

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1992-93/3
Conflicts of Interest: Office of Child Support Attorneys
Providing Services to AFDC Recipients and Non-AFDC Recipients
January 14, 1993

RULE REFERENCES:

- *Rule 1.1
- *Rule 1.6
- *Rule 1.7
- *Rule 1.9
- *Rule 3.1
- *Rule 4.3
- *Rule 4.4

STATUTORY REFERENCES:

- *42 U.S.C. 651 et seq.
- *RSA 458
- *RSA 458-C
- *RSA 458-C:7

SUBJECTS:

- *Attorney-Client Relationship
- *Confidentiality
- *Conflict of Interest
- *Domestic Relations
- *Government Representation

ANNOTATION:

Assuming that an Office of Child Support Enforcement Services (OCSES) lawyer represents only the State when securing or enforcing support obligations for a custodial parent, the lawyer does not represent the parent, and has no duty of loyalty or confidentiality with that parent.

An OCSES lawyer who assists a custodial parent in securing or enforcing support obligations should notify that parent in writing that the lawyer represents only the State and that communications between the lawyer and the parent are not confidential. (Rule 4.3)

Since we have assumed that an OCSES lawyer represents only the State, the lawyer may seek a support award for a custodial parent at the same time as the lawyer is seeking reimbursement from the non-custodial parent for AFDC payments.

Since we have assumed that an OCSES lawyer represents only the State, the lawyer may maintain actions for more than one custodial parent against the same non-custodial parent.

Since we have assumed that an OCSES lawyer represents only the State, the lawyer may switch sides if custody changes.

Since we have assumed that an OCSES lawyer represents only the State, the lawyer must investigate any claim that the custodial parent unlawfully received AFDC even when that lawyer is trying to secure or enforce support obligations in favor of that custodial parent.

FACTS:

Under Title IV-D of the Social Security Act, 42 U.S.C. §. 651 et seq., the Child support Enforcement Act, each state that participates in the Aid to Families with Dependent Children program (AFDC) is required to implement a program for child support enforcement. The State must determine an appropriate

formula for computation of child support. The State must provide services for the determination of paternity and collection of child support for recipients of AFDC. Likewise, the State must provide these same services for non-AFDC recipient parents who request services. These services include determining paternity, obtaining an order for child support, enforcing such an order, and requesting a modification of the child support order. These services must be provided at the request of either the custodial or non-custodial parent. The agency in New Hampshire responsible to provide these services is the Office of Child Support Enforcement Services (OCSES). In most of the child support cases handled by OCSES, the attorneys are requesting the Court make a determination of child support based on the statutory formula as set out in NH RSA 458-C or are requesting that the support be enforced. A small percentage of the cases handled by OCSES are complex and may involve discovery.

QUESTION:

The Committee has been requested to review several ethical concerns of attorneys at OCSES in their work providing services for parents as required under Title IV-D of the Social Security Act.

OCSES has presented the Committee with several scenarios in which it has identified potential conflicts of interest due to its federal mandate to provide services for AFDC recipients while also seeking reimbursement of the monies expended in the AFDC program, and services for both the custodial and non-custodial non-AFDC parents in enforcing and modifying child support orders.

RESPONSE:

OCSES has requested that the Committee consider that OCSES attorneys represent the State only. The Committee recognizes that the supposition the State is the only client of OCSES is accepted in several states. The Committee also recognizes that other states have concluded that OCSES (or the equivalent agency providing services under Title IV-D) represents the State and the recipient for services depending on a given situation. See NH Op 1990/91-1. In this analysis, the Committee has used the assumption that the State is the only client and the Committee takes no position as to whether this assumption is conclusively determined under New Hampshire law. Furthermore, the Committee states that the assumption that OCSES attorneys represent the State only dictates the Committee's opinion that there is no conflict of interest between and among the individual parents for whom services are provided by OCSES. This opinion is different from every other situation in which the Committee has examined a conflict of interest matter. See, e.g., "Suits to Recover Worker's Compensation Payment to an Injured Employee: The Impact of the Rules of Professional Conduct" (unpublished, approved 12/6/92.)

Assuming that the State is the client for OCSES, then the role of the attorneys employed by OCSES can be compared to that of prosecutors whose primary objective is to seek enforcement of and application of specific law to a given situation. The State, as represented by OCSES, has an interest in proceeding in those cases seeking adjudication of paternity and child support order for recipients of AFDC. In those situations, the AFDC-recipient is only an incidental beneficiary of the action in that he or she may receive a minimal amount of additional support from the action. In situations where the custodial or non-custodial parent seeks services from OCSES, the State has an interest in the matter only to the extent that the federal government has mandated its involvement under the Child Support Enforcement Act. The State can become involved in locating absent parents, adjudicating paternity, and in obtaining, enforcing and modifying child support orders when its services have been requested by a parent.

Given that OCSES has an attorney-client relationship with the State only, the OCSES has no duty of loyalty to the parent requesting services. There is no confidentiality of information given to the attorney by the parent requesting services and therefore the attorney need not abide by the constraints of Rule 1.6.

[Ed. Note: Rule 1.6 applies to all "information relating to the representation of a client," including information received from a non-client such as the parent. The lawyer may utilize the information for the benefit of the client (the state) and may reveal such information with the approval of the client (the state) without regard to the interests or desires of the non-client.]

Rule 1.7 prohibits representation of a client which is adverse to another client. Rule 1.9 prohibits representation of a client which is adverse to a former client. Assuming that OCSES has an attorney-client relationship with the State and does not develop an attorney-client relationship with the parents seeking services of OCSES, then there may be no conflict of interest in its provision of services to parents, and neither rule would be implicated.

However, the Committee urges that OCSES attorneys be diligent during their communication with parents in informing the parents that they do not represent them and that there is no confidentiality in their communications. The attorneys should stress that their role is limited and urge the parents to seek independent counsel whenever appropriate. The Committee is of the opinion that OCSES attorneys should disclose to the parents in writing that they represent the State only and not the individual parents. The Committee recognizes that the definition of an attorney-client relationship is within contract law and may be created by express agreement between the attorney and the client or may be created by a course of conduct. Consequently, the Committee states that if the OCSES attorneys are declining to represent parents in these matters, they should not give the parents the impression that they are representing them, nor should the attorneys provide the parents with legal advice. The Committee states the OCSES attorneys must be zealous in following Rules 4.3 and 4.4. Rule 4.3 states that:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Rule 4.4 requires the attorneys to respect the rights of third persons in a legal conflict.

In response to the specific problems raised by OCSES the Committee states:

1. In the case in which OCSES is providing services by adjudicating paternity or obtaining child support for a custodial parent who is no longer receiving AFDC, OCSES may litigate on behalf of the parent even though OCSES must also seek reimbursement from the non-custodial parent for monies expended by the State for AFDC. It is the understanding of the Committee that it is the requirement of the Child Support Enforcement Act and the practice of OCSES to request child support in an amount in accordance with the guidelines set by NH RSA 458-C. OCSES then seeks reimbursement of AFDC monies if and only if the defendant can pay an additional amount. Assuming that the State is the only client in this situation, the OCSES has no conflict of interest, although a conflict might arise in that OCSES' representation of the State might suggest that it concentrate its resources on those cases in which its client benefits.

2. In the case in which a non-AFDC custodial parent requests services of the State, OCSES may maintain this action because 42 U.S.C. §651 et seq. requires that it do so.

3. In the case in which an AFDC parent and a non-AFDC parent both seek child support from the same payer, OCSES may maintain both actions because it does not represent the parents/applicants for services in either case. The State has an interest in maintaining the first action because of the possible recoupment of AFDC monies and an interest in the second action because of 42 U.S.C. §651 et seq.

When litigating on behalf of any individual parent who has applied for services, OCSES must abide by Rule 3.1 which requires that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . ." The attorney for OCSES may bring before the Court the request for child support which would change the prior support order obtained by them if to do so is meritorious and within the law. In New Hampshire, RSA 458-C:7 allows modification of prior support order if there is a substantial change of circumstances or 3 years after the entry of the last support order. See also Thayer v Thayer 583 So.2d 663 (FL 1991) (public attorneys can be used in all child support proceedings, including modifications, but this petition for modification was inadequate), Carter v Morrow 526 F.Supp. 1208 (DC 1981) (state officials must provide non-AFDC recipients with child support services).

4. In the case in which OCSES has obtained a support order against a parent and there is a subsequent change of custody, OCSES may provide services to the new custodial parent in obtaining a child support order against the former custodial parent. There is no conflict of interest between clients because OCSES assumes that its only client is the State and that it does not represent the parents involved.

5. In the case in which the defendant alleges that the custodial parent has unlawfully received AFDC benefits, the OCSES has a duty in its representation of its client, the State of New Hampshire, to investigate these allegations. As previously discussed, the communications between the attorney for OCSES and the parent seeking the services of OCSES are not confidential. Instead, the attorney has a duty under Rule 1.1 to ". . . assure that the matter undertaken is completed with no avoidable harm to the client's interest . . ." Consequently, the attorney must use the information gained about the parent's alleged welfare fraud so that the State is not harmed.

SUMMARY:

Assuming that the Office of Child Support Enforcement represents only the State of New Hampshire, it can provide services to parents as required by 42 U.S.C. 651 et seq. provided that OCSES gives adequate notice to parent of nonrepresentation and lack of confidentiality. The Committee states that this notice should be in writing and that the attorneys' conduct must be consistent with the notice.

The Committee is troubled by this conclusion and states that it cannot readily conceive of another situation in which providing services to people with such disparate interests would be allowable under the Rules of Professional Conduct.

The Committee further suggests that OCSES consider seeking clarification for the NH General Court as to whether the State of New Hampshire is its only client.