

New York State Bar Association
Committee on Professional Ethics

Opinion 1149 (4/10/2018)

Topic: Conflicts of interest: Agency shop lawyer who represents the government against union members

Digest: A lawyer who is an agency shop member of a union may represent a government employer agency in disciplinary matters against union-represented employees, unless, in a particular circumstance, a reasonable lawyer would conclude that a significant risk exists that the lawyer's professional judgment on behalf of the government employer might be adversely affected by the lawyer's agency shop membership. If in a particular matter, a lawyer concludes that a conflict may exist, then the lawyer may undertake the representation if the lawyer reasonably believes that the lawyer can provide competent and diligent representation and the government agency gives its informed consent, confirmed in writing.

Rules: 1.0(q), 1.7(a) & (b).

FACTS

1. The inquiring lawyer is admitted to practice in New York and an employee of the State. The inquirer at times represents an agency of New York State in disciplinary proceedings initiated against union-represented employees. The inquirer was once a member of the particular union, but subsequently resigned membership, after which the lawyer became an agency shop member. As an agency shop member, the inquirer is required to pay union dues, but is excluded from membership benefits of the union and is unable to participate in union elections.

QUESTIONS

2. Does a lawyer who is employed by a state government agency and pays union dues as an agency shop member, but is not a union member, have a conflict in representing the government agency in disciplinary cases against members of the union and, if a conflict exists, may the conflict be waived?

OPINION

3. Rule 1.7(a) of the New York Rules of Professional Conduct (the "Rules") says in relevant part that, "[e]xcept as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude" that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." See Rule 1.7, Cmt. [10] (a lawyer's own "financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client."). Rule 1.0(q) defines "reasonable lawyer" to be "a lawyer acting from the perspective of a reasonable prudent and competent lawyer who is personally disinterested in commencing or continuing the representation."

4. In N.Y. State 578 (1986), we concluded that, under the New York State Code of Professional Responsibility (the "Code"), the predecessor of the Rules, a lawyer who was a member of a union and subject to the same collective bargaining agreement as an employee involved in a disciplinary proceeding had a conflict in undertaking the representation of the employer in that proceeding. We added, however, that, "if the lawyer is simply an agency shop member, or if the collective bargaining agreement involved is not one to which the lawyer is subject, these concerns are not present to the same degree. Therefore, such a lawyer is not specifically prohibited from

representing the State in a disciplinary proceeding brought under a collective bargaining agreement, except where the lawyer finds that he or she is unable to exercise independent professional judgment.” Otherwise put, when a lawyer is not a union member, the disabling interests that might trigger Rule 1.7(a)(2) do not exist to the same extent that union membership entails. Although we later modified N.Y. State 578 on other grounds (on which more below), we remain of the view that an agency shop member is in a different position than a union member for the purpose of conflicts analysis.

5. More recent opinions under the Rules presented questions in analogous situations in which we adopted similar themes. For instance, in N.Y. State 1119 ¶ 6 (2017), we considered whether a onetime associate district attorney could ethically represent defendants in prosecutions brought by the lawyer’s former superior. To us, the issue rested on whether a reasonable lawyer would conclude that the inquirer’s prior personal relationship with the district attorney created a “significant risk” that the lawyer’s prior relationship with district attorney would adversely affect the independent professional judgment of the inquirer in pursuing a defense. Similarly, in N.Y. State 1122 ¶ 8 (2017), when considering whether a foster parent could maintain a practice as an Attorney for Children in Family Court proceedings, we said the conflict posed by an inquirer’s status as a foster parent might well be “theoretical and remote,” and that, were there “no ‘significant risk’ of an adverse effect [on the lawyer’s professional judgment], objectively determined, an attorney who is a foster parent may undertake and continue representation of” parties in a Family Court proceeding without the need to obtain informed client consent.” *See generally* N.Y. State 968 ¶ 17 (2013) (discussing personal considerations giving rise to a “significant risk” that the professional judgment of a government lawyer defending claims of colleagues subject to a government furlough would be adversely affected where the furlough program was also applicable to the inquiring lawyer).

6. Accordingly, each time the lawyer is asked to represent the agency in disciplinary actions against employees represented by the union, the lawyer must determine whether a reasonable lawyer would conclude that the lawyer’s former union membership and/or current agency shop member status creates a significant risk that his representation of the State against union members would adversely affect the inquirer’s independent professional judgment on behalf of the client (the government agency). On the facts presented to us, we do not believe that a reasonable lawyer would conclude that there is such a significant risk.

7. If in a particular situation, the inquirer reasonably believes that there is a significant risk that the lawyer’s professional judgment would be adversely affected, then a curing mechanism appears in Rule 1.7(b), the exception to which Rule 1.7(a) refers. Rule 1.7(b) says that, notwithstanding a conflict under Rule 1.7(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.

8. In N.Y. State 578, we stuck to the position, first set out in pre-Code N.Y. State 40 (1966), that a government could not give informed consent to a conflict. We abandoned that position in N.Y. State 629 (1992) – hence the foregoing reference to modification of N.Y. State 578 – and have since consistently said that a government may provide informed consent. *See* N.Y. State 1130 ¶ 15 (2017); N.Y. State 968 ¶ 22; N.Y. State 770 (2003). Thus, if the inquirer were to conclude that a conflict exists, the conflict is subject to waiver by the State.

CONCLUSION

9. An agency shop member of a union of State employees union may represent a State agency in disciplinary matters against union-represented employees if the lawyer reasonably believes that no significant risk exists that the lawyer's professional judgment on behalf of the State agency will be adversely affected by the lawyer's personal interests. If in a particular circumstance a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the government employer might be adversely affected by the lawyer's agency-shop membership, then the lawyer may undertake the representation if the lawyer reasonably concludes that the lawyer can provide competent and diligent representation and the agency gives its informed consent, confirmed in writing.

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