

# ADVISORY ETHICS OPINION 96-04

## SYNOPSIS:

An attorney who contracts with a state office to provide representation for the office may not represent private clients in other cases in which the office is a party unless both parties consent after full disclosure of the possible effect of such representation on the exercise of the attorney's independent professional judgment.

## FACTS:

The requesting attorney is considering applying for a contract with the State's Office of Child Support (the "Office") to provide representation for the Office in cases before Family Court and magistrates. The attorney questions whether a conflict would exist for the contract attorney if that attorney represented parties in other cases in which the Office is represented by a paralegal before the magistrate. The requesting attorney notes that all non-attorney cases the Office is involved with may be appealed to Family Court and become attorney cases, but the Office has full-time attorneys available to handle conflict cases that might arise in that situation. The Office has indicated to the requesting attorney that it has software in place to deny access to records to a contract attorney that had conflicts with the Office in cases where the contract attorney had private clients.

## QUESTION:

The attorney requests an opinion as to whether the contract attorney would be precluded ethically from representing private clients in cases where the Office was involved.

## DISCUSSION:

The applicable provision of the Code of Professional Responsibility is **DR 5-105**:

**DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.**

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
- (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
- (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he 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 his independent professional judgment on behalf of each.
- (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

It seems clear that a contract attorney working for the Office of Child Support would have a conflict of interest if the attorney represented private clients in cases in which the Office took part. In Opinion 81-7, this Committee opined that a firm acting as Town Attorney was ethically barred from representing other clients in matters against the Town, including matters that might come before the Board of Selectmen, Zoning Board of Adjustment or Planning Commission. In Informal Opinion No. 691 (October 14, 1963), the American Bar Association Committee on Ethics and Professional Responsibility opined that neither a city solicitor nor his partner or associate could ethically represent a property owner in appeals or negotiations with the city. The committee noted that it was not material whether the attorney was employed by the city on a full-time or part-time basis.<sup>1</sup>

A case taking an opposite view, Maxham v. Hannigan,<sup>2</sup> can be distinguished. There, a part-time assistant attorney for the county department of social services was not prohibited from representing criminal defendants in county court, since his governmental duties were restricted to the social services department and the appearance of impropriety was highly improbable. Here, the contract attorney, in private cases, might be taking a position adverse to the very office with which the attorney contracted.

<sup>1</sup> See also, Vermont Opinion 92-15.

<sup>2</sup> Maxham v. Hannigan, 455 N.Y.S.2d 424 (App. Div. 1982)

The one remaining question is whether the attorney can continue to represent private clients in cases involving the Office if the private client and the Office both consent to the representation after full disclosure of the possible effect of the representation on the exercise of the attorney's independent professional judgment. In Informal Opinion 691. supra, the committee noted that it had held in a series of Formal Opinions that the consent that may make the representation of conflicting positions unobjectionable cannot be utilized by a person standing in an official position. Here, the contract attorney cannot be said to have an official position like the city solicitor in Informal Opinion 691.

We must add a caveat, however, about the possibility of the attorney taking a legal position contrary to one the attorney had previously taken for another client. Such an argument would be problematic and should be avoided, if necessary, by declining to represent the second client.

### **CONCLUSION:**

We conclude that a contract attorney for the Office of Child Support may represent private clients in cases in which the Office of Child Support is involved only when both the private client and the Office consent after full disclosure of the possible conflict for the attorney.