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Informal Opinion 07-06

Potential Conflict of Interest: Board Member of Child Services
Agency Representing Child Served by that Agency

You have asked the committee whether a conflict of interest exists, and if so, what action you should take in the following situation:

You are a volunteer member of the Board of Directors of an Agency providing therapeutic services to children. Board members are unpaid. The Board does not discuss the child clients of the Agency. The Board discusses Agency clinicians only if a clinician sues the Agency, in which case the Board's involvement is limited to approving payment to outside counsel or approving settlement. "Board members sometimes meet clients at celebratory/graduation events to which they have been invited."

The Juvenile Court has appointed you attorney and guardian ad litem for a child in a neglect petition. The court has ordered the child's legal co-guardians to cooperate with the child's service providers and with his therapy. When the co-guardians and the child refused to allow DCF home visits, an agreement was reached on the eve of a neglect trial that you, in your role as guardian ad litem would make monthly home visits and provide written reports to the court and counsel. The alternative would have been to remove the child from the home, which all counsel and DCF agreed would have been detrimental to the child.

In February, an "incident" occurred during the child's group therapy, and the co-guardians refused to send the child back to that provider. The Agency had arranged for the therapy provider. Counsel for one of the co-guardians asked for a "provider meeting" to discuss the matter. The outpatient facility (group therapy provider) will not participate in the "provider meeting", claiming that you have a conflict of interest because of your dual role as member of the Board of the Agency which contracts with them to provide services and as attorney/guardian ad litem for the child-client.

In an early March telephone call, you informed us that you had arranged for the appointment of a substitute GAL for the child. Thereafter, the "provider meeting" was held without you, and the problem was resolved. You have requested that we still answer your inquiry, because the Agency provides its services to approximately fifty percent of DCF children needing this type of services statewide, and the potential conflict is certain to re-occur.

You implicitly ask two questions:

1) Is there a conflict of interest in representing a client served by an Agency while serving on that Agency's Board of Directors?

2) If the matter were to come before the Board, would removal of yourself from the room and from all consideration of the matter (you call it a "Chinese Wall") be an appropriate solution?

3) Would it be an appropriate solution to appoint a new guardian ad litem for the child, while retaining your role as attorney in the neglect proceeding?

The short answers to these questions are: (1) there is no rule which prohibits you from representing clients who obtain services from the Agency while you serve on its board, but you must consider whether a conflict of interest exists under Rule 1.7; (2) if you were to determine that a conflict exists, removal of yourself from all consideration of matters that reasonably could affect your client is a necessary but not sufficient, solution. You would still need to obtain client consent, in writing; (3) Arranging for the appointment of a new GAL while remaining attorney for the client would not by itself solve a conflict if one were to arise, but could make obtaining client consent more practical.

Lawyers frequently serve on boards of private or semi-public agencies. Often, the contribution of the lawyer to the board is enhanced by the lawyer's special knowledge of the subject area which comprises the agency's purpose. The profession encourages community service of this kind, and the Rules do not create any ethical bar to serving on a board of an agency acting in the lawyer's area of training.

Whenever a lawyer represents a client who has a connection to the agency the lawyer serves as Board Member, however, a potential for conflict of interest arises. Conflict situations are governed by Rule of Professional Conduct section 1.7, which was substantially amended in 2006, effective January 1, 2007. As it is clear under the facts presented that the Agency is not a client, the relevant part of Rule 1.7 is:

“Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in subsection (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 of more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under subsection (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; . . .

(4) each affected client gives informed consent, confirmed in writing.

The focus of the inquiry under Rule 1.7 in the circumstances you report is on the child-client, not on the Agency or its contracting clinicians. There is nothing in your situation which presents a direct conflict between two clients. The only source of conflict the Committee can reasonably infer from these facts is the possibility that your duties as Board member in reviewing past or future provider suits, or in determining the scope of contracts with providers, will somehow materially limit your responsibilities to the child-client. This inquiry is one that is personal to you and your client, and about which this Committee cannot speculate.

The Comments to the new version of Rule 1.7 state:

“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 course of action that reasonably should be pursued on behalf of the client.”

It is clear from your inquiry that you do not believe that representation of clients at “provider meetings” will adversely affect representation of the client. Where your duties to the Agency as a director are largely policy-setting and involve no decisions concerning Agency clients, the likelihood of a conflict arising is limited. If you carefully consider all the possible responsibilities you owe to the Agency as a director and find none which will materially limit your responsibilities to the client, the inquiry ends. You have reasonably determined that no conflict exists, and no client consent is necessary under Rule 1.7 (b)(4).

Obtaining client consent, however, is rarely a bad idea. If you conclude that either the current situation, or some situation likely to arise in the future creates or may create a conflict, you should obtain “informed consent, confirmed in writing” from each client who is served by the lawyer who is also served by the Agency. If you determine that informed consent is required, then

your joint appointment as GAL and attorney could raise a problem. The GAL speaks for the client, and would have to be a party to the informed consent. If you are the GAL, you cannot reasonably give consent to yourself as the lawyer concerning a conflict. Your suggestion that, under such circumstances, a separate GAL should be appointed is a sensible one for these circumstances.

THE COMMITTEE ON PROFESSIONAL ETHICS

By _____
Wesley W. Horton, Chair