



## COMMITTEE ON PROFESSIONAL ETHICS

Opinion 844 (10/8/10)

Topic: Lawyer/legislator serving as appointed counsel for indigent respondents in Family Court proceedings.

Digest: Rules 8.4(d) and 1.11(f)(2) prohibit a county legislator from accepting appointments by the Family Court to serve as attorney for the child in juvenile delinquency, PINS, neglect, or abuse proceedings.

Rules: 1.11(f)(2) and 8.4(d).

### QUESTION

1. Where a county legislature approves funding and appointments for both the office of county attorney and the office of counsel for the county department of social services, may a part-time county legislator accept appointment by the Family Court to serve as attorney for the child (formerly known as law guardian) in juvenile delinquency, PINS, neglect or abuse proceedings?<sup>1</sup>

### OPINION

2. This Committee has addressed analogous situations before. Under the authority of former DR 1-102(A)(5) (lawyer shall not “engage in conduct prejudicial to the administration of justice”) and former DR 8-101(A)(2) (lawyer who is also public official shall not “use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client”), this Committee has determined that a lawyer/legislator may not represent criminal defendants in cases involving members of a police department or district attorney’s office over which the legislature has budget or appointment authority. N.Y. State 798 (2006); N.Y. State 692 (1997). The prohibition applies even if the legislator would abstain from all votes affecting the police budget or the district attorney’s budget. N.Y. State 702 (1998). The language of DR 1-102(A)(5) and DR 8-101(A)(2) has been incorporated without change into the New York Rules of Professional Conduct as Rules 8.4(d) and 1.11(f)(2), respectively.

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<sup>1</sup> “PINS” stands for “persons in need of supervision.”

3. Rules 8.4(d) and 1.11(f)(2) apply with equal force to prohibit service as attorney for the child in juvenile delinquency and PINS proceedings for three reasons: (a) the legislator's role is the functional equivalent of a criminal defense attorney, (b) the child's liberty is at stake, and (c) the legislator would be adverse to the county attorney's office, whether or not the legislator actually cross-examines county-funded or county-appointed law enforcement or other personnel.

4. We recognize that neglect and abuse proceedings are somewhat different from juvenile delinquency and PINS proceedings. For example, the attorney for the child may, in a particular neglect and abuse case, take the same position as the county attorney or the county department of social services with respect to the proposed placement of a child, the proposed termination of parental rights, or other issues. Nonetheless, for two reasons, both equally important, we believe that the ethical prohibition against accepting any of these Family Court appointments should be the same.

5. First, the public may perceive that the county legislator may be receiving favored treatment from the county attorney or the county department of social services. This perception is not dissipated in situations where the legislator agrees with those offices regarding a recommended disposition of a particular neglect or abuse case. To the contrary, the perception of favored treatment may be reinforced – perhaps the public will believe that the county attorney or department of social services agrees with the legislator's position not because it is correct but rather because the legislator holds budget or appointment authority over them and they are afraid to disagree.

6. Second, looking beyond mere perception, there is an unacceptable risk that representatives of the county attorney's office or of the county department of social services will in fact compromise their independence and adjust their positions in a neglect or abuse proceeding to conform to the legislator's recommendations or views as attorney for the child in a particular case. That is, there is a real risk that the county attorney's office or the county department of social services, in deference to the county legislator's status, will agree with the legislator either to curry favor and secure the legislator's budget or appointment support, or to avoid antagonizing the legislator and precipitating retaliatory opposition to the budget and appointment requests that those offices must submit for legislative approval.

### **CONCLUSION**

7. We answer the question in the negative. It is not ethically permissible for a county legislator to accept appointments by the Family Court to serve as attorney for the child in juvenile delinquency, PINS, or neglect and abuse proceedings.

(4-10)