

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1990-91/1
Conflict of Interest: Representing Position Adverse to Former Client
November 8, 1990

RULE REFERENCES:

- *Rule 1.6(a)
- *Rule 1.7(a)
- *Rule 1.7(a)(2)
- *Rule 1.8(b)
- *Rule 1.9
- *Rule 1.9(a)
- *Rule 1.10(a)

SUBJECTS:

- *Adverse Representation
- *Attorney-Client Privilege
- *Attorney-Client Relationship
- *Client Communications
- *Confidentiality
- *Conflict of Interest
- *Consent
- *Consultation
- *Domestic Relations
- *Government Representation
- *Independent Judgment
- *Law Firms
- *Multiple Representation

ANNOTATIONS:

A government attorney cannot represent the client in a support modification hearing if the government attorney previously represented the opposing party in the original action establishing the support order. (Rule 1.6(a); Rule 1.7(a); Rule 1.9(a)).

A lawyer must avoid representation against a former client in the same or a substantially related matter, in which the client's interests are materially adverse to the interests of the former client, unless the former client consents after consultation and with knowledge of the consequences. (Rule 1.9(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 to another client; and
- (2) each client consents after consultation and with knowledge of the consequences. (Rule 1.7(a))

A lawyer is prohibited from disclosing information received during the representation of a client (with certain exceptions) unless the client consents after consultation. (Rule 1.6(a); Rule 1.9(b)).

Government lawyers are covered by the strictures of Rule 1.6 (a).

If a former client's confidential information is used to that person's disadvantage, it is a violation of Rule 1.8(b).

A lawyer's duty of undivided loyalty to a client where there are adverse interests to the client mandates disqualification for conflict of interest. (Rule 1.7; Rule 1.9).

A lawyer's duty of confidentiality to a client continues after the end of legal representation.

Client consent to adverse representation should not be sought if a disinterested lawyer would advise the client not to provide such consent. (Rule 1.7).

There are situations where the interests of the clients are so adverse as to make any disclosure for client consent to adverse representation inadequate under Rule 1.7.

The NH Rules of Professional Conduct apply to all members of a firm the same as to one member of the firm. (Rule 1.10(a)).

FACTS:

The attorneys employed by the New Hampshire Division of Human Services, Office of Child Support Enforcement Service (the "Division") represent custodial parents (when no public assistance is being provided) and the state (when AFDC is being provided) in paternity and child support actions against absent parents in which court support orders are sought. The Family Support Act of 1988 (the "Act") mandates that the state must, at the request of either the custodial or non-custodial parent, review child support orders as appropriate in accordance with applicable guidelines. Consequently, a Division attorney who represented a non-AFDC custodial parent in obtaining a child support order could be required to represent the interests of the non-custodial parent at a subsequent modification hearing seeking to change that order.

This opinion *only* addresses the question of whether a Division attorney may represent the non-custodial parent in an effort to modify, change or reduce a child support order which the attorney previously obtained while representing the other parent.

QUESTION:

Is it ethical for the Division attorney to represent a non-custodial parent at a subsequent modification hearing seeking to change, modify or reduce a child support order in apparent conflict with the interests of the original client for whom the support order was originally obtained?

RESPONSE:

The Committee's response is premised on two important assumptions:

- 1) that the Division interprets the Act to require that the moving party in the modification hearing must be represented by the Division's attorney, and
- 2) that the party being represented by the attorney in the modification proceeding was the adverse party in the first proceeding where the other parent (not the state) was the Division attorney's client.

Rule 1.9 of the Rules of Professional Conduct (the "Rules") states:

A lawyer who has formerly represented a person in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that client's interests are materially adverse to the interests of both unless the former client consents after consultation and with knowledge of the consequences; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Further, Rule 1.7(a) of the Rules states as follows:

- (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 and with knowledge of the consequences.

Due to the changes in the Family Support Act of 1988, Division attorneys may find themselves advocating against a former client at modification hearings of child support orders they originally worked to obtain. In essence, these attorneys could be put in the position of attacking the legal arguments they presented and the validity of the support order they had previously obtained at a prior hearing on behalf of the original client. If the original client is now considered a "former" client, Rule 1.9 mandates that Division attorneys avoid this untenable position "...unless the former client consents after consultation and with knowledge of the consequences..." Rule 1.9(a). The same set of facts will be at issue and interests which are directly adverse to the original client must be advocated. Similarly, a lawyer may not seek to rescind on behalf of a new client a contract drafted on behalf of a former client. ABA Model Code Comments. The rule expressed in Rule 1.9 regarding former clients has equal, and perhaps more force where the original client may still be considered as represented by the Division's attorneys. Under Rule 1.7 an attorney owes undivided loyalty to each client. The ABA Model Code Comments to Rule 1.7 state that "[a]s a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent." "Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if wholly unrelated." The consent required is again "with knowledge of the consequences." Rule 1.7(a)(2). The conflict presented here is bound to materially interfere with the attorney's independent judgment in his representation of a non-custodial parent due to the loyalty she/he owes to the original client. Such a situation should be avoided.

Furthermore, there is a presumption that confidential disclosures were made during representation of the original client which will subsequently be used against him/her at future modification hearings. In *Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984), (decided under the ABA Model Code of Professional Responsibility) the Court of Appeals adopted the "substantially related" test for the disqualification of an attorney based on the potential revelation of confidential attorney-client communications. This test provides that the former client need only show that matters embraced in the pending suit in which his former attorney is representing his adversary are substantially related to the previous cause of action. The Court will then assume that confidences pertaining to the matter were revealed during the course of former representation without inquiring into the nature and extent of such revelations. This presumption implicates Rule 1.6(a) and 1.9(b) which, when read together, prohibit a lawyer from disclosing information received during the representation of a client (except in circumstances that do not apply in the context of this opinion) unless the client "consents after consultation". Rule 1.6(a). The ABA Model Code Comments make it clear that government lawyers are covered by the strictures of Rule 1.6. Additionally, if such information is used to the disadvantage of the original client the attorney doing so would have violated Rule 1.8(b). Because it is clear that there is a substantial relationship between a modification hearing and the original child support action and it is presumed that confidential information obtained in the first representation will be used in the second adversely to the interests of the original client, the Division attorneys are precluded from representing non-custodial parents at modification hearings without an appropriate consent from the original client.

Ethical opinions, as well as case law, support these conclusions. In *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987), the court, citing the ABA Comments to Rule 1.7, emphasized a lawyer's duty of undivided loyalty to a client in holding that the adverse interests of counsel's client mandates disqualification for conflict of interest. Furthermore, this committee, in construing Rule 1.7 and 1.9, has opined that a lawyer is prohibited from representing a client if the representation will be directly adverse to another client. The committee determined that even after legal representation is terminated, a lawyer is under a continuing obligation not to reveal or use client confidences and, consequently, should avoid representing clients in any cases which might affect the on-going duty to preserve the original client's confidences. NH Op. 88-9/11, and NH Op. 83-4/9.

The Wisconsin State Bar Association Ethics Committee held that a lawyer may not represent or must withdraw from representing a custodial parent in child support proceedings if the lawyer previously represented

the County Child Support Agency in a substantially related matter. Headnote to Opinion E-86-11, ABA/BNA Lawyers' Manual on Professional Conduct 901:9103. The Mississippi State Bar Association concluded that an attorney who represented the wife in a divorce based on irreconcilable differences could not then represent the husband in a proceeding to modify child support. Headnote to Opinion 68, ABA/BNA Lawyers' Manual on Professional Conduct 801:5102. Similarly, an attorney in Alabama may not represent a client in a matter to modify the child support granted in a divorce decree when the lawyer had previously represented the adverse party in another divorce. Headnote to Opinion 83-69, ABA/BNA Lawyers' Manual on Professional Conduct 801:1054.

Although each of Rules 1.6(a), 1.7(a), 1.8(b) and 1.9(a) contemplate that a lawyer's conflict arising out of his/her representation of a party in a matter substantially related and materially adverse to a prior representation of another party may be waived by the former client after consultation in the case of Rule 1.6(a) or "consultation and with knowledge of the consequences" in the case of Rules 1.7(a), 1.8(b) and 1.9(a), such consent should not be lightly sought. Aside from the fact that it will always be very difficult to explain to the former client all the potential consequences that may result from the disclosure of the information, where such explanation must rely on confidential information already gained in the subsequent representation, adequate disclosure could be impossible under the Rules. Consent should not be sought if a disinterested lawyer would advise the client not to provide such consent. ABA Model Code Comments to Rule 1.7. The lawyer must take into account the client's, or former client's, individual circumstances in deciding whether his/her disclosure and explanation of consequences is adequate under the Rules. For example, more care needs to be taken with the unsophisticated than with the more sophisticated and knowledgeable client. *See* ABA Informal Opinion 1287, 5/7/74. Indeed, this Committee has opined that there are situations where the interests of the clients are so adverse as to make any disclosure inadequate under Rule 1.7. NH Op. 83-4/4 (attorney providing advice to both parties in a divorce action). It is the view of the Committee that under the circumstances outlined in this inquiry, the Division's attorney could not satisfy the Rule's requirements for disclosure in a way that would be adequate to support an informed consent by the original client.

Finally, the Committee considered the question of whether other Division attorneys may freely represent the subsequent client when the original client was represented by another Division attorney in the same office. Although the definition of a "firm" contained in the ABA Model Code Comments does not specifically include groups of lawyers in governmental offices, such as the Division, these definitions were not adopted in New Hampshire. The Committee is continually concerned that *all* New Hampshire lawyers abide by the Rules, including those discussed in this opinion, for the protection of the rights of their clients. Consequently, strictly within the factual context of this inquiry, the Committee concludes that the concepts embodied in Rule 1.10(a) apply to the Division's attorneys in this case.

For the above stated reasons, the Committee concludes that it would be a violation of Rules 1.6(a), 1.7(a) and 1.9(a) of the New Hampshire Rules of Professional Conduct for the Division attorneys to represent non-custodial parents in modification hearings if they have previously represented the state or a custodial parent in the original action establishing the support order.

[**Editor's Note:** *See, e.g.*, statement and application of "harsh reality" test in conflicts analysis, as applied in NH Op 1988-89/24, at page 148.]