



# NEW YORK STATE BAR ASSOCIATION

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## New York State Bar Association Committee on Professional Ethics

Opinion 975 (7/19/13)

**Topic:** Imputation of conflicts among part-time, independently operating members of Public Defender Office

**Digest:** A county Public Defender Office is a firm for imputation purposes even if its lawyers work independently. A lawyer in such an office who is a part-time Assistant Public Defender in Family Court would be subject to an imputed conflict when another Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9. The lawyer could not appear in such matters unless the imputed conflict were waivable and properly waived, and the availability of waiver may be limited by various circumstances.

**Rules:** 1.0(h); 1.7; 1.10 (a), (d)

## FACTS

1. Inquiring counsel has been offered a position as a part-time Assistant Public Defender in a small upstate county to practice in Family Court. The Public Defender's office has three part-time criminal public defenders and two part-time Family Court public defenders. There is an attorney who as Public Defender is the administrator and maintains an office for himself and a secretary. All the Assistant Public Defenders maintain their own private offices. There is no overlap in the case assignments of the two kinds of Assistant Public Defender: the criminal Assistant Public Defenders do all the office's criminal work, and they do not appear in Family Court.

2. The Family Court public defenders each have a private practice. They do not share files with each other, either at the Public Defender's Office or in their separate private practices. One of them appears in Family Court on Monday, Wednesday and Friday, and the other appears in court on Tuesday and Thursday.

## QUESTIONS

3. If inquiring counsel accepts a position as part-time Assistant Public Defender practicing in Family Court, then may inquiring counsel appear in Family Court in the following situations?

- A. As the “conflict” Assistant Public Defender on cases in which the first (*i.e.*, the other) Assistant Public Defender has a conflict of interest;
- B. Appearing “against the first Assistant Public Defender” by representing the

C. “opposing party” either (i) as an Assistant Public Defender or (ii) as retained (*i.e.*, private) counsel; or

D. As an Attorney for the Child in matters in which another Assistant Public Defender appears.

4. If inquiring counsel accepts a position as part-time Assistant Public Defender practicing in Family Court, then may inquiring counsel accept assignments under County Law article 18-B to represent criminal defendants in the same county?

## OPINION

5. Counties in New York are authorized by statute to create an Office of Public Defender, or to contract with another county’s Office of Public Defender. County Law §716 *et seq.* Public defenders represent not only indigent criminal defendants, County Law §717(1), but also persons in Family Court or Surrogates Court who are entitled to counsel but financially unable to obtain such counsel,<sup>1</sup> which can include persons in numerous kinds of Family Court proceedings.<sup>2</sup>

6. Answers to the various parts of the inquiry will depend on whether certain conflicts of interest would be imputed to the inquiring lawyer. The New York Rules of Professional Conduct provide: “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 [“Conflict of Interest: Current Clients”], 1.8 [“Current Clients: Specific Conflict of Interest Rules”] or 1.9 [“Duties to Former Clients”], except as otherwise provided therein.” Rule 1.10(a).

7. A public defender’s office is a “firm” as defined in the Rules.<sup>3</sup> Accordingly, our prior

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<sup>1</sup> “The public defender shall also represent, without charge, in a proceeding in family court or surrogate’s court in the county or counties where such public defender serves, any person entitled to counsel pursuant to [certain statutes], who is financially unable to obtain counsel. When representing such person, the public defender shall counsel and represent him at every stage of the proceedings, shall initiate such proceedings as in the judgment of the public defender are necessary to protect the rights of such person, and may prosecute any appeal when, in his judgment the facts and circumstances warrant such appeal.” County Law §701(2).

<sup>2</sup> The Public Defender represents, among others, persons entitled to counsel under Family Court Act §262, which includes parties in a “child protective proceeding (child neglect or abuse, termination of parental rights, and Article 10-A permanency hearings), the petitioner and the respondent in a family offense case, the parents involved in a custody proceeding, the respondent in a paternity case, the parent who opposes adoption in an adoption proceeding, and any person who faces possible incarceration for contempt of court,” as well as “foster parents or other persons having physical or legal custody of the child in a child protective proceeding, and non-custodial parents or grandparents who receive notice pursuant to Social Services Law Section 384-a(2).” Merril Sobie, Practice Commentaries, New York Family Court Act §262 (McKinney’s) (citations omitted).

<sup>3</sup> See Rule 1.0(h) (“firm” includes “lawyers employed in a qualified legal assistance organization”); Rule 1.0(p) (“‘Qualified legal assistance organization’ means an office or organization of one of the four types

opinions make clear that when one lawyer in a public defender's office has a conflict based on Rule 1.7, 1.8 or 1.9, that conflict is imputed to other lawyers in the same public defender's office. *See* N.Y. State 941 ¶14 (2012); N.Y. State 862 ¶¶ 5-9 (2011); *cf.* N.Y. State 973 (2013) ¶6 (2013) (legal aid office). This remains the rule even when the assistant public defenders work on a part-time basis, and even when the lawyers concerned work in different divisions of the office. N.Y. State 862 ¶8 (the phrase "associated" in Rule 1.10(a) "includes part-time attorneys as well as full-time attorneys," and "fact that the inquirer appears as a Public Defender only in Family Court rather than in the Criminal Courts does not change the result"; inquirer is still "associated" with the disqualified Assistant in same firm "even though his area of practice is different," because "Rule 1.10(a) imputes conflicts to all lawyers in a firm, in all practice areas, not just to lawyers in the same department or practice area").

8. The inquirer notes that – unlike in some public defenders' offices – the Assistant Public Defenders in the inquirer's small upstate county maintain their own private offices, without working in any common locations, and they do not share their Public Defender files with each other. In some respects, therefore, the inquirer's prospective office is similar to the kind of lawyer panel we addressed in N.Y. State 914 (2012). That opinion concerned a panel of lawyers established to provide legal assistance to indigent clients when the Legal Aid Society has a conflict. The panel members did not work out of or store active files at a common location, did not have a common supervisor, and did not share client confidential information with the Legal Aid Society lawyers. We concluded that when members of that conflicts panel "act as independent counsel to their assigned indigents," they are not members of the same firm for imputation purposes. *Id.* ¶10.

9. The question that this Committee confronts, then, is whether the similarities of this small upstate Public Defender's Office to the legal aid conflicts panel are sufficient to remove this particular office from the rule articulated in N.Y. State 862, and instead bring it within the rule articulated in N.Y. State 914. In the Committee's opinion they are not, and the rule stated in N.Y. State 862 therefore applies.

10. While it is relevant that in actual practice the Assistants work independently, that factor is outweighed by others. The structure of the office and the central role of the Public Defender are prescribed by statutory provisions.<sup>4</sup> There is a single attorney who is the Public Defender and who is publicly listed with that title. The other attorneys in the office serve as Assistant Public Defenders and are publicly identified as such. The Public Defender appoints those assistants, and fixes their compensation, subject to authorization by the board of supervisors. It is the Public Defender who is statutorily charged with representing clients of the office. *See* County Law

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listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof."); Rule 7.2(b)(1)(iii) (applying to "a legal aid or public defender office ... operated or sponsored by a governmental agency").

<sup>4</sup> "The board or boards of supervisors may designate an attorney-at-law as public defender and shall fix his term and compensation. Subject to the approval of such board or boards, the public defender may appoint as many assistant attorneys, clerks, investigators, stenographers and other employees as he may deem necessary and as shall be authorized by such board or boards. The public defender shall fix the compensation of such aides and assistants within the amounts such board or boards may appropriate for such purposes." County Law §716.

§701(2) (quoted in footnote 1 above). We accept the inquirer's representation that the defenders typically do not share assignments or files, but they could, consistent with the underlying statutory provisions, sometimes work together collaboratively.<sup>5</sup>

11. Taking into account all the circumstances, we do not believe that the similarities between the inquirer's prospective Public Defender's Office and a legal aid conflicts panel, or anything in N.Y. State 914, would take this office out of the usual rule that applies to public defenders' offices. The result could be different if the defenders were organized with a different structure, more like the legal aid conflicts panel considered in N.Y. State 914. *See, e.g.*, County Law §722(3)(a)(i) (counties required to adopt a plan for provision of counsel that may, as alternative to using a public defender, use a plan of a local bar association whereby "the services of private counsel are rotated and coordinated by an administrator"). But a Public Defender's Office like the one in the inquiry, organized in the manner prescribed by County Law §716, constitutes a firm within which conflicts are subject to imputation under Rule 1.10(a). In light of that principle, we address the four situations posed by the inquirer.

#### Appearance in Family Court as a "conflict" Assistant Public Defender

12. We address first the inquirer's question whether it would be permissible to serve as a "conflict" Assistant Public Defender who would be assigned to handle cases in which the other Family Court Assistant Public Defender has a conflict of interest. If the other Assistant's conflict is based on Rule 1.7, 1.8 or 1.9, then for reasons discussed above, none of the other lawyers of the Public Defender's Office may "knowingly" represent the client who cannot be represented by the other Assistant.<sup>6</sup> The inquiring lawyer's knowledge of the conflict would be implicit in service as a "conflict" defender.

13. Thus when the other Family Court Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9, the conflict would be imputed to the inquiring lawyer, and the inquiring lawyer could serve as "conflict" defender only if the imputed conflict were properly waived. Rule 1.10(d) provides that imputed disqualifications may be waived by the affected client under the conditions stated in Rule 1.7. Even if the *other* Assistant's conflict is unwaivable under Rule 1.7(b), the *imputed* conflict may still be waived if the necessary conditions of waiver are satisfied

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<sup>5</sup> For example, while Assistants are normally assigned to appear in court only on different days, if one gets sick, has a vacation scheduled, or otherwise cannot go to court one day, then it would be possible for another Assistant Public Defender to cover the court appearance. Similarly, whether or not routine, the statutory basis of the office would allow the Assistant Public Defenders to have conferences, or informally call one another to discuss issues they are confronting, as a mutual resource network. Presumably, all cases taken in would be included in the Public Defender's conflict checking system.

<sup>6</sup> Conflicts based on Rules other than 1.7, 1.8 or 1.9 are not imputed by the terms of Rule 1.10(a), although service as a "conflict" defender in such cases may require the inquiring lawyer to consider other provisions. *See, e.g.*, Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 532, 578 (2013 ed.) (discussing other Rules that "carry their own imputation provisions"); *id.* at 578 (pointing out that even when one lawyer has a kind of conflict not imputed to associated lawyers, an associated lawyer could still be subject to a direct conflict such as one based on personal interest); N.Y. State 890 (2011) (conflicts under Rule 1.10(h), relating to family members, are not "automatically" imputed to other lawyers in the firm, "but imputation may arise in the particular circumstances of any given case").

as to the “conflict” defender. *See* N.Y. State 968 ¶¶ 25-26 (2013).

Appearance in Family Court against another Assistant Public Defender

14. The inquirer next asks whether it is permissible to appear “against” the other Family Court Assistant Public Defender on behalf of the party “opposing” that other Assistant Public Defender’s client, either when inquiring counsel is acting as an Assistant Public Defender or as retained (private) counsel. Such a situation might happen, for example, when one parent opposes another parent in a litigated matter.

15. These two situations by their terms presuppose that the inquiring lawyer and the other Family Court Assistant Public Defender would be representing “differing interests” as defined by Rule 1.0(f). That in turn means that under Rule 1.7(a)(1), a single Assistant Public Defender proposing to represent both parties would have a conflict of interest. Rule 1.10(a) would impute that conflict to other Assistant Public Defenders for reasons discussed above.

16. Moreover, the inquiring lawyer would be subject to the imputed conflict whether acting as Assistant Public Defender or as retained counsel, because the inquiring lawyer remains “associated” with the Public Defender’s Office even when not acting in that capacity.<sup>7</sup> A part-time Assistant Public Defender thus does not escape imputation when representing a client in the role of private practitioner. The inquiring lawyer could not appear in either capacity unless the conflict imputed to the inquiring lawyer were waivable and waived under the conditions stated in Rule 1.7(b).

17. Such a conflict may well be unwaivable, especially since it involves two members of the same firm appearing for adverse parties in the same litigation.<sup>8</sup> In our view, however, that posture does not mean that the conflict is necessarily unwaivable in every circumstance. There is a *per se* rule that the conflict may not be waived for a *single* lawyer who represents both sides.<sup>9</sup> But as noted in paragraph 13 above, such unwaivability is not imputed by Rule 1.10(a). *See* N.Y. State 968 ¶¶ 25-26 (2013). Whether such an *imputed* conflict is waivable may require consideration of the interests not just of the opposing clients but also of the public and the judiciary, see *id.* ¶28, but we cannot say categorically that such a conflict is never waivable in

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<sup>7</sup> See N.Y. State 862 (2011) (imputation of an assistant public defender’s conflict to another assistant public defender “in his private practice”); cf. N.Y. State 793 ¶15 & n.7 (citing authority for rule that where lawyer is of counsel to two firms, the firms are treated as one for conflicts purposes, so that conflict arising in one firm is imputed to lawyers in the other firm).

<sup>8</sup> See Rule 1.7(b)(1) (conflict not waivable unless lawyer has reasonable belief in ability to provide competent and diligent representation to the affected client); Rule 1.7(b)(3) (conflict not waivable if it involves “assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal”); Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated* 557-58 (2013 ed.) (noting question as to whether different lawyers in same firm may represent both sides in the same suit, even with informed consent, and expressing doubt about propriety of doing so in light of Rules 1.7(b)(1) and 1.7(b)(3)).

<sup>9</sup> Rule 1.7(b)(3). This rule refers to a “lawyer” rather than a “law firm” and thus does not, by its literal text, categorically prohibit different lawyers in the same firm from opposing each other in the same litigation or other proceeding before a tribunal.

any set of circumstances.

18. The conflict will not be waivable, however, unless the lawyers on both sides of the litigation (here, the inquiring lawyer and the other Assistant Public Defender) each reasonably believe that they can “provide competent and diligent representation” to their respective clients. Rule 1.7(b)(1). If the lawyers work in separate offices rather than in a common location, have little interaction, and do not share files, it may be more likely that both lawyers could reasonably form that belief. But each such conflict would have to be evaluated on its own facts and circumstances.

Appearance in Family Court as Attorney for the Child when another public defender also appears

19. The inquirer has also asked about the propriety of appearing as an attorney for a child concerned in a Family Court proceeding when another Assistant Public Defender is appearing for a party in such proceeding. Private attorneys may be appointed as attorneys for children,<sup>10</sup> and appointment is available in a wide variety of circumstances, *see* Family Court Act §249 (listing specific circumstances and providing that in other Family Court proceedings, the court may appoint an attorney to represent the child when in the judge’s opinion it would serve statutory purposes and independent legal counsel is not available to the child).

20. The inquiry is cast in general terms. The question of whether there would be a conflict can be resolved only in the factual context of a particular matter. If the inquiring lawyer serving as attorney for the child and the Assistant Public Defender would not be representing differing interests, then there would be no conflict under Rule 1.7(a)(1). If they would be representing differing interests, then there would be a conflict under Rule 1.7(a)(1), and it would be imputed to both lawyers under Rule 1.10(a).

21. If such a conflict were imputed, then the inquiring lawyer could not serve as attorney for child unless the imputed conflict could be waived, and was in fact waived, under the standards of Rule 1.7(b) as applied through Rule 1.10(d). However, even if such a conflict were waivable, the inquiring lawyer’s client would be a child and would be incapable by himself or herself of giving informed consent to satisfy Rule 1.7(b)(4). *See* N.Y. State 941 ¶8 (2012); N.Y. State 790 ¶8 (2005). The situation might be different if the child had another representative with authority to consent to a conflict, but whether a representative would have such authority is a question of law beyond the Committee’s jurisdiction. *See* N.Y. State 895 ¶16 (2011) (raising but declining to answer that question with respect to representatives of the child “such as a parent, guardian *ad litem*, custodian, guardian, committee, trustee or court”).

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<sup>10</sup> “Under New York Law, children (minors) in many kinds of court proceedings ... are entitled to be represented by counsel .... A governmental office entitled the Attorneys for Children Program (‘AFC Program’) maintains a list or ‘panel’ of attorneys qualified to represent children, and assigns an attorney from the panel to children involved in the judicial system who qualify by law for an appointed attorney.” N.Y. State 941 ¶2 (2012) (footnotes omitted). Attorneys for children may also be assigned through agreements with legal aid societies or with individual attorneys. Family Court Act §243.

## Appearance in criminal court as assigned counsel under County Law article 18-B

22. The inquirer's final question has to do with appointment to represent criminal defendants when the Public Defender's Office has a conflict.<sup>11</sup> This is the question that was addressed in N.Y. State 862 (2011), and we reach the same result that we did in that opinion.

23. Specifically, if the conflict in the public defender's office were based on Rule 1.7, 1.8 or 1.9, it would be imputed to the inquiring lawyer for reasons discussed above. The inquiring lawyer, knowing of the underlying conflict, could not accept the appointment unless the imputed conflict were waivable, and waived, under the standards of Rule 1.7(b) as applied via Rule 1.10(d).

## **CONCLUSION**

24. Even though the lawyers in a county's Public Defender Office work independently, the office constitutes a "firm" for purposes of imputing conflicts of interest under Rule 1.10(a).

25. A lawyer who is a part-time Family Court Assistant Public Defender in such an office would be subject to an imputed conflict if that lawyer were to appear in Family Court (i) as a "conflict" lawyer when another Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9; (ii) as an Assistant Public Defender or retained counsel "opposing" another Assistant Public Defender; or, (iii) depending on the circumstances, as an attorney for the child in a matter in which another Assistant Public Defender has appeared. The same principles of imputation under Rule 1.10(a) would also apply if a part-time Assistant Public Defender were to appear in criminal court as assigned counsel when another Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9.

26. In all such cases, the part-time Assistant Public Defender could not undertake the representation, even in private practice as retained counsel, unless the imputed conflict were waivable and properly waived. Whether a given conflict is waivable can be determined only by considering all the circumstances, and waivability may be less likely in various circumstances such as when the two Assistant Public Defenders seek to represent adverse parties in the same proceeding, or when the client is a child and thus incapable, acting alone, of providing informed consent.

(12-13)

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<sup>11</sup> "In many cases, counties that have chosen to establish a public defender in accordance with County Law Article 18-A rely on private attorneys under Article 18-B in cases in which the public defender is unable to represent an indigent litigant because of a conflict of interest with another client of the office (co-defendants in a criminal proceeding, for instance)." N.Y. State 811 (2007); *see* County Law §722.