

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 90-10

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: The client of a Child Support Enforcement Attorney (CSEA) is the state. The state, on behalf of the public, has a direct pecuniary interest in the CSEA work. This is true when the custodial parent receives Aid to Families With Dependent Children and when the parent does not receive AFDC. The custodial parent must be aware at the outset that the CSEA attorney only represents the interests of the state.

A part-time CSEA attorney is not automatically precluded from representing criminal or traffic clients in his or her private practice. A part-time CSEA attorney is also not automatically precluded from doing domestic relations work in the same county. There may be instances when the attorney's former CSEA work precludes him or her from later representing a client in order to avoid any appearance of impropriety or conflict of interest. For the same reasons, an attorney's previous private representations may limit those CSEA cases he or she may accept.

When a part-time CSEA attorney and brother who is a part time public defender are in private practice together they may not be opposing counsel in a child support enforcement case.

Non-legal CSEA employees are not engaging in the unauthorized practice of law by handling the client intake, initial interviews and preparation of forms for the CSEA office.

OPINION: We have six requests for advisory opinions all relating to child support enforcement agencies. Each question will be handled individually and addressed in the order received.

The first request contains the following seven questions.

1. Who is the client of the governmental attorney working with the Child Support Enforcement Agency?
 - a. Is it the child?
 - b. Is it the custodial parent?
 - c. Is it the local agency?
 - d. Is it the state agency?
 - e. Is it the state-at-large?

Identifying the client of a Child Support Enforcement Agency (CSEA) attorney is important when discussing the attorney's ethical obligations. For example, confidentiality, under DR 4-101, is only available to clients when an attorney-client relationship has been established. The best interest of the child is and should be the foundation for all CSEA work. However, we do not believe the child should be considered the client of a CSEA attorney. It is our view that the state-at-large must be considered the client for the CSEA attorney for reasons discussed below.

The federal government, pursuant to title IV-D of the Social Security Act, 42 U.S.C. 651-667 (1985), gives states the financial support to locate absent parents, establish paternity, and obtain and enforce child and spousal support obligations owed by absent parents. Ohio Att'y Gen. Op. 87-033 (1987). In Ohio, the Department of Human Services is the state title IV-D agency with each county having a local title IV-D agency to enforce support orders. See, Ohio Rev. Code §5101.31.

The local title IV-D agency may enter into a cooperative agreement with the county prosecutor or retain other counsel to provide the legal services for locating absent parents, establishing paternity, establishing support, and enforcing support. 8 Ohio Admin. Code §5101:1-29-51(C). Custodial parents receiving Aid to Families With Dependent Children (AFDC) must assign their support claims to the state and are not charged for the CSEA services. The title IV-D agencies also provide these services, for a nominal application fee, to custodial parents who are not receiving AFDC.

Both the Ohio Attorney General and the ABA have issued opinions which conclude that the state is the client when the custodial parent has assigned his or her child support to the state but that the custodial parent who does not receive AFDC is the client. ABA Committee on Ethics and Professional Responsibility Op. 89-1528 (1989), Ohio Att'y Gen. Op. 87-033 (1987). This solution creates inconsistent treatment for the AFDC and non-AFDC cases. Ethics: The Deliberate Dilemma, National Child Support Enforcement Association News, 8 (May1988). "The major problem this approach fails to address is the frequent cases which switch back and forth between categories (AFDC and non-AFDC). Under this approach one could walk into court with one client (the State), establish support, and leave with another client (the custodial parent, if he or she applied and was granted IV-D services)." Id.

We suggest that non-AFDC custodial parents who obtain sound support orders, with the help of the child support enforcement agency, are less likely to have to ever rely on AFDC. Therefore, the state has an interest in preventing future expenditures of AFDC where lack of child support is a factor in determining the need for AFDC. Ethics: The Deliberate Dilemma, National Child Support Enforcement Association News, 6 (May 1988).

The state has an obvious pecuniary interest when the custodial parent is receiving AFDC. A CSEA attorney who believes the custodial parent is the client creates a conflict of interest. The classic example is when the custodial parent informs the CSEA attorney that while receiving AFDC she or he also received some child support that went unreported. In this example, the state's interest regarding the alleged fraud and the custodial parent's interest are in direct conflict. The custodial parent therefore should be informed at the outset that the CSEA attorney only represents the state and that the custodial parent should obtain counsel.

In conclusion, we believe, the state-at-large is the CSEA attorney's client in both the AFDC and non-AFDC situation. The state, on behalf of the public has a strong interest in CSEA work. With the state as his or her client, the CSEA attorney has the ability to properly exercise independent professional judgment on behalf of the client.

2. Is the obligee referred to in O.R.C. 2301.87 (C), 2301.372 and 2301.38 necessarily the client?

This Board is not permitted to address legal questions. Gov.Bar R. V §2b. This opinion is based solely on legal ethics, absent any statutory construction.

3. Is "choice" required for the existence of an attorney/client relationship?

An Oregon Court of Appeals has held that no attorney-client relationship exists between the CSEA attorney and the AFDC recipient. Gibson v. Johnson, 35 Or. App. 493, 582 P.2d 452 (1978). One determining factor was the involuntary nature of the relationship. We agree but feel the state's financial interest is the more determining factor.

4. Does determining the client's identity determine the extent of the attorney's ethical obligation?

All relationships between attorneys and clients are dictated by the Code of Professional Responsibility. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to discipline. Code of Professional Responsibility, Preface. The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. Id. (emphasis added). The same standards apply to all attorney-client relationships.

5. Since a custodial parent assigns her support rights to the state in return for AFDC benefits and yet the state will forward to the custodial parent the first \$50.00 collected in any month wherein a support collection is made, who holds the direct pecuniary interest which the governmental attorney must represent?

As discussed above, the state has a direct pecuniary interest in support collection in both the AFDC and non-AFDC situations. We do not believe the \$50.00 which goes to the custodial parent changes that result:

6. If the interests of the custodial parent do not coincide with the interests of the state wherein the custodial parent has assigned part or all of her support rights, is the governmental attorney required to withdraw from his representation of the custodial parent?

The CSEA attorney must inform the custodial parent of the conflict and indicate she or he may wish to obtain counsel. Withdrawal is not an issue because the CSEA attorney does not represent the custodial parent. We suggest that the CSEA attorney make it clear at the outset that the CSEA attorney represents the state and not the custodial parent. The custodial parent should immediately be made aware of the potential for conflicts and that the CSEA attorney's allegiance is to the state.

7. Can a governmental attorney file a paternity action for an individual wanting to become the legal father of a child and thereafter file a contempt action against the father for failure to pay support?

Yes, the CSEA attorney would be ethically permitted to file a contempt action against the father. Again, in both instances the attorney is only representing the state's interest. Therefore the CSEA attorney would not be filing a contempt action against a former client.

The second request for an advisory opinion is whether a part-time CSEA attorney or members of that attorney's private firm are permitted to handle criminal and traffic defense cases in Ohio courts.

In Opinion 88-8 this Board held that part-time criminal prosecutors may not do criminal defense work. The part-time criminal prosecutor represents the state and therefore cannot represent private clients against the state. We do not believe this restriction should be extended to the part-time CSEA attorneys even though they represent the state. Child support enforcement is not criminal in nature. In our opinion a blanket prohibition is not justified for part-time CSEA attorneys doing criminal or traffic defense in private practice.

However, there may be instances when a part-time CSEA attorney's private practice would be restricted in order to prevent the appearance of impropriety. Each situation must be handled separately and in compliance with the Code of Professional Responsibility. If the circumstances of a particular representation would constitute a conflict of interest, all members of the tainted attorney's firm are likewise precluded from accepting such employment. See, Code of Professional Responsibility, DR 5-105(D).

The third request involves a part-time CSEA attorney in private practice with a brother who also serves as a part-time public defender. The Code of Professional Responsibility lacks any provision regarding related attorneys representing opposing parties. However, in our view, the part-time CSEA attorney and the part-time public defender should not represent opposing parties on any case. This would create the appearance of impropriety because the two are in private practice together. Code of Professional Responsibility Canon 9. The two attorneys must carefully guard against any further conflicts of interest which may arise from their dual capacities and common private practice.

The fourth request is from a part-time CSEA attorney who wants to know whether he may privately represent clients in pre-divorce hearings in the same county. Nothing in the Code of Professional Responsibility specifically prohibits this activity. However, the private attorney would be precluded from some CSEA work because he formerly represented one of the parents in the divorce.

Disciplinary Rule 4-101 requires attorneys to preserve confidences and secrets of clients. This obligation extends to

former clients as well. Code of Professional Responsibility, EC 4-6. Therefore, a part-time CSEA attorney is not precluded from representing pre-divorce clients in his private practice but this may limit those cases he may later handle as a CSEA attorney.

The fifth request involves several questions similar to the last request. The first question is whether a CSEA attorney may represent private clients in domestic relations proceedings. As we indicated above there is no specific provision prohibiting a CSEA attorney from private domestic relations representations. Disciplinary Rule 9-101(B) does prohibit an attorney from accepting private employment in a matter in which he or she had substantial responsibility as a public employee. This would therefore prohibit a part-time CSEA attorney from representing in private practice anyone involved in one of his or her CSEA cases.

The second question is whether members of the part-time CSEA attorney's firm would be precluded from representing private clients in domestic relations proceedings. If the CSEA attorney is required to decline the employment, that extends to all members of that attorney's law firm. Code of Professional Responsibility, DR 5-105 (D). In other words, an attorney's disqualification or conflict would be imputed to other members of his or her firm. For a complete discussion of screening "tainted" attorneys to prevent disqualifying the entire firm, see, Board of Commissioners Op. 89-13.

The third question is whether opposing counsel has a duty to his client to move for the disqualification of a part-time CSEA attorney representing private clients in domestic relations matters. This Board is unaware of an ethical duty imposed upon an attorney to move for the disqualification of opposing counsel in any circumstance. An attorney does have a duty to zealously represent a client. Code of Professional Responsibility, DR 7-101. This question asks for an answer which can only be determined from the specific facts and circumstances of a particular case.

The fifth request's last question relates to an attorney's duty to report another attorney's misconduct under DR 1-103. The duty to report has been addressed by this, Board in Opinion 90-1.

The sixth and final request is whether non-legal CSEA employees may perform certain tasks without engaging in the unauthorized practice of law. All client intake and initial interviews are performed by non-lawyers who are trained as enforcement personnel. These enforcement caseworkers fill out pre-printed forms for contempt actions, petitions for support, paternity

complaints and wage withholding orders. Once these initial pleadings are filled out, the case file, interview notes, employment verification, and financial documentation are forwarded to the legal department for review. A staff attorney reviews the case file and, when properly prepared, it is approved and signed for filing with the proper tribunal. The enforcement department personnel are cautioned against giving legal advice and must refer any legal questions to the legal department.

In our view, this activity would not constitute the unauthorized practice of law. We held in a prior opinion that intake workers at the legal aid society may do the initial screening for their organizations. Board of Commissioners Op. 89-25 (1989). One other state has held that it is not the unauthorized practice of law for a non-lawyer social worker to interview non-custodial parents, arrange agreements and prepare form and case summaries. Alabama St. Bar Op. 87-142 (1987).

The non-lawyer enforcement personnel's work must be approved by an attorney. The staff attorneys must also continue to be available for questions from enforcement personnel or the general public. These employees must frequently be reminded of the restriction on giving any type of legal advice.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.