

ADVISORY ETHICS OPINION 86-07

SYNOPSIS:

A variety of irreconcilable conflicts arise where an attorney for a state agency represents the agency and individual recipients of Agency services in simultaneous or successive representation.

OPINION:

The attorney for an Agency within one of the Departments of government of the State of Vermont asks for an opinion regarding conflicts of interest which could arise while representing both the Agency itself and individual citizens whose legal interests the Agency is charged with protecting. In addition to representing the Agency and individual citizens who receive financial and other services from the Agency, federal law obligates the attorney to provide certain legal services to citizens who are not recipients of other Agency services.

The Agency's request takes the form of five hypothetical fact patterns. To some degree this makes it difficult to give a full response, as advisory ethical opinions are generally given in relation to actual situations wherein particular facts are established.

QUESTION 1:

Simultaneous representation of an individual who formerly received Agency services and the Agency itself in recouping from a third party support monies assigned by the individual to the Agency.

Two questions are raised:

- (a) Do the interests of the individual and the Agency differ sufficiently that the simultaneous representation of both will impair the attorney's independent judgment on behalf of either client; and
- (b) If the interests do differ, could the Agency formulate a disclosure policy which would permit it to continue simultaneous representation?

Pursuant to DR5-105(A) an attorney is to decline proffered employment if it would be likely to involve the attorney in representing differing interests.

DR5-105(B) stipulates that an attorney shall not continue employment if it would be likely to involve the attorney in representing differing interests. "Differing interests" is defined in the Code of Professional Responsibility as including "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."

DR5-105(C) sets forth an exception to DR5-105(A) and (B). It provides that an attorney can represent multiple clients if it is obvious that the attorney can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the attorneys independent professional judgment on each. In this situation the interests of the attorney in representing the Agency and the individual could frequently differ. No facts have been supplied by the requesting attorney, so it is not possible to describe the exact nature of the conflict. However, the opportunity for conflict is so probable that it is unlikely that an attorney could ever represent both the Agency and the individual.

The committee is also of the opinion that no disclosure would be competent to permit the individual to avail himself or herself of the services of the attorney and at the same time permit the attorney to represent the Agency in an action against that same individual. "The exception of DR5-105(c) would rarely, if ever, be involved because the clients would not consent or any consent would appear coerced. . . ."¹ Therefore, differing interests preclude simultaneous representation.

QUESTION 2:

Simultaneous representation of two persons where one person is a recipient of Agency services, the other is not a recipient and both seek Agency assistance in securing ongoing support claims litigation against a single defendant.

¹ Opinion No. 76-18.

This hypothetical apparently postulates that the common defendant has insufficient assets to satisfy the support claims which both individuals seek to have the Agency press in their behalf. Because of the financial inability of the Defendant to satisfy both claims, the attorney is not in a position to provide undivided loyalty to either client. The attorney is precluded from simultaneous representation.

A further permutation of the hypothetical is posed by asking whether the order in time in which the recipient and non-recipient of other Agency assistance seeks representation in litigation is irrelevant. There is no justification for discriminating in favor of or against either person. Whether a non-recipient individual seeks help at the same time as, or subsequent to, the granting of assistance to another person does not provide valid grounds for declining to provide legal services to the non-recipient or to the recipient.

QUESTION 3:

Representation of two persons, neither of whom is a recipient of Agency services, against the same third person.

The answer to this question is the same as the answer to Question two. There is no basis which would suggest that use or non-use of other Agency services affects the nature of the conflicts which would invariably arise.

QUESTION 4:

Use of information that an ex-recipient of Agency services who is currently being represented by an Agency attorney has committed fraud upon the Agency in the past. The assumption has been made that the information relative to the fraud was obtained during the course of the representation.

Canon 4 of the Code of Professional Responsibility sets forth the duty of an attorney to preserve the confidences and secrets of a client. DR4-101(A) defines "confidences" as information protected by the attorney-client privilege, and "secrets" as other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. DR4-101(B) provides that an attorney shall not knowingly reveal a confidence or secret of his or her client or use such to the disadvantage of the attorney's client except with the client's consent. In addition, pursuant to DR4-101(D), the attorney must exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the attorney from disclosing such information. There are several exceptions to this requirement of non-disclosure set forth in DR4-101(C), but none of them apply to the hypothetical facts as presented.

When a question of fraud is involved, DR7-102(B)(1) provides that where an attorney receives information that a client, in the course of the representation, has perpetrated a fraud upon a person or tribunal, the attorney shall call upon the client to rectify the fraud, and that if the client refuses or is unable to do so, the attorney shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication. In the hypothetical facts given, the fraud was perpetrated prior to the commencement of representation by the Agency attorney. This renders the DR7-102(B)(1) requirement for disclosure inapplicable. It is only when the fraud has been perpetrated during the current representation that the duty to disclose applies. Thus, the duty of non-disclosure pursuant to DR4-101(A) prevails and the information may not be divulged for any purpose.

In Vermont Bar Advisory Ethics Opinion 81-1, the question of what responsibility an attorney has to reveal past client fraud under DR7-101(B) was specifically addressed. There it was stated that the duty to reveal past client fraud under DR7-101(B) is generally limited to those narrow circumstances when an attorney receives information from someone other than his or her client, which information clearly establishes that during the course of representation the client intentionally committed a fraud upon a person or tribunal. Noting that there has been a long history of accommodation in favor of preserving client confidences either through practice or by the continuous carving out of significant exceptions to the general duty to reveal fraud, the Committee favorably cites the American Bar Association's Committee on Ethics and Professional Responsibility in its Formal Opinion 341. In that opinion the ABA Committee took the position that more weight should be given to the non-disclosure requirements of DR4-101 than to the disclosure requirements of DR7-102(B)(1).

In summary, the factual situation posed, evidence of past fraud upon the Agency by the client should not be revealed by the attorney to the Agency for any purpose.

QUESTION 5:

What is the standard of legal representation required where an Agency attorney has a caseload of two thousand clients?

Canon 5 of the Code of Professional Responsibility requires that an attorney represent all clients adequately. DR6-101(A)(2) provides that an attorney shall not handle a legal matter without preparation adequate to the circumstances. DR6-101(A)(3) provides that an attorney shall not neglect a legal matter entrusted to her or him. This precept establishes that preparation and presentation of a legal matter must be adequate in reference to the circumstances of the case as opposed to the circumstances presented by an attorney's untenably large caseload.

Further discussion of the responsibilities of an attorney to adequately represent clients can be found in the Legal Background to the ABA Model Rules of Professional Conduct (Tentative Draft, January 1984), under Rule 1.3, Diligence. The discussion therein states, among other things, that an attorney must provide services within a reasonable time without unnecessary delay. Some of the omissions which are set forth as violating the duty to adequately represent a client include failure to commence action, failure to appear at hearings, failure to file pleadings, filing carelessly drafted pleadings, failure to respond to interrogatories, and failure to answer correspondence from opposing counsel or the Court.

In answer to Question five, there is a duty upon an attorney to ensure that the legal services he or she provides are adequate. If the caseload of Agency attorneys who are charged with litigation assistance becomes so overwhelming as to make it impossible to adequately represent each client, the attorney then has a duty to take steps to reduce his or her caseload to a point where adequate representation of each client is possible.