



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

Opinion 1272 (08/27/2024)

Topic: Conflict of Interest when part-time Department of Social Services Attorney represents clients adverse to Department of Social Services

Digest: Regardless of the scope of a part-time attorney’s work for a county Department of Social Services (“DSS”), the part-time DSS attorney may not represent private clients in Family Court in matters in which DSS has an interest or otherwise plays a meaningful role even if DSS and the attorney’s client wish to consent, because that situation presents a non-consentable conflict of interest. Consent to representation may permit the inquirer to proceed in other matters in which DSS is in some way involved, however, depending on the specific facts and circumstances.

Rules: 1.7(a) & (b)

FACTS:

1. The Inquirer is a part-time attorney for a county Department of Social Services (“DSS”). The Inquirer’s role is limited to representing DSS in child support and paternity matters before the Family Court Support Magistrate.¹ The attorney does not handle confirmation hearings or any other matters that come before the Family Court judge. The attorney also does not handle any child protective matters, nor does the attorney have access to DSS files in such matters. The Inquirer asks whether she may represent clients from her private practice in Family Court in matters in which DSS is involved.

QUESTION:

2. May a part-time DSS attorney whose work for DSS is limited to representing DSS in child support and paternity matters before the Family Court Support Magistrate represent private clients in Family Court in matters in which DSS is involved?

OPINION:

3. Rule 1.7(a) of the New York Rules of Professional Conduct (the “Rules”) provides as follows:

- (a) Except as provided in paragraph (b) [of Rule 1.7], a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
 - (1) the representation will involve the lawyer in representing differing interests; or

¹ Support Magistrates are appointed and empowered to hear, determine and grant relief in Family Court support and paternity proceedings. Family Court Act § 439.

(2) 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.

4. The Inquirer represents DSS part time and represents private clients the rest of the time. DSS is thus her client. If DSS seeks relief in a Family Court proceeding or otherwise takes a position regarding the outcome of the matter, but the Inquirer represented a private client whose position is adverse to that of DSS in the matter, then the Inquirer would be representing "differing interests" within the meaning of Rule 1.7(a)(1) even if the DSS matter and the private matter are not related. *See* Rule 1.7, Cmt. 6 ("absent consent, a lawyer may not advocate in one matter for a client against another client that the client represents in some other matter, even when the matters are wholly unrelated").

5. To provide some examples, it would be a conflict of interest under Rule 1.7(a)(1) for the inquirer to represent a private client as respondent (i.e., opposing party) in a Family Court Article 5 proceeding brought by DSS as assignee of an individual receiving public assistance or in a child protective proceeding brought by DSS under Family Court Article 10. Even if DSS is represented by another DSS attorney in such matters and the Inquirer has no involvement in the matter, Rule 1.10 "imputes the conflict of the lawyer to the entire legal unit of the Department [of Social Services] by virtue of the lawyer's part-time affiliation with it." N.Y. State 1074 (2015). This means that the inquirer would have a conflict of interest in such situations simply by virtue of the fact that one client (DSS) is adverse to another client (her private client).

6. Nevertheless, there may be matters in which DSS is involved but in which DSS does not have any particular interest in the course or outcome of the matter. For example, DSS may have conducted a previous investigation that is no longer relevant except as background, or a DSS social worker may be called upon to testify regarding facts that are not in dispute. Such a matter might not implicate Rule 1.7(a)(1) because the Inquirer would not be representing "differing interests," but the Inquirer would still need to consider whether she has a conflict of interest under Rule 1.7(a)(2) (quoted above), which would prohibit her from representing a client if a reasonable lawyer would conclude that there is a "significant risk" that her professional judgment on behalf of her client would be "adversely affected" by her own "financial, business, property or other personal interests." Thus, the Inquirer would need to consider, among other issues, whether her interest in maintaining her part-time position with DSS would constrain her in advancing arguments that might cast DSS or its staff in a bad light or be contrary to the positions DSS has taken in other matters.

7. Whether Rule 1.7(a)(1) or (a)(2) applies in any particular matter would depend on the specific facts and circumstances, but by way of general guidance it is the Committee's view that there would be a conflict if a part-time DSS attorney were to represent a private client in any matter in which DSS plays a "meaningful role." We believe that DSS would play a meaningful role both in matters in which the interests of a DSS client conflict with the interests of the opposing party, as well as in certain other matters in which DSS does not have a direct interest but is nevertheless involved in an important way.

8. The Committee previously articulated similar guidance in N.Y. State 1074 (2015). There, a part-time DSS attorney sought to accept assignments to represent indigent individuals both in criminal matters and in Family Court proceedings. Because the attorney did not intend to accept assignments in child abuse and neglect cases, the Committee concluded that the rule set out in

N.Y. State 859 (2011) barring a prosecutor from acting as criminal defense counsel did not apply. Opinion 1074 continued that whether the attorney could take on other types of assigned criminal or Family Court cases depended on the particular facts and circumstances of each case. Specifically, Opinion 1074 stated:

Although it is true that many Family Court proceedings implicate the Social Services Department, there are certain proceedings there that typically do not. For instance, a couple in a dispute over custody, or the occupancy or possession of marital assets, would not ordinarily excite the interest of the Department of Social Services. This is why we believe that the issue is best left to the facts and circumstances of the matter, in which the lawyer may assess whether the lawyer's part-time employment in the Department of Social Services would be an issue. *If the Department is to play any meaningful role in the Family Court proceeding, then the lawyer should decline the assignment; if not, then we see no reason why the lawyer may not appear in the Family Court on matters in which the Department plays no meaningful role.* [Emphasis added.]

9. If the Inquirer's representation of a private client creates a conflict of interest under Rule 1.7(a)(1) or (2), then the next question is whether that conflict is waivable under Rule 1.7(b). Rule 1.7(b) provides as follows:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

10. The Committee addressed the waiver issue in N.Y. State 1074, stating:

The most important element of the analysis [under Rule 1.7(b)] is the lawyer's reasonable belief "that the lawyer may provide competent and diligent representation to each affected client." We cannot negate the possibility that a part-time lawyer for the Department of Social Services may reach such a reasonable belief in undertaking the defense of a criminal defendant provided that the matter is one in which the lawyer is not then working or has not recently worked with the law enforcement officials involved, and does not involve any issue within the jurisdiction of the Department of Social Services. For example, a DWI or a larceny charge against a stranger to the Department, in which none of the law enforcement officials with whom the lawyer works or has recently worked, cannot readily be said to entail the serious issues that a lawyer in the inquirer's position might otherwise raise. But for the lawyer to be engaged in *matters within the Department's jurisdiction*, which a Family Court appearance would inevitably invoke, or for the lawyer to 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, would present exactly the problems that our earlier opinions found impermissible. In all events, the informed consent of the Department of Social Services and of the

lawyer's client, confirmed in writing, is essential to the undertaking. [Emphasis added.]

11. In referring to "matters within the Department's jurisdiction," the Committee was referring to matters in which DSS is so directly involved, as a party or otherwise, as to preclude the attorney's forming a reasonable belief, within the meaning of Rule 1.7(b)(1), that "the lawyer will be able to provide competent and diligent representation to each affected client." Absent such a reasonable belief, the conflict is non-consentable (*i.e.*, non-waivable) even if the conflicting parties desire to waive the conflict.

12. Whether the Inquirer here might be able to form such a belief in matters in which DSS is involved only indirectly would depend on the particular facts and circumstances of the matter. But even if the Inquirer reasonably believed that she could render competent and diligent representation to each affected client per Rule 1.7(b)(1), "the informed consent of the Department of Social Services and of the lawyer's client, confirmed in writing, [would be] essential to the undertaking." *See* N.Y. State 1074 (2015).

13. Finally, because the Committee addresses only issues arising under the New York Rules of Professional Conduct, we express no view with respect to any statute, ordinance or municipal ethics code that may bear upon the present inquiry.

CONCLUSION:

14. Regardless of the scope of a part-time attorney's work for a county Department of Social Services ("DSS"), the part-time DSS attorney may not represent private clients in Family Court in matters in which DSS has an interest or otherwise plays a meaningful role even if DSS and the attorney's client wish to consent, because that situation presents a non-consentable conflict of interest. Consent to representation may permit the inquirer to proceed in other matters in which DSS is in some way involved, however, depending on the specific facts and circumstances.

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