NEW YORK STATE BAR ASSOCIATION
2015 Family Law Section

High Peaks Resort
Lake Placid, NY

July 9, 2015

ETHICS CASES FROM JANUARY 15, 2013 THROUGH JUNE 15, 2015

Standing Committee on Ethics
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Emeritus

Compiled by
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Rule 1.1

Rajic v. George, 45 Misc.3d 1025, 994 N.Y.S.2d 292 (N.Y. Sup. Ct. Sept. 22, 2014)

In a case to establish the paternity of a minor child, the court admonished the putative father's attorneys for making frivolous arguments in order to delay the case. The attorneys' conduct suggested that the father's attorneys were acting in violation of Rule 1.1 by taking on a domestic relations matter without the knowledge necessary to provide competent representation. The father's attorneys also acted in violation of Rule 3.1 by making a frivolous argument to remove the case to federal court when the amount in controversy requirement was clearly not met.

In re Kellogg, 114 A.D.3d 177, 977 N.Y.S.2d 511 (4th Dep't 2013)

The Grievance Committee filed a petition charging an attorney with neglecting a client matter and engaging in conduct involving dishonesty or deceit with regard to several clients, including one client involved in a matrimonial matter. The Referee appointed to conduct a hearing determined that the respondent agreed to negotiate a separation agreement on behalf of a client and then, two years later, agreed to represent that client in a divorce action. The respondent filed a summons and complaint in the divorce action on his client's behalf, but thereafter failed to take action to complete the matter. The respondent also made misrepresentations to the client regarding the status of the matter. The Grievance Committee found that the respondent had violated Rules 1.1, 1.3, 1.4 and 8.4. After considering mitigating circumstances, the Grievance Committee suspended the respondent from the practice of law for one year.

Rule 1.3

In re Antonucci, 118 A.D.3d 110, 984 N.Y.S.2d 741 (4th Dep't 2014)

The Grievance Committee filed a petition against the respondent related to several client matters over two years and appointed a Referee to conduct a hearing. The charges included neglecting client matters, making misrepresentations to clients regarding the status of their matters, and failing to provide a written retainer agreement and itemized billing statements at regular intervals. In one case, the respondent failed to notify a client he had received settlement proceeds belonging to the client, and deposited only half into his trust account. He failed to respond to numerous inquiries from the client regarding the funds, and then lied to the client about why the proceeds were unavailable. The court found that the respondent violated Rules 1.3, 1.4, 1.5, 1.15, and 8.4. After considering mitigating factors, the court issued a one year suspension, which was stayed on condition that the respondent complies with the Rules of Professional Conduct.

In re Horton, 115 A.D.3d 193, 979 N.Y.S.2d 918 (4th Dep't 2014)

The Grievance Committee filed a petition charging an attorney with neglecting a client matter and failing to provide a domestic relations client with a written retainer agreement and itemized

billing statements at regular intervals. The Referee appointed to conduct a hearing found that the attorney had agreed to represent a client in a divorce action and agreed to prepare a qualified domestic relations order (QRDO). The attorney intermittently worked on the QRDO, but it took him four years to resolve the matter, and he issued no billing statements to the client. The attorney also failed to appear at a hearing before the Grievance Committee and failed to comply with a subpoena. The Grievance Committee found that the attorney had violated Rules 1.3, 8.4, and 22 NYCRR 1400. After considering mitigating factors, the court issued an order of censure.

In re Kellogg, 114 A.D.3d 177, 977 N.Y.S.2d 511 (4th Dep't 2013)

The Grievance Committee filed a petition charging an attorney with neglecting a client matter and engaging in conduct involving dishonesty or deceit with regard to several clients, including one client involved in a matrimonial matter. The Referee appointed to conduct a hearing determined that the respondent agreed to negotiate a separation agreement on behalf of a client and then, two years later, agreed to represent that client in a divorce action. The respondent filed a summons and complaint in the divorce action on his client's behalf, but thereafter failed to take action to complete the matter. The respondent also made misrepresentations to the client regarding the status of the matter. The Grievance Committee found that the respondent had violated Rules 1.1, 1.3, 1.4 and 8.4. After considering mitigating circumstances, the Grievance Committee suspended the respondent from the practice of law for one year.

Rule 1.4

In re Antonucci, 118 A.D.3d 110, 984 N.Y.S.2d 741 (4th Dep't 2014)

The Grievance Committee filed a petition against the respondent related to several client matters over two years and appointed a Referee to conduct a hearing. The charges included neglecting client matters, making misrepresentations to clients regarding the status of their matters, and failing to provide a written retainer agreement and itemized billing statements at regular intervals. In one case, the respondent failed to notify a client he had received settlement proceeds belonging to the client, and deposited only half into his trust account. He failed to respond to numerous inquiries from the client regarding the funds, and then lied to the client about why the proceeds were unavailable. The court found that the respondent violated Rules 1.3, 1.4, 1.5, 1.15, and 8.4. After considering mitigating factors, the court issued a one year suspension, which was stayed on condition that the respondent complies with the Rules of Professional Conduct.

In re Valley, 123 A.D.3d 176, 993 N.Y.S.2d 895 (1st Dep't 2014)

The Grievance Committee filed a petition against the respondent for reciprocal discipline. The respondent was sanctioned by the Disciplinary Board of the Washington State Bar Association for misconduct in a child custody matter. The respondent failed to provide his client with a copy of her ex-husband's petition seeking to relocate to California with the couple's children and

failed to provide her with the proposed parenting plan filed by her ex-husband. Because these actions also constituted a violation of Rules 1.4 and 1.5, the respondent is subject to reciprocal discipline in New York. The respondent also failed to file registration statements and pay biennial registration fees in New York after relocating to Washington. The attorney resigned from the practice of law in New York, and the court accepted the resignation and ordered his name be stricken from the roll of attorneys.

In re Kellogg, 114 A.D.3d 177, 977 N.Y.S.2d 511 (4th Dep't 2013)

The Grievance Committee filed a petition charging an attorney with neglecting a client matter and engaging in conduct involving dishonesty or deceit with regard to several clients, including one client involved in a matrimonial matter. The Referee appointed to conduct a hearing determined that the respondent agreed to negotiate a separation agreement on behalf of a client and then, two years later, agreed to represent that client in a divorce action. The respondent filed a summons and complaint in the divorce action on his client's behalf, but thereafter failed to take action to complete the matter. The respondent also made misrepresentations to the client regarding the status of the matter. The Grievance Committee found that the respondent had violated Rules 1.1, 1.3, 1.4 and 8.4. After considering mitigating circumstances, the Grievance Committee suspended the respondent from the practice of law for one year.

Rule 1.5

In re Antonucci, 118 A.D.3d 110, 984 N.Y.S.2d 741 (4th Dep't 2014)

The Grievance Committee filed a petition against the respondent related to several client matters over two years and appointed a Referee to conduct a hearing. The charges included neglecting client matters, making misrepresentations to clients regarding the status of their matters, and failing to provide a written retainer agreement and itemized billing statements at regular intervals. In one case, the respondent failed to notify a client he had received settlement proceeds belonging to the client, and deposited only half into his trust account. He failed to respond to numerous inquiries from the client regarding the funds, and then lied to the client about why the proceeds were unavailable. The court found that the respondent violated Rules 1.3, 1.4, 1.5, 1.15, and 8.4. After considering mitigating factors, the court issued a one year suspension, which was stayed on condition that the respondent complies with the Rules of Professional Conduct.

In re Horowitz, 116 A.D.3d 47, 980 N.Y.S.2d 543 (2d Dep't 2014)

The Grievance Committee filed a petition against the respondent related to misconduct in a matrimonial action. The Referee appointed to conduct a hearing made the following findings. The respondent represented a client in a matrimonial matter, and entered into an addendum to the retainer agreement where a third party agreed to pay for the legal fees. The third party gave the respondent several post-dated checks, with jewelry as collateral. After the checks cleared, the

third party sought return of the jewelry on several occasions, but the respondent did not cooperate. In another matrimonial action, the respondent charged the client a non-refundable fee, stating in the retainer agreement that $2,000 of the $3,000 would not be refunded even if the respondent did not handle the matter to conclusion. In the same matter, the respondent wrote to the client's estranged wife stating that the client wished to resume the marital relationship, which was not true. The court found based on these facts that the respondent violated Rules 1.5, 1.15, 4.1, and 8.4. The respondent also failed to provide a Statement of Client's Rights and Responsibilities as required by 22 NYCRR 1400. The court suspended the respondent from the practice of law for three years.

In re Valley, 123 A.D.3d 176, 993 N.Y.S.2d 895 (1st Dep't 2014)

The Grievance Committee filed a petition against the respondent for reciprocal discipline. The respondent was sanctioned by the Disciplinary Board of the Washington State Bar Association for misconduct in a child custody matter. The respondent failed to provide his client with a copy of her ex-husband's petition seeking to relocate to California with the couple's children and failed to provide her with the proposed parenting plan filed by her ex-husband. Because these actions also constituted a violation of Rules 1.4 and 1.5, the respondent is subject to reciprocal discipline in New York. The respondent also failed to file registration statements and pay biennial registration fees in New York after relocating to Washington. The attorney resigned from the practice of law in New York, and the court accepted the resignation and ordered his name be stricken from the roll of attorneys.

Rule 1.6

Ethical Duties of Lawyer-Mediator; Confidentiality Duties as to Work of Fiction, NYSBA Committee on Professional Ethics, Formal Op. 1026 (Oct. 1, 2014)

An attorney serving as a private mediator in divorce cases inquired about including information about clients in a book of fiction based on his work, without obtaining the consent of those parties. The attorney advertised himself as a mediator, but he also drafted and filed divorce papers with the appropriate court when the mediation results in an agreement. The Committee found that the attorney was subject to the duty of confidentiality in Rule 1.6 because he provided both legal and non-legal services. The information gained during mediation is not protected by attorney-client privilege, but it is "likely to be embarrassing or detrimental to the client" (Rule 1.6(a)) and is also "information that the client has requested to be kept confidential" by signing a retainer agreement in which the client is promised "complete confidentiality" (Rule 1.6(c)). The Committee further cautioned that hypothetical scenarios can only be used as long as there is no reasonable likelihood that the client's identity could be ascertained, which is a difficult, and potentially impossible, standard to meet when writing a work of fiction.

Rule 1.7

Armstrong v. Blank Rome LLP, 126 A.D.3d 427, 2 N.Y.S.3d 346 (1st Dep't 2015)

In a legal malpractice suit, the plaintiff alleged that the defendant law firm concealed a conflict of interest that stemmed from the defendant law firm's attorney-client relationship with Morgan Stanley while simultaneously representing plaintiff in divorce proceedings against her ex-husband, a senior Morgan Stanley executive, who participated in Morgan Stanley's decisions to hire outside counsel. The alleged conflict stemmed from defendants' interest in maintaining and encouraging its lucrative relationship with Morgan Stanley and the impact of that interest on defendant's judgment in representing plaintiff in the divorce proceedings. The First Department affirmed the Supreme Court's decision denying the defendants' motion to dismiss.

Cohen v. Cohen, 125 A.D.3d 589, 2 N.Y.S.3d 605 (2d Dep't 2015)

In a divorce proceeding, the plaintiff husband appealed from the Supreme Court's denial of his motion to disqualify the wife's law firm. The husband argued that he met with an attorney from the law firm for a consultation when he was considering filing for divorce. The defendant wife disputed that this meeting took place. It was undisputed, however, that the husband's brother also met with the law firm around the same time, and shared confidential information concerning various businesses that the husband and brother shared. The Second Department reversed, holding that the motion to disqualify should have been granted because of the nature of the matters disclosed at the brother's meeting. The very appearance of a conflict of interest alone was enough to warrant disqualification of the law firm as a matter of law, without a hearing.

Bernacki v. Bernacki, 47 Misc.3d 316, 1 N.Y.S.3d 761 (N.Y. Sup. Ct. Jan. 14, 2015)

In divorce proceedings, the husband sought to disqualify the wife's counsel on the grounds of conflict of interest. The husband never consulted with or spoke to the wife's attorney, but rather received a call from an administrator at the wife's attorney's firm and allegedly conducted an "intake interview" seeking information that had the potential to harm the husband's position in the case. The court denied the husband's motion, finding that there was no allegation that the attorney's law firm received confidential information that would create a conflict of interest.

S.A. v. S.K., 40 Misc.3d 1241(A), 977 N.Y.S.2d 670 (N.Y. Fam. Ct. Aug. 26, 2013)

The maternal grandmother of four children in foster care brought a visitation proceeding, seeking visitation of five children. The adoptive mother of one of the children brought a motion to disqualify the Legal Aid Society ("LAS") from further representing her child in the matter, arguing that LAS developed a relationship with the grandmother from other related proceedings and was therefore biased. The court found that there was no conflict of interest because the adoptive mother had not shown that her child had "differing interests" from the siblings that

divided the loyalties of LAS in the visitation proceeding or diminished their ability to represent the children effectively.

Zwick v. Wargo, 42 Misc.3d 607, 976 N.Y.S.2d 364 (N.Y. Fam. Ct. Dec. 3, 2013)

In a child support proceeding, both the mother and father were represented by the Assistant County Attorney's office Child Support Enforcement Unit ("CSEU"). The Support Magistrate issued an amended order decreasing the husband's support obligations, and the wife's attorney filed written objections, at which time the Family Court expressed concern about the potential conflict of interest. Attorneys appearing on behalf of CSEU represent the interests of the Child Support Agency and merely provide assistance in child support actions, and ask litigants to sign a form stating that there is no attorney-client relationship. However, the Family Court found that the CSEU attorneys' words and conduct created an implied attorney-client relationship and, therefore, a conflict of interest existed.

Conflict of Interest in Representation of Mentally Incapacitated Client and Sibling, NYSBA Committee on Professional Ethics, Formal Op. 986 (Oct. 25, 2013)

An attorney from Legal Services was retained to represent a severely incapacitated man to appeal the denial of certain Medicaid services. Until recently, the client's sister lived for and cared with him, but the client was recently moved to a hospital after accidentally setting fire to the sister's home. The client wants to return to the sister's home, but the sister is unwilling to accept him. The attorney believes that the best course of action is to appoint the sister so serve as the client's guardian, and inquired whether he can represent the sister in a petition for guardianship over her brother. The Committee concluded that a conflict of interest was present because the client's wishes regarding living arrangements are contrary to the sister's position. The conflict cannot be waived because of the client's diminished mental capacity.

Rule 1.9

In re Jalicia G., 41 Misc.3d 931, 971 N.Y.S.2d 831 (N.Y. Fam. Ct. Sept. 12, 2013)

In a child neglect proceeding filed by the Administration for Children's Services, the daughter was represented by an attorney from the Legal Aid Society ("LAS"). The mother filed a motion to disqualify her daughter's attorney because the mother was previously represented by an LAS attorney when the mother was a foster child. The court ruled that LAS attorneys who worked on the prior matter were disqualified from working on the current matter. However, the conflict was not imputed to LAS as a whole, because confidential information about the mother's case had not been shared with the daughter's attorney. The LAS computer system did not contain substantive information about cases more than five years old, and the files from the mother's case were in storage. Therefore, LAS could remain on the case as long as the mother's prior attorneys were screened out from the current matter.

Rule 1.10

D.B. v. M.B., 39 Misc.3d 1205(A), 969 N.Y.S.2d 802 (N.Y. Sup. Ct. Feb. 26, 2013)

The wife, who was the plaintiff in this divorce action, filed a motion to disqualify the husband's attorneys, "Law Firm A," because of their association with "Law Firm B." The wife had a consultation with Law Firm B, but due to the fact that the firm also represented her brother in his divorce case where some of the same assets were involved, Law Firm B declined the case. The two law firms regularly worked together on matrimonial cases as co-counsel. The court held that two forms working together as co-counsel to one another are not "associated" for the purposes of Rule 1.10(a) and, therefore, the motion to disqualify the husband's attorneys was denied.

Imputation of Conflicts Among Part-Time, Independently Operating Members of Public Defender Office, NYSBA Committee on Professional Ethics, Formal Op. 975 (July 19, 2013)

An attorney inquired about application of the conflict of interest rules to the public defender's office in a small upstate county, and whether the rules would permit one public defender to handle Family Court cases when another public defender has a conflict of interest. The public defender's office is small, with only an administrator, three part-time criminal and two part-time family court public defenders. Each of the public defenders, including the administrator, maintain their own private offices, and there is no overlap in the casework or sharing of information. The Committee found that, because a public defender's office is a "firm" as defined in the Rules of Professional Conduct, any conflict is imputed to other public defenders, even if they work in different offices and do not share information. Therefore, the Rules prevent the inquiring attorney from handling family court cases where another public defender had a conflict of interest, unless the conflict is properly waived.

Rule 1.15

In re Horowitz, 116 A.D.3d 47, 980 N.Y.S.2d 543 (2d Dep't 2014)

The Grievance Committee filed a petition against the respondent related to misconduct in a matrimonial action. The Referee appointed to conduct a hearing made the following findings. The respondent represented a client in a matrimonial matter, and entered into an addendum to the retainer agreement where a third party agreed to pay for the legal fees. The third party gave the respondent several post-dated checks, with jewelry as collateral. After the checks cleared, the third party sought return of the jewelry on several occasions, but the respondent did not cooperate. In another matrimonial action, the respondent charged the client a non-refundable fee, stating in the retainer agreement that $2,000 of the $3,000 would not be refunded even if the respondent did not handle the matter to conclusion. In the same matter, the respondent wrote to the client's estranged wife stating that the client wished to resume the marital relationship, which was not true. The court found based on these facts that the respondent violated Rules 1.5, 1.15, 4.1, and 8.4. The respondent also failed to provide a Statement of Client's Rights and

Responsibilities as required by 22 NYCRR 1400. The court suspended the respondent from the practice of law for three years.

In re Antonucci, 118 A.D.3d 110, 984 N.Y.S.2d 741 (4th Dep't 2014)

The Grievance Committee filed a petition against the respondent related to several client matters over two years and appointed a Referee to conduct a hearing. The charges included neglecting client matters, making misrepresentations to clients regarding the status of their matters, and failing to provide a written retainer agreement and itemized billing statements at regular intervals. In one case, the respondent failed to notify a client he had received settlement proceeds belonging to the client, and deposited only half into his trust account. He failed to respond to numerous inquiries from the client regarding the funds, and then lied to the client about why the proceeds were unavailable. The court found that the respondent violated Rules 1.3, 1.4, 1.5, 1.15, and 8.4. After considering mitigating factors, the court issued a one year suspension, which was stayed on condition that the respondent complies with the Rules of Professional Conduct.

Rule 1.18

Bernacki v. Bernacki, 47 Misc.3d 316, 1 N.Y.S.3d 761 (N.Y. Sup. Ct. Jan. 14, 2015)

In divorce proceedings, the husband sought to disqualify the wife's counsel on the grounds of conflict of interest. The husband never consulted with or spoke to the wife's attorney, but rather received a call from an administrator at the wife's attorney's firm and allegedly conducted an "intake interview" seeking information that had the potential to harm the husband's position in the case. The court denied the husband's motion, finding that there was no allegation that the attorney's law firm received confidential information that would create a conflict of interest or create duties to the husband under Rule 1.18.

Rule 2.4

Marital Mediation and Referrals, NYSBA Committee on Professional Ethics, Formal Op. 999 (Mar. 28, 2014)

An attorney working exclusively in the field of Marital Mediation with the stated goal "to help couples resolve problems and stay together" inquired whether it was ethical to refer couples to the attorney's spouse, who is a psychiatrist and has volunteered to provide two free counseling sessions to such couples. The Committee found that the attorney was serving as a third-party neutral under Rule 2.4 and is therefore not representing clients. Because the attorney is not representing clients, there is no personal interest conflict with the referral under Rule 1.7, which applies only to client representation.

Rule 3.1

Rajic v. George, 45 Misc.3d 1025, 994 N.Y.S.2d 292 (N.Y. Sup. Ct. Sept. 22, 2014)

In a case to establish the paternity of a minor child, the court admonished the putative father's attorneys for their unfounded arguments and delay tactics, which rose to the level of frivolity under Rule 3.1. The father's attorneys attempted to remove the case to federal court and attempted to meet the $75,000 amount in controversy requirement by falsely stating in the affidavit that the action was one for child support, when it was solely a paternity and custody case.

Rule 3.7

Lauder v. Goldhamer, 122 A.D.3d 908, 998 N.Y.S.2d 79 (2d Dep't 2014)

The plaintiff brought a legal malpractice action against her former law firm related to a matrimonial case and sought to set aside the retainer agreement. The plaintiff sought to disqualify the defendant law firm's attorney, arguing that he would have to testify in the case and would therefore be acting in two capacities. The court found that disqualification of the attorney was warranted under Rule 8.4, finding that the attorney's testimony would be necessary to resolve issues pertinent to the plaintiff's cause of action to set aside the retainer agreement. The attorney was the only attorney involved in executing the agreement, and allegedly made misrepresentations to the client that induced her to execute the agreement.

Rule 4.1

In re Horowitz, 116 A.D.3d 47, 980 N.Y.S.2d 543 (2d Dep't 2014)

The Grievance Committee filed a petition against the respondent related to misconduct in a matrimonial action. The Referee appointed to conduct a hearing made the following findings. The respondent represented a client in a matrimonial matter, and entered into an addendum to the retainer agreement where a third party agreed to pay for the legal fees. The third party gave the respondent several post-dated checks, with jewelry as collateral. After the checks cleared, the third party sought return of the jewelry on several occasions, but the respondent did not cooperate. In another matrimonial action, the respondent charged the client a non-refundable fee, stating in the retainer agreement that $2,000 of the $3,000 would not be refunded even if the respondent did not handle the matter to conclusion. In the same matter, the respondent wrote to the client's estranged wife stating that the client wished to resume the marital relationship, which was not true. The court found based on these facts that the respondent violated Rules 1.5, 1.15, 4.1, and 8.4. The respondent also failed to provide a Statement of Client's Rights and Responsibilities as required by 22 NYCRR 1400. The court suspended the respondent from the practice of law for three years.

Rule 8.4

In re Antonucci, 118 A.D.3d 110, 984 N.Y.S.2d 741 (4th Dep't 2014)

The Grievance Committee filed a petition against the respondent related to several client matters over two years and appointed a Referee to conduct a hearing. The charges included neglecting client matters, making misrepresentations to clients regarding the status of their matters, and failing to provide a written retainer agreement and itemized billing statements at regular intervals. In one case, the respondent failed to notify a client he had received settlement proceeds belonging to the client, and deposited only half into his trust account. He failed to respond to numerous inquiries from the client regarding the funds, and then lied to the client about why the proceeds were unavailable. The court found that the respondent violated Rules 1.3, 1.4, 1.5, 1.15, and 8.4. After considering mitigating factors, the court issued a one year suspension, which was stayed on condition that the respondent complies with the Rules of Professional Conduct.

In re Brooks, 122 A.D.3d 129, 992 N.Y.S.2d 436 (2d Dep't 2014)

The Grievance Committee filed a petition against the respondent alleging that he engaged in the practice of law during a two-year suspension for previous misconduct. After the effective date of his suspension, the respondent appeared in Family Court on behalf of a client, who had unexpectedly notified him that she was coming from abroad to appear in court. The respondent unsuccessfully tried to find another attorney to handle the court appearance at the last minute, but was unsuccessful. On the day of the appearance, the matter had to be adjourned, and nothing of substance occurred. The court found the respondent in violation of Rule 8.4 and issued an additional one year suspension.

In re Horowitz, 116 A.D.3d 47, 980 N.Y.S.2d 543 (2d Dep't 2014)

The Grievance Committee filed a petition against the respondent related to misconduct in a matrimonial action. The Referee appointed to conduct a hearing made the following findings. The respondent represented a client in a matrimonial matter, and entered into an addendum to the retainer agreement where a third party agreed to pay for the legal fees. The third party gave the respondent several post-dated checks, with jewelry as collateral. After the checks cleared, the third party sought return of the jewelry on several occasions, but the respondent did not cooperate. In another matrimonial action, the respondent charged the client a non-refundable fee, stating in the retainer agreement that $2,000 of the $3,000 would not be refunded even if the respondent did not handle the matter to conclusion. In the same matter, the respondent wrote to the client's estranged wife stating that the client wished to resume the marital relationship, which was not true. The court found based on these facts that the respondent violated Rules 1.5, 1.15, 4.1, and 8.4. The respondent also failed to provide a Statement of Client's Rights and Responsibilities as required by 22 NYCRR 1400.2. The court suspended the respondent from the practice of law for three years.

In re Horton, 115 A.D.3d 193, 979 N.Y.S.2d 918 (4th Dep't 2014)

The Grievance Committee filed a petition charging an attorney with neglecting a client matter and failing to provide a domestic relations client with a written retainer agreement and itemized billing statements at regular intervals. The Referee appointed to conduct a hearing found that the attorney had agreed to represent a client in a divorce action and agreed to prepare a qualified domestic relations order (QRDO). The attorney intermittently worked on the QRDO, but it took him four years to resolve the matter, and he issued no billing statements to the client. The attorney also failed to appear at a hearing before the Grievance Committee and failed to comply with a subpoena. The Grievance Committee found that the attorney had violated Rules 1.3, 8.4, and 22 NYCRR 1400. After considering mitigating factors, the court issued an order of censure.

Ohl v. Grievance Committee of Seventh Judicial Dist., 107 A.D.3d 106, 964 N.Y.S.2d 785 (4th Dep't 2013)

The Grievance Committee filed a petition against the respondent regarding misconduct in an action for divorce and the related sale of marital property. The Referee appointed to conduct a hearing found that the respondent deposited into his trust account the proceeds from the sale of the client's marital home. The respondent then disbursed a portion of those funds into a personal account, treating them as an advanced retainer fee in the divorce matter. For nearly two years, the respondent failed to respond to numerous requests from the client for an accounting of the net proceeds from the real estate transaction. The court concluded that this conduct constituted a violation of Rules 8.4 and 1.15. The court suspended the respondent from practicing law for two years.

In re Kellogg, 114 A.D.3d 177, 977 N.Y.S.2d 511 (4th Dep't 2013)

The Grievance Committee filed a petition charging an attorney with neglecting a client matter and engaging in conduct involving dishonesty or deceit with regard to several clients, including one client involved in a matrimonial matter. The Referee appointed to conduct a hearing determined that the respondent agreed to negotiate a separation agreement on behalf of a client and then, two years later, agreed to represent that client in a divorce action. The respondent filed a summons and complaint in the divorce action on his client's behalf, but thereafter failed to take action to complete the matter. The respondent also made misrepresentations to the client regarding the status of the matter. The Grievance Committee found that the respondent had violated Rules 1.1, 1.3, 1.4 and 8.4. After considering mitigating circumstances, the Grievance Committee suspended the respondent from the practice of law for one year.

22 NYCRR 1400

In re Horton, 115 A.D.3d 193, 979 N.Y.S.2d 918 (4th Dep't 2014)

The Grievance Committee filed a petition charging an attorney with neglecting a client matter and failing to provide a domestic relations client with a written retainer agreement and itemized billing statements at regular intervals. The Referee appointed to conduct a hearing found that the attorney had agreed to represent a client in a divorce action, and entered into a retainer agreement stating that he would issue billing statements at 60-day intervals, but failed to issue any billing statements in the matter. The attorney also agreed to prepare a qualified domestic relations order (QRDO) for the same client, but failed to execute a written retainer agreement for that separate representation. The attorney also failed to appear at a hearing before the Grievance Committee and failed to comply with a subpoena. The Grievance Committee found that the attorney had violated Rules 1.3, 8.4, and 22 NYCRR 1400. After considering mitigating factors, the court issued an order of censure.

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Lauder v. Goldhamer, 122 A.D.3d 908, 998 N.Y.S.2d 79 (2d Dep't 2014)

The plaintiff brought a legal malpractice action against her former law firm related to a matrimonial case and sought to set aside the retainer agreement. The plaintiff sought to disqualify the defendant law firm's attorney, arguing that he would have to testify in the case and would therefore be acting in two capacities. The court found that disqualification of the attorney was warranted under Rule 8.4, finding that the attorney's testimony would be necessary to resolve issues pertinent to the plaintiff's cause of action to set aside the retainer agreement. The attorney was the only attorney involved in executing the agreement, and allegedly made misrepresentations to the client that induced her to execute the agreement.

118 A.D.3d 110
Supreme Court, Appellate Division,
Fourth Department, New York.

Matter of David P. ANTONUCCI,
an Attorney, Respondent.
Grievance Committee of the
Fifth Judicial District, Petitioner.

May 2, 2014.

Synopsis
Background: Grievance Committee initiated attorney disciplinary proceeding.

Holding: The Supreme Court, Appellate Division held that attorney misconduct committed during time he suffered from depression warranted a one-year suspension from the practice of law, conditionally stayed.

Ordered accordingly.

**741 PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, and VALENTINO, JJ.

Opinion

PER CURIAM.

*111 Respondent was admitted to the practice of law by this Court on January 14, 1988, and maintains an office in Watertown. The Grievance Committee filed a petition alleging eight charges of misconduct against respondent, including neglecting client matters and making misrepresentations to clients regarding the status of their matters. Respondent filed an answer admitting the charges and setting forth matters in mitigation. Respondent thereafter appeared before this Court and was heard in mitigation.

Respondent admits that, from 2010 through 2012, he neglected several client matters, failed to respond to inquiries from several clients concerning their matters and made misrepresentations to certain clients regarding the status of their matters. Respondent additionally admits that he failed to provide a client in a domestic relations matter with a written retainer agreement and itemized billing statements at regular intervals and, in a separate matter, he failed to refund unearned legal fees to a client in a prompt manner. Respondent further admits that, in early 2012, he failed to notify a client that he had received settlement proceeds belonging to the client in the amount of $10,000. Respondent admits that he deposited only half of the settlement proceeds into his trust account and, for several months thereafter, he failed to respond to numerous **742 inquiries from the client regarding the funds. Respondent admits that, in July 2012, he remitted to the client funds in the amount of $5,000 and, at that time, the client was advised that the settlement proceeds were not available sooner because of a cash *112 flow problem at respondent's law office. Respondent admits that, in October 2012, he issued to the client a billing statement indicating that, in February 2012, respondent had remitted to himself funds in the amount of $5,000 in payment of outstanding legal fees in relation to the matter. Finally, respondent admits that he failed to respond promptly and completely to requests for information from the Grievance Committee during its investigation.

We conclude that respondent has violated the following Rules of Professional Conduct:

rule 1.3 (a) (22 NYCRR 1200.0)—failing to act with reasonable diligence and promptness in representing a client;

rule 1.3 (b) (22 NYCRR 1200.0)—neglecting a legal matter entrusted to him;

rule 1.4 (a)(2) (22 NYCRR 1200.0)—failing to consult with a client in a reasonable manner about the means by which the client's objectives are to be accomplished;

rule 1.4 (a)(3) (22 NYCRR 1200.0)—failing to keep a client reasonably informed about the status of a matter;

rule 1.4 (a)(4) (22 NYCRR 1200.0)—failing to comply in a prompt manner with a client's reasonable requests for information;

rule 1.5 (b) (22 NYCRR 1200.0)—failing to communicate to a client within a reasonable time the scope of the representation and the basis or rate of the fee for which the client will be responsible;

rule 1.5 (d)(5)(ii) (22 NYCRR 1200.0)—entering into an arrangement for, charging or collecting a fee in a domestic relations matter without a written retainer agreement signed

by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement;

rule 1.15 (a) (22 NYCRR 1200.0)—misappropriating client funds and commingling client funds with personal funds;

rule 1.15 (c)(1) (22 NYCRR 1200.0)—failing to notify a client in a prompt manner of the receipt of funds, securities, or other properties in which the client has an interest;

rule 1.15 (c)(4) (22 NYCRR 1200.0)—failing to pay or deliver to a client in a prompt manner as requested by the client the funds, securities or other properties in his possession that the client is entitled to receive;

rule 8.4 (c) (22 NYCRR 1200.0)—engaging in conduct involving dishonesty, deceit or misrepresentation;

***113** rule 8.4 (d) (22 NYCRR 1200.0)—engaging in conduct that is prejudicial to the administration of justice; and

rule 8.4 (h) (22 NYCRR 1200.0)—engaging in conduct that adversely reflects on his fitness as a lawyer.

We have considered, in determining an appropriate sanction, that respondent has received three letters of caution and was previously censured by this Court (*Matter of Antonucci,* 34 A.D.3d 133, 821 N.Y.S.2d 500). We have additionally considered the matters submitted by respondent in mitigation, including his statement that the misconduct occurred at a time when he was suffering from depression for which he has since sought treatment. We have further considered that respondent has engaged a mentor attorney, who intends to monitor respondent's law practice and to make recommendations to prevent similar misconduct in the future. Finally, we have considered respondent's expression of remorse for the misconduct. ****743** Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be suspended from the practice of law for a period of one year and until further order of the Court. We direct, however, that the period of suspension be stayed on condition that respondent, during that period, shall comply with the statutes and rules regulating attorney conduct and that he shall not be the subject of any further action, proceeding or application for discipline or sanctions in any court. Furthermore, in accordance with the terms of the order entered herewith, respondent is to submit to the Grievance Committee quarterly reports from his medical provider confirming that he is completing any recommended mental health treatment program and continues to have the capacity to practice law (*see Matter of Armer,* 91 A.D.3d 200, 206, 939 N.Y.S.2d 204). In addition, we direct that respondent during the period of suspension submit to the Grievance Committee quarterly reports from his mentor attorney confirming that respondent is continuing his relationship with the mentor attorney and implementing all recommendations that have been made by the mentor attorney to improve the administration of respondent's law practice and to prevent future misconduct. Any failure to meet the aforementioned conditions shall be reported by the Grievance Committee to this Court, whereupon the Grievance Committee may move before this Court to vacate the stay of respondent's suspension.

***114** Order of suspension entered.

Parallel Citations

118 A.D.3d 110, 984 N.Y.S.2d 741, 2014 N.Y. Slip Op. 03163

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126 A.D.3d 427
Supreme Court, Appellate Division,
First Department, New York.

Kristina M. ARMSTRONG, Plaintiff–Respondent,
v.
BLANK ROME LLP, et al., Defendants–Appellants.

March 3, 2015.

Attorneys and Law Firms

Hinshaw & Culbertson LLP, New York (Philip Touitou of counsel), for appellants.

Sack & Sack, LLP, New York (Eric R. Stern of counsel), for respondent.

Opinion

***427** Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 10, 2014, which, to the extent appealed from, denied defendants' motion to dismiss the Judiciary Law § 487 claim and to strike certain allegations in the complaint, unanimously affirmed, with costs.

The complaint states a claim for violation of Judiciary Law § 487 with sufficient particularity (see *Flycell, Inc. v. Schlossberg LLC,* 2011 WL 5130159, *5, 2011 U.S. Dist LEXIS 126024 [S.D.N.Y.2011]; *Greene v. Greene,* 47 N.Y.2d 447, 451, 418 N.Y.S.2d 379, 391 N.E.2d 1355 [1979]). Specifically, the complaint alleges that defendants concealed a conflict of interest that stemmed from defendant law firm's attorney-client relationship with Morgan Stanley while simultaneously representing plaintiff in divorce proceedings against her ex-husband, a senior Morgan Stanley executive, who participated in Morgan Stanley's decisions to hire outside counsel (*see* New York Rules of Professional ***428** Conduct [22 NYCRR 1200.0] rule 1.7[a]). Contrary to defendants' argument, applying a liberal construction to the allegations in the complaint (*see e.g. Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]), plaintiff identifies the nature of the conflict as stemming from defendants' interest in maintaining and encouraging its lucrative relationship with Morgan Stanley and the impact of that interest on defendants' judgement in its representation of plaintiff in the divorce proceedings (*see* New York Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7[a]).

Further, the complaint alleges numerous acts of deceit by defendants, committed in the course of their representation of plaintiff in her matrimonial action. Additionally, the complaint sufficiently alleges that the individual defendants knew of but did not disclose defendant law firm's representation of Morgan Stanley to plaintiff, and it details the calculations of her damages.

The court did not improvidently deny defendants' motion to strike allegations in the complaint regarding the conflict of interest, and it correctly found that the allegations complained of are relevant to the legal malpractice claim (*see Kaufman & Kaufman v. Hoff,* 213 A.D.2d 197, 199, 624 N.Y.S.2d 107 [1st Dept.1995]). Although an order denying a motion to strike scandalous or prejudicial matter from a pleading is not appealable as of right (*see* CPLR 5701[b][3]), we nevertheless reach this issue since plaintiff did not raise the issue of appealability (*see Chowaiki & Co. Fine Art Ltd. v. Lacher,* 115 A.D.3d 600, 982 N.Y.S.2d 474 [1st Dept.2014]).

ACOSTA, J.P., ANDRIAS, SAXE, DeGRASSE, RICHTER, JJ., concur.

Parallel Citations

126 A.D.3d 427, 2015 N.Y. Slip Op. 01755

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47 Misc.3d 316
Supreme Court, Monroe County, New York.

John E. BERNACKI, Plaintiff,
v.
Julie M. BERNACKI, Defendant.

Jan. 14, 2015.

Synopsis
Background: In divorce proceedings, husband moved to disqualify wife's counsel.

[Holding:] The Supreme Court, Kenneth R. Fisher, J., held that husband was not a prospective client.

Motion denied.

Attorneys and Law Firms

**762 Fero & Ingersoll LLP, (Matthew J. Fero, Esq., of counsel), Rochester, Attorney for Plaintiff.

Davidson Fink LLP, (Gregory J. Mott, Esq., of counsel), Rochester, Attorney for Defendant.

Opinion

KENNETH R. FISHER, J.

*317 This is plaintiff's motion for an order disqualifying defendant's counsel, Gregory J. Mott, Esq., on the grounds of conflict of interest as defined in New York State Rule of Professional Conduct 1.18, the so-called prospective client rule. The motion is palpably without merit.

"Rule 1.18(c) of the New York Rules of Professional Conduct ... prohibits a lawyer who possess *confidential information* learned during a consultation with a prospective client from representing a party with interests *materially adverse* to those of a prospective client in the *same or a substantially related matter* if the attorney received information from the prospective client that could be *significantly harmful* to that person in the matter, unless ... [certain exceptions not here present are applicable]." N.Y. State 960, 2013 WL 1281261 (N.Y.S.B.A.Comm.Prof.Eth.)(emphasis in original). As the elements of interests "materially adverse" and the "same or a substantially related matter" are clearly met on this application and are not disputed, the court turns to the other elements of the motion which are "disputed."

**763 [1] [2] [3] When considering the putatively "disputed" elements of the motion, guidance from a case decided last week by the First Department must be kept in focus. "A party has a right to be represented by counsel of its choice, and any restrictions on that right must be carefully scrutinized. This right is to be balanced against a potential client's right to have confidential disclosures made to a prospective attorney subject to the protections afforded by an attorney's fiduciary obligation to keep confidential information secret (*see* New York Rules of Professional Conduct [*318 22 NYCRR 1200.0] Rule 1.18." *Mayers v. Stone Castle Partners, LLC,* ——A.D.3d ——, ——, 1 N.Y.S.3d 58, 2015 N.Y.App. Div. LEXIS 258 (Jan. 8, 2015). "[T]he prospective client is entitled to obtain the attorney's disqualification only if it is shown that the information related in the consultation "could be significantly harmful" to him or her in the same or substantially related matter (*id.,* Rule 1.18[c])." *Id.* —— A.D.3d at ——, 1 N.Y.S.3d 58. "Courts should also examine whether a motion to disqualify, made during ongoing litigation, is made for tactical purposes, such as to delay litigation and deprive an opponent of quality representation." *Id.* —— A.D.3d at ——, 1 N.Y.S.3d 58.

[4] In this case, Mr. Mott was not retained by plaintiff and plaintiff does not assert that he ever consulted with or spoke to Mr. Mott. Plaintiff asserts that, after contacting defense counsel's law firm, he "received a call from one of Mr. Mott's administrators or paralegal which amounted to an intake interview of sorts," wherein he, without elaboration or specification, "exchanged specific and detailed information with Mr. Mott's staff some of which has the potential to be substantially harmful to my position in the current divorce matter." Affidavit of John E. Bernacki, December 1, 2014, ¶ 3. The staff member in Mr. Mott's office is not named by plaintiff. Nor does plaintiff provide the court with any information, or even a general description, of the nature of the information exchanged. Plaintiff nevertheless contends in conclusory fashion that this information has potential to be substantially harmful to his position.

Defendant presents the affidavit of Patricia Antes, Mr. Mott's legal assistant. She avers that she never spoke to John Bernacki, but took a voice mail from him regarding an inquiry as to legal representation by Mr. Mott. She avers that she

subsequently left two voice mails with Mr. Bernacki, the first stating that Mr. Mott could not speak to him because Mr. Mott represented defendant, and the second voice mail, left on Mr. Mott's instructions, informed Mr. Bernacki that Mr. Mott represented a litigant in a matter before plaintiff in Pittsford Town Court. Ms. Antes avers that she never spoke to plaintiff, never conducted any intake interview, and the only information she received from him was his name and telephone number.

Plaintiff's motion must be denied. There is no question here that the parties' interests are adverse. However, in order to disqualify Mr. Mott, Mr. Mott must have received confidential ***319** information and "have received information from the prospective client that could be significantly harmful to that person in the matter." No information is presented in this motion that would permit the court to conclude that the information allegedly revealed was of the type referred to in Rule 1.18. Plaintiff's reference to the information as "confidential," without more, is insufficient. *Jamaica Public Service Co. Ltd. v. AIU Ins. Co.*, 92 N.Y.2d 631, 638, 684 N.Y.S.2d 459, 707 N.E.2d 414 (1998)("Allowing a party seeking disqualification to meet its burden by generalized assertions of "access to confidences and secrets" would ****764** both make it difficult, if not impossible, to test those assertions and encourage the strategic use of such motions.... While a movant need not actually spell out the claimed secrets and confidences in order to prevail, it must at a minimum provide the motion court with information sufficient to determine whether there exists a reasonable probability that DR 5—108(A)(2) would be violated."); *Sullivan v. Cangelosi,* 84 A.D.3d 1486, 1487, 923 N.Y.S.2d 737 (3d Dept.2011)("defendant failed to establish that he shared any information with Carroll during the telephone conversation that could be considered confidential"). Similarly, the court cannot conclude that the information "could be significantly harmful" to plaintiff in this matter as the court is told no more about the information other than it was "specific and detailed." *Gustafson v. Dippert,* 68 A.D.3d 1678, 1679, 891 N.Y.S.2d 842 (4th Dept.2009)("Supreme Court properly refused to conduct a hearing on the cross motion inasmuch as mere conclusory assertions that there is a conflict of interest are insufficient to warrant a hearing")(quoting *Olmoz v. Town of Fishkill,* 258 A.D.2d 447, 448, 684 N.Y.S.2d 611 (2d Dept.1999)); *Mayers v. Stone Castle Partners, LLC,* —— A.D.3d at ——, 1 N.Y.S.3d 58, 2015 N.Y.App. Div. LEXIS 258 (disqualification is not warranted because the conveyed information did not have the potential to be significantly harmful).

Attached to Mr. Fero's affidavit at Exhibit B, is a letter to Mr. Mott from Mr. Fero, dated November 10, 2014, wherein Mr. Fero alleges that plaintiff revealed "financial information" to Mr. Mott's office. Bernacki does not make such a claim in his supporting affidavit, however. Mr. Fero has no personal knowledge of this matter and this letter has no evidentiary or substantive value in determining the issue here. Similarly, Mr. Fero's assertion at oral argument that there were four separate contacts with defense counsel's firm has no support in the moving papers and cannot be considered.

***320** But there is an even more overriding consideration present here. Model Rule 1.18 incorporates an element of good faith, which plaintiff's application on its face shows is not present. Since *In re American Airlines, Inc.,* 972 F.2d 605 (5th Cir.1992), courts have carved out of the prospective client doctrine situations in which parties moving for disqualification "were motivated primarily by a desire not to secure representation from ... [the lawyer in question], but to ensure that ... [the lawyer] would not, or could not, represent ... [the current client]." *Id.* 972 F.2d at 613. The A.L.I. *Restatement (Third) of the Law Governing Lawyers* § 15, Comment *c* (2000) incorporates this element of good faith in its prospective client rule. *Id.* (citing *American Airlines* "[o]n the relevance of a prospective client's disclosure allegedly intended to *produce* disqualification")(emphasis supplied). So does, emphatically, New York's Model Rule 1.18(e), which exempts any prospective client from the protection of the Rule who "communicates information unilaterally to a lawyer" without fairly expecting it to result in a retainer (subpar.1), and one who "communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter" (subpar.2)(such a person "is not a prospective client within the meaning of paragraph (a)").[1] The N.Y.S.B.A. approved ****765** comment to Model Rule 1.18 adds that "[a] lawyer may not encourage or induce a person to communicate with a lawyer or lawyers for that improper ***321** purpose." (citing MR 3.1(b)(2), 4.4, and 8.4(a)).[2]

Yet that is precisely what plaintiff did in this matter. On September 23, 2014, in an e-mail to his wife entitled, "Attorneys Which Whom I Have Sought Legal Advice," plaintiff listed twelve of the most experienced matrimonial attorneys in the county, including Mr. Mott, who, plaintiff

opined to his wife, would be unavailable to her in the action ("I believe that each attorney on the list would conflict themselves out or my attorney would move to have them replaced as I have given them confidential information"). Plaintiff proceeded in that e-mail to advise his wife of certain problems with other attorneys, and ultimately advised her to contact "my friend," Justice Dollinger's Law Clerk for "advice and guidance."

The brazenness of this is astonishing, but it establishes beyond peradventure plaintiff's purpose in contacting these experienced matrimonial attorneys, viz., that he contacted them "for the purpose of disqualifying the lawyer from handling" his wife's defense of the action. Model Rule 1.18(e)(2). Indeed, if the affidavits submitted by defendant are credited, leaving voice mail messages on a law firm's telephone recorder, purportedly containing confidential information, is just the sort of "unilatera[l]" communication sought to be addressed by the carve-out in Model Rule 1.18(e)(1).

Accordingly, plaintiff's motion is denied. *Martin v. Martin,* 224 A.D.2d 597, 638 N.Y.S.2d 674 (2d Dept.1996). *Burton v. Burton,* 139 A.D.2d 554, 527 N.Y.S.2d 53 (2d Dept.1988)(contrary result where financial information imparted during an actual two way discussion and where "there is no indication that the motion to disqualify was made for mere tactical reasons or that the defendant deliberately brought about the present predicament"). I would only add that the conclusory nature of plaintiff's showing in his motion papers wholly fails to establish, nor does it tend to show, that "the conveyed information ... ha[d] the potential to be significantly harmful to ... [plaintiff] in the matter from which he seeks to disqualify counsel." *Mayers v. Stone Castle Partners, LLC,* — A.D.3d at ——, 1 N.Y.S.3d 58.

SO ORDERED.

Parallel Citations

47 Misc.3d 316, 2015 N.Y. Slip Op. 25004

Footnotes

1 As well summarized by a commentator explaining the difference between New York's version of MR 1.18 and that of the ABA approved version:

> In this regard, New York is at the forefront (instead of lagging behind) in terms of addressing what has long been deplored as an unethical practice, yet one which is not strictly prohibited by the Model Rules: a client shopping her case around town to preclude all the qualified lawyers from taking her opponent's case. This is especially relevant in family law matters, or in smaller communities where there are fewer lawyers available to handle client matters. It is an oft-told story—a husband and wife are divorcing, and one of them has an initial consultation with all of the best divorce lawyers in town, thus conflicting those lawyers out from representing the other spouse in the divorce. This practice will not be permitted under the new version of New York's Rules of Professional Conduct.
>
> Lydia Arnold Turnipseed, *2007–2008 Survey of New York Law: PROFESSIONAL RESPONSIBILITY,* 59 Syracuse L.Rev. 987, 990 (2009).

2 It is to be pointed out that plaintiff is an experienced lawyer, and a respected town justice, and must be assumed to be intimately familiar with the consequences of consulting with multiple matrimonial attorneys in the fashion disclosed by his e-mail to his wife.

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122 A.D.3d 129
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Thomas C.
BROOKS, Jr., a suspended attorney.
Grievance Committee for the Second, Eleventh,
and Thirteenth Judicial Districts, petitioner;
Thomas C. Brooks, Jr., respondent.

Sept. 24, 2014.

DISCIPLINARY PROCEEDING instituted by the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts. By decision and order on application of this Court dated April 26, 2013, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against the respondent based upon the allegations set forth in a petition dated November 13, 2012. The respondent was directed to submit an answer to the petition, and the issues raised were referred to the Honorable Stella Schindler, as a Special Referee, to hear and report. By opinion and order of this Court dated April 3, 2012, the respondent was suspended from the practice of law for two years, commencing May 3, 2012, and continuing until further order of this Court, as a result of a previously authorized disciplinary proceeding (*see Matter of Brooks,* 95 A.D.3d 136, 941 N.Y.S.2d 234). The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on October 22, 2003.

Attorneys and Law Firms

Diana Maxfield Kearse, Brooklyn, N.Y. (Sharon Gursen Ades of counsel), for petitioner.

Opinion

PER CURIAM.

***130** The Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts served the respondent with a petition dated November 13, 2012, which contained two charges of professional misconduct. Following a preliminary hearing on June 12, 2013, and a hearing on August 16, 2013, the Special Referee issued a report sustaining both charges. The Grievance Committee now moves to confirm the Special Referee's report and to impose such discipline upon the respondent as this Court deems appropriate. The respondent has neither submitted a response to the motion nor requested additional time in which to do so.

Charge one alleges that the respondent engaged in the practice of law while under an order of suspension, in violation of rule ****437** 8.4(c), (d), and (h) of the Rules of Professional Conduct (22 NYCRR 1200.0). By opinion and order of this Court dated April 3, 2012, the respondent was suspended from the practice of law for a period of two years, commencing on May 3, 2012, and continuing until further order of this Court. On or about April 16, 2012, the respondent was personally served with a copy of the opinion and order, as well as a copy of the Court's rules governing the conduct of disbarred, suspended, or resigned attorneys (*see* 22 NYCRR 691.10). On or about May 18, 2012, the respondent appeared in Family Court, Kings County, as an attorney, for a party in a contested custody and visitation matter.

***131** Charge two alleges that the respondent failed to file an Affidavit of Compliance, in violation of rule 8.4(d) of the Rules of Professional Conduct (22 NYCRR 1200.0). The suspension order directed that the respondent comply with 22 NYCRR 691.10. Pursuant to 22 NYCRR 691.10(f), the respondent was required to file an Affidavit of Compliance within 10 days of the effective date of his suspension. He failed to do so.

Based on the evidence adduced, and the respondent's admissions, the Special Referee properly sustained both charges. Accordingly, the Grievance Committee's motion to confirm the Special Referee's report is granted.

In mitigation, the respondent testified at the disciplinary hearing that he had anticipated a suspension in connection with the prior disciplinary proceeding, he had started to wind down his practice, and he already had begun training for a new line of work. The respondent admitted that he knowingly appeared for a client on May 18, 2012, after the effective date of his suspension. The respondent asserted that he had formerly represented the client, and the client unexpectedly notified him that she was coming from abroad for an appearance in Family Court. The respondent tried to arrange for another attorney to handle the court appearance, but was unsuccessful. So as to avoid the trip being a waste for the client, whom the respondent knew was of little means, the respondent appeared on her behalf under the belief that a settlement had been reached and all that was needed was for the court to so-order it. As it turned out, on the day of

the appearance, the matter had to be adjourned and nothing of substance occurred.

In determining the appropriate measure of discipline to impose, we have taken into consideration the aforementioned mitigating circumstances, including the fact that the respondent did not act for personal gain, and the solitary nature of his misconduct. The respondent, nonetheless, knowingly violated this Court's opinion and order dated April 3, 2012. Under these circumstances, the respondent is suspended from the practice of law for a period of one year.

ORDERED that the petitioner's motion to confirm the Special Referee's report is granted; and it is further,

ORDERED that the respondent, Thomas C. Brooks, Jr., a suspended attorney, is suspended from the practice of law for a period of one year, effective immediately, and continuing until further order of this Court. The respondent shall not apply for reinstatement earlier than six months prior to the expiration ***132** date of his suspension. In such application, the respondent shall furnish satisfactory proof (1) that during the said period he refrained from practicing or attempting to practice law, (2) that he has fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10), (3) that he has complied with the applicable continuing legal ****438** education requirements of 22 NYCRR 691. 11(c), and (4) that he has otherwise properly conducted himself; and it is further,

ORDERED that the respondent, Thomas C. Brooks, Jr., a suspended attorney, shall continue to comply with this Court's rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until such further order of this court, the respondent, Thomas C. Brooks, Jr., a suspended attorney, shall continue to desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

ORDERED that if the respondent, Thomas C. Brooks, Jr., a suspended attorney, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency, and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10(f).

ENG, P.J., MASTRO, RIVERA, SKELOS and AUSTIN, JJ., concur.

Parallel Citations

122 A.D.3d 129, 992 N.Y.S.2d 436 (Mem), 2014 N.Y. Slip Op. 06310

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125 A.D.3d 589
Supreme Court, Appellate Division,
Second Department, New York.

Ilan COHEN, appellant,
v.
Tamara COHEN, respondent.

Feb. 4, 2015.

Synopsis

Background: Husband brought action for a divorce and ancillary relief. The Supreme Court, Nassau County, Janowitz, J., denied husband's motion to disqualify a law firm from representing wife. Husband appealed.

[Holding:] The Supreme Court, Appellate Division, held that appearance of a conflict of interest was alone sufficient to warrant disqualification of law firm from representing wife.

Reversed.

Hinds–Radix, J., dissented and filed memorandum.

Attorneys and Law Firms

****605** Jeffrey S. Schecter & Associates, P.C., Garden City, N.Y., for appellant.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP (Glenn S. Koopersmith, Garden City, N.Y., of counsel), for respondent.

THOMAS A. DICKERSON, J.P., SANDRA L. SGROI, SYLVIA O. HINDS–RADIX, and HECTOR D. LaSALLE, JJ.

Opinion

***589** In an action for a divorce and ancillary relief, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Janowitz, J.), dated September ***590** 26, 2012, as denied his motion to disqualify the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP, from representing the defendant in this action.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and the plaintiff's motion is granted.

****606** In this action for a divorce and ancillary relief, the plaintiff moved to disqualify the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP (hereinafter the law firm), from representing the defendant. In support of his motion, the plaintiff asserted that, in or about November 2010, he met with Steve Eisman, an attorney from the law firm, for a consultation, as he was considering divorce at that time. The defendant disputes the plaintiff's claim in this regard. According to Eisman, although the plaintiff did schedule an appointment to meet with him, the plaintiff canceled the meeting. It is undisputed, however, that the plaintiff's brother met with Eisman in July 2010. The plaintiff claims, and his brother avers, that, at this meeting, the plaintiff's brother shared with Eisman detailed confidential information concerning various businesses the plaintiff and his brother own and in which they share common interests. Eisman acknowledges that he discussed with the plaintiff's brother the "surface details" concerning, among other things, the plaintiff's brother's employment.

[1] **[2]** **[3]** The disqualification of an attorney is generally a matter resting within the sound discretion of the court (*see Albert Jacobs, LLP v. Parker,* 94 A.D.3d 919, 919, 942 N.Y.S.2d 597). However, " 'doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety' " (*Mineola Auto., Inc. v. Millbrook Props., Ltd.,* 118 A.D.3d 680, 680–681, 986 N.Y.S.2d 354, quoting *Seeley v. Seeley,* 129 A.D.2d 625, 627, 514 N.Y.S.2d 110). Here, the Supreme Court should have granted the plaintiff's motion to disqualify the law firm from representing the defendant in this action. Under the particular circumstances of this case, given the undisputed evidence of the consultation between Eisman and the plaintiff's brother, as well as the nature of the matters disclosed and the resulting substantial risk of prejudice, the very appearance of a conflict of interest was alone sufficient to warrant disqualification of the law firm as a matter of law without an evidentiary hearing (*see Galanos v. Galanos,* 20 A.D.3d 450, 452, 797 N.Y.S.2d 774; *Sirianni v. Tomlinson,* 133 A.D.2d 391, 392, 519 N.Y.S.2d 385), notwithstanding the existence of a factual dispute as to whether Eisman met with the plaintiff.

DICKERSON, J.P., SGROI, and LaSALLE, JJ., concur.

HINDS–RADIX, J., dissents and votes to affirm the order insofar ***591** as appealed from, with the following memorandum:

"Whether to disqualify an attorney is a matter which lies within the sound discretion of the court" (*Matter of Madris v. Oliviera,* 97 A.D.3d 823, 825, 949 N.Y.S.2d 696; *see Midwood Chayim Aruchim Dialysis Assoc., Inc. v. Brooklyn Dialysis, LLC,* 82 A.D.3d 1177, 919 N.Y.S.2d 397). In the instant case, it cannot be said that the denial of the plaintiff's motion to disqualify the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP (hereinafter the law firm), from representing the defendant was an improvident exercise of discretion.

The plaintiff moved to disqualify the law firm from representing the defendant on the ground that he and his brother each engaged in a preliminary consultation with Steve Eisman, an attorney from the law firm, about whether they should hire the law firm to prosecute divorce actions on their behalf. However, the plaintiff was unable to substantiate his allegation that he consulted with Eisman. Eisman stated in an affirmation that the plaintiff scheduled an appointment for a consultation and then canceled it. Eisman further asserted ****607** that the plaintiff "had consulted with various top matrimonial attorneys in the area to prevent [the defendant] from hiring an attorney."

Although it is undisputed that the plaintiff's brother consulted with Eisman, Eisman claims that only "surface details" relating to the brother's marriage, residence, employment, and children were disclosed at that conference. The plaintiff's brother claims that he shared detailed information concerning the day-to-day operations of the businesses which he operated jointly with the plaintiff, illustrated by a diagram, described how the businesses earned a profit, and provided his opinion as to the value of the businesses. However, he never retained the law firm as his counsel.

"Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter" (*Tekni–Plex, Inc. v. Meyner & Landis,* 89 N.Y.2d 123, 131, 651 N.Y.S.2d 954, 674 N.E.2d 663). Thus, a party seeking to disqualify an attorney for an opposing party on the ground of a conflict of interest has the burden of demonstrating three elements: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse (*see id.* at 131, 651 N.Y.S.2d 954, 674 N.E.2d 663; *Mediaceja v. Davidov,* 119 A.D.3d 911, 989 N.Y.S.2d 892; *Campbell v. McKeon,* 75 A.D.3d 479, 905 N.Y.S.2d 589; ***592** Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9). Since the "substantially related" standard is now the norm (*see Sessa v. Parrotta,* 116 A.D.3d 1029, 985 N.Y.S.2d 128; *Reem Contr. Corp. v. Resnick Murray St. Assoc.,* 43 A.D.3d 369, 843 N.Y.S.2d 3; *Medical Capital Corp. v. MRI Global Imaging, Inc.,* 27 A.D.3d 427, 812 N.Y.S.2d 118), the fact that an attorney has learned of some of a former client's financial information and corporate structure in prior litigation is not in and of itself a basis for disqualification (*see* NYS Comm. on Prof Ethics Bar Assn. Op. 628; *see also Abselet v. Satra Realty, LLC,* 85 A.D.3d 1406, 1407, 926 N.Y.S.2d 178).

In *Solow v. Grace & Co.,* 83 N.Y.2d 303, 312, 610 N.Y.S.2d 128, 632 N.E.2d 437, the Court of Appeals rejected its prior ruling in *Cardinale v. Golinello,* 43 N.Y.2d 288, 296, 401 N.Y.S.2d 191, 372 N.E.2d 26, that "the avoidance of even an appearance of impropriety [is] so important that any harm associated with disqualification was minimal when compared with furthering those goals." This Court has since held that, "[a]bsent actual prejudice or a substantial risk thereof, the appearance of impropriety alone is not sufficient to require disqualification of an attorney" (*Matter of Lovitch v. Lovitch,* 64 A.D.3d 710, 711, 884 N.Y.S.2d 430; *see Christensen v. Christensen,* 55 A.D.3d 1453, 867 N.Y.S.2d 580; *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.,* 31 A.D.3d 144, 150, 816 N.Y.S.2d 424).

In *Galanos v. Galanos,* 20 A.D.3d 450, 452, 797 N.Y.S.2d 774, relied upon by my colleagues in the majority, this Court ruled that "the very appearance of a conflict of interest in this case was alone sufficient to warrant disqualification." However, in that case, the plaintiff in a matrimonial action was seeking to set aside transfers of assets from the defendant to her father. The plaintiff's attorney previously represented the defendant's father "for a number of years" (*id.* at 451, 797 N.Y.S.2d 774) and therefore had access to confidential information concerning the father's assets. Thus, there was a significant attorney-client relationship between the plaintiff's ****608** attorney and the father, who was a necessary and adverse party to the litigation.

In the instant case, there was no evidence of a prior attorney-client relationship between the law firm and either the

plaintiff or his brother. A preliminary consultation between an attorney and an adverse party regarding whether the attorney should be hired to represent the adverse party in a matter which bears a substantial relationship to the present litigation may be the basis for disqualification (*see Mineola Auto., Inc. v. Millbrook Props. Ltd.,* 118 A.D.3d 680, 986 N.Y.S.2d 354; *Leisman v. Leisman,* 208 A.D.2d 688, 617 N.Y.S.2d 807; *Seeley v. Seeley,* 129 A.D.2d 625, 514 N.Y.S.2d 110). However, the plaintiff's assertions in that regard are insufficient to warrant disqualification. There is no evidence that ***593** the information provided by the brother was confidential, or that the brother's interests are materially adverse to those of the defendant (*see Gabel v. Gabel,* 101 A.D.3d 676, 955 N.Y.S.2d 171; *Bongiasca v. Bongiasca,* 254 A.D.2d 217, 679 N.Y.S.2d 132; *Matter of Nomura Sec. Intl. v. Hu,* 240 A.D.2d 249, 658 N.Y.S.2d 608; *Petrossian v. Grossman,* 219 A.D.2d 587, 631 N.Y.S.2d 187; *cf. Sullivan v. Cangelosi,* 84 A.D.3d 1486, 923 N.Y.S.2d 737; *Sirianni v. Tomlinson,* 133 A.D.2d 391, 519 N.Y.S.2d 385).

Accordingly, the plaintiff's motion to disqualify the law firm from representing the defendant was properly denied.

Parallel Citations

125 A.D.3d 589, 2015 N.Y. Slip Op. 00839

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39 Misc.3d 1205(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Supreme Court, Westchester County, New York.

D.B., Plaintiff,
v.
M.B., Defendant.

Feb. 26, 2013.

Opinion

LINDA CHRISTOPHER, J.

*1 The following papers numbered 1–10 [1] were considered in connection with plaintiff's motion brought by Order to Show Cause:

In this matrimonial action the plaintiff moves for an order disqualifying M. D., Esq., the law firm of B. & L. and the law firm of G. & C. from representing defendant, M. B., in this action, based upon his claim that B. & L. is associated with the firm of G. & C. Defendant, through counsel, opposes the motion, arguing that the relationship between the firms does not constitute an association in accordance with the Rules of Professional Conduct.

Procedural History

Defendant had initially retained M. D., Esq. to represent her in this action. She subsequently discharged Mr. D. and retained the K. Firm, which she also discharged. In or about April 2012, defendant retained B. C., Esq., whom she discharged on January 11, 2013, ten days prior to the trial scheduled in this matter. On the day of trial, defendant appeared *pro se,* at which time the Court afforded defendant the opportunity to retain counsel. Defendant then retained Mr. D., who enlisted the services of A. B., Esq., a member of the firm B. & L., LLP, to act as co-counsel with him.

Plaintiff was originally represented in this matter by E. G., Esq. from October 2009 through March 2012, at which time he sought new counsel. Plaintiff then contacted J. G., Esq., of G. & C., P.C., and alleges that over a one to two month period, he spoke with Mr. G. a total of three times, during which times plaintiff discussed the facts and issues surrounding the instant divorce case. Plaintiff claims two of the conversations took place over 10 to 15 minutes, and the third conversation was much shorter. Plaintiff wrote that during the third conversation, Mr. G. advised plaintiff that he realized he had a conflict of interest since he had already afforded defendant a consultation on this same divorce matter. According to plaintiff, Mr. G. had given the defendant the consultation prior to realizing he had a conflict of interest in representing her, based on the fact that he had represented plaintiff's brother in his divorce action. [2] Subsequently, plaintiff retained his current counsel.

Argument

Plaintiff argues that the conflict of interest which prohibits Mr. G. from providing representation to defendant, extends to Mr. B. and his firm based on plaintiff's claim that the law firms of G. & C. and B. & L. have maintained an "association" together, as that term is used in the Rule of Professional Conduct. Plaintiff's counsel claims that over the last few years, the firms of G. & C. and B. & L. routinely and frequently appear together as co-counsel or "of counsel" to one another in matrimonial actions in the counties of Westchester and Putnam. Plaintiff's counsel asserts that there have been at least 8 matters within the past 18 months wherein Mr. G. and Mr. L. have appeared together. [3] Plaintiff's counsel states that Mr. G. was in this "association" with B. & L. at the time plaintiff and defendant had their consultations with him on this divorce matter, and that said "association" still continued to exist as of January 11, 2013. Plaintiff contends that by virtue of Mr. D. engaging Mr. B. as co-counsel, Mr. D. is infected with the same conflict as G. & C. and B. & L. Plaintiff claims that Mr. D.'s association with Mr. B., while Mr. B.'s firm is associated with Mr. G., who admittedly could not represent defendant in this action, renders Mr. D. unable to represent defendant in this matter.

*2 Plaintiff also asserts that he does not consent to any of the attorneys who are conflicted from this matter due to their relationship with Mr. G., providing representation to defendant. He claims that defendant's decision to re-hire Mr. D., her first attorney, whom she had discharged, is an attempt by defendant to garner information about his brother and him, and is causing him apprehension.

With regard to the asserted conflict related to the firm's "association" with Mr. G.'s firm, Mr. L. and Mr. B. assert that 1) B. & L. LLP is a limited liability partnership, the purpose of which is the practice of law; 2) their firm is a separate and distinct practice and business from G. & C., P.C.; 3) on

occasion Mr. G. and they have worked on certain matters together over the past three years; 4) neither Mr. L. nor Mr. B., nor anyone in their firm has ever met with or represented plaintiff of his brother in any matter; and 5) that Mr. G. never shared any confidential information, nor allowed either one of them, or anyone in the firm any other access to any confidential information arising out of, or learned by Mr. G. or anyone in his firm during the representation of plaintiff during the consultation, or in the prior representation of plaintiff's brother.

Specifically, Mr. B. states that he should not be disqualified from being able to represent defendant based on a limited business relationship that his firm has with Mr. G.'s firm on a limited number of cases, all of which are unrelated to plaintiff's case. He asserts that B. & L. LLP is a separate firm, with offices located at —— Road, White Plains, N.Y. that occasionally affiliates on a limited number of matters, with G. & C., P.C., with offices located in Tarrytown, NY. Additionally, Mr. B., Mr.L. and Mr. D. all claim that disqualification is not warranted as Mr. G. never shared any confidential information with any of them, from his consultations with plaintiff, or from his prior representation of plaintiff's brother.

Mr. B. and Mr. L. set forth that they have been partners in the firm of B. & L. LLP for 10 years, and Mr. D. is a sole practitioner. Both the firm of B. & L. and Mr. D. maintain offices at —, Suite ——, White Plains. Mr. B., Mr. L. and Mr. D. state that they rent space in the suite with other lawyers, each of whom maintain separate practices. B. & L. pay rent to the landlord and Mr. D. sublets his space from another lawyer. Each of the lawyers and/or law firms in the suite is a separate practice or business. Mr. B. and Mr. L. claim that the firm's staff and all of its client files (computer files as well as hard copies) are maintained separately from other lawyers in the suite. Mr. D. makes that same claim regarding his staff and files.

Mr. B., Mr. L. and Mr. D. all state that except for limited circumstances, no lawyer in the suite has access to information relating to another lawyer's cases. Mr. D. asserts that on occasion, he will bring another lawyer in on a case with his client's consent, and share information limited to that specific case with that lawyer; that lawyer may or may not be located in the suite where Mr. D.'s office is located. Mr. B. and Mr. L. state that on occasion they are asked to act as counsel on another case by another lawyer or law firm, and that with the client's consent, their firm and that lawyer/ law firm will share information limited to that specific case. Also, Mr. B. and Mr. L. state that at times either one of them has been brought into a case by a lawyer in the suite where the firm's office is located, but on other occasions Mr. L. has been asked to act as co-counsel by lawyers whose offices are located elsewhere, including Mr. G., of G. & C., P.C. with offices located in Tarrytown. Both Mr. B. and Mr. L. submit that although Mr. L. has worked on certain cases with Mr. G. and his firm, neither of them is a partner, member or employee of Mr. G.'s firm, nor do either of them have keys to, or access to his firm's offices, and in fact, other than the cases in which Mr. L. works with Mr. G., no one in the firm of B. & L. has access to Mr. G.'s client files. Mr. B. and Mr. L. also state that they have many cases in which clients have retained them independently and which they handle independent of any involvement or input by Mr. G. or anyone at his firm, and that they receive independent payment from their clients; their firm is not solely reliant upon of counsel cases with Mr. G.

*3 In reply, plaintiff submits that the nature, extent, frequency and quality of the services that Mr. L. and Mr. G. render to their mutual clients is not identified in the papers submitted in opposition to plaintiff's motion. Plaintiff asserts that Mr. L. does not deny that he and Mr. G. and the respective firms are in an "association," and that there were at least 7 cases that L. and G. worked on together. Plaintiff's counsel asserts that Mr. G. has described to him that his relationship with Mr. L. is one where they will work together on matrimonial cases that appear likely to be litigated, and in the community of matrimonial attorneys, L. and G. are known to have a professional association whereby they appear together in contested matrimonial cases. Plaintiff further claims that as appears on e-courts, while in the last 3 years, Mr. G. has filed more than 70 notices of appearance in matrimonial actions, Mr. L. has filed less than 12. Plaintiff also submits that defendant cannot rely on the claim that she cannot locate any other attorneys to accept her case, and that she will be prejudiced if Mr. D. is disqualified as her counsel; he asserts that the fact that defendant has made herself a pariah of a client, is not his doing, and that if she needs time to retain new counsel, she no doubt will be afforded a reasonable period of time to do so.

Legal Analysis

It is well established that "A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. While the right to choose one's counsel is not absolute,

disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized. The party seeking to disqualify the attorney bears the burden to show sufficient proof to warrant such a determination."

Madris v. Oliviera, 97 AD3d 823, 824 (2d Dept.2012), *quoting, Gulino v. Gulino,* 35 AD3d 812 (2d Dept.2006). In the context of ongoing litigation, disqualification of one party's attorney can stall and derail the proceedings, giving one party a strategic advantage over the other party. *S & S Hotel Ventures Limited Partnership v. 777 S.H. Corp.,* 69 N.Y.2d 437, 443 (1987). "Whether or not to disqualify an attorney of law firm is a matter which rests in the sound discretion of the court (citation omitted)." *Gulino,* 35 AD3d 312.

Pursuant to Rule 1.9(a) of the Rules of Professional Conduct (22 NYCRR 1200.0)

> "[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 that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

As set forth in *Jamaica Public Service Co. Ltd. v. AIU Insurance Company,* 92 N.Y.2d 631, 636 (1998), a party seeking disqualification of an attorney under DR 5–108(a)(1) of the New York Code of Professional Responsibility, [which is substantially the same as current Rule 1.9(a)][4] must establish (1) that there was a prior attorney-client relationship between the moving party and opposing counsel; (2) that the matters involved in both representations are substantially related; and (3) the interests of the present client and the former client are materially adverse. *Id.*

*4 In the instant matter it is undisputed that under Rule 1.9(a), Mr. G. and his firm of G. & C., P.C. have a conflict of interest with regard to representing defendant in this divorce matter. Mr. G. had a consultation with plaintiff in connection with this same divorce action, and also had represented plaintiff's brother in his divorce action where allegedly some of the same assets were at issue, that are at issue in this matter. Additionally, according to plaintiff, prior to his consult with plaintiff, Mr. G. had given defendant a consultation in this matter, before realizing he had he had represented plaintiff's brother in his divorce action and therefore had a conflict of interest in representing her.

Rule 1.10(a) of the Rules of Professional Conduct provides that "[w]hile 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." Therefore, "where an attorney working in a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation (citations omitted)." *Kassis v. Teacher's Insurance and Annuity Association,* 93 N.Y.2d 611, 616 (1999).

While it is not disputed that there have been relationships between Mr. G. and Mr. B.'s firm, the issue is whether there is currently a relationship that rises to the level of "association" contemplated by Rule 1.10(a), and thus necessitates imputation of Mr. G.'s conflict to Mr. B. by virtue of B. & L. LLP having an "association" with Mr. G., requiring the disqualification of Mr. B ., and ultimately, Mr. D., due to his enlisting the services of Mr. B. as co-counsel.

New York State Bar Association Ethics Opinion No. 773 (January 23, 2004), relied on by plaintiff, states that a lawyer who is "of counsel" to a law firm is "associated" with the firm for purposes of imputation of conflicts of interest. The Opinion refers to DR 2–102(A)(4)[5] which provides that "[a] lawyer or law firm may be designated Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate." Also, the Opinion states that the "of counsel" relationship has been interpreted by the NYSBA Ethics Committee [as set forth in NYS Opinion 262 (1972)], "to mean that the of counsel lawyer is available to the firm for consultation and advice on a regular and continuing basis." Additionally, noted in the Opinion is the ABA Ethics Committee characterization of the "of counsel" relationship as being "close, regular [and] personal." ABA 90–357.

Also cited by plaintiff is New York State Bar Association Ethics Opinion No. 793 (March 17, 2006), which reiterates the principles set forth in Opinion 773 regarding "of counsel" relationships and imputation of conflicts, but which also contrasts the situation where a lawyer's relationship with

the firm is more attenuated than that of an "of counsel" relationship, and thus the lawyer would not be deemed "associated" with the firm for purposes of imputation of conflicts. According to the Opinion, this would occur where the relationship is not close, regular or personal, and the lawyer would not have general access to confidences and secrets of the firm.

***5** Indeed there are circumstances where despite an attorney or law firm having been engaged in an "of counsel" relationship, Courts have refused to disqualify that attorney or law firm based on an imputed conflict of interest. *See, Hempstead Video, Inc. v. Incorporated Village of Valley Stream,* 2004 WL 62560 (E.D.NY 2004)["Motions to disqualify opposing counsel are viewed with disfavor ... because they are often interposed for tactical reasons' and result in unnecessary delay." *Id.]; Regal Marketing Inc. v. Sonny & Son Produce Corp,* 2002 WL 1788026 (S.D.NY 2002); *Bison Plumbing City, Inc. v. Benderson,* 281 A.D.2d 955 (4th Dept.2001); *Shelton v. Shelton,* 151 Ad2d 659 (2d Dept.1989). In *Hempstead Video, Inc.* and *Regal Marketing Inc.* where the "of counsel" attorney 1) maintained a separate and discreet practice, and had never been and was not a member of the law firm; 2) did not have his name on the letterhead of the firm; 3) only engaged in occasional collaborative efforts with the firm, providing the firm with only sporadic assistance; and 4) was not shown to be more than a *de minimus* "of counsel" for the firm, the Court found that the relationship between the of counsel lawyer and the law firm was too attenuated to merit imputation of the conflict of interest.

Based on a review of the facts, and in conjunction with the applicable law, the Court finds that plaintiff has failed to meet his burden to demonstrate that the disqualification of Mr. B., the firm of B. & L., or Mr. D. is warranted in this matter. While Mr. G. and his firm's conflict would prohibit him and G. & C., P.C. from representing defendant, that conflict is not imputed to Mr. B. and the firm of B. & L.

Mr. B. and Mr. L. set forth that their firm is a separate and distinct practice from G. & C., P.C.; the law firm of B. & L., LLP maintains its offices in White Plains while the firm of G. & C., P.C. maintain its offices at a different location in Tarrytown. Mr. B. and Mr. L. state that over the past three years they have only occasionally affiliated with G. & C., P.C. on a limited number of matters. [6] Although Mr. L. works on certain cases with Mr. G. and his firm, neither Mr. B. nor Mr. L. are partners, members or employees of G. & C., P.C., nor do they have keys to, or access to the firm's offices, and other than the cases in which Mr. L. works with Mr. G., no one in the firm of B. & L. has access to Mr. G.'s client files. Also, Mr. B. and Mr. L. have many cases in which clients have retained them independently and which they handle independent of any involvement or input by Mr. G. or anyone at his firm, and they receive independent payment from their clients; their firm is not solely reliant on Mr. G. or his firm based on the cases where they act as his co-counsel or on an of counsel basis. Additionally, the Court notes that there has been no allegation that the name of any attorney from the firm of B. & L., LLP appears on the letterhead of the firm of G. & C, P.C., or vice versa.

***6** In contrast, plaintiff's counsel seeks disqualification of Mr. B. based on the conclusory, unsupported allegations that over the last few years, the firms of G. & C. and B. & L. have maintained an "association" together, by routinely and frequently appearing together as co-counsel or "of counsel" to one another in matrimonial actions in the counties of Westchester and Putnam; yet plaintiff's counsel cites only 6 matrimonial matters of which he has first hand knowledge, wherein Mr. G. and Mr. L. have appeared together over the past 18 months. Plaintiff's allegations that Mr. G. and Mr. L. are known to have a professional association in the community of matrimonial attorneys is opinion not supported by facts. His claim that a review of e-courts will indicate that during the last three years Mr. G. has filed 70 notices of appearances in matrimonial actions as compared to less than 12 filed by Mr. L. is of no merit. Insinuations and inferences as to the extent of the relationship between L. and G. are not a substitute for facts.

Furthermore, it is uncontroverted that neither Mr. L. nor Mr. B., nor anyone in their firm has ever met with or represented plaintiff or his brother in any matter, and Mr. G. never shared any confidential information, nor allowed either Mr. L. or Mr. B., or anyone in the firm any other access to any confidential information arising out of, or learned by Mr. G. or anyone in his firm during the representation of plaintiff during the consultation, or in the prior representation of plaintiff's brother.

The non-exclusive, and non-regular "of counsel" relationship between Mr. G. and Mr. L. is not the "close, regular and personal" type of relationship, and/or one wherein they are "available for consultation and advice on a regular and continuing basis," which would cause Mr. G. and Mr. L. to be

deemed "associated" for purposes of imputation of a conflict of interest as contemplated by the Rules and Ethics Opinions.

The Court recognizes even in a situation wherein the attorneys acting "of counsel" maintain their own distinct integrity, at some point the relationship could become an association for purpose of imputing conflicts of interest. However, given the facts of this case, the sharing of 6 to 8 cases over 18 months is insufficient to make a finding of a conflict.

Based on the foregoing, and in the Court's discretion, the Court determines that neither Mr. B., B. & L., or Mr. D. are disqualified from representing defendant in the instant divorce action.

To the extent any relief requested in Motion Sequence was not addressed by the Court it is hereby denied.

This decision shall constitute the order of the Court.

Parallel Citations

39 Misc.3d 1205(A), 969 N.Y.S.2d 802 (Table), 2013 WL 1348413 (N.Y.Sup.), 2013 N.Y. Slip Op. 50502(U)

Footnotes

1 Defendant's counsel, M. D., Esq., submitted an Affirmation in Opposition to plaintiff's motion, signed by D.A. S., Esq., with his, Mr. B.'s and Mr. L.'s affirmations annexed as Exhibits. Ms. S.'s Affirmation states that she was retained by Mr. D., and that she is appearing in this matter for the limited purpose of responding to plaintiff's application. As pointed out by plaintiff, Ms. S. does not represent defendant, and therefore the Court declines to consider her Affirmation. However, the Court will consider the Affirmations of Mr. D., Mr. B. and Mr. L. that are annexed to Ms. S.'s Affirmation.

Additionally, as noted by plaintiff, defendant did not submit an Affidavit in Opposition to plaintiff's motion. While certainly an Affidavit should have been submitted, the Court recognizes that when the issue of disqualification of her attorneys was raised in Court, defendant was clearly opposed to having her attorneys disqualified.

Plaintiff also claims that the opposition papers submitted were not timely served. However, plaintiff's counsel consented to defendant's request for an extension of time to submit his answering papers, although no such request was made to the Court. Plaintiff's counsel expected additional time to reply which the Court declined due to the impending trial date. In any event, the Court received reply papers from plaintiff which were considered herein by the Court. The Court notes that in the future, all such adjournments must be approved by the Court.

PAPERS	*NUMBERED*
Order to Show Cause/Affidavit/Affirmation/Exhibit/Memorandum of Law	1–5
Affirmation of M. D., Esq./Affirmation of A. B., Esq./Affirmation of L.B. L., Esq.	6–8
Affirmation in Reply/Memorandum of Law	9–10

2 Mr. G. previously represented plaintiff's brother in his divorce which concluded in or about 2009. According to plaintiff, some of the same assets at issue in this matter, were also at issue in his brother's divorce action.

3 While counsel claims to have personal knowledge of 6 of these 8 cases, it is claimed that another attorney, J. H., Esq., allegedly advised counsel of the other two matters.

4 The Rules of Professional Conduct replaced the New York Code of Professional Responsibility on April 1, 2009.

5 Current Rule 7.5(a)(4)of the Rules of Professional Conduct is identical to DR 2–102(A)(4) which it replaced as of April 1, 2009.

6 Mr. L. and Mr. B. both state that on occasion they are asked to act as of counsel on other cases by other lawyers or law firms, and that with that client's consent, their firm and that lawyer/law firm share information limited to that specific case.

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116 A.D.3d 47
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Lawrence Ivan HOROWITZ,
an attorney and counselor-at-law.
Grievance Committee for the
Ninth Judicial District, petitioner;
Lawrence Ivan Horowitz, respondent.

Feb. 19, 2014.

Synopsis

Background: In disciplinary proceeding instituted by the Grievance Committee, parties filed cross-motions to affirm in part, and disaffirm in part, the report of Jerome M. Becker, Special Referee.

Holdings: The Supreme Court, Appellate Division, held that:

[1] evidence supported finding that attorney violated rules of professional conduct, and

[2] suspension of attorney from practice of law for three years was warranted.

Motions granted in part and denied in part.

Attorneys and Law Firms

****545** Gary L. Casella, White Plains, N.Y. (Gloria J. Anderson and Antonia P. Cipollone of counsel), for petitioner.

Richard M. Maltz, New York, N.Y., for respondent.

RANDALL T. ENG, P.J., WILLIAM F. MASTRO, REINALDO E. RIVERA, PETER B. SKELOS, and SANDRA L. SGROI, JJ.

Opinion

PER CURIAM.

***48** The Grievance Committee for the Ninth Judicial District served the respondent with a petition containing 12 charges of professional misconduct. A verified answer was duly served. The parties thereafter entered into two stipulations encompassing most of the facts in issue, the admission of documents in evidence, and what several witnesses would testify to if called. Following a hearing, the Special Referee sustained Charges 1 through 7 and 10 through 12. Charges 8 and 9 were not sustained. The Grievance Committee now moves to confirm in part, and disaffirm in part, the report of the Special Referee. The respondent cross-moves to confirm in part, and disaffirm in ***49** part, the Special Referee's report. Moreover, the respondent asks the Court to impose a sanction no greater than a public censure.

Charges 1 through 3 emanate from a common set of factual allegations. In or about December 2008, Widad Yousef retained the respondent as substitute counsel in her then-pending matrimonial action. In or about October 2009, the respondent moved by order to show cause to be relieved as Yousef's counsel, alleging, inter alia, that she owed him legal fees in the sum of $16,220. Yousef did not oppose the motion, and the respondent was relieved as counsel by decision and order of the Supreme ****546** Court, Westchester County, dated December 17, 2009.

Thereafter, Yousef once again sought the respondent's legal services. On or about March 14, 2010, the respondent and Nicholas Ayoub signed a document entitled "Addendum to Retainer Between Widad Yousef and Lawrence Ivan Horowitz Where Nick Ayoub is the Guarantor" (hereinafter the Addendum). Per the Addendum, the respondent agreed to accept $6,000 from Ayoub as payment in full for Yousef's outstanding legal fees. He further agreed that in exchange for Ayoub's additional payment of $2,000, he would perform certain specified legal services on Yousef's behalf. On March 14, 2010, Ayoub gave the respondent three separate checks —a check dated March 14, 2010, in the amount of $4,000, a check post-dated April 14, 2010, in the amount of $2,000, and a check post-dated May 14, 2010, in the amount of $2,000. The petition alleged that as collateral, Ayoub gave the respondent "jewelry with a retail value of $15,000 to insure the payments listed above." The respondent was to maintain the jewelry in a safe until the $8,000 was paid in full, at which time he was to return the jewelry to Ayoub.

Each of the foregoing checks was timely deposited into the respondent's account at JP Morgan Chase Bank. The final check cleared on or about May 14, 2010. Between May 19, 2010, and June 2, 2010, Ayoub placed four calls to the respondent from his cellular telephone, each of which lasted one to two minutes. On May 21, 2010, the respondent

made one call to Ayoub's cellular telephone, which lasted five minutes. The petition alleged that, upon information and belief, Ayoub placed the calls to the respondent to arrange for the return of the jewelry. Ayoub was trying to get his affairs in order because he knew that his death from lung cancer was imminent. Ayoub died on June 5, 2010. As of that date, the respondent had not returned the jewelry to Ayoub.

*50 Ann Morris is Ayoub's ex-wife, and was his nominated executor. On July 7, 2010, Morris was issued letters testamentary by the Essex County Surrogate's Court in New Jersey. Several days after Ayoub's death, on June 10, 2010, Morris telephoned the respondent and asked the respondent to return the jewelry to Ayoub's estate. She placed two such calls, lasting one and four minutes, respectively. The respondent gave Morris his email address and asked her to provide him with her address. Morris understood that the respondent wanted her address so that he could return the jewelry to her. She emailed her address to him on June 10, 2010.

After one week had passed, and Morris had not received the jewelry, she called the respondent again, on June 16, 2010. This time, the respondent told her that she needed to provide proof that she was the executor of Ayoub's estate. Morris told the respondent that she could provide a copy of the death certificate, which listed her as the executor. The respondent gave Morris his fax number, and she faxed the death certificate to him on June 17, 2010.

Morris did not hear back from the respondent, so she sent him a follow-up email on June 20, 2010, confirming that she had faxed the death certificate listing her as executor, and asking him to call her as soon as possible with respect to returning the jewelry to Ayoub's estate. The respondent did not answer Morris's June 20, 2010, email. As a result, she telephoned him on June 22, 2010. The respondent told Morris that he was with a client, and that he would call her back. However, he did not do so. Morris called the respondent again a few hours later and left a voice message. He did not return her call, so she sent him an email at 5:05 **547 p.m., on the evening of June 22, 2010. The respondent did not respond to Morris's attempts to contact him.

Morris asked an attorney, Jean R. Campbell, to contact the respondent on her behalf and ask that he return the jewelry to the estate. Campbell spoke with the respondent by telephone on or about June 29, 2010. During that conversation the respondent told Campbell that he had returned the jewelry to Ayoub before his death. Campbell asked him to provide her with proof. Campbell memorialized her conversation with the respondent in a follow-up letter, which she emailed, and sent by regular mail, to the respondent on July 5, 2010. The respondent's answering letter, dated July 7, 2010, stated: "As I indicated to you on the telephone, when the last check was cashed, I returned the jewelry to Ayoub." His letter further stated that if *51 she wanted anything more from him, she should file suit, if appropriate.

Morris sought further assistance from the attorney for Ayoub's estate, Vincent R. Kramer, Jr., to secure the return of the jewelry. Kramer sent a letter to the respondent dated July 29, 2010, advising him that he was legal counsel for the Ayoub estate and asking him to return the jewelry. The respondent did not respond to Kramer's letter.

Kramer sent a second letter to the respondent on August 31, 2010, advising him that he was on the verge of commencing a legal action against the respondent and asking for his immediate reply. Again, the respondent did not respond to Kramer's letter.

Thereafter, Morris filed a grievance against the respondent, a copy of which was mailed to the respondent by the Grievance Committee, on November 9, 2010, at the address in Goshen where he was registered with the Office of Court Administration. The respondent did not return the jewelry until December 10, 2010, approximately seven months after the debt it was meant to secure was paid in full, and six months after Morris asked for its return.

[1] Charge 1 alleges that the respondent failed to promptly pay or deliver to a client or third person the funds, securities, or other properties in his possession that the client or third person was entitled to receive, in violation of Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.15(c)(4).

Charge 2 alleges that the respondent engaged in conduct involving fraud, deceit, dishonesty, or misrepresentation by making a false statement to another attorney regarding the return of the jewelry in his possession, belonging to the Ayoub estate, in violation of Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4(c).

Charge 3 alleges that the respondent engaged in conduct adversely reflecting on his fitness as a lawyer, by failing to respond to inquiries concerning the jewelry in his possession,

belonging to the Ayoub estate, in violation of Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4(h).

[2] Charge 4 alleges that the respondent failed to provide a prospective client in a domestic relations matter with a Statement of Client's Rights and Responsibilities at their initial conference, and failed to obtain an acknowledgment of receipt signed by the client, in violation of Rules of Professional Conduct (*52 22 NYCRR 1200.0) rule 1.5(e) and 22 NYCRR 1400.2. Hugh Lewis sought the respondent's counsel in or about January or February 2010 with respect to commencing a divorce action. Lewis advised the respondent that a prior action for divorce from his estranged wife had been denied. The respondent agreed to represent Lewis in a second **548 attempt to obtain a divorce. To that end, by letter dated February 28, 2010, the respondent contacted John Farrauto, the attorney who had represented Lewis's estranged wife in the prior divorce action. By letter dated April 1, 2010, the respondent sent Lewis a retainer agreement, and a Statement of Client's Rights and Responsibilities, each dated April 1, 2010, asking Lewis to sign the documents and return them to him with a check for $3,000. Lewis signed the retainer agreement and returned it to the respondent on or about April 10, 2010, along with the unsigned Statement of Client's Rights and Responsibilities, and a check for $3,000. The respondent never obtained a signed acknowledgment of receipt of the Statement of Client's Rights and Responsibilities.

[3] Charge 5 alleges that the respondent entered into an arrangement for, charged, or collected, a non-refundable fee, in violation of Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.5(d)(4) and 22 NYCRR 1400.4. Hugh Lewis retained the respondent's services to secure a divorce on his behalf. The retainer agreement dated April 1, 2010, which Lewis executed on April 10, 2010, contained a provision stating that $2,000 of the $3,000 retainer fee would not be refunded, even if the firm did not handle the matter to conclusion.

[4] Charge 6 alleges that, in the course of representing a client, the respondent engaged in deceit and knowingly made a false statement of fact or law to a third person, in violation of Rules of Professional Conduct (22 NYCRR 1200.0) rules 8.4(c) and 4.1. Following his agreement to represent Hugh Lewis in a second attempt to obtain a divorce, the respondent wrote a letter to John Farrauto, the attorney for Lewis's estranged wife, dated February 28, 2010, wherein he stated that Lewis told him "he realizes his love and passion for ... Rowena Lewis and wishes to resume residing with her and resume marital relations." Lewis never made any such statement to the respondent. In a second letter to Farrauto, dated May 18, 2010, the respondent stated "my client is still requesting that he be allowed to return to the marital residence and resume relations." Lewis did not wish to return to the marital residence. In a letter to the respondent on or about April 10, 2010, Lewis made it clear *53 that he wanted a quick divorce and had no desire to return to the marital residence or resume marital relations.

[5] Charge 10 alleges that the respondent failed to communicate to a client, in writing, the scope of the representation, and the basis or rate of the fee and expenses for which the client would be responsible, in violation of Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.5(b). Hugh Lewis signed the retainer agreement provided to him by the respondent, which was dated April 1, 2010, and returned it on or about April 10, 2010, along with a check for $3,000 and an unsigned Statement of Client's Rights and Responsibilities. The retainer agreement failed to advise Lewis that he would be billed for missed appointments and for the attorney's travel time.

[6] Charge 12 alleges that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4(c). Having agreed to represent Hugh Lewis in a second attempt to obtain a divorce from his estranged wife, and having written to her attorney, John Farrauto, in February and May 2010 relative to the same, the respondent wrote a letter to Lewis, dated January 12, 2011, wherein he stated, "I have **549 left you a number of phone messages stating that the papers have been prepared ... and have been ready for your signature in order to move ahead to get you divorced." In an undated response, Lewis disputed that the respondent had called him. In a subsequent letter to Lewis, dated February 1, 2011, the respondent reiterated, "I did call your house." The respondent's telephone records for his office and his home reflect that he did not call Lewis during the period at issue—i.e., from November 28, 2010 (the date on or about which the papers were drafted), through February 1, 2011 (the date of the respondent's letter).

In view of the respondent's admissions and the evidence adduced at the hearing, we find that the Special Referee properly sustained Charges 1 through 6, 10, and 12, and those charges are sustained. Additionally, we find that the Special Referee properly failed to sustain Charges 8 and 9, and those charges are not sustained. However, we find that the

Special Referee improperly sustained Charges 7 and 11, as the evidence did not support the findings of the Special Referee, and those charges also are not sustained. Under the totality of the circumstances, the Grievance Committee's motion to affirm in part, and disaffirm in part, the report of the Special Referee, is granted to the extent that charges 1 through 6, 10, and 12 are sustained, and denied *54 to the extent that charges 7 through 9 and 11 are not sustained. The respondent's motion to affirm in part, and disaffirm in part, the Special Referee's report, is granted to the extent that charges 7 through 9 and 11 are not sustained, and denied to the extent that charges 1 through 6, 10, and 12 are sustained.

[7] In determining an appropriate measure of discipline to impose, we have considered, in mitigation, the respondent's testimony concerning his involvement in public service and his pro bono work through his synagogue and other religious institutions in his community. Moreover, we have considered the testimony provided by the respondent's three character witnesses, who attested to the respondent's good character and reputation for honesty. However, we note that the respondent engaged in at least three separate instances of misconduct involving dishonesty or making a false statement of fact to a client or another attorney, and find that the explanations he provided for this conduct lacked candor. In failing to accept responsibility for the deceit in which he engaged, the respondent brought dishonor upon the legal profession. Additionally, the respondent's explanation for failing to timely return the jewelry entrusted to him by Nicholas Ayoub, to wit, that he expected Ayoub to come to his office to pick it up, is not credible inasmuch as Ayoub was terminally ill and bed-ridden at the time his debt to the respondent was settled. That the respondent, a seasoned trusts and estates attorney, purportedly "did not know" how to return the jewelry following Ayoub's death, is equally not believable. Previously, the respondent received a Letter of Caution (April 2011) to ensure that he obtained written consent before taking his fee from a client's escrow funds.

Under the totality of the circumstances, the respondent is suspended from the practice of law for a period of three years.

ORDERED that the petitioner's motion to confirm in part, and disaffirm in part, the report of the Special Referred is granted to the extent that charges 1 through 6, 10, and 12 are sustained, and denied to the extent that charges 7 through 9 and 11 are not sustained; and it is further,

ORDERED that the cross-motion of the respondent, Lawrence Ivan Horowitz, to **550 confirm in part, and disaffirm in part, the Special Referee's Report is granted to the extent that charges 7 through 9 and 11 are not sustained, and denied to the extent that charges 1 through 6, 10, and 12 are sustained; and it is further,

*55 ORDERED that the respondent, Lawrence Ivan Horowitz, is suspended from the practice of law for a period of three years, commencing March 21, 2014, and continuing until further order of this Court. The respondent shall not apply for reinstatement earlier than September 21, 2016. In such application, the respondent shall furnish satisfactory proof that during said period he: (1) refrained from practicing or attempting to practice law, (2) fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10), (3) complied with the applicable continuing legal education requirements of 22 NYCRR 691.11(c)(2); and (4) otherwise properly conducted himself; and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this court, the respondent, Lawrence Ivan Horowitz, shall desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

ORDERED that if the respondent, Lawrence Ivan Horowitz, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10(f).

Parallel Citations

116 A.D.3d 47, 980 N.Y.S.2d 543, 2014 N.Y. Slip Op. 01172

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115 A.D.3d 193
Supreme Court, Appellate Division,
Fourth Department, New York.

Matter of Ralph A. HORTON,
an Attorney, Respondent.
Grievance Committee of the
Seventh Judicial District, Petitioner.

Feb. 7, 2014.

Opinion

PER CURIAM.

*194 Respondent was admitted to the practice of law by this Court on June 23, 1965, and maintains an office in Rochester. The Grievance Committee filed a petition alleging three charges of misconduct against respondent, including failing to act with diligence in a client matter and failing to cooperate with the Grievance Committee. Respondent filed an answer denying material allegations of the petition, and a referee was appointed to conduct a hearing. During the proceeding before the Referee, the parties entered into a stipulation eliminating the need for a hearing with respect to the charges of misconduct, and respondent testified solely with respect to matters in mitigation. The Referee has filed a report setting forth certain factual findings and an advisory finding that respondent violated all of the disciplinary rules cited in the petition. The Grievance Committee moves to confirm the Referee's report, and respondent cross-moves to disaffirm the report in part and to remit this matter to the Grievance Committee. Respondent appeared before this Court on the return date of the motions, and he was heard in mitigation at that time.

With respect to charge one, the Referee found that, in January 2008, respondent agreed to represent a client in an action for divorce and, although respondent's retainer agreement provided that he would **919 issue to the client billing statements at 60–day intervals, respondent failed to issue any billing statements in the matter. The Referee further found that, in late 2009, respondent agreed to prepare a qualified domestic relations order (QDRO) for the client without executing a written retainer agreement for that separate representation. The Referee found that respondent thereafter intermittently worked on the QDRO, but he did not complete the matter until March 2013 and he did not issue any billing statements to his client for that matter. The Referee additionally found that, in August 2012, respondent failed to appear for a formal interview before the Grievance Committee and, in September 2012, respondent failed to comply with a subpoena issued by this Court. The Referee found that respondent subsequently retained counsel and *195 appeared in response to the subpoena. The Referee found, however, that respondent's hearing testimony, wherein respondent stated that he initially failed to comply with the subpoena because he had "miscalendared" its return date, was not credible.

With respect to charge two, the Referee found that, from March through May 2012, respondent failed to respond to two letters from the Grievance Committee regarding respondent's handling of a medical malpractice action. The Referee found that, during a subsequent formal interview with counsel to the Grievance Committee, respondent stated that he had been in regular contact with his clients and had explained to them all of the material issues concerning their matter orally, rather than in writing. The Referee further found that, three days after the formal interview, respondent sent a letter to his clients addressing the relevant issues. The Referee made an advisory finding that respondent's initial failure to advise his clients in writing regarding such issues was "inadequate, not reasonable and not prudent."

With respect to charge three, the Referee made an advisory finding that respondent's conduct at issue in this matter together with his disciplinary history, which includes a letter of admonition and five letters of caution, constitutes a course of conduct in violation of all of the disciplinary rules cited in the petition.

We confirm the factual findings of the Referee and conclude that respondent has violated the following Rules of Professional Conduct:

rule 1.3 (a) (22 NYCRR 1200.0)—failing to act with reasonable diligence and promptness in representing a client;

rule 8.4 (d) (22 NYCRR 1200.0)—engaging in conduct that is prejudicial to the administration of justice; and

rule 8.4 (h) (22 NYCRR 1200.0)—engaging in conduct that adversely reflects on his fitness as a lawyer.

We further conclude that respondent has violated 22 NYCRR part 1400 by failing to provide a client in a domestic relations

matter with a written retainer agreement and itemized billing statements at regular intervals.

Although the Referee made an advisory finding that respondent violated certain additional disciplinary rules, we decline to conclude that respondent committed those additional violations inasmuch as they are either not supported by the record or ***196** have been rendered superfluous by virtue of our determinations set forth herein. We further decline to sustain charge three in its entirety because, as this Court has previously held, allegations that a respondent has engaged in a course of conduct similar to conduct for which he has already been disciplined "are more appropriately considered ****920** as a potential aggravating factor ... rather than as a separate charge of misconduct" (*Matter of Ohl,* 107 A.D.3d 106, 110, 964 N.Y.S.2d 785).

We additionally deny respondent's cross motion to disaffirm the report in part. The challenged findings of the Referee are either legal conclusions that are merely advisory in nature, or constitute credibility determinations that are supported by the record.

In determining an appropriate sanction, we have considered in mitigation of the charges that respondent's misconduct did not involve venal intent or self-interest, that he has a substantial history of community service, and that he suffered from certain health issues during the relevant time period. We have considered in aggravation of the charges, however, respondent's aforementioned disciplinary history that, at least in part, concerns conduct similar to the conduct at issue herein. We have further considered the Referee's finding that, although respondent's health issues may explain his lack of diligence and failure to respond to the Grievance Committee during a certain time period, respondent failed to establish a nexus between his health issues and most of the misconduct set forth above. Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be censured. Order of censure entered.

SMITH, J.P., FAHEY, CARNI, SCONIERS, and VALENTINO, JJ., concur.

Parallel Citations

115 A.D.3d 193, 979 N.Y.S.2d 918 (Mem), 2014 N.Y. Slip Op. 00847

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41 Misc.3d 931
Family Court, Bronx County, New York.

In the Matter of JALICIA G., a Child under Eighteen Years of Age Alleged to be Neglected by Jacquelin G. and Randolph W., Respondents.

Sept. 12, 2013.

Synopsis

Background: Administration for Children's Services (ACS) filed petition alleging that parents neglected their daughter. Mother moved to disqualify Legal Aid Society (LAS) from representing daughter.

Holdings: The Family Court, Bronx County, Erik Pitchal, J., held that:

[1] LAS attorney's representation of daughter implicated rules of professional conduct;

[2] disqualification of LAS attorneys who represented mother was warranted;

[3] disqualification of LAS was not warranted;

[4] mother's personal views were irrelevant to outcome of her motion; and

[5] LAS's screening protocols overcame any appearance of impropriety.

Motion denied.

Attorneys and Law Firms

****834** Alan W. Sputz, Esq., Special Assistant Corporation Counsel, Administration for Children's Services, Family Court Legal Services, Bronx, by Siobhan McHale, Esq.,

Aleeza Ross, Esq., Patchogue, for Jacquelin G.

Erin Miles, Esq., The Bronx Defenders, Bronx, for Randolph W.

Patricia Nevergold, Esq., Legal Aid Society, Juvenile Rights Practice, Bronx, Attorney for the Child.

Opinion

ERIK PITCHAL, J.

***932** Now pending before the court is the respondent Jacquelin G.'s motion to disqualify the Legal Aid Society ("LAS") from representing the subject child in this child protective proceeding. For the reasons that follow, the motion is denied.

Procedural Background

This case has a complicated procedural history, of which only a portion is relevant to the instant motion. On or about April 25, 2012, the Administration for Children's Services ("ACS") filed ***933** a petition pursuant to Article 10 of the Family Court Act alleging that the respondents, Jacquelin G. and Randolph W., neglected their daughter Jalicia, who was then approximately 17 months old. Jalicia was assigned an attorney from the Bronx office of the LAS Juvenile Rights Practice, Patricia Nevergold; Mr. W. was assigned an attorney from the Family Court practice of the Bronx Defenders, Erin Miles; and Ms. G. was assigned an attorney from the Bronx Family Court 18–B panel, Edward Arfe.

The case was initially heard by Hon. Kelly O'Neill–Levy, before whom a fact-finding hearing commenced on or about July 23, 2012. In the middle of the trial, Mr. Arfe requested to be relieved, due to an irreparable breakdown in communication between himself and his client. Judge O'Neill–Levy granted this request, declared a mistrial as to Ms. G., and assigned Aleeza Ross as Ms. G.'s new attorney. Judge O'Neill–Levy completed the fact-finding as to Mr. W. in January 2013. [1]

On or about January 23, 2013, Ms. G.'s case was transferred to this Court. Fact-finding re-commenced on May 10, 2013, and a permanency hearing was held the same day. On May 10 Ms. G. also requested the immediate return of the child. As there is no statutory provision or caselaw restricting the right of a respondent to request a § 1028 hearing prior to the completion of fact-finding even though a fact- ****835** finding has already commenced, the Court agreed to conduct a § 1028 hearing. The § 1028 hearing began on May 17 and was continued to May 21. On May 21 Ms. G. testified on her own behalf, and by way of background noted that she herself had been in foster care from the age of 12 to the age of 21. (She gave birth to Jalicia when she was 23 and was 24 when this case commenced.)

As the Court is aware that most foster children in New York City are represented by LAS, the Court was concerned that LAS might have represented Ms. G. when she was in ACS custody and that, if so, it might be a conflict of interest for LAS to represent her daughter now. Ms. G. reported that before she was placed in foster care, she had lived with her family in Queens. Thus, the Court halted the § 1028 hearing and while on the record queried the UCMS database for Queens Family Court. The Court learned that Ms. G. had indeed been the subject child of an Article 10 proceeding in that court, during which time she was represented by Nadia Seerantan, who, it ***934** was later ascertained, had been a staff attorney in the Queens office of the LAS Juvenile Rights Practice at the time. Ms. Ross reported that when she took over the case from Mr. Arfe, she was not made aware of the fact that her client had previously been represented by LAS. Ms. Nevergold stated that when she was assigned Jalicia's case on or about April 25, 2012, she was not aware that Ms. G. had been in foster care, let alone been represented previously by LAS; indeed, she was told by her office that there was "no conflict" and she could pick up the case.

This motion to disqualify LAS followed. The order to show cause was heard on June 6, at which time LAS requested additional time to respond in writing. That request was granted, and a briefing schedule was set.[2] LAS, appearing by Ms. Nevergold's supervisor Dawne Mitchell, filed its opposition papers on or about June 13; Ms. Ross filed a reply on or about June 17; and a further hearing on the motion was conducted on June 18. ACS did not file papers and indicated it supports LAS in this motion. Respondent W. did not participate in the motion. The Court reserved decision.[3]

Factual Findings

The following facts relevant to the motion are undisputed. The salient facts were elicited via the papers and colloquy with counsel at motion hearings on June 6 and 18; because they are not in dispute (*see* 6/18/13 Tr. at 13–14), no evidentiary hearing was conducted. Ms. G. was in foster care from the age of 12 to 21, from November 1999 until July 2008, pursuant to an Article 10 case in Queens Family Court. During that time period, she was assigned an attorney from the LAS Queens Juvenile Rights Practice, who represented her in the Family Court proceedings. There were three LAS staff attorneys assigned to her case during this ****836** period: Renee Mitler, Nadia Seerantan, and Tara Famular. Ms. Mitler now works in the LAS Manhattan office, ***935** and Ms. Famular remains in Queens, but Ms. Seerantan is no longer employed by LAS. The LAS representation of Ms. G. in Queens ceased on or about May 19, 2008. Ms. G. does not recall ever having an attorney as part of her foster care case.

Approximately one month after it closed its Queens case for Ms. G. in 2008, LAS sent its hard file for the case to its archival service. In order for LAS staff in one borough office to obtain archived files that originated in another borough, the originating borough supervisor would have to be notified and agree to the request. No such request has ever been made by the Bronx office for the Queens office's file on Ms. G.

The LAS case management database contains client pedigree data and information about case outcomes, but it does not contain substantive information such as notes from client meetings, correspondence, or investigation or discovery material. Going forward, LAS hopes to use more electronic records, but for historical records even as recent as 2008, confidential client information is contained only in the hard files and the personal memories of individual staff. Moreover, once a case is closed and the hard file is archived, the case management system is coded to prohibit access by staff attorneys to the associated electronic record.

On or about April 25, 2012, ACS filed a child protective case in Bronx Family Court alleging that Ms. G. neglected her own daughter, 17-month-old Jalicia. Pursuant to its protocol for conflict checks, non-attorney staff from LAS queried its case management database to determine if it had any conflicts that would prohibit it from representing Jalicia. Upon reviewing the results, an attorney supervisor determined that there was "no conflict," and Patricia Nevergold, a staff attorney, was instructed that she could represent the baby and was not told that LAS previously represented Ms. G. She has been the assigned LAS attorney ever since. Not being aware that LAS previously represented Ms. G., she has not sought out any prior files or information contained within the LAS archives or electronic records. She has not had any conversations with Ms. Mitler or Ms. Famular about this case, nor has Ms. Nevergold's supervisor, Ms. Mitchell.

In the Bronx litigation, Ms. Nevergold has been advocating a position adverse to Ms. G., both by opposing the child being returned to Ms. G.'s custody and by supporting a finding of neglect against her. No written informed consent for LAS to represent her daughter was sought or obtained from Ms. G.

***936 Legal Analysis**

The Duty of Loyalty and Imputed Conflicts

[1] [2] Ordinarily, the Rules of Professional Conduct prohibit a lawyer from representing a party with materially adverse interests to that of a former client in the same matter or in a substantially related matter, absent a written waiver. N.Y. Rules of Professional Conduct § 1.9; *Cardinale v. Golinello,* 43 N.Y.2d 288, 401 N.Y.S.2d 191, 372 N.E.2d 26 (1977). Also, the conflicts of an individual attorney are generally imputed to her entire firm. N.Y. Rules of Professional Conduct § 1.10; *Cardinale* at 295, 401 N.Y.S.2d 191, 372 N.E.2d 26.

[3] [4] An animating purpose driving the duty of loyalty is the continuing duty of confidentiality that an attorney owes to a former client. N.Y. Rules of Professional Conduct § 1.6; ****837** *Kassis v. Teacher's Insurance and Annuity Ass'n.,* 93 N.Y.2d 611, 615–16, 695 N.Y.S.2d 515, 717 N.E.2d 674 (1999); *Cardinale* at 295–96, 401 N.Y.S.2d 191, 372 N.E.2d 26; N.Y. State Bar Ass'n. Comm. On Prof. Ethics Op. 605 (1989). A former client may be justifiably concerned about the continuing sanctity of her confidences if her former attorney later represents someone else against her. *Solow v. Grace & Co.,* 83 N.Y.2d 303, 309, 610 N.Y.S.2d 128, 632 N.E.2d 437 (1994).

[5] In Ms. G.'s case, attorneys from LAS previously represented her when she was in foster care, advocating for her wishes and needs. *See* Fam. Ct. Act § 241. In the present case, Ms. Nevergold, on behalf of Jalicia, is advocating a position contrary to Ms. G.'s, as she vigorously opposed Ms. G.'s § 1028 application and supports the petitioner's case for neglect. Thus, because an attorney associated with the same law firm that employed attorneys who previously represented her is now taking a position that is materially adverse to her, the general rule requiring attorneys to be loyal to former clients is implicated here. So too is the rule imputing the conflicts of an individual attorney to her firm.

Substantially Related Matters

[6] Of course, the duty of loyalty to former clients is only applicable if the new matter is "substantially related" to the prior representation. Here, LAS argues that current case in the Bronx in which Ms. G. is a respondent is "distinct" from the case in Queens four to five years ago in which she was a foster child. (Mitchell Affirm. ¶ 12.) Ms. G.'s counsel asserts that the matters are substantially related because there is a substantial risk that confidential information LAS obtained about her in the Queens case could be used against her in the current litigation. (Ross Reply Affirm. ¶ 6.)

[7] [8] [9] [10] ***937** There are two ways that a current matter may be deemed " substantially related" to a prior matter for the purpose of Rule 1.9 analysis. First, if the issues in the two cases are identical to each other, or essentially the same, then the matters are said to be substantially related. Alternatively, if the *information* generated in the first matter is substantially related to a material issue in the subsequent matter, then the cases are deemed substantially related. Put another way, if in the prior matter the attorney received specific confidential information that is substantially related to the present litigation, or if there is even a reasonable probability that the attorney received such information, then Rule 1.9 is implicated. *Lightning Park v. Wise Lerman & Katz, P.C.,* 197 A.D.2d 52, 55–56, 609 N.Y.S.2d 904 (1st Dept.1994); *First Hudson Fin. Group, Inc. v. Martinos,* 11 Misc.3d 394, 397–98, 812 N.Y.S.2d 767 (Sup.Ct. N.Y. Co.2005). After all, the duty of loyalty to former clients is mandated as a buttress to ensure the continued duty of maintaining former clients' confidences. Even if the causes of action in the two matters are distinct, and even if the specific factual allegations pled in the two cases have nothing to do with each other, if confidential information from the first case is relevant in the second case, then the two cases are substantially related. *Cf.* N.Y. State Bar Ass'n. Comm. On Prof. Ethics Op. 628 (1992).

In the course of zealously advocating for her needs as a foster child, there is a reasonable probability that Ms. G.'s LAS attorneys obtained confidential information about her at that time that would be relevant to issues in the current litigation. For example, if she had any behavioral issues or emotional disturbances (as is common among teenagers in foster care), her attorneys would have been privy to this. It is reasonable to think that her LAS attorneys would have consulted with ****838** in-house social work staff and/or Ms. G.'s therapist at the time, gaining confidential information about the extent of her condition, any diagnoses and prognoses, and recommended treatments. Likewise, if in the course of their regular interactions with the teenage Ms. G. her LAS attorneys were concerned about her cognitive development, this would also be considered confidential information gained in the course of confidential attorney-client conversations. Any advice rendered by LAS social work staff regarding Ms. G.'s cognitive issues would also have to be considered as falling under the umbrella of client confidences.

The Court agrees with Ms. G. that the current child protective case against her is substantially related to the prior case in *938 which she was the subject child. The initial question presented in the Bronx litigation was whether then–24–year–old Ms. G. neglected her daughter by engaging in domestic violence with the child's father in the child's presence. While Ms. G.'s mental health and cognitive abilities would not appear to be relevant to that question, Article 10 litigation is rarely limited to the explicit allegations presented in the initial petition. Indeed, in addition to the fact-finding hearing conducted on the petition itself, when the Court conducts a hearing pursuant to Fam. Ct. Act § 1028, the operative question is whether the child would be at imminent risk to be returned to her mother's care; this can be an inquiry that goes beyond the allegations in the petition. Additionally, should the Court make a finding of neglect, the Court will then be required to enter a dispositional order, which will be determined by reference to the child's best interests. *See* Fam. Ct. Act § 1052. The question of what disposition is in the child's best interests is deeply entwined with a determination of the parents' strengths and weaknesses, and the parent's history of emotional problems, if any, is generally explored when this issue is litigated.

Ms. G.'s mental health and cognitive abilities are thus material issues in the present Bronx case. In fact, ACS has provided notice that it intends to ask the Court to conform the pleadings to the proof adduced at fact-finding, and some of the evidence in the fact-finding hearing has touched on Ms. G.'s mental health. Her mental health and cognitive abilities were also a primary focus of the § 1028 hearing and the Court's ruling on that hearing. (*See* Decision on Application for Return of Child Pursuant to FCA 1028, July 8, 2013, at 3–6.) They will undoubtedly be major issues at any dispositional hearing the Court would be required to conduct, as well. Because there is a reasonable probability that LAS attorneys received confidential information relevant to these issues during their prior representation of Ms. G., the Court finds that the prior case and the current one are substantially related, within the meaning of Rule 1.9. For that reason, at a minimum, Renee Mitler, Tara Famular, and Nadia Seerantan must be disqualified from having anything to do with Jalicia's representation. [4]

Overcoming the Presumption of Disqualification

Notwithstanding that an attorney from LAS is currently advocating a position against Ms. G. while assigned to represent *939 her child in a matter substantially related to a case in which other LAS attorneys previously represented Ms. G., the law does not necessarily require the Court to disqualify LAS. While the individual attorneys **839 from LAS who previously represented Ms. G. in Queens are themselves disqualified, as they do owe her a continued duty of loyalty under Rule 1.9, Rules 1.9 and 1.10 do not establish a mandatory or irrebuttable presumption of disqualification of their entire law firm in circumstances like this one. *Kassis,* 93 N.Y.2d at 616–17, 695 N.Y.S.2d 515, 717 N.E.2d 674; *Solow,* 83 N.Y.2d at 309, 610 N.Y.S.2d 128, 632 N.E.2d 437.

[11] **[12]** **[13]** The law teaches that an inflexible rule in this area would unfairly disqualify members of the firm who themselves have no knowledge of the client's confidences or secrets. An inflexible rule would also incentivize motions to disqualify mid-trial as a delay tactic. As "disqualification of a law firm during litigation may have significant adverse consequences to clients and others, 'it is particularly important that the Code of Professional Responsibility not be mechanically applied when disqualification is raised in litigation.' " *Kassis,* 93 N.Y.2d at 617–18, 695 N.Y.S.2d 515, 717 N.E.2d 674 (quoting *S & S Hotel Ventures v. 777 S.H. Corp.,* 69 N.Y.2d 437, 444, 515 N.Y.S.2d 735, 508 N.E.2d 647 (1987)). Instead of mechanically applying the rules to dismiss an attorney, "[a]ny fair rule of disqualification should consider the circumstances of the prior representation." *Solow* at 313, 610 N.Y.S.2d 128, 632 N.E.2d 437; *see also Silver Chrysler Plymouth v. Chrysler Motors Corp.,* 518 F.2d 751 (2d Cir.1975). The ethical rules provide guidance, and they are the body of law on which bar authorities base disciplinary decisions, but they are not mandates on how courts should handle live litigation. *S & S Hotel Ventures,* 69 N.Y.2d at 444–45, 515 N.Y.S.2d 735, 508 N.E.2d 647; Rules of Professional Conduct Preamble Comment 12.

[14] To disqualify the entire Legal Aid Society from representing her daughter on the basis of Rules 1.9 and 1.10, Ms. G. needs to make a showing of a risk that the LAS personnel working on her daughter's behalf in the current case have acquired or could acquire the confidences and secrets she shared with other LAS personnel when she was represented by LAS previously. *Kassis,* 93 N.Y.2d at 617, 695 N.Y.S.2d 515, 717 N.E.2d 674; *see also Nimkoff v. Nimkoff,* 18 A.D.3d 344, 345–46, 797 N.Y.S.2d 3 (1st Dept.2005). If she makes such a showing, the burden shifts to LAS to disprove that the current attorney had any opportunity to acquire confidential information from LAS's files or through contact with the attorney(s) who represented Ms. G. previously. *Kassis* at 617, 695 N.Y.S.2d 515, 717 N.E.2d 674.

[15] Based on the undisputed facts, the Court finds that there is no risk that the current attorney assigned to represent Ms. G.'s *940 child, Ms. Patricia Nevergold, has obtained confidential information learned by LAS from its prior representation of Ms. G. One of the staff attorneys who represented Ms. G. in the Queens matter left Legal Aid's employment before the current case in the Bronx was filed, another now practices in the Manhattan LAS office, and the third remains in Queens. Legal Aid attorneys in one county rarely interact with their colleagues in other counties, and have no cause to ever discuss their cases with each other. The hard file from Ms. G.'s Queens case was sent to archives when it was closed approximately five years ago, and Ms. Nevergold never asked for it to be retrieved and provided to her, not could she, without supervisory approval in both the Bronx and Queens offices. The Juvenile Rights Practice's computer system does not contain substantive information about cases as old as Ms. G.'s Queens case, so there is no possibility that Ms. Nevergold could have queried the system to retrieve confidential information **840 about Ms. G.[5] *Compare Cardinale,* 43 N.Y.2d at 292, 401 N.Y.S.2d 191, 372 N.E.2d 26 (affirming disqualification of small firm characterized by cross current of discussion and ideas among all attorneys on all matters, and all firm files were open and available to all lawyers).

[16] [17] Indeed, the central issue in determining whether the "circumstances of the prior representation," *Solow* at 313, 610 N.Y.S.2d 128, 632 N.E.2d 437, warrant disqualification of an entire law firm is whether there was a free flow of information among its attorneys such that there is a meaningful risk that confidences shared with the prior attorney would be available to the current attorney taking an adverse position to the former client. *People v. Wilkins,* 28 N.Y.2d 53, 56, 320 N.Y.S.2d 8, 268 N.E.2d 756 (1971); *Hurlburt v. Behr,* 70 A.D.3d 1266, 897 N.Y.S.2d 271 (3d Dep't.2010). It is simply not realistic to treat large firms, where information does not readily flow among front-line staff with their own individual caseloads, the same as small firms. Denise A. Copeland, "Conflicts of Interest in the Mega–Firm," 13 *J. of the Legal Profession* 255 (1988). Courts considering whether there is a free flow of confidential case information within LAS have generally concluded that there is not. *See, e.g., Wilkins,* 28 N.Y.2d at 53, 320 N.Y.S.2d 8, 268 N.E.2d 756; *People v. Chambers,* 133 Misc.2d 868, 508 N.Y.S.2d 378 (Sup.Ct. Kings Co.1986); *People v. Spencer,* 101 Misc.2d 259, 420 N.Y.S.2d 868 (Sup.Ct. Kings Co.1979). These cases support this Court's conclusion that there is *941 no risk that Ms. Nevergold has access to confidential information Ms. G. shared with other LAS staff.

[18] Once the presumption of disqualification is rebutted, the attorney may generally remain on the case so long as reasonable steps are taken to ensure that, going forward, there is no sharing of confidences from her firm's past representation of the former client, generally by isolating the attorney who possesses the confidences from the current matter. *Nimkoff,* 18 A.D.3d at 346, 797 N.Y.S.2d 3; N.Y. Rules of Professional Conduct 1.0(t). As provided in the Comments to Rule 1.0:

> The purpose of screening is to ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. In any event, procedures should be adequate to protect confidential information.

Rule 1.0(t) Comment 9. In Ms. G.'s case, there were three LAS attorneys who represented her during her time in foster care, only two of whom are still employed by LAS, Renee Mitler and Tara Famular. (Mitchell Affirm. ¶ 10.) These two lawyers are disqualified from representing Ms. G.'s child in the current litigation, and they must be screened out from anything to do with the present matter. *See Susan K. v. Thomas C.,* 25 Misc.3d 1207(A), 901 N.Y.S.2d 903, 2009 WL 3151125 (Fam. Ct. Monroe Co.2009). LAS has given assurances that they have been. (Mitchell Affirm. **841 ¶ 10.) Placing them within a "cone of silence," *Nemours Foundation v. Gilbane et al.,* 632 F.Supp. 418, 428 (D.Del.1986), combined with a directive that Ms. Nevergold not seek out any confidential information about Ms. G. from them or their files, *Spencer,* 101 Misc.2d at 262, 420 N.Y.S.2d 868, is sufficient to protect Ms. G.'s confidences while permitting LAS to remain on the current case.

Based on the same facts that establish that there is no risk that Ms. Nevergold had access to confidential information about Ms. G. that may be in the LAS files at the time this motion was *942 filed, there is also no risk that, going forward, Ms.

Nevergold will obtain such information. As an officer of the court she has represented that she will not seek it out.

Appearance of Impropriety

The Rules of Professional Conduct are concerned not only with actual improprieties but also with the appearance of impropriety. *See generally Cardinale,* 43 N.Y.2d at 296, 401 N.Y.S.2d 191, 372 N.E.2d 26. For that reason, it is essential that large law firms have written policies and protocols to screen for potential conflicts of interest between potential clients and former clients at the outset of new representation. Such policies can identify irremediable conflicts before they arise, leading to the declining of representation. Equally important, these policies can create screens or cones of silence around specified personnel within the firm to permit the firm to take on new matters even if mechanical application of Rules 1.9 and 1.10 might suggest disqualification is necessary. The LAS Juvenile Rights Practice has such protocols and its attorneys have represented to the Court that they were applied in this case. There is no evidence to suggest otherwise.

[19] The gravamen of Ms. G.'s motion is that LAS's actions create an appearance of impropriety. Her attorney argues that analysis of whether there is an appearance of impropriety should occur from the subjective point of view of the client, as opposed to the general public. (Ross Reply Affirm. ¶ 18.) Among other deficits to this argument is the fact that her motion contains no affidavit from Ms. G. herself attesting to her views of the situation and any purported feelings of betrayal. Nevertheless, the Court will give Ms. G. the benefit of the doubt and accept as true the representations made by her lawyer concerning her views.

However, there is no reason to suggest that Ms. G.'s personal views of the propriety or lack thereof of LAS's actions matter to the outcome of her motion. Counsel provides no citation for the proposition that the appearance analysis ought to be a subjective, as opposed to an objective, assessment of how the lay public would view the situation. While there may be areas of the law in which courts look to the characteristics of a specific sub-population when making "reasonable person" determinations, *see e.g., J.D.B. v. North Carolina,* —— U.S. ——, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (holding that determination of whether child was in custody for purposes of triggering *Miranda* rights should be viewed with reference to how a reasonable juvenile would experience the situation), counsel does not argue that the Court ***943** should analyze the appearance of impropriety issue from the perspective respondent mothers in Article 10 cases or any other particular group. Rather, she posits that Ms. G. is "a young mother who spent the bulk of her childhood in foster care" and has "feelings of mistrust of the system and injustice," and that the appearance issue "should be viewed in the light of the client." (Ross Reply Affirm. ¶¶ 18–19.)

[20] One of the philosophical underpinnings of the Rules of Professional Conduct ****842** is that by adhering to the Rules and self-regulating, the legal profession earns and maintains public confidence. *See* N.Y. Rules of Professional Conduct Preamble, Comments 1, 4, 5. The general public ought not lose confidence in the legal system from the actions taken by LAS in the G. case. Contrary to the arguments raised by Ms. G., the screening protocols used by LAS overcome any appearance of impropriety in this case. Several factors lead to this conclusion. *See Holcombe v. Quest Diagnostics, Inc.,* 675 F.Supp.2d 515, 519 (E.D.Pa.2009). First, by counsel's own concession (Ross Affirm. ¶ 11), Ms. G. has no recollection of meeting or working with an attorney (from LAS or otherwise) when she was in foster care; this suggests that the relationship she had with them was insubstantial from her perspective and seriously undermines any claim that she feels betrayed by LAS. More importantly, from the objective perspective of the general public, the appearance of impropriety, if any, is minimal when the law firm in question had such an insubstantial relationship with the former client that the client does not even remember it. Second, the Juvenile Rights Practice at LAS is very large, consisting of over 100 lawyers, only two of whom are disqualified from working on the current case. Third, according to LAS, the screen in this case was erected from the moment the Bronx case was filed, and LAS attorneys have represented that there has been absolutely no contact by Ms. Nevergold with any information from the prior matter.

Finally, it bears noting that this case was initially filed in April 2012 and fact-finding has not yet concluded. The child has been in temporary foster care since the inception of the case, which means she has been away from her mother for about half of her young life. The initial hearing was mistried when Ms. G. had a breakdown with her first lawyer, who was relieved. She asked for a § 1028 hearing in the middle of the second fact-finding. The instant motion, if granted, would only lead to more delays and greater prejudice to the child. This prejudice, ***944** "while not of paramount importance, cannot be disregarded or minimized here." *Nimkoff,* 18 A.D.3d at 346, 797 N.Y.S.2d 3.

Conclusion

The Court is satisfied that the continued representation of Ms. G.'s child by LAS is appropriate, so long as all LAS personnel who work on this case continue to avoid any contact with the LAS records relating to its prior representation of Ms. G. herself and that those staff who worked on Ms. G.'s matter in Queens screen themselves off from having anything to do with the current matter in the Bronx.

Based on the foregoing, IT IS HEREBY ORDERED:

1)Motion # 1 is denied.

2)LAS attorneys Renee Mitler and Tara Famular are disqualified from representing Jalicia G. They are directed to isolate themselves from any and all conversations or interactions relating to the current LAS representation of Jalicia G., and to refrain from disclosing any confidential information concerning their representation of Jacquelin G. to anyone at LAS. In accordance with Rule 1.00(t) Comment 9, they are directed to file an affirmation with this Court by September 30 acknowledging their obligation not to communicate with any other LAS staff about their representation of Ms. G. or the present matter in Bronx Family Court involving Ms. G.'s daughter.

3)LAS attorneys Patricia Nevergold and Dawne Mitchell, and any other personnel from LAS who may have interacted in any way with the LAS representation of Jalicia G., are directed to refrain from seeking out any confidential information concerning ****843** the prior LAS representation of Jacquelin G.

Parallel Citations

41 Misc.3d 931, 971 N.Y.S.2d 831, 2013 N.Y. Slip Op. 23307

Footnotes

1 As of the date of this ruling, a decision on the fact-finding as to Mr. W. has not been rendered.

2 Respondent requested that the Court stay all further proceedings in the case pending a decision on the motion to disqualify LAS. The Court denied this, finding that the harm of proceeding with the case was outweighed by likelihood that the motion would fail on the merits. Respondent then sought a stay of all proceedings in the Family Court from the Appellate Division, which denied the application without prejudice to its renewal once the motion to disqualify LAS was decided.

3 Following the denial of respondent's stay application, the § 1028 hearing continued with further testimony on June 20, 25, and 27, and July 1 and 2, and the Court issued its decision on July 8. The fact-finding hearing continued on August 16, and the next date is September 30.

4 Insofar as Ms. Seerantan is no longer employed by LAS, there is no risk that she would be involved in the child's current case in Bronx Family Court.

5 Ms. Nevergold never sought out any information about Ms. G. from Legal Aid's institutional history, because she had no idea that LAS previously represented Ms. G. When she was first assigned the case, she was told that there was "no conflict."

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114 A.D.3d 177
Supreme Court, Appellate Division,
Fourth Department, New York.

Matter of Brian J. KELLOGG,
an Attorney, Respondent.
Grievance Committee of the
Fifth Judicial District, Petitioner.

Dec. 27, 2013.

Synopsis

Background: In attorney disciplinary matter, the Grievance Committee moved to confirm factual findings of referee and for imposition of appropriate discipline.

Holding: The Supreme Court, Appellate Division, held that stayed one-year period of suspension, contingent upon attorney's remaining free of further disciplinary action while stay was in effect and on attorney's submission of quarterly reports from mental health provider and from mentor attorney, was appropriate discipline for attorney's misconduct.

So ordered.

**511 PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND WHALEN, JJ.

Opinion

PER CURIAM:

*178 Respondent was admitted to the practice of law by this Court on October 17, 2005, and maintains an office in Syracuse. The Grievance Committee filed a petition alleging four charges of misconduct against respondent, including neglecting client matters and engaging in conduct involving dishonesty or deceit. Respondent filed an answer denying certain allegations, and this Court appointed a referee to conduct a hearing. During the proceeding before the Referee, the parties stipulated to certain factual issues, eliminating the need for a hearing. The Referee has filed a report sustaining the charges based upon the stipulation of the parties and **512 various evidentiary documents. The Grievance Committee moves to confirm the factual findings of the Referee and, in response to the motion, respondent appeared before this Court and submitted matters in mitigation.

With respect to charge one, respondent admits that, in 2009, he agreed to represent an individual in an action to recover damages for personal injuries that the individual sustained as the result of a physical assault, despite the fact that respondent had limited experience in personal injury matters. Respondent further admits that, although he filed an amended complaint in September 2011, he did not serve opposing counsel with that pleading until June 2012. Respondent additionally admits that, from October 2011 through April 2012, he failed to respond to several inquiries from his client regarding the matter and that, from August 2012 through March 2013, he failed to respond to discovery demands directed to his client.

With respect to charge two, respondent admits that, in 2010, he agreed to negotiate a separation agreement on behalf of a client in a domestic relations matter and, in February 2012, he agreed to represent that client in an action for divorce. Although respondent filed a summons and complaint on behalf of his client *179 in August 2012, he admits that he thereafter failed to take action to complete the matter and that he made misrepresentations to the parties regarding the status of the matter.

With respect to charge three, respondent admits that, in March 2012, he agreed to represent a client in Town Court in a traffic matter in which the most serious charge was aggravated unlicensed operation of a motor vehicle in the second degree (Vehicle and Traffic Law § 511[2]), an unclassified misdemeanor. Respondent admits that, from April through December 2012, he failed to maintain contact with his client and Town Court, resulting in the suspension of the client's driver's license for his failure to appear as directed by the court. Respondent further admits that, in December 2012, he incorrectly advised the client that the prosecution had tendered a plea offer that required the client to enter a plea of guilty to reduced charges of "non-moving violations and parking tickets," when in fact the offer from the prosecutor required the client to enter a plea of guilty to a misdemeanor. Respondent's client accepted the plea offer based upon respondent's statement, and the client unknowingly entered a plea of guilty to aggravated unlicensed operation of a motor vehicle in the third degree (Vehicle and Traffic Law § 511 [1]), an unclassified misdemeanor.

With respect to charge four, respondent admits that, during the Grievance Committee's investigation, he made

misrepresentations to the Grievance Committee regarding his knowledge and experience in the practice of law.

We confirm the factual findings of the Referee and conclude that respondent has violated the following Rules of Professional Conduct:

rule 1.1 (a) (22 NYCRR 1200.0)—failing to provide competent representation to a client;

rule 1.1 (b) (22 NYCRR 1200.0)—handling a legal matter that he knows or should know that he is not competent to handle;

rule 1.1 (c)(2) (22 NYCRR 1200.0)—intentionally prejudicing or damaging a client during the course of the professional relationship;

rule 1.3 (a) (22 NYCRR 1200.0)—failing to act with reasonable diligence and promptness in representing a client;

**513 rule 1.3 (b) (22 NYCRR 1200.0)—neglecting a legal matter entrusted to him;

rule 1.4 (a)(3) (22 NYCRR 1200.0)—failing to keep a client reasonably informed about the status of a matter;

*180 rule 8.4 (c) (22 NYCRR 1200.0)—engaging in conduct involving dishonesty, deceit or misrepresentation;

rule 8.4 (d) (22 NYCRR 1200.0)—engaging in conduct that is prejudicial to the administration of justice; and

rule 8.4 (h) (22 NYCRR 1200.0)—engaging in conduct that adversely reflects on his fitness as a lawyer.

We decline to sustain the alleged violation of rule 1.5(c) (22 NYCRR 1200.0). Although the Referee found facts that tend to support the Grievance Committee's contention that respondent violated that disciplinary rule, and those factual findings are supported by the evidence received during the proceeding before the Referee, the petition filed by the Grievance Committee lacks the requisite factual allegation that respondent's legal fee in the personal injury matter was contingent on the outcome thereof.

We have considered, in determining an appropriate sanction, that respondent has received a letter of caution and a letter of admonition for conduct that is similar to certain of the misconduct herein. We have additionally considered the matters submitted by respondent in mitigation, including his statement that the misconduct occurred at a time when he was suffering from mental health issues for which he has since sought treatment. We have further considered that respondent has engaged a mentor attorney to review his law office procedures and to make recommendations to prevent similar misconduct in the future. Finally, we have considered respondent's expression of remorse for the misconduct.

Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be suspended from the practice of law for a period of one year and until further order of the Court. We direct, however, that the period of suspension be stayed on condition that respondent, during that period, shall comply with the statutes and rules regulating attorney conduct and that he shall not be the subject of any further action, proceeding or application for discipline or sanctions in any court. Furthermore, in accordance with the terms of the order entered herewith, respondent is to submit to the Grievance Committee quarterly reports from his medical provider confirming that he is completing any recommended mental health treatment program and continues to have the capacity to practice law (*see Matter of Armer,* 91 A.D.3d 200, 939 N.Y.S.2d 204, 206). In addition, we direct that respondent, during the period of suspension, submit to the Grievance Committee quarterly reports from his mentor attorney confirming that respondent is continuing his *181 relationship with the mentor attorney and implementing all recommendations that have been made by the mentor attorney to improve the administration of respondent's law practice and to prevent future misconduct. Any failure to meet the aforementioned conditions shall be reported by the Grievance Committee to this Court, whereupon the Grievance Committee may move before this Court to vacate the stay of respondent's suspension.

Order entered suspending respondent for a period of one year, with the suspension stayed upon the terms and conditions set forth in the order.

Parallel Citations

114 A.D.3d 177, 977 N.Y.S.2d 511, 2013 N.Y. Slip Op. 08785

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122 A.D.3d 908
Supreme Court, Appellate Division,
Second Department, New York.

Cindy Ann LAUDER, respondent,
v.
Paul B. GOLDHAMER, etc., et al., appellants.

Nov. 26, 2014.

Synopsis

Background: Former matrimonial client brought action against her former law firm and firm partner for legal malpractice and to set aside retainer agreement. The Supreme Court, Rockland County, Walsh II, J., denied defendants' motion to dismiss second amended complaint for failure to state cause of action, and granted client's motion to disqualify defendants' counsel. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] client stated causes of action against partner personally;

[2] causes of action to recover damages for breach of fiduciary duty, to set aside retainer agreement, and to recover damages for violation of statute relating to attorney misconduct were not duplicative of cause of action for legal malpractice;

[3] trial court did not improvidently exercise its discretion in granting client's motion for leave to serve second amended complaint; and

[4] disqualification of counsel was warranted under advocate-witness rules.

Affirmed.

Attorneys and Law Firms

****81** Kantrowitz, Goldhamer & Graifman, P.C., Chestnut Ridge, N.Y. (Barry S. Kantrowitz and Reginald H. Rutishauser of counsel), appellant pro se and for appellants Paul B. Goldhamer, Randy Perlmutter, and Kantrowitz, Goldhamer & Graifman, LLP.

Karen Winner, New York, N.Y., for respondent.

PETER B. SKELOS, J.P., THOMAS A. DICKERSON, CHERYL E. CHAMBERS, and SANDRA L. SGROI, JJ.

Opinion

***909** In an action, inter alia, to recover damages for legal malpractice, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Rockland County (Walsh II, J.), dated September 24, 2013, as denied those branches of their motion pursuant to CPLR 3211(a) (7) which were to dismiss the amended complaint insofar as asserted against the defendant Paul B. Goldhamer individually, and to dismiss the second, sixth, and seventh causes of action, and granted the plaintiff's cross motion to disqualify attorney Barry Kantrowitz from representing the defendants and for leave to serve a second amended complaint.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff was a former matrimonial client of the defendant Kantrowitz Goldhamer & Graifman, P.C. (hereinafter the firm), of which the defendant Paul B. Goldhamer is a partner. The plaintiff commenced this action against the defendants to recover damages, inter alia, for legal malpractice, breach of fiduciary duty, and violation of Judiciary Law § 487, and to set aside a retainer agreement. The defendants moved pursuant to CPLR 3211(a)(7) to dismiss the amended complaint insofar as asserted against Goldhamer individually, and to dismiss the second through seventh causes of action. The plaintiff thereafter voluntarily withdrew the third, fourth, and fifth causes of action asserted in the amended complaint, and cross-moved to disqualify attorney Barry Kantrowitz, a partner of the firm, from representing the defendants, and for leave to serve a second amended complaint. The Supreme Court denied those branches of the defendants' motion which were to dismiss the amended complaint insofar as asserted against Goldhamer individually, and to dismiss the second, sixth, and seventh causes of action, and granted the plaintiff's cross motion.

[1] **[2]** The Supreme Court properly denied that branch of the defendants' motion which was to dismiss the amended complaint insofar as asserted against Goldhamer individually. In determining a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint, the facts alleged in the complaint must be deemed to be true, and the plaintiff must be accorded the benefit of every favorable inference (*see Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511).

Further, a court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see Freeman v. City of New York,* 111 A.D.3d 780, 781, 975 N.Y.S.2d 141; *Pasquaretto v. Long Is. Univ.,* 106 A.D.3d 794, 795, 964 N.Y.S.2d 599).

[3] Here, considering the amended complaint and the plaintiff's affidavit, the **82 plaintiff alleged that negligent acts were committed *910 personally by Goldhamer. The plaintiff also alleged that negligent acts were committed by the defendant Randy Perlmutter under Goldhamer's direct supervision and control. Goldhamer would be personally liable for any such negligence (*see* Business Corporation Law § 1505[a]; *Beltrone v. General Schuyler & Co.,* 223 A.D.2d 938, 636 N.Y.S.2d 917). Thus, the amended complaint stated causes of action against Goldhamer individually.

[4] Contrary to the defendants' contention, the second cause of action, which was to recover damages for breach of fiduciary duty, and was based upon the defendants' alleged conduct of charging her unnecessary and excessive fees, and the sixth and seventh causes of action, which were to set aside the retainer agreement and to recover damages for violation of Judiciary Law § 487, respectively, were not duplicative of the cause of action to recover damages for legal malpractice (*see Tanenbaum v. Molinoff,* 118 A.D.3d 774, 987 N.Y.S.2d 214; *Postiglione v. Castro,* 119 A.D.3d 920, 922, 990 N.Y.S.2d 257; *Loria v. Cerniglia,* 69 A.D.3d 583, 891 N.Y.S.2d 286; *Moormann v. Perini & Hoerger,* 65 A.D.3d 1106, 1108, 886 N.Y.S.2d 49). Therefore, dismissal of those causes of action was not warranted on that ground.

[5] The defendants' arguments concerning the eighth cause of action alleged in the amended complaint are not properly before this Court, since the defendants did not move to dismiss that cause of action and have raised these arguments for the first time on appeal (*see Canzona v. Atanasio,* 118 A.D.3d 837, 989 N.Y.S.2d 44).

[6] [7] The Supreme Court did not improvidently exercise its discretion in granting the plaintiff's motion for leave to serve a second amended complaint. In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025[b]; *Postiglione v. Castro,* 119 A.D.3d 920, 990 N.Y.S.2d 257; *Bernardi v. Spyratos,* 79 A.D.3d 684, 912 N.Y.S.2d 627). Here, there was no prejudice or surprise to the defendants, and the proposed second amended complaint was not palpably insufficient or patently devoid of merit.

[8] The disqualification of an attorney is a matter that rests within the sound discretion of the Supreme Court (*see Nationscredit Fin. Servs. Corp. v. Turcios,* 41 A.D.3d 802, 802, 839 N.Y.S.2d 523). Here, the Supreme Court did not improvidently exercise its discretion in granting that branch of the plaintiff's cross motion which was to disqualify Kantrowitz from representing the defendants pursuant to the advocate-witness rules (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7). The allegations in the amended complaint and the plaintiff's affidavit *911 established that the testimony of Kantrowitz, who was the only attorney involved in the plaintiff's execution of the retainer agreement and who the plaintiff alleged made certain misrepresentations that induced her to execute the agreement, would be necessary to resolve issues pertinent to the cause of action to set aside the retainer agreement (*see Fuller v. Collins,* 114 A.D.3d 827, 982 N.Y.S.2d 484; *Falk v. Gallo,* 73 A.D.3d 685, 901 N.Y.S.2d 99).

Accordingly, the Supreme Court properly denied those branches of the defendants' motion pursuant to CPLR 3211(a)(7) which were to dismiss the amended complaint insofar as asserted against the defendant Paul B. Goldhamer individually, and to dismiss the second, sixth, and seventh **83 causes of action, and properly granted the plaintiffs' cross motion.

Parallel Citations

122 A.D.3d 908, 998 N.Y.S.2d 79, 2014 N.Y. Slip Op. 08321

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107 A.D.3d 106
Supreme Court, Appellate Division,
Fourth Department, New York.

Matter of Wayne I. OHL, An Attorney, Respondent.
v.
GRIEVANCE COMMITTEE OF the
SEVENTH JUDICIAL DISTRICT, Petitioner.

April 26, 2013.

Synopsis

Background: Grievance Committee moved for confirmation of report of referee and imposition of appropriate discipline on attorney who had engaged in course of conduct involving deceit, neglect of client matters, failure to keep clients apprised of status of their cases, trust account violations, and failure to cooperate with the Grievance Committee.

[Holding:] The Supreme Court, Appellate Division, held that two-year suspension from practice of law was appropriate discipline for attorney's misconduct.

So ordered.

**785 PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

Opinion

**786 PER CURIAM:

*107 Respondent was admitted to the practice of law by this Court on February 20, 1974, and maintains an office in Mendon. The Grievance Committee filed a petition alleging five charges of misconduct against respondent, including misappropriating client funds, failing to comply with the Rules of Professional Conduct regarding financial record keeping and the maintenance of client funds, and failing to cooperate with the Grievance Committee. Respondent filed an answer denying material allegations of the petition, and a referee was appointed to conduct a hearing. The Referee has submitted a report, which the Grievance Committee moves to confirm. In response to the motion, respondent continues to deny certain allegations of the petition and he has submitted various matters in mitigation. Respondent appeared before this Court on the return date of the motion and was heard in mitigation of the charges at that time.

With respect to charge one, the Referee found that, in September 2008, respondent was retained to represent a client in an action for divorce and the related sale of certain real property that was jointly owned by the client and her then-estranged spouse. The Referee found that, on September 15, 2008, respondent deposited into his trust account funds in the amount of $116,537.19, constituting the gross proceeds of the sale of the real property. The Referee further found that, respondent converted a portion of those funds when they were deposited *108 into his trust account inasmuch as the balance in the account at the time was at least $85,146.13 below that necessary to satisfy his obligations to others.

The Referee found that respondent thereafter made various disbursements on behalf of the client, resulting in a net balance owed to the client in the amount of $9,380.01. The Referee further found that, from September 2008 through November 2010, respondent failed to respond to numerous requests from the client for an accounting of the net proceeds of the real estate transaction. The Referee found and respondent admits that, with respect to the client's divorce matter, respondent over the course of the representation produced only one billing statement, which was provided to the Grievance Committee in November 2010 after the client discharged respondent and filed a disciplinary complaint against him. As found by the Referee, that billing statement indicates that, in September 2008, respondent disbursed from his trust account to a personal account funds in the amount of $9,380.01, and treated those funds as an advanced retainer fee in relation to the client's divorce matter.

The Referee found that, after the client discharged respondent, she proceeded on a pro se basis in the divorce action and, in February 2011, she contacted respondent and requested a copy of her file in order to prepare for a court appearance. The Referee found that respondent thereafter sent to the client an email message wherein he represented that, "as agreed," respondent was holding in his trust account the net balance of the proceeds of the real estate transaction, and he would release to the client a copy of her file if she authorized respondent to apply those funds to an alleged balance owed to respondent for legal fees. The Referee found that respondent's statement that he was holding the client's funds in his trust account was false inasmuch as respondent had transferred the funds to a personal account in September 2008.

In addition to the conduct detailed above, the Referee found in relation to charge one that respondent entered into a retainer agreement with the client that did not comply with the Appellate Division **787 rules governing domestic relations matters inasmuch as the client was not afforded the right to receive itemized billing statements every 60 days or to cancel the agreement at any time. In addition, the Referee found that respondent failed to abide by the terms of the retainer agreement when he failed to provide to the client a copy of all documents and correspondence in relation to the divorce matter. Finally, *109 the Referee found that respondent on behalf of the client prepared a qualified domestic relations order without providing to the client a written retainer agreement in connection with that separate matter.

With respect to charge two, the Referee found that, in response to an allegation in this proceeding that respondent was holding in his trust account funds in the approximate amount of $420,000 that did not relate to any client matter, respondent provided to the Grievance Committee copies of a deposit slip and deposit receipt indicating that, in October 2007, respondent had deposited into his trust account on behalf of an estate funds in the amount of $464,935.35. In addition, in his verified answer to the petition in this matter, respondent asserted that he was executor for the estate in question and had continuously held those funds in his trust account. The Referee found that respondent thereafter failed to respond to numerous requests from the Grievance Committee for an accounting of the funds belonging to the estate and financial records for all transactions involving estate funds. The Referee further found that, from December 2010 through the date of the hearing in this matter, respondent produced to the Grievance Committee only certain financial records regarding the other funds held in his trust account, and he failed to produce all financial records requested by the Grievance Committee.

The Referee found that, as of September 2008, based upon the information that was available in this proceeding, respondent had a deficiency in his trust account of at least $85,146.13. The Referee further found that, from September 2008 through December 2010, respondent transferred from his trust account to various personal accounts funds in the amount of $490,488. Although respondent testified that those funds primarily consisted of legal fees to which he was entitled, the Referee found that respondent failed to produce financial records that might explain the nature of those transactions or justify unearned legal fees being deposited into his trust account in the first instance.

In addition to the trust account violations detailed above, the Referee found that, during the relevant time period, respondent arranged for certain clients to transfer to respondent funds in payment of legal fees by way of credit card transactions that were processed by a separate client. In five instances, the client that processed the transactions came into possession of funds belonging to another, unaffiliated client, and the funds were *110 ultimately transferred to respondent and deposited into his trust account.

With respect to charge three, the Referee found that respondent in relation to a child custody matter failed to provide to his clients a retainer agreement, itemized billing statements, or copies of documents relevant to their matter. In addition, the Referee found that respondent failed to keep his clients apprised of the status of their matter.

With respect to charge four, the Referee found that, in early 2010, a client retained respondent and paid him a retainer fee in the amount of $5,400. At the time, the client was the owner of a company that was named as a defendant in a federal civil lawsuit seeking unpaid wages allegedly **788 owed to certain former employees. The Referee found that, as of April 2010, respondent knew that counsel of record to the company in the federal litigation had withdrawn from the matter and that the company was obligated to file a response to a recently filed amended complaint. The Referee found that, despite that knowledge, respondent failed to take action regarding the matter and failed to advise the client that he did not intend to represent the company in the federal litigation. A default judgment in the approximate amount of $85,000 was subsequently entered against the company in the federal litigation. The Referee found that any uncertainty as to whether the client retained respondent to represent the company in the federal litigation was attributable to respondent's failure to provide the client with a written retainer agreement or letter of engagement, as was required based on the fact that respondent received a retainer fee greater than $3,000 in connection with the matter.

With respect to charge five, the Referee found that respondent's disciplinary history and the conduct at issue in this matter constitute a course of conduct involving deceit, neglect of client matters, trust account violations and failure to cooperate with the Grievance Committee.

[1] We confirm the factual findings of the Referee. We decline to sustain charge five, however, inasmuch as the allegations underlying that charge, i.e., that respondent has engaged in a course of conduct similar to misconduct for which he has already been disciplined, are more appropriately considered as a potential aggravating factor in this matter rather than as a separate charge of misconduct.

We conclude that respondent has violated the following former Disciplinary Rules of the Code of Professional Responsibility and the following Rules of Professional Conduct:

*111 DR 1–102(a)(4) (22 NYCRR 1200.3[a][4]) and rule 8.4(c) of the Rules of Professional Conduct (22 NYCRR 1200.0)—engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

DR 1–102(a)(5) (22 NYCRR 1200.3[a][5]) and rule 8.4(d) of the Rules of Professional Conduct (22 NYCRR 1200.0)—engaging in conduct that is prejudicial to the administration of justice;

DR 1–102(a)(7) (22 NYCRR 1200.3[a][7]) and rule 8.4(h) of the Rules of Professional Conduct (22 NYCRR 1200.0)—engaging in conduct that adversely reflects on his fitness as a lawyer;

DR 2–106(c)(2)(ii) (22 NYCRR 1200.11[c][2][ii]) and rule 1.5(d)(5)(ii) of the Rules of Professional Conduct (22 NYCRR 1200.0)—entering into an arrangement for, charging or collecting a fee in a domestic relations matter without a written retainer agreement signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement;

DR 2–106(c)(3) (22 NYCRR 1200.11[c][3]) and rule 1.5(d)(2) of the Rules of Professional Conduct (22 NYCRR 1200.0)—entering into an arrangement for, charging or collecting a fee proscribed by law or rule of court;

DR 6–101(a)(3) (22 NYCRR 1200.30[a][3]) and rule 1.3(b) of the Rules of Professional Conduct (22 NYCRR 1200.0)—neglecting a legal matter entrusted to him;

DR 9–102(a) (22 NYCRR 1200.46[a]) and rule 1.15(a) of the Rules of Professional Conduct (22 NYCRR 1200.0)—misappropriating client funds and commingling client funds with personal funds;

DR 9–102(b)(1) (22 NYCRR 1200.46[b][1]) and rule 1.15(b)(1) of the Rules of Professional Conduct (**789 22 NYCRR 1200.0)—failing to maintain client funds in a special account separate from his business or personal accounts;

DR 9–102(c)(3) (22 NYCRR 1200.46[c][3]) and rule 1.15(c)(3) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain complete records of all funds of a client coming into his possession and to render appropriate accounts to his client regarding them;

DR 9–102(c)(4) (22 NYCRR 1200.46[c][4]) and rule 1.15(c)(4) of the Rules of Professional Conduct (22 NYCRR 1200.0)-failing to pay or deliver to a client in a prompt manner as requested by the client the funds, securities or other properties in his possession that the client is entitled to receive;

*112 DR 9–102(d)(1) (22 NYCRR 1200.46[d][1]) and rule 1.15(d)(1) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain required records of bank accounts; and

DR 9–102(d)(2) (22 NYCRR 1200.46[d][2]) and rule 1.15(d)(2) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed.

[2] We have considered, in determining an appropriate sanction, respondent's substantial disciplinary history, which includes two letters of caution and two prior censures imposed by this Court (*Matter of Ohl,* 31 A.D.3d 122, 817 N.Y.S.2d 794; *Matter of Ohl,* 223 A.D.2d 307, 646 N.Y.S.2d 465). We have further considered the ongoing nature of the misconduct inasmuch as most of the conduct at issue in this matter is similar to conduct that, at least in part, gave rise to those prior disciplinary matters. In addition, although respondent states in this matter that he suffers from depression, anxiety and a gastrointestinal ailment, we have considered that he has made similar representations to this Court in response to prior allegations of misconduct. We have additionally considered that respondent in this proceeding has failed to submit to the Referee or this Court corroborating evidence, such as a sworn statement from his medical provider or medical records made contemporaneous with treatment, tending to establish

a nexus between his medical conditions and his misconduct. Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be suspended from the practice of law for a period of two years and until further order of the Court.

Order of suspension entered.

Parallel Citations

107 A.D.3d 106, 964 N.Y.S.2d 785, 2013 N.Y. Slip Op. 02988

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45 Misc.3d 1025
Supreme Court, New York County, New York.

Daniela RAJIC, Petitioner,
v.
Paul GEORGE, Respondent.

Sept. 22, 2014.

Synopsis

Background: Mother petitioned to establish paternity and for award of sole physical and legal custody of minor child. Putative father, who was a professional basketball player, moved to dismiss petition for lack of personal jurisdiction.

Holdings: The Supreme Court, New York County, Matthew F. Cooper, J., held that:

[1] personal jurisdiction over putative father was not required to determine custody, and

[2] court lacked personal jurisdiction over putative father as to issue of paternity.

Motion granted as to paternity, and otherwise denied.

Attorneys and Law Firms

****293** Raoul Felder & Partners, P.C., New York, for Petitioner.

Gordon & Rees, LLP, New York, for Respondent.

Opinion

MATTHEW F. COOPER, J.

***1026** In this proceeding brought by petitioner-mother, Daniela Rajic, to establish paternity and seek sole physical and legal custody of a minor child, the respondent-putative father, Paul George, moves, pursuant to CPLR 3211(a)(8), to dismiss the petition for lack of personal jurisdiction over him. Even though it is all but certain that respondent is the father of the five month old baby girl who is at the center of this case, he has gone to every length imaginable to avoid taking responsibility for his actions. And although this proceeding is only at the dismissal stage, the case is already remarkable for the scope of the litigation brought by respondent against the petitioner and the tactics employed by his attorneys.

Background and Procedural History

The petitioner, who is 23, was born and raised in Queens, New York. From approximately August 2008 through December 2011, she attended college in Tampa, Florida. Petitioner returned briefly to Queens in March 2012 to live with her family, and thereafter entered into a one-year apartment lease in Miami, Florida in late December 2012.

The parties met in June of 2013 in Miami, where they had sexual intercourse while respondent was staying at the Fontainebleau Hotel. Thereafter, they commenced a sexual relationship over the course of the next several months in the states of California and Indiana. After petitioner informed respondent that she was pregnant, the parties privately submitted themselves to DNA testing on or about December 18, 2013. The results of that test concluded that the respondent is the biological father by the likelihood of 99.9% (*see* Opposition, Paternity Test, Exhibit K). With her lease obligation ending and the subject child approximately four months from birth, petitioner returned to New York to reside with her family. On May 1, 2014, petitioner gave birth to a daughter at New York Weill Cornell Medical Center (*see* Opposition, Birth Certificate, Exhibit C). Respondent, through the communication of counsel, assisted petitioner in paying for the related hospital bills. [1]

On May 27, 2014, petitioner, having been unsuccessful in convincing respondent to officially acknowledge paternity and ***1027** assume any degree of parental responsibility, commenced this filiation and child custody proceeding by Verified Petition and Order to Show Cause. As permitted by the signed Order to Show Cause, substituted service was effectuated on respondent's attorneys, ****294** the law firm of Gordon & Rees, LLP in New York. This court permitted substituted service upon a showing that personal service on respondent would be extremely difficult, if not impossible, because of the tight security that surrounds respondent as an all-star NBA player for the Indiana Pacers, and his living in a gated community to which a process server would be unable to gain access. This court also determined that the best means of affording respondent actual notice was to have the papers served on respondent's attorneys, who had been dealing on behalf of respondent with petitioner and her attorneys throughout the pregnancy and the child's birth, and who had informed petitioner's attorneys that they

would be representing him in this proceeding (*see* Opposition, Affirmation in Support of Order to Show Cause, Exhibit X). Petitioner's Order to Show Cause was made returnable on June 27, 20014, with respondent being directed to serve and file answering papers by June 18, 2014.

Instead of submitting timely answering papers as set forth in the briefing schedule in the order, respondent's attorneys, by a notice dated June 18, 2014, and without a viable legal or factual basis to do so, attempted to remove this proceeding to the United States District Court for the Southern District of New York (the "Federal Action") on the grounds of diversity jurisdiction. The basis given for the claim of diversity of citizenship was that respondent resides in Indiana and petitioner resides in New York. In an attempt to meet the federal's court requirement that the amount in controversy be in excess of $75,000, respondent's attorney stated in his Notice of Removal that the case which respondent was seeking to remove from this court to federal court was one to "determine child support" and that "because Respondent is a high income earner, and pursuant to the New York State Child Support Standards, the child support at issue in this matter far exceeds $75,000 over the course of twenty-one years" (*see* Opposition, Notice of Removal, Exhibit DD). This statement was a complete and utter fabrication as the petition is solely one for paternity and custody; nowhere in the petition, or in the accompanying Order to Show Cause, is there a claim for, or even a mention of, child support. Thus, it unfortunately appears that respondent's attorney had no ***1028** compunction against making an absolutely untrue statement to a federal judge in order to seek removal of the custody proceeding from this court to the federal court.[2]

On June 27, 2014, petitioner filed an application to remand the Federal Action to this court. On July 22, 2014, Judge Lorna Schofield, citing United States Supreme ****295** Court authority applying the well known domestic relations exception to the federal court's subject matter jurisdiction, issued an Opinion and Order terminating the pending dismissal motion and granting petitioner's application to remand stating that it "has no subject matter jurisdiction over the claims here" (*see* Opposition, Exhibit KK).

The day after respondent filed his spurious Notice of Removal, his attorneys unleashed a second line of attack against petitioner: they commenced a proceeding in Florida. The petition, filed in the Circuit Court of the Eleventh Judicial Circuit for Miami–Dade County, was verified by respondent on June 19, 2014, and is captioned "Petition to Determine Paternity and for Related Relief." The petition all but admits paternity, stating: "Upon information and belief, Petitioner [the respondent in this proceeding] is the natural father of the minor child, but also seeks reputable, scientific testing that is accepted under the law to confirm the paternity of the minor child" (*see* Affirmation of C. Anthony Mulrain, Esq., Exhibit B). The basis given for the case being brought in the Florida court is that the mother (the respondent there and the petitioner in this proceeding) resides in Miami and the child was conceived by an act of sexual intercourse that occurred in Florida. These allegations are made despite the acknowledgment set forth in the petition itself that ***1029** "respondent has been visiting her parents [in Queens, New York] since the birth of the minor child," and the clear evidence that the unprotected act of intercourse that resulted in the pregnancy occurred on or about August 12, 2013 in California, two months later than the act of intercourse occurring in Florida (*see* Opposition, Affidavit of Daniela Rajic, p. 6).

Perhaps the most extraordinary aspect of the Florida petition is that the "related relief" that respondent seeks includes a demand that "parental responsibility be awarded solely to the Father," with the petitioner be to granted "limited parental time-sharing with the child." In demanding this relief, respondent makes the startling claim that he is "the best parent to care for the minor child on a day-to-day basis," and that respondent "is not capable of the care of the minor child ... due to the fact that [she] is currently unemployed." It is beyond comprehension how respondent could vouch for his skill at caring for the child while disparaging the petitioner's abilities when he has never even seen the child, asked to see the child, or offered to provide for the child's needs beyond paying for some medical expenses.

On July 25, 2014, respondent filed the instant motion to dismiss the child custody and paternity petition now before this court. The return date for the motion was set for September 15, 2014. After denying a late telephonic request by respondent to adjourn the motion, the court heard argument from counsel on the return date. In addition, petitioner gave sworn testimony on the record in open court, and respondent's attorney was given ample time to cross-examine her. Her testimony was convincing, credible and uncontradicted, as she established that New York, and not Florida, is her residence and her domicile. Even more importantly, petitioner testified under oath that the child has lived continuously and uninterrupted in Queens with petitioner and her family since birth. Although directed to

appear by this court in its order of July 31, 2014, and by the order of Justice Lori Sattler when she signed respondent's Order to Show Cause on July 25, 2014, respondent failed to appear in court on the return date of his motion without requesting that his appearance be waived, giving notice to the court or opposing **296 counsel, or offering any reasonable excuse for his absence. [3]

*1030 *Analysis and Discussion*

The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), enacted in New York as Domestic Relations Law ("DRL") Article 5–A (§ 75, *et seq.*) applies to this petition. DRL § 75–a (4) provides that a "[c]hild custody proceeding" means a proceeding in which legal custody, physical custody ... with respect to a child is an issue" and "includes a proceeding for ... paternity." Further, a New York court has jurisdiction to make an initial child custody determination if:

> this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

DRL § 75–a (7) defines the child's "home state" as:

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. *In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned.* A period of temporary absence of any of the mentioned persons is part of the period (emphasis added).

Given the above statutory authority along with the undisputed assertion that the child was

> born in New York on May 1, 2014 and has not left the state, or even New York City, since birth, the child's home state is undoubtedly New York. Moreover, petitioner's sworn testimony both in her affidavit and elicited at the oral argument on this motion in accordance with DRL § 75–f, [4] firmly establishes that she is a domicile of New York State, and not Florida, and that she resides with the child in New York. Accordingly, it must be concluded that this court has jurisdiction to make a determination as to custody *1031 of the child, and respondent's motion to dismiss the petition must be denied.

[1] Respondent argues that personal jurisdiction over him is required to determine custody. [5] This is simply incorrect. DRL § 76(3) provides that "[p]hysical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination." It is undisputed that actual notice of the proceeding to respondent was given by service upon his New York counsel in **297 accordance with DRL § 75–g. Respondent's continued reference to petitioner's "claim for support" is at this point, a red herring and misplaced. Nowhere in the petition is there a claim for child support and, hence, that issue is not currently before this court and will not be addressed here.

[2] [3] As to the portion of the petition for paternity, anomalous as it may seem, having jurisdiction over custody of the child does not confer this court with jurisdiction over respondent when it comes to determining if he is indeed that child's father (*see Matter of H. v. M.*, 47 A.D.3d 629, 850 N.Y.S.2d 480 [2d Dept.2008]). Every indication is that respondent's contact with New York is limited to those few times each year when he travels here to play the New York Knicks and the Brooklyn Nets. These sole instances of contact with New York State fail to meet the minimum contacts threshold, set forth under Family Court Act § 580–201, [6] that allow New York to exercise long-arm jurisdiction over a non- *1032 resident in matters of paternity and support (*see Leslie GG. v. William HH.*, 175 A.D.2d 378, 572 N.Y.S.2d 450 (3d Dept.1991).

[4] It must be underscored, however, that without the establishment of paternity, respondent lacks standing to contest custody of the child barring extraordinary circumstances not known to be evident here (*see In re*

Marquis B. v. Alexis H., 110 A.D.3d 790, 973 N.Y.S.2d 264 [2d Dept.2013]; *In re Commissioner of Social Servs. ex rel. Tyrique P.,* 216 A.D.2d 387, 629 N.Y.S.2d 47 [2d Dept.1995]). It follows that unless respondent submits to paternity testing in this court, petitioner will be granted sole legal and physical custody on default. Simply stated, if respondent wishes to continue to use jurisdiction as a means of postponing an inevitable finding of paternity—apparently out of concern that in some future proceeding he will be made to pay child support-that is his prerogative. But if he insists on pursuing this strategy, he will be forfeiting his right to be heard on the vital issues of how and by whom the child is to be raised.

In light of the foregoing, it is hereby

ORDERED, that respondent's motion to dismiss is granted as to the petition for paternity, and otherwise denied; and it is further

ORDERED, that respondent is directed to answer the petition for custody within twenty (20) days of today's date; and it is further

ORDERED, that both petitioner and respondent are to appear, with their respective counsel, in this court on October 15, 2014 at 9:15 a.m. for further proceedings on the petition, and to hear petitioner's Order to Show Cause for custody (motion ****298** sequence 001) and respondent's motion for recusal (motion sequence 004); and it is further

ORDERED, that the clerk of this court is directed to transmit a copy of this Decision and Order to the clerk of the Circuit Court of the Eleventh Judicial Circuit for Miami–Dade County.

Parallel Citations

45 Misc.3d 1025, 994 N.Y.S.2d 292, 2014 N.Y. Slip Op. 24295

Footnotes

1 Petitioner states, and respondent does not dispute, that after the child's birth, the child was added to his health insurance (*see* Rajic Affidavit, September 4, 2014, Note 3).

2 The attempt by respondent's attorneys to remove a child custody proceeding to federal court given the facts of this case and existing law is an egregious abuse of court resources and likely rises to the level of frivolity (*see* N.Y. Rules of Professional Conduct, Rule 3.1). Furthermore, given respondent's counsel's string of flawed legal strategy and motion practice, delay tactics (i.e. the removal to federal court, with patently false statements made to seek such removal), improper applications (i.e. motion sequence 003 to reargue the denial of an informal telephonic adjournment request), submitting an apparent falsified affidavit (discussed in Note 6, below), coupled with their wealth of inexperience in the area of domestic relations, it appears that counsel may be in violation of the Rule 1.1 of the N.Y. Rules of Professional Conduct (Rule 1.1 entitled "Competence" provides that "[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").

3 Although the court is aware that respondent severely broke his leg in a basketball game on August 1, 2014, petitioner aptly notes that despite the injury, respondent has nonetheless been able to attend press conferences, travel for recreation and ride in his new Ferrari (*see* Opposition, Exhibits T, U and V).

4 DRL § 75–f is entitled "Priority" and states that "[i]f a question of existence or exercise of jurisdiction under this article is raised in a child custody proceeding, the question, upon request of a party, child or child's attorney must be given priority on the calendar and handled expeditiously."

5 It must be noted that respondent's affidavit dated June 25, 2014 raises serious questions of validity. It appears that the affidavit that was submitted in connection with the Federal Action was resubmitted in this action with a changed caption. If one examines the sworn affiant and and notary signatures on the last page on both documents, they appear to be *identical.* If respondent's counsel submitted the same signature page of respondent on both documents, counsel may be subject to disciplinary action and may even have committed a crime (*see* N.Y. Penal Law 175.30, *et seq.*). At the very least, it is sanctionable.

6 Section 580–201 of the Family Court Act provides: "In a proceeding to establish, enforce, or modify a support order or to determine parentage, the tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if: 1) the individual is personally served with a summons and petition within the

state; 2) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction; 3) the individual resided with the child in this state; 4) the individual resided in this state and provided prenatal expenses or support for the child; 5) the child resides in this state as a result of the acts or directives of the individual; 6)the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse; 7) the individual asserted parentage in the putative father registry maintained in this state by the department of social services; or 8) there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction."

End of Document

40 Misc.3d 1241(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Family Court, Bronx County, New York.

In the Matter of a Custody/
Visitation Proceeding S.A., Petitioner,
v.
S.K., Respondent.

No. VXXXXX/12. | Aug. 26, 2013.

Attorneys and Law Firms

Ellen Winter Mendelson, Esq., Upper Nyack, for Petitioner S.A.

The Legal Aid Society, Juvenile Rights Practice, Bronx, New York (Lina Del Plato, Esq. of counsel), Bronx, for the Children N.K, S.A., L.A., M. A., and T.C.

Ira Landsman, Esq., Bronx, for Respondent S.K.

Opinion

CAROL R. SHERMAN, J.

***1** In this visitation proceeding brought by Maternal Grandmother S.A. on December 21, 2012, Respondent S. K., adoptive mother of the child N.K. (DOB XX/XX/2009), moved for an order of the court to relieve the Legal Aid Society, Juvenile Rights Practice, and its attorney of record, Attorney for the Child (AFC), from further representation of N. in this proceeding. Respondent alleged that AFC has a conflict of interest that bars her from providing independent representation of the child N. in that she has continuously represented N.'s siblings, the three A. children, L.A. (DOB XX/XX/2002), M.A. (DOB XX/XX/2003), S.A. (DOB XX/XX/1998), and T.C. (DOB XX/XX/1996). Respondent alleged further that the AFC should be disqualified from representing N. because of her support for the following: visits between the older children and the Maternal Grandmother in spite of child M.'s alleged statement on June 6, 2013 that he does not wish to visit; continued involvement of the older children with the Maternal Grandmother; the closing of the foster home of R. T., who is the mother of Respondent and the former foster parent of the three A. children; and the AFC's potential support for the placement of the A. children with the Maternal Grandmother. In addition, Respondent's Counsel stated the AFC has a "relationship" with the Maternal Grandmother and therefore is biased and cannot provide independent representation for the child N.. The AFC opposed the motion.

It is important to provide a brief history of this case. The Legal Aid Society, Juvenile Rights Practice (JRP), was first appointed to represent the children at the time of the filing of child neglect proceedings by the Administration of Children Services (ACS) against their birth mother N.A. as follows: in 2002, JRP was assigned to represent T. C., S.A. and M. A.; in 2004, JRP was assigned to represent L. A., and, in 2009, JRP was assigned to represent the child N.K. (*see* Family Court Act §§ 249[a]; 1016). In 2008, AFC assumed representation of T.C. and the three A. children from the prior JRP staff attorney.

On November 15, 2005, Maternal Grandmother filed for visitation with the A. children, S., M. and L.. In August 2010, the court directed that Maternal Grandmother have visitation between L., M., and S. (if she wished) one time per month.

The birth mother's parental rights were terminated in 2010 as to the four older siblings legally freeing the children for adoption. The AFC has continued to represent these children in permanency hearings before the family court which provide continuing judicial review for children who are legally freed for adoption and remain in foster care (*see* Family Court Act § 1089[a][1]). Petitioner Maternal Grandmother is the kinship foster care resource for the oldest sibling T. C.. On July 19, 2013, the Maternal Grandmother filed a petition for adoption of T..

The AFC represented the child N. from her birth in 2009 until her adoption. The child N. was placed in the foster home of Respondent at birth. In 2011, N. was legally freed for adoption and was adopted by Respondent on June 6, 2012. The court re-assigned the AFC to represent the child N.K. on December 21, 2012 at the time of the filing of Maternal Grandmother's petition for visitation.

***2** On December 1, 2006, the foster care agency placed the A. children, M., L. and S., in the home of R. T., a non-kinship foster parent. At the termination of parental rights proceeding in 2010, the court was informed by the agency that R.T. wished to adopt all three children. On October 15, 2012, Ms. T. filed adoption petitions only as to M. and L.. S., then 14 years of age, had informed the agency that she did not wish to be adopted by Ms. T. but continued to reside in her

home. [1] In 2013, the court was informed by the foster care agency that Ms. T. no longer wished to adopt M.. On June 6, 2013, Ms. T. returned all three children to the agency stating that she no longer wished to have the children in her home. M. and L. were placed in one foster home and S. was placed in a separate foster home. On July 11, 2013, Ms. T. withdrew her petitions to adopt M. and L.. Maternal Grandmother now has unsupervised day visits with these three children pursuant to court order.

In this visitation proceeding, Petitioner Maternal Grandmother S.A. has applied to the family court for visitation rights with the child N.K. pursuant to Domestic Relations Law § 72 (*see People ex rel. Sibley v. Sheppard,* 54 N.Y.2d 320 [1981]; *Matter of Emanuel S. v. Joseph E.,* 78 N.Y.2d 178 [1991]). The court scheduled a hearing to determine whether visitation between Petitioner Maternal Grandmother and N. is in the best interests of the child. In the interim, the court has not granted visitation. The Attorney for the Respondent was assigned to represent Respondent on January 31, 2013. The trial was scheduled to commence on July 19, 2013. Attorney for Respondent filed this motion to relieve AFC on July 18, 2013, the day before the scheduled hearing on the Maternal Grandmother's petition for visitation and five and one-half months after assignment. The hearing has now been adjourned and is scheduled to commence on November 19, 2013.

Legal Analysis

In a family court proceeding, the appointment of the Attorney for the Child is made to ensure independent legal representation for the child (*see* Family Court Act §§ 241; 249[a]). "Children are entitled to independent representation in Family Court proceedings because their interests are at stake and because neither the parents, the parents' counsel, nor the court can properly represent the children's interest" (*Matter of Fargnoli v. Faber,* 105 A.D.2d 523, 524 [3d Dept 1984] citing Family Court Act §§ 241, 249 [a]; *Borkowski v. Borkowski,* 90 Misc.2d 957, 959–961 [Sup Ct, Steuben County 1977] holding that "the most effective means of protecting the child's interest in our adversary system is by independent counsel for the child" [citations omitted]). Moreover, the Legislature authorized the family court "to the extent practicable and appropriate" to appoint the same attorney for the child "who has previously represented the child" emphasizing the importance of continuity in the representation of children "to help protect their interests and to help them express their wishes to the court" (Family Court Act §§ 241; 249[b]; Rules of the Chief Judge [22 NYCRR] § 7.2). The attorney for the child must take an active role in the proceedings (*Matter of Jamie TT.,* 191 A.D.2d 132 [3d Dept 1993]).

**3 The Rules of the Chief Judge direct that in all proceedings other than juvenile delinquency and person in need of supervision cases in which the AFC defends the child, the child's attorney "must zealously advocate the child's position" (22 NYCRR 7.2[d]) and that, in order to determine the child's position, the attorney "must consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2[d] [1]). The rule also requires the following:

> "(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" (22 NYCRR 7.2[d][3]).

The appointment creates an attorney-client relationship that makes the attorney for the child subject to the same 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 litigation" (22 NYCRR 7.2 [b]). These ethical requirements are rooted in an attorney's fundamental duty "to fully protect client confidences and secrets" and these rules "offer a clear test which is easy to administer" (*Solow v. Grace & Co.,* 83 N.Y.2d 303, 308 [1994]). In addition, an attorney "must avoid not only the fact, but even the appearance, of representing conflicting interests" (*Cardinale v. Golinello,* 43 N.Y.2d 288 [1977]). "[T]he lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional" (*Matter of Kelly,* 23 N.Y.2d 368 [1968]).

Whether to disqualify an attorney for the child is a matter that lies within the discretion of the family court (*Matter of Marvin Q .,* 45 AD3d 852, 853 [2d Dept 2007] [internal citations omitted], *appeal dismissed* 10 NY3d 927 [2008]). "[D]isqualification of legal counsel during litigation

implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized" (*Matter of Madris v. Oliviera,* 97 AD3d 823, 824 [2d Dept 2012] [internal citations omitted]). The burden of proof is on the moving party who must make "a clear showing that disqualification is warranted" (*Olmoz v. Town of Fishkill,* 258 A.D.2d 447 [2d Dept 1999]). The court must consider the evidence in the light most favorable to the non-moving party (*Matter of Madris v. Oliviera,* 97 AD3d at 825). The courts have recognized that "motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client and delay upon the courts" (*Solow v. Grace & Co.,* 83 N.Y.2d at 310).

***4** To prevail in the instant motion, Respondent must present clear evidence of an actual or potential conflict of interest or demonstrate a failure to diligently represent the child N. on the part of AFC and the JRP in this proceeding (*Matter of Taylor G.,* 270 A.D.2d 259, 260 [2d Dept 2000] citing *Matter of Rosenberg v. Rosenberg,* 261 A.D.2d 623, 624 [2d Dept 1999]; *Matter of Petkovsek v. Snyder,* 251 A.D.2d 1087 [4th Dept 1998]; *Matter of Zirkind v. Zirkind,* 218 A.D.2d 745, 746 [2d Dept 1995]).

In this visitation proceeding, Maternal Grandmother has requested that the court grant her visitation rights with the adopted child, N ., pursuant to the court's equitable authority under Domestic Relations Law § 72 that affords grandparents the right to bring a special proceeding or habeas corpus to obtain visitation rights in respect to certain infant grandchildren. In 1975, the legislature amended Domestic Relations Law § 72 "to allow standing not only where a parent had died, but also where circumstances show that conditions exist which equity would see fit to intervene' " (*Matter of Emanuel S.,* 78 N.Y.2d at 181 quoting Domestic Relations Law § 72[1]). The fact that a child has been freed for adoption does not negate a grandparent's standing to seek visitation with the grandchild (*see People ex rel. Sibley v. Sheppard,* 54 N.Y.2d 320 [1981]; *Matter of Netfa P.,* 115 A.D.2d 390 [4th Dept 1985]; *Matter of Loretta D. v. Commissioner of Social Servs. of City of NY,* 177 A.D.2d 573 [2d Dept 1991]). "[T]he court must make a threshold determination that the grandparent has established the right to be heard' ... Only after standing has been established is it necessary or permissible to determine if visitation is in the best interest of the grandchild' " (*Karr v. Black,* 55 AD3d 82, 85 [1st Dept 2008] quoting *Matter of Emanuel S.,* 78 N.Y.2d at 181). The grandparents must establish a "sufficient existing relationship with their grandchild or in cases where that has been frustrated by the parents, a sufficient effort to establish one, so that the court perceives it is one deserving the court's intervention" (*Matter of Emanuel S.,* 78 N.Y.2d at 182; *Matter of Sherman v. Hughes,* 32 AD3d 959, 960 [2d Dept 2006]). The presence of "much conflict" between the petitioning grandparent and the adoptive parents, by itself, does not defeat the grandparent's right to visitation (*Matter of Layton v. Foster,* 95 A.D.2d 77, 78 [3d Dept 1983]). Ultimately, although section 72 of the Domestic Relations Law "does not guarantee grandparents an absolute or automatic right of visitation [*Lo Presti v. Lo Presti,* 40 N.Y.2d 522, 526] it favors such access when visitation would contribute to the overarching goal of promoting the child's best interest" (*Matter of Layton v. Foster,* 95 A.D.2d at 78).

Respondent alleged that in this proceeding AFC and JRP violated the Code of Professional Responsibility DR 5–105 (22 NYCRR 1200.24), which is no longer in effect. The Rules of Professional Conduct (22 NYCRR 1200.0) replaced the Code of Professional Responsibility (22 NYCRR 1200.24) effective April 1, 2009, and the current rule governing conflicts of interest with current clients is set forth at Rule 1.7 as follows:

***5** "Rule 1.7 Conflict of interest: current clients

(a) Except as provided in paragraph (b), 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-judgement on behalf of client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(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. "Rule 1.0(f) defines "differing interests" 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." The children T., M., L., and S. are in very different circumstances from the child N.. N. has been adopted by Respondent, the only parent this child has ever known. However, these different circumstances are not equivalent to "differing interests."

The courts, in cases cited by Respondent, have found concurrent representation of multiple clients by an attorney to be impermissible where there is an actual or potential conflict of interest based on the presence of identified "adverse" interests that divide the loyalties of the attorney or cause the attorney to aid one client at the expense of the other or otherwise impede a client's independent representation (*e.g. Raymond v. Raymond,* 174 Misc.2d 158, 161 [Fam Ct, Albany County 1997] attorney represented a grandmother requesting visitation with her five year old granddaughter and also represented the grandfather in criminal court in which he was charged with sexual abuse of the same child. The court held that the attorney, by representing both grandparents, even though in different proceedings, clearly had a conflict because the "strategy chosen to aid one client may adversely affect the other"; *Matter of Kelly,* 23 N.Y.2d 368 [1968] the court found an impermissible conflict where a law firm represented an insurance company while one attorney of the firm was a claims adjuster for that insurance company and the court remanded the case to the trial court to determine whether the conflict was disclosed and the affected parties gave prior consent to continued representation by the law firm; *Green v. Green,* 47 N.Y.2d 447 [1979] the court held that because a law firm had "strong interests on both sides of the litigation" it was a "reasonable probability" that confidential information would be disclosed or used to aid one client and disadvantage the other warranting disqualification of the firm from representation of the plaintiff). In sum, there must be a showing that the attorney's representation of a client is "materially adverse" to that of another client to warrant a non-discretionary disqualification pursuant to the ethical rules (*Anonymous v. Anonymous,* 251 A.D.2d 241 [1st Dept 1998] citing *Matter of H. Children,* 160 Misc.2d 298, 300–301 [Fam Ct, Kings County 1994]; *see also Field v. Moore,* 189 AD 709, 711 [1st Dept 1919] holding that "[i]t is only where the nature of his work or advice is such that he would find himself in the equivocal, anomalous position of aiding one [client] as against the other, or of being compelled to choose between them, that the dual service would be improper. In other words, there must be a conflict of interest before it becomes unethical for a lawyer to represent both").

***6** In applying these case law principles in this matter, Respondent must show that the interests of the child N. and her siblings are divergent in this proceeding and these "differing interests" adversely affect the judgment or the loyalty of AFC in her representation of the child N.. Respondent asserted that AFC's prior and current representation of the A. children, S., M., and L., and T .C. in permanency hearings pursuant to Family Court Act § 1089(a)(1) and in a prior visitation proceeding filed by Maternal Grandmother as to the A. children impairs her ability to represent N. in this proceeding. However, Respondent has presented no evidence to support her claim. The issues in the permanency hearings in which the A. children are subject children are not related to and certainly are not adverse to the issues in this case and the findings and determinations made in permanency hearings as to them have no bearing on the instant visitation proceeding.

In addition, Maternal Grandmother's petition for visitation with the three A. children is unrelated to this proceeding. The allegation that AFC's support of Maternal Grandmother's continued visitation with the three A. children indicates that she is biased is also without merit. AFC's advocacy of this position did not reflect "personal and unreasoned prejudging of the issues" (*Matter of Carballeira v. Shumway,* 273 A.D.2d 753, 756 [3d Dept 2000], *lv denied* 95 N.Y.2d 764 [2000]). In 2010, the court directed supervised visits once a month between the Maternal Grandmother and the A. children. After Ms. T. returned the children to the Agency and adoption by her was not a possibility, the court ordered unsupervised day visits between the Maternal Grandmother and the three children.

Further, the rights of the A. children are not in any way affected by the outcome of this proceeding and it is abundantly clear that the A. children have no stake or interest in the outcome of this visitation proceeding. Nor do they have a conflicting personal interest that is antagonistic to the child N.. The A. children have an independent right to have visitation with their sibling N. to the extent the court determines it is in their best interests and that of N.'s (*see* Domestic Relations Law § 71; *Matter of Keenan R. v. Julie L.,* 38 AD3d 435 [1st Dept 2007]; *Matter of Lovell Raeshawn*

McC., 308 A.D.2d 589 [2d Dept 2003]). The visitation rights of siblings survives the adoption of N. and any adoption of the A. children (*see Matter of Hatch v. Cortland County Dept. of Social Servs.*, 199 A.D.2d 765 [3d Dept 1993] holding that Domestic Relations Law § 71 authorizes the court to grant post-adoption visitation rights to siblings). Whether the A. children ultimately continue to reside with or are adopted by their current foster parents or whether they reside with or are adopted by their Maternal Grandmother, their right to seek visits with N. is not in any way impacted. Further, whether the court grants or denies the Maternal Grandmother's petition for visitation with N. has no effect on the rights of the A. children to visitation with N.. In fact, Respondent has stated that she has no objection to the A. children visiting with N.. Thus, whether or not the court determines pursuant to Family Court Act § 1089(d)(2) (viii) (B)(I) that Maternal Grandmother should be considered as an adoptive resource for the A. children does not create an actual or a potential conflict of interest between N. and her siblings. No "differing interest" exists between or among the children, nor are the rights of the children to visitation with each other implicated by the court's decision in the Maternal Grandmother's visitation proceeding.

*7 Accordingly, Respondent has failed to establish that the A. children and the child N. have "differing interests" that divide the loyalties of AFC or diminish her ability to represent the child N. independently. Further, Respondent has failed to meet her burden of proof as to the presence of an actual or potential conflict of interest in the simultaneous representation by AFC of the A. children and the child N..

Nor has there been any showing of a violation of any other of the ethical rules. Respondent has not shown that JRP and AFC failed to preserve the children's confidences or that JRP, since 2002, and AFC, since 2008 for the A. children and from March 12, 2009 to June 6, 2012 and then from December 21, 2012 to the present for the child N., has not represented these children zealously (*cf. Matter of H. Children,* 160 Misc.2d 298 [Fam Ct, Kings County 1994]). Moreover, during the many years of AFC's representation of N., Respondent has never raised an objection until the filing of the instant motion on July 18, 2013, on the eve of the trial as to Maternal Grandmother's visitation rights. In fact, AFC supported N.'s continued placement with Respondent and her adoption by Respondent. The delay in asserting her objection to AFC's representation of N. and her failure to show any "differing interest" that was adverse or antagonistic to N., causes the court to question whether this motion was motivated by substantive issues or was filed as a "litigation tactic" to postpone the final determination by the court as to the visitation rights of Maternal Grandmother (*see Matter of T'Challa D.*, 196 Misc.2d 636, 645 [Fam Ct, Kings County 2003]).

The essence of Respondent's motion is her personal objection to the continued representation of N. by the AFC. However, a parent's objection to the attorney for the child is not a basis to relieve the attorney (*Matter of Kristi L.T. v. Andrew R.V.*, 48 AD3d 1202, 1206 [4th Dept 2008], *lv denied* 10 NY3d 716 [2008], reversing the family court's failure to reappoint the attorney for the child in a custody proceeding in a case in which the attorney had represented the child in two prior matters based on the mother's objection to the attorney holding that "[t]he record establishes that the prior Law Guardian was available, and we conclude that he should have been reappointed" citing Family Court Act § 249[b] which provides that the court "shall, to the extent practicable and appropriate, appoint the same attorney who has previously represented the child"). Moreover, only grounds that would justify disqualification of any lawyer warrant the disqualification of an attorney for the child (*see Matter of Stien v. Stien,* 130 Misc.2d 609, 616 [Fam Ct, Westchester County 1985] [internal citations omitted] denying a motion to disqualify the attorney for the child where the parent claimed bias and incompetence finding that the parent's counsel sought to hold the lawyer answerable to his standards and lawyers who represent children "cannot be required to satisfy standards of performance laid down for her by other counsel in the case, whose motives are dictated by the obligation to represent another party, with his or her own interests, which may or may not coincide with the interests of the child").

**8 Respondent's claim that the Attorney for the Child is biased and has a "relationship" with Maternal Grandmother is also without merit. The AFC has known the Maternal Grandmother as a party to this long ongoing litigation. She has also known Respondent as a foster mother and adoptive mother of N.. She has also known Respondent's mother, R. T., as the former foster mother of the three A. children. Respondent has presented no evidence that AFC's "relationship" with Maternal Grandmother was and is anything but a professional one that has developed over the course of her many years of representing the children in these proceedings. Contrary to Respondent's claims that AFC favors Maternal Grandmother, the AFC opposed an interim order granting visitation to Maternal Grandmother in this proceeding.

It is not clear at this time what the ultimate permanency plan will be for the children S., M. and L. nor has the Attorney for the Children advocated a particular permanency plan. However, even if AFC had formulated a position on the plan for the A. children, she has acted appropriately without bias "it is entirely appropriate, indeed expected, that a Law Guardian form an opinion about what action, if any, would be in a child's best interests' " (*Matter of Carballeira v. Shumway,* 273 A.D.2d at 756 quoting Besharov, Practice Commentaries, McKinney's Cons Law of NY, Book 29A, Family Ct Act, § 241, at 218–219; *see also Matter of Apel,* 96 Misc.2d 839, 844 [Fam Ct, Ulster County 1978]) in an Article 10 proceeding of five years duration in which the attorney for the children has provided continuous representation "formulation of an opinion and the taking of a position in support of continued placement" by the attorney was not evidence of bias and was not inconsistent with his proper role in the proceeding).

Having thoroughly reviewed the record in this matter and having been presented with no specific facts by Respondent, the court finds no credible basis for Respondent's claims of a conflict of interest or potential conflict of interest on the part of AFC and the JRP in the representation of N. as well as the A. children and T.C. Nor has Respondent presented any evidence that either AFC or the JRP has failed to diligently represent the child N.. Thus, she has not met her burden of proof and the instant motion must be denied (*see Matter of King v. King,* 266 A.D.2d 546, 547 [2d Dept 1999]; *Matter of Rosenberg v. Rosenberg,* 261 A.D.2d 623, 624 [2d Dept 1999]; *Matter of Petkovsek v. Snyder,* 251 A.D.2d 1087, 1088 [4th Dept 1998]; *Matter of Maurer v. Maurer,* 243 A.D.2d 989 [3d Dept 1997]; *Matter of Smith v. Smith,* 241 A.D.2d 980[4th Dept 1997]; *Matter of Zirkind v. Zirkind,* 218 A.D.2d 745, 746 [2d Dept 1995]).

Accordingly, the motion to disqualify AFC from further representation of the child N. in this matter is denied.

This constitutes the decision and order of the court.

Notify counsel and the parties.

Parallel Citations

40 Misc.3d 1241(A), 977 N.Y.S.2d 670 (Table), 2013 WL 5184560 (N.Y.Fam.Ct.), 2013 N.Y. Slip Op. 51524(U)

Footnotes

1 Pursuant to Domestic Relations Law § 111(1)(a) the adoptive child's consent to adoption is required if the child is over 14 years of age unless the court dispenses with this requirement.

123 A.D.3d 176
Supreme Court, Appellate Division,
First Department, New York.

In the Matter of Eric S. VALLEY (admitted as Eric Stephen Valley), a suspended attorney: Departmental Disciplinary Committee for the First Judicial Department, Petitioner, Eric S. Valley, Respondent.

Oct. 21, 2014.

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent, Eric S. Valley, was admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the Second Judicial Department on June 29, 1988.

Attorneys and Law Firms

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York (Elisabeth A. Palladino, of counsel), for petitioner.

Respondent pro se.

Opinion

PER CURIAM.

***177** Respondent Eric S. Valley was admitted to the practice of law in the State of New York by the Second Judicial Department on June 29, 1988, under the name Eric Stephen Valley. Until 1991, he maintained a law office within this Judicial Department. In or about May 1991, he moved to Washington State, where he has been admitted since November 13, 1991, and where he maintains an office for the practice of law.

By order entered May 6, 1999, effective June 7, 1999, this Court suspended respondent for failure to file registration statements and pay biennial registration fees; to date, he has not sought or been granted reinstatement.

In August 2012, respondent entered into a stipulation with the Disciplinary Board of the Washington State Bar Association, admitting to misconduct in connection with two clients' matters, and agreeing to a reprimand. In the first, a dissolution matter, he failed to place advanced legal fees into his attorney trust account as required by Washington Rules of Professional Conduct (RPC) 1.15A(c)(2) and to provide the client with an accounting of how said funds were used, as required by Washington ****896** RPC 1.15A(e). In the second, a custody matter, he failed to provide his client with a copy of her ex-husband's petition seeking to relocate to California with the couple's children; failed to provide her with the proposed parenting plan filed by her ex-husband; and failed to provide his client with a receipt for funds paid to him, or a billing statement for work done and fees incurred, as required by Washington RPC 1.4(a)(3) and 1.5(b). Based on the stipulation, the Washington State Bar Association issued a formal reprimand on September 24, 2012.

The Departmental Disciplinary Committee now seeks an order pursuant to the Rules of the Appellate Division, First Department (22 NYCRR) § 603.3, imposing reciprocal discipline on respondent. In response, respondent submits an affidavit of resignation dated June 2, 2014, and explains that when he moved to Washington state, he did not realize he was required to either resign from the New York bar or maintain his active standing, but rather assumed that his membership would simply lapse; he was unaware of his 1999 suspension. In its reply, the Committee asks that in addition to imposing a public censure, this Court accept respondent's resignation.

***178** In reciprocal discipline matters under 22 NYCRR 603.3(c), the only defenses that may be raised by the respondent in opposition are: (1) a lack of notice constituting a deprivation of due process, (2) an infirmity of the proof presented to the foreign jurisdiction, or (3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this state (*see Matter of Hoffman,* 34 A.D.3d 1, 822 N.Y.S.2d 42 [2006]). While respondent was afforded due process, and sufficient evidence established his misconduct, we observe that not all of the conduct for which respondent was disciplined in Washington state constitutes violations of parallel provisions in this state. In particular, respondent's violation of Washington RPC 1.15A(c)(2) and 1.15A(e), for failing to place advanced legal fees into his attorney trust account and failing to provide the client with an accounting of how said funds were used, do not establish a disciplinary breach under New York law. The remainder of his misconduct in Washington does, however, state violations of New York Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.4(a)(3) and 1.5(b).

While it is generally accepted in reciprocal discipline matters that the state where the misconduct occurred has the greatest interest in the sanction imposed (*see Matter of Milchman,* 37 A.D.3d 77, 826 N.Y.S.2d 239 [2006]), the same does not necessarily hold true where some of the conduct sanctioned in the respondent's home jurisdiction does not constitute a disciplinary violation here.

We conclude that in these circumstances, the petition is best resolved by the acceptance of respondent's resignation. His affidavit of resignation complies with section 603.11, in that he states that (1) his resignation is submitted freely, voluntarily and without coercion or duress, and that he is fully aware of the implications of submitting his resignation, (2) he is aware of the complaints of professional misconduct against him, and (3) if charges were brought predicated upon those complaints, he would be unable to successfully defend against them (*see* 22 NYCRR 603.11[a][1]–[3]).

Accordingly, respondent's resignation from the practice of law should be accepted, and his name stricken from the roll of ****897** attorneys, effective nunc pro tunc to June 2, 2014.

DAVID FRIEDMAN, Justice Presiding, JOHN W. SWEENY, JR. DIANNE T. RENWICK, RICHARD T. ANDRIAS, DAVID B. SAXE, Justices., concur.

Parallel Citations

123 A.D.3d 176, 993 N.Y.S.2d 895 (Mem), 2014 N.Y. Slip Op. 07113

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42 Misc.3d 607
Family Court, Essex County, New York.

In the Matter of a Support Proceeding
David William ZWICK, Petitioner,
v.
Caitlin Anne WARGO, Respondent.

Dec. 3, 2013.

Synopsis
Background: In a child support proceeding, mother filed objections to an order modifying father's support obligation.

[Holding:] The Family Court, Essex County, Timothy J. Lawliss, J., held that assistant county attorneys could not represent mother and father in same proceeding.

Vacated and remanded.

Attorneys and Law Firms

****365** Michael J. Gallant, Esq., Elizabethtown, for David William Zwick.

David D. Scaglione, Esq., Elizabethtown, for Caitlin Anne Wargo.

Opinion

TIMOTHY J. LAWLISS, J.

***608** On July 12, 2012, David William Zwick filed a petition seeking to modify this Court's January 11, 2010 Order of Support regarding the child Zachary, d/o/b: xx/xx/xxxx.

At the hearing on his petition, Mr. Zwick appeared telephonically before Support Magistrate Jonathan Heussi. Before calling Mr. Zwick, the Support Magistrate stated "Mr. Gallant is here representing Mr. Zwick ...". Attorney Gallant did not dispute this statement. After Mr. Zwick was on the phone, the Support Magistrate stated, "... we have Mr. Gallant here representing your interests ...". Again, Attorney Gallant did not dispute this statement.

At the hearing on Mr. Zwick's petition, Ms. Wargo appeared in person. Immediately after noting Ms. Wargo's presence, the Support Magistrate asked Attorney Scaglione if he was "involved in this" and Attorney Scaglione answered "yes." Thereafter Attorney Scaglione spoke on Ms. Wargo's behalf during the hearing.

The Support Magistrate issued an Amended Order Modifying an Order of Support dated September 13, 2012 granting Mr. Zwick's application for a downward modification of his child ***609** support obligation. On behalf of Ms. Wargo, Attorney Scaglione, filed written objections and stated "I represented the Respondent, Caitlin Wargo, at a support modification hearing ...". Attorney Gallant filed a reply to the objection, on behalf of Mr. Zwick and stated, "I represent the Petitioner, David William Zwick ..."

Both Attorney Scaglione and Attorney Gallant are Assistant County Attorneys for Essex County. The Court, in correspondence to counsel, expressed concern about the attorneys' potential conflict of interest and provided both attorneys an opportunity to address the issue in writing [1]. Attorney Scaglione did not respond to the Court's letter. Attorney Gallant responded, in part, as follows.

I am the Essex County Assistant County Attorney for Social Services. One of my duties is ***to represent a parent*** in Support Court when asked by the Support Collection Unit. Another Assistant County Attorney (David Scaglione) handles all the support cases for DSS. I do fill in periodically when the regular Assistant County ****366** Attorney is absent or cannot proceed for other reasons.

In the instant case, ***I represented the father's (Zwick) petition*** in a support proceeding (at the request of CSEU) and ***the other Assistant County Attorney represented the mother's (Wargo) position.*** Both parents were aware that both of the attorneys were Assistant County Attorneys and signed a LDSS–4920 form which states in part that the CSEU attorneys do not represent the client, but is helping the CSEU provide the parent with an additional service *{emphasis supplied}*.

Attorney Gallant then goes on to quote the Office of Temporary and Disability Assistance Administrative Directive 10–ADM–02 regarding Legal Services and Cost Recovery for Recipients of Child Support Services (hereinafter the "Directive") which clarifies that no attorney-client relationship exists between the litigant and the attorney providing the litigant with assistance at the request of the CSEU. The directive further states that the attorney appears

on behalf of and represents the interests of the Child Support Agency to provide assistance for the Child Support Enforcement ***610** Unit (CSEU). Apparently, it is Attorney Gallant's position that since neither he nor Attorney Scaglione represented a litigant in this action, but only represented the CSEU there was no conflict of interest having two Assistant County Attorneys assisting opposing parties in the same litigation.

[1] Although the Court agrees with Attorney Gallant regarding one point, the Court cannot agree with his final conclusions. The Court agrees that pursuant to Social Services Law § 111–c(4) and 18 NYCRR 347.17(d)(2) when a litigant asks for legal assistance from the CSEU, the attorney provided by the CSEU to assist the litigant is supposed to appear and represent the interest of the CSEU, not the interest of the litigant.

However, whenever an attorney appears on behalf of CSEU, the attorney is required to clearly disclose his or her role to the litigant at each appropriate opportunity.

It is important that the CSEU attorney, when providing legal services, clearly disclose his or her role to the CSS recipient at each appropriate opportunity. Full disclosure can eliminate honest misunderstandings or the creation of an implied attorney-client relationship. The CSEU attorney should not by word or conduct imply that an attorney/client relationship exists. Directive at (V)(A)(2)(a). *See also,* Social Services Law § 111–c(4) and 18 NYCRR 347.17(d)(2).

[2] In the case at bar, it is clear that neither Attorney Gallant nor Attorney Scaglione complied with this requirement. By word and conduct at the hearing and in the filings related to the objection, both attorneys made representations that they represented the individual litigants. To compound the problem, Support Magistrate Heussi also indicated that the attorneys represented the litigants. Notwithstanding their signatures on a boiler plate form (LDSS–4920 (12/09)), any reasonable person in the position of the petitioner or the respondent would have been led to believe that the attorneys appearing in this case represented the litigants' interests. The failure of both attorneys to clarify who the attorneys represented requires that the findings of the Support Magistrate be vacated and that the matter be remanded for a new hearing.

To make matters worse, the Court finds that the actions of each of the two attorneys involved in this case in fact created an attorney-client relationship between the attorney and litigant that he was suppose to assist.

****367** In order to avoid the creation of an implied ***611** attorney-client relationship, it is also important that staff is trained about the delivery of legal services and should not suggest to the CSS recipient that the CSEU attorney is the CSS recipient's attorney. Instead, CSEU staff should be reminded to refer to the Clinton County Department of Social Services recipient as "customers" or "recipient of services" rather than "clients." ***The CSEU attorney should do the same*** *{emphasis provided}.* Directive at (V)(A)(2)(a). *See also,* Social Services Law § 111–c(4) and 18 NYCRR 347.17(d)(2).

[3] When the words and actions of an attorney would lead a reasonable person to believe that the attorney represents the individual, the attorney-client relationship has been created regardless of the intent of the attorney. "... [F]ormality is not essential to the formation of an attorney-client relationship; rather it is necessary to look at the words and actions of the parties to ascertain' if such a relationship was formed *{citation omitted}.*" *McLenithan v. McLenithan,* 273 A.D.2d 757, 710 N.Y.S.2d 674 [3 Dept. 2000]. Given that the actions of Attorneys Gallant and Scaglione created an attorney-client relationship between themselves, Mr. Zwick and Ms. Wargo, it would appear inappropriate to have either attorney represent the CSEU upon remand. During the next hearing, the parties to the litigation would be prior clients to Attorneys Gallant and Scaglione and obviously, the hearing upon remand will involve the same or substantially related matters to which each attorney represented the individual litigant during the last hearing. *See,* 22 NYCRR 1200.0, Rules 1.6 [Confidentiality of information] and 1.9 [Duties to former clients].

[4] Finally, the Court turns to the fundamental issue presented. May two Assistant County Attorneys, who are both charged with representing the CSEU assist two litigants in the same action, when the litigants have directly opposing interests. The Court concludes that they cannot and the CSEU must utilize other options available to assist litigants with conflicting interests. (*See,* Directive at (V)(A)(2)(b) & (c)). Obviously if the County Attorney did not have any assistants, it would be preposterous for the County Attorney to appear in the action on behalf of the CSEU and assist both parties. *See, People v. Ortiz,* 76 N.Y.2d 652, 563 N.Y.S.2d 20, 564 N.E.2d 630 [1990] ("[a] lawyer simultaneously representing two clients whose interests actually conflict cannot give either

client undivided loyalty."). *See also, People v. Carncross,* 14 N.Y.3d 319, 901 N.Y.S.2d 112, 927 N.E.2d 532 [2010]. That which the County Attorney cannot do, ***612** his or her assistants cannot do. *See,* County Law §§ 501 and 502. This situation is analogous to a criminal action involving two indigent co-defendants. Two assistant public defenders working in the same office could not represent co-defendants in the same action when the co-defendants' interests are actually directly opposed. *See, People v. Prescott,* 21 N.Y.3d 925, 927, 967 N.Y.S.2d 887, 990 N.E.2d 125, 127 [2013] ("[a]n attorney may not simultaneously represent a criminal defendant and a codefendant or prosecution witness whose interests actually conflict unless the conflict is validly waived"). *See also, People v. Lynch,* 104 A.D.3d 1062, 961 N.Y.S.2d 605 [3 Dept. 2013] (regards not public defenders, but rather, counsel both from same law firm) and *People v. Cristin,* 30 Misc.3d 383, 911 N.Y.S.2d 784 [Bronx S.Ct., 2010].

ACCORDINGLY, IT IS HEREBY

ORDERED, that the Amended Order Modifying an Order of Support dated September ****368** 13, 2012 is hereby VACATED; and it is further

ORDERED, that the this matter is REMANDED for a new hearing consist with this judicial review; and it is further

ORDERED, that both Attorney Gallant and Attorney Scaglione are disqualified from representing either party or the CSEU upon remand; and it is further

ORDERED, all parties shall take notice that: pursuant to section 1113 of the Family Court Act, an appeal must be taken within thirty days of receipt of the order by appellant in court, thirty-five days from the mailing of the order to the appellant by the clerk of the court, or thirty days after service by a party or attorney for the child upon the appellant, whichever is earliest.

Parallel Citations

42 Misc.3d 607, 976 N.Y.S.2d 364, 2013 N.Y. Slip Op. 23413

Footnotes

1 This is the Court's second review of Ms. Wargo's objections. In its initial response to the objections, the Court remanded the matter to the Support Magistrate for clarification of his factual findings. Thereafter, the Support Magistrate issued an Amended Findings of Fact dated April 11, 2013 and the Court resumed its review of Ms. Wargo's original objections.

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ETHICS OPINION 1026

New York State Bar Association
Committee on Professional Ethics

Opinion 1026 (10/1/14)

Topic: Ethical duties of lawyer-mediator; confidentiality duties as to work of fiction

Digest: A lawyer-mediator who provides mediation services that are not distinct from legal services is subject to the Rules of Professional Conduct with respect to the mediation services, and those Rules protect confidential information that the lawyer-mediator learns about a client. The lawyer-mediator may not include such information in a work of fiction if there is a reasonable likelihood that readers will be able to ascertain the client's identity.

Rules: 1.6; 1.9(c); 2.4; 5.7(a)

FACTS

1. The inquirer is an attorney who also serves as a private mediator in divorce cases. The inquirer does not advertise, but potential parties to a mediation learn that he is a lawyer because, among other things, his answering machine greeting says, "You have reached the law and mediation offices of [name of inquirer]," and parties who wish to retain the inquirer must sign retainer papers making clear that the inquirer is a practicing attorney. In fact, many divorcing parties come to the inquirer precisely because he is also a lawyer.

2. Inquirer's services for divorcing parties are not limited to mediation services. When mediation is successful – *i.e.,* the parties reach a settlement – the inquirer drafts the court papers to formalize the divorce according to the settlement terms. In advance of the mediation, divorcing parties sign both a mediation retainer agreement and a separate retainer agreement by which they retain the inquirer, in his capacity as an attorney, to draft and file with a court the papers necessary to obtain a divorce.[1]

3. The mediation retainer agreement contains a section governing confidentiality, which promises "complete confidentiality" from all outside parties and proceedings, unless all parties to the mediation give their written consent. The mediation retainer agreement also states that the inquirer in his role as a mediator does not represent the parties and is not providing legal advice or legal assistance to either party in the context of the mediation. But, as provided in the legal retainer agreement, he will represent the parties in drafting and filing the court papers to obtain a divorce if the mediation results in a settlement.

4. The inquirer now wants to write a book containing stories and events drawn from information about his divorce mediation clients. He would change the clients' names and geographic locations, and would fictionalize various segments by adding children, addictions, extramarital affairs, etc. He would also sometimes blend the stories of multiple clients to safeguard against revealing sensitive and personal information that he obtained in confidence as a divorce mediator. He wants to know whether he may ethically do this without violating the New York Rules of Professional Conduct (the "Rules").

QUESTION

5. May a lawyer-mediator who handles divorce mediation, and subsequently provides legal services to those parties when the mediation is successful, publish a book of fiction that is based in part on facts relating to the mediation parties without obtaining the consent of those parties?

OPINION

6. Service of a lawyer as a mediator is expressly addressed by Rule 2.4 ("Lawyer Serving as Third-Party Neutral"), which had no equivalent in the former New York Lawyer's Code of Professional Responsibility. Rule 2.4 provides, in full, as follows:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a ***mediator*** or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client. [Emphasis added.]

This Rule, which refers to mediation parties as persons who are not law clients represented by the lawyer-mediator, does not by itself make a lawyer's service as a mediator subject to all the duties imposed by the other Rules. In particular, the Rule, by itself, imposes no duty of confidentiality. *See* Rule 1.12, Cmt. [3] (noting generally that "lawyers who serve as third-party neutrals do not obtain information concerning the parties that is protected under Rule 1.6"). But there are other possible sources of confidentiality duties.

7. We do not consider whether substantive laws (such as statutes or court rules) or private sources of guidance (such as ethics codes promulgated by mediation groups) impose duties of confidentiality on mediators. Our jurisdiction is limited to interpreting the Rules. The inquirer should therefore research substantive law and ethics codes that may apply to him in his capacity as a mediator. *See* Rule 2.4, Cmt. [2] ("the lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be

subject to various codes of ethics"); Rule 1.12, Cmt. [3] (lawyers who serve as third-party neutrals "typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals").

8. Rather, the question before us is whether the New York Rules of Professional Conduct impose a duty of confidentiality on a divorce mediator who also drafts and files divorce papers with the appropriate court if the mediation results in an agreement. We think they do, even though the duty is not based on Rule 2.4.

9. Mediation is a "nonlegal service" as defined by Rule 5.7(c), and it therefore implicates Rule 5.7 ("Responsibilities Regarding Nonlegal Services"). Rule 5.7(a)(1) provides:

> A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

10. The mediation services that the inquirer provides to the mediating parties are "not distinct" from the legal services that he provides. The mediation itself (the nonlegal service) is designed to result in a "Memorandum of Understanding," and the inquirer's separate retainer for drafting and filing the divorce papers in court (the legal services) says that he will draw up the legal divorce documents in accordance with the Memorandum of Understanding. Thus the legal and nonlegal services that the inquirer provides, far from being "distinct," are intimately bound up with each other. *Cf.* N.Y. State 1015 ¶14 (2014) (discussing factors bearing on whether legal and nonlegal services are distinct). Consequently, the inquirer is subject to the Rules – including their confidentiality provisions – not only when he provides legal services (representing the parties in court) but also when he provides nonlegal services (serving as a divorce mediator).[2]

11. Under Rule 5.7(a)(1), therefore, the inquirer is "subject to" the duty of confidentiality articulated in Rule 1.6 with respect to information that the inquirer learns from the parties during the mediation process.[3] Unless there is informed consent or some other applicable exception:

> A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person....

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, ***(b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.*** "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

Rule 1.6(a) (emphasis added).

12. Applying this Rule to the mediation process, the inquirer wishes to use information "gained during" the mediation and the post-mediation court proceedings. The information is not protected by the attorney-client privilege (because both opposing parties take part in the communications with the inquirer), but much of the information is "likely to be embarrassing or detrimental to the client if disclosed," and is also "information that the client has requested be kept confidential" by signing a retainer agreement in which the client is promised "complete confidentiality." Such information is thus confidential within the meaning of Rule 1.6. Under that Rule, the inquirer may not publish a book revealing that information in the absence of informed consent or some other applicable exception to the duty of confidentiality. And that duty continues even after conclusion of the post-mediation legal representation. *See* Rule 1.9(c)(2) (providing that a lawyer "who has formerly represented a client in a matter ... shall not thereafter ... reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client).

13. However, the conclusion that the inquirer owes a duty of confidentiality to the mediating parties does not end our analysis. The inquirer plans to write what is essentially a work of fiction based on confidential information that will be altered, augmented, rearranged, and amplified with details from the inquirer's imagination. Comment [4] to Rule 1.6 briefly addresses the issue of hypotheticals, saying:

Paragraph (a) [of Rule 1.6] prohibits a lawyer from knowingly revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person. ***A lawyer's use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.*** [Emphasis added.]

14. The issue addressed by Comment [4] arises not only in the context of hypotheticals but also in the context of fiction. Indeed, there are many well-known lawyer-novelists (such as Scott Turow, David Baldacci, Alafair Burke, John Grisham, Lisa Scottoline, Erle Stanley Gardner, and Louis Auchincloss), and their books are often apparently based in part on the authors' personal experiences as lawyers. But when a lawyer's writings could not reasonably lead to the discovery of confidential information by a third person, then the common-sense implication of Comment [4] is that the duty of confidentiality is not violated. A lawyer may publish a work of fiction inspired by issues relating to a represented client so long as there is no reasonable likelihood that the reader will be able to ascertain the client's identity.

15. Applying that standard here, if the inquirer writes a book in which there is "no reasonable likelihood" that readers will be able to identify his mediation and divorce clients, then the inquirer will not violate any duty of confidentiality imposed by the Rules. In essence, if confidential information is sufficiently altered, disguised, rearranged, and infused with the inquirer's own imagination so that no one can trace particular information to a particular client, then the book will not reveal "confidential information" within the meaning of Rule 1.6.

16. We caution, however, that this is a high standard that may be difficult to meet. The inquirer has a local practice serving individual clients. Details that would be meaningless to a person across the country may provide meaningful clues to a person living in the same county or village. The inquirer will need to pay meticulous attention, fact by fact and detail by detail, to ensure that readers cannot identify his clients. For readers of the book who know (or know of) the inquirer's clients, concealing their identities may be nearly impossible. Perhaps it can be done, but we do not want to make it sound like an easy task.

17. Finally, because the inquirer's retainer agreement for mediation services promises "complete confidentiality" to the mediating parties, the inquirer would appear to have contractual obligations of confidentiality to those who sign the retainer. Whether the scope of that contractual promise is broader than the inquirer's duty of confidentiality under the Rules is a question of law beyond our jurisdiction to decide.

CONCLUSION

18. A lawyer-mediator who serves as a private mediator in divorce cases, and thereafter represents the mediating parties by drafting and filing the papers needed to secure a divorce in court, is providing mediation services that are not distinct from legal services. The lawyer-mediator is therefore subject to the Rules of Professional Conduct with respect to the mediation services. In particular, the Rules protect confidential information about a client that was learned in the mediation or subsequent court proceedings. The lawyer-mediator may not publish a work of fiction that includes such confidential information if there is a reasonable likelihood that the reader will be able to ascertain the client's identity.

(21-14)

[1]We have not been asked whether a lawyer-mediator may ethically represent the mediating parties in filing for a divorce in court, but we note N.Y. State 736 (2001) ("An attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested issues remain, and the attorney-mediator satisfies" the applicable conflict Rules). In addition, Rule 1.12(b) – which did not exist when N.Y. State 736 was issued – provides that the inquirer may not represent either party after the mediation (in court or otherwise) "unless all parties to the proceeding give informed consent, confirmed in writing." The inquirer should also consult Rule 1.12(c), which provides that a lawyer "shall not negotiate for employment with any person who is involved as a party ... in a matter in which the lawyer is participating personally and substantially as ... an arbitrator, mediator or other third-party neutral." This rule may prohibit the inquirer from asking the party to sign a retainer for post-mediation legal services *during* the mediation, but we have not been asked whether it is permissible to propose a retainer for post-mediation legal services *before* the mediation begins.

[2]Given the relationship between the legal and nonlegal services in this inquiry, the disclaimer found in Rule 5.7(a)(4) is not available. Rule 5.7(a)(4) provides:

> For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services....

Because paragraph (a)(1) is not listed, the disclaimer is not effective when, as here, the legal and nonlegal services are not distinct from each other.

[3]We have previously opined that even if nonlawyers may engage in divorce mediation, *lawyers* who serve as mediators "should be presumed to be rendering a legal service". N.Y. State 678 (1996). That presumption too would support our conclusion that there is a duty of confidentiality, but the presumption is controversial, especially after the adoption of Rule 2.4. *See* N.Y. State 979 ¶¶ 6-7 (2013) (citing conflicting authorities but not opining as to continuing validity of N.Y. State 678). Here, Rule 5.7(a)(1) gives rise to a duty of confidentiality even if the mediation services by the inquirer are not legal services. Thus we again have no need to address the status of N.Y. State 678.

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ETHICS OPINION 999

New York State Bar Association
Committee on Professional Ethics

Opinion 999 (3/28/14)

Topic: Marital Mediation and referrals.

Digest: An attorney who works exclusively in the field of Marital Mediation, with a stated goal "to help couples resolve problems and stay together", may ethically refer such couples to the attorney's spouse, a psychiatrist, who has volunteered to provide two free couples-counseling sessions to such couples.

Rules: 1.7; 2.4(a); 2.4(b); and 8.4.

QUESTION

1. May an attorney who works exclusively in the field of marital mediation, with a stated goal: "to help couples resolve problems and stay together" ethically refer couples to the attorney's spouse, a psychiatrist who has volunteered to provide two free couples-counseling sessions to such couples?

OPINION

2. Rule 2.4(a) is entitled: "Lawyer Serving as Third Party Neutral" and provides that, "a lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." Since the inquiring attorney is engaging in neutral mediation, that attorney is not representing clients.

3. The attorney serving as a third-party neutral must be mindful of the obligations imposed by Rule 2.4(b), which requires that, "a lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them." Additionally, should it become apparent that "a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."

4. Because the lawyer is not engaging in the representation of a client or clients during the course of the mediation, the lawyer would not have a personal interest conflict under Rule 1.7 (Rule 1.7 applies only to client representation).

5. With respect to the attorney/inquirer's spouse's offer to provide two free "couples-counseling" sessions to the mediating parties, the attorney/inquirer must also be mindful of Rule 8.4(c), which provides that an attorney must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." It may be that under the circumstances Rule 8.4(c) would require the attorney/inquirer to make clear disclosures that the psychiatrist is in fact the spouse of the attorney and also that the two free sessions might not be sufficient to resolve every issue between the parties and that therefore the attorney could conceivably derive an indirect benefit from fees charged to the parties by the attorney/inquirer's spouse for work beyond the two free sessions.

6. The attorney should be aware that even though a neutral mediator is not representing a client, the lawyer neutral may still be practicing law, and other Rules may apply. *See* N.Y. State 979 (2013); N.Y. State 678 (1996).

CONCLUSION

7. The attorney inquirer may make the referral to the attorney inquirer's psychiatrist spouse subject to the cautions identified above.

35-13

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ETHICS OPINION 986

New York State Bar Association

Committee on Professional Ethics

Opinion 986 (10/25/13)

Topic: Whether 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.

Digest: 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.

Rules 1.7, 1.14

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. Rule 1.0(f); See also Rule 1.7 Cmts. [1],[2],[8]. 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 Rule 1.7. 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. [1]

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. [2] 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. Rule 1.14, Cmt. [2].

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.

13. Any protective action taken by the lawyer should be limited to what is essential to carry out the representation. Thus, the lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client. The Rule does not specify all of the potential protective actions that may be undertaken, but it makes clear that seeking the appointment of a guardian is the last resort, when no other protective action will protect the client's interests.

14. This opinion presumes that, before considering guardianship, the attorney has considered and exhausted other options. First, the lawyer has attempted to maintain a normal client-lawyer relationship as best as possible under the circumstances. A primary aspect of that relationship is to maintain communications with the client. The attorney has determined that the client's stated desire is to return to his sister's home. Even if the attorney reasonably believes this to be unwise, unreasonable, or otherwise ill advised, the client still deserves attention and respect.

15. Second, before deciding whether to take protective action with respect to the client, the lawyer has a reasoned basis, beyond what he believes to be the client's ill considered judgments, to conclude that the client cannot act in his own best interests and that protective action is necessary. The lawyer unsuccessfully attempted to communicate with the client, obtained information and assistance from the client's sister, and sought a medical evaluation.

16. It is not clear whether there are other individuals, community resources or social services agencies that may be of assistance to the client. Nor is it clear whether other options have been explored prior to seeking the appointment of a guardian. This includes an assessment as to whether or not referral to support groups or social services could provide protection to the client.

17. These alternatives should be exhausted prior to seeking the appointment of a guardian. The situation is particularly fraught for clients with limited financial means and social support networks. There are few social services available to assist such clients, thereby leaving the attorney in circumstances with few options to carry out representation as contemplated by Rule 1.14. Therefore, these circumstances require a lawyer to exercise careful judgment to adopt a course of action that best protects the client's interests.

18. The lawyer must recognize that seeking a guardianship is an extreme measure as it "deprives the person of so much and control over his or life." *In the Matter of the Guardianship of Dameris L.,* 38 Misc 3d 570 (Sur. Ct. NY Cty 2012) citing Rose Mary Bailly, Practice Commentaries, McKinney's Con Law of NY, Book 34A, Mental Hygiene Law § 81.01 at 79 (2006). It has been suggested that the lawyer should seek a guardian only if "serious harm is imminent, intervention is necessary, no other ameliorative development is foreseeable, and nonlawyers would be justified in seeking guardianship." Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client,* 3 Utah L. Rev. 515, 566. (1997); See 62 Fordham L. Rev. 1073 (1993-1994)

19. Article 81 of the Mental Hygiene Law, allows for the judicial appointment of a legal guardian for one's personal needs, property management or both, when a person is incompetent to conduct his or her own affairs. N.Y. Mental Hygiene Law § 81.02(a); 81.06 et seq. The statute expects that the system is tailored to meet the individual's specific needs by taking into account the incapacitated person's wishes, and preferences. N.Y. State 746 (2001).

20. Assuming that the attorney has undertaken this thorough evaluation of the circumstances, and now reasonably believe that guardianship is the only alternative, that lawyer may seek out others to petition for the guardianship.

21. The guardianship process is initiated by a petition. The lawyer may seek out any available individual, social service agency or private organization to petition for guardianship. Article 81 specifies seven categories of persons who may file such a petition. § 81.06.

22. The court then is required to appoint a court evaluator who will recommend whether the alleged incapacitated person (AIP) requires counsel. The court evaluator will also make recommendations as to who should serve as guardian and make appropriate living arrangements. Any conflicts between the sister and AIP will be addressed by the court evaluator. *See e.g.,* MHL 81.09(c)(5)(xv). It is not apparent whether court evaluators are appointed in all matters as required by statute.

23. The court then considers all of the evidence and determines, by clear and convincing evidence, whether the person is likely to suffer harm because he or she is unable to provide for his or her personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of this inability. § 81.02 (b).

24. The guardian is to engage in the "least restrictive form of intervention, consistent with the concept that the needs of persons with incapacities are as diverse and complex as they are unique to the individual." NY Mental Hgy Law §81.01.

25. The attorney may suggest that the sister seek a petition for guardianship and may make suggestions as to individuals or agencies to assist her in completing the petition, but the lawyer may not represent her in petitioning for the guardianship. Her interests are contrary to that of the client. She has clearly stated, contrary to the client's desires, that she will not permit him to return to her home. Thus, the attorney would be in conflict with his client if he represents the sister and assists her in filing a petition seeking an objective contrary to the client's stated desire.

26. The lawyer's position in protecting the client's interests is complicated by perceived difficulties for lay persons in completing the petition for guardianship and the lack of social service and other resources to assist the family of incapacitated people. The sister may desire to file a petition for guardianship but may be ill-equipped to do so and there may be no assistance available to her. Consequently, it may be that the attorney is the only person who can reasonably seek the appointment of a guardian. In general, a lawyer should only act as petitioner in seeking the appointment of a guardian if there is no one else who reasonably can do so. Simon, Rules of Prof Conduct Annot. at 663, N.Y. State 746 (2001).

27. In general, the interests of the petitioner in a guardianship proceeding are in conflict with that of the client, notably where there will be a contested hearing and the petitioner will serve as a witness. However, where the client does not oppose the guardianship or is incapacitated and cannot express an opinion as to the guardianship, Rule 1.14 implicitly acknowledges that the lawyer may file the petition to seek a guardianship in circumstances where the guardianship will not be subject to a hearing and no one else is reasonably available to file the petition. We previously considered the issue of whether an attorney-in-fact could petition for guardianship for a client and concluded, under the then-existing Code of Professional Conduct, that it was permissible under circumstances such as those presented here where there is no other option and there will not be a contested hearing under Article 81. We considered whether the "dual role" of petitioner in a guardianship proceeding and as client representative was impermissible in these circumstances and concluded that, given other safeguards in the Article 81 proceedings, the dual role was not impermissible. N.Y. State 746 (2001). We affirm that opinion under the Rules of Professional Conduct.

28. Should the attorney file the petition for guardianship, and the court become aware that the sister may be the only person who can be appointed as the client's guardian, the lawyer should advise the court of the sister's position regarding the client's living arrangements. The court can then consider whether, in light of the potential conflict between the client and his sister, she is the appropriate guardian.

29. Thus, using the same reasoning, Connecticut has determined that in these circumstances should the lawyer petition for the appointment of a guardian, the lawyer does not need to withdraw from representation on the underlying Medicaid matter. In circumstances involving clients with disabilities, this is not a preferred course of action. *See* Connecticut Inf. Opinion 97-19 (1997).

30. Assuming that a guardian is appointed, the lawyer should consult with the client and the guardian as to the position to be asserted in the Medicaid matter. The guardian is the representative of the client. The rationale for the appointment of a guardian is to have someone who can make decisions for the incompetent client. Thus, after the appointment of the guardian, the lawyer generally must take direction from that guardian.

31. Finally, Rule 1.14 is often frustrating because it does not provide solutions to all problems in dealing with clients with diminished capacity. It does, however, provide "an intelligible frame of reference for the lawyer and those who might later judge his conduct." Geoffrey C. Hazard

Jr. and W. William Hodes, The Law of Lawyering, § 1.14:101, p.439. (1990). See Connecticut Inf. Opinion 97-19.

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.

9-13

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[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)

[2] Rule 1.14 provides that:

(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 related to 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.

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ETHICS OPINION 975

New York State Bar Association

Committee on Professional Ethics

Opinion 975 (7/19/13)

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

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

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

FACTS

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

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

QUESTIONS

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

A. As the "conflict" Assistant Public Defender on cases in which the first (*i.e.*, the other) Assistant Public Defender has a conflict of interest;

B. Appearing "against the first Assistant Public Defender" by representing the

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

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

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

OPINION

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

6. Answers to the various parts of the inquiry will depend on whether certain conflicts of interest would be imputed to the inquiring lawyer. The New York Rules of Professional Conduct provide: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 ["Conflict of Interest: Current Clients"], 1.8 ["Current Clients: Specific Conflict of Interest Rules"] or 1.9 ["Duties to Former Clients"], except as otherwise provided therein." Rule 1.10(a).

7. A public defender's office is a "firm" as defined in the Rules.[3] Accordingly, our prior opinions make clear that when one lawyer in a public defender's office has a conflict based on Rule 1.7, 1.8 or 1.9, that conflict is imputed to other lawyers in the same public defender's office. *See* N.Y. State 941 ¶14 (2012); N.Y. State 862 ¶¶ 5-9 (2011); *cf.* N.Y. State 973 (2013) ¶6 (2013) (legal aid office). This remains the rule even when the assistant public defenders work on a part-time basis, and even when the lawyers concerned work in different divisions of the office. N.Y. State 862 ¶8 (the phrase "associated" in Rule 1.10(a) "includes part-time attorneys as well as full-time attorneys," and "fact

that the inquirer appears as a Public Defender only in Family Court rather than in the Criminal Courts does not change the result"; inquirer is still "associated" with the disqualified Assistant in same firm "even though his area of practice is different," because "Rule 1.10(a) imputes conflicts to all lawyers in a firm, in all practice areas, not just to lawyers in the same department or practice area").

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

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

10. While it is relevant that in actual practice the Assistants work independently, that factor is outweighed by others. The structure of the office and the central role of the Public Defender are prescribed by statutory provisions.[4] There is a single attorney who is the Public Defender and who is publicly listed with that title. The other attorneys in the office serve as Assistant Public Defenders and are publicly identified as such. The Public Defender appoints those assistants, and fixes their compensation, subject to authorization by the board of supervisors. It is the Public Defender who is statutorily charged with representing clients of the office. *See* County Law §701(2) (quoted in footnote 1 above). We accept the inquirer's representation that the defenders typically do not share assignments or files, but they could, consistent with the underlying statutory provisions, sometimes work together collaboratively.[5]

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

organized in the manner prescribed by County Law §716, constitutes a firm within which conflicts are subject to imputation under Rule 1.10(a). In light of that principle, we address the four situations posed by the inquirer.

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

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

13. Thus when the other Family Court Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9, the conflict would be imputed to the inquiring lawyer, and the inquiring lawyer could serve as "conflict" defender only if the imputed conflict were properly waived. Rule 1.10(d) provides that imputed disqualifications may be waived by the affected client under the conditions stated in Rule 1.7. Even if the *other* Assistant's conflict is unwaivable under Rule 1.7(b), the *imputed* conflict may still be waived if the necessary conditions of waiver are satisfied as to the "conflict" defender. *See* N.Y. State 968 ¶¶ 25-26 (2013).

Appearance in Family Court against another Assistant Public Defender

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

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

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

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

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

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

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

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

21. If such a conflict were imputed, then the inquiring lawyer could not serve as attorney for child unless the imputed conflict could be waived, and was in fact waived, under the standards of Rule 1.7(b) as applied through Rule 1.10(d). However, even if such a conflict were waivable, the inquiring lawyer's client would be a child and would be incapable by himself or herself of giving informed consent to satisfy Rule 1.7(b)(4). *See* N.Y. State 941 ¶8 (2012); N.Y. State 790 ¶8 (2005). The situation might be different if the child had another representative with authority to consent to a conflict, but whether a representative would have such authority is a question of law beyond the

Committee's jurisdiction. *See* N.Y. State 895 ¶16 (2011) (raising but declining to answer that question with respect to representatives of the child "such as a parent, guardian *ad litem*, custodian, guardian, committee, trustee or court").

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

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

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

CONCLUSION

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

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

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

(12-13)

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

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

[3] *See* Rule 1.0(h) ("firm" includes "lawyers employed in a qualified legal assistance organization"); Rule 1.0(p) ("'Qualified legal assistance organization' means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof."); Rule 7.2(b)(1)(iii) (applying to "a legal aid or public defender office ... operated or sponsored by a governmental agency").

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

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

[6] Conflicts based on Rules other than 1.7, 1.8 or 1.9 are not imputed by the terms of Rule 1.10(a), although service as a "conflict" defender in such cases may require the inquiring lawyer to consider other provisions. *See, e.g.*, Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 532, 578 (2013 ed.) (discussing other Rules that "carry their own imputation provisions"); *id.* at 578

(pointing out that even when one lawyer has a kind of conflict not imputed to associated lawyers, an associated lawyer could still be subject to a direct conflict such as one based on personal interest); N.Y. State 890 (2011) (conflicts under Rule 1.10(h), relating to family members, are not "automatically" imputed to other lawyers in the firm, "but imputation may arise in the particular circumstances of any given case").

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

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

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

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

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

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