing the lawyer from "using a public office to secure some private advantage." N.Y. State 506 (1979). *See also* Charles W. Wolfram, *Modern Legal Ethics* 458 (1986) ("permitting a lawyer to take action in behalf of a government client that later could be to the advantage of a private practice client would present grave dangers that a government lawyer's largely discretionary actions would be wrongly influenced by the temptation to secure private practice employment or to favor parties who might later become private practice clients"). Under DR 9-101(B)(1), the disqualified lawyer may be "screened" from participation under certain circumstances, thereby permitting that lawyer's law firm to engage in a representation that is off-limits to the former public officer or employee; however, the disqualified lawyer may not participate personally even with the consent of the former employer.

In this respect, DR 9-101(B) differs from DR 5-108(A), which applies to all lawyers and not exclusively former public officers and employees. Under DR 5-108(A), a lawyer is generally forbidden from representing a new client against a former client in a matter that is the same or substantially related to the prior representation. However, DR 5-108(A) permits the successive representation "with the consent of [the] former client after full disclosure." The different approaches to client consent reflect the different purposes of these rules: DR 9-101(B) is principally intended to ensure the public's confidence in the integrity of public agencies and public processes, whereas DR 5-108(A) is principally intended to protect against the misuse of the former client's confidences. Generally speaking, conflict-of-interest rules have been more restrictive in contexts, such as those addressed by DR 9-101(B), that specifically implicate the public interest. [1]

DR 9-101(B)(1) may not be literally applicable to a lawyer who is privately retained by a foster care agency to represent it in extra-judicial surrender proceedings or termination of parental rights proceedings, either because a foster care agency is a

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[1] *See generally* Bruce A. Green, Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey--or Revived Everywhere Else?, 28 Seton Hall L. Rev. 315 (1997).

private agency,[2] or because a lawyer in private practice who is retained to represent a public agency is not a "public employee".[3] We have recognized, however, that the Code imposes an equivalent restriction in cases in which DR 9-101(B)(1) does not literally apply but the concerns underlying the rule are strongly implicated. As we explained in N.Y. State 534 (1981),

> DR 9-101(B) should be seen as providing an illustration of a general policy underlying much of Canon 9. It is a policy which may be seen to develop from the Code's expressed purpose to promote public confidence in our system of justice and the various mechanisms, or agencies, which have been created to serve that system. Where the public might reasonably perceive that such agencies are being used for the personal advantage of [its] attorneys, consistent with the broad purposes of Canon 9, the attorneys have been prohibited from undertaking various kinds of private employment.

In that opinion, we acknowledged that a legal aid society is not strictly speaking a public agency, but nevertheless concluded that the policy underlying DR 9-101(B)(1) applies to

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[2] A foster care agency in proceedings pursuant to Soc. Serv. Law § 384-b(3)(b) or §383-c(4) is in many respects the functional equivalent of a "public" agency. As Professor Wolfram has observed in his hornbook, "[t]he cases [under DR 9-101(B)(1)] do not strictly limit the identity of the employer to a body that is governmental in all respects. Generally it is enough that the client-employer exercises some part of the public trust, employing powers usually reserved for public bodies." Wolfram, *supra,* at 468 & n. 18 (citing *Flego v. Philips, Appel & Walden, Inc.*, 514 F. Supp. 1178, 1180-82 (D.N.J. 1981) (lawyer for the American Stock Exchange was a "public employee") and *Handelman v. Weiss*, 368 F. Supp. 258, 262-64 (S.D.N.Y. 1973) (lawyer for the Securities Investor Protection Corp. was a "public employee")). We think it clear that when a foster care agency takes custody of a child, brings judicial proceedings to make the child eligible for adoption and undertakes other statutorily assigned responsibilities relating to foster care and adoption, it is exercising the public trust and employing powers usually reserved for public bodies.

[3] *Compare General Motors Corp. v. City of New York*, 501 F.2d 639, 650 (2d Cir. 1974) (former federal government lawyer's retention by the city to represent it in an antitrust action was private employment for purposes of DR 9-101[B]), *cited with approval in* N.Y. State 634 (1992*) with Flushing Nat. Bank v. Municipal Assistance Corp.*, 90 Misc. 2d 204, 211, 397 N.Y.S. 2d 662, 667 (Sup. Ct. N.Y. Co. 1977) (lawyer in private practice who acted as bond counsel to city's municipal assistance corporation was engaged in public employment under DR 9-101[B]); Nassau County 94-4 (DR 9-101(B) prohibits member of county bar association grievance committee from representing a client in a postmatrimonial dispute subsequent to having investigated the client's private lawyer; "[a] member of the county bar association grievance committee, when engaged in an investigatory function, is for these purposes acting as a 'public officer' to the same extent as would a member of the departmental grievance committee's counsel's staff").

limit the circumstances under which an attorney may represent individuals whom the attorney previously represented while employed by the legal aid society.

Relying on the general policy underlying DR 9-101(B)(1), we similarly concluded in N.Y. State 514 (1979) that a court-appointed guardian *ad litem* representing a proposed conservatee may not, after the conclusion of the conservatorship proceeding, accept employment as counsel for the conservator. We explained:

> As guardian *ad litem*, an attorney is in a position where there is a very real risk of influence by the prospect of future employment. … In reporting on the need for the appointment of a conservator and reviewing the qualifications of particular candidates, the guardian can obviously enhance his own opportunities for later employment. This risk, and the appearance to the public that the guardian may have in mind feathering his own nest, make it improper for an attorney who has served as guardian to accept private employment as counsel to the conservator.

We further noted that "[t]he appearance of impropriety is heightened in the present inquiry by the fact that the proffered retainer follows so closely upon the conclusion of the conservatorship proceeding." *Id.*

In the present inquiry, involving a lawyer who represents a foster care agency in proceedings that may lead to the termination of natural parents' rights, the concerns underlying DR 9-101(B) are implicated just as in the situations addressed in these two earlier opinions. Here, there is a risk that the agency's lawyer, in order to obtain later employment by the adoptive parents, will fail to advocate for the child's best interests and will influence the agency to be overly aggressive in seeking to terminate the natural parents' rights. *Compare* DR 5-101(A). Further, there is a danger that the lawyer who accepts employment by the prospective adoptive parents shortly after representing the foster care agency will be perceived by the public to have acted for private advantage.

CONCLUSION

A lawyer representing a foster care agency in extra-judicial surrender proceedings or termination of parental rights proceedings may not concurrently or subsequently represent prospective adoptive parents who are seeking to adopt the child involved in those proceedings.
