



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

Opinion 1122 (5/3/17)

Topic: Personal conflict of interest

Digest: A lawyer who serves as a foster parent may maintain a practice as an Attorney for Children and as the representative of other persons in proceedings in the Family Court of the same county. But if a reasonable lawyer would conclude, in relation to any given client, that a significant risk exists that the lawyer’s professional judgment on behalf of the client will be adversely affected by his or her personal interest as a foster parent, the lawyer may not represent the affected client unless the lawyer reasonably believes that he or she can provide competent and diligent representation and the affected client gives informed consent confirmed in writing.

Rules: 1.7(a) & (b)

FACTS

1. The inquirer, a family law practitioner, is considering serving as a foster parent under various provisions of the Family Court Act and the Social Services Law. The inquirer practices in the same county where she resides (and where she would serve as a foster parent).
2. The county commissioner of social services, as head of the county department of social services, or his or her delegate (collectively, the Commissioner) appears on behalf of the county in many of the family law actions in the inquirer’s practice, including proceedings under Article 10 (Child Protective Proceedings) and Article 10-A (Permanency Hearings for Children Placed Out of Their Homes) of the Family Court Act. Consequently, both the Commissioner and the inquirer appear on behalf of their respective clients in all Article 10 and 10-A proceedings concerning children for whom inquirer has been named attorney.
3. The county also acts as the foster care agency. The Commissioner, as legal custodian of children who have been removed from their family home, has broad and continuing responsibility for the welfare of those children and, consequently, an active role with respect to the recruitment, training and licensure of foster parents, their selection and appointment as such by the court, oversight and compensation of the foster home, and termination of the foster relationship in favor of another or the conversion of the relationship to a permanency proceeding, among other duties.

QUESTION

4. May a lawyer (i) maintain a practice as an Attorney for Children (f/k/a a Law Guardian) and as a representative of other parties in proceedings under Articles 10 and 10-A of the Family

Court Act and (ii) concurrently serve as a foster parent in a jurisdiction in which the county department of social services acts as the foster care agency?

OPINION

5. As Attorney for a Child, the inquirer's duty is to exercise professional judgment solely in the best interests of the child, both as a matter of ethics, *see* Rule 1.7 and Comment [1] thereto, and as a matter of law, *see, e.g.*, Family Court Act §§1016, 1033-b.) As a would-be foster parent, as a current foster parent, or as a current foster parent desirous of becoming the adoptive parent of a foster child, inquirer has a personal interest in preserving and strengthening the foster relationship and in satisfying the Commissioner.

6. Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules") provides that, without the consent of the client, a lawyer may not represent a client (or, if the risk becomes apparent only after the representation has been commenced, continue the representation, if: a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests.

7. Often, the inquirer's role as a foster parent will have no effect on her professional judgment on behalf of clients in her role as an Attorney for Children (or other parties to Family Court proceedings). However, from time to time, the dual roles may raise potential conflicts of interest. Although both the inquirer and the Commissioner must act in the best interests of the child in proceedings under the Family Court Act, at times, their professional interests or their views of the child's best interests may differ. In addition, there may be circumstances where the interests of the inquirer as Attorney for a Child and the inquirer's personal interests might differ. For example, such a circumstance might occur if the social worker overseeing inquirer's foster care were to testify in another proceeding adversely to inquirer's client in that other proceeding, thereby requiring inquirer to cross examine (or to forbear from cross examining) the social worker. *See* N.Y. State 790 (2005).

8. The Committee believes that, in many instances, a reasonable lawyer would deem the conflict between the inquirer's personal interests as a foster parent and her professional responsibility to a client in Article 10 and Article 10-A proceedings to be theoretical and remote and unlikely to affect the lawyer's professional judgment on behalf of the child (or another client) for which she is attorney. If there is "no significant risk" of an adverse effect, objectively determined, an attorney who is a foster parent may undertake and continue representations of children and adults in Article 10 and Article 10-A proceedings without the need to obtain informed client consent. *See* N.Y. State 790 (2005).

9. If, to the contrary, a reasonable lawyer would conclude there is a significant risk that the inquirer's professional judgment on behalf of any client will be affected by her interests as a foster parent, the inquirer would be required either to decline or to withdraw from representation of the client or, where permissible, seek client consent to the representation notwithstanding the conflict.

10. While the issue of whether an individual, adult or minor, has the capacity to give the necessary informed consent is beyond the scope of this opinion, the reader's attention is invited

to the helpful discussion of the issue of a minor's capacity to give informed consent in N.Y. State 1069 (2015) ¶¶20-27. *See also* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* (2016 ed.) pp. 467-468.

CONCLUSION

11. A lawyer who serves as a foster parent may maintain a practice as an Attorney for Children and as the representative of other persons in proceedings in the Family Court of the same county, unless a reasonable lawyer would conclude, in relation to any given client, that a significant risk exists that the lawyer's professional judgment will be adversely affected by his or her personal interest as a foster parent. If a reasonable lawyer would conclude that such a significant risk exists, the lawyer may, nevertheless, represent the affected client, provided that the lawyer reasonably believes that he or she can provide competent and diligent representation and the affected client gives informed consent confirmed in writing.

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