SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- NICOLE ADDIMANDO, Defendant/Appellant.	Second Department Docket No.: 2020/02485 Dutchess County Index No.: 74/2018

NOTICE OF MOTION OF THE NEW YORK CITY BAR ASSOCIATION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT NICOLE ADDIMANDO'S APPEAL

PLEASE TAKE NOTICE that, upon the affirmation of Tyler Maulsby, dated the 18th of August 2020, and annexed hereto as Exhibit A, the undersigned will move this Court, at the courthouse thereof, located at 45 Monroe Place, Brooklyn, NY 11201 on August 31, 2020, at 10:00 a.m., or as soon as counsel may be heard, for an order granting permission to the New York City Bar Association to file an amicus curiae brief in support of Defendant/Appellant Nicole Addimando's appeal in the above-referenced matter. A copy of the proposed brief is annexed hereto as Exhibit B.

Dated: New York, New York
August 18, 2020

Respectfully submitted,

FRANKFURT KURNIT KLEIN & SELZ, P.C.

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TO: PEOPLE OF THE STATE OF NEW YORK
Putnam County District Attorney's Office
Attn: Larry Glasser
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EXHIBIT A

(AFFIRMATION OF TYLER MAULSBY)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NICOLE ADDIMANDO,

Defendant/Appellant.

----------X

Second Department
Docket No.: 2020/02485

Dutchess County
Index No.: 74/2018

AFFIRMATION OF TYLER MAULSBY

Tyler Maulsby, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am an attorney with Frankfurt Kurnit Klein & Selz, PC. and a member of the Bar of the State of New York. I make this affirmation in support of the application of the New York City Bar Association ("NYCBA") to file an *amicus curiae* brief in support of Defendant/Appellant Nicole Addimando's Brief in support of her appeal in this matter. I am authorized by the proposed amicus to bring this motion and to submit the proposed brief filed together with this motion.

2. The New York City Bar Association (the "Association"), is one of the oldest and largest professional associations in the United States. It was founded in 1870 to improve the administration of justice, promote the rule of law, and elevate the legal profession's standards of integrity, honor, and courtesy. The Association has 25,000 voluntary member attorneys who serve hundreds of

thousands of clients, and who have a vital interest in ensuring that New Yorkers maintain their right to be represented by the counsel of their choice.

3. The Association's Professional Ethics Committee (the "Committee"), is responsible for providing guidance to New York lawyers on their ethical obligations under the New York Rules of Professional Conduct. Among other things, the Committee issues ethics opinions, interpreting the New York Rules of Professional Conduct, and answers formal and informal inquiries from New York lawyers on a variety of issues including conflicts of interest. The Committee also provides input on the drafting and amendment of the New York Rules of Professional Conduct. The Committee submits this brief on behalf of the Association to direct the Court's attention to how the New York Rules of Professional Conduct apply to the issues in this case and the policy implications stemming from the lower court's holding.

4. NYCBA anticipates that Appellant's briefing will fully address the legal reasons why disqualification of Ms. Addimando's original trial counsel was improper. As *amicus curae*, NYCBA seeks to assist the Court by supplementing Appellant's legal arguments with the policies underpinning the New York Rules of Professional Conduct and the significant policy implications to the lower court's improper application of the ethics rules governing conflicts of interest that resulted in the disqualification of Ms. Addimando's original lawyer. Given NYCBA's

longstanding involvement with the interpretation of the New York Rules of Professional Conduct, NYCBA is uniquely qualified to furnish the Court with this information.

5. I spoke with counsel for Respondent, the Putnam County District Attorney's Office, and understand that Respondent does not consent to the filing of this *amicus curae* brief at this time. I understand that Appellant consents to the filing of this amicus brief.

Dated: New York, New York
August 18, 2020

Respectfully submitted,

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EXHIBIT B

**(BRIEF *AMICUS CURIAE* OF
THE NEW YORK CITY BAR ASSOCIATION)**

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

----------X

THE PEOPLE OF THE STATE OF NEW YORK,	Second Department Docket No.: 2020/02485
Respondent,	
-against-	
NICOLE ADDIMANDO,	Dutchess County Index No.: 74/2018
Defendant/Appellant.	

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BRIEF *AMICUS CURIAE* OF THE NEW YORK CITY BAR ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF AMICUS CURIAE

The New York City Bar Association (the "Association"), is one of the oldest and largest professional associations in the United States. It was founded in 1870 to improve the administration of justice, promote the rule of law, and elevate the legal profession's standards of integrity, honor, and courtesy. The Association has 25,000 voluntary member attorneys who serve hundreds of thousands of clients, and who have a vital interest in ensuring that New Yorkers maintain their right to be represented by the counsel of their choice. The Association is a New York not-for-profit corporation. It has no shareholders, parent corporations or subsidiaries. It is not owned or controlled by any other entity; nor does it own or control any other entity. Its purpose is to advocate reform of the law in the public interest, to increase access to justice, and to support the rule of law in the United States.

The Association's Professional Ethics Committee (the "Committee"), is responsible for providing guidance to New York lawyers on their ethical obligations under the New York Rules of Professional Conduct. Among other things, the Committee issues ethics opinions, interpreting the New York Rules of Professional Conduct, and answers formal and informal inquiries from lawyers on a variety of issues including conflicts of interest. The Committee submits this brief on behalf of the Association to direct the Court's attention to how the New York

Rules of Professional Conduct apply to the issues in this case and the policy implications stemming from the lower court's holding.

No party or counsel for any party authored this brief in whole or in part or contributed funding that was intended for preparing or submitting it. No person or entity other than the Association contributed money to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

On May 23, 2018, the County Court, Dutchess County (McLoughlin, E., J.), disqualified Defendant-Appellant Nicole Addimando's defense counsel, an attorney with the Dutchess County Public Defender's Office ("DCPD"), on the grounds that DCPD's prior representation of a potential witness at Ms. Addimando's trial precluded DCPD from representing Ms. Addimando in the instant matter. The County Court further held that DCPD had a "continuing professional obligation" to its former client—Cesar Betancourt, whom DCPD had represented in 2011 in connection with a driving while intoxicated charge—and that it risked disclosing confidences of its prior client in the current matter. The County Court did not identify any purported confidential information that DCPD risked disclosing and the record reflects that DCPD was, in fact, not in possession of any of Mr. Betancourt's confidential information from its representation of him seven years earlier. Moreover, Ms. Addimando's DCPD attorney was not even

affiliated with DCPD at the time, seven years earlier, when another DCPD attorney represented Mr. Betancourt.

In holding that DCPD should be disqualified, the County Court misapplied the New York Rules of Professional Conduct (the "New York Rules" or "RPCs"), which govern attorneys' ethical obligations when representing clients. Specifically, the County Court analyzed the conflict as though Mr. Betancourt was a *current* client of DCPD instead of a *former* client, and therefore reasoned that DCPD had a heightened and unwavering duty of loyalty to Mr. Betancourt. To the contrary, Mr. Betancourt had not been DCPD's client for quite some time, and thus the County Court should have applied the New York Rule governing lawyer representation of former clients, which focuses on whether DCPD's representation of Ms. Addimando was "substantially related" to its prior representation of Mr. Betancourt and also whether DCPD risked disclosing Mr. Betancourt's "confidential information" to his detriment in its representation of Ms. Addimando. The County Court, however, did not perform this necessary analysis prior to taking the drastic step of disqualifying counsel. Instead, the court concluded that DCPD's representation of Ms. Addimando created the "appearance of impropriety"—a principle not recognized in the New York Rules in this context—in light of its prior representation of Mr. Betancourt.

There are significant policy implications to the lower court's improper application of the New York Rules and consequent disqualification of Ms. Addimando's original lawyer. The Rules strike a delicate balance between a lawyer's duties to current and former clients and the court below failed to appreciate that balance properly. Unless courts rigorously and consistently apply the conflicts-of-interest analysis set forth in the New York Rules, not only does a defendant risk being deprived of her right to be represented by counsel of her choice, but the legal professional is deprived of understandable and uniform standards of professional conduct.

FACTS RELEVANT TO THIS AMICUS BRIEF

This appeal arises from the pre-trial proceedings, trial, and subsequent conviction of Defendant-Appellant Nicole Addimando of second-degree murder and second-degree possession of a weapon in connection with the death of her partner Christopher Grover.

This Amicus Brief focuses on the May 23, 2018, order of the County Court (McLoughlin, E., J.) (the "Order"), disqualifying DCPD from its representation of Ms. Addimando. That Order granted a motion brought by the prosecution, dated May 8, 2018, seeking to disqualify DCPD based on what the prosecution termed an "unwaivable conflict of interest" arising from DCPD's prior representation of a

putative third-party witness, Cesar Betancourt, in a driving-while-intoxicated ("DWI") matter in 2011, seven years earlier.

According to the record below, Ms. Addimando confided to several defense witnesses, during the initial phases of the investigation in the instant case, that she had been the victim of sexual abuse by several individuals, including Mr. Betancourt and Mr. Grover, the decedent. During its investigation in this case the prosecution sought to interview Mr. Betancourt.

Upon learning that prosecutors were attempting to speak with him, Mr. Betancourt contacted DCPD. *See* Letter of Kara M. Gerry, May 1, 2018 ("Gerry Letter") at 3. That office informed Mr. Betancourt that he was not obligated to speak with anyone, but also told him that because of a conflict with the Addimando case, DCPD could not represent him in connection with the prosecution's desire to interview him. *Id.*

Based on Mr. Betancourt's 2018 conversation with DCPD and that office's seemingly unrelated representation of Mr. Betancourt approximately seven years earlier, the prosecution moved to disqualify DCPD from representing Ms. Addimando. The trial court granted the motion to disqualify on the purported grounds that the "potential for [DCPD's] disclosing confidences, for exhibiting disloyalty to a former client and for creating the appearance of impropriety" were too great. *See* Order at 7. The Court further held:

> [W]here there have been prior representations of individuals by the same legal organization, a concern arises that counsel's loyalties may be divided because the lawyer has a continuing professional obligation to former clients. Those obligations include a duty to maintain the former clients' confidences and secrets. That situation may potentially create a conflict between the former client and the present client.

Order at 7. The court held that there was an "unwaivable conflict of interest" that prevented the DCPD from continuing to represent Ms. Addimando in light of their prior representation, seven years earlier, of Mr. Betancourt. *Id.* at 8.

ARGUMENT

I.

THE TRIAL COURT FAILED TO APPRECIATE THAT THE RULES OF PROFESSIONAL CONDUCT DISTINGUISH BETWEEN DUTIES THAT ATTORNEYS OWE TO CURRENT CLIENTS AND THOSE THAT ATTORNEYS OWE TO FORMER CLIENTS

This case presents important ethical issues concerning the distinct duties that lawyers owe to their current clients and to their former clients.

Rule 1.7, which governs a lawyer's obligations to *current* clients, provides that a lawyer owes a duty of undivided loyalty to current clients and that the lawyer must refrain representing "differing interests" from those of the lawyer's current clients. The Rules further define such "differing interests" as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Rule 1.0(f).

When it comes to *former* clients, however, the Rules provide that lawyers owe much more limited duties of loyalty. Under Rule 1.9(a), lawyers are only required to refrain from representing a new client in a matter where it is "substantially related" to a matter which the lawyer previously handled for a former client. Matters are "substantially related" for purposes of Rule 1.9(a) "if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Rule 1.9 Cmt. [3]; *see also Solow v. W.R. Grace & Co*., 83 N.Y.2d 303, 306, 308 (1994).[1]

In addition, Rule 1.9(c) prohibits a lawyer from revealing or using confidential information obtained from a former client to that client's detriment in a subsequent representation. The definition of "confidential information" in the New York Rules encompasses a broad concept that includes, but is not limited to, information that is protected by the attorney-client privilege. *See* Rule 1.6(a). The protections of Rule 1.9(c) underscore that an attorney owes a "continuing duty to a

[1] Under the imputation principles set forth in Rule 1.10, a Rule 1.9(a) conflict preventing one attorney in a public defenders' office from appearing in a case will bar every other attorney at that office from appearing in the same matter. *See* NY Op. 862 (2011).

former client—broader in scope than the attorney-client evidentiary privilege—not to reveal confidences learned in the course of the professional relationship." *Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 637–38 (1998) (addressing Rule 1.9(c)'s predecessor DR 5-108). "The rule is designed to free the former client from any apprehension that matters disclosed to an attorney will subsequently be used against it in related litigation." *Solow*, 83 N.Y.2d at 309 (addressing DR 5-108).

As explained in NYSBA Ethics Op. 1029 (2014), the twin purposes of Rule 1.9 are: "(1) preventing a lawyer from switching sides (e.g., from participating in the litigation and settlement of a matter and then attacking the settlement), and (2) preventing the lawyer from improperly using confidential information of the former client."

In short, while Rule 1.7 prohibits a lawyer from representing one client adverse to another current client in any matter (without both clients' informed consent under limited circumstances), Rule 1.9(a) only prevents a lawyer from being adverse to a former client if the adverse matter is "substantially related" to the prior work the lawyer handled for the former client and Rule 1.9(c) merely prevents the lawyer from revealing confidences learned in the course of representing the former client. This difference between the duties owed to current and former clients is critical and strikes a delicate balance between the lawyer's

obligations of loyalty and confidentiality to the former client, on one hand, and the policy goals of not needlessly restricting a future client's ability to benefit from the lawyer's services, on the other.

If conflicts of interest are not analyzed under the proper standards, as set forth above, both lawyers and judges will face inconsistent precedents that will sow unnecessary confusion about the applicable ethical requirements. Clients, moreover, may then suffer from denial of the counsel of their choice. *See S & S Hotel Ventures Limited Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443 (1987) (because disqualification "denies a party's right to representation by the attorney of its choice," motions to disqualify opposing counsel are disfavored, must be "carefully scrutinized," and require a high standard of proof); *People v. Arroyave*, 49 N.Y.2d 264, 270 (1980) ("It is certainly well established that the right to counsel, guaranteed by both the Federal and State Constitutions, embraces the right of a criminal defendant to be represented by counsel of his own choosing") (citations omitted).

Here, the trial court ignored that delicate, but important, balance. As further addressed below, at the time that DCPD was representing Ms. Addimando, Mr. Betancourt was a former client, not a current client. As a result, the trial court should have analyzed the alleged conflict under Rule 1.9, which imposes on

lawyers far more limited duties than the general undivided duty of loyalty imposed upon lawyers with respect to current clients, under Rule 1.7.[2]

Because the court below failed to analyze the putative conflict under the appropriate ethical provision, Rule 1.9, it therefore did not consider, as required by Rule 1.9, whether DCPD's prior representation of Mr. Betancourt was "substantially related" to its representation of Ms. Addimando (within the meaning of Rule 1.9(a)) or whether DCPD was in possession of confidential information belonging to Mr. Betancourt that it could use to his detriment (within the meaning of Rule 1.9(c)).

II.

THE COURT APPLIED THE INCORRECT CONFLICTS OF INTEREST STANDARD

As Mr. Betancourt was a former, not current, client, DCPD owed him duties under Rule 1.9 and not Rule 1.7. The trial court not only failed to appreciate this distinction but it also misapplied the ethical rules governing a lawyer's potential conflict of interest.

[2] At best, Mr. Betancourt's single conversation with DCPD when the office declined to represent him for conflict reasons, created a *prospective* client relationship, which terminated at the end of the conversation. *See* Rule 1.18(a) ("a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client"). This too, would have created a much more limited duty for DCPD to Mr. Betancourt and would not have warranted disqualification of DCPD. *See* Rule 1.18(b), (c) & (d).

Subject to exceptions not relevant here, Rule 1.7 prohibits a lawyer from representing a client if "the representation will involve the lawyer in representing differing interests."[3] However, Rule 1.7(a) only imposes duties upon lawyers with respect to *current* clients. Here, DCPD's representation of Mr. Betancourt, in connection with a DWI in 2011, had ended years before its 2018 representation of Ms. Addimando. *See* Gerry Letter at 2. Thus, in 2018, Mr. Betancourt was decidedly not a current client, but rather was a *former* client of DCPD. As such, under Rule 1.7, the DCPD owed him no duties relating to the concluded representation.

When Mr. Betancourt contacted DCPD in 2018 about the prosecution's efforts to interview him in connection with the Addimando case, he was immediately told by DCPD that the office could not represent him. (*Id.*). Thus, for the purposes of Mr. Betancourt's initial conversation with DCPD about the Addimando case, he was a *prospective* client whom DCPD promptly declined to represent. *See* RPC 1.18(a). No attorney-client relationship was created at that time and, having been advised that DCPD did not represent him in the Addimando matter, Mr. Betancourt had no basis to believe that his conversations with the

[3] Under Rule 1.10, a Rule 1.7(a) conflict preventing one attorney in a firm—or public defenders' office—from appearing in a case will bar every other attorney at the office from appearing in the same matter. *See* NY Op. 862 (2011) (analyzing imputation of conflicts of interest in the context of a public defenders' office).

DCPD were privileged or otherwise confidential. *See Seaman v. Schulte Roth & Zabel LLP*, 176 A.D.3d 538, 539 (1st Dep't 2019) (no attorney relationship where attorney "clearly disclaim[ed]" one). The fact that DCPD advised Mr. Betancourt that he was not required to speak to an investigator (*see* Gerry Letter at 3), did not create an attorney-client relationship. *See M.J. Woods, Inc. v. Conopco, Inc.*, 271 F. Supp. 2d 576, 585 (S.D.N.Y. 2003) ("The simple act of an attorney giving advice to an individual does not automatically create an attorney-client relationship"; alleged advice provided by attorneys did not create attorney-client relationship).[4]

As Mr. Betancourt was a former DCPD client, the court should have analyzed the conflict under Rule 1.9, to determine whether DCPD's prior representation of Mr. Betancourt was "substantially related" to its representation of Ms. Addimando, within the meaning of Rule 1.9(a), and whether DCPD was in possession of relevant confidential information belonging to Mr. Betancourt that it could use to his detriment, within the meaning of Rule 1.9(c). The court failed to engage in any of that analysis.

[4] Moreover, the record does not reveal that Mr. Betancourt disclosed any confidences whatsoever in his brief 2018 conversation with DCPD. Rather, the record reveals simply that Mr. Betancourt sought to speak with DCPD attorneys about the fact that prosecutors were looking to speak with him, and DCPD informed Mr. Betancourt that he was not obligated to speak with anyone. *See* Gerry Letter at 3.

Instead, and rather than applying the above standards, the trial court disqualified the DCPD—without express reference to any New York Rules—on the purported grounds that the "potential for [DCPD's] disclosing confidences, for exhibiting disloyalty to a former client and for creating the appearance of impropriety" were too great. *See* Order at 7. Each of these three articulated bases is flawed.

First, as for the risk that DCPD would disclose its former client's confidences, the record does not appear to support such a finding, given that the DCPD attorney representing Ms. Addimando advised the court: "I have not reviewed Betancourt's DWI file, I do not have access to it, I have never spoken to him and I was not employed by the [DCPD] in 2011. Moreover, I have never discussed the DWI case with [Mr. Betancourt's prior DCPD lawyer] and am completely unaware of any confidences or secrets Betancourt may have discussed with [his prior DCPD lawyer] during the course of that representation." Gerry Letter at 2.

Second, as for the risk that DCPD would exhibit "disloyalty to a former client," Mr. Betancourt, this is simply *not* the appropriate standard under the New York Rules, as discussed above. DCPD owed Mr. Betancourt duties under Rule 1.9(a) only where it represented another person, such as Ms. Addimando, "in the same or a substantially related matter." The lower court never developed the

record below with respect to the question whether DCPD's completed representation of Mr. Betancourt on a DWI in 2011 was "substantially related" to DCPD's 2018 representation of Ms. Addimando. In any event, it was incorrect for the court to premise disqualification upon the notion that DCPD owed an undivided duty of loyalty to Mr. Betancourt, a concept not present in the Rules with respect to former clients.

Third, it was also incorrect for the court to weigh the propriety of DCPD's representation of Ms. Addimando by whether the representation created the "appearance of impropriety." The New York Rules simply do not call for evaluation of conflicts of interest based on the "appearance of impropriety" and, accordingly, such reasoning is not a valid basis for disqualification of counsel. *See Develop Don't Destroy Bklyn. v. Empire State Dev. Corp.*, 31 A.D.3d 144, 153 (1st Dep't 2006) (reversing lower court's disqualification of counsel for purported "appearance of impropriety" because such disqualification ignored "three basic principles of law": (1) there can be no "appearance of impropriety" if the disciplinary Rules are not violated; (2) "appearance of impropriety alone" is insufficient to warrant disqualification; and (3) the court must also weigh the party's right to counsel of its choice.).

CONCLUSION

For the foregoing reasons, Amicus New York City Bar Association respectfully submits that the disqualification of DCPD in this matter was not based on a proper interpretation of the New York Rules of Professional Conduct.

Dated: New York, New York
August 18, 2020

Respectfully submitted,

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