

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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**CA 21-01664**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

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IN THE MATTER OF THE APPLICATION OF  
STATE OF NEW YORK, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

BOBBY P., AN INMATE IN THE CUSTODY OF THE  
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND  
COMMUNITY SUPERVISION, RESPONDENT-APPELLANT.

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ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA  
(JOSEPH BETAR OF COUNSEL), FOR RESPONDENT-APPELLANT.

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Appeal from an order of the Supreme Court, Onondaga County  
(Gerard J. Neri, J.), entered November 12, 2021 in a proceeding  
pursuant to Mental Hygiene Law article 10. The order denied the  
motion of Mental Hygiene Legal Service to withdraw as counsel for  
respondent.

It is hereby ORDERED that the order so appealed from is  
unanimously reversed on the law and in the exercise of discretion  
without costs and the motion is granted.

Memorandum: Respondent, a convicted sex offender, appeals from  
an order denying the motion of Mental Hygiene Legal Service (MHLS) to  
withdraw as his appointed counsel in this Mental Hygiene Law article  
10 proceeding (*see generally* CPLR 5511; *Auerbach v Bennett*, 47 NY2d  
619, 627-629 [1979]). We reverse. Contrary to Supreme Court's  
determination, nothing in section 10.06 (c) limits a trial court's  
well established discretion to substitute or disqualify appointed  
counsel in appropriate circumstances (*see generally* *Majewski v*  
*Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). Nor,  
contrary to the assumption of the court and respondent, is the  
disposition of MHLS's motion controlled by a mechanistic application  
of the Rules of Professional Conduct (*see* *Niesig v Team I*, 76 NY2d  
363, 369-370 [1990]; *see generally* § 10.06 [c]). Rather, withdrawal  
or disqualification of counsel "may be warranted based on a mere  
appearance of impropriety" even in the absence of an actual conflict  
of interest (*Halberstam v Halberstam*, 122 AD3d 679, 679-680 [2d Dept  
2014]; *see* *McCutchen v 3 Princesses & AP Trust Dated Feb. 3, 2004*, 138  
AD3d 1223, 1226 [3d Dept 2016]). Under the unique circumstances of  
this case, we exercise our own discretion to grant MHLS's motion to  
withdraw "so as to avoid even the appearance of impropriety" on MHLS's  
part (*McCutchen*, 138 AD3d at 1227 [internal quotation marks omitted];  
*see* *Burton v Burton*, 139 AD2d 554, 554 [2d Dept 1988]; *see generally*

*Matter of Von Bulow*, 63 NY2d 221, 224 [1984]). In light of our determination, we need not decide whether MHLs is actually prohibited by the Rules of Professional Conduct from representing respondent under these circumstances.

Entered: June 3, 2022

Ann Dillon Flynn  
Clerk of the Court