NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 941 (10/16/12)

Topic: Conflict of interest involving an attorney's spouse

Digest: A lawyer on a county panel of the Attorneys for Children Program may serve as "attorney for the child" even though another party in the proceeding is represented by the lawyer's spouse (an Assistant Public Defender) or by another lawyer who works in the same office as the lawyer's spouse, unless (i) the circumstances create a conflict of interest under Rule 1.7(a)(2) or Rule 1.10(h), and (ii) the child has no legal representative who can and does consent to the conflict on the child's behalf.

Rules: 1.0(h), 1.7(a) & (b), 1.10(a), (d) & (h)

QUESTION

1. May a lawyer on a county panel of the Attorneys for Children Program serve as attorney for the child in court proceedings if the petitioner or respondent is represented by the lawyer's spouse (who is an Assistant Public Defender) or by another lawyer who works in the same office as the lawyer's spouse?

BACKGROUND

2. Under New York Law, children (minors) in many kinds of court proceedings (including juvenile delinquency matters, custody and visitation disputes, and child protective proceedings) are entitled to be represented by counsel in Family Court, Supreme Court, Surrogate's Court, and appellate courts. 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.

3. When an AFC Program panel member is assigned to a case, the panel member plays the role of "attorney for the child," and functions as the child's lawyer. An attorney for the child is generally responsible for representing and advocating the child's wishes in the proceeding, which may or not be in the "best interests" of the child.[1]

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[1] According to a Fourth Department publication entitled *Ethics for Attorneys for Children* (Aug. 2011):

> [T]he role of the attorney for the child is very different from that of a guardian ad litem. A guardian ad litem, who need not be an attorney, is appointed as an arm of the Court to protect the best interests of a person under a legal disability. In contrast, the role of the attorney for the child is to serve as a child's lawyer.

The publication is available at *http://www.nycourts.gov/courts/ad4/AFC/AFC-ethics.pdf*.

4. The AFC Program operates under the supervision of the Appellate Division in each judicial department, and is governed by §7.2 of the Rules of the Chief Judge. [2] That section, entitled "Function of the attorney for the child," provides that the attorney for the child "is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on … conflicts of interest …."

5. The inquirer, Attorney X, is on the panel of the Attorneys for Children Program in a particular county. Attorney X's spouse is an Assistant Public Defender in the same county. When Attorney X represents a child in a proceeding, the petitioner or respondent is often represented by an attorney from the same Public Defender's Office in which Attorney X's spouse works. Attorney X does not directly oppose the petitioner or respondent in those proceedings, but rather represents the child.

OPINION

Rule 1.10(h): Spouse v. Spouse

6. In the New York Rules of Professional Conduct (the "Rules"), only one provision directly addresses conflicts between spouses. Rule 1.10(h) provides:

> A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

[2] 22 N.Y.C.R.R. §7.2. Rule 7.2(c) and (d) help to understand the role of an attorney for the child. They provide as follows:

> (c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.
> (d) In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position.
>
> (1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.
> (2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.
> (3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

7. If Attorney X is assigned to represent a child in a proceeding in which Attorney X's spouse is representing another party to the matter whose interests differ from the child's interests, then Attorney X must decline or withdraw from the representation of the child per Rule 1.16(b) (lawyer "shall withdraw" from representing a client if the lawyer "knows … that the representation will result in violation of these Rules or of law") unless, per Rule 1.10(h), the child (Attorney X's client) "consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client."[3]

8. However, a client who is a child may be incapable of consenting to the conflict under Rule 1.10(h). In a prior opinion involving a minor client, we cited three opinions decided under the old Code of Professional Responsibility – N.Y. State 256 (1972), N.Y. State 274 (1972), and N.Y. State 790 n.4 (2005) – in which "this Committee determined that a minor by himself or herself could not consent to a conflict," and we added that "[n]othing in the Rules of Professional Conduct changes this conclusion." N.Y. State 895 (2011) ¶15. Although a child acting alone lacks capacity to consent to a conflict, consent may be possible if the child has a separate law guardian or other representative who has power to consent on the child's behalf. Whether a representative does have such power is a question of law that we cannot answer. *See* N.Y. State 895 ¶ 16 (2011). (Nor do we know whether any of the children Attorney X will represent will have a law guardian or other legal representative.)

Rule 1.7(a)(2): Personal Interest Conflicts

9. Attorney X, even if not barred from the representation by Rule 1.10(h), must also consider another Rule when another party in the proceeding is represented by Attorney X's spouse or another Assistant Public Defender. Spousal conflicts may arise not only under Rule 1.10(h), but also under New York's more general rules on conflicts of interest. In particular, Rule 1.7(a)(2) provides that a lawyer generally may not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's own financial business, property or other personal interests. Even in such cases, however, the lawyer may represent the client if each of four conditions is met. Among these are the conditions that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," and that "each affected client gives informed consent, confirmed in writing." Rule 1.7 (b).

10. We lack sufficient facts to determine whether there is a "significant risk" that the professional judgment of the attorney for the child will be thrown off course ("adversely affected") by the lawyer's "personal interests" in the success of the spouse's employer (here, the Public Defender). The fear, stated in the abstract, is that when an Assistant Public Defender

[3] In contrast to Rules 1.7(b)(4), 1.9(a), and various other rules, Rule 1.10(h) does not expressly require that the client's consent be "confirmed in writing." However, in N.Y. State 895 (2011), we pointed out that a client's consent to a Rule 1.10(h) conflict must be confirmed in writing because Rule 1.10(d) says: "A disqualification prescribed by this Rule may be waived by the affected client … under the conditions stated in Rule 1.7." The conditions stated in Rule 1.7 include informed consent, confirmed in writing. In any event, confirming a client's consent to a conflict in writing is a wise policy because it impresses on the client the importance of that consent, and avoids later confusion about whether consent was given.

represents another party, Attorney X will somehow pull punches or represent the child-client less diligently than if the spouse did not work at the Public Defender's Office. Whether that abstract fear would become a reality may depend on multiple factors such as (a) the position the spouse holds at the Public Defender's Office, (b) how secure the spouse's job is at that office, (c) the relationship between the spouse and the Assistant Public Defender involved in the case, (d) whether the interests of the child and of the party represented by the Assistant Public Defender are aligned or antagonistic, and (e) whether the case is attracting attention from the press or from politicians. Those are just illustrative factors, not an exhaustive list. When the Assistant Public Defender involved in the case is actually Attorney X's spouse, then – even if there were not differing interests creating a Rule 1.10(h) conflict – there would be a heightened likelihood of a personal interest conflict.[4] Each matter will turn on its own circumstances, and Attorney X must exercise his or her own best judgment in identifying and weighing the relevant factors. *See, e.g.,* N.Y. State 895 ¶ 11 (2011) (applying various factors to analyze a potential conflict with a spouse's law firm).

Rule 1.10(a): Imputed Conflicts

11. If Rule 1.7(a)(2) disqualifies Attorney X from representing a child in a particular matter, then Rule 1.10(a) ordinarily imputes that conflict to every other lawyer who is associated in the same "firm." We must therefore determine whether the AFC Program is a "law firm" within the meaning of Rule 1.0(h), which provides as follows:

> (h) ''Firm'' or ''law firm'' includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

12. As we understand the AFC Program, it falls outside that definition. Nor are the attorneys on the panel of the AFC Program automatically deemed to belong to a single firm for conflict of interest purposes, such as sometimes happens when attorneys share offices in a way that gives each other access to the confidential information possessed by other attorneys in the office-sharing arrangement. *See, e.g.,* N.Y. City 80-63 (1980) (two firms that shared offices could not represent opposing parties in litigation because of the "strong likelihood" that the separate law firms could not maintain the confidences and secrets of their respective clients); N.Y. County 680 (1990) ("Even though lawyers who share office space are not partners, they may be treated as if they were partners for some purposes" if they share confidential information.)

[4] "When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j)." Rule 1.7, Cmt. [11].

13. Rather, the only connection between the attorneys on the panel, aside from a common purpose, is that they obtain assignments and seek reimbursement from the same administrator. This does not transform them into a law firm. *Compare Rosenblum v. Great Neck Teachers Ass'n Benefit Trust Fund,* 36 Misc. 3d 1203(A) (Nassau County Sup. Ct. 2012) ("organization that makes referrals to a panel of lawyers" falls outside the definition of "law firm" under Rule 1.0(h)) *with* N.Y. State 804 (2006) (independent private practitioners who formed a "qualified legal services corporation" to represent indigent clients, and who each received a pro rata share of the fees paid by the county to the corporation, constituted a "law firm" for conflicts purposes). Because the AFC Program is not a law firm within the meaning of the Rules, a conflict for Attorney X will not be imputed to other lawyers in the AFC program (but if Attorney X is associated with other lawyers in some firm, a Rule 1.7 conflict will be imputed to them).

14. The Public Defender's Office, however, is a law firm, assuming it either is a "government law office" or comes within the definition of a qualified legal assistance organization under Rules 1.0(p) and 7.2(b)(1). *See* N.Y. State 862 (2011) (finding that Public Defender's Office was a firm). Thus its lawyers, unlike those of the AFC Program, are subject under Rule 1.10(a) to mutual imputation of personal-interest conflicts.[5]

15. We note – as we did in N.Y. State 895 at ¶ 14 – that an Assistant Public Defender who works in the same office as Attorney X's spouse may have a "mirror-image conflict under Rule 1.7(a)(2)." Whether such a conflict arises will depend on the kinds of factors discussed in paragraph 10 above. If it does arise, then under Rule 1.10(a), the conflict will be imputed to every lawyer "associated in" the Public Defender's Office who knowingly undertakes a representation despite the conflict. However, if the client of the Public Defender's Office has the capacity to give informed consent to a conflict, then that client's consent may cure the imputed conflict. *See* Rule 1.10(d) (clients may waive imputed conflicts "under the conditions stated in Rule 1.7"). But the consent of the Assistant Public Defender's client will not cure any conflict that Attorney X may have in representing the child-client.

16. Finally, we point out that whenever Attorney X is called upon to serve as attorney for a child, he should heed the mandate of Rule 1.14(a) by seeking, "as far as reasonably possible, [to] maintain a conventional relationship with the client."

CONCLUSION

17. A lawyer on a county panel of the Attorneys for Children Program may serve as attorney for the child even though another party in the proceeding is represented either by the lawyer's spouse, who is an Assistant Public Defender, or by another lawyer who works in the same office as the lawyer's spouse, unless (i) the circumstances create a conflict under Rule 1.7(a)(2) or Rule 1.10(h), and (ii) the child has no legal representative who can and does consent to the conflict on the child's behalf.

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[5] Spousal conflicts under Rule 1.10(h), on the other hand, are not among those listed as requiring imputation under Rule 1.10(a).