



# Ohio Board of Professional Conduct

**OPINION 2023-06**

Issued June 9, 2023

Withdraws Adv. Op. 2006-6

## **Child Support Enforcement Agency Staff Attorney's Prior Service as a Child Support Enforcement Agency Administrative Hearing Officer**

**SYLLABUS:** Absent informed consent, confirmed in writing of all parties, a Child Support Enforcement Agency [hereinafter CSEA] staff attorney may not represent the state in any action involving a CSEA matter in which that staff attorney issued administrative orders as a CSEA administrative hearing officer. However, other law may prohibit the CSEA staff attorney's representation even with the consent of all parties. A CSEA staff attorney is not barred from representing the state in an action solely because a party in the action is a person who once appeared before that staff attorney in a different matter while the staff attorney served as an administrative hearing officer.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

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**APPLICABLE RULE:** Prof.Cond.R. 1.12

#### **QUESTIONS PRESENTED:**

- 1) May a CSEA staff attorney represent the state in any action, including actions for contempt, involving a CSEA matter in which the staff attorney participated as the CSEA hearing officer making determinations or issuing administrative orders?
- 2) Is a CSEA staff attorney barred from representing the state in a matter solely because a party to the matter once appeared before that staff attorney in another matter in which the staff attorney participated as the administrative hearing officer?

**OPINION:**

This inquiry raises questions in several areas, including the application of the Ohio Rules of Professional Conduct, Ohio Ethics Law issues, and compatibility of office issues. Administrative officers are hired by a CSEA, “to issue administrative orders determining the existence or nonexistence of a parent and child relationship, requiring the payment of child support or, both.” R.C. 3111.53. CSEA administrative officers are commonly referred to as hearing officers. The officer may schedule, and conduct conferences and hearings, related to issues of paternity and the payment of support to include review, adjustment, and mistake of fact hearings along with other administrative duties as determined by the CSEA director. O.A.C. 5101:12-30-25. An administrative order or determination by a CSEA administrative hearing officer becomes a final order unless an action to contest the order or determination is brought by the parties. For example, an administrative determination by an administrative hearing officer as to the existence or nonexistence of a parent and child relationship becomes a final and enforceable order unless the mother, alleged father, guardian, or legal custodian of the child brings an action within a prescribed time. R.C. 3111.46, 3111.49.

Staff attorneys may be hired by a CSEA “to advise, assist, and represent the agency in performance of its functions pertaining to the enforcement of support orders.” R.C. 3125.17. A CSEA staff attorney might be called upon to represent the state in a court action brought by a person challenging an administrative hearing officer’s determination or order, or to represent the state in a civil proceeding involving a CSEA matter, such as a contempt action filed for failure to abide by a final court order.

*Rules of Professional Conduct*

Prof.Cond.R. 1.12 and Rule 1.7 are applicable to the question of whether a CSEA staff attorney may represent the state in an action involving a matter in which the staff attorney participated as a hearing officer making determinations or issuing administrative orders. Prof.Cond.R. 1.12(a) limits the ability of a lawyer to accept representation in matters the lawyer participated in personally and substantially as an adjudicative officer, unless all the parties to the proceeding give informed consent, confirmed in writing. *See also* Prof.Cond.R. 1.0(b) and (f). Comment [1] to the rule specifically notes that the term “adjudicative officer” includes hearing officers.

As indicated above, administrative orders or determinations by a CSEA administrative hearing officer are a significant exercise of authority in a CSEA matter. When a lawyer serving as a CSEA administrative hearing officer participates in a matter by rendering a determination on an issue and issuing an administrative order, he or she has participated personally and substantially in the matter. Thus, a CSEA staff attorney may not represent the state in any matter in which that staff attorney participated as a CSEA administrative hearing officer making administrative determinations or issuing administrative orders, unless all parties give informed written consent.<sup>1</sup>

However, even if all parties provide informed, written consent, Prof.Cond.R. 1.7(c) must be considered. Prof.Cond.R. 1.7 governs conflicts of interest related to current clients. Here, the CSEA staff attorney must consider if the representation of the current client, the state, is prohibited by other law as required by Prof.Cond.R. 1.7(c)(1). As indicated above, R.C. 3125.17 permits a CSEA to employ staff attorneys to advise, assist, and represent the agency in its performance of its functions pertaining to the enforcement of support orders. However, O.A.C. 5101:12-1-80 indicates that when a CSEA intends to enter into an IV-D contract<sup>2</sup> with a private attorney to provide legal services as described in R.C. 3125.17, the private attorney shall not represent the CSEA on matters in which that attorney participated as a CSEA administrative officer making administrative determinations or issuing an administrative order. Thus, even if the parties to a matter have consented to a lawyer representing the CSEA on a matter in which he or she previously served as a hearing officer, the above referenced administrative code section may prohibit the conduct. A CSEA staff attorney subject to an IV-D contract, should seek an opinion from the Ohio Attorney General regarding the interpretation of the above referenced statute and administrative code section.

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<sup>1</sup> The Board has previously cautioned government employees from seeking consent to representation burdened by a conflict. *See* Adv. Op. 2019-05. Rather than seek informed written consent to representation where the staff attorney formerly made administrative determinations or orders as a hearing officer, the best practice is to assign a different staff attorney to the matter pursuant to Prof.Cond.R. 1.12(c)(1),(2).

<sup>2</sup> The federal government, pursuant to title IV-D of the Social Security Act, as amended, 42 U.S.C. 651-667 (1985), gives states financial support to locate absent parents, establish paternity, and obtain and enforce child and spousal support obligations owed by absent parents. Ohio Atty Gen. Op. 87-033 (1987). In Ohio, the Department of Human Services is the state title IV-D agency with each county having a local title IV-D agency to enforce support orders. *See* R.C. 5101.31. Title IV-D child support cases in Ohio are governed by R.C. Chapter 3125. *In re Z.M.*, 2019-Ohio-1192(12<sup>th</sup> Dist.).

Further, while the Board has no advisory authority as to the application of Ohio Ethics Law for public officials and employees, except as applied to judges and court employees, a CSEA staff attorney should be aware that R.C. 102.03(A) states that, “[n]o present or former public official or employee shall, during public employment or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantive exercise of administrative discretion.” Under this provision, a CSEA staff attorney’s prior participation and exercise of administrative discretion may serve to prohibit the representation pursuant to Prof.Cond.R. 1.7(c)(1). A CSEA staff attorney in this circumstance should seek an opinion from the Ohio Attorney General regarding the interpretation of the above referenced statute and administrative code section.

While the conduct in question may be technically permissible pursuant to Prof.Cond.R. 1.12 when all of the above referenced considerations are met, the Board remains of the opinion that the better practice is to assign or hire a different CSEA staff attorney to handle these types of matters. This practice is permissible pursuant to Prof.Cond.R. 1.12(c)(1),(2) to ameliorate the conflict. It also serves to preserve the confidence of the parties and the public in two ways. First, it helps eliminate any question that the conduct is prejudicial to the administration of justice when the same individual issues administrative orders or determinations and subsequently represents the state in matters related to those orders or determinations. *See* Prof.Cond.R. 8.4(d). Second, it may eliminate any implication that the CSEA staff attorney has the ability to improperly influence a government agency or official. *See* Prof.Cond.R. 8.4(e).

#### *Service as Administrative Officer in Prior Matter*

A CSEA staff attorney is not barred from representing the state in an action solely because a party in the action is a person who once appeared before him or her when he or she served as a CSEA hearing officer. Over time, the same person may be the subject of several distinct child support matters, with different parties. In deciding whether representation of the state is proper in a CSEA matter, the ethical determination is whether the CSEA staff attorney while serving as a CSEA administrative hearing officer

had substantial responsibility in the currently pending matter. This determination will depend upon the facts and circumstances and the parties involved.

*Compatibility of Office*

A lawyer who serves as both an administrative hearing officer and staff attorney for a CSEA should consider the compatibility of those two public positions. See OAG Op. 2005-022 (“In addition, the administrative hearing officer serves as a staff attorney for the CSEA when required.”) The question of compatibility of public positions is beyond the scope of the Board’s advisory authority. A lawyer in this circumstance should seek an opinion from the Ohio Attorney General.