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**MEMORANDUM**

TO: CAFL Appellate Panel Support Unit

FROM: [Law Student Intern]

DATE: December 2015

RE: Is a Parent’s Due Process Right to Counsel Violated when her Counsel has a Personal Conflict of Interest?

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**Question Presented**

 Does a trial attorney’s personal conflict of interest violate a parent’s right to counsel? What must the parent show to succeed on appeal?

**Brief Answer**

 Yes, a trial attorney’s personal conflict of interest violates a parent’s right to counsel, but only under certain circumstances. If the parent can show that her trial attorney had an “actual” conflict, then she need not show that the conflict prejudiced her case. Strong factual support is necessary; the court will not rely on a “categorical” type of conflict, such as an intimate relationship between the client’s attorney and an adverse party’s attorney. If the parent can only show that her attorney had a “potential” conflict, she must prove that her attorney’s performance fell below that of an ordinary fallible lawyer and that this poor performance prejudiced her case. This is essentially the same as the ineffective assistance of counsel standard in Saferian.

**Statement of Facts**

 After trial, mother’s appellate counsel learned that the mother’s trial counsel had two potential conflicts of interest. Five years ago, trial counsel was in a personal relationship with the DCF trial attorney on the mother’s case. The attorneys lived together during the relationship. Additionally, mother’s trial counsel had applied for a job as a DCF attorney, and her application was pending at the time of trial (and is still pending). Trial counsel failed to inform the mother of these potential conflicts before or during trial.

**Discussion**

 Both parents and children have a right to counsel in child welfare proceedings. G.L. c. 119, § 29; Department of Public Welfare v. J.K.B., 379 Mass. 1, 6-7 (1979) (granting parents the right to counsel in termination cases); Adoption of Meaghan, 461 Mass. 1006, 1007-08 (2012) (recognizing the right to counsel for parents and children in private adoption proceedings). The right to counsel means the right to effective assistance of counsel. *See* Care and Protection of Georgette, 439 Mass. 28, 34 (2003). Effective assistance means conflict-free counsel. *Id.*

 Massachusetts Rule of Professional Conduct Rule 1.7 states that an attorney cannot represent a client if doing so will conflict with the interests of another client or when the attorney has a personal interest in the matter. Mass. R. Prof. C. 1.7(a). If a conflict exists, an attorney can only represent the client if certain qualifications are met, including that the client must give informed, written consent. Mass. R. Prof. C. 1.7(b).

 Trial counsel may have either an “actual” or “potential” conflict of interest that impairs the client’s right to “untrammeled and unimpaired assistance of counsel free of any conflict of interest and unrestrained by commitments to others.” Com. v. Martinez, 425 Mass. 382, 388 (1997). To determine if the attorney violated the parent’s right to conflict-free counsel, the court must first determine if the conflict was either actual or potential; if the conflict is only potential, then the parent must show that the conflict was prejudicial. *See* Com. v. Hodge, 386 Mass. 165, 169-70 (1982).

1. **A parent is not required to show prejudice when an actual conflict existed, but the parent must show sufficient facts to prove an actual conflict.**

 An actual conflict exists when the “‘independent professional judgment’ of trial counsel is impaired, either by his own interest, or by the interest of another client.” Com. v. Shaiar, 397 Mass. 16, 20 (1986). If the court finds that the attorney had an actual conflict, the parent will not need to show that the conflict caused prejudice.[[1]](#footnote-2) *Id.* To show that an actual conflict existed, a parent cannot merely rely on speculation of a conflict. *Id.*

Intimate Relations with Opposing Counsel. An attorney’s personal relationships may create an actual conflict, but there must be sufficient facts to show the conflict. *See* Com. v. Croken, 432 Mass. 266 (2000). For example, in Croken, a criminal defendant learned after trial that his trial counsel was dating an assistant district attorney during trial and that the attorneys later married. *See* 432 Mass at 270-71. The defendant argued that the undisclosed relationship created an actual conflict that demanded a new trial. *Id*. at 269. The defendant did not know many details about the attorney’s relationship. *Id.* at 271. However, the Supreme Judicial Court noted the ethical rules and found that there was a reasonable possibility that a significant personal relationship may impair the “core of the attorney-client relationship.” *Id.* at 274. The Court noted that intimate relationships may cause “inadvertent breaches of confidentiality.” *Id.* at 274 (quoting ABA Criminal Justice Section, Ethical Problems Facing the Criminal Defense Lawyer 248-49 (1995)). An attorney’s partner may be aware of trips, communications, time spent preparing for trial, or other material details. *Id.* at 275. Although the SJC could not determine if an actual conflict existed, it recognized the risk of an actual conflict when an attorney represented a client while in this type of a relationship. *Id*. The SJC remanded the case for an evidentiary hearing to determine the nature of the two attorneys’ relationship prior to and at trial. *Id.* at 276-77.

 On the other hand, in Com. v. Stote, the SJC determined that a defense counsel’s past relationship with an ADA did not create an actual conflict. 456 Mass. 213, 221 (2009). This relationship was briefer than the relationship in Croken. *Id.* at 220. The parties did not live together, lessening the likelihood of inadvertent breaches of confidentiality. *Id*. Therefore, a party cannot rely on the nature of the personal relationship, but instead must show that the particular relationship caused an actual conflict and actual risks. *See* *Id.* at 221.

 The Appeals Court is unlikely to hold that an actual conflict existed when this mother’s trial attorney was in a personal relationship with the DCF trial attorney five years ago, before this case was filed. An actual conflict is more likely if the parties live together or are otherwise extensively involved in each other’s lives at the time of trial. *See* Stote, 456 Mass. 213 at 221. Here, it is unlikely that there were inadvertent breaches of confidentiality since the two lawyers were no longer in a relationship at the time of trial. The mere existence of a past relationship is insufficient. *Id*. Additional factual information would be necessary to determine if an actual conflict existed. For example, facts suggesting the attorneys remained in close contact, spent intimate time in each other’s homes, and that the DCF attorney was aware of preparations for the case might support the existence of an actual conflict of interest.

 Job Application with the Adverse Party. In Massachusetts, the Appeals Court has held that an actual conflict does not automatically exist when an attorney applies for a position with an adverse party. *See* Com. v. Agbanyo, 69 Mass. App. Ct. 841 (2007). For example, in Com. v. Agbanyo, a criminal defendant learned on the day of trial that his counsel accepted a position with the district attorney’s office. *Id.* at 841. The Appeals Court held that the defendant did not knowingly consent to the continued representation, even though the judge discussed the situation with the defendant. *Id*. at 845-46. However, the court also held that there was no actual conflict of interest. *Id*. at 847. The attorney was not employed as a prosecutor while representing the defendant and did not owe professional duties to the district attorney’s office in conflict with the defendant’s interests. *Id*. An actual conflict of interest did not exist solely on the basis of an accepted job offer. *Id*.; *see also* Adoption of Ted, 87 Mass. App. Ct. 1108, 2015 Mass. App. Unpub. 163 (Rule 1:28 decision) (mother’s counsel’s pending job application with DCF at time of trial was, at most, a potential conflict of interest, following Agbanyo).

If the Appeals Court refused to find that an actual conflict existed when a defense attorney accepted a job offer with the district attorney’s office (Agbanyo), then it is unlikely to find an actual conflict when the mother’s attorney applied for a position with DCF and that application was still pending. This case is on all fours with Ted, where a mother’s attorney had a pending job application with DCF at the time of trial. That was insufficient to show an actual conflict in Ted, and it is not enough here.

1. **A parent must show that a potential conflict led to poor attorney performance that prejudiced the client.**

 If a party cannot show that an actual conflict existed, then the party can still argue that a potential conflict of interest materially affected the attorney’s representation. To do so, the parent must demonstrate that the conflict materially prejudiced her case. *See* Stote, 456 Mass at 222. This analysis is similar to an ineffective assistance analysis. *Id*. Massachusetts courts apply a two-part test to evaluate an attorney’s conduct and determine if that conduct caused prejudice. *See* Care and Protection of Georgette, 439 Mass. 28, 33 (2007); Care and Protection of Stephen, 401 Mass. 144, 149 (1987); Com. v. Saferian, 366 Mass. 89, 96 (1974). Both parts of this test must be satisfied. *Id.*

 First, the parent must show that her counsel’s conduct “[fell] measurably below that which might be expected from an ordinary fallible lawyer.” Stephen, 401 Mass. at 149 (quoting Saferian, 366 Mass. at 96). Second, the attorney’s poor performance must have prejudiced the parent’s case. *See* Georgette, 439 Mass. at 33-34. This may be difficult to prove when there is substantial evidence of unfitness. *See id.* at 34 (children’s counsel could not show prejudice to their return-home position where there was “overwhelming” evidence against the father, including evidence of the father’s alcoholism and abuse of the children). The court may find prejudice when an attorney failed to properly prepare for trial. *See* Adoption of Azziza, 77 Mass. App. Ct. 363, 367 (2010). In Azziza, the father’s attorney failed to interview potential witness or call on them to testify. *Id*. at 369. She also failed to introduce a favorable report from DCF. *Id.* The Appeals Court held that father’s attorney’s conduct fell short and were prejudicial, especially since “the evidence of unfitness, while sufficient, was not overwhelming.” *Id.* at 369.

As noted above, in Adoption of Ted, the mother’s trial attorney’s job application with DCF was pending at the time of trial, and he never told the mother about it. *Id.* at \*7. On appeal, the mother argued that her attorney failed prepare her to testify because of the conflict. *Id.* Her trial counsel disputed this, and claimed to have done considerably pretrial preparation. Further, the trial court found that the mother had provided perjurious testimony during trial. *Id*. at \*8. The trial court determined that the mother could not show either prong of the test. *Id*. The Appeals Court agreed and noted that, given the “strength of the evidence of the mother’s unfitness, the judge’s ruling was plainly correct.” *Id.* The Appeals Court further reasoned that an attorney would not want to provide substandard representation and appear unskilled or unethical to the future employer. *Id.*

Notably, the Appeals Court was not pleased that the mother’s attorney did not tell her about the job application:

Lest our views be misunderstood, we emphasize that we are not ruling that trial counsel correctly decided that disclosure of his potential conflict of interest was unwarranted. To the contrary, regardless of whether counsel satisfied his formal ethical responsibilities (a question we ultimately do not reach), we believe that any doubts whether to disclose here should have been resolved in favor of disclosure. *See* [Commonwealth v. Stote, 456 Mass. 213, 224, 922 N.E.2d 768 (2010)](https://advance.lexis.com/document/?pdmfid=1000516&crid=7ec05415-9321-44ef-b7c5-7641408904db&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5FFK-7TC1-F15C-B03R-00000-00&pddocid=urn%3AcontentItem%3A5FFK-7TC1-F15C-B03R-00000-00&pdcontentcomponentid=345916&pdshepid=urn%3AcontentItem%3A5FFR-7DN1-J9X5-W4W4-00000-00&pdshepcat=initial&pdteaserkey=sr0&ecomp=_thhk&earg=sr0&prid=e66a6a7b-b2ad-4086-8a7f-9e13ddc3b6c5) (emphasizing that an “attorney should err on the side of caution by disclosing [to the client] the relevant facts” regarding a potential conflict of interest). However, at least under the facts of this case, counsel’s failure to disclose his employment application did not relieve the mother of demonstrating that counsel’s potentially divided loyalties actually caused her prejudice.

Id. at \*9-10.

In this case, the mother must demonstrate specific examples of her attorney’s inadequate preparation for trial (actions falling below those of a reasonably fallible attorney). The mother must also be able to show prejudice from those actions. This will be hard to do if the evidence of her unfitness is overwhelming. Further factual development is, therefore, essential.

**Conclusion**

 The Massachusetts appellate courts will not find a conflict of interest on the part of trial counsel based simply on the type of conflict, such as an intimate relationship with opposing counsel or a pending job application with DCF. While an attorney’s personal relationship *may* cause an actual conflict, the parent must be able to show that the circumstances of the relationship presented a significant risk of breached confidentiality. This is more likely when the relationship is ongoing at the time of trial and the attorneys live together. In this case, the fact that the mother’s trial attorney and the DCF attorney are no longer in a relationship suggests that an actual conflict does not exist. The mother would have to prove additional facts (such as continuing trysts, “sleep-overs,” or actual information-sharing) to show that an actual conflict exists.

 An attorney’s job application with DCF does not create an actual conflict. To prove that there is a potential conflict, a parent must satisfy the test for ineffective assistance of counsel. The mother must show that her trial attorney’s actions fell below those of an ordinary fallible lawyer. To do so, she must show specific examples of her attorney’s failures, such as inadequate preparation, failure to interview or call witnesses, etc., that the court could reasonably conclude were a result of the conflict of interest. The mother must also show prejudice. She may be unable to so if there is significant evidence of unfitness against her.

Additional Recent Cases:

Commonwealth v. Watkins, 473 Mass. 222 (2015)

In affirming the defendant’s convictions of first-degree murder and a related offense (as well as the denial of his motion for a new trial), the SJC rejected the defendant’s argument that a new trial was required on the ground that the prosecutor, who was previously employed as a public defender, had represented the defendant in several cases and, therefore, had a conflict of interest in regard to his role in the present case. The Court set forth the governing authority as follows: “A defendant who demonstrates an actual conflict of interest is entitled to a new trial, under [the] Federal and State Constitutions…. See Commonwealth v. Holliday, 450 Mass. 794, 806, cert. denied, 555 U.S. 947 (2008). An actual conflict of interest arises if a prosecutor has formerly represented a defendant in a matter that is substantially related to the pending case. See Mass. R. Prof. C. 1.9(a)…. If a defendant establishes only a potential or tenuous conflict of interest, however, the conviction will not be set aside unless the defendant demonstrates that the conflict resulted in actual prejudice.” The Court concluded that there was no actual conflict of interest here because none of the cases in which the prosecutor represented the defendant, “each of which ended many years before the current matter, [was] substantially related to the murder case…. Moreover, the record does not indicate that the defendant ever informed his trial counsel, either before or during trial, of a potential conflict of interest by the prosecutor. Nor did the defendant seek to have the prosecutor disqualified on the ground of a potential conflict. In the absence of an actual conflict of interest, the defendant must establish that the conflict resulted in actual prejudice…. The defendant has not done so.” Despite its ruling, the Court “emphasize[d] that the better practice for the prosecutor would have been to avoid the risk of reversal of a conviction, following a later determination that there was a conflict of interest, by simply choosing not to prosecute a former client.”

Commonwealth v. Holley, 476 Mass. 114 (2016)

SJC held that “complete disqualification of an entire district attorney’s office and the appointment of a special prosecutor are not required when a lawyer who previously represented a defendant currently being prosecuted by the district attorney’s office joins that office” noting the different rules of imputation for lawyer serving as public employees. The attorney who previously represented the defendant did not participate in the case or share confidential information with the prosecutor.

1. In Care and Protection of Georgette, the Supreme Judicial Court rejected the application of the “actual conflict” analysis in a care and protection case involving an attorney who represented multiple siblings with different positions. Care and Protection of Georgette, 439 Mass. 28, 33 n.7 (2003). However, the Court’s decision should not suggest that the “actual conflict” analysis cannot be applied to other types of conflicts of interest. [↑](#footnote-ref-2)