
**E-83-20 Conflict of interest: Family Court
Commissioner representing non-AFDC
individual in child support action**

Facts

The Family Court Commissioner's Office is under contract with the District Attorney's Office to provide services to non-AFDC individuals in pursuing non-support actions. These services include the preparation and presentation of contempt proceedings against the non-paying spouse.

Question

What is the propriety of the Family Court Commissioner (1) appearing as advocate in these proceedings while acting as advisor to the trier of fact, and (2) pursuing the contempt action if a special assistant FCC were to act as advisor to the trier of fact?

Answer

The Family Court Commissioner may not act as advocate and advisor simultaneously.

Opinion

Section 20.34 of the Code of Professional Responsibility and Chapter 20 of the Wisconsin Supreme Court Rules provides that a lawyer should represent a client zealously within the bounds of the law. While the Code states that a lawyer may serve simultaneously as both advocate and advisor, it recognizes that the two roles are essentially different. SCR 20.34(1)(c). As an advocate, the attorney's duty is to urge any permissible construction of the law which is favorable to the client. As an advisor, the attorney is obligated to provide a professional opinion to the client and the lawyer has no duty to the general public. *ABF Annotated Code of Professional Responsibility*, p. 283 (1979). See SCR 20.34(2)(a), 20.34(2)(b). See also 20.34(2)(l), 20.34(3)(b).

In the situation here set forth, the Family Court Commissioner is asked to be both a zealous advocate and an impartial advisor. The Professional Ethics Committee is not convinced that the FCC can adequately serve both of these competing interests. In so holding the committee is aware that Wis. Stat. sec. 767.29 authorizes the FCC to pursue non-support actions, including enforcement by contempt. Nevertheless, the appearance of impropriety in such simultaneous representation is so significant that the committee finds such representation improper. *See* SCR 20.48.

In regard to the second inquiry, the committee finds SCR 20.28(4) controlling. That section provides that if a lawyer is required to decline or withdraw from employment, no partner or associate of the lawyer or his or her firm may accept or continue the employment.

In Formal Opinion 342 (Nov. 24, 1975) the ABA Committee on Ethics and Professional Responsibility instructed the application of Disciplinary Rule 5-105(D), the ABA's equivalent to SCR 20.28(4), in the government attorney context. In that opinion the ABA committee held that the disqualification of a government attorney because of his prior connection to a matter as a private practitioner should not serve to disqualify other government lawyers associated with the disqualified attorney. The State Bar Professional Ethics Committee adopted this holding in Formal Opinion E-79-1. Both the ABA and State Bar opinions, however, concerned disqualification based on conflicts resulting from prior, not continuing, employment. Therefore, the committee holds that in those situations where it would be improper for the FCC to act as advisor and advocate it would also be improper for an assistant FCC to act as advisor while the FCC acted as advocate.