

ETHICS OPINION

RO-90-05

QUESTION:

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"FACTS:

The E██████████ County District Attorney's Office is under contract with the Department of Human Resources to handle all child support matters under Title IV of the Social Security Act. The office has a full-time district attorney and four part-time assistant district attorneys of which I handle the Child Support Unit.

QUESTION ONE:

Is it ethical for another part-time district attorney and/or the district attorney to represent the State of Alabama in an action which I can't handle due to my past representation of the party against whom the child support action is instigated?

QUESTION TWO:

If the answer to Question One is no, can the parties, if the conflict is made known to them, waive any potential conflict where the district attorney and/or another part-time assistant district attorney can proceed with representing the State?

QUESTION THREE:

Is it ethical for the part-time assistant district attorney, who handles Title IV cases, to handle those cases in which another part-timer represented the party against whom the child support action is instigated, in the underlining divorce action?

Example - Attorney A, a part-time assistant district attorney, represents John Smith in a divorce action. After the divorce Kathy Smith, the ex-wife who has custody of the child(ren), obtains the services of the Department of Human Resources for help in enforcing her child support order. Can Attorney B, also a part-time assistant district attorney who handles child support (Title IV) cases, represent the State of Alabama in an action against John Smith for collection of past due support?

QUESTION FOUR:

If the answer to Question Three is no, can the parties, if the conflict is made known to them, waive any potential conflict, so that the part-time assistant district attorney, who handles Title IV cases, may proceed as the attorney for the State?"

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ANSWER QUESTION ONE:

Your query is whether your personal disqualification can be vicariously attributed to the district attorney or other part-time district attorneys in child support prosecutions. The answer to that depends in large part on the nature of the disqualification. If you represented a defendant in a substantially related matter, or if you represented a defendant in such fashion that it might be reasonably inferred that you obtained confidences or secrets of that defendant that could be used against that defendant, or for the benefit of third parties, in any subsequent representation, then you are disqualified and anyone associated with you in the practice of law, including the district attorney and the part-time district attorneys would also be vicariously disqualified. Under those circumstances a special prosecutor would seem to be indicated. Since it is impossible to speculate as to all the possible grounds for disqualification no absolute answer can be given to this question but it is reasonable to assume, and required by the rules to assume, that in most instances the disqualification would flow throughout the office.

ANSWER QUESTION TWO:

On a case by case basis waiver might be sufficient to cure any conflict of interest that would prevent your participation in the matter at hand. Once again this would depend upon the nature of the disqualification, the sophistication of the party granting the waiver and the nature of the action being prosecuted. In criminal cases the Commission generally does not favor waiver because of the possibility of inadvertently creating reversible error or otherwise interfering with the administration of justice and the perception of impeding effective and independent representation of all parties.

ANSWER QUESTION THREE:

There is a substantial possibility of the use or misuse of confidential information in the example cited with your question three and on those facts we would opine that any attorneys associated with Attorney A in the practice of law including other assistant district attorneys, may not take a position adverse to John Smith in a substantially related matter.

ANSWER QUESTION FOUR:

Disciplinary Rule 5-105(C) imposes a very high conflict of interest standard in domestic relation cases and in cases involving custody of children, alimony or child support. Accordingly, and in recognition of that high standard, it is our opinion that waiver would not be effective on the facts upon which this question is based. It is noted that Attorney A, a part-time district attorney, had an attorney/client relationship with John Smith in not just a substantially related matter but in the same matter. In the opinion of the Commission it would be inappropriate for an attorney now representing the State and associated as a part-time assistant district attorney with Attorney A to take on a directly adverse interest to Attorney A's former client in the same, or a substantially related, matter. Waiver, in our opinion, cannot cure such a substantial conflict. There are also problems with creating an appearance of impropriety, all suggesting to the Commission that, as in Question One, a special prosecutor might be advisable.

AWJ/vf

3/12/90