

Final

**Rhode Island Supreme Court
Ethics Advisory Panel
Opinion No. 99-07 - Request No. 768
Issued March 10, 1999**

Facts:

The inquiring attorney is an attorney for a division of a state agency which by federal and state statute is charged with the tasks of establishing and enforcing child support orders for the benefit of the state and custodial parents. Under the pertinent statutes, attorneys for the division represent the state pursuant to a statutory assignment of rights in cases in which the custodial parents are receiving public assistance. The inquiring attorney states that the pertinent statutes also require agency attorneys to represent custodial parents who are not receiving public assistance in the above-mentioned matters. The inquiring attorney presents two situations for the Panel's consideration.

In the first scenario, an attorney in the division represents more than one custodial parent against the same absent parent for the enforcement of child support orders. Child support payments that belong to one client were erroneously posted to and received by the other client. Pursuant to published state policy which provides for notice and a hearing, the agency is attempting to recoup the erroneously transmitted funds from the custodial parent who received them. The agency has asked the attorney to represent the state's interest at the administrative hearing, and to commence an action in Superior Court on behalf of the state to recoup the funds.

In the second situation, an attorney in the division represents the mother, who is a non-welfare custodial parent, against the father in an action to enforce a child support order. Meanwhile, the court has ordered a change in custody to the father. The father now requests representation by an attorney in the division.

Issues Presented:

A. The inquiring attorney asks whether in the first scenario the agency attorney who represents a non-welfare custodial parent in a child support enforcement matter may represent the state against that client in an administrative or a court proceeding to recoup child support funds erroneously transmitted to the client. He/she also asks whether the attorney should withdraw from representing the custodial parent to represent the state.

B. The inquiring attorney asks whether in the second situation the attorneys for the division may represent the father as custodial parent in a proceeding against the mother whom an attorney in the division already represents in a child support enforcement action against the father.

Opinion:

A. There is a conflict of interest pursuant to Rule 1.7(a) which prohibits the attorney from representing the state's interest in proceedings to recoup funds from his/her client. The attorney may not represent the state in the proceedings even if he/she withdraws from the representation of the client. The attorney may continue to represent the client in the child support enforcement action if the attorney reasonably believes that the representation will not be materially limited by the attorney's responsibilities to the state, and if he/she obtains the client's consent after consultation. The attorney may not represent the custodial parent in the recoupment proceedings.

B. The attorney who represents the mother has a conflict of interest pursuant to Rule 1.7(a) which would prohibit him/her from representing the father. Under Rule 1.10(a), the conflict of interest is imputed to other attorneys in the division and therefore attorneys in the division must decline the representation of the father.

Reasoning:

Rule 1.7 states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall

include explanation of the implications of the common representation and the advantages and risks involved.

In the first scenario, the interests of the state are directly adverse to the interests of the attorney's client, the custodial parent in possession of erroneously transmitted funds. Although under paragraph (a)(1) a client may consent to representation notwithstanding such a conflict, when a disinterested lawyer would conclude that the client should not agree to the representation, the lawyer involved cannot properly request the client's consent or provide representation on the basis of the client's consent. See Comments to Rule 1.7. In the opinion of the Panel, a disinterested lawyer would likely advise against consent in the situation presented. Therefore, there is an impermissible conflict of interest that prohibits the attorney from representing the state in the recoupment proceedings against his/her client. Withdrawing from the representation of the custodial parent in order to undertake the representation of the state does not cure the conflict of interest.

The Panel believes that with respect to the continued representation of the custodial parent in the original child support enforcement action, the attorney must also consider Rule 1.7(b). Specifically, if the attorney represents the state in other matters, such as assigned child support matters where the custodial parents are receiving public assistance, the attorney is in the unenviable position of representing two clients who have adverse interests. Under Rule 1.7(b) the attorney has a further obligation to decide whether the continued representation of the custodial parent in the child support enforcement action will be materially limited by his/her representation of or obligations to the state. The attorney may continue the representation of the custodial parent only if he/she reasonably believes that the representation will not be materially limited and if each client consents after consultation. As to whether the attorney may represent the custodial parent in his/her defense against the state in any recoupment proceedings, the Panel is of the opinion that pursuant to Rule 1.7(a) he/she may not. The interests of the custodial parent are directly adverse to the interests of the attorney's other client, the state, in the recoupment proceedings.

No facts were submitted which indicate that the interests of the two custodial parents are adverse. The Panel cautions, however, that before undertaking and during the representation of more than one custodial parent against the same absent parent, attorneys in the agency must consider whether there exists a conflict of interest pursuant to Rule 1.7.

In the second scenario, the interests of the mother are directly adverse to those of the father. Pursuant to Rule 1.7(a), the mother's attorney has a conflict of interest which prohibits him/her from representing the father. Lawyers employed in the division of the agency which is charged with the tasks of establishing and enforcing child support orders constitute a firm within

the meaning of the Rules of Professional Conduct. The prohibitions set forth in Rule 1.10(a) therefore apply.

In pertinent part, Rule 1.10 states:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

It is the opinion of the Panel that the conflict of interest of the attorney who represents the mother is imputed to other lawyers in the division. The Panel further believes that the conflict presented in this second scenario is such that it would be improper for the attorneys to request the consent of the mother and of the father. Accordingly, the attorneys in the division must decline the representation of the father in the second scenario.

In summary, the Panel concludes that in the first scenario (a) the agency attorney for the non-welfare custodial parent has a conflict of interest and is prohibited from representing the state in the recoupment proceedings; (b) the agency attorney cannot cure the conflict by withdrawing from the representation of his/her client in order to represent the state; (c) the agency attorney may continue to represent the client in the original child support enforcement proceedings only if he/she reasonably believes that the representation will not be materially limited by his/her responsibilities to the state, and if the clients consent; and (d) the attorney may not represent his client against the state in the recoupment proceedings. The Panel concludes that in the second scenario, the attorneys in the division must decline the representation of the father. The Panel suggests that the agency should adopt an internal procedure to safeguard against future conflicts of interest.

The Panel's guidance is restricted to interpretations of the Rules of Professional Conduct and does not extend to issues under the State Ethics Code or any other rules, regulations or laws that may have bearing on the issues raised by this inquiry.