The Daniel Webster-Batchelder American Inn of Court

Table 6 – Joint Representation and Waivers Presentation

March 6, 2024

Our presentation focuses on joint representation and waivers in several contexts including criminal; family; wills, trusts, and estates; and corporate matters. The materials address the general rules of professional conduct and comments applicable to an attorney's joint representation of two or more clients as well as those rules and decisions relevant to specific areas of practice. Several of the materials are decisions from other jurisdictions due to the lack of authority from New Hampshire. These materials do not belong to the presenters but have been reviewed, organized, and compiled by the presenters to assist your understanding and supplement the presentation.

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Relevant Rules of Professional Conduct

Rule 1.1 - Competence:

(a) A lawyer shall provide competent representation to a client.

(b) Legal competence requires at a minimum:

(1) specific knowledge about the fields of law in which the lawyer practices;

(2) performance of the techniques of practice with skill;

(3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;

(4) proper preparation; and

(5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.

(c) In the performance of client service, a lawyer shall at a minimum:

(1) gather sufficient facts regarding the client's problem from the client, and from other relevant sources;

(2) formulate the material issues raised, determine applicable law and identify alternative legal responses;

(3) develop a strategy, in consultation with the client, for solving the legal problems of the client; and

(4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.

Ethics Committee Comment

The New Hampshire Rule continues the prior New Hampshire Rule, expanding on the Model Rule to serve both as a guide and objective standard. The Model Rule standards of legal knowledge, skill, thoroughness, and preparation reasonably necessary are rejected as being too general.

ABA comment [8] (formerly Comment [6]) requires that a lawyer should keep abreast of . . . the benefits and risks associated with relevant technology." This broad requirement may be read to

assume more time and resources than will typically be available to many lawyers. Realistically, a lawyer should keep reasonably abreast of readily determinable benefits and risks associated with applications of technology used by the lawyer, and benefits and risks of technology lawyers similarly situated are using.

ABA Comment to the Model Rules - RULE 1.1 COMPETENCE

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a)(unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.14 - Client with Diminished Capacity:

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

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

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

Ethics Committee Comment

1. ABA Comment 3 says that the presence of family members or other persons during discussions with the lawyer, at the clients request "generally does not affect the applicability of the attorney-client evidentiary privilege." This comment raises concerns. The lawyer should determine if the privilege would be waived.

2. ABA Comment 5 addresses consulting with traditional "family members." For some clients, non-traditional relationships such as unmarried heterosexual, gay, or lesbian partners may be at least as important as blood or marital relationships. There may be substantial conflict between the non-traditional partner and the traditional family. Evidence of the importance of a particular relationship to the client would include express client directions set out in planning documents such as letters of intent, health care or general power of attorney, or nomination of guardian.

3. ABA Comment 7 highlights that the least restrictive action should be taken, based upon the circumstances of each client. This is consistent with the approach of New Hampshire's probate courts, in considering a guardianship over an incapacitated adult.

4. ABA Comment 4 says that the lawyer would "ordinarily look to" any legal representative (such as a guardian) for decisions. The situations in which the client's legal representative should not be the person making decisions are limited to two situations: where the lawyer represents the client in a matter against the interests of the legal representative or where that the legal representative instructs

the lawyer to act in a manner that will violate that person's legal duties toward the client. See Restatement Third, The Law Governing Lawyers § 24(c) (2000).

5. ABA Comment 10 states that "[n]ormally, a lawyer would not seek compensation for such emergency actions taken." In these situations there is no ethical bar to requesting compensation, where the person benefiting from the action can afford to pay for the legal services.

2004 ABA Model Rule Comment - RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

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

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's

interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering

alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Rule 1.16 - Declining or Terminating Representation:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with the applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) As a condition to termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

(e) The representation of a lawyer having entered a limited appearance as authorized by the tribunal under a limited representation agreement under Rule 1.2(f)(1), shall terminate upon completion of the agreed representation, without the necessity of leave of court, upon providing notice of completion of the limited representation to the court.

Ethics Committee Comment

Section (e) is unique to New Hampshire, and is intended to encourage limited representation.

2004 ABA Model Rule Comment - RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Rule 1.18 - Duties to Prospective Client:

(a) A person who provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has received and reviewed information from a prospective client shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received and reviewed information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received and reviewed disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received and reviewed the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

a. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

b. written notice is promptly given to the prospective client.

Ethics Committee Comment

1. The New Hampshire rule expands upon the ABA Model Rule in one area. The ABA Model Rule 1.18(a) defines a prospective client as one who "consults" with a lawyer about possible representation; the New Hampshire Rule defines prospective client as one who "provides information to a lawyer" about possible representation. ABA Model Rule 1.18(b) establishes a general rule for protection of information "learned" by a lawyer from a prospective client; the New Hampshire Rule clarifies the scope of the protection so that it applies to information "received and reviewed" by a lawyer from a prospective client.

In its version of Rule 1.18, New Hampshire's rule eliminates the terminology of "consultation" and learning and extends the protections of the rule to persons who, in a good faith search for representation, provide information unilaterally to a lawyer who subsequently receives and reviews

the information. This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other unilateral forms, and in the process disclose confidential information that warrants protection. This change further recognizes that receipt and review are likely to be more objective standards than learning.

2. Not all persons who communicate information to an attorney unilaterally are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship (see ABA Model Rule comment No. 2); or for the purpose of disqualifying an attorney from participation in a matter; or through contemporaneous contact with numerous attorneys; is not a "prospective client" within the meaning of paragraph (a).

3. New Hampshire has concerns with ABA Comment 5, which purports to allow an attorney to secure prior "informed consent" from a prospective client that information provided in initial consultations would not preclude subsequent representation of another client in the matter. Unlike the more detailed analysis contemplated by Comment 22 to Rule 1.7, a prospective client's prior consent may be made more quickly and less likely to be "informed" as to the potential adverse consequences of such an agreement.

ABA Comment to Model Rules - RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice and contact information, or provides legal information of general

interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k)

(requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 1.4 - Client Communications:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

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

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

(4) promptly comply with reasonable requests for information; and

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

(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.

Ethics Committee Comment

Attorneys seeking to determine the scope of the duty to communicate under this rule should also review ABA Comment 5 to Rule 2.1. That Comment states that when a matter is likely to involve litigation, Rule 1.4 may require a lawyer "to inform the client of forms of dispute resolution that

might constitute reasonable alternatives to litigation." This comment may prove important given the overlap of Rules 2.1 and 1.4, the increasingly important role of alternative dispute resolution in litigation, and the implications this duty might have for a lawyer's civil liability.

<u>ABA Comment to the Model Rules - RULE 1.4 COMMUNICATION</u>

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

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

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

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

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

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Rule 1.6 - Confidentiality of Information:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or

(2) to secure legal advice about the lawyer's compliance with these Rules; or

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order; or

(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Ethics Committee Comment

The New Hampshire Rule reorganizes and changes Rule 1.6(b).

The New Hampshire Rule permits the disclosure of any criminal act involving death or bodily harm or substantial injury to the financial interest or property of another. Rule 1.6 should not be viewed as a departure from the general rule of client confidentiality, and should not be interpreted to encourage lawyers to disclose the confidences of their clients. The disclosure of client confidences is an extreme and irrevocable act. Hopefully no New Hampshire lawyer will be subject to censure for either disclosing or failing to disclose client confidences, as the lawyer's individual conscience may dictate.

As to ABA Comments [18] (formerly Comment [16]) and [19](formerly Comment [17]), see Ethics Opinion 2008-9/4 discussing duties relating to "metadata;" www.nhbar.org/legal-links/Ethics-Opinion-2008-09_04.asp.] A lawyer is responsible for reasonably ensuring adequate protection of

client confidences in data held or stored by others, including, e.g., offsite storage and "cloud" storage.

ABA Comment to the Model Rules - RULE 1.6 CONFIDENTIALITY OF INFORMATION

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected 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 is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with

respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertraining a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the

representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Rule 1.7 - Conflicts of Interest:

(a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client , a former client or a third person or by a personal interest of the lawyer.

(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.

(c) Notwithstanding (a) and (b) above, a lawyer from the New Hampshire Public Defender Program may represent an individual for arraignment if that individual is not:
(1) a co-defendant of a defendant also represented by the New Hampshire Public Defender Program; or
(2) a witness in a case in which the New Hampshire Public Defender Program represents a client and it is a case in which the New Hampshire Public Defender Program determines that there is a significant risk that the representation of the witness will materially limit the lawyer's responsibilities to the existing client.

Comment
Paragraph (c) of Rule 1.7 is designed to address a difficulty that has arisen in connection with the anticipated implementation in the near future of Circuit Court – District Division Criminal Rules 2.20 through 2.23 (and equivalent rules that are to be promulgated for the Superior Court). These rules were developed in the wake of the New Hampshire Supreme Court's order in Nygn & a. v. Manchester District Court, No. 2011-0464 (decided March 16, 2012), and are designed to insure, to the maximum extent possible, that an attorney will actually be present to represent a defendant at arraignment.

The New Hampshire Public Defender (NHPD) is obliged, by statute, to represent all indigent criminal defendants charged with offenses punishable by incarceration. See N.H. RSA 604-B:2, :6 (2001). The only exception to this obligation is when NHPD has a conflict of interest that prevents it from providing conflict-free representation. In order to effectuate RSA 604-B, NHPD has in place an extensive internal conflict of interest policy to guide its attorneys and staff when determining whether NHPD is able to provide conflict-free representation. The conflict policy was written using the New Hampshire Rules of Professional Conduct and its annotations as guidance. NHPD's conflict policy requires NHPD office staff to run the names of the defendant and all witnesses through a statewide database. If the defendant is a co-defendant in an open case or an alleged victim or witness, a trained conflict resolution attorney, guided by the Rules of Professional Conduct, determines whether NHPD can represent the new defendant, or whether it must decline representation.

In State v. Veale, 154 N.H. 730, 734-35 (2007), the New Hampshire Supreme Court decided that NHPD is one firm for purposes of conflict determinations. Therefore, when NHPD is making conflict-of-interest determinations it operates under the assumption that all nine of the trial offices and the Appellate Defender constitute one law firm. This becomes a concern when NHPD has an attorney in one office representing a defendant, a witness name appears in that defendant's case, a conflict check is run, and the same name appears as a client in another office. In practice, there will rarely if ever be communication between the two attorneys about the individual; in fact the attorneys will most likely never even know about each other, but because of Rule 1.7 and the Veale case, NHPD would take precautionary measures and reject one of the cases. Historically, this approach has caused a substantial number of withdrawals, backlog for the courts, and delay for the clients. However, given the current state of the rules and the law, NHPD is unable to avoid withdrawal.

Paragraph (c) of the rule was adopted because the conflict of interest regime set forth in Rule 1.7(a) and (b) would significantly inhibit the ability of NHPD to participate in implementing the new arraignment rules which will be set forth in Circuit Court – District Division Rules 2.20 through 2.23. In order to effectuate the goal of having an attorney actually present to represent at arraignment all indigent defendants charged with felony or class A misdemeanor offenses, the number of instances in which NHPD will be called upon to provide such representation will increase substantially. Yet without the availability of NHPD attorneys to serve as counsel at arraignment, implementation of the new rules would not be possible due to the practical difficulties and prohibitive costs entailed in providing contract or appointed counsel in every circumstance where, under the prior version of Rule 1.7, NHPD could have been deemed to have a conflict preventing its attorneys from acting as counsel at arraignment.

New paragraph (c) of Rule 1.7 is designed to create an exception to the strict requirements of paragraphs (a) and (b) of the rule that will apply only to NHPD attorneys representing defendants at arraignment. Not only is this exception justified for the practical reasons stated above, but it also is justified by the need for the NHPD to respond quickly to court appointments for arraignment purposes and by the limited scope of the representation provided by NHPD to clients represented at arraignments only. It must be noted that the exception does not permit an NHPD attorney to represent co-defendants at arraignment. In addition, even where the client to be represented at arraignment by one NHPD attorney is a witness or an alleged victim in a case where another NHPD attorney represents the defendant, the representation will not be allowed if NHPD determines, in accordance with its internal conflicts policy, that there is a significant risk the representation at arraignment will materially limit the other NHPD attorney's responsibilities to that attorney's client.

Ethics Committee Comment

The requirements that a lawyer maintain loyalty to a client and protect the client's confidences are fundamental. Although both the former rule 1.7 and the current rule 1.7(b) allow a lawyer to undertake representation in circumstances when there is exists a concurrent conflict of interest, the lawyer should use extreme caution in deciding to undertake such representation. The lawyer must make an independent judgment that he or she can provide "competent and diligent representation" before the lawyer can even ask for consent to proceed. The court in subsequent proceedings can review such a judgment. See Fiandaca v. Cunningham, 827 F.2d. 825 (1st Cir. 1987).

In evaluating the appropriateness of representation in a conflict situation under 1.7(b), the New Hampshire Bar Association Ethics Committee has used under the old rules the "harsh reality test" which states:

"(i)f a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent. If this "harsh reality test" may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation . . . ." New Hampshire Bar Association Ethics Committee Opinion 1988-89/24 (http://nhbar.org/pdfs/f088-89-24.pdf).

This test has proven useful to practicing attorneys and retains its validity under the amended rules.

As discussed in Comment 17 to the ABA Model Rules, the determination of whether two clients are directly aligned against one another so as to give rise to a non-waivable conflict will require case-by-

case analysis in the context of the particular circumstances. Other factors – including the availability of insurance, hold harmless agreements or indemnification agreements – may also be relevant in determining whether the interests of the clients are in reality "directly adverse" so as to preclude waiver of, or consent to, the conflict. However, even when third party payers or other financial protections eliminate the clients' financial exposure in litigation, there are claims (for example, assertions of comparative fault among professionals) in which the client, not the insurer, may have a strong personal interest in a vigorous defense of their work despite the fact that insurance will cover any judgment. This makes such concurrent representation impossible. In making these determinations, the harsh reality test discussed above should be foremost in the attorney's mind.

2004 ABA Model Rule Comment - RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of

this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in

unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an

undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to

common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily

will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even

litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may

reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require

the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.9 - Duties to Former Clients:

(a) 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.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Ethics Committee Comment

The New Hampshire Supreme Court has relied upon this rule for the criteria governing the consideration of a motion to disqualify a party's former lawyer for a conflict of interest. Sullivan County Reg. Refuse Disp. Dist. v. Town of Acworth, 141 N.H. 479, 481-82 (1996).

Law firms and legal service organizations which handle a high volume of cases confront the limitations of this rule on a more frequent basis than do other practitioners. Firms and organizations may accept cases where a former client is a witness in the new (current client's) case if the representation of the former client is not “substantially related” to the current client’s case. Rule 1.9(a) permits such representation, but attorneys are cautioned to fully explore the definition of "substantially related" under relevant case law in the controlling jurisdiction. If such representation

is permissible, attorneys in the law firm or organization must nevertheless take appropriate steps in a case that is not substantially related to comply with Rule 1.9(c) by protecting the confidential information obtained during the representation of the former client.

The New Hampshire Public Defender has adopted a Rule 1.9(c) compliance policy in cases that are not substantially related in which a "neutral attorney" orders the former client's files sealed and prohibits any communication between the attorney who represented the former client and the attorney who represents the new client. In two cases where the State sought disqualification of the Public Defender because one of its attorneys had previously represented an individual who was a state's witness in the new case, the New Hampshire Superior Court denied disqualification and referenced with apparent approval the Public Defender's Rule 1.9(c) compliance policy. See State of New Hampshire v. Gordon Perry, Nos. 97-S-777 - 780 (Merrimack County Superior Court (Nadeau, J.) April 10, 1998); State of New Hampshire v. Eric Smalley, No. 01-S-1280 (Merrimack County Superior Court (McGuire, J.) January 29, 2002).

2004 ABA Model Rule Comment - RULE 1.9 DUTIES TO FORMER CLIENTS

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions.

The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or

another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Rule 8.4 - Misconduct:

It is professional misconduct for a lawyer to:

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

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

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

(d) state or imply an ability to influence improperly a government agency or official;

(e) state or imply an ability to achieve results by means that violate the Rules of Professional Conduct or other law; or

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

(g) take any action, while acting as a lawyer in any context, if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, harass or burden another person, including conduct motivated by animus against the other person based upon the other person's race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules of Professional Conduct, nor does it preclude a lawyer from engaging in conduct or speech or from maintaining associations that are constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

New Hampshire Supreme Court Comment

Subsection (g) is intended to govern the conduct of lawyers in any context in which they are acting as lawyers. The rule requires that the proscribed action be taken with the primary purpose of embarrassing, harassing or burdening another person, which includes an action motivated by animus against the other person based upon the other person's race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. The rule does not prohibit conduct that lacks this primary purpose, even if the conduct incidentally produces, or has the effect or impact of producing, the described result.

Ethics Committee Comment

Section (d) of the ABA Model Rule is deleted. A lawyer's individual right of free speech and assembly should not be infringed by the New Hampshire Rules of Professional Conduct when the lawyer is not representing a client. The deletion of section (d) was not intended to permit a lawyer, while representing a client, to disrupt a tribunal or prejudice the administration of justice, no matter how well intentioned nor how noble the purpose may be for the unruly behavior.

Model Rule section (e) is split into New Hampshire sections (d) and (e).

2004 ABA Model Rule Comment - RULE 8.4 MISCONDUCT

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

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

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

Criminal Law

Below we have included a section of the New Hampshire Practice Series which addresses joint representation of criminal defendants. Also included below is a decision from the Professional Conduct Committee discussing the ethical implications of an attorney's joint representation of a couple involved in a domestic violence matter. Finally, you will find a decision from the New Hampshire Supreme Court addressing an ineffective assistance of counsel claim where trial counsel represented the defendant and his wife, also a defendant in the matter.

1 NH Practice Series: Criminal Practice & Procedure § 18.21

New Hampshire Practice Series: Criminal Practice and Procedure > PART II INITIATION OF CRIMINAL PROCEEDINGS > CHAPTER 18 THE RIGHT TO COUNSEL > B. Effective Assistance of Counsel

§ 18.21 *Joint Representation* of Defendants

A defendant is not afforded the effective assistance of counsel unless his attorney is acting in his interest and his interest only.[1] But representation of multiple defendants by one attorney is not per se violative of the *Sixth Amendment* right to counsel; only when there is a conflict in the several defendants' interests must separate counsel be appointed.[2]

Nonetheless, it is rare for an attorney to agree to ***joint representation***. And it is unwise. ***Joint representation*** may lead to a plethora of problems at trial that may not be apparent at first blush. The most obvious and common problem occurs when one codefendant decides to plead guilty and testify against his codefendant.

The United States Supreme Court held in 1980, in *Cuyler v. Sullivan*,[3] that "since a possible conflict inheres in almost every instance of multiple representation," a defendant who raised no objection to multiple representation at trial but later alleges that the multiple representation violated his *Sixth Amendment* rights bears the burden of showing that "an actual conflict of interest adversely affected his lawyer's performance."[4] A defendant who makes such a claim must show "(a) some plausible alternative defense strategy or tactic that trial counsel might have pursued; and (b) an inherent conflict between that alternative defense and other demands and interests arising from counsel's representation of another person."[5]

The New Hampshire Supreme Court has held that the test announced in *Cuyler v. Sullivan*,[6] to measure the effective assistance of counsel as against claims of conflict of interest, will be used for purposes of the State

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[1] *See, e.g.*, *Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)*; *State v. Theodore, 118 N.H. 548, 392 A.2d 122 (1978)*, *aff'd*, *Theodore v. New Hampshire, 614 F.2d 817 (1st Cir. 1980)*.

[2] *Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)*.

[3] *Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)*.

[4] *Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, 64 L. Ed. 2d 333, 346–347 (1980)*. The *Cuyler* standard is applied by the New Hampshire Supreme Court in all cases of alleged conflict of interest, unrelated to multiple representation of ***criminal*** defendants, including cases in which the attorney has a financial interest in a business owned by his client or where an attorney is the subject of the same ***criminal*** investigation that forms the basis for later indictment of his client. *See, e.g.*, *State v. Fennell, 133 N.H. 402, 578 A.2d 329 (1990)*.

[5] *Hopps v. State Bd. of Parole, 127 N.H. 133, 136, 500 A.2d 355, 356 (1985)*; *State v. Guaraldi, 127 N.H. 303, 500 A.2d 360 (1985)*; *State v. Mountjoy, 142 N.H. 648, 708 A.2d 682 (1998)* (simultaneous representation of defendant and State's witness). There is no per se rule that ineffective counsel exists when a single attorney represents codefendants. *Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)*.

[6] *Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)*.

Constitution.[7] A defendant who establishes "that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."[8]

The Court has stated:

> Our constitution does not forbid multiple representation, but caution should be exercised by counsel before he or she decides to represent more than one ***criminal*** defendant in connection with related charges. *See* ABA Standards for ***Criminal*** Justice, Standard 4-3.5(b) (2d Ed. 1980) ("The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations …").[9]

Because of its concern with the problems which inhere in multiple representation, the Court, in the exercise of its supervisory jurisdiction, in 1985, in *Hopps v. State Board of Parole*,[10] required that, in all cases involving multiple representation, both counsel and the trial court shall be responsible for making a record indicating that counsel has investigated the possibility of conflict, has discussed the possibility with each client, and has determined that conflict is highly unlikely.[11] In 1997, the Court extended the *Hopps* standard to cases in which a defense attorney represents both a defendant and a State's witness.[12]

Multiple representation is specifically addressed by *Rule 5 of the New Hampshire Rules of **Criminal** Procedure*. Its terms illustrate the risk involved in multiple representation.

The Rule provides that:

(1) A lawyer shall not represent multiple defendants if such representation would violate the Rules of Professional Conduct.

(2) A lawyer shall not be permitted to represent more than one defendant in a ***criminal*** action unless:

(A) The lawyer investigates the possibility of a conflict early in the proceedings and discusses the possibility with each client;

(B) The lawyer determines that a conflict is highly unlikely; and

(C) The lawyer notifies the court of the multiple representation and a hearing on the record is promptly held. The court shall inquire into all relevant facts, including, but not limited to, the following:

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[7] *Hopps v. State Bd. of Parole, 127 N.H. 133, 136, 500 A.2d 355 (1985)*; *Abbott v. Potter, 125 N.H. 257, 480 A.2d 118 (1984)*.

[8] *State v. Cyrs, 129 N.H. 497, 501–502, 529 A.2d 947 (1987)*; *Hopps v. State Bd. of Parole, 127 N.H. 133, 136, 500 A.2d 355, 356 (1985)*; *Abbott v. Potter, 125 N.H. 257, 260, 480 A.2d 118, 119 (1984)*. Although not writing in the context of ***joint representation***, in 2018 Justice Souter, sitting by designation on the United States Court of Appeals for the First Circuit, stated that a defendant who did not object at trial must show that the conflict affected his lawyer's performance in *United States v. Tirado, 890 F.3d 36 (1st Cir. 2018)*. Justice Souter was the author of the seminal case on conflict of interest and ineffective assistance while on the New Hampshire Supreme Court, *Hopps v. State Board of Parole, 127 N.H. 133, 500 A.2d 355 (1985)*.

[9] *Abbott v. Potter, 125 N.H. 257, 259, 480 A.2d 118, 119 (1984)*. *See also* *Hopps v. State Bd. of Parole, 127 N.H. 133, 139, 500 A.2d 355, 359 (1985)*, *citing* 1 ABA Standards for ***Criminal*** Justice, Standard 4-3.5(b) (2d ed. 1980), and ABA Model *Rules of Professional Conduct, Rule 1.7(b)*. The Court has applied the *Cuyler* analysis to a situation in which the defendant claimed that her right to counsel was violated because she entered into a contingent fee agreement with her attorney. *State v. Labonville, 126 N.H. 451, 492 A.2d 1376 (1985)* (no denial of right to counsel under New Hampshire or federal constitutions where there was no showing that the conflict of interest created by the contingent fee agreement "was actual or genuine to the point of adversely affecting trial counsel's representation").

[10] *Hopps v. State Bd. of Parole, 127 N.H. 133, 500 A.2d 355 (1985)*.

[11] *Hopps v. State Board of Parole, 127 N.H. 133, 500 A.2d 355 (1985)*.

[12] *State v. Mountjoy, 142 N.H. 648, 708 A.2d 682 (1998)*.

(i) Evidence of the lawyer's discussion of the matter with each client;

(ii) Evidence of each client's informed consent to multiple representation based on the clients understanding of entitlement to conflict free counsel;

(iii) A written or oral waiver by each client of any potential conflict arising from the multiple representation; and

(D) The court finds by clear and convincing evidence that the potential for conflict is very slight.[13]

The United States Supreme Court has held that a trial court may, consistent with the *Sixth Amendment*, decline a proffer of waiver and insist on separate representation when it finds that a potential for conflict exists that may burgeon into an actual conflict as the trial progresses.[14]

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[13] *N.H. R. Crim. Proc. 5*.

[14] *Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692, 1698, 100 L. Ed. 2d 140 (1988)*.

Professional Conduct Committee
No. LD-2011-010

CLAUSON'S CASE

Argued: June 14, 2012
Opinion Issued: September 18, 2012

1. Attorneys—Conflict of Interest—Generally

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. N.H. R. PROF. COND. 1.7; ABA Model Code cmt. 8.

2. Attorneys—Conflict of Interest—Generally

In a situation where a lawyer concurrently represents two or more parties with respect to the same subject matter there is usually a chance that their interests will, at some point, diverge.

3. Attorneys—Conflict of Interest—Particular Cases

When a husband was accused of assaulting his wife, by appearing on behalf of both spouses to lift a no-contact condition of the husband's bail order and by representing the husband in his criminal case, respondent violated the professional conduct rule regarding concurrent conflicts of interest. The joint representation presented several significant risks that respondent's responsibilities to the wife would materially limit his representation of the husband. N.H. R. PROF. COND. 1.7(a).

4. Attorneys—Conflict of Interest—Generally

Loyalty and independent judgment are essential elements in a lawyer's relationship to a client. N.H. R. PROF. COND. 1.7; ABA Model Code cmt. 1.

5. Attorneys—Conflict of Interest—Former Representation

A lawyer who has formerly represented a client in a matter is prohibited from revealing information relating to the representation. The professional conduct rule regarding concurrent conflicts of interest expressly applies to such a situation by virtue of its reference to a lawyer's responsibilities to a former client. N.H. R. PROF. COND. 1.7(a)(2), 1.9(c)(2).

6. Attorneys—Conflict of Interest—Generally

The professional conduct rule regarding concurrent conflicts of interest is an objective standard and does not rely upon the lawyer's subjective belief about his ability to remain impartial. N.H. R. PROF. COND. 1.7(a).

7. Attorneys—Conflict of Interest—Former Representation

The professional conduct rule regarding duties to former clients protects former clients by recognizing the twin duties an attorney owes to a former client: the duty to preserve confidences and the duty of loyalty. A violation of subsection (a) of the rule consists of four elements: a valid attorney-client relationship between the attorney and the former client;

materially adverse interests between the former client and a present client; representation of the present client in the same or a substantially related matter; and a lack of consent on the part of the former client. N.H. R. PROF. COND. 1.9.

8. Attorneys—Conflict of Interest—Particular Cases

When a husband was accused of assaulting his wife, and respondent appeared on behalf of both spouses to lift a no-contact condition of the husband's bail order and represented the husband in his criminal case, the Professional Conduct Committee erred in finding that he had violated the rule regarding duties to former clients. Even accepting that the criminal case was a "matter" the same as or substantially related to the bail hearing, the wife appeared to have opposed the criminal case against her husband throughout the respondent's brief representation of the husband. Thus, her interests could not be said to have been adverse to the husband's interests at all, much less "materially" so. N.H. R. PROF. COND. 1.9(a).

9. Attorneys—Conflict of Interest—Former Representation

The rule regarding duties to former clients is directed not at attorneys facing a possibility that the representation of one client could be infringed by a lawyer's other responsibilities, but at those attorneys whose client's interests in a current matter are in fact materially adverse to those of a former client in the same or a substantially related matter. The rule regarding concurrent conflicts of interest expressly contemplates the risk of divergent interests arising by its reference to situations in which a lawyer's responsibilities to a former client might materially limit the representation of one or more clients. The rule regarding former clients refers not to possibilities but to actual adverse interests. N.H. R. PROF. COND. 1.7(a)(2), 1.9.

10. Attorneys—Competency of Counsel—Professional Standards

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. N.H. R. PROF. COND. 1.1; ABA Model Code cmt. 1.

11. Attorneys—Competency of Counsel—Particular Cases

When a husband was accused of assaulting his wife, and respondent appeared on behalf of both spouses to lift a no-contact condition of the husband's bail order and represented the husband in his criminal case, the Professional Conduct Committee erred in finding a violation of the rule regarding professional competency. Removing the no-contact order did not require highly specialized knowledge or skill; a district court rule did not require that the husband be present at the hearing to lift the no-contact provision; respondent had objectively reasonable grounds to believe that the spouses' interests were aligned; and the record did not establish that respondent placed the husband at risk of violating the order by contacting the wife on his behalf. N.H. R. PROF. COND. 1.1.

12. Attorneys—Competency of Counsel—Professional Standards

Expertise in a specific area of law generally is not required in order to meet the minimum standards for competency. N.H. R. PROF. COND. 1.1.

13. Trial—Criminal Cases—Generally—Rules of Procedure

A hearing on a motion to lift a no-contact provision of a bail order was neither an arraignment nor sentencing, and could not reasonably be construed as a "stage of the trial"

because trial had not yet begun. Thus, respondent did not knowingly violate the district court rule regarding a defendant's presence. DIST. DIV. R. 2.3.

14. Attorneys—Competency of Counsel—Professional Standards

The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. N.H. R. PROF. COND. 1.1; ABA Model Code cmt. 5.

James L. Kruse, of Concord, on the brief and orally, for the professional conduct committee.

Clauson & Atwood, of Hanover (*K. William Clauson* on the brief and orally), for the respondent.

LYNN, J. The respondent, K. William Clauson, appeals an order of the Supreme Court Professional Conduct Committee (PCC) suspending him from the practice of law for six months based upon its finding that he violated New Hampshire Rules of Professional Conduct (Rules) 1.1, 1.7, 1.9(a), and 8.4(a). Because we find that the respondent violated only Rules 1.7 and 8.4(a), we affirm in part, reverse in part, vacate in part, and remand.

I

The record supports the following facts. On June 20, 2009, Todd Gray was arrested for assault arising out of an incident that occurred early in the morning of June 14, 2009, at the home he shared with his wife Brenda and their children. In the supporting affidavit for the arrest warrant, State Trooper Nathan Hamilton stated that he learned the following in the course of investigating the incident. Mr. and Mrs. Gray attended a graduation party in Vermont on the night of June 13 and became intoxicated. Mrs. Gray told Hamilton that, after returning home with their daughter Amber, a dispute arose during which Mr. Gray broke a bathroom mirror, threw furniture over, and slapped Mrs. Gray in the face. Mr. Gray later told Hamilton that he had punched the mirror in response to his wife's "bickering," and that she had scratched him on the side of the neck. Some time after speaking with Mrs. Gray, Hamilton located Amber and asked her what happened. She said that after hearing the sound of the mirror breaking, she approached the bathroom and had "some words" with her father, and in response he backed her into a wall and slapped her in the face. After that, according to Amber, Mrs. Gray approached Mr. Gray and slapped him on the back of the head; Mr. Gray then threw Mrs. Gray into a refrigerator, table, and chair, slapped her, and, after Amber called the police, left the house. Trooper Hamilton returned to obtain a written statement from Mrs. Gray later on June 14, but she declined to provide one and said she did not want the investigation to proceed.

After his arrest on June 20, Mr. Gray appeared before a bail commissioner, who released him on $500 personal recognizance and ordered him not to contact Mrs. Gray or Amber or go within 100 yards of them. On June 22, Mrs. Gray sought the respondent's assistance in lifting the no-contact condition of the bail order so that Mr. Gray could return home. The respondent, an attorney licensed to practice in New Hampshire since 1971, agreed to represent her in the matter. After speaking with Mr. Gray by telephone to obtain his consent to appear in the district court on his behalf, the respondent filed a motion entitled "Brenda Gray and Todd Gray's Emergency Motion for Immediate Hearing on Bail Conditions." The respondent appeared with Mrs. Gray for a hearing on the motion on June 23 in the Lebanon District Court (*Cirone*, J.). He told the court that Mrs. Gray did not consider herself a victim in the case and wanted the no-contact condition lifted. The court, however, declined to rule on the matter because Mr. Gray was not present.

On June 30, the respondent again appeared on behalf of the Grays to request the no-contact condition be lifted. Mr. Gray was also arraigned at that hearing and entered a not guilty plea through the respondent, who had by that time agreed to represent him in the criminal case. At some point, the court expressed its concern that the respondent's joint representation of the Grays presented a possible conflict of interest. Mrs. Gray then testified that she was not afraid of her husband and wanted him to return home, and engaged in a discussion with the court about the matter. Mr. Gray did not speak during that hearing. The court issued an order the next day lifting the no-contact condition of the bail order.

The respondent represented Mr. Gray in his criminal case. After the court scheduled a trial to take place in November, the State agreed to place the charges on file for one year without a finding, conditioned on Mr. Gray's good behavior and completion of an anger management course.

The Attorney Discipline Office issued a notice of charges against the respondent in August 2010 alleging violations of Rules 1.7(a), 1.9(a), 1.1, and 8.4(a). A hearing panel found that the respondent violated each Rule as charged and recommended: (1) a sanction of three months suspension; (2) a requirement to take the Multistate Professional Responsibility Exam (MPRE) and earn a 90% passing score; (3) attendance at twelve hours of continuing education seminars; and (4) payment of all expenses incurred in the investigation and prosecution of the matter. After hearing oral argument, the PCC found violations of each of the Rules, as charged, issued a six-month suspension, and required the respondent to complete an MPRE course and pass the examination. The respondent appealed.

II

We first consider whether the respondent violated the Rules. The PCC's finding of a violation must be supported by clear and convincing evidence. SUP. CT. R. 37A(III)(d)(2)(C). "In attorney discipline matters, we defer to the PCC's factual findings if supported by the record, but retain ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred and, if so, what the sanction should be." *Clark's Case*, 163 N.H. 184, 187-88 (2012).

A. Concurrent Conflict of Interest

The PCC first concluded that the respondent violated Rule 1.7(a), which provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> . . .
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (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.

[1] Comment 8 to the ABA Model Rules explains further:

> Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's

> other responsibilities or interests . . . . The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

N.H. R. PROF. CONDUCT 1.7, ABA Model Code Comment 8.

Because the respondent does not contend that he obtained informed, written consent, our analysis is limited to whether his representation of Mr. and Mrs. Gray presented a significant risk that his representation of one would be materially limited by his responsibilities to the other.

The respondent advances several arguments as to why his representation of the Grays did not violate Rule 1.7: (1) that their respective interests were aligned insofar as each wanted the no-contact order lifted; (2) that his representation of Mr. Gray in the underlying criminal case was contingent upon his review of the police file; and (3) that because both Mr. and Mrs. Gray denied that the alleged assault even occurred, his representation of each would never be materially limited by his responsibilities to the other.

[2] The first argument is unpersuasive because it pertains to the *actual* alignment of the Grays' interests — not the *risk* that the respondent's responsibilities to one would materially limit his representation of the other. *See Wyatt's Case*, 159 N.H. 285, 298 (2009) (Rule 1.7(b) (the former version of Rule 1.7(a)(2)) "is broad, and focuses not upon direct adversity at the outset, but the risk that it or other material limitations may arise in the course of the dual representation" (citation omitted)); *see also* R. FLAMM, LAWYER DISQUALIFICATION § 4.1, at 61 (2003) ("In a situation where a lawyer concurrently represents two or more parties with respect to the same subject matter there is usually a chance that their interests will, at some point, diverge.").

The second argument is also unpersuasive because the PCC found that the respondent represented Mr. Gray in the general criminal case *before* the June 30 hearing. The record supports that finding, particularly given that the respondent entered a not guilty plea on Mr. Gray's behalf at the June 30 hearing. Moreover, the finding of a concurrent conflict may be predicated solely upon the respondent's representation of the Grays in the two hearings convened for the purpose of lifting the no-contact condition of the bail order. Whether or not we accept that the respondent's representation of Mr. Gray on the criminal assault charge was contingent upon

receiving and reviewing the police file, it is undisputed that the respondent represented *both* Mr. and Mrs. Gray at the bail hearings. Because there is no evidence in the record that the respondent provided Mrs. Gray with any additional legal services after the June 30 hearing, we limit our analysis of Rule 1.7 to the two hearings on the bail conditions.

[3, 4] We conclude that the joint representation presented several significant risks that the respondent's responsibilities to Mrs. Gray would materially limit his representation of Mr. Gray. First, the respondent's responsibilities to Mrs. Gray included an obligation to offer candid and independent advice which, if given, could have conflicted with Mr. Gray's interest in removing the no-contact provision and defending against the underlying assault charge. For example, the respondent knew that Mrs. Gray had an obligation to tell the truth in the bail hearing. A disinterested lawyer might have examined the facts, explained to Mrs. Gray the risks of telling the court that the assault never happened notwithstanding substantial evidence to the contrary, and, accordingly, advised her to refrain from denying the assault took place. Similarly, a disinterested lawyer might have foreseen a possibility that Mrs. Gray would change her mind and opt later to proceed as a willing witness for the prosecution. In that event, prudence might also dictate advising her to refrain from supporting removal of the no-contact order lest she later face exposure to cross-examination based upon her prior statements to the court (a possibility made even more pronounced in light of her having told Trooper Hamilton on the night of the incident that Mr. Gray had, in fact, assaulted her). But providing such advice obviously would have been detrimental to Mr. Gray's interest in lifting the no-contact condition and defending against the criminal case. This situation presented the primary risk arising from a concurrent conflict of interest under Rule 1.7(a)(2): divided loyalties that might inhibit the lawyer's range of options in advising a client. *See* N.H. R. PROF. CONDUCT 1.7, ABA Model Code Comment 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); *cf. Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (In a conflict situation, "the evil . . . is in what the advocate finds himself compelled to *refrain* from doing."); *Barefield v. DPIC Companies, Inc.*, 600 S.E.2d 256, 269 (W. Va. 2004) ("An attorney should not be permitted to put himself in a position where, even unconsciously, he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another." (quotations omitted)).

[5] The respondent's responsibilities to Mrs. Gray could also materially limit his representation of Mr. Gray were the case against him to proceed to trial. At trial, the respondent's obligation to Mr. Gray would be to

cross-examined witnesses against him as vigorously as possible. Yet his ability to cross-examine Mrs. Gray — an inevitable witness for the prosecution — would be limited by Rule 1.9(c)(2), which prohibits a lawyer who has "formerly represented a client in a matter" from revealing information "relating to the representation." Rule 1.7(a)(2) expressly applies to such a situation by virtue of its reference to a lawyer's "responsibilities to . . . a former client." Although Rule 1.6 would allow the respondent to reveal such information if he obtained Mrs. Gray's informed consent, the fact that she supported lifting the no-contact order on June 30 did not make her continued support of her husband a foregone conclusion. In the event that Mrs. Gray withheld her consent to allow the respondent to use information "relating to the representation" — information he presumably obtained when he initially interviewed her about the matter — the respondent could not effectively advocate on behalf of Mr. Gray and would likely be forced to withdraw.

[6] The foregoing discussion makes clear that the respondent's third argument — that because the Grays denied the assault took place meant "there could be no occasion when . . . [the respondent's] representation would be 'materially limited' by his responsibilities to each" — also lacks merit. Whether or not the respondent was in fact satisfied that there was no assault, his loyalties to Mr. Gray in seeking to lift the no-contact order and defend him against the charged crime could have compromised his ability to provide independent and disinterested advice to Mrs. Gray. *See In re O'Brien*, 26 A.3d 203, 209 (Del. 2011) ("Rule 1.7(a) is an objective standard and does not rely upon the lawyer's subjective belief about his ability to remain impartial."). The risk that the respondent's loyalties would be divided was made even more palpable by the evidence the police had collected against Mr. Gray, including that Mrs. Gray told Trooper Hamilton that Mr. Gray had hit her and that Amber told Hamilton that Mr. Gray had not only hit Mrs. Gray, but also pushed her into a table and a refrigerator. The respondent's ability to counsel Mrs. Gray either to stay silent at the bail hearing or to reconsider her support for her husband given that the State was pursuing the charges against him was impaired by his obligation to advocate effectively for Mr. Gray. *See* N.H. R. PROF. CONDUCT 1.7, ABA Model Code Comment 8. Thus, we agree with the PCC that clear and convincing evidence supports a finding that the respondent violated Rule 1.7(a)(2) when he represented both Mr. and Mrs. Gray.

The PCC also determined, without elaboration, that this conflict was unwaivable because the respondent could not have "reasonably believed" that he could provide effective and diligent representation notwithstanding the conflict. *See* N.H. R. PROF. CONDUCT 1.7(b)(1). This conclusion was

unnecessary to the disposition of the matter because it is undisputed that the respondent did not obtain informed consent under Rule 1.7(b)(4). Thus, we need not address it.

Because the respondent violated Rule 1.7(a), he also violated Rule 8.4(a), which provides: "It is professional misconduct for a lawyer to . . . violate . . . the Rules of Professional Conduct . . . ." *See Wyatt's Case*, 159 N.H. at 306.

B. Successive Conflict of Interest

[7] The PCC also found that the respondent violated Rule 1.9(a). That rule provides:

> 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.

Rule 1.9 protects former clients by recognizing "the twin duties an attorney owes to a former client: [t]he duty to preserve confidences and the duty of loyalty." *Wyatt's Case*, 159 N.H. at 304. A violation of Rule 1.9(a) consists of four elements: a valid attorney-client relationship between the attorney and the former client; materially adverse interests between the former client and a present client; representation of the present client in the same or a substantially related matter; and a lack of consent on the part of the former client. *Id.* at 304-05.

[8] The PCC's finding of a Rule 1.9(a) violation lacks clear and convincing evidence in the record. Even accepting that the criminal case was a "matter" the same as or substantially related to the bail hearing, Mrs. Gray appeared to have *opposed* the criminal case against her husband throughout the respondent's brief representation of Mr. Gray. *Cf. Wyatt's Case*, 159 N.H. at 305 (material adversity present where attorney formerly represented client in guardianship proceedings and subsequently represented conservator attempting to establish permanent guardianship over client, against former client's wishes). Thus, her interests cannot be said to have been adverse to Mr. Gray's interests at all, much less "materially" so.

[9] Moreover, to the extent that the PCC found a violation of Rule 1.9(a) based upon a *risk* of a conflict arising, such an interpretation is inconsistent with the rule's text. Rule 1.9 is directed not at attorneys facing a *possibility* that the representation of one client could be infringed by a lawyer's other responsibilities, but at those attorneys whose client's interests in a current matter are *in fact* materially adverse to those of a former client in the same

or a substantially related matter. Indeed, to the extent that the PCC's finding of a Rule 1.9(a) violation was predicated on a risk of divergent interests arising, Rule 1.7(a)(2) expressly contemplates such risks by its reference to situations in which a lawyer's responsibilities to "a former client" might materially limit the representation of one or more clients. Rule 1.9 refers not to possibilities but to actual adverse interests. Accordingly, although we might be inclined to find a Rule 1.9 violation had Mrs. Gray changed her position about the alleged assault, the undisputed facts do not support the PCC's finding of a successive conflict.

C. Competence

Finally, the PCC found that the respondent was incompetent under Rule 1.1: "A lawyer shall provide competent representation to a client." N.H. R. PROF. CONDUCT 1.1(a). Rule 1.1(b) establishes the minimum requirements for legal competence:

> (1) specific knowledge about the fields of law in which the lawyer practices;
>
> (2) performance of the techniques of practice with skill;
>
> (3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;
>
> (4) proper preparation; and
>
> (5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.

Id. 1.1(b).

The PCC determined that the respondent violated Rule 1.1 as to both clients in the matter of removing the no-contact order. The PCC did not conclude that the respondent's representation of Mr. Gray in the subsequent criminal case against him constituted a Rule 1.1 violation.

[10-12] We conclude that there was not clear and convincing evidence of a violation of Rule 1.1. The PCC's decision rested on four grounds, which we address in turn. First, the PCC concluded that the respondent lacked the "requisite knowledge and expertise" to represent Mr. Gray in the bail condition hearing.

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience

> in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

N.H. R. PROF. CONDUCT 1.1, ABA Model Code Comment 1. The PCC's ruling does not explain why the respondent, an attorney practicing law in New Hampshire since 1971, was unqualified to assist the Grays in such a limited representation as a bail modification hearing, nor does it explain why his actions rose to the level of incompetence. *Cf. Attorney Grievance v. Gisriel*, 974 A.2d 331, 351-52 (Md. 2009) (attorney incompetent for failing to respond to motion to dismiss). The scope of that representation was limited to the relatively simple objective of removing the no-contact order. Although the respondent lacked significant *general* criminal law experience, the legal objective for which the Grays hired him — to remove the no-contact order placed upon Mr. Gray — did not require highly specialized knowledge or skill. *See In re Richmond's Case*, 152 N.H. 155, 158 (2005) ("[E]xpertise in a specific area of law generally is not required in order to meet the minimum standards for competency under Rule 1.1."). Indeed, the respondent's June 23 appearance, though unsuccessful, appears to have been reasonably calculated to accomplish Mrs. Gray's stated desire to be reunited with her husband as soon as possible. Moreover, the respondent was successful both in lifting the no-contact order a week later at the June 30 hearing and in negotiating a plea which resulted in Mr. Gray avoiding trial. The PCC's determination on this point lacks clear and convincing evidence that the basic level of proficiency required was more than that of a "general practitioner." *See* N.H. R. PROF. CONDUCT 1.1, ABA Model Code Comment 1.

[13] Second, the PCC concluded that the respondent's first appearance before the court on behalf of Mrs. Gray violated "the rules of the tribunal" because Mr. Gray was required to be present for that hearing. The PCC cites Rule 3.4(c), which provides that a lawyer "shall not . . . knowingly disobey an obligation under the rules of a tribunal." The relevant rule of the district court, however, requires the defendant's presence at the "arraignment, at every stage of the trial, and at the imposition of the sentence." DIST. DIV. R. 2.3. The June 23 hearing on the motion to lift the no-contact provision was neither an arraignment nor sentencing, and cannot reasonably be construed as a "stage of the trial" because trial had not yet begun. Thus, the respondent did not knowingly violate District Division Rule 2.3.

Contrary to the PCC's conclusion that the respondent "failed to understand that Mrs. Gray was not a party to the criminal case and did not have standing" to challenge the no-contact order, we have found no legal

authority for the proposition that the purported victim protected by a no-contact order in a domestic violence case cannot, at the very least, request an opportunity to be heard with respect to an aspect of the order that affects her, notwithstanding that she is not a named party to the case. Judge Cirone acknowledged as much in his testimony before the PCC when he stated that it was his practice to grant requests to waive the defendant's presence when a person seeks to lift a no-contact order. Moreover, even assuming that Mrs. Gray did not have standing to make such a request, the respondent's June 23 appearance was on behalf of *both* Mr. and Mrs. Gray. Thus, we reject the PCC's determination that the respondent's June 23 attempt to have the no-contact order lifted amounted to incompetent representation.

[14] Third, the PCC ruled that the respondent "failed to investigate" and, therefore, did not understand the "respective interests of Mr. and Mrs. Gray." The record does not support this conclusion. Rather, it indicates that the respondent spoke with both Mr. and Mrs. Gray and had objectively reasonable grounds to believe that their interests were aligned. He also spoke with Trooper Hamilton, who supported the Grays' attempt to lift the no-contact condition and accompanied the respondent and Mrs. Gray to the June 23 hearing for that purpose. Moreover, "[t]he required attention and preparation are determined in part by *what is at stake*; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence." N.H. R. PROF. CONDUCT 1.1, ABA Model Code Comment 5 (emphasis added). Here, the only thing at stake in the initial representation was whether the no-contact condition of Mr. Gray's bail order would remain in effect. The circumstances surrounding Mrs. Gray's request to seek immediate removal of the no-contact order did not lend themselves to a more extensive investigation into the facts. Given the limited nature of the representation and the short period of time the respondent had to achieve the objective of reuniting Mrs. Gray with her husband, we reject the PCC's conclusion that the respondent conducted an insufficient investigation under the circumstances.

The PCC also stated that the respondent "failed to evaluate the actual or potential conflicts of interest." To the extent that this finding served as an independent basis for a Rule 1.1 violation, it may be true that, in some circumstances, a gross and inexcusable failure to evaluate a potential conflict of interest constitutes incompetent representation in violation of Rule 1.1. Here, however, the limited nature and scope of the initial representation — seeking to lift the no-contact provision — might have led

even competent counsel to mistakenly believe that any risk of a conflict arising under Rule 1.7 was not "significant." *See* N.H. R. PROF. CONDUCT 1.7(a)(2).

Finally, the PCC determined that the respondent "placed Mr. Gray at risk of being in violation of the no contact order" because he "facilitated communications" between Mr. Gray and Mrs. Gray. The bail order states that the defendant "shall have no contact with Brenda Gray . . . by mail, telephone or otherwise." Notwithstanding the PCC's determination that the respondent put Mr. Gray at risk of violating that condition through his joint representation at the bail condition hearings, the record lacks competent evidence to establish that the respondent placed Mr. Gray at risk of violating the order by contacting Mrs. Gray on Mr. Gray's behalf. *Cf. State v. Kidder*, 150 N.H. 600, 603 (2004) (in related context of RSA 173-B:4 (2002), holding that a defendant "may properly be found guilty of violating a protective order when he knowingly contacts the victim through an attorney"); RSA 173-B:5-a (Supp. 2011) (establishing parameters for permissible contact post-*Kidder*). Although the rule from *Kidder* might support an inference that the respondent would have treaded close to the line of impermissible contact had he acted on Mr. Gray's behalf in reaching out to Mrs. Gray, neither the PCC's order nor its brief cites any facts indicating that Mr. Gray so directed him or that he so obliged.

In light of the foregoing, we conclude that the PCC lacked clear and convincing evidence that the respondent violated Rule 1.1.

III

The PCC based the respondent's six-month suspension on his violation of Rules 1.1, 1.7(a), 1.9(a), and 8.4(a). We have found, however, that there was clear and convincing evidence that he violated only Rules 1.7(a) and 8.4(a). We cannot be confident that the PCC's sanction would have been the same had it correctly recognized the extent of his violations of the Rules. Accordingly, we vacate the sanction and remand to the PCC to reconsider the appropriate sanction.

Affirmed in part; reversed in part; vacated in part; and remanded.

DALIANIS, C.J., and HICKS and CONBOY, JJ., concurred.

User Name: Donna Cote

Date and Time: Wednesday, March 6, 2024 12:15:00AM EST

Job Number: 218763566

Documents (2)

1. *Clauson's Case, 164 N.H. 183*

   Client/Matter: -None-

   Search Terms: (joint /3 representation) & criminal

   Search Type: Terms and Connectors

   Narrowed by:

Content Type	**Narrowed by**
Cases	Sources: NH state

2. Clauson's Case, 164 N.H. 183_Attachment1

   Client/Matter: -None-

   Search Terms: (joint /3 representation) & criminal

   Search Type: Terms and Connectors

   Narrowed by:

Content Type	**Narrowed by**
Cases	Sources: NH state

Cited
As of: March 6, 2024 5:15 AM Z

Clauson's Case

Supreme Court of New Hampshire

June 14, 2012, Argued; September 18, 2012, Opinion Issued

No. LD-2011-010

Reporter
164 N.H. 183 *; 53 A.3d 621 **; 2012 N.H. LEXIS 124 ***; 2012 WL 4497542

CLAUSON'S CASE

Subsequent History: Released for Publication October 29, 2012.

Prior History: **[***1]** Professional Conduct Committee.

Disposition: Affirmed in part; reversed in part; vacated in part; and remanded.

Core Terms

no-contact, lifting, bail, former client, assault, conflicting interest, ***criminal*** case, clear and convincing evidence, concurrent, incompetent, competence, loyalties, violating, removing

Case Summary

Procedural Posture
The New Hampshire Supreme Court Professional Conduct Committee (PCC) suspended respondent attorney from the practice of law for six months on the ground that he violated N.H. R. Prof. Conduct 1.1, 1.7(a), 1.9(a), and 8.4(a). Respondent appealed.

Overview
After a husband was arrested for assaulting his wife, respondent appeared on behalf of both spouses to lift a no-contact condition of a bail order. Respondent also represented the husband in his ***criminal*** case. The court held that respondent had violated Rule 1.7(a)(2). The ***joint*** ***representation*** presented several significant risks that respondent's responsibilities to the wife would materially limit his representation of the husband. Because respondent violated Rule 1.7(a), he also violated Rule 8.4(a). The evidence did not support a finding of a Rule 1.9(a) violation, however. The wife appeared to have opposed the ***criminal*** case against her husband throughout respondent's brief representation of him. Thus, her interests were not adverse to her husband's. Moreover, Rule 1.9(a) was not directed at attorneys facing only a possibility of materially adverse interests. Finally, respondent was not incompetent under Rule 1.1. The limited nature and scope of the initial representation — seeking to lift the no-contact provision — might have led even competent counsel to mistakenly believe that any risk of a conflict arising under Rule 1.7 was not significant.

Outcome
The court reversed the findings that respondent had violated Rules 1.1 and 1.9(a). It affirmed the findings that he had violated Rules 1.7 and 8.4(a). Because the PCC had based its sanction on respondent's violation of all four rules, the court vacated the sanction and remanded the case to the PCC to reconsider the appropriate sanction.

LexisNexis® Headnotes

Evidence > Burdens of Proof > Clear & Convincing Proof

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN1[] **Burdens of Proof, Clear & Convincing Proof**

The finding of a violation by the Professional Conduct Committee (PCC) must be supported by clear and convincing evidence. N.H. Sup. Ct. R. 37A(III)(d)(2)(C). In attorney discipline matters, the New Hampshire Supreme Court defers to the PCC's factual findings if

supported by the record, but retains ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred and, if so, what the sanction should be.

Legal Ethics > Client Relations > Conflicts of Interest

HN2[] Client Relations, Conflicts of Interest

See N.H. R. Prof. Conduct 1.7(a).

Legal Ethics > Client Relations > Conflicts of Interest

HN3[] Client Relations, Conflicts of Interest

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. N.H. R. Prof. Conduct 1.7, ABA Model Code cmt. 8.

Legal Ethics > Client Relations > Conflicts of Interest

HN4[] Client Relations, Conflicts of Interest

In a situation where a lawyer concurrently represents two or more parties with respect to the same subject matter there is usually a chance that their interests will, at some point, diverge.

Legal Ethics > Client Relations > Conflicts of Interest

HN5[] Client Relations, Conflicts of Interest

N.H. R. Prof. Conduct 1.7, ABA Model Code cmt. 1 states that loyalty and independent judgment are essential elements in the lawyer's relationship to a client.

Legal Ethics > Client Relations > Conflicts of Interest

Legal Ethics > Client Relations > Duties to Client > Duty of Confidentiality

HN6[] Client Relations, Conflicts of Interest

N.H. R. Prof. Conduct 1.9(c)(2) prohibits a lawyer who has formerly represented a client in a matter from revealing information relating to the representation. N.H. R. Prof. Conduct 1.7(a)(2) expressly applies to such a situation by virtue of its reference to a lawyer's responsibilities to a former client.

Legal Ethics > Client Relations > Conflicts of Interest

HN7[] Client Relations, Conflicts of Interest

N.H. R. Prof. Conduct 1.7(a) is an objective standard and does not rely upon the lawyer's subjective belief about his ability to remain impartial.

Legal Ethics > Professional Conduct > General Overview

HN8[] Legal Ethics, Professional Conduct

See N.H. R. Prof. Conduct 8.4(a).

Legal Ethics > Client Relations > Representation > Acceptance

HN9[] Representation, Acceptance

See N.H. R. Prof. Conduct 1.9(a).

Legal Ethics > Client

Relations > Representation > Acceptance

HN10[] Representation, Acceptance

N.H. R. Prof. Conduct 1.9 protects former clients by recognizing the twin duties an attorney owes to a former client: the duty to preserve confidences and the duty of loyalty. A violation of Rule 1.9(a) consists of four elements: a valid attorney-client relationship between the attorney and the former client; materially adverse interests between the former client and a present client; representation of the present client in the same or a substantially related matter; and a lack of consent on the part of the former client.

Legal Ethics > Client Relations > Representation > Acceptance

Legal Ethics > Client Relations > Conflicts of Interest

HN11[] Representation, Acceptance

N.H. R. Prof. Conduct 1.9 is directed not at attorneys facing a possibility that the representation of one client could be infringed by a lawyer's other responsibilities, but at those attorneys whose client's interests in a current matter are in fact materially adverse to those of a former client in the same or a substantially related matter. N.H. R. Prof. Conduct 1.7(a)(2) expressly contemplates the risk of divergent interests arising by its reference to situations in which a lawyer's responsibilities to a former client might materially limit the representation of one or more clients. Rule 1.9 refers not to possibilities but to actual adverse interests.

Legal Ethics > Client Relations > Duties to Client > Effective Representation

HN12[] Duties to Client, Effective Representation

N.H. R. Prof. Conduct 1.1(b) establishes the minimum requirements for legal competence: (1) specific knowledge about the fields of law in which the lawyer practices; (2) performance of the techniques of practice with skill; (3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention; (4) proper preparation; and (5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.

Legal Ethics > Client Relations > Duties to Client > Effective Representation

HN13[] Duties to Client, Effective Representation

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. N.H. R. Prof. Conduct 1.1, ABA Model Code cmt. 1.

Legal Ethics > Client Relations > Duties to Client > Effective Representation

HN14[] Duties to Client, Effective Representation

Expertise in a specific area of law generally is not required in order to meet the minimum standards for competency under N.H. R. Prof. Conduct 1.1.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

HN15[] Defendant's Rights, Right to Presence at Trial

N.H. Dist. & Mun. Ct. R. 2.3 requires the defendant's presence at the arraignment, at every stage of the trial, and at the imposition of the sentence.

Legal Ethics > Client Relations > Duties to Client > Effective Representation

HN16[] Duties to Client, Effective Representation

The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. N.H. R. Prof. Conduct 1.1, ABA Model Code cmt. 5.

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1.[] 1.

Attorneys > Conflict of Interest > Generally

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. N.H. R. PROF. COND. 1.7; ABA Model Code cmt. 8.

NH2.[] 2.

Attorneys > Conflict of Interest > Generally

In a situation where a lawyer concurrently represents two or more parties with respect to the same subject matter there is usually a chance that their interests will, at some point, diverge.

NH3.[] 3.

Attorneys > Conflict of Interest > Particular Cases

When a husband was accused of assaulting his wife, by appearing on behalf of both spouses to lift a no-contact condition of the husband's bail order and by representing the husband in his ***criminal*** case, respondent violated the professional conduct rule regarding concurrent conflicts of interest. The ***joint representation*** presented several significant risks that respondent's responsibilities to the wife would materially limit his representation of the husband. N.H. R. PROF. COND. 1.7(a).

NH4.[] 4.

Attorneys > Conflict of Interest > Generally

Loyalty and independent judgment are essential elements in a lawyer's relationship to a client. N.H. R. PROF. COND. 1.7; ABA Model Code cmt. 1.

NH5.[] 5.

Attorneys > Conflict of Interest > Former Representation

A lawyer who has formerly represented a client in a matter is prohibited from revealing information relating to the representation. The professional conduct rule regarding concurrent conflicts of interest expressly applies to such a situation by virtue of its reference to a lawyer's responsibilities to a former client. N.H. R. PROF. COND. 1.7(a)(2), 1.9(c)(2).

NH6.[] 6.

Attorneys > Conflict of Interest > Generally

The professional conduct rule regarding concurrent conflicts of interest is an objective standard and does not rely upon the lawyer's subjective belief about his ability to remain impartial. N.H. R. PROF. COND. 1.7(a).

NH7.[] 7.

Attorneys > Conflict of Interest > Former Representation

The professional conduct rule regarding duties to former clients protects former clients by recognizing the twin duties an attorney owes to a former client: the duty to preserve confidences and the duty of loyalty. A violation of subsection (a) of the rule consists of four elements: a valid attorney-client relationship between the attorney and the former client; materially adverse interests between the former client and a present client; representation of the present client in the same or a substantially related matter; and a lack of consent on the part of the former client. N.H. R. PROF. COND. 1.9.

NH8.[] 8.

Attorneys > Conflict of Interest > Particular Cases

When a husband was accused of assaulting his wife, and respondent appeared on behalf of both spouses to lift a no-contact condition of the husband's bail order and represented the husband in his ***criminal*** case, the Professional Conduct Committee erred in finding that he had violated the rule regarding duties to former clients. Even accepting that the ***criminal*** case was a "matter" the same as or substantially related to the bail hearing, the wife appeared to have opposed the ***criminal*** case against her husband throughout the respondent's brief representation of the husband. Thus, her interests could not be said to have been adverse to the husband's interests at all, much less "materially" so. N.H. R. PROF. COND. 1.9(a).

NH9.[] 9.

Attorneys > Conflict of Interest > Former Representation

The rule regarding duties to former clients is directed not at attorneys facing a possibility that the representation of one client could be infringed by a lawyer's other responsibilities, but at those attorneys whose client's interests in a current matter are in fact materially adverse to those of a former client in the same or a substantially related matter. The rule regarding concurrent conflicts of interest expressly contemplates the risk of divergent interests arising by its reference to situations in which a lawyer's responsibilities to a former client might materially limit the representation of one or more clients. The rule regarding former clients refers not to possibilities but to actual adverse interests. N.H. R. PROF. COND. 1.7(a)(2), 1.9.

NH10.[] 10.

Attorneys > Competency of Counsel > Professional Standards

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. N.H. R. PROF. COND. 1.1; ABA Model Code cmt. 1.

NH11.[] 11.

Attorneys > Competency of Counsel > Particular Cases

When a husband was accused of assaulting his wife, and respondent appeared on behalf of both spouses to lift a no-contact condition of the husband's bail order and represented the husband in his ***criminal*** case, the Professional Conduct Committee erred in finding a violation of the rule regarding professional competency. Removing the no-contact order did not require highly specialized knowledge or skill; a district court rule did not require that the husband be present at the hearing to lift the no-contact provision; respondent had objectively reasonable grounds to believe that the spouses' interests were aligned; and the record did not establish that respondent placed the husband at risk of violating the order by contacting the wife on his behalf. N.H. R. PROF. COND. 1.1.

NH12.[] 12.

Attorneys > Competency of Counsel > Professional Standards

Expertise in a specific area of law generally is not required in order to meet the minimum standards for competency. N.H. R. PROF. COND. 1.1.

NH13.[] 13.

Trial > ***Criminal*** Cases > Generally > Rules of Procedure

A hearing on a motion to lift a no-contact provision of a bail order was neither an arraignment nor sentencing, and could not reasonably be construed as a "stage of the trial" because trial had not yet begun. Thus, respondent did not knowingly violate the district court rule regarding a defendant's presence. DIST. DIV. R. 2.3.

NH14.[] 14.

Attorneys > Competency of Counsel > Professional Standards

The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment

than matters of lesser complexity and consequence. N.H. R. PROF. COND. 1.1; ABA Model Code cmt. 5.

Counsel: *James L. Kruse*, of Concord, on the brief and orally, for the professional conduct committee.

Clauson & Atwood, of Hanover (*K. William Clauson* on the brief and orally), for the respondent.

Judges: LYNN, J. DALIANIS, C.J., and HICKS and CONBOY, JJ., concurred.

Opinion by: LYNN

Opinion

[*185] [622]** LYNN, J. The respondent, K. William Clauson, appeals an order of the Supreme Court Professional Conduct Committee (PCC) suspending him from the practice of law for six months based upon its finding that he violated *New Hampshire Rules of Professional Conduct (Rules) 1.1*, *1.7*, *1.9(a)*, and *8.4(a)*. Because we find that the respondent violated only *Rules 1.7* and *8.4(a)*, we affirm in part, reverse in part, vacate in part, and remand.

I

The record supports the following facts. On June 20, 2009, Todd Gray was arrested for assault arising out of an incident that occurred early in the morning of June 14, 2009, at the home he shared with his wife Brenda and their children. In the supporting affidavit for the arrest warrant, State Trooper Nathan Hamilton stated that he learned the following in the course of investigating the incident. Mr. and Mrs. Gray **[***2]** attended a graduation party in Vermont on the night of June 13 and became intoxicated. Mrs. Gray told Hamilton that, after returning home with their daughter Amber, a dispute arose during which Mr. Gray broke a bathroom mirror, threw furniture over, and slapped Mrs. Gray in the face. Mr. Gray later told Hamilton that he had punched the mirror in response to his wife's "bickering," and that she had scratched him on the side of the neck. Some time after speaking with Mrs. Gray, Hamilton located Amber and asked her what happened. She said that after hearing the sound of the mirror breaking, she approached the bathroom and had "some words" with her father, and in response he backed her into a wall and slapped her in the face. After that, according to Amber, Mrs. Gray approached Mr. Gray and slapped him on the back of the head; Mr. Gray then threw Mrs. Gray into a refrigerator, table, and chair, slapped her, and, after Amber called the police, left the house. Trooper Hamilton **[**623]** returned to obtain a written statement from Mrs. Gray later on June 14, but she declined to provide one and said she did not want the investigation to proceed.

[*186] After his arrest on June 20, Mr. Gray appeared before a **[***3]** bail commissioner, who released him on $500 personal recognizance and ordered him not to contact Mrs. Gray or Amber or go within 100 yards of them. On June 22, Mrs. Gray sought the respondent's assistance in lifting the no-contact condition of the bail order so that Mr. Gray could return home. The respondent, an attorney licensed to practice in New Hampshire since 1971, agreed to represent her in the matter. After speaking with Mr. Gray by telephone to obtain his consent to appear in the district court on his behalf, the respondent filed a motion entitled "Brenda Gray and Todd Gray's Emergency Motion for Immediate Hearing on Bail Conditions." The respondent appeared with Mrs. Gray for a hearing on the motion on June 23 in the Lebanon District Court (CIRONE, J.). He told the court that Mrs. Gray did not consider herself a victim in the case and wanted the no-contact condition lifted. The court, however, declined to rule on the matter because Mr. Gray was not present.

On June 30, the respondent again appeared on behalf of the Grays to request the no-contact condition be lifted. Mr. Gray was also arraigned at that hearing and entered a not guilty plea through the respondent, who had by **[***4]** that time agreed to represent him in the ***criminal*** case. At some point, the court expressed its concern that the respondent's ***joint*** ***representation*** of the Grays presented a possible conflict of interest. Mrs. Gray then testified that she was not afraid of her husband and wanted him to return home, and engaged in a discussion with the court about the matter. Mr. Gray did not speak during that hearing. The court issued an order the next day lifting the no-contact condition of the bail order.

The respondent represented Mr. Gray in his ***criminal*** case. After the court scheduled a trial to take place in November, the State agreed to place the charges on file for one year without a finding, conditioned on Mr. Gray's good behavior and completion of an anger management course.

The Attorney Discipline Office issued a notice of charges against the respondent in August 2010 alleging

violations of *Rules 1.7(a)*, *1.9(a)*, *1.1*, and *8.4(a)*. A hearing panel found that the respondent violated each Rule as charged and recommended: (1) a sanction of three months suspension; (2) a requirement to take the Multistate Professional Responsibility Exam (MPRE) and earn a 90% passing score; (3) attendance at twelve **[***5]** hours of continuing education seminars; and (4) payment of all expenses incurred in the investigation and prosecution of the matter. After hearing oral argument, the PCC found violations of each of the Rules, as charged, issued a six-month suspension, and required the respondent to complete an MPRE course and pass the examination. The respondent appealed.
[*187]

II

We first consider whether the respondent violated the Rules. ***HN1***[] The PCC's finding of a violation must be supported by clear and convincing evidence. *Sup. Ct. R. 37A(III)(d)(2)(C)*. "In attorney discipline matters, we defer to the PCC's factual findings if supported by the record, but retain ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred and, if so, what the sanction should be." *Clark's Case, 163 N.H. 184, 187-88, 37 A.3d 327 (2012)*.

[**624] *A. Concurrent Conflict of Interest*

The PCC first concluded that the respondent violated *Rule 1.7(a)*, which provides:

> ***HN2***[] (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> …
>
> (2) there is a significant risk that **[***6]** the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
> (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.

NH[1][] [1] Comment 8 to the ABA Model Rules explains further:

> ***HN3***[] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's **[*188]** other responsibilities or interests … . The conflict in effect forecloses alternatives that would otherwise be **[***7]** available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

N.H. R. Prof. Conduct 1.7, ABA Model Code Comment 8.

Because the respondent does not contend that he obtained informed, written consent, our analysis is limited to whether his representation of Mr. and Mrs. Gray presented a significant risk that his representation of one would be materially limited by his responsibilities to the other.

The respondent advances several arguments as to why his representation of the Grays did not violate *Rule 1.7*: (1) that their respective interests were aligned insofar as each wanted the no-contact order lifted; (2) that his representation of Mr. Gray in the underlying ***criminal*** case was contingent upon his review of the police file; and (3) that because both Mr. and Mrs. Gray denied that the alleged assault even occurred, his representation **[***8]** of each would never be materially limited by his responsibilities to the other.

NH[2][] [2] The first argument is unpersuasive because it pertains to the *actual* alignment of the Grays' interests — not the *risk* that the respondent's responsibilities to one would materially limit his representation of the other. *See* *Wyatt's Case, 159 N.H.*

285, 298, 982 A.2d 396 (2009) (Rule 1.7(b) (the former version of Rule 1.7(a)(2)) "is broad, and focuses not upon direct adversity at the outset, but the risk that it or other material limitations may arise in the **[**625]** course of the dual representation" (citation omitted)); *see also* R. FLAMM, LAWYER DISQUALIFICATION § 4.1, at 61 (2003) HN4[] ("In a situation where a lawyer concurrently represents two or more parties with respect to the same subject matter there is usually a chance that their interests will, at some point, diverge.").

The second argument is also unpersuasive because the PCC found that the respondent represented Mr. Gray in the general ***criminal*** case *before* the June 30 hearing. The record supports that finding, particularly given that the respondent entered a not guilty plea on Mr. Gray's behalf at the June 30 hearing. Moreover, the finding of a concurrent conflict may be predicated **[***9]** solely upon the respondent's representation of the Grays in the two hearings convened for the purpose of lifting the no-contact condition of the bail order. Whether or not we accept that the respondent's representation of Mr. Gray on the ***criminal*** assault charge was contingent upon **[*189]** receiving and reviewing the police file, it is undisputed that the respondent represented *both* Mr. and Mrs. Gray at the bail hearings. Because there is no evidence in the record that the respondent provided Mrs. Gray with any additional legal services after the June 30 hearing, we limit our analysis of Rule 1.7 to the two hearings on the bail conditions.

NH[3,4][] [3, 4] We conclude that the ***joint representation*** presented several significant risks that the respondent's responsibilities to Mrs. Gray would materially limit his representation of Mr. Gray. First, the respondent's responsibilities to Mrs. Gray included an obligation to offer candid and independent advice which, if given, could have conflicted with Mr. Gray's interest in removing the no-contact provision and defending against the underlying assault charge. For example, the respondent knew that Mrs. Gray had an obligation to tell the truth in the bail hearing. A **[***10]** disinterested lawyer might have examined the facts, explained to Mrs. Gray the risks of telling the court that the assault never happened notwithstanding substantial evidence to the contrary, and, accordingly, advised her to refrain from denying the assault took place. Similarly, a disinterested lawyer might have foreseen a possibility that Mrs. Gray would change her mind and opt later to proceed as a willing witness for the prosecution. In that event, prudence might also dictate advising her to refrain from supporting removal of the no-contact order lest she later face exposure to cross-examination based upon her prior statements to the court (a possibility made even more pronounced in light of her having told Trooper Hamilton on the night of the incident that Mr. Gray had, in fact, assaulted her). But providing such advice obviously would have been detrimental to Mr. Gray's interest in lifting the no-contact condition and defending against the ***criminal*** case. This situation presented the primary risk arising from a concurrent conflict of interest under Rule 1.7(a)(2): divided loyalties that might inhibit the lawyer's range of options in advising a client. *See* HN5[] N.H. R. Prof. Conduct 1.7, **[***11]** ABA Model Code Comment 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); *cf.* Holloway v. Arkansas, 435 U.S. 475, 490, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (In a conflict situation, "the evil … is in what the advocate finds himself compelled to *refrain* from doing."); Barefield v. DPIC Companies, Inc., 215 W. Va. 544, 600 S.E.2d 256, 269 (W. Va. 2004) ("An attorney should not be permitted to put himself in a position where, even unconsciously, he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another." (quotations omitted)).

NH[5][] [5] **[**626]** The respondent's responsibilities to Mrs. Gray could also materially limit his representation of Mr. Gray were the case against him to proceed to trial. At trial, the respondent's obligation to Mr. Gray would be to **[*190]** cross-examined witnesses against him as vigorously as possible. Yet his ability to cross-examine Mrs. Gray — an inevitable witness for the prosecution — would be limited by HN6[] Rule 1.9(c)(2), which prohibits a lawyer who has "formerly represented a client in a matter" from revealing information "relating to the representation." Rule 1.7(a)(2) expressly applies **[***12]** to such a situation by virtue of its reference to a lawyer's "responsibilities to … a former client." Although Rule 1.6 would allow the respondent to reveal such information if he obtained Mrs. Gray's informed consent, the fact that she supported lifting the no-contact order on June 30 did not make her continued support of her husband a foregone conclusion. In the event that Mrs. Gray withheld her consent to allow the respondent to use information "relating to the representation" — information he presumably obtained when he initially interviewed her about the matter — the respondent could not effectively advocate on behalf of Mr. Gray and would likely be forced to withdraw.

NH[6][] [6] The foregoing discussion makes clear that the respondent's third argument — that because the

Grays denied the assault took place meant "there could be no occasion when … [the respondent's] representation would be 'materially limited' by his responsibilities to each" — also lacks merit. Whether or not the respondent was in fact satisfied that there was no assault, his loyalties to Mr. Gray in seeking to lift the no-contact order and defend him against the charged crime could have compromised his ability to **[***13]** provide independent and disinterested advice to Mrs. Gray. *See* *In re O'Brien, 26 A.3d 203, 209 (Del. 2011)* ***HN7***[] ("*Rule 1.7(a)* is an objective standard and does not rely upon the lawyer's subjective belief about his ability to remain impartial."). The risk that the respondent's loyalties would be divided was made even more palpable by the evidence the police had collected against Mr. Gray, including that Mrs. Gray told Trooper Hamilton that Mr. Gray had hit her and that Amber told Hamilton that Mr. Gray had not only hit Mrs. Gray, but also pushed her into a table and a refrigerator. The respondent's ability to counsel Mrs. Gray either to stay silent at the bail hearing or to reconsider her support for her husband given that the State was pursuing the charges against him was impaired by his obligation to advocate effectively for Mr. Gray. *See* *N.H. R. Prof. Conduct 1.7*, ABA Model Code Comment 8. Thus, we agree with the PCC that clear and convincing evidence supports a finding that the respondent violated *Rule 1.7(a)(2)* when he represented both Mr. and Mrs. Gray.

The PCC also determined, without elaboration, that this conflict was unwaivable because the respondent could not have "reasonably **[***14]** believed" that he could provide effective and diligent representation notwithstanding the conflict. *See* *N.H. R. Prof. Conduct 1.7(b)(1)*. This conclusion was **[*191]** unnecessary to the disposition of the matter because it is undisputed that the respondent did not obtain informed consent under *Rule 1.7(b)(4)*. Thus, we need not address it.

Because the respondent violated *Rule 1.7(a)*, he also violated *Rule 8.4(a)*, which provides: ***HN8***[] "It is professional misconduct for a lawyer to … violate … the Rules of Professional Conduct … ." *See* *Wyatt's Case, 159 N.H. at 306*.

B. Successive Conflict of Interest

NH[7][] [7] The PCC also found that the respondent violated *Rule 1.9(a)*. That rule provides:

> ***HN9***[] **[**627]** 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.

HN10[] *Rule 1.9* protects former clients by recognizing "the twin duties an attorney owes to a former client: [t]he duty to preserve confidences and the duty of loyalty." *Wyatt's Case, 159 N.H. at 304*. A violation **[***15]** of *Rule 1.9(a)* consists of four elements: a valid attorney-client relationship between the attorney and the former client; materially adverse interests between the former client and a present client; representation of the present client in the same or a substantially related matter; and a lack of consent on the part of the former client. *Id. at 304-05*.

NH[8][] [8] The PCC's finding of a *Rule 1.9(a)* violation lacks clear and convincing evidence in the record. Even accepting that the ***criminal*** case was a "matter" the same as or substantially related to the bail hearing, Mrs. Gray appeared to have *opposed* the ***criminal*** case against her husband throughout the respondent's brief representation of Mr. Gray. *Cf.* *Wyatt's Case, 159 N.H. at 305* (material adversity present where attorney formerly represented client in guardianship proceedings and subsequently represented conservator attempting to establish permanent guardianship over client, against former client's wishes). Thus, her interests cannot be said to have been adverse to Mr. Gray's interests at all, much less "materially" so.

NH[9][] [9] Moreover, to the extent that the PCC found a violation of *Rule 1.9(a)* based upon a *risk* of a conflict arising, such an interpretation **[***16]** is inconsistent with the rule's text. ***HN11***[] *Rule 1.9* is directed not at attorneys facing a *possibility* that the representation of one client could be infringed by a lawyer's other responsibilities, but at those attorneys whose client's interests in a current matter are *in fact* materially adverse to those of a former client in the same **[*192]** or a substantially related matter. Indeed, to the extent that the PCC's finding of a *Rule 1.9(a)* violation was predicated on a risk of divergent interests arising, *Rule 1.7(a)(2)* expressly contemplates such risks by its reference to situations in which a lawyer's responsibilities to "a former client" might materially limit the representation of one or more clients. *Rule 1.9* refers not to possibilities but to actual adverse interests. Accordingly, although we might be inclined to find a *Rule 1.9* violation had Mrs. Gray changed her position

about the alleged assault, the undisputed facts do not support the PCC's finding of a successive conflict.

C. Competence

Finally, the PCC found that the respondent was incompetent under Rule 1.1: "A lawyer shall provide competent representation to a client." N.H. R. Prof. Conduct 1.1(a). **HN12**[] Rule 1.1(b) establishes the minimum requirements **[***17]** for legal competence:

> (1) specific knowledge about the fields of law in which the lawyer practices;
> (2) performance of the techniques of practice with skill;
> (3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;
> (4) proper preparation; and
> (5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.

Id. 1.1(b).

The PCC determined that the respondent violated Rule 1.1 as to both clients in **[**628]** the matter of removing the no-contact order. The PCC did not conclude that the respondent's representation of Mr. Gray in the subsequent ***criminal*** case against him constituted a Rule 1.1 violation.

NH[10-12][] [10-12] We conclude that there was not clear and convincing evidence of a violation of Rule 1.1. The PCC's decision rested on four grounds, which we address in turn. First, the PCC concluded that the respondent lacked the "requisite knowledge and expertise" to represent Mr. Gray in the bail condition hearing.

> **HN13**[] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of **[***18]** the matter, the lawyer's general experience, the lawyer's training and experience **[*193]** in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

N.H. R. Prof. Conduct 1.1, ABA Model Code Comment 1. The PCC's ruling does not explain why the respondent, an attorney practicing law in New Hampshire since 1971, was unqualified to assist the Grays in such a limited representation as a bail modification hearing, nor does it explain why his actions rose to the level of incompetence. *Cf.* Attorney Grievance v. Gisriel, 409 Md. 331, 974 A.2d 331, 351-52 (Md. 2009) (attorney incompetent for failing to respond to motion to dismiss). The scope of that representation was limited to the relatively simple objective of removing the no-contact order. Although the respondent lacked significant *general* ***criminal*** law experience, the legal objective for which the Grays hired him — to remove the no-contact order placed upon Mr. Gray — did not require highly specialized knowledge or skill. *See* In re Richmond's Case, 152 N.H. 155, 158, 872 A.2d 1023 (2005) (**HN14**[] "[E]xpertise **[***19]** in a specific area of law generally is not required in order to meet the minimum standards for competency under Rule 1.1."). Indeed, the respondent's June 23 appearance, though unsuccessful, appears to have been reasonably calculated to accomplish Mrs. Gray's stated desire to be reunited with her husband as soon as possible. Moreover, the respondent was successful both in lifting the no-contact order a week later at the June 30 hearing and in negotiating a plea which resulted in Mr. Gray avoiding trial. The PCC's determination on this point lacks clear and convincing evidence that the basic level of proficiency required was more than that of a "general practitioner." *See* N.H. R. Prof. Conduct 1.1, ABA Model Code Comment 1.

NH[13][] [13] Second, the PCC concluded that the respondent's first appearance before the court on behalf of Mrs. Gray violated "the rules of the tribunal" because Mr. Gray was required to be present for that hearing. The PCC cites Rule 3.4(c), which provides that a lawyer "shall not … knowingly disobey an obligation under the rules of a tribunal." **HN15**[] The relevant rule of the district court, however, requires the defendant's presence at the "arraignment, at every stage of the **[***20]** trial, and at the imposition of the sentence." DIST. DIV. R. 2.3. The June 23 hearing on the motion to lift the no-contact provision was neither an arraignment nor sentencing, and cannot reasonably be construed as a "stage of the trial" because trial had not yet begun. Thus, the respondent did not knowingly violate District Division Rule 2.3.

Contrary to the PCC's conclusion that the respondent "failed to understand that Mrs. Gray was not a party to the ***criminal*** case and did not have standing" to challenge the no-contact order, we have found **[**629]**

no legal **[*194]** authority for the proposition that the purported victim protected by a no-contact order in a domestic violence case cannot, at the very least, request an opportunity to be heard with respect to an aspect of the order that affects her, notwithstanding that she is not a named party to the case. Judge CIRONE acknowledged as much in his testimony before the PCC when he stated that it was his practice to grant requests to waive the defendant's presence when a person seeks to lift a no-contact order. Moreover, even assuming that Mrs. Gray did not have standing to make such a request, the respondent's June 23 appearance was on behalf of *both* Mr. **[***21]** and Mrs. Gray. Thus, we reject the PCC's determination that the respondent's June 23 attempt to have the no-contact order lifted amounted to incompetent representation.

NH[14][] [14] Third, the PCC ruled that the respondent "failed to investigate" and, therefore, did not understand the "respective interests of Mr. and Mrs. Gray." The record does not support this conclusion. Rather, it indicates that the respondent spoke with both Mr. and Mrs. Gray and had objectively reasonable grounds to believe that their interests were aligned. He also spoke with Trooper Hamilton, who supported the Grays' attempt to lift the no-contact condition and accompanied the respondent and Mrs. Gray to the June 23 hearing for that purpose. Moreover, ***HN16***[] "[t]he required attention and preparation are determined in part by *what is at stake*; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence." *N.H. R. Prof. Conduct 1.1*, ABA Model Code Comment 5 (emphasis added). Here, the only thing at stake in the initial representation was whether the no-contact condition of Mr. Gray's bail order would remain in effect. The circumstances surrounding Mrs. Gray's **[***22]** request to seek immediate removal of the no-contact order did not lend themselves to a more extensive investigation into the facts. Given the limited nature of the representation and the short period of time the respondent had to achieve the objective of reuniting Mrs. Gray with her husband, we reject the PCC's conclusion that the respondent conducted an insufficient investigation under the circumstances.

The PCC also stated that the respondent "failed to evaluate the actual or potential conflicts of interest." To the extent that this finding served as an independent basis for a *Rule 1.1* violation, it may be true that, in some circumstances, a gross and inexcusable failure to evaluate a potential conflict of interest constitutes incompetent representation in violation of *Rule 1.1*. Here, however, the limited nature and scope of the initial representation — seeking to lift the no-contact provision — might have led **[*195]** even competent counsel to mistakenly believe that any risk of a conflict arising under *Rule 1.7* was not "significant." ***See*** *N.H. R. Prof. Conduct 1.7(a)(2)*.

Finally, the PCC determined that the respondent "placed Mr. Gray at risk of being in violation of the no contact order" **[***23]** because he "facilitated communications" between Mr. Gray and Mrs. Gray. The bail order states that the defendant "shall have no contact with Brenda Gray ... by mail, telephone or otherwise." Notwithstanding the PCC's determination that the respondent put Mr. Gray at risk of violating that condition through his ***joint representation*** at the bail condition hearings, the record lacks competent evidence to establish that the respondent placed Mr. Gray at risk of violating the order by contacting Mrs. Gray on Mr. Gray's behalf. *Cf. State v. Kidder, 150 N.H. 600, 603, 843 A.2d 312 (2004)* (in related context of *RSA 173-B:4* (2002), holding that a defendant "may **[**630]** properly be found guilty of violating a protective order when he knowingly contacts the victim through an attorney"); *RSA 173-B:5-a* (Supp. 2011) (establishing parameters for permissible contact post-*Kidder*). Although the rule from *Kidder* might support an inference that the respondent would have treaded close to the line of impermissible contact had he acted on Mr. Gray's behalf in reaching out to Mrs. Gray, neither the PCC's order nor its brief cites any facts indicating that Mr. Gray so directed him or that he so obliged.

In light of the foregoing, **[***24]** we conclude that the PCC lacked clear and convincing evidence that the respondent violated *Rule 1.1*.

III

The PCC based the respondent's six-month suspension on his violation of *Rules 1.1*, *1.7(a)*, *1.9(a)*, and *8.4(a)*. We have found, however, that there was clear and convincing evidence that he violated only *Rules 1.7(a)* and *8.4(a)*. We cannot be confident that the PCC's sanction would have been the same had it correctly recognized the extent of his violations of the Rules. Accordingly, we vacate the sanction and remand to the PCC to reconsider the appropriate sanction.

Affirmed in part; reversed in part; vacated in part; and remanded.

DALIANIS, C.J., and HICKS and CONBOY, JJ., concurred.

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Hopps v. State Bd. of Parole

Supreme Court of New Hampshire

August 15, 1985

No. 84-223

Reporter
127 N.H. 133 *; 500 A.2d 355 **; 1985 N.H. LEXIS 443 ***

Roland E. Hopps v. State Board of Parole & a.

Prior History: **[***1]** Appeal from Merrimack County.

Disposition: *Affirmed.*

Core Terms

conflicting interest, dual representation, trial court, set fire, evidentiary, bedroom

Case Summary

Procedural Posture
Petitioner prisoner sought review of an order of the trial court (New Hampshire), which denied his habeas corpus petition.

Overview
After his release from prison, the prisoner collaterally attacked his conviction of arson on the ground that he had been denied the effective assistance of counsel. The prisoner claimed that representation by his privately retained trial counsel was tainted by a conflict of interest arising from counsel's ***joint*** ***representation*** of both him and his wife. The trial court denied the habeas corpus petition. On appeal, the court affirmed. The court found that the prisoner was not entitled to an acquittal if the evidence had equally pointed to himself and his wife as the arsonist. Thus, the court ruled that the prisoner was not entitled to a defense theory that the circumstantial evidence did not point more forcefully to him rather than his wife or that on the evidence it was more likely that his wife set the fire. The court also rejected the prisoner's contention that the trial court committed reversible error in failing sua sponte to question counsel or the prisoner and his wife about the possibility of a conflict.

Outcome
The court affirmed the denial of defendant's habeas corpus petition.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > General Overview

Criminal Law & Procedure > Counsel > ***Joint Representation***

Legal Ethics > Client Relations > Conflicts of Interest

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN1[] **Judgments, Relief From Judgments**

While the general standard for judging assertions of ineffective assistance of counsel is that of reasonable competence, special rules apply when such a claim is predicated on a conflict of interest arising from one lawyer's simultaneous representation of more than one defendant. When a defendant has not objected at trial to such dual representation, in order to demonstrate a violation of his rights under Colo. Const. art. 15, part I, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. In addition, relief under the rule in Cuyler requires proof of two elements: (a) some plausible alternative defense strategy or tactic that trial counsel might have pursued; and (b) an inherent conflict between that alternative defense and other demands and interests arising from

counsel's representation of another person.

Civil Procedure > Appeals > Standards of Review > Reversible Errors

Criminal Law & Procedure > Counsel > ***Joint Representation***

Legal Ethics > Client Relations > Conflicts of Interest

HN2[] Standards of Review, Reversible Errors

Unless the trial court knows or reasonably should know that a particular attorney-client conflict exists, the court need not initiate an inquiry.

Criminal Law & Procedure > Counsel > ***Joint Representation***

Legal Ethics > Client Relations > Conflicts of Interest

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Criminal Law & Procedure > Counsel > Right to Counsel > Trials

HN3[] Counsel, *Joint Representation*

In all ***criminal*** cases involving multiple representation both counsel and the trial court are responsible for making a record indicating that counsel has investigated the possibility of conflict of interest, has discussed the possibility with each client, and has determined that conflict is highly unlikely. Similarly, counsel and the court will be responsible for making a record of each client's informed consent to dual representation; that consent must rest on the client's understanding that he is entitled to counsel representing him alone. The trial court should address the issue on the record as early in the proceedings as is practicable, and must refuse to allow dual representation unless the record indicates convincingly that the potential for conflict is very slight.

Headnotes/Summary

Headnotes

1. Constitutional Law--Right to Effective Counsel--Conflict of Interest

While the general standard for judging assertions of ineffective assistance of counsel is that of reasonable competence, special rules apply when such a claim is predicated on a conflict of interest arising from one lawyer's simultaneous representation of more than one defendant.

2. Constitutional Law--Right to Effective Counsel--Conflict of Interest

When a defendant has not objected at trial to his lawyer's simultaneous representation of more than one of the defendants, in order to demonstrate a denial of effective assistance of counsel, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. N.H. CONST. pt. 1, art. 15.

3. Constitutional Law--Right to Effective Counsel--Conflict of Interest

A defendant who claims ineffective assistance of counsel, and shows that a conflict of interest actually affected the adequacy of his representation, need not demonstrate prejudice in order to obtain relief.

4. Constitutional Law--Right to Effective Counsel--Conflict of Interest

In order for a defendant to demonstrate a violation of the right to effective counsel by his lawyer's simultaneous representation of more than one of the defendants, and thus to obtain relief, there must be proof of two elements: (a) some plausible alternative defense strategy or tactic that trial counsel might have pursued, and (b) an inherent conflict between that alternative defense and other demands and interests arising from counsel's representation of another person.

5. Constitutional Law--Right to Effective Counsel--Conflict of Interest

Since neither of two arguments that defendant asserted his counsel might have pressed, if he had not simultaneously represented two defendants, was open to defendant, there was no showing of a plausible alternative defense strategy or tactic that trial counsel might have pursued, and no showing of a conflict of interest violating defendant's right to effective assistance of counsel.

6. Constitutional Law--Right to Effective Counsel--Conflict of Interest

At joint trial, court did not commit reversible error in failing to question defense counsel or the two defendants *sua sponte* about the possibility of a conflict of interest due to defense counsel's simultaneous representation of both defendants.

7. Constitutional Law--Right to Effective Counsel--Conflict of Interest

Unless the trial court knows or reasonably should know that a particular conflict of interest exists, the court need not initiate an inquiry into the possibility that simultaneous representation by counsel of more than one defendant at a joint trial constitutes a conflict of interest.

8. Constitutional Law--Right to Effective Counsel--Conflict of Interest

While defendant had no constitutional basis to claim reversible error in trial court's proceeding without inquiring *sua sponte* into possible conflicts, where counsel simultaneously represented two defendants in joint trial, making such an inquiry would have been the better course to take, because the potential for conflict in such cases is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations.

9. Constitutional Law--Right to Effective Counsel--Conflict of Interest

In all future ***criminal*** cases involving multiple representation, both counsel and the trial court will be responsible for making a record, indicating that counsel has investigated the possibility of conflict of interest, has discussed the possibility with each client, and has determined that conflict is highly unlikely; similarly, counsel and the court will be responsible for making a record of each client's informed consent to dual representation, which must rest on the client's understanding that he is entitled to counsel representing him alone; and the trial court should address the issue on the record as early in the proceedings as is practicable, and must refuse to allow dual representation unless the record indicates convincingly that the potential for conflict is very slight.

10. Habeas Corpus--Denial of Relief

Petitioner in habeas corpus proceeding failed to carry his burden to prove entitlement to relief, where he presented no evidence in support of his claim that he had inadequate notice of arson charges against him due in part to failure of the superior court to hold a formal arraignment, claims which the State controverted.

11. Appeal and Error--Preservation of Questions--Failure To Present Below

Claim not raised below may not be originated on appeal.

Counsel: *Bertram D. Astles*, of Derry, by brief and orally, for the petitioner.

Stephen E. Merrill, attorney general (*Steven L. Winer*, attorney, on the brief and orally), for the State.

Judges: Souter, J. All concurred.

Opinion by: SOUTER

Opinion

[*135] **[**356]** In 1982, the present petitioner was tried for the arson of his own house, and in a joint trial his then wife was tried for conspiracy to commit the same act of arson. The wife was acquitted, but the petitioner was convicted and sentenced to serve a term of imprisonment and to pay a fine. The petitioner took a direct appeal from his conviction, which we affirmed in State v. Hopps, 123 N.H. 541, 465 A.2d 1206 (1983). After the petitioner's release from prison, his parole officer notified him that he would have to arrange a schedule of installments to pay the fine. The petitioner then brought a petition for habeas corpus collaterally attacking his conviction on the ground that he had been denied the effective assistance of counsel. He claimed that representation by his privately retained trial counsel was tainted by a conflict of interest arising from counsel's **[***2]** ***joint*** ***representation*** of both the plaintiff and his wife. The same judge who had presided at trial (*Johnson*, J.) heard the habeas claim and denied relief. We affirm.

The plaintiff rests his habeas claim on the guarantees of effective assistance of counsel provided by part I, article 15 of the Constitution of New Hampshire, and by the sixth and fourteenth amendments to the Constitution of the United States. In accordance with our customary practice, we will independently consider the plaintiff's

State constitutional claim first, *see* State v. Ball, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983), looking to cases from other jurisdictions solely for their help in dealing with the issues of State law. *See* Michigan v. Long, 103 S. Ct. 3469, 3475-76 (1983). In the present instance, however, the State standards are identical with their federal counterparts. Abbott v. Potter, 125 N.H. 257, 259-60, 480 A.2d 118, 119 (1984). Therefore, the reasons that support the denial of relief will apply equally to all claims, and we need not address the federal issues separately.

HN1[] While the general standard for judging assertions of ineffective assistance of counsel is that of reasonable **[***3]** competence, Breest v. Perrin, 125 N.H. 703, 705, 484 A.2d 1192, 1194 (1984); Strickland v. Washington, 104 S. Ct. 2052, 2064-65, *reh'g denied*, *104 S. Ct. 3562 (1984)*, special rules apply when such a claim is predicated on a conflict of interest arising from one lawyer's simultaneous representation **[*136]** of more than one defendant. Abbott v. Potter supra; Cuyler v. Sullivan, 446 U.S. 335 (1980). When a defendant has not objected at trial to such dual representation, we have held that in order to demonstrate a violation of his rights under part I, article 15,

> "'a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.' Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). '[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.' Id. at 349-50; *see* Brien v. United States, 695 F.2d 10 (1st Cir. 1982)."

Abbott v. Potter, supra at 259-60, 480 A.2d at 119 (quoting Cuyler v. Sullivan, supra at 349-50).

The United States Court of Appeals for the First Circuit has explained that relief **[***4]** **[**357]** under the rule in *Cuyler* requires proof of two elements: (a) some plausible alternative defense strategy or tactic that trial counsel might have pursued; and (b) an inherent conflict between that alternative defense and other demands and interests arising from counsel's representation of another person. Brien v. United States, supra at 15.

We must begin our examination of the petitioner's claim, therefore, by examining the theories of defense that he raised at trial, as a preface to considering what alternative strategies or tactics might have been open to him. The defense as reflected in closing argument rested essentially on two points. First, counsel urged the jury to find that the items of circumstantial evidence of guilt against both parties were the unpersuasive results of a mishandled investigation. Second, he argued that the fire in question was more likely the result of flawed electrical wiring than the product of arson.

In the present proceeding the petitioner contends that his trial counsel should have pressed one of two other arguments: (a) that the circumstantial evidence did not point more forcefully to the petitioner, rather than to his wife, **[***5]** as the person who actually set the fire, and (b) that on the evidence it was more likely that the wife set it. The petitioner assumes that if the jury had accepted the former argument it would have acquitted him because it could not have determined who set the fire; he assumes that if the jury had accepted the latter, it would have acquitted him on a finding that his wife had set it.

We, however, conclude that neither argument was open to him. Neither argument rests on an adequate evidentiary basis, and in fact each argument flatly conflicts with evidence that includes **[*137]** the petitioner's own testimony at the trial. Moreover, the first argument rests on legal error.

The evidentiary record against which the petitioner's arguments must be measured can be summarized briefly. The opinion in State v. Hopps, 123 N.H. 541, 465 A.2d 1206, states the facts generally, and here we need to describe only the evidence particularly bearing on the habeas claim.

On August 30, 1981, the petitioner and his wife returned to Littleton after three days in Maine. After stopping at their house for a short time about 2 p.m. they drove to Lisbon. About 8:30 p.m. a neighbor observed smoke **[***6]** coming from the house, and the fire department promptly extinguished a basement fire. The petitioner and his wife returned and remained at the house until about 10:50 p.m., when they drove away together. At 11 p.m. a neighbor heard two explosions and called the fire department, which returned to extinguish an upstairs fire that did major damage, and was later said to have been caused by an accelerant in one of the bedrooms.

Starting with this general setting, the petitioner's first alternate theory of defense is that there was an equal likelihood that he or his wife spread the accelerant and caused the second fire to break out upstairs, so that the jury could not reasonably find that the petitioner rather

than his wife was responsible. Ironically, the prosecutor at trial hinted at the same argument when he told the jury that "[i]t is hard to tell who may have struck the match."

At the least, however, such an argument would have tested the outer limit of what was ethically permissible on the evidence. The only testimony about the activity of the petitioner and his wife inside the house between the first and second fires came from the petitioner. He said that after the last **[***7]** fireman had gone, he went through the entire house to "secure" it, putting down windows, including a window in the bedroom in question. He said that when he returned to the ground floor his wife was talking on the telephone. When she finished her call they left the house.

Since there were no admitted eyewitnesses to the spreading of the accelerant or the placement of an incendiary device, the jury could only identify the arsonist **[**358]** on the circumstantial evidence, *inter alia*, that an accelerant had been used and that the petitioner and his wife had been in the house just before the explosions. Strictly speaking, however, the petitioner's own testimony placed him in the bedroom, while there was no testimony that his wife had entered it in the time between the fires. Thus, it would have been improper to argue that there was no basis to find the petitioner's presence in the bedroom more likely than his wife's, or that there was no basis to find his agency in setting the fire more likely than hers.

[*138] This first alternative argument would, however, have suffered a more obvious flaw even than its evidentiary weakness. Its silent premise is that the petitioner **[***8]** would have been entitled to an acquittal if the evidence pointed equally to himself and his wife as the arsonist. This legal assumption is false, however. For if the evidence tended to prove beyond a reasonable doubt and with equal plausibility that both had set the fire, the jury could properly have convicted the petitioner. It would thus have been objectionable to argue that the jury could not convict the petitioner merely because the evidence had pointed to him and his wife with equal force.

Assuming that there could be any dispute about the evidentiary basis for the first alternative defense theory, there is no room to argue that there was evidentiary support for the second. The petitioner and his new appellate counsel both claimed that a neighbor, Mrs. Richards, had testified that she had seen the petitioner leave the house before the second fire, but had not testified that she had seen the wife leave. Since there was evidence that both had been inside the house, the petitioner would have had his trial counsel argue that the petitioner left first, with the result that the wife was more probably the one who remained behind to set the fire.

This, however, is simply a misrepresentation **[***9]** of the evidence, and any jury argument based on it would have been clearly objectionable. Mrs. Richards in fact gave the following testimony:

> "Q. You say you looked out your window?
> A. Yes, because I heard some voices, and I looked and I could see . . . Mrs. Hopps was on the front porch and Mr. Hopps was coming out of the house.
> Q. . . .
> A. . . . I saw him going out behind the house on the side of the house . . . .
> . . .
> A. . . . When he went down to the side, by the side of the house, I went back to lay down, and that was when I heard someone talking, so I got up again and looked out the window again. It was Mrs. Hopps, she was on the porch and Mr. Hopps was coming out of the house.
> Q. Out of the front?
> A. Yes, out of the front door.
> Q. Then what did you see?
> A. Well, they got in their car and went down the road."

[*139] Thus, on Mrs. Richards's testimony, it appears more likely that the petitioner was the last one to leave the house.

The second defense theory would have run up against even more inconsistent testimony, however. The petitioner himself twice testified that he and his wife left the house together after **[***10]** the first fire. And, as we have seen, his own indication that he had been the last one in the upstairs bedroom where the second fire broke out would have undercut any argument that his counsel might have tried to make to the disadvantage of the wife. Thus, the evidence was at odds with the theory that the wife was the last one out, and any finger-pointing at her would have been improper, implausible, and probably very damaging to the petitioner. Counsel's failure to engage in it cannot be attributed to any conflict of interest. *See* United States **[**359]** v. Mers, 701 F.2d 1321, 1331 (11th Cir.), *reh'g en banc denied*, *707 F.2d 523*, *cert. denied*, *104 S. Ct. 481 (1983)*.

Since we have found no alternative strategy or tactic of

Family Law

Courts addressing the joint representation of both parents in a child protection or similar proceeding have reached varying results on whether a Rule 1.7 conflict of interest exists, demonstrating that joint representation in this context is not a per se conflict, but is fact-dependent:

- State ex rel. S.A., 37 P.3d 1172 (Utah Ct. App. 2001), in which the court concluded that the joint representation of both parents in a child protection proceeding in which the mother was accused of killing one child did present a conflict of interest under Rule 1.7 because to prevail in the case and obtain custody of the surviving child, the father would have to distance himself from the mother.

- Idaho Dep't of Health & Welfare v. Doe, 249 P.3d 362 (Idaho 2011), in which the court concluded that the joint representation of both parents in a TPR proceeding did not present a conflict of interest under Rule 1.7. Although the parents had divorced (and subsequently remarried) during the pendency of the case, and although conflict within the home was made an issue at trial, the court found that these and other matters "do not demonstrate an actual conflict of interest."

While those cases dealt with actual/potential representation of the parents by the same attorney, there is also case law addressing imputation of conflicts in this context to other attorneys within a single firm under Rule 1.10. So, in New Jersey Div. of Child Protection & Permanency v. G.S., 149 A.3d 816 (N.J. Super. 2016), the court concluded that a conflict of interest could arise when the parents in a child welfare case were represented by separate attorneys within New Jersey Office of Parental Representation. The court further concluded that such joint representations were not categorically prohibited and could be waived by the parents. In the facts of this particular case, the court noted that the history of domestic abuse between the parents did not give rise to a conflict, but a conflict requiring waiver arose when the parents advocated for conflicting parenting plans. The opinion is valuable for a fairly comprehensive discussion of the ethical issues.

The following cases also address joint representation issues that do not involve representation of both parents:

- In re Quadaysha C., 949 N.E.2d 712 (Ill. App. 2011), in which the court held that it was a per se conflict of interest for an attorney to represent both a parent and the child's guardian ad litem in a TPR case.

- In re Cliffton B., 81 Cal. App. 4th 415 (2000), in which the court held that an attorney's joint representation of two children in a TPR case was an actual of conflict interest where the children had diverse interests, and concluded that the lower court had erred in failing to appoint independent counsel for each of the children.

All of the cited cases are included below.

37 P.3d 1172
Court of Appeals of Utah.

STATE of Utah, in the Interest of S.A.,
a person under eighteen years of age.
M.A., Appellant,
v.
State of Utah, Appellee.

No. 20000265–CA.
|
Oct. 18, 2001.
|
Rehearing Denied Dec. 10, 2001.

Synopsis
State filed petition alleging that mother had caused the death of one son and that remaining son was a sibling at risk. The Juvenile Court, Third District, Salt Lake City Department, Charles D. Behrens, J., found mother to be responsible for the death of one of her children and adjudicating her other child to be at risk. Mother appealed. The Court of Appeals, Greenwood, P.J., held that: (1) mother's due process rights were not violated by simultaneous proceedings in juvenile court and in criminal court; (2) mother's due process rights were not violated by court's order requiring father to obtain separate counsel; (3) principles of res judicata were not violated by multiple proceedings in juvenile and criminal court; and (4) juvenile court did not lose jurisdiction by failure to schedule an adjudicative hearing within sixty days of the shelter hearing.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (16)

[1] **Appeal and Error** Constitutional law

Constitutional issues are questions of law which the appellate court reviews for correctness.

1 Case that cites this headnote

[2] **Criminal Law** Right of defendant to counsel

Cases in which the court assigns substitute counsel in criminal prosecutions are reviewed under an abuse of discretion standard.

[3] **Attorneys and Legal Services** Effect of Conflicts

Substitution of counsel is mandatory when a conflict of interest exists.

1 Case that cites this headnote

[4] **Appeal and Error** Conclusiveness and effect of prior rulings; res judicata and collateral estoppel

The application of res judicata or collateral estoppel is a question of law, reviewed by the appellate court for correctness.

1 Case that cites this headnote

[5] **Appeal and Error** Statutory or legislative law

The appellate court reviews issues requiring statutory interpretation for correctness and gives no deference to the trial court.

[6] **Infants** Questions considered

A determination of whether a juvenile court retains jurisdiction is a question of law and is reviewed by the appellate court for correctness.

[7] **Appeal and Error** Mootness

The appellate court has a duty to address issues, even if issues are technically moot, that may arise again on remand.

[8] **Constitutional Law** Advisory Opinions

Although the appellate court, as a general rule, does not issue advisory opinions, it may address the construction of a statute that is frequently applied by the trial courts.

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1 Case that cites this headnote

[9] **Constitutional Law** Protection of Children; Child Abuse, Neglect, and Dependency

Infants Time for pleading, proceedings, or ruling; stay

Due process rights of mother accused in death of one of her children were not violated by simultaneous judicial proceedings in district court criminal prosecution and in the juvenile court child welfare case brought to remove second child; best interests of mother's other child would not have been served if juvenile proceeding was stayed pending the outcome of the criminal prosecution. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[10] **Appeal and Error** Form and requisites in general

Appeal and Error Points and arguments

When a brief fails to cite relevant legal authority or provide any meaningful analysis regarding an issue, the appellate court will not consider appellant's argument.

2 Cases that cite this headnote

[11] **Attorneys and Legal Services** Conflicts of Interest

A conflict of interests exists when parties have inconsistent interests. Rules of Prof.Conduct, Rule 1.7.

2 Cases that cite this headnote

[12] **Attorneys and Legal Services** Effect of Conflicts

Once a conflict of interest is established, separate counsel is mandatory. Rules of Prof.Conduct, Rule 1.7.

[13] **Infants** Eligibility and qualifications of counsel; conflicts of interest

Joint representation of mother and father in juvenile court proceeding to determine custody of child commenced after mother was accused of killing other child presented a conflict of interest, where father was not charged with any acts relating to child's death and father would have to distance himself from mother to obtain custody of other child. Rules of Prof.Conduct, Rule 1.7.

1 Case that cites this headnote

[14] **Res Judicata** Necessity of identity

Res judicata does not apply if the same claims are not pursued in the separate proceedings.

[15] **Infants** Continuance

Res Judicata Family and domestic relations

Res judicata did not require the juvenile court custody proceeding with regard to mother's remaining child to be continued until the conclusion of the criminal action brought against mother accused of killing one of her children; the two actions had different demands and distinct burdens of proof.

1 Case that cites this headnote

[16] **Infants** Time for hearing

Statute requiring that, in abuse, neglect, and dependency proceeding, the final adjudication hearing shall be held no later than sixty days from date of shelter hearing, is directory rather than jurisdictional. U.C.A.1953, 78-3a-308(2).

1 Case that cites this headnote

Attorneys and Law Firms

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Mark L. Shurtleff, Attorney General and John Peterson, Attorney General's Office, Salt Lake City, for Appellee.

Martha Pierce, Salt Lake City, Guardian Ad Litem.

Before Judges GREENWOOD, JACKSON, and BILLINGS.

OPINION

GREENWOOD, Presiding Judge.

¶ 1 This is one of two appeals that stem from a juvenile court adjudication regarding the parents of S.A.[1] The State filed a petition alleging M.A. (Mother) had caused the death of her infant son T.A. and that S.A, her older son, was a sibling at risk. The State contended Mother was solely responsible for T.A.'s death and, therefore, D.A. (Father) was not a party to the adjudication phase of the juvenile court proceedings.

1 The companion case to the present case addresses the father's appeal. *See* *In re S.A.,* 2001 UT App 307, 37 P.3d 1166.

¶ 2 Mother appeals the juvenile court's decision finding her responsible for T.A.'s death and finding S.A. to be a sibling at risk.

BACKGROUND[2]

2 Mother does not directly challenge the factual findings of the juvenile court and we recite them accordingly. However, Mother includes a recitation of facts in her brief in an effort to demonstrate that the State had all its experts in place and that she lacked the time and resources to present her own defense.

¶ 3 Mother and Father are married and are the biological parents of two sons: S.A., born January 24, 1996, and T.A., born May 25, 1999, who died September 14, 1999. On September 13, 1999, Mother was home alone with her two children. T.A. was fussy and off his normal schedule. The family had recently moved into a new home and had not established telephone service, so Mother drove to a phone booth to call Father. Father stated that Mother sounded stressed during their conversation. After returning home, Mother put T.A. in his crib around 2:30 for his afternoon nap, but he awoke between 3:00 and 3:20. When Mother heard T.A. fussing, she rocked him and placed him back in the crib. She then went to make dinner.

¶ 4 Father arrived home from work between 4:00 and 4:30 p.m. Mother met him at the top of the stairs, which was unusual. Normally, Father checked on T.A. when he returned from work, but on this day he showered first. Mother asked him to eat dinner before showering. It was also unusual for dinner to be prepared when Father arrived at home.

¶ 5 After dinner, Mother asked Father to get T.A. up. Father found T.A. lying face down in the crib with his right arm over his head. Father, believing T.A. was seriously ill or dead, screamed that T.A. was dead. Mother came into the room, but stayed away from the baby. She told Father to start CPR and went to a neighbor's home to call 911.

¶ 6 Father administered five rounds of CPR before the EMTs arrived and continued resuscitation efforts. The EMTs immediately took T.A. to Tooele Regional Medical Center (TRMC). As efforts to revive T.A. continued, he was life-flighted to Primary Children's Medical Center (PCMC). The TRMC physician did not see any retinal hemorrhaging during T.A.'s exam.

¶ 7 T.A. was admitted to the PCMC Pediatric Intensive Care Unit where resuscitation efforts were successful. The pediatrician specializing in critical care, Dr. Vernon, examined T.A. Dr. Vernon found extensive retinal hemorrhaging, anoxic brain injury, and diffuse brain swelling so severe he did not ***1175** believe that the child could live. T.A. was not brain dead upon admission, but was nearly so. Dr. Vernon explained the findings to both parents who, in his opinion, acted odd in that they sat at opposite sides of the room instead of together comforting each other, which was more common in his experience. Dr. Vernon's diagnosis was a non-accidental trauma and that T.A. had been in acute distress for a few hours prior to being admitted to PCMC. Mother and Father granted permission to remove T.A. from life support when physicians told them he was brain dead. T.A. died shortly thereafter on September 14, 1999.

¶ 8 Because retinal injuries like those T.A. suffered are often indicative of child abuse, medical personnel called the police and the Department of Child and Family Services (DCFS). DCFS removed S.A. from his home. A shelter hearing took place on September 17, 1999, and the juvenile court granted

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DCFS temporary custody of S.A. After a kinship study, S.A. was placed with his maternal grandparents.[3]

3 At oral argument, counsel for Mother stated S.A. has now been returned to his parents.

¶ 9 In its petition, the State alleged that Mother caused T.A.'s death and that S.A. should continue in DCFS custody as a sibling at risk.

¶ 10 Mother was charged with murder on October 13, 1999. Mother filed a motion to strike the adjudicative hearing on the State's petition until after the criminal case had been resolved. The juvenile court denied the motion.

¶ 11 The State filed a motion requesting that Father obtain separate counsel because the State contended Mother caused T.A.'s death and Father was not responsible. Mother and Father opposed the motion because of the potential financial burden it would place on the family and contended any conflict between the parents was speculative. The juvenile court granted the State's motion. The juvenile court also heard arguments regarding Father's status in this matter. The State argued "there would be no adjudication pursued as to the father and that he had only been subpoenaed as a witness." The trial court determined that no allegations were made against Father, and, therefore, he was not a party to the adjudication. The trial court informed Father's counsel he would be allowed only to rehabilitate Father as a witness and could not otherwise participate during the trial.[4] During this same hearing, both Mother and Father presented oral motions to the court asking it to dismiss the case as the trial was scheduled to begin after the sixty-day deadline imposed by statute. Father also made a motion to intervene. The trial court denied the motions.

4 Father argues this action by the juvenile court denied him his due process rights and statutory right to representation. We agree with Father in the companion case and base our reversal of both cases on his argument. *See* *In re S.A,* 2001 UT App 307, 37 P.3d 1166.

¶ 12 During the adjudication hearing[5] on the State's petition, the State presented further medical evidence to demonstrate T.A.'s death was not accidental. Mother argued T.A. had a "near miss" Sudden Infant Death Syndrome event and the prolonged CPR caused the ocular damage. The State's experts testified that Mother's theories were improbable. Two physicians testified that brain damage was the cause of death and that it probably occurred at the same time as the ocular damage. The juvenile court found Mother abused T.A. and caused his death and S.A. was a sibling at risk. Both Father and Mother appealed the juvenile court's decision.[6] This opinion addresses Mother's appeal.

5 *See* Utah Code Ann. §§ 78–3a–308 to –311 (1996 & Supp.2000) (stating procedures related to adjudication hearing).

6 The juvenile court conducted a dispositional hearing to determine S.A.'s placement. *See* Utah Code Ann. § 78–3a–311 (Supp.2001). Both parents participated in this portion of the juvenile court proceedings and they do not challenge the actions of the juvenile court during this phase.

ISSUES AND STANDARDS OF REVIEW

¶ 13 Mother first contends her due process rights were violated when the State proceeded against her in separate proceedings in separate forums involving the same factual issues.[7] Mother also argues her due process ***1176** rights were impaired when she chose to exercise her Fifth Amendment right against self-incrimination by not testifying in the juvenile court proceeding, to prevent the State from using her testimony in the pending criminal prosecution. Mother further argues the trial court erred in ordering Father to obtain separate counsel. She argues the cost of two attorneys, as well as the potential costs of expert witnesses, compromised her ability to defend herself and violated her due process rights.

7 Mother appears to claim that there were three proceedings—the criminal case, the juvenile court abuse case, and a proceeding involving listing her on the juvenile database of child abusers. She does not provide any analysis involving the database proceeding, and, therefore, we do not address it. *See* Utah Code Ann. §§ 62A–4a–116 to –116.5 (Supp.1999).

[1] ¶ 14 " 'Constitutional issues, including ... due process, are questions of law which we review for correctness.' " *In re Adoption of S.L.F.,* 2001 UT App 183,¶ 9, 27 P.3d 583 (quoting *In re K.M.,* 965 P.2d 576, 578 (Utah Ct.App.1998)).

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[2] [3] ¶ 15 Regarding the juvenile court's decision to order Father to obtain separate counsel, the State argues this case is analogous to cases in which the court assigns substitute counsel in criminal prosecutions, which are reviewed under an abuse of discretion standard. *See State v. Pursifell,* 746 P.2d 270, 272 (Utah Ct.App.1987). We agree. However, "substitution of counsel is mandatory when ... a conflict of interest" exists. *Id.* at 274.

[4] ¶ 16 Mother also contends the simultaneous proceedings violated res judicata principles. The application of res judicata or collateral estoppel is a question of law, reviewed for correctness. *See In re J.J.T.,* 877 P.2d 161, 162 (Utah Ct.App.1994). However, this court has applied a more flexible approach when reviewing child welfare cases involving these doctrines. *See In re E.R.,* 2000 UT App 143,¶ 12, 2 P.3d 948.

[5] [6] ¶ 17 Finally, Mother argues that because the adjudication hearing occurred after the sixty-day time period required by Utah Code Ann. § 78–3a–308 (Supp.2000), the juvenile court lost jurisdiction. We review "issues requir[ing] statutory interpretation ... for correctness, giving no deference to the trial court." *S.L.F.*, 2001 UT App 183 at ¶ 9, 27 P.3d 583. Whether a juvenile court retains jurisdiction is a question of law, reviewed for correctness. *See In re A.M.S.,* 2000 UT App 182, ¶ 11, 4 P.3d 95.

ANALYSIS

I. MOOTNESS

¶ 18 "We first address the threshold issue of whether [Mother]'s claims are moot." *In re N.R.,* 967 P.2d 951, 953 (Utah Ct.App.1998). In *In re S.A.,* 2001 UT App 307, 37 P.3d 1166, also decided today, we address Father's arguments on appeal, and for the reasons set forth therein, we reverse the decision of the juvenile court and remand this case for a new adjudication in which both parents may fully participate. Because the reversal in Father's case mandates a reversal in Mother's case as well, Mother's issues are technically moot.

[7] [8] ¶ 19 However, when issues may arise again on remand this court has a duty to address them. *See Bair v. Axiom Design, L.L.C.,* 2001 UT 20,¶ 22, 20 P.3d 388. Additionally, although this court, as a general rule, does not issue advisory opinions, we may address the construction of a statute that is frequently applied by the trial courts. *See In re N.R.,* 967 P.2d at 953. In the present case, Mother raises some issues that may arise again on remand. Mother also argues section 78–3a–308(2), which is frequently applied by the juvenile court, required a dismissal of her case. We therefore address most of Mother's arguments. [8]

8 We do not address Mother's argument that the requirement that the adjudication hearing take place within sixty days after the shelter hearing, *see* Utah Code Ann. § 78–3a–308 (Supp.2000), violated her due process rights, because she did not have adequate time to prepare her case and secure expert witnesses. On remand, Mother will have had almost two years to locate witnesses to testify on her behalf. We therefore need not determine if the sixty-day time period allotted by the statute is unconstitutional as applied to her.

II. DUE PROCESS ARGUMENTS

A. Multiple Proceedings

¶ 20 Mother argues the State violated her due process rights by bringing multiple actions against her in the district court criminal ***1177** prosecution and the juvenile court child welfare case. Both the United States Supreme Court and this court have allowed persons to be prosecuted criminally and simultaneously be subject to civil proceedings. *See United States v. Kordel,* 397 U.S. 1, 11, 90 S.Ct. 763, 769, 25 L.Ed.2d 1 (1970) (noting that under the facts of the case the government did not violate due process by pursuing civil forfeiture while also proceeding against defendant in criminal setting).

[9] ¶ 21 This court recognized the likelihood of parallel court proceedings in *In re A.R.,* 937 P.2d 1037 (Utah Ct.App.1997), *cert. dismissed, and aff'd. by,* 1999 UT 43, 982 P.2d 73. In that case, this court stated: "Of course, child abuse is also a crime and there exists the possibility of a *parallel or subsequent* criminal prosecution based on the same underlying acts. This is not relevant to the instant inquiry, for such a criminal prosecution is a completely independent proceeding." *Id.* at 1043 (citation omitted) (emphasis added). We also agree with the State that the best interests of at risk children are not served

when juvenile proceedings are stayed pending the outcome of criminal prosecutions. *See In re V.A.,* 105 Misc.2d 254, 432 N.Y.S.2d 137, 142 (N.Y.Fam.Ct.1980); *In re K.W.,* 2000 OK Civ App 84,¶¶ 7–9, 10 P.3d 244. Therefore, Mother's due process rights are not violated by multiple or simultaneous proceedings.

B. Fifth Amendment

¶ 22 Mother also contends the exercise of her Fifth Amendment right to decline to testify in the juvenile court proceedings deprived the juvenile court of necessary information regarding the cause of T.A.'s death. Mother states she could not testify in the juvenile court proceeding because the State could use any testimony later in the criminal proceedings. Because her testimony was essential to the juvenile court case, Mother contends her due process rights were violated. However, Mother does not address the issue further. She cites no case law nor does she provide any analysis of how the exercise of her Fifth Amendment right in the juvenile court prejudiced her due process rights.

[10] ¶ 23 When a "brief fails to cite relevant legal authority or provide any meaningful analysis regarding [an] issue," this court will not consider appellant's argument. *State v. Shepherd,* 1999 UT App 305,¶ 27, 989 P.2d 503; *see also* Utah R.App. P. 24; *Green v. Louder,* 2001 UT 62,¶ 34, 29 P.3d 638. We can only presume Mother wishes this court to determine what due process or fundamental rights were affected by her choice not to testify, and if these rights were affected to such a degree as to require reversal. However, "[b]ecause the briefing on this issue is inadequate, we decline to consider the merits" of Mother's claim. *Shepherd,* 1999 UT App at ¶ 27, 989 P.2d 503.

C. Separate Counsel

¶ 24 Mother also asserts that the juvenile court's order requiring Father to obtain separate counsel impaired her due process rights because it increased the financial burden on the family. She also contends Father did not need separate counsel. We disagree. The juvenile court properly ordered Father to obtain separate counsel and this order did not violate Mother's due process rights.

1. Order to Obtain Separate Counsel

[11] **[12]** **[13]** ¶ 25 We agree with the Guardian ad Litem and the State that joint representation of Mother and Father in this case presented a conflict of interest. A conflict of interests exists when parties have inconsistent interests. *See State v. Newman,* 928 P.2d 1040, 1044 (Utah Ct.App.1996). To obtain custody of S.A., Father would have had to distance himself from Mother because Father was not charged with any act relating to the death of T.A. The Guardian ad Litem was willing to recommend Father have custody of S.A., but only if Father's primary interest was S.A.'s well-being. The juvenile court recognized and addressed these issues with Father. Additionally, Father's counsel, who represented Father below and on appeal, acknowledged at oral argument that his client had a conflict of interest with Mother. Although Mother argues the potential conflict is entirely conjectural, the record indicates otherwise, and Father's own attorney's statements during oral argument indicate a conflict existed between Mother and Father. Once a conflict is established, separate counsel ***1178** is mandatory. *See State v. Pursifell,* 746 P.2d 270, 274 (Utah Ct.App.1987); Utah Rules Prof'l Conduct R. 1.7 (With limited exceptions "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client ... or if the representation of that client may be materially limited by the lawyer's responsibilities to another client.").

2. Financial Burden

¶ 26 Having determined that the juvenile court properly ordered Father to obtain separate counsel, we next examine Mother's argument that the cost of separate counsel created a financial hardship that impaired her due process rights. The State contends this argument fails because Mother and Father had the opportunity to seek appointed counsel in the juvenile court. *See* Utah Code Ann. § 78–3a–913 (Supp.2000). Despite the availability of appointed counsel throughout the proceedings, neither party requested appointed counsel nor submitted affidavits of impecuniosity or other documents demonstrating their inability to meet the costs of legal counsel.

¶ 27 Section 78–3a–913, in contrast to Mother's argument, specifically protects the rights of parents and minors. This section states in part:

> The parents ... shall be informed that they have the right to be represented by counsel at every stage of the

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> proceedings. They have the right to employ counsel of their own choice and *if any of them requests an attorney and is found by the court to be indigent, counsel shall be appointed by the court* ....

Id. at § 78–3a–913(1)(a) (emphasis added). In the present case, the juvenile court communicated to Father that if he needed appointed counsel, counsel would be made available to him.

¶ 28 Further, even if Mother and Father did not qualify for appointed counsel, Mother has provided no case law or analysis suggesting that financial hardship constitutes a violation of due process. Because Mother has not properly briefed the issue, we decline to consider it further. *See* Utah R.App. P. 24(a)(9); *Burns v. Summerhays,* 927 P.2d 197, 199 (Utah Ct.App.1996).

III. RES JUDICATA AND COLLATERAL ESTOPPEL

¶ 29 Mother argues the juvenile court proceedings should have been continued until the conclusion of the criminal proceeding. She argues res judicata and collateral estoppel principles require this result. Mother correctly states that the purposes of res judicata include avoiding inconsistent decisions and relieving parties from the costs of multiple lawsuits. *See* *In re J.J.T.,* 877 P.2d 161, 162 (Utah Ct.App.1994). She argues the juvenile proceeding and the criminal proceeding involve the same facts and parties. She contends the common issue in both proceedings is the cause of T.A.'s death, and therefore, these simultaneous proceedings violate res judicata principles. We disagree.

¶ 30 Mother recognizes the burden of proof differs between the two cases, but argues the essential facts are the same. Mother therefore concludes that underlying principles of res judicata required the juvenile court to stay the juvenile proceeding until the criminal proceeding had been concluded. She cites *Lewis v. Moultree,* 627 P.2d 94, 96 (Utah 1981), for the proposition that a "common ground for a stay is the pendency of another action involving identical parties and issues where a decision in one action settles the issue in another...." The *Lewis* court, however, also stated that a trial court's decision to stay proceedings in these circumstances is discretionary. *See id.* Nevertheless, although a conviction in the criminal proceeding would control the juvenile court as to her culpability for T.A.'s death, Mother's argument fails if the criminal court acquitted her, as the State could still pursue her in a juvenile proceeding with its lower burden of proof.[9] *See* *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 362, 104 S.Ct. 1099, 1104, 79 L.Ed.2d 361 (1984) ("It is clear that the difference in the ***1179** relative burdens of proof in criminal and civil actions precludes the application of the doctrine of collateral estoppel.").

9 A criminal conviction requires that Mother's guilt be proven beyond a reasonable doubt. *See* Utah Code Ann. § 76–1–501(1) (1999). An abuse case "brought before the juvenile court ... must be proved by clear and convincing evidence." Utah R. Juv. P. 41(c).

[14] ¶ 31 Further, res judicata does not apply if the same claims are not pursued in the separate proceedings. In *In re J.J.T.,* we concluded that a prior hearing on neglect did not have preclusive effect on a later hearing terminating parental rights. We stated: "The juvenile court properly distinguished between the neglect proceeding and the proceeding terminating appellant's parental rights. In so doing, the court [correctly] held the prior proceeding was not res judicata as the parties did not litigate the same claim or demand in each proceeding." *In re J.J.T.,* 877 P.2d at 165–66. In that case we noted the differences between a neglect proceeding and a proceeding to terminate parental rights. *See* *id.* at 166.

[15] ¶ 32 In the present case, the proceedings are also distinct. The juvenile court adjudication was held to determine if M.A. caused the death of T.A. and if S.A. was a child at risk. The subsequent dispositional hearing determined S.A.'s placement and care, and future services to be rendered to the family. The criminal proceeding involves the criminal culpability of Mother, and, unlike the other proceedings, requires that Mother be found guilty beyond a reasonable doubt.

¶ 33 In sum, the different demands, goals, and burdens of proof in the multiple proceedings prevent the application of res judicata. *Cf.* *One Assortment of 89 Firearms,* 465 U.S. at 361, 104 S.Ct. at 1104 ("The time has come to clarify that neither collateral estoppel nor double jeopardy bars a civil,

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remedial forfeiture proceeding initiated following an acquittal on related criminal charges.").

IV. JURISDICTION UNDER SECTION 78–3A–308

¶ 34 Section 78–3a–308(2) provides: "The pretrial may be continued upon motion of any party, for good cause shown, but the final adjudication hearing shall be held no later than 60 calendar days from the date of the shelter hearing." Utah Code Ann. § 78–3a–308(2) (Supp.2000). Mother argues the sixty-day time limit had expired prior to the adjudication hearing and the juvenile court therefore lacked jurisdiction. She cites *In re S.C.,* 1999 UT App 251, 987 P.2d 611, in which this court stated: "[W]e conclude the sixty-day limitation imposed by section 78–3a–308(2) is mandatory and that the trial court must hold the adjudication hearing on the State's abuse and neglect petition within sixty days of the shelter hearing." *Id.* at ¶ 15.

¶ 35 The Guardian ad Litem contends section 78–3a–308(2) is mandatory, but not jurisdictional, because any delay by the trial court could result in dismissal of DCFS petitions. The Guardian ad Litem notes children would be returned to potentially dangerous homes and families would not receive needed services. The State also argues section 78–3a–308(2) is not jurisdictional, and contends that *In re S.C.* did not suggest the statute is jurisdictional, but acknowledged that the purpose of the Child Welfare Reform Act is to assure that juvenile court child welfare cases move quickly. *See id.* at ¶ 13.

[16] ¶ 36 The holding in *State v. Tyree,* 2000 UT App 350, 17 P.3d 587, supports both the Guardian ad Litem's and State's interpretation of the statute. In that case, the criminal defendant claimed the trial court lost jurisdiction over him because it failed to sentence him within the forty-five-day time period required by Utah Rule of Criminal Procedure 22. *See id.* at ¶ 6. This court disagreed and held that the language of the rule was not jurisdictional. *See id.* at ¶¶ 7–8. Further, this court observed that although jurisdiction cannot be waived, the rule allowed the court to postpone sentencing with defendant's concurrence. *See id.* at ¶ 8. This court held that this language indicates the rule is directory and not jurisdictional. *See id.* The present case is similar. Rule 54 of the Utah Rules of Juvenile Procedure allows the parties to stipulate to a continuance of the requisite hearing. *See* Utah R. Juv. P. 54(c). In *In re S.C.,* we held that the sixty-day limit could be waived by strict compliance with Rule 54. 1999 UT App at ¶ 20.1999 UT App at ¶ 20. The possibility of waiver negates the possibility of the statute being jurisdictional.

¶ 37 Therefore, a failure to hold the adjudicative proceeding within sixty days does not divest the juvenile court of its jurisdiction. ***1180** In the present case, the juvenile court had jurisdiction to hold the adjudication hearing after the expiration of the sixty-day time period. [10]

10 We do not wish to imply that the sixty-day requirement in section 78–3a–308(2) is meaningless. Rather, we emphasize that the purpose of the statute is to expedite juvenile court proceedings in favor of children who are in need of prompt placement in an appropriate environment. *See In re S.C.,* 1999 UT App 251,¶ 13, 987 P.2d 611. We encourage juvenile courts to adhere to the guidelines of the statute.

CONCLUSION

¶ 38 We reverse and remand this case for the reasons set forth in Father's companion appeal. Because several of the issues raised by Mother in her appeal may arise again on remand, we have addressed them.

¶ 39 We first conclude that requiring Mother to participate in and defend herself in multiple proceedings does not violate her due process rights. Additionally, we do not address whether her choice to exercise her right not to testify in one proceeding led to the deprivation of any other right because Mother failed to properly brief this issue.

¶ 40 The juvenile court properly ordered Father to obtain separate counsel because of a conflict of interest. Mother had access to court-appointed counsel if she could not afford an attorney. Therefore, her due process rights are protected by legislative enactments guaranteeing her right to appointed counsel in the face of financial hardship. Additionally, Mother has not presented case law or analysis to support her argument that financial hardship, alone, deprives her of due process.

¶ 41 Principles of res judicata or collateral estoppel have no application to the these proceedings. Res judicata does not apply to distinct criminal and civil proceedings with different demands and distinct burdens of proof.

¶ 42 Finally, we conclude that Utah Code Ann. § 78–3a–308(2) (Supp.2000) is mandatory insofar as it directs juvenile courts to promptly adjudicate juvenile matters. The statute is not jurisdictional, however, and the failure of the juvenile court to hold the adjudicative hearing within sixty days of the shelter hearing does not divest the juvenile court of jurisdiction.

¶ 43 Nonetheless, we reverse the decision of the juvenile court for the reasons set forth in our opinion discussing Father's appeal. We remand this case to the juvenile court.

¶ 44 WE CONCUR: NORMAN H, JACKSON, Associate Presiding Judge, and JUDITH M. BILLINGS, Judge.

All Citations

37 P.3d 1172, 432 Utah Adv. Rep. 17, 2001 UT App 308

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150 Idaho 563
Supreme Court of Idaho,
Boise, February 2011 Term.

In the Matter of the Termination of the Parental Rights of Jane (2010–28) Doe and John Doe.
IDAHO DEPARTMENT OF HEALTH & WELFARE, Petitioner–Respondent,
v.
Jane (2010–28) DOE and John Doe, Respondents–Appellants.

No. 38217.
|
March 17, 2011.

Synopsis
Background: The Idaho Department of Health and Welfare (IDHW) filed a petition to terminate mother and father's parental rights to their two children. The Magistrate Court, Penny J. Stanford, J., terminated parental rights. Parents appealed. The District Court of the Seventh Judicial District, Fremont County, Gregory W. Moeller, J., affirmed. Parents appealed.

Holdings: The Supreme Court, Horton, J., held that:

[1] as a matter of first impression, the trial court's failure to appoint separate counsel to represent mother and father during termination of parental rights proceeding did not constitute reversible error, and

[2] the magistrate judge's failure to recuse herself did not constitute reversible error.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (8)

[1] **Appeal and Error** Scope and Extent of Review

In an appeal from the district court, acting in its appellate capacity, the Supreme Court: reviews the trial court, or magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings.

1 Case that cites this headnote

[2] **Appeal and Error** Constitutional law
Appeal and Error Statutory or legislative law

Both constitutional questions and questions of statutory interpretation are questions of law over which the Supreme Court exercises free review.

3 Cases that cite this headnote

[3] **Judges** Determination of objections

Whether it is necessary for a judicial officer to disqualify himself in a given case is left to the sound discretion of the judicial officer himself. Rules Civ.Proc., Rule 40(d).

2 Cases that cite this headnote

[4] **Appeal and Error** Abuse of discretion

In determining whether the trial court has abused its discretion, the Supreme Court examines: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

2 Cases that cite this headnote

[5] **Infants** Eligibility and qualifications of counsel; conflicts of interest

The trial court's failure to appoint separate counsel to represent mother and father during termination of parental rights proceeding did not constitute reversible error; mother and father failed to show an actual conflict of interest that adversely affected their lawyer's performance. West's I.C.A. § 16–2009.

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4 Cases that cite this headnote

[6] **Constitutional Law** Parent and Child Relationship

A parent has a fundamental liberty interest in maintaining a relationship with his or her child. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[7] **Infants** Manner and conduct of proceedings in general

The magistrate judge's failure to recuse herself from termination of parental rights proceeding based on the fact that judge was previously a prosecutor who had prosecuted father for various criminal offenses did not constitute reversible error; mother and father failed to establish any prejudice, as none of the prior charges against father involved questions of family law. Rules Civ.Proc., Rule 40(d)(2).

[8] **Appeal and Error** Necessity of Motion Presenting Objection

In the absence of a motion for disqualification of a judge, the Supreme Court will not review that issue on appeal.

7 Cases that cite this headnote

Attorneys and Law Firms

****363** R. James Archibald, Idaho Falls, for appellants.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent.

ON THE BRIEFS

HORTON, Justice.

***564** This case is an appeal from the district court's decision affirming the termination of Jane Doe's (Mother) and John Doe's (Father) parental rights. This appeal was filed prior to the rule change in 2009 that allows for a direct appeal to this Court from a magistrate's decision granting or denying a petition for termination of parental rights. I.A.R. 11.1. Bearing in mind the concerns for both the children and the parents in such cases that motivated our decision to adopt rules expediting such appeals, we have attempted to adhere to the expedited time-frame of I.A.R. 12.2. We affirm the decision of the district court which, in turn, affirmed the magistrate court's orders terminating Mother's and Father's parental rights.

****364 *565 I. FACTUAL AND PROCEDURAL BACKGROUND**

Mother and Father are the parents of two children and Mother is the parent of a third child by a different father.[1] Between April, 1999 and April, 2006, the Idaho Department of Health and Welfare (IDHW) received nine separate reports alleging that the children were being neglected. These reports related to the conditions in the family home. Beginning in 2004, IDHW was actively involved with the family, with a caseworker visiting the home and IDHW providing financial assistance by paying bills for overdue utilities, purchasing items needed for home repairs, and supplying cleaning materials. The family was also assisted by the children's teachers and teachers' aides, who would take the children to the bathroom to clean them and comb their hair before school. In April, 2006, IDHW took the children into custody. In August, 2006, Mother and Father divorced. Mother and Father briefly lived apart before Father permanently moved back into the family home and they remarried.

1 The father of the third child stipulated to the termination of his parental rights.

IDHW developed a case plan to attempt to reunite the children with their parents. Over the next two years, the children were repeatedly placed back in the home, only to have the conditions in the home rapidly deteriorate, again necessitating removal of the children. On March 2, 2008, IDHW filed the present Petition to Terminate Parental Rights. The children have been placed with Father's sister who allows Mother and Father to visit the children.

In the summons, Mother and Father were notified of their right to counsel and the right to have counsel appointed. The trial court granted their request for a court-appointed attorney who jointly represented Mother and Father throughout these

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proceedings. During the pendency of the proceedings, four different magistrate judges were assigned to the termination proceedings. Of these, the state moved for a recusal of the first judge under I.R.C.P. 40(d)(1) and the second and third judges issued orders of self-disqualification. A trial occurred in October, 2008, and the magistrate judge subsequently issued a memorandum decision and order terminating Mother's and Father's parental rights. The magistrate judge found that the state had shown, by clear and convincing evidence, that the children were neglected, as defined by I.C. § 16–1602(25), and that it was in the best interests of the children that Mother's and Father's parental rights be terminated. Accordingly, the trial court terminated Mother's and Father's parental rights.

Mother and Father appealed to the district court. On appeal, they did not challenge the basis for the magistrate judge's determination that their parental rights should be terminated. Rather, they argued that separate counsel should have been appointed for Mother and Father and that the magistrate judge should have recused herself. [2] The district court rejected these arguments, finding that the arguments were waived as they were not raised before the magistrate judge. In the alternative, the district court held that Mother and Father had failed to show a conflict that adversely affected their representation and that they had failed to demonstrate bias on the part of the magistrate judge. The district judge consequently affirmed the magistrate court's termination order. Mother and Father now appeal to this Court.

2 Mother and Father advanced a third argument regarding the transcript of the termination proceedings that was withdrawn at oral argument.

II. STANDARD OF REVIEW

[1] In an appeal from the district court, acting in its appellate capacity, this Court:

> reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure.

****365** ***566** *Nicholls v. Blaser,* 102 Idaho 559, 561, 633 P.2d 1137, 1139 (1981), *quoted in* *Doe v. State,* 137 Idaho 758, 759–60, 53 P.3d 341, 342–43 (2002).

[2] In this appeal, Mother and Father have challenged their joint representation and the magistrate judge's failure to recuse herself, arguing that these constitute reversible error. The question of joint representation concerns the scope of I.C. § 16–2009 and is, consequently, a question of statutory interpretation that may be impacted by the constitutional requirements of due process and parents' "fundamental liberty interest in maintaining a relationship with his or her child." *In re Adoption of Doe,* 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006) (citing *Doe v. State,* 137 Idaho 758, 760, 53 P.3d 341, 343 (2002)). "Both constitutional questions and questions of statutory interpretation are questions of law over which this Court exercises free review." *Stuart v. State,* 149 Idaho 35, 40, 232 P.3d 813, 818 (2010) (citing *Federated Publ'ns, Inc. v. Idaho Bus. Rev., Inc.,* 146 Idaho 207, 210, 192 P.3d 1031, 1034 (2008)).

[3] **[4]** In reviewing the parents' argument regarding the trial judge's failure to recuse herself under I.R.C.P. 40(d), "whether it is necessary for a judicial officer to disqualify himself in a given case is left to the sound discretion of the judicial officer himself." *Bradbury v. Idaho Judicial Council,* 149 Idaho 107, 113, 233 P.3d 38, 44 (2009) (citing *Sivak v. State,* 112 Idaho 197, 206, 731 P.2d 192, 201 (1986)). In determining whether the trial court has abused its discretion, this Court examines:

> (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and

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(3) whether the trial court reached its decision by an exercise of reason.

Baxter v. Craney, 135 Idaho 166, 169, 16 P.3d 263, 266 (2000) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

III. ANALYSIS

As noted above, Father and Mother do not challenge the basis upon which the magistrate judge terminated their parental rights; rather, they raise two procedural issues in this appeal. First, they argue that the same attorney should not have represented both Father and Mother during the termination proceedings. Second, they argue that the magistrate judge should have recused herself because, during her time as a prosecutor, she prosecuted Father for a number of offenses. We address these issues in turn.

A. Mother and Father have failed to show that an actual conflict arose that would render joint representation improper.

[5] **[6]** Idaho Code § 16–2009 provides the right to appointed counsel in terminations of parental rights. [3] In the present case, a single attorney was appointed to represent both Mother and Father without objection from the attorney or from the parents. Idaho's appellate courts have not previously addressed the scope of I.C. § 16–2009 in the context of joint representation. At the outset, we note that I.C. § 16–2009 does not mandate the appointment of separate counsel for parents in proceedings terminating parental rights. Nevertheless, a parent has a "fundamental liberty interest in maintaining a relationship with his or her child," *In re Adoption of Doe,* 143 Idaho at 191, 141 P.3d at 1060, and Idaho's Rule of Professional Conduct 1.7 prohibits representation where "there is a significant risk that the representation ... will be materially limited by the lawyer's responsibilities to another client...." We conclude that I.C. § 16–2009 does provide for effective representation in proceedings terminating parental rights. ***567** ****366** Based on that conclusion, we need not address the question of whether the due process clause, standing alone, would require appointment of counsel in this case or, having appointed counsel, what standard of effectiveness due process would mandate. *See* *Lassiter v. Dep't of Soc. Servs.,* 452 U.S. 18, 31–32, 101 S.Ct. 2153, 2161–62, 68 L.Ed.2d 640, 652–53 (1981) (establishing a case-by-case determination of whether due process requires appointment of counsel in termination proceedings).

3 In relevant part, the statute states:

> The parent or guardian ad litem shall be notified as soon as practicable after the filing of a petition and prior to the start of a hearing of his right to have counsel, and if counsel is requested and the parent or guardian is financially unable to employ counsel, counsel shall be provided. The prosecuting attorneys of the several counties shall represent the department at all stages of the hearing.

I.C. § 16–2009.

While the question of joint representation in termination proceedings has not been addressed in Idaho, there is a well-developed body of case law relating to the question of joint representation in criminal matters. This Court has stated:

> Whether a trial court's failure to adequately inquire into a potential conflict of interest is enough, on its own, to justify reversal depends on whether the defendant objected to the conflict at trial. When a trial court fails to make a proper inquiry, but the defendant did not object to the conflict at trial, the defendant's conviction will only be reversed if he or she can prove that an actual conflict of interest adversely affected his lawyer's performance.

State v. Severson, 147 Idaho 694, 703, 215 P.3d 414, 423 (2009) (citing *Cuyler v. Sullivan,* 446 U.S. 335, 346–48, 100 S.Ct. 1708, 1717–18, 64 L.Ed.2d 333, 345–46 (1980)). In other jurisdictions that have faced similar questions, the adoption of this standard has been nearly universal. *See, e.g., State ex rel. V.H.,* 154 P.3d 867 (Utah Ct.App.2007) (requiring a demonstration of prejudice); *Baker v. Marion*

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Cnty. Office of Family & Children, 810 N.E.2d 1035, 1041 (Ind.2004) (focusing on "whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination"); *In re Heather R.,* 269 Neb. 653, 694 N.W.2d 659, 661 (2005) (requiring a showing that the "lawyer actively represented conflicting interests and that the actual conflict of interest adversely affected the lawyer's performance"); *State v. Joanna V.,* 134 N.M. 232, 75 P.3d 832, 836 (N.M.Ct.App.2003) ("A defendant claiming ineffective assistance of counsel based on conflict of interest must show an actual conflict existed; a mere possibility of a conflict is not sufficient to support the claim."); *In re B.L.D.,* 113 S.W.3d 340, 348 (Tex.2003) ("[T]he trial court's inquiry ... is limited to whether there is an actual conflict of interest."); *In re Kafia M.,* 742 A.2d 919, 927–28 (Me.1999) (requiring a showing of conflict of interest during the period of joint representation).

Applying this standard, Mother and Father have failed to show an actual conflict of interest that adversely affected their lawyer's performance. They cite a number of instances in the record where conflict within the home was made an issue during trial. They mention one instance where testimony focused on the state of Mother's trailer when Father was not residing in the family home. Finally, they mention the fact that Mother and Father divorced during the termination proceedings (though they later began living together again and subsequently remarried) and that they had different responsibilities under the case plans developed by IDHW. These instances do not demonstrate an actual conflict of interest. The parents' divorce was not concealed from the court and the magistrate judge's decision carefully differentiated between the roles Mother and Father played (or failed to play) in the parenting relationship. There was no obvious conflict between the parents' interests (namely, opposing termination of their parental rights) and there has been no showing of any additional conflict of interest, much less any prejudice to either Mother or Father resulting from the joint representation. The fact that separate counsel was not appointed under the circumstances of this case does not constitute reversible error.

B. Having failed to request a recusal, the alleged bias of the magistrate judge does not rise to the level of reversible error.

[7] [8] On appeal, Mother and Father argue that the magistrate judge erred in failing to recuse herself because she was previously a prosecutor who had prosecuted Father for a variety of offenses. No objection or motion for disqualification was filed at any time during ****367 *568** the trial. In the absence of a motion for disqualification, this Court will not review that issue on appeal. *See McPheters v. Maile,* 138 Idaho 391, 396–97, 64 P.3d 317, 322–23 (2003) (declining to review the issue of disqualification where no motion to disqualify was found in the record).

Further, though unnecessary to our disposition of this issue, we note that none of the charges against Father involved questions of family law.[4] Mother and Father have failed to identify any prejudice that resulted from the magistrate judge sitting on this case.[5] There is no indication in the record that the magistrate judge was previously involved in any child protection proceedings involving Mother and Father.[6] These observations highlight the rationale for requiring a motion to disqualify to be presented before the trial court. Because the question of a recusal under I.R.C.P. 40(d)(2) is committed to the discretion of the trial judge, absent some objection at trial, there was no decision by the trial court that can be reviewed and no factual record was developed from which grounds for disqualification can be discerned.

4 Although the record before this Court does not include any documents relating to earlier cases, Mother and Father assert that the prior cases against Father in which the magistrate was involved as a prosecutor included juvenile proceedings, alcohol violations, burglary and grand theft, an insufficient funds check, and infractions.

5 The parents have not advanced a claim that the failure to object at trial constituted ineffective assistance of counsel at the trial level. However, any argument that the failure to file a motion for disqualification would have constituted ineffective assistance of counsel would fail based on the requirement that the defendant show "that deficient performance resulted in prejudice." *Smith v. State,* 146 Idaho 822, 835, 203 P.3d 1221, 1234 (2009).

6 IDHW was represented by a Deputy Attorney General in all phases of these proceedings.

We therefore find that the district court properly concluded that the magistrate judge's failure to recuse herself did not constitute reversible error.

IV. CONCLUSION

We affirm the district court's opinion affirming the termination of Mother's and Father's parental rights. Costs to Respondent.

Chief Justice EISMANN and Justices BURDICK, J. JONES and W. JONES concur.

All Citations

150 Idaho 563, 249 P.3d 362

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447 N.J.Super. 539
Superior Court of New Jersey, Appellate Division.

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY, Plaintiff–Respondent,
v.
G.S. and K.S., Defendants–Appellants.
In the Matter of A.S. and B.S., Minors.

DOCKET NO. A–5222–15T2, A–5223–15T2
|
Argued October 31, 2016
|
Decided November 22, 2016

Synopsis

Synopsis

Background: Division of Child Protection and Permanency filed action seeking the care, custody, and supervision of children, after parents tested positive for opiates and admitted to drug use. The Superior Court, Chancery Division, Monmouth County, entered orders regarding asserted conflicts of interest regarding representation of parents. Parents appealed.

Holdings: After grant of leave to appeal, the Superior Court, Appellate Division, Sabatino, P.J.A.D., held that:

[1] as a matter of first impression, there is no per se ethical prohibition upon staff attorneys from within the same Office of Parental Representation (OPR) regional office representing different parents within the same abuse, neglect, dependency, or termination of rights case, provided that appropriate screening measures are scrupulously implemented;

[2] as a matter of first impression, when a significant divergence in positions arises between the parents in such a case, the actual or potential conflict may be waivable; and

[3] as a matter of first impression, trial court had authority to sua sponte raise potential conflict of interest and to consider the issue at an evidentiary hearing.

Affirmed as modified and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (12)

[1] **Constitutional Law** Protection of Children; Child Abuse, Neglect, and Dependency

Constitutional Law Removal or termination of parental rights

Infants Effectiveness of Counsel

A right to counsel, as applies pursuant to due process and statute in child abuse or neglect cases and in parental rights termination cases, is the right to the effective assistance of counsel. N.J. Const. art. 1, par. 1; N.J. Stat. Ann. §§ 9:6-8.30(a), 9:6-8.43(a), 30:4C-15.4(a).

6 Cases that cite this headnote

[2] **Constitutional Law** Protection of Children; Child Abuse, Neglect, and Dependency

Infants Effectiveness of Counsel

In cases brought against a parent by the Division of Child Protection and Permanency, the effectiveness of defense counsel, under due process and statutory guarantees of right to counsel, is assessed by the two-part test set forth in *Strickland*, which examines whether: (1) the attorney's performance was deficient, and (2) whether the deficient performances actually prejudiced the client. N.J. Const. art. 1, par. 1; N.J. Stat. Ann. §§ 9:6-8.30(a), 9:6-8.43(a), 30:4C-15.4(a); RPC 1.1.

6 Cases that cite this headnote

[3] **Constitutional Law** Protection of Children; Child Abuse, Neglect, and Dependency

Constitutional Law Removal or termination of parental rights

To provide effective assistance of counsel, as required by due process and statute in child abuse, neglect, dependency, or parental rights

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termination cases, counsel must provide the client with undivided loyalty and representation that is untrammeled and unimpaired by conflicting interests. N.J. Const. art. 1, par. 1; N.J. Stat. Ann. §§ 9:6-8.30(a), 9:6-8.43(a), 30:4C-15.4(a); RPC 1.1.

4 Cases that cite this headnote

[4] **Infants** Children in general

A child who is the subject of an abuse, neglect, dependency, or parental rights termination proceeding is entitled to representation by counsel employed in separate unit of Public Defender's Office from that of parent's counsel. N.J. Stat. Ann. §§ 9:6-8.21(d), 9:6-8.23, 30:4C-15.4(b).

1 Case that cites this headnote

[5] **Attorneys and Legal Services** Nature and Scope of Duty

Attorneys and Legal Services Confidentiality

Attorneys and Legal Services Multiple clients; dual representation

Attorneys and Legal Services Conflicts of Interest

Fundamentally, a lawyer owes his or her client the key responsibilities of confidentiality and loyalty; from that duty issues the prohibition against representing clients with conflicting interests. Restatement (Third) of the Law Governing Lawyers § 122; RPC 1.7(a).

2 Cases that cite this headnote

[6] **Attorneys and Legal Services** Persons subject to standards

The Rules of Professional Conduct are applicable to lawyers assigned by the Office of Public Defender in either a civil or criminal context. N.J. Stat. Ann. § 2A:158A-13.

1 Case that cites this headnote

[7] **Infants** Eligibility and qualifications of counsel; conflicts of interest

There is no per se ethical prohibition upon staff attorneys from within the same Office of Parental Representation (OPR) regional office representing different parents within the same abuse, neglect, dependency, or parental rights termination case, provided that appropriate screening measures are scrupulously implemented. N.J. Stat. Ann. §§ 9:6-8.21 et seq., 30:4C-12 et seq.; RPC 1.7(a).

[8] **Infants** Eligibility and qualifications of counsel; conflicts of interest

A conflict of interest that warrants attention, in the context of staff attorneys from within the same Office of Parental Representation (OPR) regional office representing different parents within the same abuse, neglect, dependency, or parental rights termination case, is one that goes beyond the mere fact that the clients have the status of co-defendants in the case; the trigger for concern is instead whether there is a manifest particularized divergence between the clients' factual contentions or legal assertions, or the remedies they wish their counsel to advocate. N.J. Stat. Ann. §§ 9:6-8.21 et seq., 30:4C-12 et seq.; RPC 1.7(a).

[9] **Infants** Eligibility and qualifications of counsel; conflicts of interest

Analysis of whether representation of different parents by staff attorneys from within the same Office of Parental Representation (OPR) regional office, within the same abuse, neglect, dependency, or parental rights termination case, creates an impermissible conflict of interest must focus on whether parents are directly adverse to one another or whether their respective attorneys are materially limited by the circumstances in being able to zealously advocate their interests. N.J. Stat. Ann. §§ 9:6-8.21 et seq., 30:4C-12 et seq.; RPC 1.7(a).

[10] **Infants** Eligibility and qualifications of counsel; conflicts of interest

When a significant divergence in positions arises between the parents during the course of an abuse, neglect, dependency, or parental rights termination case, the actual or potential conflict, due to representation of parents by staff attorneys from within the same Office of Parental Representation (OPR) regional office, may be mutually waivable by parents, with appropriate consultation with counsel and substantiation of that waiver. N.J. Stat. Ann. §§ 9:6-8.21 et seq., 30:4C-12 et seq.; RPC 1.7.

[11] **Attorneys and Legal Services** Disclosure, Waiver, or Consent

A client's consent to waiver of attorney conflict can be reviewed by the trial court for fairness, reliability, and compliance with the Rules of Professional Conduct. RPC 1.7(b)(1).

1 Case that cites this headnote

[12] **Infants** Proceedings as to right or waiver

Trial court had the authority to sua sponte raise potential conflict of interest and to consider the issue at an evidentiary hearing, in proceeding brought by Division of Child Protection and Permanency regarding care and supervision of children, in which both parents were defendants and were both represented by staff attorneys from same Office of Parental Representation (OPR) regional office; it was trial court which was charged with duty to enforce the Rules of Professional Conduct. N.J. Stat. Ann. § 30:4C-12 et seq.; RPC 1.7(a).

3 Cases that cite this headnote

****818** On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FN–13–172–15.

Attorneys and Law Firms

T. Gary Mitchell, Deputy Public Defender, argued the cause for appellants (Joseph E. Krakora, Public Defender, attorney; Mr. Mitchell, of counsel and on the briefs).

Deirdre A. Carver, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Carver, on the brief).

Nancy P. Fratz, Assistant Deputy Public Defender, argued the cause for minors A.S. and B.S. (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Joseph F. Suozzo, Deputy Public Defender, of counsel; Ms. Fratz, on the brief).

Theodore T. Reilly argued the cause for amicus curiae New Jersey State Bar Association (New Jersey State Bar Association, attorneys; Thomas H. Prol, of counsel; Christopher J. Carey, Mr. Reilly and Dina M. Mikulka, on the brief).

Before Judges Sabatino, Haas and Currier.

Opinion

The opinion of the court was delivered by

SABATINO, P.J.A.D.

***543** On leave granted, we review the Family Part's series of orders that concern the potential need to disqualify one or both staff attorneys from the Office of Parental Representation ("the OPR") who respectively represent the father and the mother in defending this child welfare case. The pertinent conflict-of-interest questions now before us were prompted by co-defendants' advocacy of competing parenting plans for the future care of their twin children.

The issues presented are of first impression. In particular, we examine under the applicable Rules of Professional Responsibility ("RPCs") and case law: (1) whether an actual or potential conflict of interest arises when staff attorneys from the same OPR regional office each represent a parent having interests or positions divergent from that of the other parent; (2) any such ****819** conflicts may be waived by the clients, and, if so, in what manner; and (3) ***544** what is the appropriate role of the court in dealing with such representational issues when they surface.

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For the reasons that follow, we affirm, with some modification, the trial judge's determination to conduct a hearing to explore the conflict and waiver issues that arose in this particular case.

We agree with the OPR, the Office of Law Guardian ("the OLG" or "the Law Guardian"), and the amicus New Jersey State Bar Association that, with appropriate screening measures, the law does not categorically prohibit or even presumptively disfavor staff attorneys working out of the same OPR regional office from separately defending individual parents in a Title Nine or Title Thirty case. In addition, when a significant divergence arises between the parents during the course of such litigation, the actual or potential conflict often may be mutually waivable by those clients, with appropriate consultation with counsel and substantiation of that waiver.

We also conclude that the trial court has a proper institutional role in assuring that the zealous independence of the staff attorneys will not be compromised, and that the confidentiality of client communications and attorney work product will be scrupulously maintained. The court retains the authority and discretion to conduct a hearing to explore such matters on a case-by-case basis to address specific instances where particularized concerns have arisen about the propriety of ongoing representation by the staff attorneys or the sufficiency of any client waivers and screening measures.

Lastly, we recommend that the representational issues presented here be prospectively examined in a broader context by the Family Practice Committee or some other designated Supreme Court Committee. Such review may include the potential drafting of a provision in Part V of the Rules of Court to address these circumstances. If adopted, those new rules might replicate some, if not all, of the facets applicable to dual representation by staff attorney public defenders in criminal cases under the principles ***545** expressed in *State v. Bell*, 90 *N.J.* 163, 447 *A.*2d 525 (1982) and the possibly analogous procedures set forth in *Rule* 3:8–2.

I.

Background of the Parties and This Litigation

Defendants are the parents of twins, A.S. and B.S., born in December 2012. Defendants entered into an agreement in 2013 to share joint legal custody of the children. Defendant G.S., the mother, was designated as the primary residential custodian, and defendant K.S., the father, who had more recently become involved in the twins' lives, was afforded visitation with them supervised by G.S.

In 2014 the Division of Child Protection and Permanency ("the Division") received two referrals concerning these children: (1) a report of a July 2014 domestic violence incident between defendants, which allegedly occurred in the presence of the children and resulted in G.S.'s arrest for simple assault of K.S.; and (2) a report that G.S. had been arrested in October 2014 for engaging in shoplifting while the children were in her company. Defendants claimed they were no longer in a relationship at that time. They both denied having a history of substance abuse or domestic violence. The Division found the allegations were not established and at that point closed the case.

On January 29, 2015, the Division received a third referral concerning this family, ****820** this time from the twins' paternal grandmother. She reported that the children had been left in her care ten days earlier, when defendants, who she claimed were using heroin, had been involved in a physical altercation. The Division's ensuing investigation revealed to it that during an argument in the children's presence, G.S. accused K.S. of stealing her phone, broke the top off of a glass bottle, and then stabbed K.S. in the arm.

G.S. was consequently charged with committing aggravated assault with a weapon as an act of domestic violence. K.S. stated to the Division that G.S. was a heroin addict. He denied using heroin himself, but admitted to using Xanax and Percocet. G.S., ***546** meanwhile, denied using heroin. She did not believe that K.S., who had used heroin in the past, was currently using it because he had "completed detox." Drug screens conducted on January 30, 2015 revealed that G.S. tested positive for opiates and morphine, and that K.S. tested positive for opiates, morphine, and oxycodone. G.S. later admitted to using heroin.

On February 5, 2015, the Division performed an emergency (or "Dodd" removal [1]) of the children from defendants' care, based on G.S.'s admission to using ten bags of heroin a day; K.S.'s admission of misusing prescription medication; and both parents having tested positive for opiates and morphine. At the request of G.S., the children were placed by the Division with their maternal aunt, in whose care they remain to date. The Division located K.S. later that night, who said at that time he "hoped that the children could be with their maternal aunt."

1 A "Dodd removal" refers to the emergency removal of a child without a court order, pursuant to the Dodd Act, *N.J.S.A.* 9:6–8.21 to –8.82. *N.J. Div. of Youth & Family Servs. v. P.W.R.*, 205 *N.J.* 17, 26 n.11, 11 *A.*3d 844 (2011).

Four days later, the Division filed an order to show cause and a verified complaint in the Family Part seeking the care, custody, and supervision of the children under Title Nine, *N.J.S.A.* 9:6–8.21 to –8.73 (regarding abuse and neglect), and also under Title Thirty, *N.J.S.A.* 30:4C–12 (regarding the care and supervision of children). The application was mainly based on defendants having tested positive for opiates and morphine and their admitted drug use.

The OPR assigned two deputy public defenders from the same regional field office, OPR–Central, to represent G.S. and K.S. at the initial court hearing. As we will discuss *infra*, there are currently eight regional OPR offices that cover the State's twenty-one counties.[2] The OPR–Central regional office handles cases arising in Middlesex and Monmouth counties.

2 *See* Office of the Public Defender, Regional Office of Parental Representation Offices, http://www.nj.gov/defender/regional/#3 (last visited November 16, 2016).

***547** According to her certification filed with the Family Part after the concerns about potential conflicts in this case arose, the staff attorney assigned to represent the father specifically informed him before the initial post-removal hearing in February 2015 that there were safeguards within the OPR office, described in more detail *infra*, to "ensure confidentiality for each client." The staff attorney further advised K.S. that a "process of review" had been undertaken to determine whether a potential for conflict existed. She explained to K.S. that the trial court "would likely question him regarding his understanding of any possible conflict of interest," stemming from the fact that two staff attorneys from the same OPR office had been assigned to represent different clients in the case. According ****821** to the attorney's certification, K.S. responded that he understood her disclosures, and said that he wanted her to represent him. There is no indication in our record that K.S. signed a written waiver of a potential conflict, or that his assent was otherwise documented in any manner, aside from his signing the generic Public Defender application form.

The certification filed by the OPR staff attorney for the mother did not address whether she had made similar representations about the potential for conflict to G.S. at the outset of the case. However, as a separate certification from OPR–Central's managing attorney attests, the OPR has a standard protocol regarding the assignment of staff attorneys to co-defendants in the same case, and the protocol was followed here. As part of that protocol, which we discuss more extensively, *infra*, the OPR staff attorneys are required at the outset of each case to evaluate whether it presents a potential conflict of interest that could result in a significant likelihood of prejudice to either or both defendants. In any event, the two assigned OPR staff attorneys have separately and continuously represented K.S. and G.S. since the inception of this case in February 2015.

At the conclusion of the February 9, 2015 hearing, the trial court found that the Division's emergency removal was required due to imminent danger to the children's lives based on defendants' ***548** substance abuse, but not domestic violence. The court issued an order to show cause granting the Division care, custody, and supervision of the children and awarding defendants supervised visitation. The court further ordered: defendants to submit to substance abuse evaluations; G.S. to attend inpatient substance abuse treatment; the Division to find a suitable domestic violence program for G.S.; and K.S. to meet with the Division's domestic violence liaison. Defendants consented to the Title Nine removal of the twins and agreed to the court-ordered services.

During a compliance review hearing in September 2015, the Division withdrew its Title Nine abuse and neglect claim against defendants because it found that the allegations were "not established." By order entered on that date, G.S. and K.S. consented to the continuing jurisdiction of the court for the provision of substance abuse services pursuant to *N.J.S.A.* 30:4C–12. G.S. singularly was ordered to engage in a batterer's intervention program. G.S. subsequently received substance abuse treatment, but she unfortunately relapsed.

The Parents' Divergent Permanency Plans

On February 1, 2016, after the children had been in placement with the maternal aunt for twelve months, a permanency hearing was scheduled before the Family Part in accordance with *N.J.S.A.* 30:4C–61.2(a)(2). The Division requested that the permanency goal change from reunification to Kinship Legal Guardianship ("KLG") with the maternal aunt pursuant to *N.J.S.A.* 30:4C–90. The staff attorney for G.S.

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represented to the court that her client, who was not present in court that day because she had been incarcerated on a separate offense, agreed with that goal and opposed reunification of the twins with K.S. Meanwhile, K.S., who was present in court that day and who was pursuing substance abuse treatment, disagreed with the mother's position. According to the representations of his own staff attorney, K.S. sought a goal of reunification of the twins with him once he obtained a stable residence.

The Law Guardian requested a three-month extension to afford K.S. an opportunity to present an appropriate permanency plan. ***549** The Law Guardian noted to the court that the children "very much enjoy[ed]" their visits with their father, which were ****822** apparently conducted at the paternal grandmother's house. The trial judge agreed with the request, issuing an order on that date granting a permanency plan extension of one month to enable K.S. to find suitable housing and continue his substance abuse treatment.

The Conflicts Issue Identified and Addressed

At the conclusion of the February 1 hearing, the trial judge sua sponte raised the issue of whether a potential for prejudicial conflict existed because the parents had submitted competing permanency plans. The staff attorneys responded that they did not think there was a conflict, but agreed to speak to their managing attorney about it. Consequently, in the permanency order issued that day, the judge directed the parties to submit briefs on the conflicts issue.

Later that same day, G.S.'s attorney discussed the judge's concerns with her client. According to her certification, she explained to G.S. that she could continue to provide G.S. with independent legal representation, and advocate for her position notwithstanding that another attorney from OPR–Central would seek a different outcome for K.S., and that each attorney operated independently and would protect client confidences. There is no indication in our record that G.S. executed a written conflicts waiver. Nor does the record contain a conflicts waiver signed by K.S.

The trial judge conducted an initial oral argument on the conflicts issue on February 25, 2016. The staff attorneys argued that they should be permitted to continue representing each of the parents because there was no per se conflict of interest as a result of their representation. They further asserted that under analogous principles in *Bell*, *supra*, 90 *N.J.* at 173, 447 *A.*2d 525, the OPR was responsible for making the determination of whether there was an actual or potential conflict. The staff attorneys argued that the OPR's conflict assessment was subject to "substantial ***550** deference" by the court, and was not appropriate for judicial review because it would involve the consideration of potentially privileged communications. Counsel admitted that they did not know what decision-making process was used by the OPR in determining whether to assign outside pool attorneys in multiple-representation cases. The Division and Law Guardian took no position at that time, except the Division argued that if the court found a conflict, defendants should be required to place any waiver of that conflict on the record.

In a written decision issued on March 17, 2016, the trial judge found that there was an actual conflict of interest between G.S. and K.S. from which prejudice would be presumed. The judge perceived that there was "very little in the way of 'identity of interests' " between defendants. As the judge described it, the matter began as a result of domestic violence, and neither defendant had shown an effort to dispel that atmosphere through counseling. The judge further noted that defendants "initially sought to portray the other as the one with an addiction to heroin, while at the same time denying [his or her] own involvement."

Thereafter, K.S. showed positive results to substance abuse treatment, but G.S. relapsed. The judge also observed that defendants each sought at the permanency hearing to obtain a more favorable relationship with the children at the expense of the other, insofar as G.S. sought a permanency goal of KLG with a relative who could "presumably be friendlier to her," whereas K.S. sought to have the children reunified with him, thereby controlling G.S.'s access to the children.

****823** As a result, the judge directed the parties, in accord with analogous principles for criminal cases under *Rule* 3:8–2, to appear at a hearing to address the apparent conflicts and whether defendants wanted to enter a knowing and voluntary waiver. The judge held that if both parents entered conflicts waivers, the matter would be resolved, but if either parent did not waive, "the court will be forced to require one or both OPR attorneys to withdraw from the case."

***551** Beyond this case-specific ruling, the judge announced in his written opinion that he would institute the following procedural framework in all cases currently on his Children-In-Court docket where staff attorneys from the same OPR office represented co-defendant parents:

> In the future, at the outset of any case where the Public Defender wishes to employ two OPR staff attorneys to represent the parents, the court will expect full compliance with *State v. Bell* and *R.*[ ]3:8–2. It will expect a motion to be made on the record seeking permission for dual representation of the parents. It will hear and evaluate the motion using the same procedures it has outlined above.

On March 22, 2016, the judge issued an order granting K.S.'s request to adjourn the permanency hearing, which had been scheduled for that date, "so that [the] defense may review the [March 17, 2016] Opinion and decide whether or not to ask for a stay."

Defendants moved for reconsideration of the court's March 17, 2016 ruling. Defendants argued that the court erred in applying *Rule* 3:8–2 to a Family Part matter and also in its application of *Bell*, *supra*, 90 *N.J.* at 173, 447 *A.*2d 525. Defendants argued that different permanency goals, standing alone, do not constitute a prejudicial conflict that would disqualify the public defenders from representing defendants. Defendants also expressed concern that, in reaching its decision, the court did not have the benefit of reviewing the measures that have been put in place by OPR–Central to insure that each defendant was provided with independent counsel fully able to preserve confidences and represent his or her client's interests.

The trial judge conducted oral argument in May 2016 on the motion for reconsideration. The two staff attorneys appeared on behalf of their clients. G.S. was present, but K.S. was not because he had been hospitalized for a drug overdose. In addition, an OPR appellate attorney appeared for the first time in the matter to present oral argument on behalf of both defendants and offer historical background about how the OPR shifted from a representation model that relied heavily on pool attorneys to a model that ***552** now generally utilizes staff attorneys. The OPR appellate attorney urged the court to allow the conflicts issues to be addressed internally within the OPR, and that the court should give substantial deference to the OPR's handling of these issues. The Division took no position on the conflicts issues. The Law Guardian argued that there was at least a potential for conflict, which should be addressed as quickly as possible.

The trial judge denied the motion for reconsideration. In a lengthy written opinion issued on June 14, 2016, the judge again found that defendants here were "in clear conflict" from which prejudice may be presumed. The judge rejected the OPR's contention that a court has no further role in a conflicts matter once it is satisfied that the "prophylactic measures" are in place and that the staff attorneys are committed to "fidelity and independence." The judge expressed concern that the court and the parties might not know if such safeguards were being followed by ****824** the OPR, and even if they were followed, the safeguards might not address every possible conflict. For example, the judge was troubled by his impression that the OPR does not currently have in place "a policy to require that each staff attorney be assigned a separate investigator," nor would the OPR "commit to that being a requirement in the future." [3]

3 At oral argument on appeal, the OPR appellate attorney represented to this court that separate investigators are assigned to the attorney for each parent, although that practice was not documented in the trial court.

In denying reconsideration, the judge also stated in his opinion that he would adhere to the following protocol in all cases where the OPR seeks to have staff attorneys from the same office represent parents in child welfare cases. The judge's protocol may be summarized as follows:

> 1. The OPR must first apply to the court at the outset for permission to represent both parents. During that hearing, the OPR has the burden to: explain why it cannot follow the "norm" set forth in *Bell*, *supra*, 90 *N.J.* at 174, 447 *A.*2d 525, and assign co-defendants to outside pool counsel; and show why joint representation by staff attorneys is the "last resort available" to the OPR. "Joint representation" will be denied if the OPR fails to establish either factor.
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> ***553** 2. If the OPR establishes the above threshold factors, the court will then conduct a thorough examination on the record and in the presence of the defendants, regarding any information indicating a real or potential conflict between the defendants.

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> 3. If the court is satisfied that a real or potential conflict exists, it may seek knowing, willing and voluntary waivers from the defendants. If a waiver is obtained, the court will "consider this as a part of the overall circumstances to be evaluated on the issue of joint representation."
>
> 4. If either parent does not waive the conflict, and there is evidence of a present conflict, the OPR will be directed to assign pool attorneys for the parents. If only a potential conflict has been identified, the court will determine whether there is a significant likelihood of prejudice such that pool attorneys will be required. And, on proof of no prejudice to the other parent from allowing opposing staff attorneys to remain in the case, the court may grant the OPR's request.

Defendants moved again for reconsideration and other relief, including a stay of the trial court's rulings to accommodate the filing of a motion for leave to appeal with this court. The trial court granted the request for a continuation of the stay in an order on August 2, 2016. In an attached written statement of reasons, submitted pursuant to *Rule* 2:5–6(c), the judge clarified that he had not yet disqualified either of the OPR–Central staff attorneys from representing defendants. Instead, he had only directed counsel to appear for a hearing as to "whether the continued representation of one or both parents by staff attorneys from the same OPR office is warranted."

The Present Appeals

Subsequently, we granted leave to appeal to G.S. (A–5222–15T2) and K.S. (A–5223–15T2), consolidated and accelerated those appeals, granted defendants' application to extend the stay pending appeal, and directed that the record shall include the trial judge's August 2, 2016 Statement of Reasons. Because of the importance of the issues affecting the practice of law and a lawyer's ethical responsibilities, we invited ****825** the New Jersey Bar Association to appear as amicus curiae. The Bar Association kindly accepted our invitation, filing a brief and also appearing at oral argument. In the meantime, the permanency hearing for the children in the trial court has been adjourned.

***554** Although there is substantial agreement among the respective positions taken by counsel on the appeal, the Law Guardian differs with the position taken by defendants through the OPR appellate attorney as to whether a hearing was warranted in this case to explore conflict issues after the parents had advocated divergent parenting plans. The OPR appellate attorney maintains that the competing plans and the other circumstances here do not rise to the level of a prejudicial conflict warranting judicial inquiry. In any event, the OPR appellate attorney maintains that adequate client waivers have been procured to remediate any such presumed conflicts of interest.

The Law Guardian, however, argues that there is a sufficient concern of potential conflict here to justify the trial court's inquiries into the topic and its decision to order a hearing to explore the issue. In that regard, the Law Guardian expresses concerns that if the representation of both staff attorneys continues without being judicially validated in some way at this time, the children might be disadvantaged by continued delay and uncertainty if either or both parents claim on appeal from a final permanency order that their trial attorney was compromised, and the result below was thus tainted.

The Bar Association declines to take a position on whether a hearing is justified in this case, but instead presents broader principles relating to the assignment of defense counsel in Title Nine and Title Thirty cases and the importance of presumptively deferring to the professional judgment of the attorneys involved.

All three counsel who substantively briefed the appeal agree that the principles for civil representation of parents in a Title Nine or Title Thirty action are not identical with those in a criminal defense context addressed in *Bell* and *Rule* 3:8–2. They all respectfully contend that the prospective guidelines announced by the trial court—including a demonstration at the outset of a child welfare case that no pool attorneys are available in the county to represent the co-defendant parents—are unwarranted. They maintain that the OPR's general arrangement of allowing ***555** two staff attorneys in the same office to represent these parents, with appropriate screening, should be presumptively allowed unless a case-specific conflict emerges. The Division and the Attorney General continue to take no position.

II.

The Parents' Rights to Effective Representation

Parents in New Jersey charged with civil abuse and neglect under Title Nine or who are subject to Title Thirty termination proceedings have a constitutional right to counsel under the due process guarantees of Article I, paragraph 1 of the State

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Constitution, and a statutory right under *N.J.S.A.* 9:6–8.43(a), 9:6–8.30(a), and 30:4C–15.4(a). *N.J. Div. of Youth & Family Servs. v. B.R.*, 192 *N.J.* 301, 305, 929 *A.*2d 1034 (2007); *N.J. Div. of Youth & Family Servs. v. E.B.*, 137 *N.J.* 180, 186, 644 *A.*2d 1093 (1994); *Crist v. N.J. Div. of Youth & Family Servs.*, 135 *N.J.Super.* 573, 576–77 n.2, 343 *A.*2d 815 (App. Div. 1975). The statutory and constitutional rights of the parent must be "scrupulously protected." *N.J. Div. of Youth & Family Servs. v. G.M.*, 198 *N.J.* 382, 397, 968 *A.*2d 698 (2009).

****826** **[1]** **[2]** A right to counsel is "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 *U.S.* 759, 771 n.14, 90 *S.Ct.* 1441, 1449 n.14, 25 *L.Ed.*2d 763, 773 n.14 (1970). In cases brought against a parent by the Division, the effectiveness of defense counsel is assessed by the two-part test set forth in *Strickland v. Washington*, 466 *U.S.* 668, 687, 104 *S.Ct.* 2052, 2064, 80 *L.Ed.*2d 674, 693 (1984), applicable in criminal cases. *N.J. Div. of Youth & Family Servs. v. B.H.*, 391 *N.J.Super.* 322, 345, 918 *A.*2d 63 (App. Div.), *certif. denied*, 192 *N.J.* 296, 927 *A.*2d 1294 (2007). That test examines whether (1) the attorney's performance was deficient and (2) whether the deficient performances actually prejudiced the client. *Strickland*, *supra*, 466 *U.S.* at 687, 104 *S.Ct.* at 2064, 80 *L.Ed.*2d at 693. *See also RPC* 1.1 (imposing on lawyers the ethical duty of competence).

***556** **[3]** To be effective, counsel "must provide the client with undivided loyalty and representation that is 'untrammeled and unimpaired' by conflicting interests." *State v. Norman*, 151 *N.J.* 5, 23, 697 *A.*2d 511 (1997) (quoting *State v. Bellucci*, 81 *N.J.* 531, 538, 410 *A.*2d 666 (1980)). "[A]n attorney hobbled by conflicting interests that so thoroughly impede his ability to exercise single-minded loyalty on behalf of the client cannot render the effective assistance guaranteed by our constitution." *State v. Cottle*, 194 *N.J.* 449, 467, 946 *A.*2d 550 (2008).

[4] Indigent parents in Title Nine and Title Thirty proceedings are entitled to representation provided through the Office of the Public Defender. *N.J. Div. of Youth & Family Servs. v. R.D.*, 207 *N.J.* 88, 113, 23 *A.*3d 352 (2011) (citing *N.J.S.A.* 9:6–8.23(a),(b); *N.J.S.A.* 9:6–8.43(a); *N.J.S.A.* 30:4C–15.4). *See also In re Adoption of Child by J.E.V.*, 226 *N.J.* 90, 106, 141 *A.*3d 254 (2016) (due process guarantee requires appointment of counsel to some indigent litigants). "Simple justice demands nothing less in light of the magnitude of the consequences involved." *Crist*, *supra*, 135 *N.J.Super.* at 575, 343 *A.*2d 815. A child who is the subject of a Title Nine or Title Thirty proceeding is also entitled to representation by counsel employed in a separate unit of the Public Defender's Office, referred to as a "law guardian." *J.B. v. W.B.*, 215 *N.J.* 305, 332, 73 *A.*3d 405 (2013) (citing *N.J.S.A.* 9:6–8.21(d); *N.J.S.A.* 9:6–8.23; *N.J.S.A.* 30:4C–15.4(b)).

History of the Public Defender and the Creation of the OPR

The Office of the Public Defender was established in 1967 under the Public Defender's Act, *N.J.S.A.* 2A:158A–1 to –25, to replace "the assigned counsel system with a statewide program for the defense of indigents at public expense." *State v. Western World, Inc.*, 440 *N.J.Super.* 175, 193–94, 111 *A.*3d 1113 (App. Div. 2015), *certif. denied*, 225 *N.J.* 221, 137 *A.*3d 534 (2016). The Public Defender was initially required to provide representation, and all necessary services and facilities of representation, to indigent ***557** criminal defendants charged with an indictable offense. *N.J.S.A.* 2A:158A–5.

Subsequent legislation in 1974 assigned that right of representation to abuse and neglect proceedings under Title Nine, *N.J.S.A.* 9:6–8.43(a), [4] and in 1999 to termination cases under Title Thirty, *N.J.S.A.* 30:4C–15.4. Thereafter, the Public Defender created the OPR, formerly known as ****827** the Parental Representation Unit ("PRU"), to represent parents in both Title Nine and Title Thirty cases.

4 In 1974, the responsibility for providing counsel for parents in Title Nine cases was assigned to the then-established Department of the Public Advocate. *See* Office of the Public Defender, History, http://www.nj.gov/defender/history/ (last viewed on November 16, 2016); *E.B.*, *supra*, 137 *N.J.* at 186, 644 *A.*2d 1093.

The Public Defender is empowered to appoint deputy public defenders, *N.J.S.A.* 2A:158A–6, and also to maintain and compensate "trial pools of lawyers" on a case-by-case basis. *N.J.S.A.* 2A:158A–7(c),(d). Pool attorneys may be engaged "whenever needed to meet case load demands, or to provide

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independent counsel to multiple defendants whose interests may be in conflict." *N.J.S.A.* 2A:158A–9 (emphasis added).

All communications between the defendant clients and any lawyers in the Public Defender's Office "shall be fully protected by the attorney-client privilege to the same extent and degree as though counsel has been privately engaged." *N.J.S.A.* 2A:158A–12. The Public Defender's Office has the ultimate responsibility to represent the client and is the client's attorney of record, regardless of whether the lawyers it assigns are staff or pool attorneys. *Turner v. Dep't of Human Servs.*, 337 *N.J.Super.* 474, 478, 767 *A.*2d 530 (App. Div.), *certif. denied*, 168 *N.J.* 294, 773 *A.*2d 1157 (2001).

The statutory scheme prescribes that the Public Defender is to make selections of staff and pool attorneys "on a basis calculated to provide the respective defendants with competent counsel in the ***558** light of the nature, complexity and other characteristics of the cases, the services to be performed, the status of the matters, and other relevant factors." *N.J.S.A.* 2A:158A–8. In selecting attorneys to serve as counsel for indigent parents, the Public Defender's Office also must: (1) consider an attorney's willingness to make a commitment to represent a parent; (2) ensure that an attorney has received proper training; and (3) provide for an internal administrative unit to supervise, evaluate, and select non-staff counsel to represent indigent parents independently from the Office of Law Guardian. *N.J.S.A.* 30:4C–15.4(c)(1)–(3). Decisions by the Public Defender concerning the representation of parents are to be made by staff who have no actual involvement in the day-to-day representation of children provided by the OLG. *N.J.S.A.* 30:4C–15.4(c)(3).

The Post–2004 Reforms

From 1974 to the mid–2000s, the general practice in Title Nine proceedings was for the Public Defender to assign an attorney in the OLG to represent the child, and to assign separate pool attorneys to represent the parents. *N.J. Div. of Youth & Family Servs. v. E.B.*, 264 *N.J.Super.* 1, 6, 623 *A.*2d 1379 (App. Div. 1993), *aff'd*, 137 *N.J.* 180, 644 *A.*2d 1093 (1994).[5] That practice changed, however, in 2004, when, as part of the State's comprehensive reform of the child welfare system, the Public Defender transitioned from a model primarily utilizing pool attorneys, which had received criticism, to a model utilizing staff attorneys more often.

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> Prior to an amendment in 1977, *N.J.S.A.* 9:6–8.21 defined an "attorney" for an indigent parent as "a pool attorney" from the Public Defender "appointed in order to avoid conflict between the interests of the child and the parent[.]" *L.* 1974, *c.* 119. *N.J.S.A.* 9:6–8.21 currently defines an "attorney" for an indigent parent as "an attorney from the Office of the Public Defender or an attorney appointed by the court who shall be appointed in order to avoid conflict between the interests of the child and the parent or guardian in regard to representation." (Emphasis added).

The State's reform plan was developed as part of a settlement reached in a federal class action filed on behalf of children in the ***559** Division's care.[6] Among other ****828** things, the plan was designed to improve legal representation of indigent parents. The reform plan provided in relevant part that:

> Children are represented by the Law Guardian Unit of the ... [Public Defender], which has a large in-house staff. Parents are also represented by the [Public Defender], which has a small in-house staff for this purpose (the parental representation unit, PRU, which mainly handles appeals, with almost all the trial level representation being handled by pool private sector attorneys paid on an hourly basis for this work.) This model raises several concerns.
>
> [*A New Beginning: The Future of Child Welfare in New Jersey*, at 146 (June 9, 2004), available at http://dspace.njstatelib.org:8080/xmlui/handle/10929/25777 (emphasis added).]

The reform plan went on to detail those concerns, including the following criticisms of heavy reliance on pool attorneys:

> [B]ecause most of the parental representation is not institutionalized, but handled by the individual pool attorneys, most parents are represented by counsel without reliable access to ongoing training, support (from paralegals, investigators, or the like) or supervision, which cannot but affect the quality of parental representation. Parents are often represented by different attorneys during the course of their cases, undermining both the quality of representation and the parents' confidence in the operation of the system as a whole, at a time of particular legal and emotional vulnerability.

[*Ibid.* (emphasis added).]

6 *See* *Charlie H. v. Whitman*, 83 *F.Supp.*2d 476 (D.N.J. 2000) (addressing a motion to dismiss filed in the federal class action).

In accordance with the reform plan, the Child Welfare Panel engaged as consultants Professor Martin Guggenheim of New York University School of Law, and Craig Levine, Senior Counsel for the New Jersey Institute for Social Justice. These consultants asserted in their report that the pool attorney system had contributed to the inadequate representation of indigent parents because the pool attorneys were often unprepared, undertrained, underpaid, and improperly managed. Martin Guggenheim & Craig Levine, *Report to New Jersey Child Welfare Panel on the Representation of Parents in Child Welfare Cases* (May 2005) at 7–9.[7] They recommended that to the extent pool attorneys would continue ***560** to be used in conflict cases with multiple parents, it was important to implement a meaningful evaluative tool for their performance. *Id.* at 35. Further, they recommended that representation be housed in separate institutions—one for so-called "primary" and another for so-called "secondary" parents—which might decrease the need for retaining pool attorneys. *Id.* at 26–27, 35.

7 Available at https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/40775/c5362005g.pdf?sequence=1&isAllowed=y (last viewed on November 16, 2016).

In a public report submitted in June 2005, the Interagency Council for Children and Families (the "ICCF"), the agency charged with ensuring the timely implementation of the reform plan, described the aim of the Public Defender's transformation to a predominantly staff-based system for the representation of indigent parents. According to the ICCF, the transformation was designed "both to increase the quality and accountability of legal counsel and to ensure the presence of legal counsel for parents from the earliest possible opportunity in a child welfare proceeding." *Interagency Council for Children & Families, Public Report*, at 3 ****829** (June 30, 2005).[8] To that end, the OPR hired additional staff attorneys, opened new offices, and hired new investigators. *Id.* at 3–4. In addition, the OPR "continue[d] to maintain a list of seasoned pool attorneys for cases with multiple defendant parents and [to] manage such trial assignments to ensure timely selection of legal counsel for those cases[.]" *Id.* at 5.

8 Available at https://dspace.njstatelib.org/xmlui/handle/10929/30082 (last viewed on November 16, 2016).

This transition from a predominantly pool attorney model to a predominantly staff attorney model took longer than expected. According to the OPR, the transition was not fully implemented on a state-wide basis until September 2013.

Conflicts Protocols

Under the former system that had been in effect from 1974 to 2013, few issues of conflict-of-interest would have arisen, because parents were then mainly represented by pool attorneys from separate firms and children were represented by the OLG, an ***561** entirely separate office within the Public Defender.[9] "OLG and OPR are kept administratively separate to avoid any appearance of conflict [between counsel for children and their parents] in these cases." Office of the Public Defender, *supra*, *History*.

9 Separate law guardians are also appointed if there is a conflict of interest among the children. *See, e.g.*, *N.J. Div. of Youth & Family Servs. v. Robert M.*, 347 *N.J.Super.* 44, 61–62, 69, 788 *A.*2d 888 (App. Div.) (appointing four separate law guardians to children in a termination case), *certif. denied*, 174 *N.J.* 39, 803 *A.*2d 635 (2002). Although there are parallel issues of how best to deal with client conflicts with respect to the Law Guardian, those issues are not posed in this appeal, and we therefore do not address them.

The OPR recognized that under the revised system, a potential for conflict could arise from the fact that staff attorneys from the same OPR office can be assigned to represent co-defendant parents. According to the Guggenheim report, approximately one-third of the OPR's cases involve multiple parents and require the assignment of a second attorney. Guggenheim & Levine, *supra*, at 26–27. To address that concern, the OPR chose not to adopt the "primary"/"secondary" client model suggested by Guggenheim and Levine, but instead established protocols for staff attorneys, to insure confidentiality and to protect independent advocacy when they are representing parents in child welfare cases. If, however, a determination is made that there is a potential conflict of interest and a significant

likelihood of prejudice, representation is assigned to a pool attorney.

The record does not contain any written guidelines issued internally by the OPR detailing the protocols for representation by staff attorneys within the same office representing two parents in the same case. However, the record does contain a certification from the managing attorney of OPR–Central describing those existing protocols. The managing attorney explained that beginning in 2013, the OPR instituted a state-wide program of staff attorney representation of co-defendants in civil child welfare matters. A "critical component" of the program was to insure that staff attorneys considered potential conflicts.

***562** According to the managing attorney's certification, "[s]taff attorneys were instructed to review each case at the onset and determine if the circumstances demonstrated a potential conflict of interest and a significant likelihood of prejudice to either or both defendants." If the staff attorney found a potential conflict, the attorney was directed to immediately bring the case ****830** to the managing attorney's attention for further assessment. Cases in which a final determination was made "that a potential for conflict exists that could result in a significant likelihood of prejudice" were immediately reassigned to a pool attorney—a result OPR–Central has had to use in only a "few" cases.

The managing attorney further attested that, before the present case was filed by the Division, the following protocols within the OPR had been "continuously implemented to insure confidentiality and to preserve independent advocacy":

- Each staff attorney representing a co-defendant on the same case has a separate and distinct office and individual filing cabinets to store case files.

- Each staff attorney representing a co-defendant on the same case has a separate secretary assigned and/or must undertake his/her own administrative tasks.

- Each staff attorney representing a co-defendant on the same case is assigned to a separate printer located in different rooms within the office.

- All staff and secretaries are precluded from using the speaker phone function when speaking with clients.

- All staff attorneys are precluded from removing documents from the copier or fax, and must wait for documents to be placed in his/her mailbox by support personnel or the manager.

- All staff attorneys have been directed to keep all files secured in cabinets and any work product out of plain view.

- All staff attorneys have been instructed to maintain confidentiality and independent advocacy by insuring conversations with colleagues regarding shared cases are limited to general information and only to that which is not protected by attorney client privilege.

The OPR–Central managing attorney further explained in her certification that she sometimes has conferences with individual staff and pool attorneys about litigation issues and strategies. She asserted that her advice and recommendations to the attorneys are kept confidential, and that no information she learns about the position or strategy of a co-defendant is shared. "In instances ***563** where staff attorneys, with the consent of their respective clients, wish to discuss a collaborative case strategy or shared legal question," the managing attorney "meet[s] with both attorneys together to discuss the legal considerations related to their collaborative strategy or shared question." According to the managing attorney, even when such collaborative approaches are pursued, "each attorney is expected to and does independently advocate for his/her client" in the case.

During the motion proceedings before the trial court in this case, the OPR appellate attorney further clarified these customary practices in his representations to the court. He acknowledged that the OPR does not ordinarily assign staff attorneys from other OPR offices to represent co-defendant parents in a case because it does not have offices in every county. Because of logistical impediments, it is difficult to assign counsel to such co-defendants from different regional offices. Instead, the OPR generally utilizes two staff attorneys from the same office, with the screening protocol described in OPR–Central's managing attorney's certification. The OPR's appellate attorney acknowledged to the trial court that there was no "standard script" for staff attorneys to explain to clients the risks of such representation arrangements out of a common office.

****831** III.

Mindful of this important history and background information, we now address the issues raised on appeal.

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In essence, the issues fall into three clusters: (1) the identification of actual or potential conflicts arising from OPR staff attorneys within the same office representing co-defendant parents; (2) whether such conflicts may be waived, and, if so, how; and (3) the appropriate role of the court. We examine them in turn.

A.

The Identification of Conflicts

The OPR, Law Guardian, and amicus in this case all agree with the fundamental principle that it is vital to safeguard against ***564** conflicts of interest that might compromise the integrity or quality of representation of indigent parents in defending Title Nine and Title Thirty actions. Their arguments differ over what precisely comprises such conflicts of interest, and over when specifically measures must be taken to address actual or potential conflicts.

[5] Fundamentally, a lawyer owes his or her client the key responsibilities of confidentiality and loyalty. *In re Op. No. 653 of the Advisory Comm. on Prof'l Ethics*, 132 *N.J.* 124, 129, 623 *A.*2d 241 (1993). From that duty "issues the prohibition against representing clients with conflicting interests." *Ibid.* "The prohibition against lawyer conflicts of interest is intended to assure clients that a lawyer's work will be characterized by loyalty, vigor, and confidentiality." *Restatement (Third) of the Law Governing Lawyers* § 122 comment b (2000). The risk in representing clients with conflicting interests is that a lawyer's divided loyalty will result in less vigorous representation of both clients, and that the lawyer will use confidences of one client to benefit the other. *A. v. B.*, 158 *N.J.* 51, 57, 726 *A.*2d 924 (1999).

[6] The Rules of Professional Conduct, which address conflicts of interest, are indisputably applicable to lawyers assigned by the Office of Public Defender in either a civil or criminal context. *N.J.S.A.* 2A:158A–13; *Bell*, *supra*, 90 *N.J.* at 169, 447 *A.*2d 525; *State v. Noel*, 386 *N.J.Super.* 292, 297, 900 *A.*2d 845 (Law Div. 2005). Specifically at issue here is *RPC* 1.7(a), a provision "rooted in the concept that '[n]o man can serve two masters[.]' " *State ex rel. S.G.*, 175 *N.J.* 132, 139, 814 *A.*2d 612 (2003) (quoting Raymond L. Wise, *Legal Ethics* 272–73 (1970)). *RPC* 1.7(a) prescribes:

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer. [10]

10 Our Supreme Court largely adopted, with certain modifications, the ABA Model Rules of Professional Conduct in 1984 " 'to harmonize New Jersey's standards with the Model Rules and to provide clear, enforceable standards of behavior for lawyers.' " *In re Op. No. 17–2012 of the Advisory Comm. on Prof'l Ethics*, 220 *N.J.* 468, 478, 107 *A.*3d 666 (2014) (quoting *State v. Rue*, 175 *N.J.* 1, 14, 811 *A.*2d 425 (2002)). *Restatement (Third) of the Law Governing Lawyers*, *supra*, § 121, defines a conflict of interest as arising "if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person." *See In re Simon*, 206 *N.J.* 306, 316 n.5, 20 *A.*3d 421 (2011) (citing § 121 of the *Restatement*).

****832 *565** Hence, pursuant to *RPC* 1.7(a)(1), one lawyer cannot represent multiple clients with "directly" conflicting interests or interests that "materially limit" the lawyer's advocacy. A conflict of interest may thereby preclude a lawyer from representing co-defendants.

Under *RPC* 1.10, such a conflict is "imputed to all members of a law firm, disqualifying all if any one would be disqualified." *S.G.*, *supra*, 175 *N.J.* at 138, 814 *A.*2d 612. However, in New Jersey, public defenders are not viewed for imputation purposes in exactly the same manner as a law firm of attorneys. *See* Michels, *N.J. Attorney Ethics* § 24:2–2 at 600 (2015); *Bell*, *supra*, 90 *N.J.* at 171, 447 *A.*2d 525; *State v. Muniz*, 260 *N.J.Super.* 309, 314–15, 616 *A.*2d 926 (App. Div. 1992).

For the reasons we shall discuss, *infra*, the comparison with private law firms is not perfect. Our courts have addressed these conflict-of-interest concerns in the somewhat analogous context of the representation of co-defendants in a criminal case.

For instance, in *Bellucci*, *supra*, 81 *N.J.* at 545, 410 *A.*2d 666, the Supreme Court held that representation of multiple defendants in a criminal case by a single private attorney or attorneys from the same law firm is barred and implicates the defendants' Sixth Amendment rights to the effective assistance of counsel "unless defendants are fully advised of the potential problems involved." "[O]nce a potential conflict exists, prejudice will be presumed in the absence of waiver ... even if associated attorneys are involved instead of the same attorney." *Id.* at 543, 410 *A.*2d 666 (citing *State v. Land*, 73 *N.J.* 24, 30, 372 *A.*2d 297 (1977)). As the Court explained in *Bellucci*, prejudice is presumed when ***566** lawyers from the same law firm represent criminal co-defendants because: (1) firm members have access to confidential information; (2) the entire firm shares an economic interest in the clients of each attorney; and (3) public confidence in the integrity of the Bar would be eroded if conduct proscribed by one lawyer could be performed by another lawyer in the firm. *Bellucci*, *supra*, 81 *N.J.* at 541–42, 410 *A.*2d 666.

Multiple representation of defendants in criminal cases by public defenders from the same office does not, however, "in itself give rise to a presumption of prejudice," because the same degree of conflict risks pertaining to private law firms does not exist. *Bell*, *supra*, 90 *N.J.* at 171, 447 *A.*2d 525. The Court in *Bell* explained that the Public Defender differs from private law firms because public defenders have no financial incentive in retaining clients, and

> [a]s a consequence, the public does not lose confidence in a rule allowing attorneys in the same office to represent joint defendants, even though a single attorney from that office could not handle the cases. Because "the primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State," *Branti v. Finkel*, 445 *U.S.* 507, 519, 100 *S.Ct.* 1287, 1295, 63 *L.Ed.*2d 574, 584 (1980), we can expect the public defenders to withdraw from the case whenever joint representation may prejudice their clients. A per se rule requiring counsel from separate offices would therefore needlessly deprive many defendants ****833** of competent local public defenders.
>
> [*Id.* at 168–69, 447 *A.*2d 525 (emphasis added).]

The Court in *Bell* was "satisfied that although the subtle influences that arise from public defenders practicing side by side in the same office may present difficulties in maintaining absolute independence, 'the inbred adversary tendencies of [public defense] lawyers are sufficient protection.' " *Id.* at 169, 447 *A.*2d 525 (quoting *People v. Robinson*, 79 *Ill.*2d 147, 37 *Ill.Dec.* 267, 402 *N.E.*2d 157, 162 (1979) (quoting *ABA Standards, The Defense Function*, at 212–13 (1971))). [11]

11 *See State v. Reardon*, 337 *N.J.Super.* 324, 330, 766 *A.*2d 1203 (App. Div. 2001) (conflict of interest based on multiple representation by attorneys from same Public Defender's Office was not supported by record); *State v. Scherzer*, 301 *N.J.Super.* 363, 459–60, 694 *A.*2d 196 (App. Div.) (finding no per se conflict in co-defendants represented by public defenders), *certif. denied*, 151 *N.J.* 466, 700 *A.*2d 878 (1997); *Muniz*, *supra*, 260 *N.J.Super.* at 314–15, 616 *A.*2d 926 (holding public defender not disqualified from representing a defendant whose victim had been represented by another public defender in the same office on unrelated matter); *State v. Rogers*, 177 *N.J.Super.* 365, 367, 426 *A.*2d 1035 (App. Div. 1981) (holding joint representation of co-defendants by public defenders from same office did not constitute denial of defendants' constitutional rights to counsel), *appeal dismissed*, 90 *N.J.* 187, 447 *A.*2d 537 (1982).

***567** **[7]** For similar reasons, we conclude that there is no per se ethical prohibition upon staff attorneys from within the same OPR regional office representing different parents within the same case, provided that appropriate screening measures are scrupulously implemented. There is no need for us in these appeals to pass upon, item-by-item, the protective measures described in the certification of OPR–Central's managing attorney. We observe that they appear to be appropriately designed to safeguard client confidences, on the whole, and to promote zealous independent representation by the respective staff lawyers for each parent.

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We do add two important points of enhancement. First, the described protocol should be expanded to include measures to safeguard electronically stored confidential client information and attorney work product, in a manner conforming with the recently-enacted subsection (f) to *RPC* 1.6 (eff. September 1, 2016) and the associated Official Comment issued on August 1, 2016. In this digital information age, it is vital that screening measures not be confined to physical case files. The screening must include the protection of electronically stored data, which, for example, might contain confidential attorney notes on client confidences and strategies. [12]

12 At oral argument, we were assured by the OPR's appellate attorney that the OPR maintains separate log-in passwords for individual attorneys so that access to sensitive computer files is limited. Beyond this, we recommend that the OPR consider what additional measures are warranted in light of the new *RPC* subsection.

Second, we instruct the OPR to formalize its protocol with written guidelines that are distributed to all staff and managing ***568** attorneys, assuming they do not already exist. The OPR's appellate attorney represented that the procedures described in the certification of OPR–Central's managing attorney are followed in all of the OPR's other regional offices statewide. In any event, they ought to be promulgated internally in a more formal manner to assure compliance.

The harder questions presented here concern identifying under what circumstances the mere theoretical possibility for conflict advance to a tangible, case-specific concern that warrants scrutiny and potential ****834** corrective action. This potential was explained by the Court in a criminal context in *Bell*, *supra*, 90 *N.J.* at 171–73, 447 *A.*2d 525. In that case, the Court found no conflict where, near the end of the trial, a detective testified, without prior disclosure, that several hours before the burglary he had seen one of the co-defendants carrying a pair of pink pants; the pants were later found with the stolen items. *Id.* at 171–72, 447 *A.*2d 525. The trial judge overruled defense counsels' objection on the basis of surprise. *Id.* at 172, 447 *A.*2d 525.

Defense counsel in *Bell* did not raise the conflict issue until after cross-examination of the detective had been completed. *Ibid.* The conflict claim was based on the fact that co-defendant Bell alone, without co-defendant Peguese, was seen carrying the pants. *Ibid.* "No further explanation was given as to how a conflict had developed from this alleged dissimilarity." *Ibid.* The Court held:

> We fail to see the conflict. The confidentiality of the information was not at issue. The attorney defending Peguese was unfettered in his ability to respond to this new information. Bell could hardly seek to claim a tactical trial problem related to his co-defendant. Its real burden lay not in any conflict but in its surprise. As noted, the trial court permitted an adjournment to allow counsel to check out the incident but denied a mistrial because the nondisclosure was inadvertent. Two privately retained lawyers would have faced the same problems of trial tactics at that time.
>
> At no time, either at trial or on appeal, have defendants suggested what either trial attorney might have done differently once the conflict arose. Neither defendant took the stand. Peguese's attorney stated that this was his usual trial strategy. Contrast this with *Holloway v. Arkansas*, 435 *U.S.* 475, 98 *S.Ct.* 1173, 55 *L.Ed.*2d 426 (1978), where a trial court had ordered one public defender to represent three criminal defendants. He could cross-examine none although their ***569** interests differed. *Cf. Glasser v. United States*, 315 *U.S.* 60, 62 *S.Ct.* 457, 86 *L.Ed.* 680 (1942) (attorney representing two defendants voluntarily refrained from cross-examining prosecution witness because of feared adverse effect on one co-defendant).
>
> [*Bell*, *supra*, 90 *N.J.* at 172–73, 447 *A.*2d 525 (emphasis added).]

Thereafter, in a civil case, *In re Petition for Review of Opinion 552 of Advisory Committee on Professional Ethics*, 102 *N.J.* 194, 507 *A.*2d 233 (1986), the Court held that in a Section 1983 civil rights action, "a government attorney is precluded from representing co-defendant government officers or employees only where the allegations or the facts as developed present an actual conflict of interests or the realistic possibility of such a conflict." *Id.* at 208, 507 *A.*2d 233 (emphasis added). "If no such conflict is presented, then a government attorney may simultaneously represent as co-defendants governmental officers or employees and the government entity." *Ibid.* The Court cautioned, however,

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that "[t]his joint representation ... is conditioned upon the continuing obligation of the attorney to ascertain whether there exist potential conflicts of interests among the defendants, and if, under the circumstances, such potential conflicting interests emerge that outweigh the mutuality or similarity of the interests among defendants." *Id.* at 208–09, 507 *A.*2d 233 (emphasis added). If that materializes, "the attorney shall be obligated promptly to terminate such joint representation and initiate steps for the separate representation ****835** of the defendants." *Id.* at 209, 507 *A.*2d 233.

The Court explained in *Opinion 552* that joint representation of co-defendants "with potentially differing interests is permissible provided there is a substantial identity of interests between them in terms of defending the claims that have been brought against all defendants. The elements of mutuality must preponderate over the elements of incompatibility." *Id.* at 204, 507 *A.*2d 233. Critical to that determination is whether co-defendants "would present consistent defenses to the claims brought against them." *Id.* at 205, 507 *A.*2d 233. Thus, "representation of multiple parties may be permitted even if the positions may appear to be somewhat potentially conflicting." *Ibid.*

***570** Moreover, under the RPCs, representation of clients who are on the same side in the same civil litigation, unlike opposing clients with a direct conflict of interest, does not always present a potential for a conflict of interest, and is not automatically barred. Michels, *supra*, § 19:2–1(e) at 415. A disqualifying conflict may arise in representing co-defendants "by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." *Ibid.* (quoting *ABA Model Rules of Prof'l Conduct R.* 1.7 (2000)). *See, e.g., Wolpaw v. Gen. Acc. Ins. Co.*, 272 *N.J.Super.* 41, 45, 639 *A.*2d 338 (App. Div.) (requiring a liability insurer to retain separate counsel for co-defendants with conflicting interests), *certif. denied*, 137 *N.J.* 316, 645 *A.*2d 143 (1994).

In identifying conflicts, "[t]he critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." *ABA Model Rules of Prof'l Conduct*, *supra*, *R.* 1.7 comment 8.

These principles came into play in a Title Thirty case involving private representation in which a defendant father appealed from an order terminating his parental rights. *N.J. Div. of Youth & Family Servs. v. V.K.*, 236 *N.J.Super.* 243, 249, 565 *A.*2d 706 (App. Div. 1989), *certif. denied*, 121 *N.J.* 614, 583 *A.*2d 315, *cert. denied*, 495 *U.S.* 934, 110 *S.Ct.* 2178, 109 *L.Ed.*2d 507 (1990). The Division became aware of the case when the mother called a hotline because she felt "overwhelmed" with the care of her small children. *Id.* at 250, 565 *A.*2d 706. The parents had "a history of emotional instability and inability to control their behavior," and "would not agree to voluntary placement of the children." *Ibid.* The trial court heard "extensive testimony of physical and sexual abuse of the two children" by the co-defendant parents in the termination case. *Ibid.* The parents were also tried on criminal ***571** charges of child abuse and were acquitted. *Id.* at 251, 565 *A.*2d 706.

On appeal in *V.K.*, the father argued, among other things, that private trial counsel should not have represented both him and his wife "as such representation constituted a conflict of interest." *Id.* at 256–57, 565 *A.*2d 706. He claimed that there was " 'no question but that all of the family problems have their root' " in his wife's alleged conduct, and that the conflict was further heightened by the fact that he wanted the children back, while unbeknownst to him, his wife did not. *Id.* at 257, 565 *A.*2d 706. The Division's attorney had raised a possible conflict of interest concerning the co-defendants' private counsel representing the husband in the related criminal matter, but the husband ****836** and wife stated at the time that they did not believe there was a conflict of interest and wanted common trial counsel to represent them in the civil termination trial. *Ibid.*

We found no support in the record for the father's allegations of a conflict in *V.K.* Without citing to *Bell* or *RPC* 1.7, we held that "[o]ur careful review of the record reveals no conflict of interests between appellant and his wife that would result in prejudice to appellant. Their interests were not divergent; both sought to establish that [the Division's] claim that they had sexually abused their children was groundless." *Ibid.* (citing *United States ex rel. Smith v. New Jersey*, 341 *F.Supp.* 268, 271 (D.N.J. 1972) (where, by comparison, the co-defendants' interests were identical)).

More recently, in *New Jersey Division of Youth & Family Services v. N.S.*, 412 *N.J.Super.* 593, 639–40, 992 *A.*2d 20 (App. Div. 2010), we held that there was no per se

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"disqualifying conflict" when "one attorney assumes the tandem roles of counsel for the same defendant in both a Title Nine action and criminal proceedings arising from the abuse or neglect of a child." The concern in allowing dual representation in that case centered on the release of the Division's files under *Rule* 5:12–3. *Ibid.* We held that such dual representation by counsel may be allowed "subject to a protective order, which preserves the confidentiality of the ***572** source prompting the Division's protective services litigation." *Id.* at 640, 992 *A.*2d 20.

[8] These cases signify that a conflict of interest that warrants attention in this multiple representation context is one that goes beyond the mere fact that the clients have the status of co-defendants in the same Title Nine or Title Thirty case. The trigger for concern is instead whether there is a manifest particularized divergence between the clients' factual contentions or legal assertions, [13] or the remedies they wish their counsel to advocate. The latter concern implicates the standard of *RPC* 1.7, i.e., whether the circumstances show "direct" adversity between the clients, *see RPC* 1.7(a)(1), or, alternatively, whether there is a "significant risk" that the representation of one client will "materially limit" the advocacy of the other client represented by a staff attorney in the same OPR office. *See RPC* 1.7(a)(2).

13 We refrain from using in this context the term "positional conflict" that is used in some of the briefs on appeal. The use of that term here is misplaced. A "positional conflict" occurs when a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. *See ABA Model Rules of Prof'l Conduct R.* 1.7 comment 24 (2000); John S. Dzienkowski, *Positional Conflicts of Interest*, 71 *Tex. L. Rev.* 457, 460 (1993).

The American Bar Association has provided some guidance on this subject with specific reference to the representation of multiple parents in abuse and neglect cases by a single attorney. In particular, Standard 14 of the American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse & Neglect Cases (2006) cautions that counsel should "[b]e alert to and avoid potential conflicts of interest that would interfere with the competent representation of the client." (Emphasis added). By illustration, ABA Standard 14 states:

> Action: The parent's attorney must not represent both parents if their interests differ. The attorney should generally avoid representing both parents when there is even a potential for conflicts of interests. In situations involving allegations of domestic violence ****837** the [same] attorney should never represent both parents.
>
> Commentary: In most cases, attorneys should avoid representing both parents in an abuse or neglect case. In the rare case in which an attorney, after careful ***573** consideration of potential conflicts, may represent both parents, it should only be with their informed consent. Even in cases in which there is no apparent conflict at the beginning of the case, conflicts may arise as the case proceeds. If this occurs, the attorney might be required to withdraw from representing one or both parents. This could be difficult for the clients and delay the case. Other examples of potential conflicts of interest that the attorney should avoid include representing multiple fathers in the same case or representing parties in a separate case who have interests in the current case.
>
> In analyzing whether a conflict of interest exists, the attorney must consider "whether pursuing one client's objectives will prevent the lawyer from pursuing another client's objectives, and whether confidentiality may be compromised."
>
> [*Ibid.* (emphasis added) (citations omitted).]

The ABA Standard does not, however, address whether such conflict problems are ameliorated when different staff attorneys within the same public defender's office separately represent the co-defendant parents.

Another ABA publication has recommended that, when assigning counsel to defend parents in child welfare claims, attorneys should ascertain whether the parents have claims or contentions against each other, particularly domestic violence claims. If so, then the following questions may bear on the conflict analysis:

> • Does representing one client foreclose alternatives for the other?
>
> • Will confidential information from Client A be compromised in representing Client B?
>
> • Can the lawyer comply with the duties owed to each client, including the duty to pursue each client's position?

• Will the client reasonably fear that the lawyer will pursue that client's case less effectively out of deference to the other client?

• Can the lawyer ask for consent?

[Jennifer L. Renne, *Legal Ethics in Child Welfare Cases* 49 (Amer. Bar Ass'n. 2004).]

Although we do not necessarily adopt these five questions as comprehensive or dispositive, they do appear to be useful points of inquiry.

The Law Guardian rightly stresses in its arguments that the conflicts analysis in this child welfare context must be dynamic rather than static. As the Title Nine or Title Thirty litigation progresses, the contentions and positions of the parents can often diverge significantly, even if at the outset of the case they had ***574** been allied in asserting that no abuse or neglect occurred and that their children should be reunified with them. As time passes, the capacity of each individual parent to be a fit caretaker may improve or deteriorate, due to a multitude of factors such as physical or mental health, substance abuse or treatment, employment, housing, incarceration, domestic violence, parenting classes, social services, and so forth. Likewise, the needs of the children may evolve, and their relationships with each parent may grow or dwindle. The Division's factual contentions may focus more on one parent than another as the case progresses, with shifting degrees of culpability for past harm ****838** inflicted upon the children. Expert opinions about each parent may also diverge.

For these many reasons, an initial assessment at the outset of a case that there is no apparent conflict between the parents may become invalid with the passage of time. Hence, it is vital that the conflicts analysis be updated when such changes occur.

[9] To summarize, we conclude that there is no per se prohibition upon, or any presumptive disallowance of, different staff attorneys within the same OPR field office separately representing co-defendant parents in Title Nine and Title Thirty cases. Nevertheless, greater scrutiny of the potential for conflict is required when the parents' factual contentions, legal positions, or remedial preferences materially diverge. The propriety of continued dual representation of both clients out of the same OPR office must be reexamined when such divergence materializes. In particular, in accordance with *RPC* 1.7, the analysis must focus on whether the clients are now "directly" adverse to one another, or whether their respective staff attorneys are "materially limited" by the circumstances in being able to zealously advocate their interests.

With respect to whether disqualification of one or both staff attorneys is required, the OPR appellate attorney urges that we apply in this child welfare context the language of *Bell*, focusing on whether there is a "significant likelihood of prejudice" to the clients created by the potential conflict-of-interest. ***575** *Bell*, *supra*, 90 *N.J.* at 171, 447 *A.*2d 525. That standard for disqualification may well be sensibly extended from *Bell*, subject to the broader examination of this general issue by the Court itself or a designated rule-making committee.

However, for the reasons we explain more fully in Part III(C), *infra*, we disagree with appellants' counsel that a trial court has no role in inquiring into potential conflicts before that threshold of "substantial likelihood of prejudice" is attained. We also do not agree with appellants that the trial judge in this particular case acted prematurely and precipitously in reacting to the conflict potential once the co-defendant parents had advocated competing parenting plans. To the contrary, we agree with the Law Guardian and the amicus that the conflicts concerns may be an appropriate subject of judicial inquiry even before "a substantial likelihood of prejudice" materializes.

B.

Client Consultation and Potential Waiver of Conflicts

Having attempted to define what may constitute a disqualifying conflict in this Title Nine and Title Thirty setting, we turn our attention to the related important subject of client consultation and potential waiver. Here again, the test of the governing ethical rules is instructive.

RPC 1.7(b) provides that:

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity

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cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

(2) the lawyer reasonably believes that the lawyer will be able to provide ****839** competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

***576** (4) 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.

[*RPC* 1.7(b) (emphasis added).]

[10] Multiple representation of the co-defendants by OPR staff attorneys in the present case does not fall under any of the categorical exceptions to client waiver specified in *RPC* 1.7(b)(2),(3),(4). Defendants' trial attorneys have each certified that they are prepared to continue to provide their respective clients with diligent representation. *RPC* 1.7(b)(2). Representation of multiple defendants in a Title Nine case is not prohibited by law, *RPC* 1.7(b)(3), nor have the co-defendants in this case asserted claims against each other in this litigation. *RPC* 1.7(b)(4). *See* Michels, *supra*, § 26:4–1 at 635 ("a lawyer may not simultaneously represent adversaries in a litigation matter, even with the consent of both parties").

Nor does this matter entail the type of conflict of interest that our Court has otherwise recognized as "so egregious" that it "cannot be cured by consent." *In re Garber*, 95 *N.J.* 597, 613–14, 472 *A.*2d 566 (1984). The trial judge in this very case recognized that "it is highly unlikely in abuse and neglect cases an attorney could be involved in a conflict so serious in nature that it could not be waived."

By comparison, joint representation of co-defendants in a criminal case can be subject to waiver of conflicts in appropriate circumstances. *See* *Cottle*, *supra*, 194 *N.J.* at 473, 946 *A.*2d 550; *Bellucci*, *supra*, 81 *N.J.* at 544–45, 410 *A.*2d 666. *See also* Gary T. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 *Va. L. Rev.* 939, 956 (1978). That said, if a court finds an actual conflict of interest in a criminal case, "there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented." *Wheat v. United States*, 486 *U.S.* 153, 162, 108 *S.Ct.* 1692, 1698, 100 *L.Ed.*2d 140, 150 (1988). That residual judicial authority to disqualify counsel exists here, as well. *See*, *infra*, at Part III(C), concerning the court's role.

***577** **[11]** As the professional ethics rules and related authorities have instructed, in order for client consent to a waiver of attorney conflict to be effective, it must be informed and based on "full disclosure and consultation." *RPC* 1.7(b)(1). The consent can be reviewed by the trial court for fairness, reliability, and compliance with the Rules of Professional Conduct. *State v. Loyal*, 164 *N.J.* 418, 440, 753 *A.*2d 1073 (2000) (in which the Court disregarded a client's consent to a conflict in a criminal case, based on the need to maintain public confidence in the judicial system); *In re Dolan*, 76 *N.J.* 1, 13, 384 *A.*2d 1076 (1978) (reaffirming that a client's consent must be knowing, intelligent, and voluntary).

"Sophistication" of the client is also a factor to be considered in determining whether his or her consent was adequate. Advisory Comm. on Prof'l Ethics Op. 679 (July 17, 1995). *See* Marshall J. Berger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 *B.U. L. Rev.* 1115, 1130 (1982) (observing that legal aid clients traditionally lack experience in legal matters). This is of particular concern in the present context of the representation of indigent parents in Title Nine and Title Thirty matters. At times, such indigent parents have limited education, mental health issues, cognitive limitations, and other personal problems that can make it difficult for them to fully appreciate ****840** the concepts of an attorney's conflict-of-interest and the respective advantages and disadvantages of changing counsel.

The logistics for attorneys obtaining client waivers in business litigation or other civil matters can be more feasible than those confronting lawyers who represent indigent parents. Such parents at times may be harder to locate, meet with, and counsel than other clientele.

Another impediment to waiver in Title Nine and Title Thirty cases is the possibility—which can also arise in the context of indigent criminal defendants—that a defendant parent may refuse to waive a conflict in a deliberate, bad faith effort to stall the case by forcing the substitution of pool counsel or a staff attorney from a different OPR office. A transition to such substituted counsel ***578** will consume time, as the new attorney will need to review the case from scratch and prepare for future proceedings. This prospect of delay is particularly worrisome in light of the strong policies that favor achieving permanency of outcomes for children who remain in limbo

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while Title Nine and Title Thirty cases are litigated. *N.J. Div. of Youth & Family Servs. v. K.M.*, 136 *N.J.* 546, 558, 643 *A.*2d 987 (1994).

Consequently, the OPR and the courts have an important role in not allowing clients to withhold conflict waivers in bad faith as a stalling maneuver. In extreme instances where such bad faith exists, the client's demand for a new attorney may be rejected, despite his or her expressed dissatisfaction. Of course, if the assigned attorney is actually compromised and is thereby depriving the client of effective assistance, our appellate courts are empowered to set aside final judgments or fashion other appropriate relief on that basis. *See* *B.R.*, *supra*, 192 *N.J.* at 306, 929 *A.*2d 1034.

We emphasize the importance of client communication about conflict issues, particularly at the outset of the Title Nine or Title Thirty case when the OPR staff attorneys are first assigned to represent co-defendant parents. Each assigned OPR attorney must discuss with the client the arrangements for the office's representation, including the screening procedures that will be maintained to assure confidentiality and independent advocacy. On this point, we are troubled that there is no assertion in the certification by G.S.'s staff attorney (unlike that from K.S.'s attorney) that such discussions about conflict with that particular client took place at the outset of this case in 2015.[14]

14 This omission as to G.S., which was perhaps inadvertent, should be addressed on remand.

The discussion with the client and the client's assent to the arrangement should be documented in some uniform manner, either by a standard form or file memorandum that can be evidential if a future problem arises. In this regard, we do not ***579** decide in these appeals whether a written waiver by the client, as prescribed by *RPC* 1.7(b)(1), is the best means for substantiating the OPR client's acquiescence. We leave that question to further consideration by the OPR itself, or by a Supreme Court Committee if one is asked to examine these issues.

C.

The Court's Appropriate Role

The final major subject—which perhaps is the main reason why these particular interlocutory appeals were generated—is defining the court's appropriate role in reviewing and taking action on conflict issues ****841** implicated by the OPR's current post-reform practice of relying principally on staff attorneys rather than pool counsel to represent co-defendant parents. The OPR contends that the trial court should generally defer considerably to the OPR's professional judgment in dealing "in-house" with such conflicts concerns, and to refrain from conducting sua sponte inquiries into the subject. The Law Guardian and the amicus are more supportive of the court taking a proactive role, although they agree with the OPR that it is generally entitled to substantial deference in handling such conflicts problems.

It is well established that an evaluation of whether a conflict exists in multiple representation cases is initially best addressed by the attorney or attorneys in each case. *Opinion 552*, *supra*, 102 *N.J.* at 206, 507 *A.*2d 233; *Bell*, *supra*, 90 *N.J.* at 173–74, 447 *A.*2d 525. The attorney must be "satisfied based on objective reasonableness that there is no direct adversity between the defendants and that joint representation will not adversely affect the relationship of either class of defendants, *RPC* 1.7(a), nor materially limit his or her professional responsibilities towards any such client-defendant, *RPC* 1.7(b)." *Opinion 552*, *supra*, 102 *N.J.* at 206, 507 *A.*2d 233.

"Initially, it is the attorney's obligation when he first meets with his prospective clients to advise them of possible conflicts and of ***580** their constitutional rights." *Land*, *supra*, 73 *N.J.* at 32, 372 *A.*2d 297. In keeping with such principles, *Bell*, *supra*, 90 *N.J.* at 175, 447 *A.*2d 525, the Court institutionally "was satisfied that the New Jersey Public Defender is sensitive to the need to appoint outside counsel in cases of potential conflict."

The reasonableness of a lawyer's initial determination concerning a conflict of interest is subject to subsequent review by the court. *Restatement (Third) of the Law Governing Lawyers*, *supra*, § 121 comment g. "Although lawyers must engage in self-regulation as an initial matter, when the issue of conflict of interest arises in a disqualification context, the court has a supervisory role to play." Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, vol. 1 at 236.2 (2d ed. 1992).

[12] Here, the trial judge, who is charged with the duty to enforce the Rules of Professional Conduct under *Rule* 1:18, had the authority to both raise the potential conflict of interest,

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sua sponte, and to consider the issue at an evidentiary hearing, if the issue could not be resolved on the written record. *State v. Murray*, 162 *N.J.* 240, 250, 744 *A.*2d 131 (2000); *Dewey v. R.J. Reynolds Tobacco Co.*, 109 *N.J.* 201, 222, 536 *A.*2d 243 (1988); *Bell*, *supra*, 90 *N.J.* at 173, 447 *A.*2d 525. We reject appellants' contention that the trial judge here acted prematurely or precipitously in ordering a hearing on the subject and in attempting to ascertain whether sufficient informed client waivers had been procured.

Although we are not persuaded that the history of domestic violence of both parents with one another and their mutual substance abuse posed a sufficient conflict to require client waiver, when the defendants advocated conflicting parenting plans, that event tipped the balance enough to justify the court's sua sponte order for a hearing. The parenting plans were diametrically opposed: the mother's preferred plan was for her to maintain a caretaking role in a KLG with her relative, whereas the father's plan would instead have the children reunified solely with him.

***581** If, for example, an expert witness were called by the mother's attorney to ****842** opine on the merits of her plan, the father's attorney would have a strong tactical incentive to impeach that expert through cross-examination or by proffering a competing expert to criticize the mother's plan. That head-on divergence of positions triggered the need to be certain that the two staff lawyers involved were not impeded from advocating their clients' positions and that their clients understood the arrangements within the OPR office and assented to them. We do not go so far as to say that the trial court was required to investigate the conflicts problems, but the court certainly did not abuse its discretion in raising the issue and calling for a hearing with the clients present.

The OPR appellate attorney has expressed concerns about the potential for a conflicts hearing to reveal confidential or prejudicial information inadvertently if the clients testified at such a proceeding. Although those disclosure risks are not fanciful, we are confident that the trial court can structure the inquiries at such a proceeding in a manner that minimizes that risk. By comparison, our criminal courts similarly deal routinely with such disclosure risks at hearings when defendants wish to discharge their assigned counsel and represent themselves. *See, e.g.*, *State v. Crisafi*, 128 *N.J.* 499, 509, 608 *A.*2d 317 (1992) (regarding judicial inquiries at hearings to assure a criminal defendant is waiving his right to assigned counsel "knowingly and intelligently").

That said, we discern the need to modify the trial court's rulings here in one significant respect. Although we appreciate the judge's prophylactic good intentions in assuring that the representation of co-defendant parents in Title Nine and Title Thirty cases is not compromised in future cases, the judge erred by importing into this OPR context the specific procedures for criminal representation prescribed by the Court in *Bell* and further codified in *Rule* 3:8–2 [15] of our Rules of Criminal Practice.

15 *Rule* 3:8–2 provides as follows:

> No attorney or law firm shall be permitted to enter an appearance for or represent more than one defendant in a multi-defendant indictment without securing permission of the court.
> Such motion shall be made in the presence of the defendants sought to be represented as early as practicable in the proceedings but no later than the arraignment so as to avoid delay of the trial. For good cause shown, the court may allow the motion to be brought at any time.

***582** We recognize that *Bell* detailed, in essence, a hierarchy of preferred arrangements for the representation of indigent co-defendants in criminal cases: first, deeming the use of outside pool counsel as "the norm"; second, "as the next preferable course," assigning deputy public defenders from an adjoining county; and third, as a last resort, providing counsel by multiple staff attorneys within the same local office, with appropriate screening. *Bell*, *supra*, 90 *N.J.* at 174, 447 *A.*2d 525.

We decline to impose an identical hierarchy in this setting, an approach that the OPR, the Law Guardian, and the Bar Association all likewise disfavor for application to Title Nine and Title Thirty cases. As a policy matter, the Court's opinion in *Bell* in 1982 could not have anticipated the reforms of the child-welfare pool attorney system that were recommended in the early 2000s and which have finally been fully implemented. Those reforms conflict with *Bell*'s treatment of pool attorney representation in criminal cases as "the norm."

Second, there are qualitative differences between criminal litigation, which tends to ****843** focus retrospectively on evidence of past events bearing on whether a defendant

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committed an offense, and child welfare litigation. The latter tends to be more dynamic and forward-looking, and a setting in which the lawyer-client relationship can involve much broader concerns for trial advocacy than disproving past wrongdoing.

Third, the second-preferred option in *Bell* of using staff attorneys from adjoining counties is not readily feasible here since there are only eight regional OPR offices for the twenty-one ***583** counties. The defendant parents consequently may have transportation impediments in traveling to their attorneys' offices.

Lastly, as we have already mentioned, we respectfully suggest that a broader study of these issues by a Committee is preferable to the adoption in these appeals of the trial court's preemptive mandate for a demonstration of the need to use staff attorneys at the outset of every Title Nine and Title Thirty case. In that same vein, we defer to the Supreme Court on whether a Court Rule for Part V children-in-court cases akin to *Rule* 3:8–2 should be adopted.

For these reasons, we affirm, with this important modification, the trial court's orders calling for a hearing to explore whether the continued representation of G.S. and K.S. by separate staff attorneys within OPR–Central is appropriate under the *RPC*s; whether the respective clients have waived any applicable conflicts-of-interest with their informed consent; and whether sufficient screening measures within the OPR office are being maintained. The remand hearing on the conflicts issues shall be completed within sixty days. Thereafter, depending on the disposition of that hearing, the litigation may be concluded with appropriate representation.

IV.

As a final word, we wish to make clear that our discussion of these important representational issues should not be misread as a suggestion that any of the staff attorneys or their supervisors in this case have engaged in unethical or inappropriate conduct. Indeed, the advocacy of co-defendants' competing parenting plans by the two staff attorneys in OPR–Central provides a strong indication of their professional independence in serving their respective clients.

We likewise do not wish to suggest that the trial judge in this case was unjustified in wanting to delve into and resolve the conflicts issues before the case proceeded to a final hearing and final order. In fact, we commend the judge for conscientiously ***584** placing an important spotlight on these vital issues, and for his thoughtful written opinions addressing them.

We do not presume in this opinion to resolve all of the institutional issues that are posed here. We hope and respectfully suggest they will be examined more comprehensively and deeply by a designated Supreme Court Committee with, of course, the collective input and wisdom of the OPR, other stakeholders, and experts in the field.

V.

The trial court's rulings on the conflicts issues are accordingly affirmed, as modified. The matter is remanded for a hearing consistent with this opinion. We do not retain jurisdiction.

All Citations

447 N.J.Super. 539, 149 A.3d 816

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Declined to Extend by In re A.F., Ill.App. 2 Dist., May 7, 2012

409 Ill.App.3d 1020
Appellate Court of Illinois,
Second District.

In re QUADAYSHA C., Bobby P., Zarriea B., and Zyliss H., Minors (The People of the State of Illinois, Petitioner–Appellee, v. Nicole H., Respondent–Appellant).

No. 2–10–1105.
|
May 11, 2011.

Synopsis
Background: Termination proceedings were brought concerning five of mother's ten children, who had been in temporary custody and guardianship of Department of Children and Family Services. The Circuit Court, Winnebago County, Patrick L. Heaslip, J., terminated mother's parental rights to the five children. Mother appealed.

[Holding:] The Appellate Court, McLaren, J., held that representation of mother, guardian ad litem, and court appointed special advocate by the same attorney was ineffective assistance of counsel, requiring reversal.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (4)

[1] **Infants** Effectiveness of Counsel

Infants Counsel; arguments, conduct, and effectiveness

Representation of both mother and her minor children's guardian ad litem (GAL) and court appointed special advocate (CASA) by the same attorney in proceedings leading to termination of mother's parental rights to five of her ten children was a per se conflict of interest that amounted to ineffective assistance of counsel, requiring reversal of order terminating parental rights. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[2] **Infants** Effectiveness of Counsel

When the same attorney, during termination of parental rights proceedings, appears on behalf of both the respondent mother and the minor at different times, prejudice is presumed for purposes of ineffective assistance of counsel, and respondent need not demonstrate that the conflict contributed to the judgments entered against her. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[3] **Infants** Proceedings

Infants Eligibility and qualifications of counsel; conflicts of interest

Both the trial court and appointed counsel in juvenile proceedings must remain aware of the parties' representation so that the same attorney does not appear on behalf of both the respondent mother and the minor at different times; the termination of parental rights is a drastic measure, and the strict procedural requirements adopted to regulate such proceedings are paramount.

3 Cases that cite this headnote

[4] **Infants** Eligibility and qualifications of counsel; conflicts of interest

If properly followed, the per se conflict of interest rule in termination of parental rights proceedings prevents attorneys from being placed in the untenable and potentially unethical position of having their loyalties divided by representing multiple parties in the same proceedings. U.S.C.A. Const.Amend. 6.

7 Cases that cite this headnote

Attorneys and Law Firms

****712** Michael W. Raridon, Attorney at Law (Court-appointed), Rockford, for Nicole Harmon.

Joseph P. Bruscato, Winnebago County State's Attorney, Lawrence M. Bauer, Deputy Director, Scott Jacobson, State's Attorneys Appellate Prosecutor, for People.

*****920 *1021 OPINION**

Justice McLAREN delivered the judgment of the court, with opinion.

Respondent, Nicole H., appeals from the trial court's order terminating her parental rights to her minor children Quadaysha C., *****921 **713** Bobby P., Zarriea B., and Zyliss H. We reverse and remand.

This case involves 5 of Nicole's 10 children. Quadaysha, Bobby, Zarriea, Zyliss, and Jarrell H. (who is not a subject of this appeal) were under the guardianship of Nicole's sister, Denise. On September 7, 2007, the State filed petitions alleging that Quadaysha and Jarrell were abused and neglected minors because Denise inflicted excessive corporal punishment upon them. The State alleged that Bobby, Zarriea, and Zyliss were neglected because of the injurious environment caused by the excessive punishment. The court appointed a "Conflicts I" attorney for Nicole and appointed the office of the public defender as guardian *ad litem* (GAL) for the children. The children were placed in shelter care, and the Department of Children and Family Services (DCFS) was granted temporary custody and guardianship. On the next court date, the trial court appointed the Court Appointed Special Advocate (CASA) as GAL for the children and appointed the office of the public defender as counsel for CASA.

After a trial, which Nicole did not attend because she had just given birth to another child, the trial court found that Quadaysha and Jarrell were abused minors and that the other three children were neglected. The case was continued to January 9, 2008, for a dispositional hearing. Nicole failed to appear for the dispositional hearing. When the court asked everyone in the courtroom to identify himself or herself, Assistant Public Defender Kristin Anderson stated that she was "in for Rob Simmons on behalf of CASA." Both CASA and Catholic Charities filed reports with the court and included recommendations for the dispositions. Both recommended that guardianship ***1022** and custody be granted to DCFS; CASA also recommended, among other things, that Nicole have supervised visitation with her children and that she be ordered to submit to random drug and alcohol testing. Off-the-record conferences were held before the parties made their arguments and recommendations. The State asked the court to take judicial notice of the reports and recommended that custody and guardianship of the five children be granted to DCFS, with discretion to place them with a relative or in traditional foster care. All parties would be required to cooperate with the service plan. When asked by the court if she was "in agreement on behalf of the children," Anderson replied, "Yes." The court then granted custody and guardianship to DCFS, with discretion to place the children with a relative or in traditional foster care. The court entered "[g]eneral orders of cooperation." The court also ordered the parents [1] to remain drug- and alcohol-free, to submit to random drug drops and Breathalyzer tests, to submit to all requested assessments, and to follow up with any recommended treatments.

1 None of the childrens' fathers is involved in this appeal.

Beginning with the first permanency hearing, held on July 8, 2008, Anderson, who had appeared on behalf of CASA at the dispositional hearing, appeared on behalf of Nicole. This representation lasted through March 12, 2010, by which time the State had filed petitions to terminate Nicole's parental rights. Another appointed attorney appeared on Nicole's behalf during the hearing on the petitions. The trial court subsequently found Nicole to be an unfit parent and concluded that it was in the best interests of the children, except for Jarrell, that Nicole's parental rights be terminated. The permanency goal for Quadaysha, Bobby, Zarriea, and Zyliss was then changed to adoption. This appeal followed.

****714 ***922 [1]** Nicole first contends that she received inadequate assistance of counsel because Anderson represented both her and CASA, the children's GAL, during the course of these proceedings.

[2] [3] [4] This court has held that a *per se* conflict of interest requiring the reversal of a termination of parental rights arose when the same attorney appeared on behalf of both the respondent mother and the minor at different times during the same proceedings. See *In re Paul L.F.,* 408 Ill.App.3d 862, 349 Ill.Dec. 791, 947 N.E.2d 805 (2011);

In re Darius G., 406 Ill.App.3d 727, 346 Ill.Dec. 634, 941 N.E.2d 192 (2010). In *Darius G.,* we propounded a "clear rule" that "the *same* attorney may not during the proceedings appear on behalf of *different* clients." (Emphases in original.) *Darius G.,* 406 Ill.App.3d at 738, 346 Ill.Dec. 634, 941 N.E.2d 192. In such a situation, "[p]rejudice is presumed and respondent need not demonstrate that the conflict contributed to the judgments entered ***1023** against her." *Darius G.,* 406 Ill.App.3d at 739, 346 Ill.Dec. 634, 941 N.E.2d 192. The application of such a rule will "inform the trial court not to accept an appearance from an attorney who already, at some point during the proceedings, appeared on behalf of another party." *Darius G.,* 406 Ill.App.3d at 738, 346 Ill.Dec. 634, 941 N.E.2d 192. Both the trial court and appointed counsel in juvenile proceedings must remain aware of the parties' representation; the termination of parental rights is a drastic measure, and the strict procedural requirements adopted to regulate such proceedings "are paramount." *Darius G.,* 406 Ill.App.3d at 739, 346 Ill.Dec. 634, 941 N.E.2d 192. The *per se* rule, if properly followed, prevents attorneys from being placed in the untenable and potentially unethical position of having their loyalties divided by representing multiple parties in the same proceedings. *Paul L.F.,* 408 Ill.App.3d at 867, 349 Ill.Dec. 791, 947 N.E.2d 805.

The State argues that *Darius G.* also propounded an exception to the *per se* rule that should apply in this case if this court follows the precedents set in *Darius G.* and *Paul L.F.* In *Darius G.,* this court noted:

> "The State asserts that Herrmann [the conflicted attorney] 'stepped up' at these proceedings, suggesting that he merely appeared to assist his colleagues who could not be present. To the contrary, Herrmann appeared *on behalf* of his clients. He did not, for example, represent to the court that respondent's (or Darius's) counsel was unavailable and that a continuance was needed. This distinction is critical because, in the latter example, Herrmann would be representing his office or his colleague, not a client. Accordingly, there would be no conflict." (Emphasis in original.) *Darius G.,* 406 Ill.App.3d at 738 n. 4, 346 Ill.Dec. 634, 941 N.E.2d 192.

The State asserts that, because Anderson stated that she was "in for" her colleague, there was no *per se* conflict. We first note that, when Anderson was called upon to identify herself at the dispositional hearing, her full answer was, "Kristin Anderson in for Rob Simmons *on behalf of CASA.*" (Emphasis added.) Second, Anderson did not merely ask for a continuance because Simmons was unavailable, as in the hypothetical in *Darius G.;* she agreed "on behalf of the children" with the proposed dispositions of the abuse and neglect petitions. The State's attempt to apply the *Darius G.* "exception" is disingenuous, improperly applies the quoted text to the record in this case, and is not well taken.

The State further attempts to distinguish *Darius G.,* but to no avail. In *Darius G.,* the conflicted attorney appeared *****923** ****715** first on the respondent's behalf and later on the minor's behalf; this court noted:

> "We consider that off-the-record confidential communications between respondent and Herrmann likely occurred, that, in those ***1024** conversations, Herrmann likely learned information that he would not otherwise have learned, and that he might have, in his interactions with respondent, formed an opinion of her that he would not otherwise have had the opportunity to formulate. Certainly, it is reasonable to presume that, as respondent's counsel, Herrmann at a minimum interviewed her and reviewed her file. As such, if Herrmann concluded from this confidentially gleaned information that respondent was unfit or that her rights should be terminated, he was subsequently placed in the unique position of being able to *use* this information when he represented Darius. In contrast, if Herrmann represented only respondent, his obligation would have been to advocate only for respondent's interests. Thus, he would not have had the opportunity to use confidential information against respondent, his first client, even if unintentionally." (Emphasis in original.) *Darius G.,* 406 Ill.App.3d at 735–36, 346 Ill.Dec. 634, 941 N.E.2d 192.

The State notes that the record clearly reflects that Nicole was not present at the dispositional hearing and does not reflect whether the minors were present. According to the State, it is important that Anderson never saw Nicole, and presumably could not form an opinion of her, before she began to represent her. This argument misses the point; that portion of the *Darius G.* analysis was necessary because the attorney in that case represented the respondent *before* he represented the minor. Where, as here, the attorney represents

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the minor first, "possibly forming the opinion that it would be in the child's best interest for the respondent's rights to be terminated," the "conflict and resulting prejudice are clear." *Darius G.,* 406 Ill.App.3d at 735, 346 Ill.Dec. 634, 941 N.E.2d 192.

The State also points out that the "record reflects nothing less than zealous advocacy by Anderson on respondent's behalf." Again, this argument misses the point. The *per se* nature of the rule requires no proof of prejudice. *Darius G.,* 406 Ill.App.3d at 736, 346 Ill.Dec. 634, 941 N.E.2d 192; see also *In re S.G.,* 347 Ill.App.3d 476, 481, 283 Ill.Dec. 405, 807 N.E.2d 1246 (2004). "It is what is not in the record, or what is incapable of being reflected by the record, that prompts us to apply the *per se* conflict-of-interest rule in this case." *S.G.,* 347 Ill.App.3d at 481, 283 Ill.Dec. 405, 807 N.E.2d 1246. Thus, while the record may show numerous examples of Anderson's zealous and capable advocacy on Nicole's behalf, such examples do not overcome the presumed prejudice that arises from the divided loyalties entailed by representing more than one party in a proceeding, and they are not relevant to our analysis.

The State proposes an alternative process to follow when an attorney has represented multiple parties in a juvenile proceeding, including, at most, a "limited remand" with the burden on the respondent to show " 'whether the risk of a conflict colored the [parties'] representation.' " See ***1025** *People v. Hardin,* 217 Ill.2d 289, 302, 298 Ill.Dec. 770, 840 N.E.2d 1205 (2005). However, we have concluded that applying the *per se* rule is the simple way to resolve this recurring problem, and it should be followed. *Paul L.F.,* 408 Ill.App.3d at 868, 349 Ill.Dec. 791, 947 N.E.2d 805.

Therefore, we conclude that the clear rule of *Darius G.* applies here. Prejudice to Nicole is presumed in Anderson's prior representation of the children's GAL, and we reverse the judgments of the trial court finding her to be *****924** ****716** an unfit parent and terminating her parental rights and remand the cause for further proceedings.

Because of our disposition of this issue, we need not consider respondent's other contentions.

Reversed and remanded.

Justices HUTCHINSON and SCHOSTOK concurred in the judgment and opinion.

All Citations

409 Ill.App.3d 1020, 949 N.E.2d 712, 350 Ill.Dec. 920

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by In re N.P., Cal.App. 4 Dist., January 21, 2014

81 Cal.App.4th 415
Court of Appeal, Fourth District, Division 3, California.

In re CLIFFTON B., a Person Coming Under the Juvenile Court Law.
Orange County Social Services Agency, Plaintiff and Respondent,
v.
Carl B. et al, Defendants and Appellants.

No. G025902.
|
June 8, 2000.
|
Review Denied Aug. 30, 2000.

Synopsis
In parental termination proceedings in which reunification services had been terminated, the Superior Court, Orange County, No. J–435807, Kim Garlin Dunning, J., denied father's motion to reverse order ending reunification services and terminated parents' rights. Father, child and sibling appealed. The Court of Appeal, Sill, P.J., held that: (1) father failed to show sufficient progress in drug abuse treatment to establish changed circumstances entitling him to reinstatement of reunification services; (2) substantial evidence supported court's refusal to apply benefit exception, applicable when there is compelling reason for finding that termination would be detrimental to adoptable child; (3) court fulfilled any implied duty it had to consider sibling visitation; and (4) failure to appoint independent counsel for adoptable child and his brother in foster care was not harmless where it most likely affected amount of post-termination sibling visitation.

Affirmed in part, reversed and remanded in part.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] **Infants** Evidence

Parent who petitions court for a hearing to change, modify, or set aside a previous order in dependency proceeding bears the burden of showing both that a change of circumstance exists and that the proposed change is in the child's best interests. West's Ann.Cal.Welf. & Inst.Code § 388.

73 Cases that cite this headnote

[2] **Infants** Discretion of lower court

Order denying motion to change, modify, or set aside a previous order in dependency proceeding will not be set aside unless parent can show it was an abuse of discretion. West's Ann.Cal.Welf. & Inst.Code § 388.

26 Cases that cite this headnote

[3] **Infants** Necessity and entitlement

Infants Efforts and compliance by government or agency

Evidence that father had maintained his sobriety for seven months following isolated relapse after eight months of sobriety was insufficient to render refusal to reinstate reunification services an abuse of discretion, given evidence of father's long history of drug abuse and court's reluctance to believe that most recent relapse would be father's last. West's Ann.Cal.Welf. & Inst.Code § 388.

165 Cases that cite this headnote

[4] **Infants** Relationship or bond with child

Infants Rehabilitation and reunification efforts

Substantial evidence supported refusal of juvenile court to avoid termination of father's parental rights under benefit exception applicable when compelling circumstances demonstrate that termination would be detrimental to adoptable child, notwithstanding father's maintaining significant relationship with child during monitored visitation, child's living with father for six-month period when he was three and one half years old, father's maintenance of sobriety for seven-month period,

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and social worker's acknowledgment that terminating relationship would involve some risk to child, where child had adjusted well to foster family that was willing to adopt him and there was risk of drug relapse by father, who had long history of drug abuse. West's Ann.Cal.Welf. & Inst.Code § 366.26(c)(1)(A).

398 Cases that cite this headnote

[5] **Infants** Parents and relatives

In parental termination proceedings, father had no standing to raise issues regarding adoptable child's interest in continued visitation with second son who was in foster care.

8 Cases that cite this headnote

[6] **Infants** Issues and questions in lower court in general

Child's right to sibling visitation following termination of parental rights was not waived by failure to raise it in trial court where child and his elder brother contended that their counsel was ineffective in failing to raise sibling visitation issue. U.S.C.A. Const.Amend. 6.

49 Cases that cite this headnote

[7] **Infants** Sibling relationship; separation

Sibling interaction, and wishes of brother, were not factors in determining whether to terminate parental rights to adoptable child. West's Ann.Cal.Welf. & Inst.Code § 366.26.

4 Cases that cite this headnote

[8] **Infants** Determination and findings

Juvenile court fulfilled any implied duty it had to consider sibling visitation when, after terminating parental rights and referring child for adoption, it ordered sibling visitation with child's older brother, who was in group home and who had close relationship with child, for one hour twice a month.

94 Cases that cite this headnote

[9] **Infants** Counsel; arguments, conduct, and effectiveness

In proceedings that resulted in termination of parental rights to younger of two children, juvenile court's error in failing to appoint separate counsel for child and his older brother, who was in group home, was not harmless, even though younger child's permanent plan most probably would not have been changed, where brothers had interest in frequency and duration of their visits during the period of time between termination of parental rights and the final adoption order and amount of post-termination contact ordered most likely would not have been same had independent counsel been appointed.

70 Cases that cite this headnote

Attorneys and Law Firms

****779 *418** Richard Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant Carl B.

Stephanie M. Davis, under appointment by the Court of Appeal, Marina Del Rey, for Defendant and Appellant Deborah B.

Laurence M. Watson, County Counsel, and Rachel M. Bavis, Deputy County Counsel, for Plaintiff and Respondent.

Marsha Faith Levine, under appointment by the Court of Appeal, Irvine, for the Minor, Cliffton B.

Stephen S. Buckley, under appointment by the Court of Appeal, for the Minor, Zachary B.

OPINION

SILLS, P.J.

Carl and Deborah B. appeal from the order of the juvenile court terminating Carl's parental rights to their younger son, Cliffton. They claim Carl had made sufficient progress on his drug abuse treatment program by the time of

the permanency hearing to justify reversing the previous order ***419** terminating reunification services. (Welf. & Inst.Code, § 388.)[1] Alternatively, they claim Cliffton's relationship with his father is so beneficial that parental rights should not be terminated. (§ 366.26, subd. (c)(1)(A).)

1 All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Carl also claims the juvenile court should have made orders maintaining the relationship between Cliffton and his older brother, Zachary, who was placed in long-term foster care. Carl points out both ****780** children were represented by one attorney, who did not advocate for sibling visitation or represent Zachary's interests. Carl claims this was an impermissible conflict of interest and constitutes ineffective assistance of counsel, which he raises on Zachary's behalf. Cliffton does not dispute the termination of parental rights, but he too claims the juvenile court should have made orders preserving his relationship with Zachary and raises ineffective assistance of counsel. Zachary, for whom we appointed independent appellate counsel, joins in Cliffton's claims.

We affirm the termination of parental rights, find ineffective assistance of counsel, and remand the case for a new hearing on the sibling visitation order.

Cliffton and Zachary were taken from their parents and placed in Orangewood Children's Home (OCH) in August of 1997, when Cliffton was twenty months old and Zachary was 10 years old. This family had been troubled for years; both parents have a history of drug and alcohol abuse, and Deborah, the mother, was diagnosed as bipolar in 1992. Prior to the series of events that culminated in the children's detention, Orange County Social Services Agency (SSA) had received 16 child abuse reports involving this family, dating back to 1985.

In June 1997, Cliffton's four-month-old sibling, Rachel, died when Deborah accidentally rolled over onto the baby in her sleep, smothering her. The home was described by investigators as dirty and unkempt, and next to the bed were found a marijuana cigarette and a glass pipe in an ashtray. Apparently, a friend had given Deborah some drugs for a birthday present a few days before. A month later, an intoxicated Deborah was hospitalized under section 5150 after throwing things and breaking windows. She returned home, but was re-hospitalized a week later after she slapped Carl and yanked Cliffton out of the bathtub. After a few days, while Carl was napping, Cliffton wandered out of the house and was found clad only in a diaper in the middle of a busy intersection.

While the brothers were at OCH, they saw each other daily. Zachary told workers, “I need to see Cliffy every day,” and their mutual enjoyment of ***420** their time together was well documented. During visits with the parents, Cliffton would cry and pull away from his mother, but would sit on Zachary's lap or play quietly next to him. Zachary was described as “parentified,” in that he worried about the welfare of his parents and Cliffton.

SSA was not able to find a foster home for both brothers, so they were placed in separate homes, cutting down their visits to once a week. Zachary's social worker reported, “Zachary ... worries greatly about Cliffton and truly does need to see him each week. Cliffton is always happy to see his brother.”

Carl participated consistently in his reunification plan for twelve months. Although he attended parenting classes and drug abuse counseling, he tested positive for drug use several times until April 1998. After that he remained sober. At the twelve-month review hearing, the juvenile court adopted SSA's recommendation and released Cliffton to Carl for a 60–day trial visit, with the hope that Zachary would “follow soon after.”

The trial visit went well. Cliffton adjusted happily to Carl's home, attending day care with no problems while Carl worked. Carl continued to participate in counseling and twice-a-week drug testing, kept his home neat and properly stocked with food, and used appropriate parenting skills. Carl's counselor observed, “Dad does a good job with the kid....” In November 1998, the juvenile court ordered Cliffton placed with Carl under a plan of family maintenance; on February 4, 1999, Zachary began a 60–day trial visit in the home.

Unfortunately, Carl's recovery faltered. On February 16, SSA received test results from January 28 and February 1 indicating Carl had ingested methamphetamine on at least one occasion in late January. ****781** Carl admitted his “mistake,” explaining he was stressed because his mother had recently died and he was feeling financial pressures. The brothers were removed from his home and placed again in OCH. SSA filed a supplemental petition (§ 387), to which both parents entered no contest pleas. The juvenile court sustained the petition,

denied reunification services because the parents had already received the maximum amount, and set a permanency hearing for both children on August 23.

On the day of the permanency hearing, Carl filed a petition under section 388, requesting custody of Cliffton and Zachary or, alternatively, additional reunification services. Before the hearing began, however, all counsel stipulated to long-term foster care as a permanent plan for Zachary, and the petition was withdrawn as to him. Carl's declaration stated he had been ***421** employed full-time at the same job for a year and a half; he owned his home; he had been attending drug testing and counseling twice weekly, with no positive tests since his relapse in February; he attended Alcoholics Anonymous meetings weekly and had a sponsor who was also a co-worker. He enjoyed unmonitored visits with Zachary every Saturday for six hours, and he had a two-hour monitored visit with Cliffton every Friday.

When asked what circumstances had changed since April, Carl said, “Me. Myself.... I am much more able to deal with life on life's terms. I am learning how to face things from a proper perspective. I am not trying to run away from things. I am willing to face them head on.... [I]f I start to feel myself in a position where I feel weak and powerless then I have people to help support me ... and I feel like I am a different person.” Carl had been promised a promotion at his job within the next month, and he appreciated “the fact that they actually recognized me where I work as being more capable than just being a technician.... My life is really starting to be a lot better and ... there is much more that I find pleasing, exciting, motivating. It's a different world for me. Life is good. It's fun. It's enjoyable, you know, it's not just a pain.”

The court reluctantly denied Carl's petition because it found he had not met his burden of showing changed circumstances. “The problem is you had it all. We gave it all back to you. You had Cliffton home on a family maintenance plan. Zachary was returned to you on a 60–day trial visit. You have been going to the counseling. You have been doing that. You have regularly come to court for your appearances. We talk every time you come. You had this support system that you are relying on today. The support system has been in place for a long time now. [¶] The changed circumstances are really not so much change. It is just more of what you have been doing. [¶] At this point, based on several months of sobriety that you had and your long history of relapsing after periods of sobriety, I am not willing to put Cliffton through that again. I am not going to do that.”

The next day, the juvenile court conducted the permanency hearing. The social worker's report confirmed Carl's excellent progress. Carl's therapist reported, “Carl is doing fine. The father's ability to confront and deal with his problems has improved, since his relapse. He used to use denial.” Carl's group counselor labeled him “a jewel” and said his relapse was “not unusual.” Carl's current social worker, Elizabeth Mavity, testified her observation of a recent visit between Carl and Cliffton revealed “a very warm affectionate relationship between the father and the child. The father was willing to play with the child, to be with the child, to accommodate the child.” Cliffton's reaction to Carl was “equally warm and responsive.”

***422** Mavity was concerned, however, about the long substance abuse history. “While the father has done his services in an exceptional manner he did have the relapse behavior at the end of January and ****782** the beginning of February and that was close to the point where he was going to graduate from the program the first time and he's due to graduate again shortly.... [¶] I'm just concerned that that could happen again and I wouldn't want to see the child exposed to that kind of situation again.” She acknowledged terminating parental rights would have “some negative effect” on Cliffton, but the risk of being removed from his family again outweighed the value of the relationship.

During closing arguments, Rebecca Captain, who was appointed to represent both Cliffton and Zachary, made the following statement: “First I would like to mention that off the record there was a discussion about a conflict or a possible conflict that minor's counsel might have had regarding representing Zachary who's Cliffton's 12–year–old brother and representing Cliffton in regards to Zachary going into long-term foster care yesterday and the recommendations on Cliffton being to terminate his parental rights for adoption. [¶] Individually I don't have a problem with either one of the recommendation[s] but in representing both I was concerned about that and would just want to, knowing the court's position, just want to state on the record that I know that my client, Zachary, who is Cliffton's brother[,] is very opposed to his brother's parental rights being terminated today and any effect that would have on his continuing relationship with his brother or visitation or being able to live with him in the future. But with that said I'll move to closing.” [2]

2 On the previous day, Ms. Captain stated, “Rebecca Captain appearing on behalf of Cliffton B[.] on the

[section] 388 [petition] and also I just wanted the record to reflect that we have had an off the record discussion about a possible conflict and that the Court did not believe I had a conflict. Let the record reflect that." We have been advised that after the selection and implementation hearing, Ms. Captain declared a conflict, and on October 18, 1999, the juvenile court appointed separate counsel to represent the brothers.

The juvenile court found that although Carl had maintained regular visitation and contact with Cliffton, he had not demonstrated their relationship would be more beneficial to Cliffton than a permanent home with adoptive parents. "We're at a point now where this court needs to decide do we kind of let the status quo go on because is it more important that Cliffton see you on a regular basis or is it more important that he be able to start a life with a permanent family ... [¶] I have no doubt that both parents love Cliffton deeply but 'frequent loving contact' ... is not enough. [¶] Monitored visits once a week are not really enough.... [F]or six days and 22 hours out of every week, you weren't there as Cliffton's parents and you lost that role for almost—well, certainly a little more than a third of his life.... [¶] [F]or ***423** the past several months there hasn't really been a parent/child relationship and we weren't to the point in these proceedings where you had earned the opportunity to redevelop the parent/child relationship." Because Cliffton was clearly adoptable, the court terminated parental rights. [3]

3 SSA has filed two separate motions requesting us to take additional evidence of events subsequent to the date of the order on appeal. (Code Civ. Proc., § 909; Cal. Rules of Court, rule 23(b).) Cliffton's social worker declares that as of February 17, 2000, Cliffton and Zachary were scheduled to visit two times per month. Although Cliffton's foster mother was cooperative, there were logistic complications with Zachary's group home arrangement, and the boys actually visited approximately once a month. The boys both enjoy the visits. The foster mother informally agreed to facilitate visits once a month but said the family intends to move out of the area. She is willing to continue telephone and written contact.

Zachary's social worker declares that Carl tested positive for drugs in January 2000. Also, during the Christmas 1999 holiday period, Carl allowed Zachary to have unauthorized contact with the mother and left Zachary with "an unauthorized caretaker" (the maternal grandmother).

The proffered evidence does not affect our analysis; accordingly, we decline to grant the motions. (See *Tyrone v. Kelley* (1973) 9 Cal.3d 1, 13, 106 Cal.Rptr. 761, 507 P.2d 65; *Pack v. Vartanian* (1965) 232 Cal.App.2d 466, 476–477, 42 Cal.Rptr. 729.)

****783** The section 388 petition was properly denied

[1] **[2]** Carl claims the juvenile court should have granted his petition under section 388 because full compliance with his treatment plan, coupled with seven months of clean tests, are sufficient to change the circumstances of an isolated relapse. Section 388 allows an interested person to petition the juvenile court for a hearing to change, modify or set aside a previous order if the petitioner can establish changed circumstances and that the proposed order would be in the best interests of the child. The burden of proof is on the petitioner. (*In re Casey D.,* (1999), 70 Cal.App.4th 38, 82 Cal.Rptr.2d 426; *In re Richard C.* (1998) 68 Cal.App.4th 1191, 80 Cal.Rptr.2d 887.) The juvenile court here determined Carl had not met that burden. We will not reverse the juvenile court's determination unless Carl can show it was an abuse of discretion. (*In re Casey D., supra,* 70 Cal.App.4th at p. 47, 82 Cal.Rptr.2d 426.) He has not done so.

[3] Carl's seven months of sobriety since his relapse in January, while commendable, was nothing new. He had a history of drug use dating back to his college days, and since then his periods of sobriety alternated with recurring drug use. Even after the initial detention of his children, it took Carl six months before he was able to stay sober for any length of time. Then, after eight months of sobriety, he still succumbed to the temptation of illegal drugs. As Carl's counselor confirmed, relapses are all too common for a recovering drug user. "It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform." (*In re* ***424** *Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9, 65 Cal.Rptr.2d 495.) In Carl's case, 200 days was not enough to reassure the juvenile court that the most recent relapse would be his last.

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The refusal to apply the benefit exception is supported by substantial evidence

[4] Section 366.26, subdivision (c)(1)(A) authorizes the juvenile court to avoid the termination of parental rights to an adoptable child if it finds "a compelling reason for determining that termination would be detrimental to the child [because] ... [t]he parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." Carl points out there is no dispute that he maintained regular visitation and contact, and he claims his relationship with Cliffton is of the nature and quality contemplated by the statute.

Although the statute does not specify the type of relationship necessary to derail termination of parental rights, case law has required more than "frequent and loving contact." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418, 35 Cal.Rptr.2d 162.) "[T]he court balances the strength and quality of the natural parent-child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, 32 Cal.Rptr.2d 535.)

Carl argues his situation is markedly different from *Beatrice M.* and *Autumn H.* because in each of those cases the child was removed from the parent's custody at or near birth and never had the opportunity to develop a parental relationship. In contrast, Cliffton was almost two years old when he was detained and was returned to Carl's care for six months when he was three and a half years old. Carl testified, "We bonded when he was living at home with me for the six months.... We are still very close. He still calls me daddy. ****784** He comes and runs up and jumps in my arm asking me to hold him and we hug and kiss. We are very close." This "warm affectionate relationship" was confirmed by the social worker, and she acknowledged terminating the relationship would involve some risk to Cliffton.

Admittedly, this is a very close case. Considering the artificial restraints created by monitored weekly visitation, Carl has maintained a significant relationship with Cliffton. But *Autumn H.* teaches that the juvenile court ***425** must engage in a balancing test, juxtaposing the quality of the relationship and the detriment involved in terminating it against the potential benefit of an adoptive family. Cliffton is young and has adjusted well to his foster family, who are willing to adopt him. As the social worker commented, "If he has good structure and affection and he's safe and stable from an early age ... he's going to have a better chance in life than he's had so far." The juvenile court balanced this potential benefit against the risk that returning him to Carl would result in another disruption in his life, further eroding his ability to develop trust and to bond with others. Substantial evidence supports the court's conclusion, and we will not disturb it.

Sibling visitation

Carl, Cliffton and Zachary all claim the juvenile court should have made sibling visitation orders when terminating parental rights to Cliffton so the concededly close and valuable relationship between the two brothers would be maintained. They claim the juvenile court's adoption of SSA's recommendation for sibling visitation of one hour twice a month did not fulfill its statutory duty to consider a sibling plan.

[5] **[6]** Carl "has no standing to raise issues regarding [Cliffton and Zachary's] interest in each other, since his own rights have not been affected thereby." (*In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1806–1807, 54 Cal.Rptr.2d 560.) He is not aggrieved by the sibling visitation order, because his interest in these proceedings was to reunify with Cliffton. (*In re Nachelle S.* (1996) 41 Cal.App.4th 1557, 1562, 49 Cal.Rptr.2d 200.) We address the issue, however, because it is properly raised by Cliffton. [4]

4 SSA also claims the issue of sibling visitation was waived because no one raised it in the trial court. This may be true as to Carl. (*In re Anthony P.* (1995) 39 Cal.App.4th 635, 46 Cal.Rptr.2d 107.) But the waiver argument does not apply to the children, when the crux of their ineffective assistance of counsel argument is that their counsel failed to raise the sibling visitation issue.

The argument is based on section 16002, which became effective in 1994. That section expresses the intent of the Legislature to "ensure the preservation and strengthening of the child's family ties" by placing siblings removed from

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their homes together in foster care. To that end, the statute directs: “(b) The responsible local agency shall make a diligent effort in all out-of-home placements ... to maintain sibling togetherness and contact. When maintaining sibling togetherness is not possible, diligent effort shall be made, and a case plan prepared, to provide for ongoing and frequent interaction among siblings until family reunification is achieved, or, if parental rights are terminated, as part of developing the permanent plan for ***426** the child. If the court determines by a preponderance of the evidence that sibling interaction is detrimental to a child ..., the reasons for the determination shall be noted in the court order, and interaction shall be suspended.

“(c) When there has been a judicial suspension of sibling interaction, the reasons for the suspension shall be reviewed at each periodic review hearing pursuant to Section 366. When the court determines that sibling interaction can be safely resumed, that determination shall be noted in the court order and the case plan shall ****785** be revised to provide for sibling interaction.

“(d) If the case plan for the child has provisions for sibling interaction, the child, or his or her parent or legal guardian shall have the right to comment on those provisions.”

In 1998, the Legislature added subdivision (e) to section 16002, which pertains to sibling contact after parental rights are terminated: “If parental rights are terminated and the court orders a dependent child to be placed for adoption, the licensed county adoption agency or the State Department of Social Services shall take all of the following steps to facilitate ongoing sibling contact.... [¶] (1) Include in training provided to prospective adoptive parents information about the importance of sibling relationships to the adopted child and counseling on methods for maintaining sibling relationships. [¶] (2) Provide prospective adoptive parents with information about siblings or half-siblings of the child, except the address where the siblings or half-siblings of the children reside. However, this address may be disclosed by court order for good cause shown. [¶] (3) Encourage prospective adoptive parents to make a plan for facilitating postadoptive contact between the child who is the subject of a petition for adoption and any siblings or half-siblings of this child.” [5]

5 Section 16002, subdivision (e) was part of Assembly Bill 2196 (Assem. Bill No. 2196 (1998 Reg. Sess.) § 3.), which also included the addition of section 366.29 and the amendment of Family Code section 8715. These sections, dealing with the actual adoption hearing, require the adoption report to describe the efforts made under section 16002, subdivision (e) (Fam.Code, § 8715, subd. (b)), and provide that the court may include orders for postadoptive sibling contact in the final adoption order “[w]ith the consent of the adoptive parent or parents.” (§ 366.29, subd. (a).) The statute hastens to provide, however, that “[i]n no event shall the continuing validity of the adoption be contingent upon the postadoptive contact, nor shall the ability of the adoptive parent or parents and the child to change residence within or outside the state be impaired by the order for contact.”

[7] The parties suggest the juvenile court should have considered sibling interaction (and Zachary's interests) when deciding whether to terminate parental rights to Cliffton. They are wrong. The focus of the .26 hearing was to select the best permanent plan for *Cliffton;* Zachary's wishes ***427** are not a consideration. (*In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1188, 2 Cal.Rptr.2d 569.) The statutes and case law have made it clear that parental rights to an adoptable child should be terminated unless one of the statutory exceptions apply. As discussed *ante,* none applies here. And there is no separate exception for the child's general best interests. “[C]onsideration of the child's best interests is inherent in the legislative procedure for selecting and implementing a permanent plan. The four specified exceptions to adoption provided in section 366.26, subdivision (c)(1) are a final check to ensure termination of parental rights is in the best interests of the minor and is the least detrimental alternative. In this regard, the Legislature recognized that in certain specific instances, a plan other than adoption may be appropriate and less detrimental to the rights of both parent and child. [Citation.] Preserving the child's relationships with relatives other than a parent was not one of those instances.” (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1165, 53 Cal.Rptr.2d 93.)

After the permanent plan is selected, however, sibling contact remains an issue. SSA points out section 16002 is directed specifically to SSA and does not place any affirmative duty on the juvenile court unless sibling interaction is suspended. We acknowledge this literal reading of the statute; but the obvious intent of the Legislature would be eviscerated if the juvenile court were not required to *consider* sibling contact for a dependent child over whom it has jurisdiction. The

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statute contemplates that sibling contact will be an ongoing issue subject to periodic review throughout the dependency proceedings. ****786** When the juvenile court terminates parental rights and refers a child for adoption, it retains jurisdiction over that child until the adoption is effected. During that interim period, the juvenile court can make visitation orders as it sees fit, and sibling contact should remain the subject of its concern.

[8] Here, the juvenile court did consider sibling visitation. It adopted SSA's report, which recommended sibling visitation of two hours per month, "provided the prospective adoptive parents are willing to facilitate." Although this amount of visitation does not satisfy appellate counsel, it certainly fulfilled any implied duty the juvenile court has to consider sibling visitation.

Ineffective assistance of counsel for Cliffton and Zachary

Carl and the children contend [6] the children were provided ineffective assistance of counsel because their joint representation created a conflict of ***428** interest. There is no doubt that in this case there was an actual conflict of interest, as evidenced by Ms. Captain's comments and the juvenile court's subsequent actions. SSA concedes this point but asserts that failure to appoint independent counsel for children with diverse interests is subject to a harmless error analysis. (*In re Candida S.* (1992) 7 Cal.App.4th 1240, 1253, 9 Cal.Rptr.2d 521.) SSA argues that because independent counsel could not have affected the termination of parental rights to Cliffton, no error occurred.

6 SSA argues Carl has no standing to raise ineffective assistance of counsel on behalf of his children. But in *In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 283 Cal.Rptr. 483, the court held a "father has standing to assert his child's right to independent counsel, because independent representation of the children's interests impacts upon the father's interest in the parent-child relationship." (*Id.* at p. 565, 283 Cal.Rptr. 483.) This case was in the same procedural context (an appeal after termination of parental rights to some of the siblings) and the conflict of interest was the divergent interests in sibling visitation.

[9] But SSA misses the point. While the selection of Cliffton's permanent plan would probably have been the same, the post-termination contact between Cliffton and Zachary would most likely *not* have been the same. Both brothers have an interest in the frequency and duration of their visits during the period of time between termination of parental rights and the final adoption order. Furthermore, the maintenance and strengthening of the fraternal bond during these months may have a significant influence on the willingness of the prospective adoptive parents to continue sibling contact and on the visitation plan SSA is required to formulate in its final adoption report. Accordingly, we conclude the juvenile court erred in failing to appoint independent counsel for each brother.

Disposition

The order terminating parental rights to Cliffton is affirmed. The sibling visitation order is reversed and remanded to the juvenile court for a new hearing on post-termination sibling contact. At that hearing, each brother shall continue to be represented by independent counsel.

RYLAARSDAM, J., and BEDSWORTH, J., concur.

All Citations

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Wills, Trusts, and Estates Law

Below we have included an ethics opinion and a decision from New Jersey addressing joint representation in wills, trusts, and estates. The Ethics Opinion provides that where a married couple seeks joint representation to draft a will and one spouse privately discloses information to the attorney, the attorney should attempt to obtain permission from the disclosing client to share the information and explain the ramifications of any resulting denial, specifically that withdrawal from representation of both clients would be necessary. The New Jersey decision, A. v. B., 158 N.J. 51 (1999) addresses when the disclosed information is material to the representation.

NEW HAMPSHIRE BAR ASSOCIATION

Joint Representation of Clients in Estate Planning

Ethics Committee Advisory Opinion #2014-15/10

ABSTRACT: Joint representation of clients in estate planning requires informed consent and that the lawyer be from those clients and that the lawyer be on guard for impermissible conflicts arising during the course of the representation which require withdrawal.

ANNOTATIONS:

Joint representation of client requires informed consent.

A lawyer must keep both clients reasonably informed about the representation.

A lawyer must be vigilant to detect if a concurrent conflict of interest arises between the clients which requires the lawyer's withdrawal.

RULE REFERENCES:
Rule 1.0(e)
Rule 1.4
Rule 1.6
Rule 1.7
Rule 1.16

Issues Presented:
What ethical guidelines apply when an attorney is asked to represent two clients jointly in the preparation of estate planning documents? What type of informed consent, if any, must the lawyer obtain before proceeding?

Factual Background:
Lawyer is asked to meet with Mr. and Mrs. Smith, a married couple, to discuss preparing estate planning documents designed to manage the couple's healthcare and financial decisions. The couple has been married for thirty years and wants to create a joint revocable trust that benefits each other during life, followed by their mutual children after the second spouse's death. Mrs. Smith discloses during the initial meeting that, in addition to planning for shared marital assets, she wants to direct that a modest financial asset owned by her individually be made payable on her death to a charity. Nothing during the initial fact-gathering raises a concern for the lawyer that the interests of either spouse might limit the lawyer's ability to prepare a joint estate plan for the couple. At the end of the meeting, the couple wants to engage the lawyer to draft their documents.

Analysis:
One of the most challenging aspects of an estate planning practice involves the joint representation of clients. Before entering into joint representation, a lawyer must identify any

potential conflicts of interest between the clients, and clearly communicate the nature of the client relationship and the lawyer's ethical obligations. Evaluating potential conflicts of interests requires the lawyer to assess the type of representation, the confidentiality protection afforded to information received by the lawyer, the duty of loyalty owed to each client, and either the existence or risk of adversity between the clients or a material limitation on the lawyer's ability to represent all clients involved. The lawyer must ensure the clients understand the confidentiality considerations and the fact that potential conflicts may arise which could change the lawyer-client relationship. Furthermore, the lawyer should obtain the clients' informed consent to share information at the outset of the representation.

Joint Representation Requires Informed Consent. The New Hampshire Rules of Professional Conduct (referred to collectively as the "Rules" and individually as a "Rule") are written as pertaining to a single client and the only discussion of "common representation" is contained in the ABA comments to Rule 1.7 [*see* comments 29 – 33]. Embarking on the joint representation of two clients in connection with the same subject matter, especially in an estate planning context, requires a careful analysis of the lawyer's obligations to each client.

The majority of estate planning cases that involve document preparation for new clients with common objectives are free of conflicts of interest. In this factual scenario, there is nothing present that creates a direct adversity between the clients, nor any significant risk that the lawyer's representation of a client will be materially limited by the other client's objectives. Accordingly, at least at the outset, there is no Rule 1.7(a) concurrent conflict of interest of which the lawyer must be concerned, and no informed consent is required under Rule 1.7(b). However, informed consent should be obtained under Rule 1.6(a) before proceeding with the joint representation.

Preserving the confidentiality of client information is a cornerstone of the lawyer-client relationship. It is critical that clients involved in joint representation, such as spouses engaging one lawyer for estate planning, understand the lawyer's duties with respect to disclosure and non-disclosure of client-related information.

Since the lawyer must preserve the confidentiality of two clients involved in common representation, it is paramount that the lawyer's duties be communicated clearly to both clients. While neither the New Hampshire Supreme Court, nor this Committee, has opined on the issue of implied consent to share confidential information in a joint representation context, authority exists in other jurisdictions for the proposition that jointly represented clients do not impliedly relinquish the protections afforded under Rule 1.6 merely by agreeing to engage one lawyer to provide joint representation in the same matter. See Georgia Bar Assoc. Formal Advisory Op. 03-2 (Sept. 11, 2003); and Professional Ethics of the Florida Bar, Op. 95-4 (May 20, 1997). Accordingly, we conclude that until the New Hampshire Supreme Court opines on the issue, a lawyer should obtain the "informed consent" of both clients to allow all information protected under Rule 1.6(a) to be shared between the clients in order to continue with the joint representation of clients in estate planning matters.[1] While this Rule does not require the clients' informed consent to be "confirmed in writing," as does Rule 1.7(b), it certainly is recommended that written confirmation be obtained.

Given the importance of having all requisite information available to effectuate the clients' goals when preparing estate planning documents for a couple, a free flow of information among the lawyer and the clients is essential to ensure the clients' objectives are accomplished and the lawyer complies with the Rules throughout the course of the representation. The best practice for estate planning practitioners is to require clients to acknowledge, in writing, that information will be shared freely between the clients and lawyer during the joint representation. Such written acknowledgement establishes an unambiguous understanding, at the outset, as to whom disclosure of information is permitted and when.

Compliance with Rule 1.4. The lawyer must keep both clients reasonably informed about the representation under Rule 1.4(a)(3). A client's failure to authorize a free exchange of information with a joint client could place the lawyer in the difficult position of being in possession of information that cannot be used to further the other joint client's interests. In fact, the interplay between the need to obtain informed consent under Rule 1.6(a) and compliance with Rule 1.4 is emphasized in the ABA Comment [31] to Rule 1.7:

- As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4.

Rule 1.7 Concerns. It is not a per se conflict to represent two clients in connection with a joint estate plan. Concurrent representation of spouses in estate planning generally is non-adversarial and it often is more efficient and economical for spouses to engage one lawyer to assist with all aspects of a common plan. An alignment of interests may not always be the case. Sometimes joint clients involved in estate planning have common, but not identical goals, and it is important for the lawyer to determine at the outset of the representation whether (1) any such divergent goals exist and, if so (2) does the divergence rise to the level of a conflict of interest under Rule 1.7(a) that may or may not be waived through written informed consent under Rule 1.7(b).

A concurrent conflict of interest exists under Rule 1.7(a) if: "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." When evaluating at the outset whether joint representation of spouses in estate planning triggers a conflict under Rule 1.7(a), the lawyer must gauge the likelihood that the clients' interests currently differ or reasonably may diverge during the course of joint representation. If so, the lawyer must decide whether such difference or divergence materially would interfere with the lawyer's independent judgment and evaluation of estate planning alternatives that otherwise could be pursued for any one spouse. *See* Rule 1.7(a)(2) and ABA Model Rule Cmt. 8; *see also generally* N.H. Bar Assoc. Ethics Comm. Advisory Op. No. 1988-89/6 (Nov. 10, 1988) (advising a lawyer to weigh all factors carefully in order to determine whether a lawyer's independent professional judgment

would be compromised by the dual representation of a husband and wife who plan to live separately but not divorce).

When assessing joint representation of clients, the lawyer should keep in mind that the failure to identify a concurrent conflict of interest under Rule 1.7 or obtaining informed consent to what later is determined to be a non-waivable conflict, is evaluated under New Hampshire's "harsh reality" test. The harsh reality test is based on an objective standard under which the lawyer should inquire "whether, if a disinterested lawyer were to look back at the inception of the representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent." *See generally* N.H. Bar Assoc. Ethics Comm. Formal Op. No. 1988-89/24 (Aug. 10, 1989).

Additionally, the existence of a conflict of interest must be evaluated throughout the entire course of any joint representation. For example, informed consent would be needed if (1) the interests of the clients diverge, and they now want to benefit different people with different plans, (2) each client disagrees as to the other's choices of people to act in various fiduciary capacities, (3) the clients no longer wish to use a joint revocable trust or (4) one party asks for information to be withheld from the other party. When new facts develop, the lawyer must assess whether a conflict exists under Rule 1.7(a), whether lawyer may continue to represent both and, if so, whether a consent is required and able to be provided under Rule 1.7(b). Under the facts described in this opinion, there are no conflict of interest concerns that would trigger the need for a detailed analysis under Rule 1.7. The fact that Mrs. Smith wishes to make a separate, modest charitable bequest, which was disclosed to the other spouse raises no adversity of interests and does not constitute a planning nuance that would materially limit the lawyer's ability to represent Mr. Smith.

Potential Withdrawal from Joint Representation. If the jointly represented clients later develop significantly divergent goals or become estranged during the joint representation, then the lawyer may need to terminate the representation of both clients if effective informed consent is not feasible under Rule 1.7(b). Notwithstanding the clients' clear agreement to share all client-related information at the outset of the representation, if one spouse communicates information to the lawyer that is relevant to the overall estate plan, but refuses to allow the lawyer to disclose the information to the co-client, withdrawal will be mandated if the inability to disclose information would impair the lawyer's duties under Rule 1.4(a)(3) to the co-client (See ABA Comment [31] to Rule 1.7). If withdrawal from joint representation is deemed necessary, the withdrawal must be accomplished in a manner that protects both clients' interests, and the lawyer must continue to protect client-related information even after termination of the representation. Rule 1.16. Additionally, if one joint client asks that material information be withheld from the other client, the lawyer who reached an agreement with the clients, and obtained informed consent in conformance with Rule 1.6(a) to share information, has a duty to disclose the information to the fellow client.

Alternatively, if a lawyer fails to obtain the requisite informed consent under Rule 1.6(a) at the outset of the joint representation, the lawyer is prohibited from sharing any information that a

client has requested be kept secret. In this latter scenario, the lawyer should attempt to obtain permission from the disclosing client to share information and explain the ramification of any resulting denial, specifically that a withdrawal from representation of both clients would be necessary. If disclosure was not authorized at the outset of the joint representation, the lawyer also should consider whether a "noisy withdrawal" will be warranted, after evaluating the nature of the confidence and the harm that could result if the confidence is not disclosed.[2]

Best Practices for Obtaining Consent. It is essential that the lawyer develop procedures to ensure clear and unequivocal client expectations as to how the lawyer will handle joint representation of clients. Best practices dictate that, at minimum, several issues must be discussed at the initial meeting before the lawyer prepares documents for a joint estate plan, including the following: (1) there will be full disclosure of all client-related information between the lawyer and the joint clients; (2) no secrets shall be kept by the lawyer from either client; (3) throughout the course of the joint representation, both clients must concur with the overall planning goals, despite the fact that each could, with consent of the other and consistent with the Rules, deviate from original objectives; (4) should differences arise between the clients' objectives that reasonably cannot be resolved, the lawyer may be forced to withdraw from representing both clients; and (5) each client has the right to request a copy of the client file following termination of the joint representation. Although not mandated by the Rules, from a risk management standpoint and to ensure client expectations are clear, the best practice is to obtain the clients' informed written consent to the disclosure of all information to both clients involved in the joint estate plan and what will be communicated by the lawyer between the joint clients.

ENDNOTES:

[1] To obtain "informed consent," the lawyer must share "adequate information and explanation" with both clients of the "material risks of and reasonably available alternatives to the proposed course of conduct." *See* Rule 1.0(e).

[2] For example, a "noisy withdrawal" might involve the attorney disclosing to the wife that information was disclosed by the husband with specific instructions not to share it with the wife, and the attorney is thereby forced to withdraw from representing either husband or wife. See for example *A v. B*, 726 A.2d 924, 158 N.J. 51 (1999).

SUBJECTS:

Joint Representation

Estate Planning

Concurrent conflicts of interest.

- **By the NHBA Ethics Committee**
  This opinion was submitted for publication to the NHBA Board of Governors at its June 18, 2015 meeting.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Cortland Associates, LP v. Cortland Neighborhood Condominium Ass'n, N.J.Super.Ch., June 10, 2005

158 N.J. 51
Supreme Court of New Jersey.

A., individually and on behalf
of minor child, C., Plaintiff,
v.
B., Defendant and Third–Party Plaintiff–Respondent,
v.
Hill Wallack, Attorneys at Law,
Third–Party Defendant–Appellant.

Submitted April 1, 1999.
|
Decided April 15, 1999.

Synopsis
Law firm that jointly represented husband and wife in planning their estates sought to disclose existence of husband's illegitimate child to wife. Husband joined law firm as third-party defendant in paternity action to prevent firm from making the disclosure. The Superior Court, Family Part, denied husband's requested restraints, but the Superior Court, Appellate Division, reversed and remanded for imposition of preliminary restraints. Law firm appealed. The Supreme Court, Pollock, J., held that law firm was entitled to disclose existence, but not name, of husband's illegitimate child.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (5)

[1] **Attorneys and Legal Services** Privileges, duties, and liabilities of attorneys in general

The principle of attorney-client confidentiality imposes a sacred trust on the attorney not to disclose the client's confidential communication.

[2] **Attorneys and Legal Services** Wills, trusts, and estates

Possible inheritance of wife's estate by husband's illegitimate child did not constitute a “substantial injury to the financial interest or property of another,” so as to require law firm that was jointly representing husband and wife in planning their estates to disclose existence of illegitimate child to wife. RPC 1.6(b).

1 Case that cites this headnote

[3] **Attorneys and Legal Services** Wills, trusts, and estates

Attorneys and Legal Services Exceptions; permitted or required disclosures

Law firm that was jointly representing husband and wife in planning their estates was entitled to disclose to wife the existence of husband's illegitimate child; husband's deliberate omission of the existence of an illegitimate child when discussing his estate with law firm constituted a fraud on wife, which law firm was allowed to rectify under the rules of professional conduct, law firm learned about child from mother and not in confidential communication from husband, and husband and wife had signed agreement suggesting their intent to share all information with each other. RPC 1.6(c).

1 Case that cites this headnote

[4] **Attorneys and Legal Services** Confidentiality

Attorneys and Legal Services Concurrent clients

An attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information.

2 Cases that cite this headnote

[5] **Records** Particular Subjects of Records Concerning Individuals

Estate planning law firm's disclosure of the existence, but not the identity, of husband's illegitimate child would not violate statute governing confidentiality of paternity proceedings. N.J.S.A. 9:17–42.

Attorneys and Law Firms

****924** ***52** John J. Gibbons, Newark, submitted a brief on behalf of third-party defendant-appellant (Gibbons, Del Deo, Dolan, Griffinger & Vecchione, attorneys).

Mark Z. Segal and Neil M. Day, Lawrenceville, submitted a brief on behalf of defendant and third-party plaintiff-respondent (Fox, Rothschild, O'Brien & Frankel, attorneys; Kenneth H. Mack, of counsel).

Opinion

The opinion of the Court was delivered by

POLLOCK, J.

This appeal presents the issue whether a law firm may disclose confidential information of one co-client to another co-client. Specifically, in this paternity action, the mother's former law firm, which contemporaneously represented the father and his wife in planning their estates, seeks to disclose to the wife the existence of the father's illegitimate child.

***53** A law firm, Hill Wallack (described variously as "the law firm" or "the firm"), jointly represented the husband and wife in drafting wills in which they devised their respective ****925** estates to each other. The devises created the possibility that the other spouse's issue, whether legitimate or illegitimate, ultimately would acquire the decedent's property.

Unbeknown to Hill Wallack and the wife, the husband recently had fathered an illegitimate child. Before the execution of the wills, the child's mother retained Hill Wallack to institute this paternity action against the husband. Because of a clerical error, the firm's computer check did not reveal the conflict of interest inherent in its representation of the mother against the husband. On learning of the conflict, the firm withdrew from representation of the mother in the paternity action. Now, the firm wishes to disclose to the wife the fact that the husband has an illegitimate child. To prevent Hill Wallack from making that disclosure, the husband joined the firm as a third-party defendant in the paternity action.

In the Family Part, the husband, represented by new counsel, Fox, Rothschild, O'Brien & Frankel ("Fox Rothschild"), requested restraints against Hill Wallack to prevent the firm from disclosing to his wife the existence of the child. The Family Part denied the requested restraints. The Appellate Division reversed and remanded "for the entry of an order imposing preliminary restraints and for further consideration."

Hill Wallack then filed motions in this Court seeking leave to appeal, to present oral argument, and to accelerate the appeal. Pursuant to *Rule* 2:8–3(a) [1], we grant the motion for leave to ***54** appeal, accelerate the appeal, reverse the judgment of the Appellate Division and remand the matter to the Family Part. Hill Wallack's motion for oral argument is denied.

I.

Although the record is both informal and attenuated, the parties agree substantially on the relevant facts. Because the Family Part has sealed the record, we refer to the parties without identifying them by their proper names. So viewed, the record supports the following factual statement.

In October 1997, the husband and wife retained Hill Wallack, a firm of approximately sixty lawyers, to assist them with planning their estates. On the commencement of the joint representation, the husband and wife each signed a letter captioned "Waiver of Conflict of Interest." In explaining the possible conflicts of interest, the letter recited that the effect of a testamentary transfer by one spouse to the other would permit the transferee to dispose of the property as he or she desired. The firm's letter also explained that information provided by one spouse could become available to the other. Although the letter did not contain an express waiver of the confidentiality of any such information, each spouse consented to and waived any conflicts arising from the firm's joint representation.

Unfortunately, the clerk who opened the firm's estate planning file misspelled the clients' surname. The misspelled name was entered in the computer program that the firm uses to discover possible conflicts of interest. The firm then prepared reciprocal wills and related documents with the names of the husband and wife correctly spelled.

***55** In January 1998, before the husband and wife executed the estate planning documents, the mother coincidentally retained Hill Wallack to pursue a paternity claim against the husband. This time, when making its computer search for conflicts of interest, Hill Wallack spelled the husband's name

correctly. Accordingly, the computer search did not reveal the existence of the firm's joint representation of the husband and wife. As a result, the estate planning department did ****926** not know that the family law department had instituted a paternity action for the mother. Similarly, the family law department did not know that the estate planning department was preparing estate plans for the husband and wife.

A lawyer from the firm's family law department wrote to the husband about the mother's paternity claim. The husband neither objected to the firm's representation of the mother nor alerted the firm to the conflict of interest. Instead, he retained Fox Rothschild to represent him in the paternity action. After initially denying paternity, he agreed to voluntary DNA testing, which revealed that he is the father. Negotiations over child support failed, and the mother instituted the present action.

After the mother filed the paternity action, the husband and wife executed their wills at the Hill Wallack office. The parties agree that in their wills, the husband and wife leave their respective residuary estates to each other. If the other spouse does not survive, the contingent beneficiaries are the testator's issue. The wife's will leaves her residuary estate to her husband, creating the possibility that her property ultimately may pass to his issue. Under *N.J.S.A.* 3B:1–2;:3–48, the term "issue" includes both legitimate and illegitimate children. When the wife executed her will, therefore, she did not know that the husband's illegitimate child ultimately may inherit her property.

The conflict of interest surfaced when Fox Rothschild, in response to Hill Wallack's request for disclosure of the husband's assets, informed the firm that it already possessed the requested information. Hill Wallack promptly informed the mother that it ***56** unknowingly was representing both the husband and the wife in an unrelated matter.

Hill Wallack immediately withdrew from representing the mother in the paternity action. It also instructed the estate planning department not to disclose any information about the husband's assets to the member of the firm who had been representing the mother. The firm then wrote to the husband stating that it believed it had an ethical obligation to disclose to the wife the existence, but not the identity, of his illegitimate child. Additionally, the firm stated that it was obligated to inform the wife "that her current estate plan may devise a portion of her assets through her spouse to that child." The firm suggested that the husband so inform his wife and stated that if he did not do so, it would. Because of the restraints imposed by the Appellate Division, however, the firm has not disclosed the information to the wife.

II.

This appeal concerns the conflict between two fundamental obligations of lawyers: the duty of confidentiality, *Rules of Professional Conduct* (*RPC*) 1.6(a), and the duty to inform clients of material facts, *RPC* 1.4(b). The conflict arises from a law firm's joint representation of two clients whose interests initially were, but no longer are, compatible.

[1] Crucial to the attorney-client relationship is the attorney's obligation not to reveal confidential information learned in the course of representation. Thus, *RPC* 1.6(a) states that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." Generally, "the principle of attorney-client confidentiality imposes a sacred trust on the attorney not to disclose the client's confidential communication." *State v. Land,* 73 *N.J.* 24, 30, 372 *A.*2d 297 (1977).

[2] ***57** A lawyer's obligation to communicate to one client all information needed to make an informed decision qualifies the firm's duty to maintain the confidentiality of a co-client's information. *RPC* 1.4(b), which reflects a lawyer's duty to keep clients informed, requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *See also* *Gautam v. De Luca,* 215 *N.J.Super.* 388, 397, 521 *A.*2d 1343 (App.Div.1987) (stating that attorney has continuing duty "to inform his client promptly of any information important to him"); *Passanante v. Yormark,* 138 *N.J.Super.* 233, 238, 350 *A.*2d 497 (App.Div.1975) ("[An attorney's] duty includes the obligation ****927** of informing his client promptly of any known information important to him."). In limited situations, moreover, an attorney is permitted or required to disclose confidential information. Hill Wallack argues that *RPC* 1.6 mandates, or at least permits, the firm to disclose to the wife the existence of the husband's illegitimate child. *RPC* 1.6(b) requires that a lawyer disclose "information relating to representation of a client" to the proper authorities if the lawyer "reasonably believes" that such disclosure is necessary to prevent the

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client "from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another." *RPC* 1.6(b)(1). Despite Hill Wallack's claim that *RPC* 1.6(b) applies, the facts do not justify mandatory disclosure. The possible inheritance of the wife's estate by the husband's illegitimate child is too remote to constitute "substantial injury to the financial interest or property of another" within the meaning of *RPC* 1.6(b).

[3] By comparison, in limited circumstances *RPC* 1.6(c) permits a lawyer to disclose a confidential communication. *RPC* 1.6(c) permits, but does not require, a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary "to rectify the consequences of a client's criminal, illegal or fraudulent act in furtherance of which the lawyer's services had ***58** been used." *RPC* 1.6(c)(1). Although *RPC* 1.6(c) does not define a "fraudulent act," the term takes on meaning from our construction of the word "fraud," found in the analogous "crime or fraud" exception to the attorney-client privilege. *See N.J.R.E.* 504(2)(a) (excepting from attorney-client privilege "a communication in the course of legal service sought or obtained in the aid of the commission of a crime or fraud"); Kevin H. Michels, *New Jersey Attorney Ethics* § 15:3–3 at 280 (1998) ("While the RPCs no longer incorporate the attorney-client privilege into the definition of confidential information, prior constructions of the fraud exception may be relevant in interpreting the exceptions to confidentiality contained in *RPC* 1.6(b) and (c) ....") (internal citation omitted). When construing the "crime or fraud" exception to the attorney-client privilege, "our courts have generally given the term 'fraud' an expansive reading." *Fellerman v. Bradley,* 99 *N.J.* 493, 503–04, 493 *A.*2d 1239 (1985).

We likewise construe broadly the term "fraudulent act" within the meaning of *RPC* 1.6(c). So construed, the husband's deliberate omission of the existence of his illegitimate child constitutes a fraud on his wife. When discussing their respective estates with the firm, the husband and wife reasonably could expect that each would disclose information material to the distribution of their estates, including the existence of children who are contingent residuary beneficiaries. The husband breached that duty. Under the reciprocal wills, the existence of the husband's illegitimate child could affect the distribution of the wife's estate, if she predeceased him. Additionally, the husband's child support payments and other financial responsibilities owed to the illegitimate child could deplete that part of his estate that otherwise would pass to his wife.

From another perspective, it would be "fundamentally unfair" for the husband to reap the "joint planning advantages of access to information and certainty of outcome," while denying those same advantages to his wife. Teresa S. Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a* ***59** *Unilateral Confidence,* 28 *Real Prop. Prob. Tr. J.* 683, 743 (1994). In effect, the husband has used the law firm's services to defraud his wife in the preparation of her estate.

The New Jersey *RPC*s are based substantially on the *American Bar Association Model Rules of Professional Conduct* ("the *Model Rules* "). *RPC* 1.6, however, exceeds the *Model Rules* in authorizing the disclosure of confidential information. A brief review of the history of the *Model Rules* and of *RPC* 1.6 confirms New Jersey's more expansive commitment to the disclosure of confidential client information.

In 1977, the American Bar Association appointed a Commission on Evaluation of Professional Standards, chaired by the late Robert J. Kutak. The Commission, generally known as the "Kutak Commission," originally ****928** proposed a rule that permitted a lawyer to disclose confidential information in circumstances comparable to those permitted by *RPC* 1.6. The House of Delegates of the American Bar Association, however, rejected the Kutak Commission's recommendation. As adopted by the American Bar Association, *Model Rule* 1.6(b) permits a lawyer to reveal confidential information only "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." Unlike *RPC* 1.6, *Model Rule* 1.6 does not except information relating to the commission of a fraudulent act or that relating to a client's act that is likely to result in substantial financial injury. In no situation, moreover, does *Model Rule* 1.6 require disclosure. Thus, the *Model Rules* provide for narrower disclosure than that authorized by *RPC* 1.6.

In 1982, this Court appointed a committee to consider the *Model Rules.* The committee, chaired by the Honorable Dickinson R. Debevoise, became known as the "Debevoise Committee." It determined that the original provisions proposed by the Kutak Commission more closely reflected the existing ethics rules in New Jersey. Thus, the Committee

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concluded that *Model Rule* 1.6 would “narrow radically the circumstances in which New Jersey ***60** attorneys either may or must disclose the information of their clients' criminal or fraudulent behavior.” *Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct* (1983), *reprinted in* Michels, *supra,* Appendix D at 1043. When adopting the *RPC* s, this Court substantially followed the recommendation of the Debevoise Committee. Described as an “openly-radical experiment,” Geoffrey C. Hazard, Jr. & W. William Hodes, 2 *The Law of Lawyering* § AP4:104 (1998), *RPC* 1.6 “contained the most far-reaching disclosure requirements of any attorney code of conduct in the country,” Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others,* 47 *Rutgers L.Rev.* 81, 92 (1994).

Under *RPC* 1.6, the facts support disclosure to the wife. The law firm did not learn of the husband's illegitimate child in a confidential communication from him. Indeed, he concealed that information from both his wife and the firm. The law firm learned about the husband's child through its representation of the mother in her paternity action against the husband. Accordingly, the husband's expectation of nondisclosure of the information may be less than if he had communicated the information to the firm in confidence.

In addition, the husband and wife signed letters captioned “Waiver of Conflict of Interest.” These letters acknowledge that information provided by one client could become available to the other. The letters, however, stop short of explicitly authorizing the firm to disclose one spouse's confidential information to the other. Even in the absence of any such explicit authorization, the spirit of the letters supports the firm's decision to disclose to the wife the existence of the husband's illegitimate child.

Neither our research nor that of counsel has revealed a dispositive judicial decision from this or any other jurisdiction on the issue of disclosure of confidential information about one client to a co-client. Persuasive secondary authority, however, supports the ***61** conclusion that the firm may disclose to the wife the existence of the husband's child.

The forthcoming *Restatement (Third) of The Law Governing Lawyers* § 112 comment *l* (Proposed Final Draft No. 1, 1996) (“the *Restatement* ”) suggests, for example, that if the attorney and the co-clients have reached a prior, explicit agreement concerning the sharing of confidential information, that agreement controls whether the attorney should disclose the confidential information of one co-client to another. *Ibid.* (“Co-clients ... may explicitly agree to share information” and “can also explicitly agree that the lawyer is not to share certain information ... with one or more other co-clients. A lawyer must honor such agreements.”); *see also Report of the ABA Special Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife,* 28 *Real* ****929** *Prop. Prob. Tr. J.* 765, 787 (1994) (“Although legally and ethically there is no need for a prior discussion and agreement with the couple about the mode of representation, discussion and agreement are the better practice. The agreement may cover ... the duty to keep or disclose confidences.”); American College of Trust and Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct* 65–66 (2d ed. 1995) (“When the lawyer is first consulted by the multiple potential clients the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them.”).

[4] As the preceding authorities suggest, an attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a “disclosure agreement,” the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior ***62** agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation.

In the absence of an agreement to share confidential information with co-clients, the *Restatement* reposes the resolution of the lawyer's competing duties within the lawyer's discretion:

> [T]he lawyer, after consideration of all relevant circumstances, has the ... discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy.
>
> [*Restatement (Third) of* The Law Governing Lawyers, *supra,* § 112 comment *l.*]

Additionally, the *Restatement* advises that the lawyer, when withdrawing from representation of the co-clients, may

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inform the affected co-client that the attorney has learned of information adversely affecting that client's interests that the communicating co-client refuses to permit the lawyer to disclose. *Ibid.*

In the context of estate planning, the *Restatement* also suggests that a lawyer's disclosure of confidential information communicated by one spouse is appropriate only if the other spouse's failure to learn of the information would be materially detrimental to that other spouse or frustrate the spouse's intended testamentary arrangement. *Id.* § 112 comment *l,* illustrations 2, 3. The *Restatement* provides two analogous illustrations in which a lawyer has been jointly retained by a husband and wife to prepare reciprocal wills. The first illustration states:

> Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other. Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about whom Husband had not previously informed Lawyer. Husband states that Wife would be distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of the information could destroy their marriage. Husband directs Lawyer not to inform Wife. The inter vivos trust that Husband proposes to create would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will, because Husband proposes to use property designated in Husband's will for a personally favored charity. In view of the lack of material effect on Wife, Lawyer may assist Husband to establish and fund the inter vivos trust and refrain from disclosing Husband's information to Wife.
>
> ***63** [*Id.* § 112 comment *l,* illustration 2.]

In authorizing non-disclosure, the *Restatement* explains that an attorney should refrain from disclosing the existence of the illegitimate child to the wife because the trust ****930** "would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will." *Ibid.*

The other illustration states:

> Same facts as [the prior Illustration], except that Husband's proposed inter vivos trust would significantly deplete Husband's estate, to Wife's material detriment and in frustration of the Spouses' intended testamentary arrangements. If Husband will neither inform Wife nor permit Lawyer to do so, Lawyer must withdraw from representing both Husband and Wife. In the light of all relevant circumstances, Lawyer may exercise discretion whether to inform Wife either that circumstances, which Lawyer has been asked not to reveal, indicate that she should revoke her recent will or to inform Wife of some or all the details of the information that Husband has recently provided so that Wife may protect her interests. Alternatively, Lawyer may inform Wife only that Lawyer is withdrawing because Husband will not permit disclosure of information that Lawyer has learned from Husband.
>
> [*Id.* § 112 comment *l,* illustration 3.]

Because the money placed in the trust would be deducted from the portion of the husband's estate left to his wife, the *Restatement* concludes that the lawyer may exercise discretion to inform the wife of the husband's plans. *Ibid.*

An earlier draft of the *Restatement* described the attorney's obligation to disclose the confidential information to the co-client as mandatory. *Id.* (Council Draft No. 11, 1995); *cf.* Collett, *supra,* at 743 (arguing that nature of joint representation of husband and wife supports mandatory disclosure rule). When reviewing the draft, however, the governing body of the American Law Institute, the Council, modified the obligation to leave disclosure within the attorney's discretion.

Similarly, the American College of Trust and Estate Counsel (ACTEC) also favors a discretionary rule. It recommends that the "lawyer should have a reasonable degree of discretion in determining how to respond to any particular case." American College of Trust and Estate Counsel, *supra,* at 68. The ACTEC suggests that the lawyer first attempt to convince the client to ***64** inform the co-client. *Ibid.* When urging the client to disclose the information, the lawyer should remind the client of the implicit understanding that all information will be shared by both clients. The lawyer also should explain to the client the potential legal consequences of non-disclosure, including invalidation of the wills. *Ibid.* Furthermore, the lawyer may mention that failure to communicate the information could subject the lawyer to a malpractice claim or disciplinary action. *Ibid.*

The ACTEC reasons that if unsuccessful in persuading the client to disclose the information, the lawyer should consider several factors in deciding whether to reveal the

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confidential information to the co-client, including: (1) duties of impartiality and loyalty to the clients; (2) any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer regarding the subject of the representation would be shared with the other client; (3) the reasonable expectations of the clients; and (4) the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed. *Id.* at 68–69.

The Section of Real Property, Probate and Trust Law of the American Bar Association, in a report prepared by its Special Study Committee on Professional Responsibility, reached a similar conclusion:

> Faced with any adverse confidence, the lawyer must act as a fiduciary toward joint clients. The lawyer must balance the potential for material harm to the confiding spouse caused by disclosure against the potential for material harm to the other spouse caused by a failure to disclose.
>
> [*Report of the Special Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife, supra,* 28 *Real Prop. Prob. Tr. J.* at 787.]

The report stresses that the resolution of the balancing test should center on the expectations of the clients. *Id.* at 784. In general, "the available ruling authority ... ****931** points toward the conclusion that a lawyer is not required to disclose an adverse confidence to the other spouse." *Id.* at 788. At the same time, the report acknowledges, as did the *Restatement,* that the available ***65** ruling authority is "scant and offers little analytical guidance." *Id.* at 788 n. 27.

The Professional Ethics Committees of New York and Florida, however, have concluded that disclosure to a co-client is prohibited. New York State Bar Ass'n Comm. on Professional Ethics, Op. 555 (1984); Florida State Bar Ass'n Comm. on Professional Ethics, Op. 95–4 (1997).

The New York opinion addressed the following situation:

> A and B formed a partnership and employed Lawyer L to represent them in connection with the partnership affairs. Subsequently, B, in a conversation with Lawyer L, advised Lawyer L that he was actively breaching the partnership agreement. B preceded this statement to Lawyer L with the statement that he proposed to tell Lawyer L something "in confidence." Lawyer L did not respond to that statement and did not understand that B intended to make a statement that would be of importance to A but that was to be kept confidential from A. Lawyer L had not, prior thereto, advised A or B that he could not receive from one communications regarding the subject of the joint representation that would be confidential from the other. B has subsequently declined to tell A what he has told Lawyer L.
>
> [New York State Bar Ass'n Comm. on Professional Ethics, Op. 555, *supra.*]

In that situation, the New York Ethics Committee concluded that the lawyer may not disclose to the co-client the communicating client's statement. The Committee based its conclusion on the absence of prior consent by the clients to the sharing of all confidential communications and the fact that the client "specifically in advance designated his communication as confidential, and the lawyer did not demur." *Ibid.*

The Florida Ethics Committee addressed a similar situation:

> Lawyer has represented Husband and Wife for many years in a range of personal matters, including estate planning. Husband and Wife have substantial individual assets, and they also own substantial jointly-held property. Recently, Lawyer prepared new updated wills that Husband and Wife signed. Like their previous wills, their new wills primarily benefit the survivor of them for his or her life, with beneficial disposition at the death of the survivor being made equally to their children.
>
> * * *
>
> Several months after the execution of the new wills, Husband confers separately with Lawyer. Husband reveals to Lawyer that he has just executed a codicil ***66** prepared by another law firm) that makes substantial beneficial disposition to a woman with whom Husband has been having an extra-marital relationship.
>
> [Florida State Bar Ass'n Comm. on Professional Ethics, Op. 95–4, *supra.*]

Reasoning that the lawyer's duty of confidentiality takes precedence over the duty to communicate all relevant information to a client, the Florida Ethics Committee concluded that the lawyer did not have discretion to reveal the information. In support of that conclusion, the Florida

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committee reasoned that joint clients do not necessarily expect that everything relating to the joint representation communicated by one co-client will be shared with the other co-client.

In several material respects, however, the present appeal differs from the hypothetical cases considered by the New York and Florida committees. Most significantly, the New York and Florida disciplinary rules, unlike *RPC* 1.6, do not except disclosure needed "to rectify the consequences of a client's ... fraudulent act in the furtherance of which the lawyer's services had been used." *RPC* 1.6(c). *But see New York Code of Professional Responsibility* DR 4–101; *Florida Rules of Professional Conduct* 4–1.6. Second, Hill Wallack learned of the husband's paternity from a third party, not from the husband himself. Thus, the husband did not communicate anything to the law firm with the expectation that the communication would be ****932** kept confidential. Finally, the husband and wife, unlike the co-clients considered by the New York and Florida Committees, signed an agreement suggesting their intent to share all information with each other.

Because Hill Wallack wishes to make the disclosure, we need not reach the issue whether the lawyer's obligation to disclose is discretionary or mandatory. In conclusion, Hill Wallack may inform the wife of the existence of the husband's illegitimate child.

[5] Finally, authorizing the disclosure of the existence, but not the identity, of the child will not contravene *N.J.S.A.* 9:17–42, which provides:

> All papers and records and any information pertaining to an action or proceeding held under [the New Jersey Parentage Act] which may reveal the identity of any ***67** party in an action, other than the final judgment or the birth certificate, whether part of the permanent record of the court or of a file with the State registrar of vital statistics or elsewhere, are confidential and are subject to inspection only upon consent of the court and all parties to the action who are still living, or in exceptional cases only upon an order of the court for compelling reason clearly and convincingly shown.

The law firm learned of the husband's paternity of the child through the mother's disclosure before the institution of the paternity suit. It does not seek to disclose the identity of the mother or the child. Given the wife's need for the information and the law firm's right to disclose it, the disclosure of the child's existence to the wife constitutes an exceptional case with "compelling reason clearly and convincingly shown."

The judgment of the Appellate Division is reversed and the matter is remanded to the Family Part.

For reversal and remandment—Chief Justice PORITZ and Justices HANDLER, POLLOCK, GARIBALDI, STEIN, and COLEMAN—6.

Opposed—none.

All Citations

158 N.J. 51, 726 A.2d 924

Footnotes

1 *Rule* 2:8–3 provides:

Motion for Summary Disposition

(a) Supreme Court. On an appeal taken to the Supreme Court as of right from a judgment of the Appellate Division, any party may move at any time following the service of the notice of appeal for a summary disposition of the appeal. Such motion shall be determined on the motion papers and on the briefs and record

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filed with the Appellate Division and may result in an affirmance, reversal or modification. The pendency of such motion shall toll the time for the filing of briefs and appendices on the appeal. The Supreme Court may summarily dispose of any appeal on its own motion at any time, and on such prior notice, if any, to the parties as the Supreme Court directs.

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Corporate Law

Finally, below we have included an article by Marc C. Laredo discussing shareholder duties and disputes in closely-held corporations. The article specifically addresses Massachusetts law. We also invite you the review this link which provides more general information on corporations and their structure.

Shareholder Duties and Disputes in Closely-Held Corporations in Massachusetts Revisited[1]

By Marc C. Laredo

Marc C. Laredo is a partner with Laredo & Smith, LLP in Boston. He is the editor-in-chief of the Massachusetts Law Review.

In 2007, the *Massachusetts Law Review* published *Shareholder Duties and Disputes in Closely-Held Corporations in Massachusetts* ("*Shareholder Duties*"),[2] a review and analysis of the law governing closely-held Massachusetts corporations.[3] This body of law can differ — sometimes significantly — from the law governing closely-held entities formed in other states as well as the law governing non-closely-held Massachusetts entities. Over the past decade, while the fundamental principles have remained the same, Massachusetts courts have refined and built upon those principles and addressed previously unresolved issues, including developing a body of law to govern closely-held Massachusetts limited liability companies.[4] Court decisions regarding closely-held entities, while applying established principles, are often fact-specific, with the facts and equities of a particular situation frequently dictating the ultimate outcome.[5] Guided by the format of *Shareholder Duties*, this article will remind the reader of the governing principles and authorities, review recent decisions, discuss unresolved issues, and provide practical suggestions for practitioners.[6]

I. The General Standards and Basic Rules

The leading case regarding the duties of shareholders in closely-held Massachusetts corporations remains *Donahue v. Rodd Electrotype Co. of New England Inc.*[7] In *Donahue*, a case discussed extensively in *Shareholder Duties*, the Supreme Judicial Court (SJC) applied the general law of partnerships to so-called "close" corporations, namely those entities with "(1) a small number of shareholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operation of the corporation."[8] Shareholders in a closely-held corporation "owe one another a strict fiduciary duty" and must act with "utmost good faith and loyalty."[9] Those duties, as the SJC held in *Wilkes v. Springside Nursing Home Inc.*,[10] are tempered by the doctrine that actions that harm another shareholder will be allowed if they have a "legitimate business purpose" and there is no practical "less harmful alternative."[11]

The law regarding closely-held Massachusetts corporations is not the same as general Massachusetts corporate law. In the closely-held context, Massachusetts courts have added on extra layers of rights and duties because of the special nature of the closely-held entity. Thus, for example, in a Massachusetts close corporation, the shareholders owe duties to the corporation *and to one another.*[12] Those

1. My thanks to Payal Salsburg of Laredo & Smith, LLP, for her assistance with this article.

2. 91 Mass. L. Rev. 138 (2007).

3. The terms "closely-held" and "close" have the same meaning in this context. This article will use both terms interchangeably.

4. In many respects, the word "owner" is a more accurate means of describing those covered by the rules regarding closely-held entities. The owners of a corporation are shareholders or stockholders (Mass. Gen. Laws ch. 156D, § 1.40 (2005)); the owners of a limited liability company are members (Mass. Gen. Laws ch. 156C, § 2 (2005)); and the owners of a limited liability partnership are partners (Mass. Gen. Laws ch. 108A, §§ 2 and 45 (2011)). The management structures differ for each form of entity.

A corporation's shareholders elect directors, who are charged with the overall management of the entity. Mass. Gen. Laws ch. 156D, §§ 1.40(a), 8.03 (2005). The directors then elect officers, who manage the corporation's day-to-day affairs. Mass. Gen. Laws ch. 156D, § 8.40 (2005). Every corporation must have a president, treasurer, and secretary (the same person can serve in more than one office). Mass. Gen. Laws ch. 156D, § 8.40 (2005).

In a limited liability company, the members may select a manager or managers, who then function as a combination of directors and officers. Mass. Gen. Laws ch. 156C, § 24 (2005). A limited liability company also can (but is not required to) create officers or others to carry out the duties of the managers. *Id.*

In a limited liability partnership, the partners govern and have the authority to act for the partnership. Mass. Gen. Laws ch. 108A, § 45 (2011). A limited liability partnership functions like a traditional partnership except that the liability of individual partners is limited rather than joint and several. Mass. Gen. Laws ch. 108A, § 15 (2011).

5. *See, e.g.,* Selmark Assocs. Inc. v. Ehrlich, 467 Mass. 525, 526 (2014) (in a case involving a close corporation the court began its ruling with the observation that "[t]his case is, like many, factually intense."). *Selmark Associates* involved a determination of what effect various agreements among the parties had on "the otherwise applicable duties of parties in a close corporation . . . ." *Id.* at 539. This made the factual analysis particularly important.

6. The format is similar but not identical to the one used in *Shareholder Duties*. The captions used in the original article have been modified in some instances and sections where there have been few developments have been merged or omitted.

7. 367 Mass. 578 (1975).

8. *Id.* at 586.

9. *Id.* at 593 & n.18; *Shareholder Duties* at 139.

10. 370 Mass. 842 (1976).

11. *Id.* at 842, 851.

12. Int'l Bhd. of Elec. Workers Local No. 129 Benefit Fund v. Tucci, 476 Mass. 553, 561 (2017) (citations omitted).

same duties carry over to their roles as directors (and other actions that they take in connection with the corporation). This is in contrast to the general rule of Massachusetts corporate law "that a director of a Massachusetts corporation owes a fiduciary duty to the corporation itself, and not its shareholders . . . ."[13] It also is important to note that the law governing Massachusetts closely-held entities is not necessarily the same as the law of entities formed in other states.[14] The duties owed among owners of a close corporation to one another and to the corporation apply to all owners, majority and minority, thus requiring all owners to abide by the same rules.[15] These duties remain in effect for all owners even if one owner violates them. As the SJC explained, "[a]llowing a party who has suffered harm within a close corporation to seek retribution by disregarding its own duties has no basis in our laws and would undermine fundamental and long-standing fiduciary principles that are essential to corporate governance."[16] The court added that "[i]f shareholders take it upon themselves to retaliate any time they believe they have been frozen out, disputes in close corporations will only increase. Rather, if unable to resolve matters amicably, aggrieved parties should take their claims to court and seek judicial resolution."[17]

As practitioners in this area can attest, closely-held entities, even highly profitable ones, sometimes do a substandard job of adhering to the necessary corporate formalities, such as meetings (or consents in lieu of meetings) and record-keeping. The problems often start at the inception of the business when the founders may be unaccustomed to proper or good corporate governance and money may be tight, leading to less attention being paid to legal issues. An entity may be formed by the owners themselves (perhaps with the assistance of a non-lawyer professional, such as an accountant or a company that provides online assistance for individuals forming an entity) without documentation other than the articles of organization (or the certificate of organization for a limited liability company or certificate of registration for a limited liability partnership) on file with the Massachusetts Secretary of State. Even the amount of stock (or the percentage of membership or partnership interest) held by each owner can be unclear. As the entity grows, it may not have an attorney who regularly represents it, leading to a lack of attention to ongoing recordkeeping. Much of this may not be an issue until a problem or dispute arises, at which point the lack of documentation can cost the entity and its owners far more in time and expense than they would have spent getting the entity's legal affairs in order in the first instance.

The Massachusetts courts have adopted a practical approach in such situations, looking to other sources of information, such as an entity's income tax returns, to determine key issues, such as the percentage of ownership each individual has in the entity. An unpublished decision of the Appeals Court in *Houser Buick Inc. v. Houser*[18] illustrates this practical approach. In *Houser*, a closely-held corporation filed suit against one of its shareholders for breach of fiduciary duty.[19] After an adverse judgment, the shareholder claimed that the action against him had not been properly authorized by the corporation because "bringing a suit against a director is such an extraordinary act that it requires a meeting and vote of the directors."[20] Relying on the SJC's holding in *Samia v. Central Oil Co. of Worcester*,[21] the Appeals Court panel rejected that argument.[22] Without condoning the absence of formalities often seen with closely-held businesses, the court refused to permit the director who had been complicit in this informality, including years without any formal directors' meetings, to use this same informality as a shield against allegations of misappropriation.[23] "Where rights of creditors or other outsiders are not involved, actions taken without compliance with corporate formalities have frequently been held to bind shareholders."[24] While the *Houser* court appropriately allowed the realities of the situation to govern, the arguments made by the dissident shareholder (and the resultant time and attorneys' fees) could have been avoided in their entirety had the proper formalities been observed at the outset.

13. *Id.* One other exception to the general rule is "where a controlling shareholder who also is a director proposes and implements a self-interested transaction that is to the detriment of minority shareholders, a direct action by the adversely affected shareholders may proceed." *Id.* at 562. Delaware, in contrast to Massachusetts, "has a history of asserting that directors stand in a fiduciary relation to stockholders of the company . . . ." *Id.* at 563. In *Tucci*, this meant that the claims of the shareholders in this publicly-held Massachusetts entity needed to be brought derivatively. *Id.* at 562-63.

14. *See* K. Kusiak and E. Davis, "Gaining the Advantage in Close-Corporation Disputes: Examining Key Differences between Massachusetts and Delaware Fiduciary Duty Law," 97 Mass. L. Rev. 23 (2015) for a thorough discussion of the differences between Massachusetts and Delaware law in the close corporation context (Delaware being the formation jurisdiction of choice for many corporate lawyers).

15. Zimmerman v. Bogoff, 402 Mass. 650, 657 (1988); Donahue v. Rodd Electrotype Co. Inc., 367 Mass. 578, 593 n.17 (1975); *Shareholder Duties* at 140.

16. Selmark Assocs. Inc. v. Ehrlich, 467 Mass. 525, 552-53 (2014).

17. *Id.* at 553 (citations omitted). The rationale for this ruling is that the courts are the appropriate forum to resolve claims of unfair conduct, and self-help is not appropriate. While perhaps understandable in the abstract, it ignores the difficulties that a minority shareholder can face if she is a victim of a breach of fiduciary duty and can lead to some seemingly harsh results. Take, for example, the shareholder whose employment is wrongfully terminated. Resort to the courts can take months or years (although preliminary injunctive relief might alleviate that delay if it is available). She needs to earn a living and so takes a job with a competitor. In doing so, she can be charged with breach of fiduciary duty. So, her alternatives are stark — follow the court's required procedures and be unable to support herself or her family, or take new employment and be subject to a claim against her (perhaps at the same time that she is pursuing her own breach of fiduciary duty claim). Neither is a particularly attractive alternative. It also is at odds with the general duty that an aggrieved party has to mitigate its damages.

18. No. 15–P–823, 2016 WL 1079402 (Mass. App. Ct. March 18, 2016) (unpublished per Rule 1:28).

19. *Id.* at *1.

20. *Id.*

21. 339 Mass. 101 (1959).

22. *Houser*, at *1.

23. *Id.*

24. *Id.* (*citing* Pitts v. Halifax Country Club Inc., 19 Mass. App. Ct. 525 (1985)); *see* O'Brien v. Pearson, 449 Mass. 377 (2007) (absent clear corporate action setting stock holdings, jury found that O'Brien "was a forty eight per cent shareholder in the corporation…."). In its opinion, the *O'Brien* court noted that the articles of organization were filed "without detailing the shareholder distribution." *Id.* at 379. Typically, however, the articles of organization do not identify the shareholders or their ownership percentages in an entity.

A. The Owner-Employee

One of the hallmarks of the closely-held entity is that the owners are often employees of the entity. Indeed, employment may be how the owners receive a return on their investment in the business. This leads to difficulties when the basic rules of employment in Massachusetts, such as that of employment generally being "at will" unless contractually altered, clash with the rights of owners to derive benefit from the business through the employment relationship.

While there is a heightened standard of scrutiny when the employment of a shareholder-employee is terminated, a pair of Superior Court decisions, *Bensetler v. Data Plus Inc.*[25] and *Holland v. Burke*,[26] serves as a reminder that any entitlement to employment is not unlimited. In *Bensetler*, a husband and wife were employees and shareholders of a closely-held business.[27] The marriage foundered and, during the divorce process, the husband terminated the wife's employment.[28] Although the court rejected some of the stated reasons for the discharge, it ruled that certain other ones were sufficient cause for termination and that "[m]aintaining a disgruntled, non-contributing, and self-serving employee such as Mrs. B. on the company's payroll was not in the company's best interest . . . [and] there was no effective alternative course of action less harmful to Mrs. B. that could have been taken . . . ."[29] In *Holland*, a case involving the allegedly improper termination of an owner's employment and the misappropriation of funds by the other owners, the court noted that "[w]hether there is a freeze out in this situation depends on the shareholders' reasonable expectations of benefit."[30] There, the terminated shareholder-employee, unlike the other shareholder-employees, was not experienced in the business, did not establish "that he had a reasonable expectation of continued employment" and did not show "that a guaranty of employment was a major reason for his investment of capital, or that he was relying on employment . . . or his livelihood."[31] "Rather, the credible evidence established that Holland's primary motivation in joining the enterprise was to invest in the land and the two businesses, an interest which Holland retains by virtue of his stock ownership."[32] Without an expectation of employment as a return for investment, depriving one of employment is not a freeze out. Both cases illustrate that whether the termination of a shareholder-employee is improper depends on the particular facts and circumstances of each case.[33]

Sometimes, however, the employment relationship will be governed by an agreement among the owners or a separate employment agreement. In those circumstances, the contract will govern under the rules discussed in the section below on agreements among owners.

B. Diverting Corporate Opportunities

An owner of a closely-held business may not divert corporate opportunities away from the business without full disclosure and approval by the entity. But, as with other fiduciary duties, this too can be modified by agreement.[34] In *Pointer v. Castellani*,[35] the SJC held that where an operating agreement stated that a company had a limited business purpose and that its members were specifically permitted "to conduct any other business or activity whatsoever" a member was free to take an opportunity that was "not involved within [the company's] line of business."[36] Thus, as in other areas of the law involving closely-held businesses, agreements among members or shareholders will often control and can limit or expand their rights and duties.

C. Which Law Applies

The *Donahue* rules only apply to Massachusetts entities.[37] Whether an entity is a Massachusetts entity depends on its state of incorporation.[38] Even if a business has its base of operations in Massachusetts, *Donahue* will not apply unless the entity is formed as a Massachusetts domestic entity.[39] Thus, what seemingly can be a minor decision — the state in which the entity should be initially incorporated or registered — can have enormous ramifications should a dispute among the owners arise.[40]

25. No. 012109, 2008 WL 4926048, 24 Mass. L. Rptr. 628 (Mass. Super. Ct. Oct. 14, 2008) (Roach, J.).

26. No. BACV200500122A, 2008 WL 4514664, 24 Mass. L. Rptr. 5551 (Mass. Super. Ct. June 18, 2008) (Connon, J.).

27. *Bensetler*, at *1 and 3.

28. *Id*. at *3-4.

29. *Id*. at *6.

30. *Holland*, at *6. *Holland* involved both a limited liability company and corporations. *See id*.

31. *Holland*, at *7.

32. *Id*.

33. *See* Clay v. J.L. Hammett Co., No. 12–P–285, 2012 WL 5832460 (Mass. App. Ct. Nov. 19, 2012) (unpublished per Rule 1:28) (affirming lower court's ruling that bonuses paid to shareholder/employees in connection with sale of company were permissible because "no facts in the summary judgment record would establish a violation of the business judgment rule. Indeed, the only evidence was that the bonus payments were reasonable.").

34. "The existence of a contract 'does not relieve stockholders of the high fiduciary duty owed to one another in all their mutual dealings,' but where the parties have defined in a contract the scope of their rights and duties in a particular area, good faith action in compliance with that agreement will not implicate a fiduciary duty." Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 727 (2013).

35. 455 Mass. 537, 555-56 (2009).

36. *Id*. at 555-56.

37. Harrison v. NetCentric Corp., 433 Mass. 465 (2001); *see* Nahass v. Harrison, 207 F. Supp. 3d 96, 102 (D. Mass. 2016).

38. *NetCentric*, 433 Mass. at 470-72. The *NetCentric* court distinguished its prior ruling in Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501 (1997). *NetCentric*, 433 Mass. at 470-72. In *Demoulas*, the court applied a "functional approach" in ruling that Massachusetts law governed "because the company involved was formed originally in Delaware but later merged into a Massachusetts corporation." *Id*. at 470. Thus, the *Demoulas* ruling is an exception to the general rule that the law of the state of incorporation governs and it will take extraordinary circumstances for a court to stray from that rule. *See id.*

39. An entity is formed by filing the appropriate papers with the Secretary of State in the state of incorporation along with the requisite filing fee. An entity can then register to do business in another state by filing the appropriate papers with that state's Secretary of State, again along with that state's filing fee. Thus, an entity based in Massachusetts can be formed in Delaware and then registered as a foreign corporation doing business in Massachusetts. The entity will be a Delaware entity, not a Massachusetts entity.

40. *See* K. Kusiak and E. Davis, "Gaining the Advantage in Close-Corporation Disputes: Examining Key Differences between Massachusetts and Delaware Fiduciary Duty Law," 97 Mass. L. Rev. 23 (2015).

Of note in *NetCentric* was that while the parties' "stock and noncompetition agreements provide that they are governed by Massachusetts law" that did not mean that Massachusetts law governed the internal affairs of the entity.[41] Thus, two different state's laws came into play — Delaware law for issues involving breach of fiduciary duty and Massachusetts law for the stock and noncompetition agreements. In this regard, *NetCentric* should serve as a cautionary reminder to practitioners to consider the choice of law issue carefully in both forming the entity and creating agreements among its owners and between the company and its owners.

Petrucci v. Esdaile,[42] a decision from the Business Litigation Session of the Superior Court, illustrates the importance of carefully crafting any choice of law provisions in agreements among shareholders. In *Petrucci*, the parties' limited liability company operating agreement stated that "[t]his Agreement and the application or interpretation hereof, shall be governed exclusively by the laws of the State of Delaware, and specifically the Act" which, as the court held, meant Delaware's limited liability company statute.[43] The court held that Massachusetts law governed with respect to issues concerning the statute of limitations even though the operating agreement stated that it was governed by Delaware law.[44] The court found that the parties' "choice-of-law provision does not expressly address limitations periods and, for that reason, does not control which State's statute of limitations applies here."[45] The court then used Massachusetts's functional approach to determining the applicable statute of limitations to conclude that the Massachusetts statute of limitations controlled — a ruling that allowed contract-related claims to survive a statute of limitations challenge.[46] Thus, while Delaware law governed the standards for the parties' internal disputes, Massachusetts law controlled when such claims had to be made.

D. The Applicability of *Donahue* to New Types of Legal Entities

Massachusetts courts have applied the *Donahue* standards to limited liability companies. In *Pointer v. Castellani*,[47] although the entity in question was a limited liability company, the court applied *Donahue's* rules of fiduciary duties of shareholders of closely-held corporations to the entity.[48] Interestingly, the court used the word "corporation" rather than "company," leading to the conclusion that it views these different forms of entities interchangeably for purposes of applying closely-held entity law.[49]

E. The Identity of the Client

Lawyers who work with closely-held entities must consider the question: Who is the client? This question must be asked both at the onset of the relationship and then again as significant matters arise. The answers are not always easy.

Often, the client is the entity.[50] But that does not address the related problem of the inherent conflict in any agreement involving two or more people that their interests differ in some respect. Who does the attorney then represent?

The easiest course of action is for each of the entity's owners to have his or her own separate counsel. But that may not be a very practical approach for a new entity with limited resources. An attorney who suggests that a host of lawyers or law firms must be involved soon may not have a client at all or, perhaps even worse, a client who decides to do nothing rather than incur the added expense of additional lawyers.[51]

There is no perfect solution to this dilemma and the appropriate approach will vary from case to case and also depend on the nature of the relationship among the owners and the agreement in question. Regardless of the approach, full disclosure should be made, preferably in writing. If the owners are in a more adversarial situation, disclosure may not suffice and the individual owners should be urged to consult with their separate attorneys (at least to review what has been drafted) and, if the attorney is representing the entity, the attorney should make clear that she does not represent anyone individually.[52]

The issue of the identity of the client came to the forefront in *Bryan Corp. v. Abrano*,[53] and led to lengthy litigation resulting in the disqualification of counsel for one of the owners. *Abrano* involved a dispute among the family members/owners of a closely-held corporation.[54] In 2014, the company had retained a law firm to represent it in a lawsuit brought by a former company consultant.[55] Several months later, two of the company's owners contacted the same law firm about representing them individually in connection with their dispute with the third owner.[56] The law firm agreed to represent the two individual owners; at the same time, the law firm advised all the

41. *NetCentric*, 433 Mass. at 472 n.10.

42. No. 1684CV03998BLS2, 2017 WL 3080555, 34 Mass. L. Rptr. 304 (Mass. Super. Ct. June 1, 2017) (Salinger, J.). This case was featured in a front-page article in *Massachusetts Lawyers Weekly.* Mass. Lawyers Weekly, Vol. 46, Issue 25 (June 19, 2017).

43. *Id.* at *2.

44. *Id.* at *3.

45. *Id.*

46. *Id.*

47. 455 Mass. 537 (2009).

48. *Id.* at 539, 549-51; *see generally* Beninati v. Borghi, 90 Mass. App. Ct. 556 (2016).

49. While the first sentence of the court's decision stated that "[t]he plaintiff, Bernard J. Pointer, was part owner of Fletcher Granite Company LLC, a closely-held corporate entity," the court later stated that it was "uncontested that FGC is a close corporation…." *Id.* at 538, 549. The *Pointer* court is not the only Massachusetts appellate court to use terminology related to corporations in the context of closely-held entities. In One to One Interactive LLC v. Landrith, 76 Mass. App. Ct. 142 (2010), the court began its opinion with the statement that "[f]ormer founders of an Internet start-up company, One to One Interactive LLC (OTO or company), sued each other for claims arising out of internal disputes and the eventual demise of their closely-held corporation." *Id.* at 143 (emphasis added). A limited liability company, however, is not technically a corporation.

50. Rule 1.13 of the Massachusetts Rules of Professional Conduct governs the ethical duties of a lawyer who represents an entity.

51. Take, for example, a situation where a mother and her children or three siblings are trying to put together a new business. The statement from the lawyer that each one must have his or her own attorney is likely to be met with strong resistance.

52. Having each owner have his or her counsel review any agreement before it is signed can be very helpful should later disagreements arise. Of course, the difficulty is in persuading clients with limited resources that they need separate counsel.

53. 474 Mass. 504 (2016).

54. *Id.* at 505-06.

55. *Id.* at 506.

56. *Id.*

owners that there might be a conflict of interest between them and the company and, if a conflict developed, the law firm would withdraw from the pending litigation.[57] Three weeks later, the law firm announced its intent to resign as counsel for the company in the lawsuit.[58] The law firm subsequently represented one of the owners in litigation against the third owner and in another lawsuit brought by the company against a third party.[59] The company then moved to disqualify the law firm, and the lower court granted the motion.[60] An appeal accepted for direct appellate review before the SJC followed.[61]

Relying on the Massachusetts Rules of Professional Conduct, the SJC reasoned that at the time the law firm agreed to represent the two owners, it should have known "that their interests were adverse to, or were likely soon to become adverse to, those of the company and, in these circumstances, both the duty of loyalty and Rule 1.7 required it to decline representation, or at least seek the informed consent of the company."[62] The court specifically rejected the argument that at the time the law firm agreed to represent the individual owners, there was no conflict between those owners and the company.[63] Even if no actual conflict existed, the potential for conflict existed, requiring the law firm to decline the representation or obtain informed consent for the representation. Nor could the firm eliminate the conflict by withdrawing from its representation of the company. The court held that

> a firm may not undertake representation of a new client where the firm can reasonably anticipate that a conflict will develop with an existing client, and then choose between the two clients when the conflict materializes. Both the duty of loyalty and the rules clearly forbid such conduct.[66]

In a similar vein, in another close corporation case, the failure to carefully identify the client led to a Superior Court ruling that emails between an attorney and his clients/minority shareholders were not protected by the attorney-client privilege because the clients had shared them with their brother who, while also was a shareholder and only nominally adverse to them in litigation against another family member, was not represented by their attorney.[67] There, the clients unsuccessfully argued that the brother also was a client; the court rejected that theory, ruling that there was neither an express nor an implied attorney-client relationship between the brother and the attorney.[68] As a result, the privilege was waived when the communications were shared and the court ordered the communications to be produced.[69]

The issue of the identity of the client also comes into play when there is litigation among owners and questions arise as to whether communications with counsel are privileged and whether certain corporate constituents are entitled to access corporate attorney-client privileged communications.[70] In *Chambers v. Gold Medal Bakery Inc.*, the court ruled that where certain shareholders' interests were adverse to the corporation's interests in certain litigation, those shareholders were "not entitled to privileged or protected information relating to the two litigations."[71] In so ruling, however, the court cautioned that "[t]he judge or discovery master should take particular care to distinguish Gold Medal's privileged communications… from the underlying facts of Gold Medal's financial health and status, information that may have been generated irrespective of litigation."[72] The court added that "[w]e stress that no one factor or combination of factors is dispositive in determining when a director has interests adverse for attorney-client privilege purposes, particularly in the unique context of a close corporation. The analysis is 'fact specific and necessarily depends upon the circumstances of each case.'"[73]

A law firm's involvement in a dispute among owners of a closely-held entity can trigger later claims against the law firm itself.[74] In *Baker*, the plaintiffs were minority members of a closely-held

57. *Id.* at 506-07.

58. *Id.* at 507.

59. Bryan Corp. v. Abrano, 474 Mass. 504, 507-08 (2016).

60. *Id.* at 508-09.

61. *Id.* at 509. Although not discussed in the opinion, the appeal was interlocutory in nature because judgment had not yet entered in the lower court. It was before the SJC because the court had granted a request for direct appellate review. *Id.* at 509. Interlocutory appeals are permitted in cases involving the disqualification of counsel. *See* Borman v. Borman, 378 Mass. 775, 778-81 (1979).

62. *Abrano*, 474 Mass. at 510. Rule 1.7 of the Massachusetts Rules of Professional Responsibility provides that:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (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.

In *Abrano*, the court used the most recent version of the rule because the changes to the rule in 2015 were not substantive. *Abrano*, 474 Mass. at 510 n.9.

63. *Id.* at 512.

64. Bryan Corp. v. Abrano, 474 Mass. 504, 512-14 (2016). Only a disinterested company representative would have been in a position to provide the informed consent for the company. *Abrano*, 474 Mass. at 515 n.11

65. *Id.* at 515.

66. *Id.* at 516.

67. Mirra v. Mirra, No. 1484CV03857BLS2, 2017 WL 2784835 34 Mass. L. Rptr. 247 (Mass. Super. Ct. Apr. 26, 2017) (Salinger, J.), reported in *Massachusetts Lawyers Weekly* (May 8, 2017) (front-page story).

68. *Id.*

69. *Id.* at *3.

70. Chambers v. Gold Medal Bakery Inc., 464 Mass. 383 (2013); see Comment, 95 Mass. L. Rev. 234 (2013) (by the author).

71. *Id.* at 384.

72. *Id.* at 392.

73. *Id.* at 395-96.

74. Baker v. Wilmer Cutler Pickering Hale & Dorr LLP, 91 Mass. App. Ct. 835, 836 (2017).

Massachusetts limited liability company.[75] They alleged that "the majority members secretly retained the attorneys, one of whom is the daughter of a majority member, to, at least ostensibly, represent the closely-held company" in developing a plan to merge the Massachusetts entity into a new Delaware entity, "all for the purpose of eliminating significant protections afforded minority members under the Massachusetts company's operating agreement."[76] The Appeals Court reversed a Superior Court decision dismissing the case against the defendant law firms and individual attorneys, ruling that the complaint stated sufficient facts regarding claims "for breach of fiduciary duty, aiding and abetting tortious conduct, civil conspiracy, and violation of G.L. c. 93A" to survive a motion to dismiss.[77] The court relied on a ruling of the SJC "that counsel for a close corporation can owe a fiduciary duty to individual shareholders."[78] Here, the court concluded that the plaintiffs had alleged sufficient facts to support the claim that the lawyers and the law firms had duties to both the corporation and the individual owners, even though they never interacted with the individual minority owners.[79]

Identifying the client is a difficult but extremely important issue for counsel for a closely-held entity. Although litigation among the owners is the most extreme example of where conflict exists, there are numerous other situations where similar conflicts arise. Counsel must carefully meet his or her ethical obligations while not losing sight of the practical issues facing the entity and its owners.

F. Agreements among Owners

Shareholder agreements are specifically recognized both by Massachusetts statute and case law.[80] Such agreements can cover a wide array of issues, including how to deal with death, disability, internal management and compensation, retirement or termination of employment and how to resolve internal disputes. Some of these issues, such as employment, may be the subject of a separate agreement rather than included in the shareholder agreement.

While shareholder agreements will be enforced — and in that regard can, in certain circumstances, eliminate a challenge to an action based upon a claim of breach of fiduciary duty — that enforcement is strictly limited to the terms of the agreement.[81] In *Selmark Associates Inc. v. Ehrlich*,[82] the SJC was asked to construe "the duties fellow shareholders and directors of a close corporation owe to each other in a context where contractual agreements exist defining in part their relationships…."[83] The court reiterated the rule that "when the challenged conduct at issue in a case is clearly contemplated by the terms of the parties' written agreements, we have declined to find liability for breach of fiduciary duty."[84] The court added, however, that "[w]hen the contract does not entirely govern the other shareholders' or directors' actions challenged by the plaintiff, a claim for breach of fiduciary duty may still lie."[85]

Applying the principle of strict adherence to the terms and scope of the agreement, the court held that there was no governing employment contract between the corporation and the minority shareholder because that contract had expired by its terms years earlier and at that point the employee became an employee at will.[86] Therefore, the shareholders still owed one another fiduciary duties in connection with the minority shareholder's claims relating to the termination of his employment.[87] Nor did the existence of other agreements replace the fiduciary duties owed to the employee because those agreements did not expressly deal with employment after the employment agreement ended and before a right to conversion of stock contained in one of those other agreements (a conversion agreement) ripened (the conversion agreement only created a right to an employment agreement *after* conversion of the stock).[88]

Yet, when the terms of an agreement are specific and on point, they will control. In *Balles v. Babcock Power Inc.*,[89] a senior management employee was terminated "when it was discovered that he was engaged in an ongoing extramarital affair with a young female subordinate."[90] The company argued that the termination was "for cause."[91] Carefully construing the stockholders' agreement, the court held that the termination was not permitted under the precise terms of the agreement, which listed what constituted cause and allowed in some instances for an opportunity to cure any wrongful conduct, which opportunity had not been provided.[92] The court rejected the claim that such an opportunity would have been futile, an exception which, the court, held, "notably, is quite narrow…."[93] *Balles* is a reminder of the importance of the precise language used in agreements among owners of close corporations.

Where shareholders of a closely-held corporation do not in advance establish the terms and conditions of permissible outside work performed by directors, officers or shareholders, a court will not read into their agreement a provision that curtails such activity where such outside engagement does not pose a conflict of interest to the

75. *Id.*

76. *Id.*

77. *Id.* at 837.

78. *Id.* (relying upon Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg PC, 405 Mass. 506, 513 (1989)).

79. *Id.* at 842-47. The court appeared particularly troubled by the allegations that one of the attorneys was the daughter of one of the majority owners, the secret nature of the attorneys' role, and that the attorney's actions appeared to be directly adverse to the interests of the minority owners. Baker v. Wilmer Cutler Pickering Hale & Dorr LLP, 91 Mass. App. Ct. 835, 849 (2017). The Appeals Court also allowed the claim under General Laws chapter 93A, with its potential for multiple damages and attorney's fees, to proceed. *See id.* at 849-51.

80. Mass. Gen. Laws ch. 156D, §§ 7.30–7.32 (2005). The statute places some limits on the agreements, such as that they must be set forth in the articles of organization or signed by the shareholders and approved by the corporation and that they are only valid for 10 years unless the agreement provides otherwise. Id. The statute applies to all corporations, not just closely-held ones. *See id.*

81. *See* Butts v. Freedman, No. 1584CV03652BLS2, 2017 WL 6395705, *3 (Mass. Super. Ct. Oct. 27, 2017) (Sanders, J.) ("It is true that a contract (like an operating agreement) can limit or even eliminate these fiduciary obligations.")

82. 467 Mass. 525 (2014).

83. *Id.* at 526.

84. *Id.* at 537.

85. *Id.* at 537-38.

86. *Id.* at 536.

87. *Id.*

88. 467 Mass. 525, 538-39 (2014).

89. 476 Mass. 565 (2017).

90. *Id.* at 566.

91. *Id.* at 567.

92. *Id.* at 570-80. The detail involved in the court's discussion is worthy of independent review by practitioners in this area, particularly those involved in crafting such agreements, as a guide to the level of detail that may be scrutinized by a reviewing court.

93. *Id.* at 577.

corporation (such as taking for personal gain work that might otherwise inure to the benefit of the corporation) and does not diminish the shareholder's capacity to generate revenues for the corporation.[94] In *McGrath v. Braney*, three shareholders of an accounting firm alleged that the fourth shareholder had breached his fiduciary duties to them by (1) deceiving them about his status as a compensated board director of a local bank, (2) diverting his time, attention, and best efforts away from the accounting firm, and (3) failing to turn over his earnings from the local bank to the closely-held corporation.[95] The trial court found in favor of the fourth shareholder, explaining that "neither the Articles of Organization nor the By-Laws contained any restrictions on what a shareholder could or could not do beyond the singular limitation that all shareholders needed to be duly licensed CPAs in good standing in the Commonwealth of Massachusetts."[96] Despite their protests to the contrary, each of the three complaining shareholders engaged in "substantial amounts of outside activity unrelated to the business of the firm," albeit only the fourth shareholder's activity generated any actual compensation.[97] The evidence demonstrated that the shareholder's position as a board director for the local bank was conspicuously posted on the corporation's website, disclosed annually on various regulatory filings, and listed on the accounting firm's malpractice insurance application.[98] Moreover, the shareholder exceeded two of the other three shareholders in his economic productivity for the firm.[99] Thus, without any agreement specifically restricting outside business activities or obligating individual shareholders to turn over all income derived from outside activities to the corporation, the shareholder was free to engage in such activity.[100]

In *Merriam v. Demoulas Super Markets Inc.*,[101] the SJC held that the minority shareholders of a Subchapter S corporation[102] could sell their shares consistent with the agreements contained in the corporation's articles of organization and bylaws, regardless of whether the buyer's ownership would terminate the corporation's status as a Subchapter S corporation. Because the articles of organization did not contain any restrictions on stock transfers that required the corporation's Subchapter S status to be maintained, and the shareholders had not elected to restrict transfers in a separate stock restriction agreement or by amendment to the articles of organization, the court found it entirely proper for a trial court to decline the invitation to impose such restrictions after the fact. Moreover, where the articles of organization did not contain a pre-emptive right of first refusal to the company, neither principles governing fiduciary duty nor the implied covenant of good faith and fair dealing would insert such a term where the parties chose not to do so themselves.[103]

II. Remedies

A. Derivative Actions

Although it did not involve a closely-held entity, *International Brotherhood of Electrical Workers Local No. 129 v. Tucci*[104] presents a useful summary of general Massachusetts law governing derivative actions, how such actions differ from direct actions, and the rules that must be followed in bringing a derivative action. The court noted that "[w]e continue to adhere to the view that whether a claim is direct or derivative is governed by whether the harm alleged derives from the breach of a duty owed by the alleged wrongdoer — here the directors-to the shareholders or the corporation."[105]

The importance of standing — and hence whether a claim is direct or derivative — in the context of actions brought against shareholders was highlighted yet again in *DeCroteau v. DeCroteau*.[106] In *DeCroteau*, a corporation was owned by three brothers: 51 percent by Joseph and the remaining 49 percent collectively by Mark and Michael.[107] The corporation owned and operated a funeral home on property rented from a limited liability company owned solely by Mark and Michael.[108] When the lease to the property expired, Mark and Michael listed the property for sale, thus allegedly risking the existence and operation of the corporation and jeopardizing Joseph's livelihood.[109]

Acting in his individual capacity, Joseph sued his brothers.[110] He sought a preliminary injunction, which was denied.[111] On appeal, the court ruled that Joseph had not demonstrated that he had standing to bring most of the claims directly in the lawsuit, ruling that

> DeCroteau Corporation, not the plaintiff, is the tenant of DBR. DeCroteau Corporation, not the plaintiff, owns and operates the funeral home business. Consequently, the plaintiff's claims, other than the count for breach of fiduciary duty . . . and the claims regarding the creation of a resulting trust or imposition of a constructive trust, belong to DeCroteau Corporation, an entity separate and distinct from the plaintiff.[112]

Thus, only the direct claims were allowed to proceed.

Not only must an owner party bring a claim in the correct capacity — direct or derivative — the owner also must have been an

94. McGrath v. Braney, No. 10–1603A, 2014 WL 1588714 (Mass. Super. Ct. Apr. 3, 2014) (Gordon, J.).

95. *Id.* at *1.

96. *Id.* at *3.

97. *Id.* at *5-6.

98. *Id.* at *8-9.

99. *Id.* at *12-13, 15.

100. McGrath v. Braney, No. 10–1603A, 2014 WL 1588714, *15 (Mass. Super. Ct. Apr. 3, 2014) (Gordon, J.).

101. 464 Mass. 721 (2013).

102. Subchapter S is a federal tax code election that a corporation can make to avoid double taxation. Many closely-held corporations elect to be a subchapter S corporation so that there is only one level of tax. Whether a subchapter S election is appropriate is a question for the entity's accountant or an attorney familiar with the tax laws. There are specific rules regarding the election that need to be carefully followed. Any discussion of the appropriateness of such an election is well beyond the scope of this article.

103. *See also* Fronk v. Fowler, 456 Mass. 317, 331-32 (2010); Butler v. Moore, No. 10-10207-FDS, 2015 WL 1409676 (D. Mass. Mar. 26, 2015) (Stearns, J.).

104. 476 Mass. 553 (2017); *see* D. Parke, "Recent Massachusetts decision addresses shareholder remedies," Mass. Lawyers Journal 27 (May/June 2017).

105. *Id.* at 563 n.14.

106. 90 Mass. App. Ct. 903 (2016).

107. *Id.* at 903.

108. *Id.*

109. *Id.*

110. *Id.* at 904.

111. *Id.*

112. DeCroteau v. DeCroteau. 90 Mass. App. Ct. 903, 904 (2016).

owner at the time of the wrongdoing (or ownership transferred to her as a matter of law) and throughout the litigation process in order to have standing.[113] In *Mirra v. Mirra*,[114] for example, the court ruled that shareholders lacked standing because they had not been shareholders at the time of the alleged wrongdoing.[115] Nor were the shareholders saved by the "'continuing wrong' doctrine"

> because every wrongful transaction may be viewed as a continuing wrong to the corporation until remedied, …the 'test to be applied in such situations concerns whether the wrong complained of is in actuality a continuing one or is one which has been consummated … [W]hat must be decided is when the specific acts of alleged wrongdoing occur, and not when their effect is felt.[116]

Moreover, as discussed in *Shareholder Duties*, even if an owner has standing by virtue of ownership at the time of wrongdoing, the right to bring a derivative action is lost if the owner loses her ownership interest.[117]

B. Damages and Equitable Relief

Measuring damages often is a critical issue in shareholder disputes. That task can be complicated, involving expert testimony and challenges as to speculation.[118] Illustrative of this issue is the SJC's holding in *Selmark Associates*, where the court reversed a judgment awarding damages on account of speculation and duplicative damages.[119] The court also reversed the lower court's ruling that there had been a violation of the Massachusetts unfair and deceptive trade practices statute, General Laws ch. 93A,[120] holding that the rule in *Szalla v. Locke*,[121] which held that claims under chapter 93A do not apply to intra-corporate disputes, applied even though the parties' dispute involved more than one entity.[122]

Multiple considerations come into play in the determination of damages. For example, in *One to One Interactive LLC v. Landrith*,[123] the Appeals Court held that post-breach developments (in this case "up to the time that the balloon payment was due") "are relevant to the consideration of what Landrith would have been able to recover 'but for' the breach of fiduciary duty."[124] In *Rubin v. Murray*,[125] the Appeals Court found no abuse of discretion in the trial judge ordering the return of an alleged overpayment of extra compensation and compelling the declaration of dividends.[126] Moreover, even a transaction that is profitable for all shareholders can still be challenged on the grounds that it involved a breach of fiduciary duty and damages flowed from that breach.[127]

C. Dissolution of the Entity

In certain instances, dissolution of the entity may be a solution to deadlock among the shareholders of a corporation. General Laws ch. 156D, § 14.30 "allows any shareholder or group of shareholders who hold forty per cent of 'the total combined voting power of all the shares of [a] corporation's stock outstanding' and are 'entitled to vote on the question of dissolution' to petition the Superior Court for dissolution of the corporation on the basis of director or shareholder deadlock."[128] The corporate dissolution statute was examined by the SJC in *Koshy v. Sachdev*,[129] where the court held that "[a] judge may allow a petition for dissolution due to deadlock between a corporation's directors only in cases of 'true deadlock.'"[130]

> To establish the existence of a 'true deadlock' between directors, the petitioning party must prove that (1) 'the directors are deadlocked in the management of the corporate affairs'; (2) 'the shareholders are unable to

113. Mass. R. Civ. P. 23.1; Billings v. GTFM LLC, 449 Mass. 281, 282 (2007). Rule 23.1 of the Massachusetts Rules of Civil Procedure provides that a derivative complaint "shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law from one who was a stockholder or member at such time."

114. No. 1484CV03857–BLS2, 2017 WL 439586, 34 Mass. L. Rptr. 31 (Mass. Super. Ct. Jan. 31, 2017) (Salinger, J.).

115. *Id.* at *5 ("The Massachusetts Business Corporation Act provides that '[a] shareholder may not commence or maintain a derivative proceeding unless the shareholder ... was a shareholder of the corporation at the time of the act or omission complained of [.]' …. This is known as the 'contemporaneous ownership requirement.'"

116. Id. (*quoting* Blasband v. Rales, 971 F.2d 1034, 1046 (3d Cir. 1992)) (citations omitted). The *Mirra* court noted that the exception to the contemporaneous ownership requirement that one who obtains an ownership interest through "transfer by operation of law from one who was a shareholder at the time of the allegedly wrongful act or omission" was not applicable here. *Mirra*, slip op. 5 n. 4.

117. *Shareholder Duties* at 148. If a merger or other action was taken solely to eliminate a derivative claim, that act might give rise to a claim of fraud that would defeat the lack of standing claim. Kolancian v. Snowden, 532 F. Supp. 2d 260, 262-63 (D. Mass. 2008). The SJC reaffirmed the important distinction between direct and derivative actions in Fronk v. Fowler, 456 Mass. 317, 332 (2010). Although *Fronk* involved a partnership, its holding relied upon, and applies with equal force to, shareholders' disputes. *Id.* at 332 n.23. The failure to bring a derivative action, along with other failures on the merits, led the court to affirm a trial court award of attorneys' fees for bringing a frivolous action. *Fronk* should be a cautionary note for attorneys, both because of the difference between direct and derivative actions and because of the court's holding regarding attorneys' fees.

118. *See, e.g., Selmark Associates*, 467 Mass. at 542-47.

119. *Id.*

120. Mass. Gen. Laws ch. 93A, § 11 (2006).

121. 421 Mass. 448 (1995).

122. *Selmark Associates*, 467 Mass. at 549-551; compare Beninati v. Borghi, 90 Mass. App. Ct. 556, 566-67 (2016) (third parties who interact with insider wrongdoers could be held liable under chapter 93A). Two other cases are worthy of note in the area of damages. In one, the SJC reaffirmed that how earnings in closely-held corporations are measured can be important in divorce cases. J.S. v. C.C., 454 Mass. 652 (2009). In the other, the previously discussed *Pointer* case, the court reaffirmed its holding in Brodie v. Jordan, 447 Mass. 866 (2006) that a forced sale was not a remedy for a freeze-out. Pointer, 455 Mass. at 822. The *Pointer* court also discussed the important issue of contractual indemnification in an operating agreement and held that the plaintiff had a right to be indemnified. *Id.* at 821-22.

123. 76 Mass. App. Ct. 142 (2010).

124. *Id.* at 150-53. The *Landrith* court also noted that equity claims can, at the judge's discretion, be sent to the jury. Id. at 146 n.8.

125. 79 Mass. App. Ct. 64 (2011).

126. A federal district court decision illustrates the broad powers that a court has to fashion equitable relief (subject to limitations such as the one set forth in Brodie). Butler v. Moore, 246 F. Supp.3d 466 (D. Mass. 2017) (Stearns, J.), vacated in part by No. 10-10207-FDS, 2017 WL 2294071 (May 25, 2017).

127. *O'Brien,* 449 Mass. at 386.

128. Mass. Gen. Laws ch. 156D, § 14.30 (2005); *see Shareholder Duties* at 150-51.

129. 477 Mass. 759 (2017); *see* Comment, 99 Mass. L. Rev. 69 (2018).

130. *Id.* at 765 (citations omitted).

break the deadlock'; and (3) 'irreparable injury to the corporation is threatened or being suffered. . . . If the petitioning party can establish a 'true deadlock,' then the statute vests the judge with the discretion to order dissolution as a remedy.[131]

Delving deeply into the facts, the court ruled that "the utter impasse as to fundamental matters of corporate governance and operation shown to exist in these circumstances gave rise to a state of 'true deadlock' such that the remedy of dissolution provided by the statute is permissible."[132] The determination as to whether the court should exercise its discretion to dissolve the corporation was left to the trial court on remand.[133]

The court listed four factors to be used in determining the existence of true deadlock: (a) "whether irreconcilable differences between the directors of a corporation have resulted in 'corporate paralysis'";[134] (b) "the size of the corporation at issue ….[since] deadlock is more likely to occur in a small or closely-held corporation, particularly one where ownership is divided on an even basis between two shareholder-directors";[135] (c) if "a party has manufactured a dispute in order to engineer a deadlock . . . [in which case], a court should view the party's claim with skepticism";[136] and (d) the "degree and extent of distrust and antipathy between the directors."[137]

Significantly, the court held that while chapter 156D allows for an orderly dissolution, "it also authorizes lesser remedies, such as a buyout or the sale of the company as an ongoing entity."[138] While dissolution (and its companion remedies of buyout or sale) is only useful in certain limited circumstances, the statute provides a useful set of remedies in cases of true deadlock among equal owners of a corporation.

III. Practical Considerations and Future Trends

In many ways, owners of closely-held businesses in Massachusetts control their own destinies when it comes to determining the rules by which they will be governed. They decide in the first instance whether or not to be governed by Massachusetts law by their choice of the state of incorporation and then their choices of law (both substantive and procedural) and forum that they make in their shareholder, employment and other agreements (although unless they are advised properly by counsel they may not be aware of the significant considerations involved in these decisions).

Given the enforceability of agreements among owners — even if they are in conflict with the common law fiduciary duties owed by the owners to one another and the entity — it would seem imprudent in most instances for owners of closely-held businesses not to have detailed agreements among themselves. Yet, for many reasons, including inertia, cost, and the fear of causing strife, owners often do not have such agreements, leading to uncertainty and costly litigation. The critical lesson for any lawyer who represents a closely-held entity is that the lawyer should urge the owners to create the appropriate agreements at the outset of the relationship and then encourage the owners to revisit their agreements periodically, especially if circumstances and relationships change.[139]

Not every situation will require the same type of agreement or agreements. In most cases, an owners' agreement should address four key issues — death, disability, ceasing to work because of retirement or termination of employment, and a mechanism for the owners to buy out one another if they no longer can get along. Whether other types of agreements, such as an employment agreement, are warranted will depend on the particular situation and the interests of the owners, which might be quite different in this regard. Even the most carefully crafted agreement will not prevent disputes that may arise among owners of closely-held businesses, but a well-framed agreement can provide guidance and order to resolving disputes when they do arise.

Closely-held businesses offer significant benefits to their owners — entrepreneurship, a greater ability to control one's future, and the opportunity to build a sustainable, multi-generational enterprise to name just a few. But with those benefits come the inevitable disputes and changed circumstances — disagreements among the owners, death, and disability, among others. It is in planning for those situations and then resolving them when they do arise that the law governing closely-held entities is so important. Practitioners and business owners alike would be well-advised to become familiar with Massachusetts law on closely-held entities.

131. *Id.* (citations omitted).

132. *Id.* at 760.

133. *Id.*

134. *Id.* at 766.

135. Koshy v. Sachdev, 477 Mass. 759, 766-70 (2017).

136. *Id.* at 767.

137. *Id.* at 767-68.

138. *Id.* at 771.

139. Of course, for every rule there is an exception and there may be circumstances where the parties' best interests are served by no agreement at all or one that covers some, but not all, of these issues.