Ethics for DSS Legal Practice
(Parts I & II)

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Program Materials

Note- many of the materials presented here are excerpts from the full documents from which they are taken, so as to focus on the issues presented in this program.

NEW YORK RULES OF PROFESSIONAL CONDUCT (Effective April 1, 2009)

PREAMBLE:

A LAWYER'S RESPONSIBILITIES (partial)

[1] A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice

[2] The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation.

SCOPE

[10] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide whether to agree to a settlement or to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and in their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government

agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

RULE 1.1:
COMPETENCE

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 1.2:
SCOPE OF REPRESENTATION AND
ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

a Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

d A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

e A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

f A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

g A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Comment

Allocation of Authority Between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. The lawyer shall consult with the client with respect to the means by which the client's objectives are to be pursued. See Rule 1.4(a)(2).

[2] Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. On the other hand, lawyers usually defer to their clients regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Because of the varied nature of the matters about which a lawyer and client might disagree, and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. Likewise, the client may resolve the disagreement by discharging the lawyer, in which case the lawyer must withdraw from the representation.

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client, however, may revoke such authority at any time.

In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Refusal to Participate in Conduct a Lawyer Believes to Be Unlawful

[4] In some situations … a lawyer is prohibited from aiding or participating in a client's improper or potentially improper conduct; but in other situations, a lawyer has discretion. .

RULE 1.4:

COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea (1)

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

Communicating with Client

[2] In instances where these Rules require that a particular decision about the representation be made by the client, *the rule* requires that the lawyer promptly consult with the client and secure the client's consent prior to taking action, unless prior discussions with the client have resolved what action the client wants the lawyer to take.

For example, *the rule* requires that a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously made clear that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.

[3] *The rule* requires that the lawyer reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Likewise, for routine matters such as scheduling decisions not materially affecting the interests of the client, the lawyer need not consult in advance, but should keep the client reasonably informed thereafter. Additionally, *the rule* requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, *the rule* requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer's staff acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications, or arrange for an appropriate person who works with the lawyer to do so.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation. In certain circumstances, such as

when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(j).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to those who the lawyer reasonably believes to be appropriate persons within the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

RULE 2.1:

ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. Nevertheless, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibilities as advisor may include the responsibility to indicate that more may be involved than strictly

legal considerations. For the allocation of responsibility in decision making between lawyer and client, see Rule 1.2.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial or public relations specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 3.1.

Non-Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of a claim or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the action has no reasonable purpose other than to harass or maliciously injure a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law (which includes the establishment of new judge-made law). The term "knowingly," which is used in Rule 3.1(b)(1) and (b)(3), is defined in Rule 1.0(k).

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

22 NYCRR 130-1.1

Section 130-1.1. Costs; sanctions

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart. This Part shall not apply to town or village courts, to proceedings in a small

claims part of any court, or to proceedings in the Family Court commenced under article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

An example about a court being concerned about potentially frivolous litigation in the context of an Art 81 guardianship case is found in a case called ***In Re I.V.***, 39 Misc3d 1232(A) Supreme Court, Bronx County, 2013)

RULE 1.13:

ORGANIZATION AS CLIENT

(a) When a lawyer employed or retained by an organization is dealing with the organization’s directors, officers, employees, members, shareholders or other constituents, and it appears that the organization’s interests may differ from those of the

constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

Acting in the Best Interest of the Organization

3 When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that

when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. Under *the rules*, a lawyer's knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably" connote a range of conduct that will satisfy the requirements of *the rules*. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client.

4 In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility within the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Measures to be taken may include, among others, asking the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it may be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. *See* Rule 1.4.

<u>Government Agency</u>

9 The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may

be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified.

RULE 1.14:

CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer. When the client is a minor or suffers from a diminished mental capacity, maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should consider whether the presence of such persons will affect the attorney-client privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, with or without a disability, the question whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and reasonably believes that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d).

Ethical Issues in the Courtroom

RULE 3.3:

CONDUCT BEFORE A TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent

conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be based on the lawyer's own knowledge, as in an affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. *See also* Rule 8.4(b), Comments [2][3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The duties stated in paragraphs (a) and (b) – including the prohibitions against offering and using false evidence – apply to all lawyers, including lawyers for plaintiffs and defendants in civil matters, and to both prosecutors and defense counsel in criminal cases.

Remedial Measures

10 A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be

surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

11 The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

12 Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

13 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. A lawyer should not engage in conduct that offends the dignity and decorum of proceedings or that is intended to disrupt the tribunal. While maintaining independence, a lawyer should be respectful and courteous in relations with a judge or hearing officer before whom the lawyer appears. In adversary proceedings, ill feeling may exist between clients, but such ill feeling should not influence a lawyer's conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Ex Parte Proceedings

14 Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the opposing party, if absent, just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

RULE 4.3:

COMMUNICATING WITH UNREPRESENTED PERSONS

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. As to misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(a), Comment [2A].

[2] The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

RULE 3.7:

LAWYER AS WITNESS

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 (*Conflict of Interest Current Client)* or Rule 1.9. (*Duties to Former Clients*)

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and also can create a conflict of interest between the lawyer and client.

RULE 8.4:

MISCONDUCT

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

(1) unlawful discrimination; or

(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.

(3) “Harassment” for purposes of this Rule, means physical contact, verbal conduct, and/or nonverbal conduct such as gestures or facial expressions that is:

a. directed at an individual or specific individuals; and

b. derogatory or demeaning.

Conduct that a reasonable person would consider as petty slights or trivial inconveniences does not rise to the level of harassment under this Rule.

(4) This Rule does not limit the ability of a lawyer or law firm to, consistent with these Rules:

a. accept, decline, or withdraw from a representation;

b. express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public advocacy or education, or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution; or

c. provide advice, assistance, or advocacy to clients

(5) “Conduct in the practice of law” includes:

a. representing clients;

b. interacting with witnesses, coworkers, court personnel, lawyers,

and others, while engaging in the practice of law; and

c. operating or managing a law firm or practice; or

(h) engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on their behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference

with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law.

A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. The assertion of the lawyer's constitutional rights consistent with Rule 8.1, Comment [2] does not constitute failure to cooperate. The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court.

[4] A lawyer may refuse to comply with an obligation imposed by law if such refusal is based upon a reasonable good-faith belief that no valid obligation exists because, for example, the law is unconstitutional, conflicts with other legal or professional obligations, or is otherwise invalid. As set forth in Rule 3.4(c), a lawyer may not disregard a specific ruling or standing rule of a tribunal, but can take appropriate steps to test the validity of such a rule or ruling.

[4A] A lawyer harms the integrity of the law and the legal profession when the lawyer states or implies an ability to influence improperly any officer or agency of the executive, legislative or judicial branches of government.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[5A] Discrimination and harassment in the practice of law undermine confidence in the legal profession and the legal system and discourage or prevent capable people from becoming or remaining lawyers or reaching their potential as lawyers.

[5B] "Unlawful discrimination" refers to discrimination that violates federal, state, or local law.

[5C] Petty slights or trivial inconveniences without more are not harassment. However, harassment can consist of a single instance. Verbal conduct includes written as well as oral communication.

[5D] A lawyer's conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York. This Rule is not

intended to discourage and does not prohibit free expression, no matter how popular or unpopular the speaker's views.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).

[5G] Nothing in Rule 8.4(g) is intended to narrow or limit the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that "adversely reflects on the lawyer's fitness as a lawyer"). Thus, Rule 8.4(h) may reach conduct that is not covered by Rule 8.4(g).

22 NYCRR Part 1200, Appendix A

STANDARDS OF CIVILITY

As Amended January 24, 2020

PREAMBLE

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. (The term "court" as used herein also may refer to any other tribunal, as appropriate.) They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Rules of Professional Conduct or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

The Standards of Civility are divided into two main sections, one that is generally applicable but also contains a number of items specifically directed to the litigation setting, and one that is more specifically directed to transactional and other non-litigation settings. The first section, in turn, is divided into four parts: lawyers' duties to other lawyers, litigants, witnesses and others; lawyers' duties to the court and court personnel; court's duties to lawyers, parties and witnesses; and court personnel's duties to lawyers and litigants. There is also a Statement of Client's Rights appended to the Standards of Civility.

As lawyers, judges, court employees and officers of the court, and as attorneys generally, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility.

SECTION 1 – GENERAL STANDARDS

LAWYERS' DUTIES TO OTHER LAWYERS, LITIGANTS WITNESSES AND CERTAIN OTHERS

I. Lawyers should be courteous and civil in all professional dealings with other persons.

A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.

B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

C. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.

D. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.

II. When consistent with their clients' interests, lawyers should cooperate with opposing counsel in an effort to avoid litigation and to resolve litigation that has already commenced.

A. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever it is practicable to do so.

B. Lawyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

III. A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests.

A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.

C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension

might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

E. A lawyer should notify other counsel and, if appropriate, the court and other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

IV. Responding to communications.

A lawyer should promptly return telephone calls and electronic communications and answer correspondence reasonably requiring a response, as appropriate. (For the avoidance of doubt, the foregoing refers to communications in connection with matters in which the lawyer is engaged, not to unsolicited communications.) A lawyer has broad discretion as to the manner and time in which to respond and need not necessarily follow the same means or format as the original communication or the manner requested in the original communication.

V. The timing and manner of service of papers should not be designed to cause disadvantage to the party receiving the papers.

A. Papers should not be served in a manner designed to take advantage of an opponent's known absence from the office.

B. Papers should not be served at a time or in a manner designed to inconvenience an adversary.

C. Unless specifically authorized by law or rule, a lawyer should not submit papers to the court without serving copies of all such papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the court.

VI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

A. A lawyer should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.

B. A lawyer should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.

VII. In depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.

A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, depositions and conferences, and make reasonable efforts to prevent clients and witnesses from causing disorder or disruption.

C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.

D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

VIII. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or in writing, and to agreements implied by the circumstances or by local customs.

IX. Lawyers should not mislead.

A. A lawyer should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

B. A lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

C. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

X. Lawyers should be mindful of the need to protect the standing of the legal profession in the eyes of the public. Accordingly, lawyers should bring the New York State Standards of Civility to the attention of other lawyers when appropriate.

LAWYERS' DUTIES TO THE COURT AND COURT PERSONNEL

I. A lawyer is both an officer of the court and an advocate. As such, the lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.

A. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.

B. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

C. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.

II. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

JUDGES' DUTIES TO LAWYERS, PARTIES AND WITNESSES

I. A Judge should be patient, courteous and civil to lawyers, parties and witnesses.

A. A Judge should maintain control over the proceedings and insure that they are conducted in a civil manner.

B. Judges should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses

C. Judges should, to the extent consistent with the efficient conduct of litigation and other demands on the court, be considerate of the schedules of lawyers, parties and witnesses when scheduling hearings, meetings or conferences.

D. Judges should be punctual in convening all trials, hearings, meetings and conferences; if delayed, they should notify counsel when possible.

E. Judges should make all reasonable efforts to decide promptly all matters presented to them for decision.

F. Judges should use their best efforts to insure that court personnel under their direction act civilly toward lawyers, parties and witnesses.

DUTIES OF COURT PERSONNEL TO THE COURT, LAWYERS AND LITIGANTS

I. Court personnel should be courteous, patient and respectful while providing prompt, efficient and helpful service to all persons having business with the courts.

A. Court employees should respond promptly and helpfully to requests for assistance or information.

B. Court employees should respect the judge's directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.

SECTION 2 - STANDARDS FOR TRANSACTIONAL/NON-LITIGATION SETTINGS

INTRODUCTION

Section 1 of the Standards of Civility, while in many respects applicable to attorney conduct generally, in certain respects addresses the practice of law in the setting of litigation and other formal adversary proceedings, where conduct is governed by a variety of specific procedural rules of order and may be supervised by a judge or other similar official. This Section 2, which is more directed to transactional and other non-litigation settings, should be read with Section 1 as one integrated whole for a profession that has multiple facets and spheres of activity.

The differences in practice between lawyers' roles and the expectations in litigation and other settings can sometimes be significant. Although fewer formal rules of conduct and decorum apply outside of the litigation setting, lawyers conducting transactional work should keep Section 1 of Standards of Civility in mind, along with the following additional items.

ADDITIONAL TRANSACTIONAL/NON-LITIGATION STANDARDS

I. A lawyer should balance the requirements and directions of the client in terms of timing with a reasonable solicitude for other parties. Unless the client specifically instructs to the contrary, a lawyer should not impose deadlines that are more onerous than necessary or appropriate to achieve legitimate commercial and other client-related outcomes.

II. A lawyer should focus on the importance of politeness and decorum, taking into account all relevant facts and circumstances, including such elements as the formality of the setting, the sensitivities of those present and the interests of the client.

III. Where an agreement or proposal is tentative or is subject to approval or to further review by a lawyer or by a client, the lawyer should be careful not to proceed without proper authorization or otherwise imply that authority from the client has been obtained when such is not the case.

Ethical Issues

Settlement of Cases

Hallock v. State, 64 NY2d 224 (1984)

Matter of Lillian G., 208 AD3d 875 (2nd Dept., 2022)

18 NYCRR 457.6 Serving involuntary clients.

(d) Local social services districts must develop and implement procedures for the provision of services to involuntary clients. Such procedures must include provisions for:

(1) training PSA and legal staff in the appropriate utilization of the various interventions which may be employed on behalf of involuntary PSA clients, as described in this section and in paragraphs (2) and (3) of subdivision (c) of section 457.5 of this Part;

(4) assuring the availability of the agency's legal staff for timely consultation with PSA staff when requested and the timely implementation of legal interventions on behalf of involuntary clients in appropriate situations; and

(5) assuring that any significant disagreements between PSA and legal staff regarding the need for legal intervention on behalf of an involuntary PSA client are promptly referred to the local social services commissioner or his or her designee for resolution.

MHL §81.10 Counsel

(f) The court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to this section. The person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent. *If the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation for the person alleged to be incapacitated. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award reasonable compensation to the mental hygiene legal service or any attorney appointed pursuant to this section, payable by the petitioner or the estate of the decedent or by both in such proportions as the court may deem just.*

Frivolous Litigation

Matter of Lillian G., 208 AD3d 871 (2nd Dept., 2022)

Matter of Hutchinson, 206 AD3d 472 (1st Dept., 2022)

ACD

18 NYCRR 432.11. Adjournments in contemplation of dismissal

(a) A social services official, when acting as the petitioner in a child abuse and neglect proceeding which is commenced pursuant to article 10 of the Family Court Act, shall not consent to an order which adjourns such proceeding in contemplation of dismissal if the official determines that such an adjournment would not be in the best interests of the child because the provision of protective services to the child and family during the term of the adjournment would not help to alleviate the circumstances which resulted in the alleged abuse or neglect of the child.

(b) The factors to be considered in making the determination not to consent to an adjournment in accordance with subdivision (a) of this section because the adjournment would not be in the best interests of the child shall include, but not be limited to:

(1) whether the terms of an order which will adjourn a child protective proceeding in contemplation of dismissal will include requirements that the child's parent(s) or guardian(s) avail themselves of rehabilitative services and/or refrain from the types of

conduct which relate to the alleged abusive or neglectful behavior that necessitated the filing of a child protective petition;

(2) whether the evidence which a child protective service could introduce in a child protective proceeding to prove that the respondent in such proceeding abused or neglected a child will be available at a subsequent fact-finding hearing which would be held in the event that the conditions of the order issued in contemplation of dismissal in a child protective proceeding were violated;

(3) the seriousness of the alleged incidents of child abuse or neglect;

(4) the likelihood that the child will be abused or neglected after the issuance of an order which adjourns a child protective proceeding in contemplation of dismissal;

(5) the amount of cooperation which the respondent in a child abuse and neglect proceeding is willing to provide to the child protective service to help alleviate the circumstances which resulted in the alleged abuse or neglect of the child; and

(6) whether the terms of an order which will adjourn a child protective proceeding in contemplation of dismissal can be made sufficiently clear so that compliance with its provisions may be adequately monitored by a child protective service.

Rindner v Cannon Mills, Inc. 127 Misc2d 604 (Supreme Court, Rockland County, 1985)

Diaz v. New York Comprehensive Cardiology, PLLC, 43 Misc3d 759 (Supreme Court, Kings County, 2014)

Who is the attorney representing?

New York State Bar Association
Committee on Professional Ethics
Opinion 986 (10/25/13)

QUESTION

1. May a lawyer who represents a mentally incapacitated adult in a Medicaid benefits proceeding also represent that person's sister in seeking to petition for a guardianship for him where the sister, against the client's wishes, has refused to remove her brother from a hospital and will not permit him to return to her home?

BACKGROUND

2. A Legal Services lawyer was retained to represent a severely incapacitated man to appeal the denial of certain Medicaid services. He has been diagnosed with

schizophrenia and mental retardation. A recent evaluation concluded that he is "unable to function autonomously, and he cannot make financial or health decisions on his own. He is significantly mentally retarded." The client is not able to make decisions during the representation and "does not understand what is involved in appealing the denial of Medicaid Services." The client was assisted by his sister in applying for Legal Aid Services.

3. The sister has cared for and lived with the client until recently, when the client accidentally set fire to the sister's home. The sister brought him to a hospital where he remains. The hospital wants to discharge the client and his expressed desire is to return to the sister's home. The sister is unwilling to accept the client back to her home.

4. The attorney states that there is no practical method of protecting the client's interests other than to have a guardian appointed. There is no other family. Social services agencies have extremely limited resources. The sister is willing to serve as the guardian, but the client is so incapacitated that he is not capable of consenting or objecting to the appointment of his sister as guardian.

5. The attorney asks whether he is permitted to represent the sister in a petition for guardianship over her brother.

OPINION

6. The lawyer asks whether concurrent representation of client A with significant diminished capacity and another client (B) who seeks to become the guardian for client A is permissible when the stated wishes of client A are directly contrary to the position of Client B as the prospective guardian. To what extent is the lawyer bound by the arguably unreasonable and ill-considered stated desire of the incapacitated client in assessing whether such a conflict exists? What action is permissible by the lawyer?

7. Concurrent conflicts of interest are governed by Rule 1.7 of the Rules of Professional Conduct which prohibits a lawyer from representing clients with "differing interests." This includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. The lawyer is expected to be loyal, protect client confidences and provide independent judgment.

8. In the representation of Client A in the Medicaid appeal, the lawyer learned of the client's stated desire to return to his sister's home. Living arrangements are a fundamental interest of the client as contemplated by *the rules.* Unquestionably, if Client A did not have significant diminished capacity, the lawyer could not undertake to represent his sister in any proceeding where Client A's stated desires would be undermined, and in this case directly contrary to the client's wishes, by the lawyer's representation of another client.

9. Thus, the question is whether the client's significantly diminished capacity alters the judgment as to whether the lawyer would be representing "differing interests" if he undertook representation of the sister in the guardianship proceeding. As explained below, it does not.

10. Rule 1.14 seeks to provide guidance to a lawyer in such circumstances. It acknowledges the difficulty of providing diligent and competent representation to clients who have diminished capacity precisely because the client is often incapable of understanding and making decisions about the matter. In such circumstances, even though the representation may be premised upon the goal of maximizing a client's autonomy and dignity, the lawyer may believe that advocating the client's stated position to be directly contrary to what the lawyer reasonably believes is the only viable choice for the client with significant diminished capacity. May the lawyer maintain a position contrary to the client's stated wishes when that client has significant diminished capacity?

11. Rule 1.14 suggests a course of action for the attorney in such circumstances. First, a lawyer must "as far as reasonably possible" maintain a normal lawyer-client relationship. The fact that a client suffers from mental illness or retardation does not diminish the lawyer's responsibility to treat the client attentively and with respect.

12. Second, Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances. "Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities on the lawyer." Roy D. Simon, Simon's Rules of Professional Conduct Annotated, 662 (2013). One of those responsibilities is to acknowledge that even clients with diminished capacity may have the ability to make decisions or reach conclusions about matters affecting their own well-being.

CONCLUSION

32. It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

[1] In some circumstances, the concurrent conflict may be waived, but not in this case. Even if the lawyer reasonably believed that he could provide competent and diligent representation to both Clients A and B, Client A is not capable of providing informed consent to such a waiver. Rule 1.7 (b)

Matter of S.B. (E.K.) 66 MIsc3d 452 (Supreme Court, Chemung County, 2019)

Matter of Caryl S.S. (Valerie L.S.) 45 Misc3d 1223[A] (Sup Ct, Bronx County 2014)

New York State Bar Association Committee on Professional Ethics Opinion 1000 (3/28/14)

Topic: Payment of Legal Fees by a Non-Client Whose Interests Could Be Adverse to the Lawyer's Client

Digest: It is permissible for a third-party to pay for a lawyer's representation of a client where the client's interests may be adverse to the interests of the third-party payer if:

1) the lawyer obtains the informed consent of the lawyer's client and

2) the lawyer exercises independent professional judgment on the client's behalf without interference from the potentially adverse third-party payer. That the lawyer may be owed additional fees from the client does not pose a conflict unless the outstanding debt interferes with the lawyer's ability to represent the client.

Rules: 1.0(e), 1.6, 1.7(a), 1.8(f); 1.16(b)(5), 4.3.

QUESTION

1. The inquiring lawyer asks whether the lawyer may accept payment of a retainer fee from the client's sibling to pursue an appeal on behalf of the client notwithstanding that the appeal could be adverse to the interests of the sibling and that the client remains in arrears on fees owed to the lawyer for work on proceedings giving rise to the appeal. We conclude that the lawyer may do so if the lawyer complies with Rule of Professional Conduct 1.8(f) concerning payments of fees by persons other than the client and if the third-party payer understands that the lawyer's obligations run solely to the client. That the client owes the lawyer additional fees from prior work is not an obstacle to this conclusion unless the debt gives rise to a conflict of interest with the client for which informed consent is not a remedy.

BACKGROUND

2. The inquirer is a New York lawyer who represents one of two siblings in a dispute arising out of the incapacity of their now-deceased parent. Before the parent died, the client sued for removal of the non-client sibling as guardian of the parent. The court ruled in favor of the non-client sibling on the guardianship issue and awarded attorney's fees from the parent's assets. The parent thereafter died, but the appeal of the award of attorney's fees lives on.

3. The prevailing non-client sibling, apparently unhappy with the amount of the award of attorneys' fees, has paid the inquiring lawyer a retainer from the parent's estate to enable the lawyer's client to pursue an appeal of the attorney's fee award. One of the arguments the inquirer will make on the appeal is that the non-client sibling should be held personally liable for the attorney's fee.

4. The inquirer's client has not satisfied the terms of their fee arrangement for services rendered in connection with the trial-level disputes underlying the appeal. The inquirer is concerned that the inquirer's personal financial interest in being paid for the earlier services could give rise to a conflict between the lawyer and the lawyer's client.

ANALYSIS

5. Rule of Professional Conduct 1.8(f) deals with third-party payment of attorneys' fees. That Rule states that a "lawyer shall not accept compensation for representing a client from one other than the client unless (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship and (3) information relating to the representation of the client is protected as required by Rule 1.6," which requires a lawyer to maintain the confidential information of the client. Simply put, Rule 1.8(f) means that a lawyer owes a client the same duties owed to a client without regard to the source of the fees the lawyer is paid, with the added proviso that a client must give "informed consent" to the arrangement.

6. Rule 1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." We have a number of opinions that apply these principles to various scenarios. See, e.g., N.Y. State 901 (2011) and 867 (2011). Whether a lawyer conveys "adequate information" to constitute "informed consent" varies with the facts and circumstances in which the lawyer seeks consent and involves many factors including the proposed course of conduct, the sophistication of the client as a consumer of legal services, and risks attending the particular representation. Under these specific facts the inquiring lawyer cannot obtain informed consent without clarifying that the lawyer's duty runs solely to the client, that the non-client payer will not affect the lawyer's exercise of independent professional judgment on the client's behalf on the appeal, and, most important, that the non-client payer's interests may be adverse to the client's interests on the appeal, with particular emphasis on the fact that the non-client sibling may be found personally liable for the attorneys' fees.

7. It is common for third parties to pay attorney's fees. Mortgagors commonly pay lenders' legal fees in real estate closings. In 2007, in N.Y. State 818, we acknowledged and approved the regular practice of issuers paying the legal fees of designated underwriters' counsel assuming compliance with DR 5-107(B), the predecessor of Rule 1.8(f), provided there was disclosure of conflicts accompanying the arrangement. We said the same in 1989, in N.Y. State 601, although there we disapproved the proposal because the fee arrangement provided a financial incentive for the lawyer to subordinate the interests of the lawyer's clients (tenants) if the lawyer achieved a settlement with the adverse third-party payer (the landlord).

8. Here, the non-client sibling is willing to finance the appeal without condition and knows that a result of the appeal could be that the non-client-sibling would have to pay

the attorneys' fee. The lawyer's full disclosure to the lawyer's client must necessarily entail disclosure of the lawyer's discussions with the non-client payer.1

9. Accordingly, the lawyer should leave no doubt in the third-party payer's mind concerning the potential consequences of the appeal for which the payment is being made. We do not mean thereby to suggest that a lawyer who receives payment from a third-party payer in compliance with Rule 1.8(f) must always undertake this responsibility. To the contrary, in most instances, we would expect that the third-party payer is fully mindful of the potential for adversity in the lawyer's representation of a client under some form of indemnity duty, whether contractual or otherwise.

10. Finally, that the inquirer's client is in arrears on fees for prior services is insufficient to suggest that the lawyer has a conflict in representing the client on the appeal. While under Rule 1.7 a lawyer may not represent a client when a lawyer's personal interests conflict with those of the client, it provides a lawyer may obtain a client's informed consent to proceed despite the conflict if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation" of the client. Sometimes, clients do not pay their lawyers, and this fact alone does not invariably negate a "reasonable belief" that a lawyer will be able to "provide competent and diligent" representation to the client. If the lawyer concludes that the lawyer is able to "provide competent and diligent representation" of the client on the appeal, see Rule 1.7(b), then the mere existence of the debt does not ethically disable the lawyer from obtaining informed consent from the client to proceed with the appeal.

CONCLUSION

11. A lawyer may accept a retainer from a third-party payer whose interests are potentially adverse to the lawyer's client's interests if the lawyer complies with Rule of Professional Conduct 1.8(f) concerning payments of fees by persons other than the client and if the third-party fee-payer understands that the lawyer's obligations run solely to the client. That the client owes the lawyer an additional fee from prior work is not an obstacle to this conclusion unless the debt gives rise to such adversity with the client that the lawyer's representation will be affected by the adversity or the lawyer may not obtain informed consent

New York State Bar Association Committee on Professional Ethics Opinion 1224 (06/03/2021)

Topic: Conflicts of interest; diminished capacity.

Digest: When a lawyer is jointly representing two clients as joint purchasers in a transaction and one of them no longer wishes to proceed, the lawyer cannot continue to represent both clients without violating Rule 1.7, which prohibits lawyers from jointly representing clients with differing interests. That one of the clients has diminished capacity does not alter this conclusion.

Rules: Rules 1.7; 1.14

FACTS

1. The inquirer is an attorney who has known his clients, a husband ("H") and wife ("W"), for over a decade. H and W entered a contract to jointly purchase real property ("Transaction 1"). Shortly afterwards, H was involuntarily committed for a period of time to a psychiatric facility. No petition to appoint a guardian for H was subsequently filed. H wants to move forward with Transaction 1, but W now does not.

2. Separately, just prior to his involuntary commitment, H set up an LLC, with both H and W as members, with the intent that the LLC would buy a second property ("Transaction 2"). No contract has been signed, but H wants to move forward with Transaction 2 while W now does not.

3. W holds a power of attorney ("POA") for H which confers upon W the power to act on behalf of H with respect to real estate transactions, and W has instructed inquirer both to terminate the contract in Transaction 1 and to discontinue negotiations toward a contract in Transaction 2. The inquirer asks if he may ethically follow W's instructions.

QUESTION

4. Where a husband and wife who are joint clients provide conflicting instructions whether or not to proceed with real estate transactions in which they each have a financial interest, where the wife holds a power of attorney for the husband, and where there is reason to believe that the husband may have diminished capacity, may an attorney follow the instructions of the wife and act contrary to the stated wishes of the husband?

OPINION

5. Our analysis focuses on Rule 1.7 of the New York Rules of Professional Conduct (the "Rules"). Under Rule 1.7(a)(1), a lawyer may not represent a client (or clients) if "a reasonable lawyer would conclude" that "the representation will involve the lawyer in representing differing interests," unless the conflict is consentable and the lawyer obtains each affected client's informed consent pursuant to Rule 1.7(b). "Differing interests" are defined in Rule 1.0(f) "to include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest."

6. Here, it is abundantly clear that clients H and W now have differing interests. Rule 1.7 therefore prohibits the inquirer from representing them both unless they each give their informed consent, confirmed in writing. See Comment [4] to Rule 1.7 ("If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b)").

7. Implicit in the current inquiry, however, is a question about whether either diminished capacity or a power of attorney require a different outcome. With regard to a client's diminished capacity, Rule 1.14(a) provides that "when a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client." See generally N.Y. State 1144 ¶ 11 (2018) (discussing various aspects of Rule 1.14). By mandating that a lawyer maintain a conventional relationship with a client who has diminished capacity as far as reasonably possible, Rule 1.14(a) requires the inquirer, as much as reasonably possible, to carry out the wishes of H, despite his apparent diminished capacity. See Comment [3] to Rule 1.14 ("the lawyer must keep the client's interests foremost" and must generally "look to the client ... to make decisions on the client's behalf."). Accordingly, regardless of H's alleged diminished capacity, Rule 1.7(a)(1) prevents the Inquirer from going forward with the joint representation of H and W because they have "differing interests" absent the informed consent of both H and W. Here, however, securing the informed written consent of H and W to the joint representation is not possible because the clients are each directing the attorney to pursue mutually exclusive objectives (go forward and not go forward).

8. The inquirer's remaining question -- whether he can honor the instructions of W and terminate the Transactions in reliance on W's use of the POA to act on H's behalf-- presents questions of law that are outside the scope of this committee's jurisdiction. We do not opine on issues of law. However, the presence of the POA highlights the conflicted position that inquirer occupies. An unconflicted lawyer might well advise H to seek immediate revocation of the POA so that W does not attempt to use the POA in a manner contrary to H's wishes -- but if the inquirer were to do so, he would be acting contrary to W's interests. See Comment [8] to Rule 1.7 ("The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.").

CONCLUSION

9. When a lawyer is jointly representing two clients as purchasers in a transaction and one of them no longer wishes to proceed, the lawyer cannot continue to represent both clients jointly without violating Rule 1.7. That one of the clients has diminished capacity does not alter this conclusion.

NAPSA Code of Ethics

Adult Protective Services programs and staff promote safety, independence, and quality-of-life for older persons and persons with disabilities who are being mistreated or in danger of being mistreated, and who are unable to protect themselves.

Guiding Value

Every action taken by Adult Protective Services must balance the duty to protect the safety of the vulnerable adult with the adult's right to self-determination.

Secondary Value

Older persons and persons with disabilities who are victims of mistreatment should be treated with honesty, caring, and respect.

Principles

- Adults have the right to be safe.
- Adults retain all their civil and constitutional rights, i.e., the right to live their lives as they wish, manage their own finances, enter into contracts, marry, etc. unless a court adjudicates otherwise.
- Adults have the right to make decisions that do not conform with societal norms as long as these decisions do not harm others.
- Adults have the right to accept or refuse services.

NAPSA has also published practice guidelines:

NAPSA (or APS) Practice Guidelines

APS worker practice responsibilities include:

- Recognize that the interests of the adult are the first concern of any intervention.
- Avoid imposing personal values on others.
- Seek informed consent from the adult before providing services.
- Respect the adult's right to keep personal information confidential.
- Recognize individual differences such as cultural, historical and personal values.
- Honor the right of adults to receive information about their choices and options in a form or manner that they can understand.
- To the best of one's ability, involve the adult as much as possible in developing the service plan.
- Focus on case planning that maximizes the vulnerable adult's independence and choice to the extent possible based on the adult's capacity.

- Use the least restrictive services first whenever possible—community-based services rather than institutionally-based services.
- Use family and informal support systems first as long as this is in the best interest of the adult.
- Maintain clear and appropriate professional boundaries.
- In the absence of an adult's expressed wishes, support casework actions that are in the adult's best interest.
- Use substituted judgment in case planning when historical knowledge of the adult's values is available.
- Do no harm. Inadequate or inappropriate intervention may be worse than no intervention.

Duty to Report Misconduct of Municipal Employee

New York State Bar Association Committee on Professional Ethics Opinion 1191 (05/26/2020)

Topic: Duty to Municipal Organization; Conflicts of Interest

Digest: Counsel for a municipal corporation owes a duty solely to the municipal corporation. Upon learning information of serious allegations by municipal employees injurious to the municipality, corporation counsel should report the information to higher authorities within the municipal unit, including, if need be, to the highest authority. A prior or current representation of the employees in their official capacities does not relieve the corporate counsel of this duty.

Rules: 1.6, 1.7, 1.9, and 1.13

FACTS

1. The inquirer is a New York attorney who is chief counsel to a New York municipal corporation. The corporation counsel's office is responsible for representing the municipality and its employees when sued in an official capacity. If a conflict exists between the municipal corporation and one or more employees, the counsel's office retains outside counsel.

2. The corporation counsel's office is responsible as well for reviewing and investigating allegations of wrongdoing by municipal employees. Recently, the corporation counsel has learned of serious and credible allegations against certain employees, including supervisory employees, who may have engaged in the misappropriation of municipal funds of substantial injury to the municipality. The allegations concern the misuse of funds for work that the employees did not discharge.

3. As corporation counsel, the inquirer has represented some of the alleged wrongdoers in their official capacity, either currently or in the past.

QUESTIONS

4. The inquirer's questions are best reduced to two: (a) What are the obligations of a municipal counsel when faced with serious and credible allegations of wrongdoing by municipal employees adversely affecting the municipal corporation? (b) What are the municipal counsel's duties when the counsel's office has previously represented, or continues to represent, the alleged wrongdoers, in their official capacities?

OPINION

5. Rule 1.13 of the N.Y. Rules of Professional Conduct (the "Rules") governs this inquiry. "The duties defined in this Rule apply to government organizations." Rule 1.13, Cmt. [9]. Under that Rule, the inquirer's client is the municipal corporation and not any of its constituents. Rule 1.13(a) says: When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituent, and it appears that the organization's interests may differ from those with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of its constituents. Rule 1.13 (b) continues: If a lawyer for the organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

6. The legal rights and duties of a municipal corporate counsel may vary by municipality, so we are in no position to establish a general standard of conduct in all circumstances. If, however, the municipal corporate counsel reaches the conclusions set out in Rule 1.13(b), and lacks authority to act on the his or her own power without violating Rule 1.6 on the protection of confidential information owned by the municipal corporation (such as a reference to a county District Attorney), then Rule 1.13(b)(3) permits the lawyer to refer the matter "to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law." The "applicable law" is beyond our jurisdiction to decide, but for purpose of this inquiry we assume that the highest authority in a municipality is its chief executive (a mayor or town executive) or its governing body (a town committee, a village board, etc.).

7. Accordingly, if the inquire concludes, as the facts suggest, that municipal employees are engaged in conduct that violates the employees' duties to the municipal corporation, may result in liability to that municipal corporation, and may result in substantial injury to the municipal corporation, then Rule 1.13 obligates the corporate counsel to report the conduct to a higher authority such as the municipality's chief executive or governing body. Whether the corporate counsel may disclose the information if the municipal officials do not act on the disclosure depends on whether disclosure is permitted under Rule 1.6(b), including whether disclosure is "required" by law. Not able to opine on legal questions owing to limits on our jurisdiction, we offer no view on whether the corporate counsel may disclose the municipality's confidential information to third persons, with some confidence that disclosure to the higher authorities may excite some action.

8. That the corporation counsel may have previously represented one or more of the affected employees in their official capacity but in unrelated matters does not affect this duty. Rule 1.9 prohibits a lawyer from representing another person in “the same or substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” Nothing in the inquiry suggests that any prior representation of the affected employees was in any way related to the allegations of wrongdoing that corporate counsel currently confronts. Absent circumstances in which the corporate counsel acquired personal (as opposed to municipal) confidential information from the employees – and no such indication exists here – then Rule 1.9 poses no barrier to revealing wrongdoing by a person previously represented in an official capacity.

9. If the corporate counsel’s office currently represents an individual employee in an official capacity in a pending matter, and that employee is among those who are alleged to have engaged in wrongdoing, then, again assuming that the corporate counsel has not acquired personal (as opposed to municipal) confidential information from the employee, the corporate counsel should withdraw from the representation consistent with the dictates of Rule 1.16, including, if need be, permission of the tribunal before which the office appears on behalf of the individual. Such is the requirement of Rule 1.7, governing current conflicts of interest, which prohibits a lawyer from a representation that “will involve the lawyer in representing differing interests.” On the facts here, the interests of the municipality and the official plainly diverge, and hence a conflict exists.

10. Our parentheticals concerning the acquisition of personal confidential information as opposed to confidential information owned by the municipality are intended as an alert of the perils inhering in any corporate representation – that a lawyer for an organization, including a municipal corporation, must be careful to be clear that the lawyer is counsel for the corporation and not for any of its constituents, including employees.

CONCLUSION

11. Counsel for a municipal corporation who learns of information that municipal employees have breached a legal duty to the municipality that may be imputed to the municipality or otherwise is likely to result in substantial injury to the municipality should report the information to the municipal authorities and may disclose the information outside the municipality if required by law. A prior representation of the affected employees is no obstacle to this disclosure if unrelated to the alleged wrongdoing, and a lawyer may withdraw from a current representation of an affected employee consistent with the rules of the tribunal

Ethical Issues of Other Counsel That May Affect Your Cases

Attorney for the Child

22 NYCRR §7.2 Function of the attorney for the child.

(a) As used in this part, "attorney for the child" means a law guardian appointed by the family court pursuant to section 249 of the Family Court Act, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto.

(b) The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation.

(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 of 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.

Duty to meet the child(ren)

Matter of Mark T. v Joyanna U, 64 AD3d 1092 (3rd Dept., 2009)

Matter of Schenectady County DSS v Joshua BB., 168 AD3d 1244 (3rd Dept., 2019).

Substituted Judgement

C.C v D.D., 64 Misc3d 1216(A) (Supreme Court, New York County, 2019).

Grabowski v. Smith, 182 A.D.3d 1002 (4th Dept., 2020)

Muriel v. Muriel, 179 AD3d 1529 (4th Dept., 2020)

Vega v. Delgado, 195 AD3d 1555 (4th Dept., 2021)

DD v RM, 72 MIsc3d 1218(A) (Family Court, Nassau County, 2021)

Jennifer VV. v. Lawrence WW., 182 AD3d 652 (3rd Dept., 2020),

Zealous advocacy

Silverman v. Silverman, 186 AD3d 123 (2nd Dept., 2020)

Multiple children with divergent views and wishes.

Matter of Brian S. (Scott S.) 141 A.D.3d 1145 (4thDept., 2016)

M.M. v K.M., 62 Misc3d 487 (Supreme Court, Nassau County, 2018)

Labella v. Robertaccio, 191 AD3d 1457 (4th Dept., 2021)

Attorney as Witness

In re James A., 46 Misc3d 1207(A) (Family Court, Clinton County, 2015)

BB v EE., 69 Misc3d 796 (Family Court, Westchester County, 2020)

Matter of Janel E., 173 AD2d 413 (1st Dept., 1991)

Matter of T.-B. Children, 168 AD2d 396 (1st Dept., 1990)

In Matter of C. M. v I. E., 71 Misc.3d 1225(A) (Supreme Court, Broome County, 2021),

Matter of de Menil, 195 AD3d 410 (1st Dept., 2021),

Court Evaluator

Mental Hygiene Law §81.09.

(c) The duties of the court evaluator shall include the following:

1. meeting, interviewing, and consulting with the person alleged to be incapacitated regarding the proceeding.

2. determining whether the alleged incapacitated person understands English or only another language, and explaining to the person alleged to be incapacitated, in a manner which the person can reasonably be expected to understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights to which the person is entitled, including the right to counsel.

3. determining whether the person alleged to be incapacitated wishes legal counsel of his or her own choice to be appointed and otherwise evaluating whether legal counsel should be appointed in accordance with section 81.10 of this article.

5. investigating and making a written report and recommendations to the court; the report and recommendations shall include the court evaluator's personal observations as to the person alleged to be incapacitated and his or her condition, affairs and situation, as well as information in response to the following questions:

(i) does the person alleged to be incapacitated agree to the appointment of the proposed guardian and to the powers proposed for the guardian;

(ii) does the person wish legal counsel of his or her own choice to be appointed or is the appointment of counsel in accordance with section 81.10 of this article otherwise appropriate;

(iii) can the person alleged to be incapacitated come to the courthouse for the hearing;

(iv) if the person alleged to be incapacitated cannot come to the courthouse, is the person completely unable to participate in the hearing;

(v) if the person alleged to be incapacitated cannot come to the courthouse, would any meaningful participation result from the person's presence at the hearing;

(vi) are available resources sufficient and reliable to provide for personal needs or property management without the appointment of a guardian;

(vii) how is the person alleged to be incapacitated functioning with respect to the activities of daily living and what is the prognosis and reversibility of any physical and mental disabilities, alcoholism or substance dependence? The response to this question shall be based on the evaluator's own assessment of the person alleged to be incapacitated to the extent possible, and where necessary, on the examination of assessments by third parties, including records of medical, psychological and/or psychiatric examinations obtained pursuant to subdivision (d) of this section. As part of this review, the court evaluator shall consider the diagnostic and assessment procedures used to determine the prognosis and reversibility of any disability and the necessity, efficacy, and dose of each prescribed medication;

(viii) what is the person's understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;

(ix) what is the approximate value and nature of the financial resources of the person alleged to be incapacitated;

(x) what are the person's preferences, wishes, and values with regard to managing the activities of daily living;

(xi) has the person alleged to be incapacitated made any appointment or delegation pursuant to section 5-1501, 5-1505, or 5-1506 of the general obligations law , section two thousand nine hundred sixty-five or two thousand nine hundred eighty-one of the public health law , or a living will;

(xii) what would be the least restrictive form of intervention consistent with the person's functional level and the powers proposed for the guardian;

(xiii) what assistance is necessary for those who are financially dependent upon the person alleged to be incapacitated;

(xiv) is the choice of proposed guardian appropriate, including a guardian nominated by the allegedly incapacitated person pursuant to section 81.17 or subdivision (c) of section 81.19 of this article; and what steps has the proposed guardian taken or does the proposed guardian intend to take to identify and meet the current and emerging needs of the person alleged to be incapacitated unless that information has been provided to the court by the local department of social services when the proposed guardian is a community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law;

(xv) what potential conflicts of interest, if any, exist between or among family members and/or other interested parties regarding the proposed guardian or the proposed relief;

(xvi) what potential conflicts of interest, if any, exist involving the person alleged to be incapacitated, the petitioner, and the proposed guardian; and

(xvii) are there any additional persons who should be given notice and an opportunity to be heard.

In addition, the report and recommendations shall include any information required under subdivision (e) of this section, and any additional information required by the court.

6. interviewing or consulting with professionals having specialized knowledge in the area of the person's alleged incapacity including but not limited to developmental disabilities, alcohol and substance abuse, and geriatrics.

9. attending all court proceedings and conferences.

New York State Bar Association Committee on Professional Ethics

Opinion 1046 (1/8/15)

Topic: Representing incapacitated client; conflict of interest

Digest: A lawyer may accept court appointments to serve as Court Evaluator or Guardian for an Alleged Incapacitated Person in a guardianship proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility represented by the law firm in matters unrelated to AIP. The lawyer does not represent the AIP as counsel and Rule 1.7(a) is not implicated. Whether a lawyer may accept a court appointment to serve as counsel for the AIP in a guardianship proceeding in which the petitioner is the health care facility depends on (1) whether the interests of the AIP and the health care facility are "differing interests" and whether the lawyer has a disabling personal interest, which are questions of fact beyond the jurisdiction of this Committee, and (2) whether the lawyer can obtain consent to the potential conflict,

which requires a careful assessment by the lawyer of whether the AIP is capable of giving informed consent.

Rules: 1.0(f), 1.7(a) & (b), 1.14(a)

FACTS

1. The inquiring law firm or its lawyers receive court appointments under the Mental Hygiene Law to serve as Court Evaluator or Guardian to an Alleged Incapacitated Person ("AIP") or Counsel to an AIP. These appointments are necessary when there is no family member or close associate willing to serve on behalf of the AIP.

2. Often, it is the residential care facility (the "Care Facility") where the AIP resides that is the petitioner in the proceedings, because there are no family members or close associates to act as petitioner.

3. The duties of a Court Evaluator are to interview the AIP and determine whether the AIP understands English, to explain the nature and possible consequences of the proceeding and the rights of the AIP, to determine whether the AIP wishes legal counsel of his or her own choice, to interview the petitioner or others familiar with the AIP's condition, affairs and situation, to determine whether sufficient resources are available to provide for the personal needs or property management of the AIP without the appointment of a guardian, and to make a written report and recommendation to the court.

4. The role of a Guardian is to manage the property and provide for the personal needs of the AIP, if the court determines (as a result of the guardianship petition) that the AIP cannot manage his or her own personal needs and either (i) the AIP agrees to the appointment, or (ii) the court determines that the AIP is incapacitated as defined in section 81.02(b) of the Mental Hygiene Law. Where the AIP does not have sufficient assets to manage his or her personal needs, the Guardian will apply for Medicaid to help to defray the costs of the Care Facility.

5. The role of independent counsel to the AIP is to represent the interests of the AIP where (i) the AIP has requested counsel, (ii) the AIP wishes to contest the petition or does not consent to the authority requested in the petition to move the AIP from where the AIP presently resides to a nursing home or other residential care facility, or (iii) the court determines that there is a potential conflict between the court evaluator's role and the advocacy needs of the AIP.

6. The inquiring law firm also represents residential care facilities in various matters involving Medicaid benefits, guardianship, litigation and collection. However, the law firm does not represent the Care Facility in any matter in which it has accepted an appointment to serve on behalf of a resident. Such work is handled by other law firms that regularly represent the Care Facility.

QUESTION

7. May lawyers in a firm accept court appointments to serve as Court Evaluator, Guardian or Counsel to an Alleged Incapacitated Person in a proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility if their

law firm simultaneously represents the health care facility in matters unrelated to the AIP?

OPINION

8. The answer to the question depends upon whether there is a conflict of interest under Rule 1.7. Rule 1.7(a) states, in part, "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 (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." Thus the answer to the question turns on (a) whether the lawyer or others in the lawyer's firm represent both the AIP and the Care Facility, and (b) whether the interests of the AIP and the Care Facility are "differing interests" or there is a significant risk that the lawyer's professional judgment on behalf of the AIP would be adversely affected by the lawyer's personal interest in remaining in the good graces of the Care Facility.

9. Rule 1.0(f) defines "differing interests" as including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Comment [8] under Rule 1.7 explains: Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. . . . The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of a client. 3 Court Evaluator for an AIP

10. The responsibilities of a Court Evaluator differ from those of counsel to an alleged incapacitated person. The person acting as court evaluator is required to make inquiry into an AIP's assets, mental state and ability to handle his or her affairs, and then to report the findings to the court, so that the court may decide whether a guardian is needed and who that guardian should be. A Court Evaluator need not be a lawyer.

11. An appointment by a court to serve as a Court Evaluator under the Mental Hygiene Law does not create a lawyer-client relationship. Consequently, the limitations of Rule 1.7(a)(1) do not apply to a lawyer serving in such role,1 because the lawyer does not "represent" the AIP. Guardian for an AIP

12. The responsibilities of a Guardian do not begin until the court determines a Guardian should be appointed. For a general description of guardianship proceedings, see N.Y. State 986 (2013). As in the case of a Court Evaluator, a Guardian does not have an attorney-client relationship with the AIP. Consequently, the limitations Rule 1.7(a)(1) do not apply to a lawyer serving in such role. Counsel for an AIP

13. Unlike a Court Evaluator or a Guardian for an AIP, Counsel for an AIP does have an attorney-client relationship with the AIP. Consequently, it is important to determine whether the AIP and Care Facility have "differing interests" in the guardianship

proceedings under Rule 1.7(a)(1) and whether the lawyer's professional judgment on behalf of the AIP will be adversely affected by the lawyer's personal interests in remaining in the good graces of his or her firm's regular client, the Care Facility, under Rule 1.7(a)(2). It is irrelevant that the lawyer does not represent the AIP and the Care Facility in the same matter. See Rule 1.7, Comment [6] ("a lawyer may not advocate on one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated.") Differing interests

14. Guardianship proceedings are not typical adversarial court proceedings and the interests of the AIP and the Care Facility are not always differing. The guardianship proceeding often is commenced by the Care Facility for the purpose of providing financial assistance to the AIP to remain in the Care Facility. These proceedings are rarely contested. Consequently, although the interests of the petitioner in a guardianship proceeding theoretically conflict with those of the AIP, we have concluded that, where the AIP does not oppose the guardianship, or is incapacitated and cannot express an opinion, the lawyer does not represent such a differing interest. See N.Y. State 986 (2013) (lawyer may serve as the petitioner), N.Y. State 746 (2001) 1 In the role of Court Evaluator or Guardian, a lawyer will receive information of a sensitive nature from the individual. This information is not "confidential information" covered by Rule 1.6(a) because it is not received from a client, although the Mental Hygiene Law or other law may create other responsibilities of confidentiality. (same). On the other hand, if the AIP has requested independent counsel, or if the court has appointed counsel for the AIP after determining that there is a potential conflict between the court evaluator's role and the advocacy needs of the AIP, then it is quite possible there are more than theoretically differing interests. Because determining whether the interests of the AIP and the Care Facility are "differing interests" raises questions of fact, such determination is beyond the jurisdiction of this Committee. The Lawyer's Personal Financial Interests

15. Where the lawyer or the lawyer's firm have a continuing relationship with the Care Facility that is the petitioner in a guardianship proceeding, or into which a Guardian might place the AIP, the relationship between the law law firm and the Care Facility could adversely affect the independent professional judgment of the lawyer in representing the AIP, thus creating a personal interest conflict for the lawyer. Consent to Conflicts of Interest

16. If the court appointment as counsel for the AIP creates a differing interest conflict or a personal interest conflict under Rule 1.7(a), the next step is to determine whether the conflict is consentable under Rule 1.7(b), and, if so, whether the lawyer may obtain informed consent from both the Care Facility and the AIP.

17. The process of obtaining consent to a conflict under Rule 1.7(a) requires a lawyer to satisfy the four subparagraphs of Rule 1.7(b). Specifically, the lawyer must determine that (i) he or she can provide competent and diligent representation to each affected client, (ii) the representation is not prohibited by law, and (iii) the representation does not involve the assertion of a claim by the Care Facility against the AIP (or vice versa). Rule 1.7(b)(1), (2) and (3). Finally, each client must give "informed consent, confirmed in writing." Rule 1.7(b)(4). In N.Y. State 986, we applied Rule 1.7(b)(1)-(3), concluding that the inquirer could not represent both the AIP and his sister, who wished to be

appointed guardian, because their positions as to the AIP's living arrangements were inconsistent. However, we did not reach the issue of consent.

18. In N.Y. State 836 (2010), we concluded that a conflict analogous to the one here was consentable. There, the lawyer had represented an incapacitated client in connection with the appointment of a guardian (one of the client's adult children). However, the client had subsequently been living independently and no longer needed a guardian. In addition, the guardian was planning to move across the country. Accordingly, the client and the guardian wanted the lawyer to represent them jointly in applying for termination of the guardianship. We noted that the interests of the client and the guardian were potentially differing, although we determined that the lawyer could reasonably believe that the lawyer could provide competent and diligent representation to both parties. Consequently, because the representation would not be adversarial and because the matter would be supervised by the court, we concluded that the conflict was consentable.

19. Before accepting a court appointment to represent the AIP in the proceeding here, the inquirer must obtain the informed consent of both the Care Facility and the AIP. Obtaining consent of the Care Facility ordinarily will not be problematical (even after explaining that the 5 lawyer's obligation is to provide diligent representation to the AIP). However, obtaining informed consent of the AIP is more complicated.

20. In N.Y. State 836 (2010), we discussed the ability of an AIP to give consent. We noted that a lawyer must take special care when obtaining consent from a person who may be, or has been deemed to be, incapacitated and under guardianship. This careful assessment was necessary because, if the client's capacity to make reasoned decisions was so diminished that the client could not give informed consent, then the lawyer could not satisfy the informed consent requirement of Rule 1.7(b)(4). There, however, we concluded that a client may consent to dual representation despite the possible determination of incapacity. We relied on Rule 1.14(a) (which directs the lawyer to maintain a conventional relationship with the client to the extent possible), on the Mental Hygiene Law (which states that an incapacitated person retains all powers and rights except those that are specifically granted to the Guardian), and on our opinion in N.Y. State 746 (2001) (which stated "there is generally no bar to representing a client whose decision making capacity is impaired, but who is capable of making decisions and participating in the representation").

21. Because the inquirer needs to obtain consent before accepting a court appointment to act as counsel to an AIP where the lawyer's firm also represents the Care Facility in other matters, the lawyer should make sure that the court is aware that the firm represents the Care Facility in unrelated matters, and that the lawyer will need to obtain consent to a potential conflict from both the Care Facility and the AIP before proceeding.

CONCLUSION A lawyer may accept court appointments to serve as Court Evaluator or Guardian for an Alleged Incapacitated Person in a guardianship proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility represented by the law firm in matters unrelated to AIP. The lawyer does not represent the AIP as counsel and Rule 1.7(a) is not implicated. Whether a lawyer may accept a

court appointment to serve as counsel for the AIP in a guardianship proceeding in which the petitioner is the health care facility depends on (1) whether the interests of the AIP and the health care facility are "differing interests" and whether the lawyer has a disabling personal interest, which are questions of fact beyond the jurisdiction of this Committee, and (2) whether the lawyer can obtain consent to the potential conflict, which requires a careful assessment by the lawyer of whether the AIP is capable of giving informed consent

Miscellaneous

Attorney meeting with/interviewing a person who is represented

In re Brian R., 48 AD3d 575 (2nd Dept., 2008)

Madris v. Olivera, 97 AD3d 823 (2nd Dept., 2012)

Matter of Cristella B., 77 AD3d 654 (2nd Dept., 2010)

Matter of G.G.**,** 4 Misc3d 1025(A) (Sup. Ct., Kings County, 2004)

Judicial Disqualification

Matter of John II. v Kristen JJ., 208 AD3d 1447 (3rd Dept., 2022)

Corey O. v Angela P. 203 AD3d 1450 (3rd Dept., 2022)

Ethical issues that may affect a County Attorney, DSS Attorney or an attorney who contracts with an LDSS.

New York State Bar Association Committee on Professional Ethics

Ethics Opinion 1153

The FACTS here are that the inquiring lawyer has just been appointed as County Attorney. The inquiring attorney also serves as a member of the board of trustees of the county-sponsored community college and currently chairs that board.

In any litigation involving the community college, its board, or its staff, the county attorney's office represents the community college and its constituents, either through the office's own staff attorneys or by selecting outside counsel. The county attorney's office supplies other legal services to the community college as well.

The inquiring lawyer wanted to know whether ethical issues arise from remaining on the community college's board of trustees while acting as county attorney. Specifically,

does a conflict of interest arise when an attorney simultaneously serves as a county attorney and as a member of the board of trustees of a county-sponsored community college and, if so, is the conflict subject to waiver by informed consent? What other considerations must a lawyer in these two roles take into account in discharging the lawyer's ethical obligations to each?

CONCLUSION

24. If no law or regulation prohibits the dual roles, an attorney may serve as both county attorney and chair of a county-sponsored community college to which the county attorney's office provides legal services if, in each circumstance when the interests of the county and the community college overlap, a reasonable lawyer would conclude that the dual roles do not involve a significant risk that the lawyer's interests as a board member would adversely affect the discharge of the lawyer's independent professional judgment on behalf of the county. If the lawyer cannot so conclude, then the lawyer may seek a waiver of the conflict from each the county and the community college if the lawyer reasonably believes that the lawyer may provide competent and diligent representation to the county and the lawyer obtains informed consent, confirmed in writing. Absent such a reasonable belief and accompanying informed consent, another lawyer in the county attorney's office may generally act for the affected client upon informed consent confirmed in writing that the other attorney in the office may provide the requisite representation. In all events, the county attorney must take special precautions to assure the protection of evidentiary privileges that the lawyer's dual roles might imperil.

General Municipal Law Sec. 801

Except as provided in section eight hundred two of this chapter, (1) no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or appoint an officer or employee who has any of the powers or duties set forth above and (2) no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more positions of public employment, the holding of which is not prohibited by law.

New York State Bar Association *Committee on Professional Ethics*

Opinion 1074 (11/13/15)

The question here was whether a part-time lawyer for a county Department of Social Services could accept appointments as assigned counsel for indigent persons in which the Department of Social Services is not involved.

The fact here were that a county Department of Social Services has a legal unit that employs a part-time attorney. In this capacity, the attorney handles paternity and child support matters, liens, Medicaid issues, and guardianships, and on occasion is able to assist others on the Department's legal staff in child abuse and neglect cases. In addition to part-time work at the Social Services Department, the attorney maintains a solo practice in which, among other things, the attorney participates in the County's Assigned Counsel Program representing indigent individuals in criminal matters as well as Family Court proceedings. The attorney wishes to continue to accept assignments in criminal and Family Court matters from the County's Assigned Counsel Program, for which the County pays. The attorney does not intend to accept any such assignments in child abuse and neglect cases.

QUESTION

May a part-time attorney for a county Department of Social Services accept assignments from the same county's Assigned Counsel Program to represent clients at the County's expense in criminal and Family Court matters?

CONCLUSION

11. A part-time lawyer for a county Department of Social Services may accept appointments as assigned counsel for indigent persons in Family Court and in criminal matters provided that the Department or others in law enforcement with whom the lawyer works are not materially involved.

New York State Bar Association Committee on Professional Ethics Opinion 1219 (03/17/2021)

Topic: Part-time county attorney, parole violation hearings, conflicts.

Digest: A part-time assistant County Attorney whose office does not handle criminal prosecutions can generally represent defendants in State parole violation hearings. A conflict may arise in particular cases, such as where the defendant is adverse to the County Attorney's office in other proceedings or where County employees are involved in the parole violation, and those conflicts may sometimes be unwaivable.

Rules: 1.0(h), 1.7, 1.10(a).

FACTS

1. The inquirer is a part-time assistant County Attorney. The County Attorney is the legal advisor to the County Executive and other officers and employees acting in their official capacity and pursues and defends civil actions by and against the County. The County Attorney's Office does not prosecute criminal actions. The inquirer himself, among other things, advises the sheriff, County probation office and County Executive on administrative matters, represents the County in civil cases, and handles employment related hearings.

2. There are attorneys who report to the County Attorney who handle juvenile justice and Social Services matters, but the inquirer does not engage in that practice. Those attorneys work in a different building from the inquirer and do not save files to shared drives. The inquirer does not have access to those offices or files.

3. The County Attorney wishes to engage the inquirer as an independent contractor to provide assigned County-paid representation to defendants in State parole violation hearings and appeals from those hearings. The parole violation hearings and appeals are held before State administrative tribunals that are part of the State Department of Corrections and Community Supervision, not County judges or officials, and the County generally has no role in those hearings (beyond paying for assigned counsel). While it is conceivable that a violation of a County ordinance could lead to a parole violation, County laws are generally not at issue in those proceedings. The County probation office that the inquirer sometimes advises deals with probation and not parole for State law offenses that would be at issue in the parole violation hearings in which the inquirer would be acting.

QUESTION

4. May a part-time assistant County Attorney whose office does not handle criminal prosecutions represent defendants in State parole violation hearings?

OPINION

5. This Committee has long opined that a part-time town or county attorney who has prosecutorial responsibility may not undertake criminal defense work in any court of the State if the attorney has the statutory responsibility to prosecute crimes or offenses under State law. N.Y. State 657 (1993), citing N.Y. State 544 (1982) and earlier opinions. Even in cases in which the part-time municipal attorney has responsibility to prosecute violations of local ordinances, but not State law, our opinions have found criminal defense work permissible only if: (2) the defense does not require him to appear before a judicial or other official of the locality he represents, (3) the local government unit by which he is employed, or a violation or construction of one of its ordinances, is not involved, (4) the offense charged is unlike any of those which he prosecutes, and (5) the investigating officers and law enforcement personnel involved are not those with whom he associates as prosecutor. Id. See also N.Y. State 874 (2011) (citing N.Y. State 544 and 657 as still valid under current N.Y. Rules of Professional Conduct (the "Rules")). These prohibitions on prosecutors defending

criminal cases are ordinarily imputed to the entire county or municipal law office under Rule 1.10(a). N.Y. State 788 (2005) (full-time prosecutor's conflicts imputed to part-time prosecutor); N.Y. State 874 (part-time Social Services attorney cannot represent in a criminal proceeding a respondent in an unrelated Social Services child abuse and neglect proceeding being prosecuted by others in the Social Services office).

6. Where, as here, the part-time municipal attorney has no prosecutorial responsibilities, we have found a similar set of criteria to be applicable: It has been held a number of times that a part-time town attorney may practice criminal law without conflict of interest or appearance of impropriety if (1) he has no statutory or other responsibility for prosecution of criminal proceedings on behalf of the town or duties closely related thereto, (2) he does not represent private clients before a town justice in the town he represents, and (3) a violation or construction of an ordinance of that town is not involved. N.Y. State 315 (1973), modified in N.Y. State 544. See also ABA 34 (1931) ("If the City Attorney's duties and those of his assistants are entirely of a civil character . . ., and he is not required to defend the accused in any court in which a city official performs the duties of judge or magistrate, we find no objection to his conducting the defense of criminal cases.") (quoted in N.Y. State 544).

7. Parole violation hearings are not typical criminal proceedings like those that were at issue in these prior opinions, but we need not consider whether the guidance relating to criminal defense work developed in those opinions would otherwise prohibit parole violation defense work, because (1) the inquirer's practice as a part-time county attorney is entirely civil, as is all 3 of the work of the County Attorney's office; (2) the inquirer would not appear before any County judges or officials in the contemplated parole work; and (3) a violation or construction of County law is not typically at issue in parole violation hearings or appeals. In these circumstances, there is no per se bar on the inquirer conducting State parole violation work.

8. There may be, however, particular cases in which the inquirer would have a conflict. For example, if the conduct of County employees is involved in the parole violation, or the parole violation defendant is a party to a civil case brought by the County Attorney's Office, the inquirer might have a conflict. See N.Y. State 1074 ¶ 8 (2015) (Department of Social Services attorney may accept assignments from county's Assigned Counsel Program except where "the Department is to play any meaningful role in the Family Court proceeding"); N.Y. State 800 ¶¶ 5-6 (2006) (part-time prosecutor may accept assignment to represent indigent persons in Family Court in adjacent county except, inter alia, where prosecutor had worked with law enforcement personnel involved).

9. Where the civil case brought by the County Attorney's Office is pursued by a different unit of the office, as is the case with the child neglect and abuse proceedings, the question would arise whether the conflicts of the County Attorney's Office lawyers who prosecute those proceedings would be imputed to the inquirer. The question of imputation in turn depends on whether the unit handling those proceedings is to be considered to be part of the same "law firm" as the unit in which the inquirer works. See

Rules 1.10(a) (imputing conflicts under Rules 1.7 to all lawyers "associated in a firm"), 1.0(h) (definition of "firm" and "law firm" includes "a government law office"). This is "'a fact-intensive inquiry'" that focuses, among other things, on "(1) whether the group presents itself to the public in a way that suggests it is a single firm; . . . (2) whether the lawyers in the group have mutual access to information concerning the clients they serve," and (3) the independence of the lawyers from common supervision. N.Y. State 1210 ¶¶ 6-8 (2020).

10. If a conflict were to arise in a particular case, it may sometimes be waived with the consent, confirmed in writing, of both the individual parole hearing defendant and the County. See N.Y. State 1074 ¶ 10 (noting that where a conflict is consentable, "the informed consent of the Department of Social Services and of the lawyer's client, confirmed in writing, is essential"). Our opinions have long recognized, however, that obtaining informed consent from a client who cannot afford counsel, and may not have effective choice of counsel, presents particular difficulties. See N.Y. State 1105 ¶ 18 (2016) ("when the lawyer seeks consent from a client who is receiving free legal services, the lawyer must consider whether such consent would be freely given"); N.Y. State 490 (1978) (when seeking consent from client of legal aid office, "the staff should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and . . . the staff [must be] satisfied that their clients could refuse to consent without any sense of guilt or embarrassment").

11. In some circumstances, the conflict may by unwaivable. Our prior opinions in this area identify two paradigmatic situations that give rise to unwaivable conflicts. First, while it apparently is unlikely that County employees will appear as witnesses in parole violation hearings, where the relationship with a witness is such that defense counsel could not reasonably conclude he or she could examine the witness as effectively as an unconflicted counsel, no consent can be sought. Rule 1.7(b)(1); see, e.g., N.Y. State 859 ¶ 15 (2011) (citing as example of non-consentable conflict where part-time DSS attorney "might have to impeach the same law 4 enforcement personnel on whom Social Services relies in abuse and neglect proceedings"); N.Y. State 1074 ¶ 10 (same).

12. Second, where a parole violation client is a respondent in a quasi-prosecutorial proceeding—such as a child neglect or child abuse proceeding, if those conflicts are imputed to the inquirer as discussed above—we have held that a part-time prosecutor cannot serve as counsel to the respondent even in an unrelated matter because of the "risk of the public perceiving favoritism at the prosecutor's office." See N.Y. State 788 (2005) (such risk where part-time prosecutor serves as criminal defense counsel "precludes waiver of the conflict"); N.Y. State 859 ¶¶ 13, 16 ("[t]he role of the Social Services attorney when prosecuting child abuse and neglect proceedings is comparable to the role of the DA's office in criminal prosecutions," so part-time Social Services attorney may not represent respondent in an unrelated criminal matter even with consent).

CONCLUSION

13. A part-time assistant County Attorney whose office does not handle criminal prosecutions can generally represent defendants in State parole violation hearings. A conflict may arise in particular cases, such as where the defendant is adverse to the County Attorney's Office in other proceedings or where County employees are involved in the parole violation, and those conflicts may sometimes be unwaivable.

New York State Bar Association *Committee on Professional Ethics*

Opinion #859 (03/25/2011)(partial)

FACTS

1. A County's Department of Social Services has a legal unit that employs one full-time attorney (the inquirer) and one part-time attorney. The full-time attorney supervises the Legal Unit and has an office at Social Services. The part-time attorney is in private practice and does not have an office at Social Services. However, the part-time attorney frequently visits Social Services and its Legal Unit to retrieve and discuss files, to conference cases, and to obtain supplies.

2. Social Services brought a child neglect petition against an individual (the "Respondent"), and the Legal Unit assigned the case to the part-time attorney. Upon assignment, the part-time attorney realized that the Respondent is the part-time attorney's client in an "unrelated" local criminal proceeding.

These facts raised four related questions:

First, may the part-time attorney represent the Respondent in the child neglect proceedings brought by Social Services?

Second, would consent (waiver) by the Respondent in the child neglect case (or Social Services) cure the conflict?

Third, if the conflict cannot be cured by consent, may the full-time attorney in the Legal Unit prosecute the child neglect proceedings?

Fourth, Would a screening process avoid or cure the conflict?

The opinion was that the part-time Social Services attorney may not represent the Respondent in abuse and neglect proceedings brought by Social Services. The full-time attorney is disqualified from representing Social Services in the child neglect and abuse proceedings against the Respondent while the part-time attorney is representing the Respondent in the unrelated criminal matter. These conflicts of interest are not curable by consent or by screening, but may be cured if the part-time attorney either terminates his association with Social Services or withdraws from representing the Respondent in the unrelated criminal matter.

New York State Bar Association Committee on Professional Ethics

Opinion 1216 (01/15/2021)

Topic: Government lawyer doing consulting work for private company

Digest: A government agency lawyer, doing work on behalf of the government in connection with a software contract between the agency and a private company, may not also work as a consultant to the private company to help it provide such software to other agencies unless there is law expressly allowing such work. Such consulting work could also be prohibited by rules on conflicts of interest or by the rule prohibiting a lawyer from accepting benefits intended to influence the actions of public officials.

Rules: 1.01(a) (h) & (l), 1.7(a)(1)-(2), 1.7(b), 1.11(d)(2) & (f)(3), 5.7(a) & (d)

FACTS

1. The inquirer is an assistant county attorney who played a significant role in the county's successful acquisition and implementation of software to manage the county's contracts and insurance. The county paid a one-time fee and pays an annual maintenance fee for the software. The inquirer continues to provide technical support to county staff on the use of the software.

2. The outside vendor who supplied, customized and installed the software for the county, and who worked closely with the inquirer on the software contract with the county, has offered to employ inquirer as a consultant. In that role, the inquirer would provide "implementation and support services" to other counties that purchase its software. As described by the inquirer: Implementation involves discovery of what the entity's contract/insurance process is, consulting with the software company to redesign the software so it best works with the county process, uploading county vendors, users and standard form contracts into the software, training on the software and then go-live with the software. Support of the software primarily consists of answering questions as to how the software works, questions/issues with the software and coordinating with the software developer regarding the same.

QUESTIONS

3. If the inquirer were to provide such consulting services, would it give rise to a conflict of interest and, if so, would the conflict be waivable?

4. In the event of a dispute between the county and vendor arising from or related to the sale and implementation of the software, would the inquirer's role as a paid consultant to the vendor disqualify the county attorney's office from representing the county and, if so, would the conflict be waivable?

5. Would the answers be different if the inquirer were paid directly by other counties that are clients of the vendor, rather than by the vendor itself?

OPINION

Rule 1.11

6. Rule 1.11 governs special conflicts of interest for former and current government officers and employees. In relevant part it provides: (d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not: … (2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

7. A "matter" includes "any … contract, . . . negotiation, … or any other representation involving a specific party or parties." Rule 1.0(l).

8. The contractual relationship between the county and the vendor in which inquirer has participated and will continue to participate, is thus a "matter" subject to Rule 1.11(d)(2). As such, "[e]xcept as law may otherwise expressly provide," the inquirer is ethically prohibited from negotiating for private employment with the vendor. See N.Y. State 1187 ¶7 (2020) (lawyer personally and substantially involved in one matter as a public officer may not negotiate to represent a party to that matter, even in another matter "wholly unrelated" to the first matter). This prohibition is not waivable, and it continues until conclusion of the matter in which the inquirer is participating. N.Y. State 1205 ¶¶ 8-9 (2020).

9. Whether there is a local law or policy that falls within the "law" exception of Rule 1.11(d)(2) and which would authorize or provide a procedure for securing county approval of the proposed consulting services arrangement presents an issue of law rather than of ethics, and is therefore a question beyond the committee's jurisdiction.

10. Even if the inquirer's proposed consulting conduct with the software vendor complies with Rule 1.11, the inquirer must also comply with any local laws and policies that govern county employees in general, including any provisions of the municipality's code of ethics relating to outside employment. See N.Y. State 1169 ¶¶ 6-7 (2019). For examples of such laws and policies (from counties other than the one where the inquirer works), see, e.g., Rensselaer County Personnel Policy § 2.12 (before beginning outside employment, employees must obtain 3 advance written approval from their department head; outside employment must not interfere with work performance or schedule; and employees may not use County property, time, or IT systems in connection with outside employment); Suffolk County Standard Operating Procedure A-15(5) (outside employment may not be undertaken on regularly scheduled work time or on sick time, and "may not involve or appear to involve a conflict of interest or a potential conflict of interest").

11. Such local laws and policies could significantly limit the ability of inquirer to provide the outside consulting services, even beyond a requirement that the work be approved by the county attorney's office. For example, an assistant county attorney prohibited from outside employment during regular business hours could find it hard to provide software implementation and support services for other counties that have similar regular business hours. However, we do not opine as to how such local laws and policies might limit the proposed conduct, as our advisory role is limited to interpreting the rules of legal ethics. Rule 1.7(a)(2)

12. Rule 1.7 sets forth the general rules for conflicts with current clients. It provides, in pertinent part: (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that ... (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.

13. Here, there would be a conflict of interest if a reasonable lawyer would find a "significant risk" that the inquirer's professional judgement as an assistant county attorney would be "adversely affected" by the inquirer's own "financial, business, property or other personal interests" in establishing and maintaining a paid consultancy arrangement with the vendor. See Rule 1.7(a)(2).

14. The inquirer's personal interests could adversely affect the inquirer's professional judgment in representing the county in various ways. For example, if the county were to consider replacing the vendor's software or terminating the vendor's annual contract -- actions that would hurt the vendor financially -- the inquirer might be inclined (or might even be pressured by the vendor) to advocate for maintaining the relationship with the vendor, unchanged, for fear of being terminated as an outside consultant by the vendor and losing substantial outside income.

15. If a personal interest conflict exists under Rule 1.7(a), the conflict would preclude the inquirer's proposed consulting relationship with the vendor unless the conflict is waivable and is waived by the county in compliance with Rule 1.7(b), which provides, in pertinent part: (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; ... and (4) each affected client gives informed consent, confirmed in writing.

16. Thus, waiver can only occur upon the satisfaction of the elements of Rule 1.7(b), including the lawyer's reasonable belief that the lawyer "will be able to provide competent and diligent representation" and the informed consent of the county, confirmed in writing.

17. We do not have sufficient facts to determine whether, in fact, the inquirer's employment as an outside consultant for the vendor would present a personal interest conflict, or if so, whether that conflict would be waivable, but if such a conflict exists,

waivability under Rule 1.7(b)(1) seems doubtful in light of the likely nature of the inquirer's divided loyalties. We question that a lawyer with such strong financial interests in maintaining good relations with the vendor could "reasonably believe[]" that the lawyer could provide competent and diligent representation to the client (the county).

18. If the inquirer determines that no local law or policy precludes the proposed consulting arrangement or that such local law or policy "expressly" permits it, and if no personal interest conflict exists, that it is waivable, then the inquirer would still have to consider other ethical issues. In particular, Rule 1.11(f)(3) provides that a lawyer who holds public office shall not "accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official." (Emphasis added.) In determining whether such a purpose is "obvious," relevant factors could include (i) the significance to the inquirer of the amount of money to be paid to the inquirer as a consultant; (ii) the value to the vendor of the inquirer's consulting; and (iii) whether there will be county matters within the inquirer's discretion that could significantly benefit vendor. If the proposed conduct would violate this Rule, then the conduct would be absolutely barred, because the Rule contains no provisions for waiving this conflict. Rule 5.7

19. As a consultant, the inquirer might be providing only "nonlegal services" (defined by Rule 5.7(c) as "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer"). However, the inquirer's consulting work for the vendor could cross the line into legal services to the vendor (or the vendor's other county customers). In that case, the provisions of Rule 5.7(a) would govern the extent to which such services would be subject to the Rules. For an explanation of Rule 5.7, see, e.g., N.Y. State 1200 (2020) (applying Rule 5.7 to lawyer who was also a wealth advisor) and N.Y. State 1178 (2019) (applying Rule 5.7 to a lawyer serving as a third-party neutral). Rule 1.7(a)(1)

20. Moreover, if the inquirer's nonlegal consulting work veers into legal services, the inquirer would have at least one law client other than the county that employs inquirer, the proposed conduct would have to comply with the conflicts provision of Rule 1.7(a)(1) (a lawyer shall not represent a client if a reasonable lawyer would conclude that "the representation will involve the lawyer in representing differing interests," absent effective waiver under Rule 1.7(b)). Payments Made by the Other County Clients

21. The inquirer asks whether revising the proposed arrangement so that the inquirer would be paid directly by the vendor's other county customers would affect the ethical analysis. 5 In our view, revising the source of payment would not cure problems under Rule 1.11(d)(2), since the other counties would also be parties to a "matter" (the software contract) in which the inquirer would be participating. Likewise, if the inquirer's proposed conduct would violate Rule 1.7(a)(2), the conflict could not necessarily be avoided by obtaining payment directly from the vendor's other county customers because the inquirer would still have a financial interest in the consultancy arrangements. However, if the conduct would violate Rule 1.11(f)(3), then revising the

payment arrangements might avoid the violation, because it seems lesslikely that the vendor's other county customers would pay consulting fees for the purpose of influencing the inquirer's official conduct on behalf of the county that employs inquirer.
Disputes between the County and the Vendor

22. Since we find it doubtful that the Rules of Professional Conduct would permit the inquirer to engage in the proposed conduct, we will only briefly address the conflicts that would arise if a dispute arises between the county and the vendor. If the inquirer were to represent the county in that dispute against the vendor, it would magnify the risk that the consultancy arrangement could adversely affect the inquirer's professional judgment on behalf of the county as the likelihood of alienating the vendor by aggressive advocacy on behalf of the county (or seeking to please the vendor with conciliatory advocacy) would be higher. This would be so even if the inquirer were paid by the other counties rather than by the vendor. Thus the inquirer's personal conduct of such litigation would likely give rise to a conflict, and perhaps an unwaivable conflict, under Rule 1.7(a)(2) and 1.7(b).

23. A conflict under Rule 1.7 would be imputed to other assistant county attorneys under Rule 1.10(a), which provides: "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, 1.8 or 1.9, except as otherwise provided therein." A county law department is a "firm." See Rule 1.0(h) (defining "firm" to include "a government law office"); N.Y. State 968 ¶19 (2013) (citing Rule 1.0(h) for proposition that a "firm" is defined to include a federal government law office). However, if the inquirer has a conflict under Rule 1.7 that is imputed to those other assistant county attorneys via Rule 1.10(a), the conflict could be waivable even if the inquirer's own conflict were not. See Rule 1.10(d) ("A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7"; Rule 1.7(b) (setting forth conditions for conflict waiver); N.Y. State 968 ¶26 (2013) ("where the nonconsentable nature of Lawyer A's conflict is personal to Lawyer A, the circumstances may well allow the client to consent to representation by Lawyer B" in the same firm).

CONCLUSION

24. A lawyer who personally and substantially participates in implementing and maintaining management software sold to the county where the lawyer is employed as an assistant county attorney may negotiate terms with and provide consulting services as an outside software implementation consultant to the vendor who provided and maintains that software, in order to assist the vendor's other county clients who are acquiring and implementing the same or similar management software, provided the inquirer complies with local law and policy regarding outside employment, and provided that the consulting arrangement satisfies the requirements of Rule 1.7(a)(1) regarding conflicts arising from differing interests, Rule 1.7(a)(2) regarding personal 6 interest conflicts, and Rule 1.11(f)(3) regarding influence on public officials. Although a review of

all the facts and circumstances will determine whether the requirements of these Rules can be satisfied, based on the limited information made available to the committee, it appears doubtful that any conflict would be waivable under Rule 1.7(b)(1). Our conclusion regarding the likelihood of overcoming a possible personal interest conflict would be magnified if a dispute arose between the county and the vendor. Our analysis would not be affected if the vendor's other county clients engaged and paid the inquirer in place of a direct contract with, and direct payments from, the vendor.

Committee on Professional Ethics Opinion 1238

(03/14/2022)

Topic: Conflict of interest; full-time attorney in county attorney's office with part-time outside practice Digest: A full-time lawyer in a county attorney's office who represents the county in civil litigation in state and federal courts may represent private clients in Family Court, or accept appointments as assigned counsel to represent indigent persons in Family Court, provided neither the county nor any of its agencies is a party to the proceeding and either no conflict of interest exists under Rule 1.7(a) or, if there is a waivable conflict, both the county and the Family Court client give informed consent to the conflict, confirmed in writing, pursuant to Rule 1.7(b)(4).

Rules: 1.0(h), 1.7 (a)-(b), 1.10(a), 1.11(f)

FACTS:

1. The inquirer is a permanent, full-time attorney in the County Attorney's Office, assigned to defend the county in civil litigation in state and federal courts. Neither the inquirer nor any other lawyer in the County Attorney's Office appears in Family Court as a member of the County Attorney's Office, but the county is represented in Family Court by counsel in the Family Law Division of the county's Department of Social Services.

2. Assignments to represent indigent clients in criminal cases and Family Court matters are made pursuant to the 18-B program, which is governed by a contract between the county and the county bar association. The inquirer did not draft or negotiate that contract, and inquirer plays no role in approving assigned counsel appointments or claims for compensation.

3. With the permission of the county attorney, the inquirer has embarked upon the private practice of law while retaining his position in the County Attorney's Office. In his private practice, the inquirer declines representation in any Family Court matter in which the county is a party.

QUESTION:

4. May a full-time assistant county attorney represent clients in Family Court matters in which the county is not a party, including assigned counsel matters pursuant to the 18-B program? OPINION:

5. This committee has established and repeatedly affirmed a per se rule that prohibits a parttime prosecutor from representing a defendant in a criminal proceeding anywhere in New York state. See e.g., N.Y. State 788 (2005); N.Y. State 657 (1993); N.Y. State 184 (1971); N.Y. State 171 (1970).

6. In N.Y. State 800 (2006), however, when faced with a part-time prosecutor who proposed to represent indigent persons in Family Court proceedings in an adjacent county, we declined to extend the per se prohibition. Instead, we identified three types of Family Court proceedings in which the part-time prosecutor would be barred from representation: (a) matters in which the prosecutor was then working or had previously worked with the law enforcement officials involved, (b) juvenile delinquency proceedings and (c) cases involving Persons in Need of Supervision ("PINS"). Id. ¶ 5.

7. Outside these strictures, we opined that whether the part-time prosecutor could accept a Family Court assignment depended "on all the relevant facts and circumstances." Id. ¶ 4. We said: The attorney must avoid all conflicts of interest, ensuring that neither the attorney's own interests, nor the attorney's simultaneous work as a prosecutor preclude the attorney from exercising independent judgment on behalf of his or her clients. In many cases, a conflict might not be apparent at the outset of the case. For this reason, the attorney must be careful to avoid cases where a conflict is likely to occur. N.Y. State 800 ¶ 4 (footnotes omitted).

8. In N.Y. State 1074 (2015) we applied the same facts-and-circumstances test to a part-time Department of Social Services attorney who wanted to accept assignments to represent indigent persons in criminal and Family Court matters, noting that the attorney had made a "well advised" decision not to accept child abuse and neglect cases from the assigned counsel program, two additional types of Family Court proceedings which we deemed "off limits" under the rationale of N.Y. State 800. Id. ¶ 6. In importing the part-time prosecutor facts-and-circumstances test to the Department of Social Services attorney we concluded: We cannot say that the Rules invariably forbid a lawyer to accept the representation of an indigent defendant in a traffic violation merely by virtue of the lawyer's role as a part-time lawyer handling Medicaid, paternity, or child support issues for the Department of Social Services. Likewise, we cannot say that the Rules invariably forbid a lawyer to accept a representation in a Family Court proceeding between, say, two private individuals in which the Department of Social Services has no involvement. N.Y. State 1074 ¶5.

9. Here, a full-time assistant county attorney wants to represent clients in Family Court proceedings to which the county is not a party, including assigned counsel 18-B matters. Neither he nor any other attorney in the County Attorney's Office represents the county in juvenile delinquency, PINS, or child abuse or neglect cases. In our view,

provided that law enforcement officers with whom the attorney is working or with whom he has previously worked as assistant county are not involved in the Family Court proceeding, there is no basis in the Rules or in our prior opinions that would give rise to a per se prohibition. As in N.Y. State 800 and N.Y. State 1074, the ethical propriety of each intended Family Court representation would be governed by the same facts-and-circumstances test.

10. Our conclusion is consistent with our most recent opinion in this area, N.Y. State 1219 ¶ 7 (2021), where we opined that the inquirer, a part-time assistant county attorney, was not subject to a "per se bar" on representing convicted defendants in state parole violation hearings where "(1) the inquirer's practice as a part-time county attorney is entirely civil, as is all of the work of the County Attorney's office; (2) the inquirer would not appear before any County judges or officials in the contemplated parole work; and (3) a violation or construction of County law is not typically at issue in parole violation hearings or appeals." Rather, we noted "[t]here may be . . . particular cases in which the inquirer would have a conflict. For example, if the conduct of County employees is involved in the parole violation, or the parole violation defendant is a party to a civil case brought by the County Attorney's Office, the inquirer might have a conflict." Id. ¶ 8 (citing N.Y. State 1074 ¶ 8 (2015) and N.Y. State 800 ¶¶ 5-6 (2006)).

11. In applying the facts-and-circumstances test here, two important factors regarding the inquirer's practice are the full-time character of the inquirer's public practice, and the particular sensitivity of family law matters. Especially in this context, the inquirer's Family Court representation could give rise to situations where a reasonable lawyer would conclude there is a significant risk that the attorney's professional judgment would be adversely affected by his personal interests, including his status in the County Attorney's Office, under Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules"). Specifically, Rule 1.7 (a)(2) provides: (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) ***; or (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.

12. For example, county policies that concern child protective services, adoption, custody and visitation, support, family offense, guardianship, delinquency, paternity, foster care, or other county policies and procedures affecting children and families may be implicated in a Family Court case. See N.Y. State 800. An assistant county attorney representing a private or an assigned counsel client in such a case may feel constrained in advancing the most advantageous or persuasive legal arguments, or in pursuing the most promising factual inquiries, if those actions might embarrass county officials or conflict with county policy and risk antagonizing the County Attorney.

13. If the inquirer determines that a conflict of interest exists in a particular matter under Rule 1.7(a)(2), the lawyer's representation may nonetheless be permitted under Rule 1.7(b) which provides: (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.

14. We have previously opined that government may waive a conflict pursuant to Rule 1.7(b), provided the conflict is waivable under the Rules and "(i) the lawyer was reasonably certain both that the entity was legally authorized to waive the conflict of interest and that all legal prerequisites to the consent had been satisfied and (ii) the lawyer reasonably believed that the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust." N.Y. State 1130 ¶15 (2017).

15. Even if there is no conflict or if there is a waivable conflict and informed consent to the representation is properly sought and secured from both the county and the Family Court client, three caveats are in order.

16. First, this committee's jurisdiction is limited to the Rules and we do not opine on questions of law. Therefore, the inquirer should be mindful that, independent of any ethical concerns, his proposed conduct may violate a statute, local law, or municipal ethics code concerning outside private employment by an assistant county attorney.

17. Second, Rule 1.11(f)(2) cautions that a lawyer who holds public office 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." See also N.Y. State 1065 ¶ 11 (2015) ("even assuming there is no conflict under Rule 1.7(a), the inquirer is prohibited from using any influence he may have as a public official to influence or attempt to influence, any tribunal to act in favor of the [inquirer's] proposed client.").

18. Third, our conclusion might be different if the attorneys in the Family Law Division of the Department of Social Services were considered to be part of the same "law firm" as the County Attorney's Office. See Rule 1.0(h) (definition of "firm" and "law firm" includes a "government law office." That is because our analysis relies heavily on the fact that the County Attorney's Office, and the inquirer, are engaged exclusively in civil practice and the attorneys in the Family Law Division represent the Department of Social Services in all Family Court matters.

19. We have opined that the defense function in juvenile delinquency proceedings "although not categorized as 'criminal' is indistinguishable from defense in an adult criminal proceeding" and that "PINS proceedings are functionally indistinguishable from juvenile delinquency proceedings" (N.Y. State 800 ¶¶ 7, 8). Citing N.Y. State 657 (1993) and N.Y. State 788 (2009), we have also opined: The role of the Social Services attorney when prosecuting child abuse and neglect proceedings is comparable to the

role of the D.A.'s office in criminal prosecutions. In both, the attorney represents the interests of the state in matters with grave consequences (incarceration in one, custody and parentage in the other). Like the D.A. in criminal prosecutions, the Social Services prosecutor has a special role that is "inherently incompatible" with the role of defense counsel. N.Y. State 859 ¶ 13 (2011).

20. Accordingly, following the broadening of the per se rule that prohibits a part-time prosecutor from representing a defendant in a criminal proceeding anywhere in New York State to include Department of Social Service and assistant county attorneys who prosecute these quasicriminal matters in Family Court, if the attorneys in the Family Law Division here prosecute juvenile delinquency, PINS or child abuse and neglect proceedings, which appears likely, its lawyers would not be permitted to accept private clients or 18-B counsel assignments to defend such matters in the Family Court. That per se prohibition would apply to the inquirer if the two offices are, in effect, the same law firm for imputation purposes under Rules 1.10(a) which provides: "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 . . . except as otherwise provided therein."

21. Whether the lawyers in the County Attorney's Office and the Family Law Division of the Department of Social Services are in the same "firm" as defined by Rule 1.0(h) is a "fact-intensive inquiry" that focuses, among other things, on (1) whether the County Attorney's Office, on the one hand, and the Family Law Division or the Department of Social Services, on the other hand, present themselves to the public in a way that suggests they are a single firm; (2) whether the lawyers in each office have mutual access to the same information concerning the clients that they each serve; and (3) whether the lawyers in each office are independent from the direction and control of supervising attorneys in the other office. See N.Y. State 1219 ¶ 9 (2021); N.Y. State 1210 ¶¶ 6-8 (2020).

CONCLUSION:

22. A full-time lawyer in a county attorney's office who represents the county in civil litigation in state and federal courts may represent private clients in Family Court, or accept appointments as assigned counsel to represent indigent persons in Family Court, provided neither the county nor any of its agencies is a party to the proceeding and either no conflict of interest exists under Rule 1.7(a) or, if there is a waivable conflict, both the county and the Family Court client give informed consent to the conflict, confirmed in writing, pursuant to Rule 1.7(b)(4).

Former DSS Attorney Entering Private Practice

New York State Bar Association Committee on Professional Ethics

Opinion 1148 (4/2/2018)

A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in the same matter while a government employee.

FACTS

The inquirer recently retired as one of the local social services department's child support enforcement unit attorneys, and has started a solo law firm in the same region. In this practice, the inquirer wishes to represent clients adverse to the Department, including opposing the Department's enforcement actions.

OPINION

Nothing in the Rules creates an absolute bar to a former government attorney's representation of a client in opposition to the attorney's former employer. Rule 1.11(a)(2) is the principal Rule governing conflicts that may be faced by a former government attorney. Rule 1.11(a) provides in pertinent part that "a lawyer who has formerly served as a public officer or employee of the government . . . shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." Hence, Rule 1.11(a)(2) allows a former government attorney to represent private clients on matters in which the attorney did not participate "personally and substantially" while in government service.

6. The history of Rule 1.11(a)(2) makes "clear that the disqualification must be based on the lawyer's "personal participation to a significant extent." "[T]hat a former government lawyer was counsel for the government in unrelated matters at the same time that the defendant's case was investigated or prosecuted is not enough to demonstrate personal and substantial participation under DR 9-101," the precursor to Rule 1.11(a)(2) in the N.Y. Code of Professional Responsibility (the "Code"), "or to require disqualification under that rule." "Neither the Code, nor its goal of promoting public confidence require so limiting the practice of former government lawyers that they may not, following their return to private practice undertake work involving the types of matters in which they have gained particular expertise while in public service."

7. The aims of Rule 1.11(a), a rule specific to onetime government lawyers, are akin to, but significantly differ from, those of Rule 1.9(a), a rule more generally regulating a lawyer's duty to former clients. The goals of Rule 1.9(a) include preventing a lawyer from "switching sides" and "improperly using confidential information of the former client," whereas Rule 1.11(a) is designed not only to protect the former government client but also to "prevent a lawyer from exploiting public office for the advantage of another client," An additional and important concern of Rule 1.11(a), however, is to avoid an undue deterrent on lawyers serving in a public position without

forever forgoing private practice in the legal area in which the lawyer served the government.

8. To be sure, underlying each Rule is a protection of the former client's confidential information. A government lawyer, like any lawyer, owes an ongoing duty to a former client to preserve the confidential information the lawyer garnered in the representation unless the former client releases the lawyer from that duty. Rule 1.11(a)(1) requires a lawyer who formerly served as a public officer or government employee to comply with Rule 1.9(c), which in turn provides that "a lawyer who has formerly represented a client in a matter" [in this case, a government or governmental agency] "shall not thereafter use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client" or reveal such information, in each case "except as these Rules would permit or require with respect to a current client." Among the exceptions in each Rule is the former client's "informed consent" within the meaning of Rule 1.0(j). Consistent with this proscription, Rule 1.11(a)(2) says that the government agency may consent if a former government attorney seeks to represent another party "in a matter in which the lawyer participated personally and substantially" while a government employee, subject always to the proscription in Rule 1.11(c) against the use of confidential government information against third persons, a ban that consent may not waive (and that is not an issue we address in this opinion).

10. Otherwise put, Rule 1.11(a) ousts the application of Rule 1.9(a) in the context of government lawyers. Rule 1.9(a)'s "substantial relationship" may extend its reach to encompass matters that Rule 1.11(a)'s requirement of "personal and substantial" involvement in the specific matters was not intended to embrace. We do not negate the possibility that the two may overlap in some instances, but neither do we believe that the two are necessarily congruent. That each Rule uses different language, that Rule 1.11(a) is specific to government lawyers in contrast to Rule 1.9(a)'s general application, and that Rule 1.11(a) serves public purposes beyond those animating Rule 1.9(a), fortify this conclusion. We note, too, that the considerations for determining whether Rule 1.11(a) applies are materially narrower than those customarily applied in analysis of a Rule 1.9(a) conflict. *Compare* Rule 1.11, Cmt. 10 (factors to be used in determining whether two matters are the same include "the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters") *with* Rule 1.9, Cmts. [2] & [3] (setting forth additional factors to be considered in making a decision about whether a conflict exists).

11. Consequently, we conclude that a onetime government lawyer may represent clients adverse to the lawyer's former government employer unless that lawyer had a personal and substantial involvement in the same specific matter in which the lawyer now proposes to challenge the government's position. This conclusion rests on the assumptions (a) that the inquiring lawyer does not possess confidential information about the specific matter obtained during the inquirer's government service, and (b) that the inquiring lawyer does not otherwise possess confidential information about the specific matter which, owing to the lawyer's confidentiality obligations, the lawyer could not competently represent the client in resisting the government's action without

violating the lawyer's ongoing duty of confidentiality, But merely knowing how the government agency usually handles such matters, untethered to personal and substantial involvement in or confidential information about the specific matter, is alone insufficient to prevent the former government lawyer from representing a private client against the lawyer's former government employer.

CONCLUSION

12. A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in, and possesses no confidential information acquired about, the same specific matter while a government employee.

New York State Bar Association Committee on Professional Ethics

Opinion 1205 (10/26/2020)

Topic: Government Employee Negotiating for Private Employment

Digest: A lawyer serving as in-house counsel for a federal agency may not negotiate for private employment with an organization that is an adverse party in litigation before the agency where the lawyer is participating personally and substantially in the litigation.
Rules: 1.0(l) & (n), 1.11

FACTS

1. The inquirer serves as in-house counsel for a federal agency. The inquirer would like to apply for a position with a private employer that is an adverse party in litigation before the agency.

2. The inquirer is "personally and substantially" involved in the litigation in which the private employer is an adverse party. The inquirer states, however, that the confidential information he obtained while representing the agency on the matter did not precipitate his interest in the private practice position. Moreover, if the inquirer were offered and accepted a position with the private employer, the inquirer would not participate in the matter.

QUESTION

3. Do the New York Rules of Professional Conduct bar a lawyer in public service from applying for a job with the private employer who is an adverse party in litigation before the agency?

OPINION

4. Our jurisdiction is limited to addressing provisions of the New York Rules of Professional Conduct (the "Rules"). We assume for purposes of this opinion that the inquirer's proposed activities comply with any other applicable laws and regulations, but we do not analyze them. See N.Y. State 1148 ¶ 4 (2018).

5. Rule 1.11(d)(2) states that "[e]xcept as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not…negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially." (Emphasis added.) The Terminology section of the Rules provides: "Person includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity." Rule 1.0(n). The term "matter," which 2 is broadly defined in Rule 1.0(l), "includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties."

6. As Comment [4] to Rule 1.11 recognizes, Rule 1.11 "represents a balancing of interests," and notes that a "lawyer should not be in a position where benefit to [a private] client might affect performance of the lawyer's professional functions on behalf of the government."

7. The inquirer's proposed conduct is prohibited by Rule 1.11(d)(2). Under the language in Rule 1.11(d), the inquirer is "currently serving as a public officer or employee." He seeks to "negotiate for private employment with a[] person" (the private employer) "who is involved as a party … in a matter in which the lawyer is participating personally and substantially."

8. The fact that the inquirer's desire to join the private employer is not connected to any confidential information obtained while working with the federal agency, and the fact that he would recuse himself from participating in the litigation if hired by the private employer, do not avoid the prohibition in Rule 1.11(d)(2). Furthermore, the restrictions in Rule 1.11(d)(2) cannot be waived by the government or the private employer. Compare Rule 1.11(a)(2) (expressly permitting appropriate government agency to give informed consent to former governmental lawyer's conflict) with Rule 1.11(d)(2) (not mentioning consent). See also ABA 96-400, n. 6 ("[ABA Model] Rules 1.11 and 1.12 are actually more rigorous than 1.7(b), in that they define circumstances in which negotiations for new employment cannot be pursued at all") (emphasis added).

9. Although the inquirer's proposed conduct is prohibited by Rule 1.11(d)(2), that does not mean that he is perpetually forbidden from negotiating for employment with the private employer. Once the matter in which he is currently participating personally and substantially concludes, the inquirer will no longer be barred from negotiating for a position with the private employer. Furthermore, if the inquirer leaves the federal agency

and is no longer a government officer or employee, he may ethically negotiate for a position with the private employer.

10. If the inquirer is ultimately hired by the private employer, he will need to comport with the requirements in Rule 1.11(a) through (c). See, e.g., N.Y. State 1148 ¶ 11 (“a onetime government lawyer may represent clients adverse to the lawyer's former government employer unless that lawyer had a personal and substantial involvement in the same specific matter in which the lawyer now proposes to challenge the government's position”).

CONCLUSION

11. A lawyer serving as in-house counsel for a federal agency may not negotiate for private employment with an organization that is an adverse party in litigation before the agency where the lawyer is participating personally and substantially in the litigation.

New York State Bar Association Committee on Professional Ethics

Opinion 1029 (10/23/2014)

Topic: Conflicts of interest for government lawyers with prior private clients

Digest: A government agency lawyer who previously represented a nongovernmental client in litigation against the agency is prohibited from representing the agency in a particular matter if that matter is the same as or substantially related to the litigation and the interests of the former client and the agency are materially adverse, although such conflict may be cured by informed consent of the prior client. If the lawyer participated personally and substantially in the prior litigation, then, notwithstanding any consent of the prior client, the lawyer is also prohibited from representing the agency in a particular matter that is the same as the prior litigation, such as advising the agency on compliance with the settlement agreement that ended the litigation. Advice on programs that were not involved in the litigation likely would not be the same matter as, nor substantially related to, the litigated matter unless the parties and the underlying facts were the same. Advice on programs that were involved in the litigation would require closer scrutiny to determine if the matter were the same or substantially related. The fact that legal issues involved in a new matter may be the same as ones in the litigation does not automatically make the matters substantially related.

Rules: 1.0(l); 1.9(a); 1.11(d)

FACTS

1. The inquirer is employed as an attorney for a municipal agency. The inquirer was previously employed by an advocacy organization that conducted class action litigation (the “Litigation”) against the agency. In that capacity the inquiring lawyer participated personally and substantially in the Litigation, which was eventually settled.

2. The lawyer's responsibilities with the agency include setting policy for programs provided to the agency's constituents. The lawyer does not provide legal advice to the agency on compliance with the settlement agreement that resolved the Litigation. While much of lawyer's advice to the agency involves new programs for the agency's constituents, the lawyer may be called upon to advise on programs involving the same settings that gave rise to the Litigation.

3. The inquirer asks whether his prior involvement in the Litigation presents any ethical issues for his ongoing work for the agency on any programs or issues that were involved in the Litigation.

QUESTION

4. May the lawyer advise the agency on issues involved in the Litigation, including issues relating to the provision of services to the agency's constituents with respect to (i) programs that were not involved in the Litigation, and (ii) programs that were involved in the Litigation?

OPINION

5. Two separate conflicts rules in the New York Rules of Professional Conduct (the "Rules") apply to this situation: Rule 1.9 and Rule 1.11.

6. Rule 1.9(a) is the general rule applicable to conflicts with former clients. It provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter" in which the new client's interests "are materially adverse to the interests of the former client" unless the former client gives informed consent, confirmed in writing.

7. The goals of Rule 1.9 include (1) preventing a lawyer from switching sides (e.g., from participating in the litigation and settlement of a matter and then attacking the settlement), and (2) preventing a lawyer from improperly using confidential information of the former client. See Rule 1.9, Cmts. [2] & [3]. To achieve these goals, Rule 1.9(a) applies not only to representation in the very matter in which the lawyer represented the former client, but also to representation in matters that are "substantially related."

8. Rule 1.11, as its name denotes, is the special conflicts rule applicable to current and former government employees. Rule 1.11(a) applies to a lawyer in the private sector who formerly served as a public officer or employee of the government. Rule 1.11(d) applies to the reverse situation – the one presented here – providing in part: (d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not: (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter …

9. Rule 1.11(a) applies instead of Rule 1.9(a) with respect to lawyers who leave the government and join the private sector, but Rule 1.11(d), which applies to lawyers who leave private practice to join the government, applies in addition to Rule 1.9(a). Compare Rule 1.11, Cmt. [4] (explaining that a former government lawyer is disqualified "only from particular matters in which the lawyer participated personally and substantially") with Rule 1.11, Cmt. [9B] ("Where a government law office's representation is materially adverse to a government 3 lawyer's former private client, … the representation would, absent informed consent of the former client, also be prohibited by Rule 1.9.").

10. The goal of Rule 1.11 is not to prevent switching sides. In particular, Rule 1.11(d) applies "regardless of whether a lawyer is adverse to a former client." Rule 1.11, Cmt. [3] (noting that rule is designed not only to protect former clients "but also to prevent a lawyer from exploiting public office for the advantage of another client," so that in general, "a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government"). The goals of Rule 1.11 are discussed in a Comment which goes on to state: On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. … [Certain provisions in Rule 1.11(b)] are necessary to prevent the disqualification rule from imposing too severe a deterrent to entering public service. The limitation on disqualification in paragraphs (a)(2) and (d) to matters involving a specific party or specific parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function. Rule 1.11, Cmt. [4] (noting that the Rule "represents a balancing of interests"). Are the Litigation and the Current Representation the Same Matter?

11. The term "matter," which appears in both Rule 1.9 and Rule 1.11, appears in the definition section of the Rules: "'Matter' includes "any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties." Rule 1.0(l); see Rule 1.9, Cmt. [2] ("The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction."). And, at least for purposes of Rule 1.11: [A] "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters. Rule 1.11, Cmt. [10].1 1 Comment [10] addresses the relationship of two matters "[f]or purposes of paragraph (e)." Rule 1.11(e) does not define "matter" in general, but merely provides that "[a]s used in this Rule, the term 'matter' as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions." The Rule's history may shed light on why the Comment, in making a general point about the definition of "matter," refers to a paragraph that addresses only

rulemaking. The ABA Model Rules do not include a definition of "matter" in the definition section, but rather define that term in Rule 1.11(e). Nor was the term defined in the 4

12. The inquiry specifies that the lawyer does not provide legal advice to the agency on compliance with the settlement agreement that resolved the Litigation. We note that for the lawyer to give such advice would seemingly be prohibited under Rule 1.9(a) and Rule 1.11(d). The lawyer participated personally and substantially in the Litigation settled by that agreement, and advising on compliance with the agreement with respect to the very parties involved in the Litigation would implicate concerns of switching sides, improperly using the former client's confidential information, and exploiting public office for the advantage of the former client.

13. Since the lawyer does not in fact advise the agency on compliance with the settlement agreement, the lawyer's representation of the agency does not necessarily constitute representation in the same "matter" as the Litigation. We turn to an analysis of the factors mentioned in Comment [10] to Rule 1.11 – the facts, the passage of time, and the parties.

14. As to whether the matters involve the same basic facts, we distinguish between (i) programs that were not involved in the Litigation and (ii) programs that were involved in the Litigation. If the lawyer's advice to the agency does not involve the same programs that were the subject of the Litigation, it may be easy to conclude that the current representation and the Litigation do not involve the same basic facts. But if the lawyer were to advise the agency regarding the same programs, especially if the advice were given in connection with an adversarial proceeding brought on behalf of the agency's constituents, then a more detailed analysis would be required to determine whether the new advice involves the same basic facts as the Litigation.

15. As to the passage of time, the Litigation was commenced years ago and has already been settled. Although the settlement agreement was finalized only within the past year, the inquiry nonetheless involves matters separated by time.

16. Finally, as to whether the matters involve the same or related parties, the current clients of the agency were not named plaintiffs in the Litigation. We have found no case law or ethics opinions attempting to define "a specific party or parties" as that phrase is used in Rule 1.0(l), but our prior opinions citing that Rule involve the same party or parties. See, e.g., N.Y. State 904 ¶ 8 (2012) (concluding that criminal investigation and civil claim for restitution, though related, were not same matter, in part because prosecutor was party only to the former and claimant was party only to the latter).

17. We believe the term "a specific party or parties" in Rule 1.0(l), at least for purposes of Rule 1.11, should be interpreted narrowly. See Rule 1.11, Cmt. [4] (quoted above). In a class action, only named plaintiffs should be considered a "specific party or parties," and that term should generally not be deemed to include all members of the class even though they may benefit from relief resulting from the lawsuit. Cf. N.Y. City 2004-1 (2004) ("If a class member has not individually retained the class lawyer or consulted

with that lawyer and the lawyer has not acquired confidential information about that class member, the lawyer should be definition section in the version of the Rules proposed to the Appellate Divisions by the New York State Bar Association in 2008. Rule 1.0(l) was added by the New York Administrative Board sua sponte. 5 free to accept an unrelated matter against the class member while the class action is pending."). This factor thus counts against a conclusion that the matters are the same.

18. Taking these various factors into account, it seems unlikely that the current representation and the Litigation would be deemed the same matter if the advice does not involve the programs that were the subject of the Litigation. We do not foreclose the possibility that they could be deemed the same matter in some circumstances, such as if the lawyer were to advise the agency regarding the litigated programs and the advice were given in connection with an adversarial proceeding brought on behalf of the agency's constituents, especially if that adversarial proceeding were similar or related to the prior Litigation. Are the Litigation and the Current Representation Substantially Related Matters?

19. If a matter on which the inquirer would advise the agency were not the same as the one in which the inquirer "participated personally and substantially while in private practice or nongovernmental employment," then Rule 1.11(d) would not preclude the inquirer's participation in giving such advice. However, giving such advice could still implicate Rule 1.9(a), which applies to representation not only in the same matter, but also in matters that are "substantially related." It is therefore relevant to determine whether issues involving the constituents of the agency should be viewed as substantially related to the Litigation.

20. Comment [3] to Rule 1.9 explains that matters are "substantially related" if "they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Ultimately, the determination of substantial relationship is a factual one. See N.Y. State 1008 ¶ 21(2014) ("the 'materially advances' inquiry is fact-intensive").

21. The test of substantial relation between two matters is more easily met than the test of whether two matters will be deemed the same, but the factors discussed above are again relevant to the analysis. If the lawyer's advice to the agency does not involve the same programs that were the subject of the Litigation, then the current representation and the Litigation probably are not substantially related. But if the advice involves the same programs, and especially if the advice is given in connection with litigation (such as an adversarial proceeding brought on behalf of the agency's constituents), then a more detailed analysis would be required to determine whether a reasonable lawyer would perceive a substantial risk that "confidential factual information that would normally have been obtained in the prior representation" would materially advance the agency's position in the new representation.

22. The mere circumstance that the current representation may involve legal issues that were also involved in the Litigation does not make the matters substantially related. Interpretations of the ethical rules have long distinguished between conflicts involving the same matter and conflicts involving the same legal issue. Such “issue” (or “positional”) conflicts tend to be more problematic in the case of concurrent representation than in the case of former representation. Even as to concurrent representation, a lawyer may ordinarily “take inconsistent 6 legal positions in different tribunals at different times on behalf of different clients,” although there can be circumstances in which an issue conflict arises because “there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s representation of another client in a different case.2 As to former representation: When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type, even though the subsequent representation involves a position adverse to the prior client. Rule 1.9, Cmt. [2]. That is not to say that an issues conflict could never arise as to a former client, but the Comment makes clear that such conflicts are not typical, and they are even less likely to occur when (as here) the second representation does not involve litigation.

23. If the inquirer were asked to give advice to the agency in a matter substantially related to the Litigation, then the inquirer would need to consider whether the agency’s interest in that matter is “materially adverse to the interests of the former client” under Rule 1.9(a). If so, then Rule 1.9 would preclude the inquirer’s representation of the agency in that matter. Of course at the time of the Litigation, there was adversity between the plaintiffs and the agency. The inquiry does not provide the facts necessary to determine whether the interests of the agency and the former client are, currently, materially adverse in any matter in which the lawyer would be advising the agency.
Consent to Conflicts

24. A conflict under Rule 1.9(a) may be cured if “the former client gives informed consent, confirmed in writing,” and those terms are defined. See Rule 1.0(j) (defining “Informed consent”); Rule 1.0(e) (defining “Confirmed in writing”). If representation of the agency in a particular matter presents a conflict under Rule 1.9 but not under Rule 1.11, then the former client’s informed consent, confirmed in writing, would allow the lawyer to represent the agency in that matter. Situations in which there would be a conflict under Rule 1.9 but not under Rule 1.11 could arise if the interests of the agency in the new matter were materially adverse to those of the former client, but the government lawyer had not participated “personally and substantially” in the prior matter, or if the new matter were not the same as the prior one but only substantially related.

25. On the other hand, informed consent does not cure a conflict under Rule 1.11(d). Under that Rule, a lawyer currently serving as a public officer may not participate in a matter in which the lawyer participated personally and substantially while in private practice. The only exceptions arise when "law may otherwise expressly provide" or when, "under applicable law, 2 Rule 1.7, Cmt. [24]; accord Restatement (Third) of the Law Governing Lawyers § 128, comment (f) (2000); see N.Y. State 826 (2008) (discussing consentability of positional conflicts). 7 no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter." Rule 1.11(d).

26. Here, the lawyer did participate personally and substantially in the Litigation, so the existence of a conflict under Rule 1.11(d) turns on whether the matter of the current representation is the same matter as the Litigation. If the matters are the same, then the lawyer would be disqualified, notwithstanding any consent of the former client, because neither of the exceptions in Rule 1.11(d) would apply. The lawyer is apparently not the only one authorized to act for the agency. Nor has the inquirer mentioned any law expressly providing that the lawyer may represent the agency notwithstanding the conflict.

CONCLUSION

27. The lawyer may not advise the agency on compliance with the Litigation settlement agreement with respect to the parties in that Litigation. Otherwise, the lawyer may advise the agency on a matter involving the agency's programs unless (a) the matter is the same as the matter in the Litigation, or (b) the matter is substantially related to the matter in the Litigation and the agency's interest in that matter is materially adverse to the interests of the former client. Advice on programs that were not involved in the Litigation likely would not be in the same or a substantially related matter unless the parties and the underlying facts were the same as those in the Litigation. Before giving advice on a program that was involved in the Litigation, the lawyer would need to determine whether such advice is in the same matter, or, if in a substantially related matter, whether there is material adversity between the interests of the agency and the former client. Even if legal issues involved in the new matter may be the same as issues in the prior Litigation, that does not automatically make the matters substantially related

New York State Bar Association Committee on Professional Ethics

Opinion 1083 (1/21/16)

FACTS

1. The inquirer is a member of a law firm that represents many nursing home clients. The inquirer proposes to form a nonprofit organization (the "Nonprofit") to accept judicial guardianship appointments for low-asset, long-term nursing home residents ("Incapacitated Persons" or "IPs") who lack the necessary capacity to authorize release of the financial records that are needed to document their eligibility for Medicaid, who do not have family members or others holding a power of attorney to

manage the Medicaid application process, and who might be at risk of discharge from the facility for non-payment.

2. The inquirer states that the nonprofit organization would be independent from the inquirer's law firm. Neither the inquirer nor any lawyer or employee in the inquirer's firm would be officers, directors or employees of the Nonprofit. The Nonprofit would be staffed by an administrator, who would oversee the Nonprofit's financial obligations. The Nonprofit also would partner with schools or community organizations that could provide social workers or social work students to perform on-site visits with Incapacitated Persons.

3. The inquirer's representation regarding the Nonprofit's independence from the inquirer's law firm is critical to our analysis. Based on that representation, we assume that the Nonprofit's board of directors, its administrator and its staff will not be controlled, directly or indirectly, by the law firm or any of the firm's nursing home clients and that the employees and agents of the Nonprofit will always act in what they perceive to be the best interests of the Nonprofit and those IP clients for whom it serves as guardian, regardless of the impact their actions might have upon the inquirer's law firm or its nursing home clients. *I think that is quite an assumption!*

4. The inquirer states that the petitioner seeking the appointment of a guardian for an Incapacitated Person would be the nursing home where the IP resides. The inquirer's firm would represent the nursing home in seeking appointment of a guardian and be paid by the nursing home for that representation. *It is worth noting here that MHL 81.19(e) prohibits either a creditor of the AIP or a provider of health care, day care, educational or residential services to the IP to serve as guardian, unless the court were to find that there was no other person or corporation willing to serve.*

5. The facts of the opinion also went on to recite the responsibilities of the guardian as well as that the guardian must act with the utmost care and diligence and the utmost degree of trust, loyalty and fidelity in relation to the IP. Also mentioned were the powers to manage the financial assets of the IP, and to apply for government benefits and to authorize access to or release of confidential records.

8. The law firm's facts submitted also included that the nursing home petitioner would not "nominate" the Nonprofit as guardian, but would "make the judge aware" that the Nonprofit is available to act as guardian. The Nonprofit would charge the nursing home petitioner a one-time flat fee for accepting an appointment to serve as property management and personal needs guardian for the IP. The fee would be based on the anticipated cost of securing a payment source for the IP's nursing home care (primarily the fees due to the law firm retained to prepare the Medicaid application) plus an amount estimated to be necessary to cover the cost of addressing personal needs issues. *So interesting here that the NFP suggested to the court to serve as guardian is going to retain the nursing home's lawyer to handle the Medicaid application.*

9. *The opinion then said* We assume that the law firm will advise the judge of the capabilities of the Nonprofit and of potential conflicts of interest between the petitioning nursing home and the Nonprofit, including (i) the Nonprofit's capabilities to act as personal needs guardian, and (ii) how the proposed fee structure provides for personal needs issues.

10. If the Nonprofit is appointed property management guardian, it might opt to, but would not be required to, hire the inquirer's law firm to prepare and file the IP's application to the DSS for Medicaid benefits. *But, of course they already said that they were basing their fee partially on the retainer fee for hiring the nursing home's law firm to do the Medicaid application.*

11. The inquirer identifies three reasons for forming the Nonprofit – one practical and two financial. The practical reason, the inquirer states, is that guardianship judges have complained that they have difficulty finding persons who will accept guardianship appointments in low-asset cases, and the appointments therefore are being made to non-profit organizations. According to the inquirer, the nonprofit organizations accepting such appointments in the inquirer's geographic practice area often do not have the staffing or expertise to fulfill their duties to successfully prosecute a Medicaid application. In these cases, the burden and expense of securing Medicaid funding falls to the nursing home where the IP resides, while the designated non-profit guardian receives court-awarded guardianship fees for performing little or no work. *Isn't this an issue that you would take up with the court, court examiner and the non-profits? The complaint here seems to be about the guardians not doing the MA applications and remitting payments to the nursing homes.*

12. The financial reasons both stem from the negative economic effects on the inquirer's nursing home clients that result from the current financing system. The first arises from the way the DSS is required to treat, for the purpose of establishing an IP's Medicaid budget, the monthly payment amounts typically awarded to non-profit organization guardians that are paid out of the IP's Social Security benefit payments. Medicaid recipients in nursing homes are responsible for paying the nursing home a certain amount of the nursing home costs each month out of their income, usually out of the monthly Social Security benefit. This amount is termed the recipient's Net Available Monthly Income (NAMI). Medicaid benefits are paid to the nursing home in an amount equal to the difference between the facility's approved Medicaid rate and the NAMI amount. However, the DSS does not disregard guardianship fees that are paid out of the IP's Social Security benefits in determining the Medicaid budget. According to the inquirer, the monthly guardian's fee is typically $450. Thus, on an annualized basis, the nursing home may receive $5,400 less for an IP for whom a guardian has been appointed, compared to nursing home residents whose cost of care is being paid by Medicaid but who do not have guardians. *How would this complaint be solved by the appointment of the lawyer's NFP as guardian? What is their source of funding? They already said that they were going to take a fee based upon retaining the*

law firm for the MA application and some other fee based upon anticipated personal needs. The use of Social Security benefits to pay guardianship fees is actually a matter of Medicaid policy based upon what the local district permits, and based upon what NYS DOH counsel has permitted. This would be an issue for these lawyers to take up with NYS DOH.

13. The second financial reason is that, according to the inquirer, where a nonprofit organization guardian is appointed, the social security benefit payment and other income is often paid directly to the non-profit organization, so that it may deduct its monthly court-awarded fee. The non-profit organization is then expected to remit the balance to the nursing home. However, many of the existing non-profit organizations accepting guardianship appointments often fail to pay over or are late in paying over the excess to the nursing home, to the home's financial detriment. *It would seem that the non-profit's purpose is to make sure that the nursing home gets paid. Notice that there is no comment about then other agencies effectiveness in performing their personal needs duties.*

OPINION

16. The jurisdiction of our Committee is to interpret the New York Rules of Professional Conduct (the "Rules") as they apply to the conduct of lawyers. We therefore make no determinations here on whether the Nonprofit meets the requirements of the Mental Hygiene Law for a guardian of IPs, the provisions of the tax law governing not-for-profits, including their eligibility to receive and retain non-profit status under the Internal Revenue Code, or the provisions of any business corporation law with respect to the governance of the Nonprofit. *So, for these ethical opinions keep in mind that they only interpret the Ethical Rules.*

20.

We assume for purposes of this opinion that each of the inquirer's nursing home clients is a continuing client. Once the inquirer forms the Nonprofit, if the inquirer continues to represent the Nonprofit, the Nonprofit and the nursing homes will be concurrent clients. Similarly, once the Nonprofit has been formed, if the Nonprofit has been named guardian and the Nonprofit seeks to hire the inquirer's firm to prepare a Medicaid application or to pursue matters involving personal care, the Nonprofit and the nursing home would be concurrent clients.

<u>The Formation of the Nonprofit</u>

22. The Bar Association accepted as true that in forming the Nonprofit, the law firm is acting on its own and not on behalf of a client, and that the creation of the Nonprofit would be in the interest of nursing home clients. They came to this conclusion despite recognizing that the objective of forming the Nonprofit is, at least in part, to benefit financially the firm's nursing home clients.

The opinion did recognize that where the lawyer or the lawyer's firm have a continuing relationship with the Care Facility that is the petitioner under the guardianship proceeding, or into which the Guardian might place the AIP [alleged incapacitated person], the relationship between the law firm and the Care Facility could adversely affect the independent professional judgment of the lawyer in representing the AIP, thus creating a personal interest conflict for the lawyer. However, the response was that this question is also a factual one that is beyond the jurisdiction of this Committee.

The opinion also said that personal needs matters, such as quality of care issues, treatment decisions and decisions about the IP's place of abode, are more likely to involve differing interests between the guardian, which must exercise the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person, and the law firm's nursing home client. This question, too, is one of fact that is beyond our jurisdiction. But if a facility's violations may lead to substantial monetary penalties or disenrollment from the Medicare or Medicaid programs, or if facilities compete for residents to fill empty beds, and if an injury sustained by a resident caused even in part by noncompliance with government standards and procedures may lead to litigation, then the prospect of conflicting loyalties between the lawyer's nursing home clients and the guardian with respect to personal needs issues would seem to be not insubstantial.

The opinion also considered issues of conflicts between clients represented by the law firm. It noted that some conflicts could not be consented to by the clients if prohibited by law. Interestingly, the opinion did not make any analysis of consent to waive a conflict by an incapacitated person, or of the ability of the NFP guardian to waive a conflict of interest, when it's duties are to the IP, but its formation is due to the law firm with the conflict, and its continued existence is owed to the nursing homes that suggest their appointments as guardian to the court, but are the party that they have a legal issue with.

31. A lawyer whose firm represents nursing homes may form a nonprofit corporation for the purpose of accepting judicial guardianship appointments for low-asset nursing home residents who lack the capacity to document their eligibility for Medicaid. But representing the nonprofit in certain matters might present conflicts of interest. For example, if the nonprofit is appointed property management guardian for an incapacitated person who resides in a nursing home client of the firm and the firm is asked to provide services for the guardian (such as preparing the Medicaid application) there is a potential conflict of interest between the guardian and the nursing home client, but if the incapacitated person has limited assets, the interests of the two clients are unlikely to differ. If the nonprofit is appointed personal care guardian for an incapacitated person who resides in a nursing home client of the law firm, the interests of the guardian and nursing home clients are more likely to differ. Consent to a conflict of interest by both the nonprofit and the nursing home may be possible, but if the matter involved a claim by the guardian against a nursing home client (i.e. regarding quality of

care issues) that is represented by the inquirer's firm in the matter, the firm could not also represent the nursing home, because the conflict would be non-consentable.