

ETHICS OPINION

RO-91-41

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QUESTION:

"I have received the enclosed letter from counsel for the Department of Human Resources. I have discussed that opinion with Mr. ██████████ and with your office. I now request your written opinion in these circumstances.

I am an attorney in private practice and an approved attorney for the State of Alabama Department of Human Resources. To my knowledge, I am one of two approved attorneys in ██████ County. The ██████ County Department of Human Resources contacts me, or another approved attorney, when it desires to proceed in juvenile court concerning a dependent child. Virtually all of the cases which I handle for the Department are child protective proceedings in juvenile court. In the past, I have represented the ██████ County Department as a special prosecutor and have appeared as counsel for appellee in cases which were appealed after I had represented the Department in the lower court. Recently, I represented the ██████ County Department in an administrative hearing concerning the revocation (or, denial of renewal) of a daycare license. I now have active, pending cases in which I am appearing at the request of the ██████ County Department of Human Resources in juvenile court, child dependency proceedings. I am now appearing in cases involving termination of parental rights on behalf of both the ██████ County Department of Human Resources and the State of Alabama Department of Human Resources.

I have been requested to appear in an administrative hearing, and have initially corresponded with the Department, concerning a founded complaint of child abuse by the ██████ County Department of Human Resources against an employee of a long-standing client. The founded complaint does not involve protective proceedings to a child. It becomes simply a matter of record and may be disseminated and entered onto networking registries of child abuse and neglect. Neither the child or her family are now, or have ever been, my clients. Neither the child nor her family have ever been parties in any dependency proceeding in juvenile court, or any other proceeding, in which I have appeared at the request of the Department.

Under the Alabama Rules of Professional Conduct, is my representation of a person in an administrative hearing contesting 'founded complaint of child abuse' directly adverse, as defined under Rule 1.7, to the ██████ County Department of Human Resources and the State of Alabama Department of Human Resources such that I have a conflict of interest and cannot represent that person in the administrative hearing?

Upon receipt of the notice letter from counsel for the State Department, I have considered the Rule's alternative which would allow avoidance of this problem. However, I am informed that the commissioner has an arbitrary but blanket policy of refusal to consent to the possibility of a conflict. Therefore, the Department has refused to give its consent under Rule 1.7(a)(2).

In addition, I have been provided a copy of Ethics Opinion RO-91-23. That opinion seems to answer my question if the phrase 'currently involved in an active case for the Department' encompasses appearance at the request of the Department in a dependency proceeding in juvenile court. However, under the same reasoning, is my continued appearance as a private attorney

in a domestic relations case where a circuit judge has ordered intervention by the Department, investigation by the Department or other appearance by the Department also prohibited under Rule 1.7 because I am an approved attorney with active cases. The adversarial nature and the loyalty related conflicts addressed in the Comments to Rule 1.7 would seem to apply equally to domestic relations cases where the Department's position is adverse to my domestic relations client. If I have a conflict of interest in a purely administrative hearing unrelated to juvenile dependency cases, then it would seem under the cited opinion that I also have a conflict in domestic relations cases where the Department is involved. Or, do I only have a conflict if the Department's position is adverse to my domestic relations client? Or, do I have a conflict, regardless of the position taken by the Department, due to the supposed confidence and secrets on procedures, strategy and other matters such that the adverse domestic relations party could claim that I should be disqualified?

If Opinion RO-91-23 is so far reaching as to require my withdrawal from any case in which the Department appears or is a party, then my private practice (and presumably the practice of virtually all of the approved attorneys in the State of Alabama) should be severely limited beyond that which I believe to prevail in this state."

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ANSWER:

You may not represent a client in a founded complaint of child abuse by the Department of Human Resources while you are currently representing the Department in other matters even though these matters are not related to the founded complaint.

DISCUSSION:

Ethics Opinion RO-91-23, mentioned in your letter, is dispositive of the question. In that opinion, the Disciplinary Commission, applying Rule 1.7 of the Rules of Professional Conduct, held that a lawyer that was currently involved in an active case for the Department could not represent a party in a matter adverse to the Department regardless of whether the matters are substantially related unless the lawyer reasonably believes that the representation will not adversely affect the relationship with the other client and each client consents. In making this decision, the Commission cited with approval Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2nd Cir. 1976), that in situations where a lawyer takes part in litigation against an existing client, the propriety of the conduct must be measured not so much against the similarities in litigation as against the duty of undivided loyalty which an attorney owes to each of his clients.

You were also concerned in your letter about the application of the rule where you are representing a client in domestic matters and the circuit judge has ordered intervention, investigation or other appearance by the Department. As you point out, the Comment to Rule 1.7 would seem to apply equally

to domestic relations cases where the Department's position is adverse to "my domestic relations client." Certainly, Rule 1.7 and the Comment to the rule applies to those situations but the distinguishing aspect is that the Department's appearance is more in the nature of a witness rather than as a party to the litigation. It also should be pointed out that the rule requires that the representation of a client be directly adverse to another client as opposed to indirectly or generally adverse. The rule also has a probability factor using the words "will be directly adverse" as opposed to "may be directly adverse." By using "will" instead of "may" the rule means a reasonable element of probability instead of a remote chance of conflict.

It is the view of the Commission that Rule 1.7 and RO-91-23 should not be applied in a manner that is mechanical or overbroad. Rather, they should be applied in a manner that realistically balances the interests of the client and those individuals that desire to become a client of the effected lawyer.

RWN/vf

10/22/91