

ADVISORY ETHICS OPINION 87-19

SYNOPSIS:

The rule permitting multiple simultaneous representation only when it is obvious that an attorney can adequately represent the interests of more than one client does not permit an Agency of state government to avoid resulting conflicts arising from simultaneous representation by having the Agency subordinate its interests to those of individual clients; other issues are also addressed.

OPINION:

In Opinion 86-7 this Committee gave its opinion regarding conflicts of interest which could arise when an attorney for an Agency within one of the departments of government of the State of Vermont represents the Agency itself and individual citizens whose legal interests the Agency is charged with protecting. The Committee addressed five hypothetical fact patterns which made it difficult to give a full response as advisory ethical opinions are generally given in relation to actual situations wherein particular facts are established. The Agency has filed another request, this time providing six additional hypothetical factual situations for consideration.

As a general proposition it should be noted that in the particular type of practice in which this Agency is involved there is a raging national debate in both judicial and ethical forums concerning the issue: "Who is the client." States with different agency enabling legislation or different ethical codes than ours have variously concluded that the state, the parents, or the child is the client. It is the view of this Committee that all three potential parties are in fact clients and that the attorney must decide which one and only person or entity he or she will represent.

QUESTION 1:

The agency's first hypothetical is an extension of Question 1 in Opinion 86-7. There we concluded that an attorney cannot simultaneously represent an individual and the Agency itself in recouping from a third person monies owed to the Agency and the individual. The Agency proposes to cure the conflict by adopting a policy that:

- a. monies owed to it be subordinated to any monies owed to the individual;
- b. the possible conflict of interest be disclosed to the individual; and
- c. the consent of the individual to proceed is obtained

For the reasons set forth in Opinion 86-7, the Agency's effort to establish a program which prioritizes an attorney's allegiance continues to violate the Code. The apparent intent of the policy adopted by the Agency is to subordinate the rights of the Agency as a client to those of the individual client, thus eliminating any conflict between the interests of the two parties. In this situation the interests of the attorney in representing the Agency and the individual could nonetheless differ. For example, who does the attorney represent if he or she believes that the individual or the Agency has perpetrated a fraud on the other party. Or, what happens if settlement negotiations with a debtor are underway; an attorney cannot represent the individual and Agency adequately when there is a limit found to satisfy two obligations. Where there is an opportunity for conflict, an attorney must avoid representing two clients.

The hypothetical presented also included full disclosure to the individual client, apparently to satisfy the requirements of DR 5-105(C), which allows for multiple representation where it is obvious that an attorney can adequately represent the interests of each client if each consents to the representation upon the full disclosure of the possible effect of such representation on the exercise of the attorney's independent professional judgment. As was stated in Opinion 86-7, the Committee is 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 the same individual. Therefore, differing interests preclude simultaneous representation.

QUESTION 2(a):

When the Agency has instituted an action to collect from a third party monies assigned by an individual client to the Agency and during the course of the action the client's status changes and the client is no longer a client of the Agency for non-legal services, is the attorney for the Agency improperly soliciting if the individual client is notified of the pending action and asked whether he or she wants the Agency to continue the action on his or her behalf?

Since simultaneous representation of the Agency and the individual client in this fact pattern involves potentially differing interests and is therefore precluded, the issue of improper solicitation is moot.

QUESTION 2(b):

In the fact pattern as outlined in 2(a) above, can an attorney for the Agency represent both the Agency in its continued legal action and the individual client in securing payments from the same third party, given the Agency's policy preference for the non-public assistance client?

The answer to this question is the same as the answer to Question 1. DR 5-105(A) and (B) clearly state that an attorney cannot undertake representation or continue representation if that representation involves representing differing interests. The fact that the conflict arises after the commencement of an action does not affect the nature of the conflicts which would invariably arise.

QUESTION 3:

Where the Agency has commenced an action on behalf of an individual client who does not receive the Agency's non-legal services and the client's status changes and the client now receives the Agency's non-legal services, can the Agency's attorney simultaneously represent the client and the Agency's interest in recouping monies assigned by the client to the Agency?

The answer to this question is the same as the answer to Questions 1 and 2(a). Differing interests preclude simultaneous representation. DR 5-105(A) and (B).

QUESTION 4:

If a client terminates legal services provided by the Agency, can the attorney for the Agency then represent the Agency in pursuing the third party for monies owed to the Agency?

Upon the termination of representation of the non-public assistance client, the attorney for the Agency is not faced with a question of conflict of interest due to multi-party representation. Therefore, the restrictions of DR 5-105 do not apply.

However, an issue arises as to whether the attorney for the Agency can use information obtained during the prior representation in the course of pursuing the Agency's claim against the third party. Pursuant to DR 4-101(B), except when permitted under DR 4-101(C), a lawyer shall not knowingly use a confidence or secret of his or her client for the advantage of a third person unless the client consents after full disclosure. "Confidence" refers to information protected by the attorney-client privilege under the applicable law and "secret" refers to other information gained in the professional relationship which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. Therefore, the attorney for the Agency has to undertake an analysis to ensure that no confidences or secrets obtained through the representation of the individual client are used to further the Agency's action without the consent of the client after full disclosure.

QUESTION 5:

When the Agency has successfully concluded an action to collect from a third party monies assigned by the individual client to the Agency, can the attorney for the Agency then represent the individual client in seeking to recover whatever additional monies are owed by the third person to that individual?

The answer to this question is the same as the answer to Question 4. Upon successful conclusion of the Agency's action, the attorney for the Agency is not faced with a question of conflict of interest due to multi-party representation. However, he or she must be cognizant of the restrictions imposed by DR 4-101 on the disclosure of confidences and secrets. As a practical matter, we fail to see how such a scenario could arise since the Agency has a policy which obligates it to first advance the claims of the individual client.

QUESTION 6:

When the Agency concludes an administrative collection action on behalf of itself and an individual client under a statute which dictates the sequence of distribution of any proceeds of the collection, can an attorney for the Agency simultaneously represent the Agency and the individual client in an appeal by the third party?

The question posed by the Agency makes it difficult to give a full response. We restrict our response to the question of I.R.S. tax offsets, which is provided as an example by the Agency.

Where the Agency is seeking to collect a single lump sum and the sequence of distribution for the proceeds from the tax offset is dictated by federal law, the interests of the Agency and the non-public assistance client are identical on appeal. Therefore, the DR 5-105(A) requirement that a lawyer decline employment if it would be likely to involve him or her in representing differing interests is inapplicable. Under these limited facts, multiple representation would be proper.