

ETHICS OPINION

RO-93-14

[REDACTED]

QUESTION:

"As we discussed on July 9, 1993, please ask the Disciplinary Commission to give us a formal opinion concerning the propriety or not of the following action that we contemplate taking. I explain this action and the circumstances surrounding our action below.

FACTS

Four or five years ago, [REDACTED], my partner, was appointed to represent the Alabama Department of Human Resources as defense attorney defending a class action lawsuit challenging the entire Alabama foster care system. I joined [REDACTED] firm and handled the matter with him until after it was settled, about two years ago, pursuant to a lengthy consent decree. Since that time, DHR, still represented by our law firm and [REDACTED], has been in the process of implementing the consent decree. The decree will not be implemented fully for a period of another six or eight years, so that our firm will be involved in this matter for the indefinite future.

One of the ways of funding some of the additional services agreed to in the decree was the use of what are known as 'Zebley Funds.' Zebley Funds are lump sum payments paid to children who are in the class of children covered by the consent decree in a different class action suit in Pennsylvania. The Social Security Administration was determined to have used wrongful and illegal regulations in denying eligibility for these children in prior years. They have been ordered by the Pennsylvania Federal Court to make retroactive lump sum payments for the benefits that should have been paid but were not. Accordingly, DHR is now receiving on behalf of many children lump sums which, for an individual child, may vary from a few thousand dollars to as much as \$30,000-\$40,000 (possibly higher). DHR is going to reimburse itself for prior expenses paid on behalf of the children and will pay over the remainder, if any, to the child.

The remaining portion of the lump sum will need to be placed in a trust that needs to be established for the child's benefit. The reason for this is so the lump sum will not destroy future Medicaid and Supplemental Security Income eligibility and consequent benefits. If the sum is paid to a Trustee, rather than to the child, and the trust meets certain requirements, then the money being held by the Trust would not destroy the child's eligibility for future Federal and State benefits. This is a desired result.

DHR has determined that the best way to pay the excess lump sum funds to a Trustee is to employ a procedure whereby the State DHR pays the excess to a Conservator that will be appointed by the child's county's Probate Judge, pursuant to a petition for establishment of a conservatorship. Thus, for each child, there will be a conservatorship established, and the Conservator's only duty will be to receive the lump sum payment and to enter into a contract with a Trustee, whereby the Trustee would be paid the sum from the Conservator. The Trustee then would manage, handle and disburse

that sum pursuant to the trust agreement. DHR would like one person in the state to be the Conservator for every child in the state who will receive the lump sum.

Now we come to our question: DHR has asked our firm to be the Conservator for each of these children throughout the State. The reason they wish for us to do this is because of our familiarity with the situation. Further, I am the attorney drafting the trust agreement to be used State-wide, and I am the attorney who will be drafting the proposed orders for the Probate Courts to use when appointing the Conservator. Consequently, it would be most cost effective and easiest to employ our firm to handle the conservatorships. We anticipate that these will be very simple -- receiving a sum of money and immediately paying it over to a Trustee pursuant to the terms of a trust agreement that we would sign.

QUESTION

Under the circumstances related above, is there any ethical (or moral or legal) reason that we should not be the Conservator for each of these children throughout the State? Stated differently, is there some reason that it would not be proper for our firm to be a Conservator for children throughout the State where our firm already represents the Alabama Department of Human Resources on a continuing and substantial basis?

In my analysis of this situation, I cannot see that there will be a direct conflict between the Department of Human Resources' interests and the interests of the individual children. By establishing a trust for the benefit of the child, the child will have a lump sum of money to pay for his or her needs, in the Trustee's discretion. By establishing the Trust, the child would not lose medicaid and Social Security benefits that he or she would otherwise lose were the sums not paid in a proper qualifying trust. Thus, it appears to be certainly within the best interest of the child to pay the sum to a Trustee. Ultimately, the only possible problem I can foresee is that if a parent of a child wants to get his or her hands on the child's money to be used for their needs, they may argue that allowing the trust to be established was contrary to the child's immediate interests. Being the Conservator, we would have established the trust pursuant to a Court order directing us to establish the trust to pay the money over into the trust. I do not see a conflict of interest, but perhaps there is a conflict under these circumstances. This is the reason I am writing this request for a formal opinion.

I would appreciate your reply to this request within three to five weeks. We are trying to implement the trust agreement process for children throughout the State."

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ANSWER:

There is no conflict of interest per se in you and the other lawyers in your firm being appointed custodians of children who are wards of the Department of Human Resources while at the same time your firm continues to represent the Department of Human Resources.

DISCUSSION:

Under the facts presented, your firm has an attorney-client relationship with DHR and with the minor wards of the Department of Human Resources but you are being paid exclusively by DHR. Rule 1.8(f) recognizes that an attorney may be paid by someone other than the client provided there is no

interference with the attorney-client relationship or the lawyer's independence of judgment. In this situation, you have two clients one of which is paying for legal services for both. Rule 1.7 of the Rules of Professional Conduct provides in substance that a lawyer shall not represent a client if that representation will be directly adverse to another client or if the representation may be materially limited by the lawyer's responsibilities to another client or a third person.

Under the facts as stated in your request, it does not appear that the interests of the minors and DHR are directly adverse at this point. However, as you point out, it is conceivable that circumstances could arise where the interests of the minors would be adverse to the interests of DHR. In the event this should occur, it could result in a conflict of interest which would require termination of your representation of one or both parties.

LGK/vf

7/21/93