

ADVISORY ETHICS OPINION 89-08

SYNOPSIS:

Rules requiring preservation of confidences and secrets of a client and precluding multiple simultaneous representation and/or representation of conflicting interests do not apply to or prohibit attorneys for a state agency from representing agency against a non-custodial parent in child support enforcement action after having been assigned child support rights by the custodial parent, where agency attorneys never established an attorney-client relationship with either parent.

FACTS:

A department of state government requests an opinion concerning the ethical propriety of its legal department proceeding to enforce a child support obligation against a noncustodial parent. The department relies upon a "Support Collection Agreement and Assignment of Support Rights" executed by a custodial parent who had not been receiving child support payments from the noncustodial parent. Eighteen months prior to the execution of this agreement, the department had agreed in writing to act "on behalf" of the noncustodial parent to receive and endorse his support checks, keep records and forward payments to the custodial parent for the benefit of the child. This is a service provided to Vermonters who wish to participate in the "Vermont for Kids" program, whereby child support payments are passed through the Department, thus avoiding direct contact between the two parents.

This earlier agreement with the noncustodial parent also authorized the Department to initiate support enforcement if the noncustodial parent's support obligations were in arrears and included the right to pursue wage withholding, court actions and state and federal tax refund intercepts.

Neither of the agreements were executed by the Department's lawyers nor did these lawyers have any contact with either of the custodial or noncustodial parents. The request for an advisory opinion states that the legal unit of the Department represents "only the Department" and has no client/attorney relationship with either of the custodial or noncustodial parent.

We assume that at all relevant times, neither of the custodial or noncustodial parents were receiving any direct services from or were "clients" of the Department. This opinion is based upon the representations of the Department legal unit and an analysis of the written agreements between the Department and the custodial and noncustodial parents.

The agreement between the Department and the custodial parent contains an elaborate "explanation of assignment" which advises the parent that if she/he wishes the Department's attorneys to handle child support matters under the "Vermont for Kids" program:

"in order for our attorneys to comply with the code of professional responsibility, to avoid conflicts of interest, and to effectively manage the "Vermont for Kids" cases, you are required to assign your support right to the Vermont Department of Social Welfare. If you only want basic collection as described in the assignment you need not sign your support rights to the Vermont Department of Social Welfare."

The explanation goes on to state that the assignment will enable the Department to exclusively decide on what actions it will take to obtain support and that the parent will not be consulted concerning settlement or negotiations. The document further advises the parent to seek legal advice if he or she does not understand the assignment.

The support collection agreement and assignment of support rights is a detailed, two-page, single-spaced document which specifies the responsibilities of each party. It makes clear that the Department "shall not act as an attorney for the custodial parent." The major obligations of the Department are to establish, collect and enforce child support obligations, including paternity, and to forward one hundred percent of all support collected from the noncustodial parent directly to the custodial parent.

DISCUSSION:

The Committee has previously reviewed a substantial number of hypothetical fact situations presented by the same Department and relating to the same type of issue. These prior opinions discuss the requirements under DR 5-105(B), relating to conflicts of interest.¹ Thus, we determined that where an attorney for a state agency represents the agency and individual recipients of

¹ See Opinions 86-7 and 87-19.

agency services in simultaneous or successive representation, the attorney must decline representation if it would be likely to involve the attorney in representing differing interests, i.e. "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."²

The instant request presents a significant difference from the circumstances explored in Opinions 86-7 and 87-19. Here, the Department highlights the fact that its attorneys had no contact with either the custodial or noncustodial parent at the time the respective parents signed agreements to participate in the "Vermont for Kids" program. The question posed concerns the ethics of proceeding against the noncustodial parent solely on behalf of the State of Vermont. The answer to the question turns upon the nature of the relationship, if any, between the noncustodial parent and the Department lawyers at the time the noncustodial parent authorized the Department to accept and forward child support checks on to the custodial parent. As mentioned, the legal unit did not involve itself in this transaction. However, the Application which authorizes the Department to collect payments requests detailed information about the noncustodial parent, including social security number, employer, present marital status, assets and "legal situation." Clearly, an agreement is reached which has legal consequences. However, the Code of Professional Responsibility only applies to attorneys. The application, while it creates a binding relationship between the Department and the noncustodial parent makes it clear that the individual is dealing with the Department's Cash Receipts Unit and is not providing information to an attorney in the context of a lawyer client relationship in order to advance some legal interest of the client. Thus, the requirements of Canon 4 which protect confidences and secrets of a client are not invoked. Indeed, none of the information provided was gained in a "professional relationship" that a client has requested be held inviolate or the disclosure of which would be embarrassing or likely to be detrimental to the client.³ Moreover, since the noncustodial parent never employed or retained the services of the Department's legal unit within the meaning of DR 5-105(A), the legal unit would not be representing differing interests by pursuing a support claim on behalf of the department against the noncustodial parent.

Further, agreement between the Department and the noncustodial parent specifically contemplates that the Department may "initiate appropriate steps for support enforcement if my support arrearages . . . exceed one month's support obligation. These actions include, . . . initiating wage withholding or other court action and certifying my name to the IRS and the State Tax Department on behalf of my family." A fair construction of the agreement does not support a conclusion that either the Department or its attorneys would act to advance the noncustodial parent's legal interests. It follows that neither the confidentiality provisions of Canon 4 nor the independent professional judgment considerations of Canon 5 are involved with respect to the noncustodial parent.

The question still remains, however, whether the Department attorneys may proceed under the terms of the support collection agreement and assignment of support rights signed with the custodial parent. Any ethical considerations turn on whether the agreement creates a lawyer/client relationship. If such a relationship exists, then our opinion in No. 86-7, Question 1, would govern, because the interests of the individual and the Department could frequently differ within the meaning of DR 5-105(B). The "explanation of assignment" goes to great lengths to state that the Department is not "representing" the custodial parent. It specifies that the parent may retain an attorney "to protect his or her own nonassigned interests"; and that the Department does not act as an attorney for the custodial parent and shall not provide an attorney for the custodial parent. Assuming that a custodial parent understands and accepts the terms of the agreement, it seems clear that no attorney/client relationship is created. The Department's attorneys in any actions against the noncustodial parent would solely be representing the Department. The custodial parent would have no right to direct the course of any litigation or to make any decisions with respect to the collection efforts undertaken by virtue of the assignment. Both the Department and the custodial parent reserve the right to terminate the agreement; and the agreement is automatically terminated if the custodial parent receives welfare benefits from the State of Vermont or any other state.

To summarize, although the Support Collection Agreement and Assignment of Support. Rights between the custodial parent and the Department is complex and could be interpreted to mean that the Department is acting an agent of the custodial parent, it does not create a specific lawyer/client relationship. Therefore, the Department's attorneys are not placed in a situation of having to represent "differing interests" within the meaning of DR 5-105(B) should they pursue collection actions against the non-custodial parent.

Since the relationship between the Department and the non-custodial parent did not create any lawyer/client relationship, the information provided by the noncustodial parent was not confidential for purposes of the Code of Professional Responsibility. Thus, the Department's attorneys would incur no professional responsibility problems by pursuing the noncustodial parent for failure to meet support obligations.

² EC 5-14.

³ See DR 4-101(A).