
E-96-3 Prosecutors' communications with represented persons through personnel of other governmental agencies

Facts

An attorney represents a husband and wife with regard to a CHIPS petition filed regarding their child. The District Attorney's Office represents the state. The attorney representing the parents files a Notice of Retainer with the DA's Office and the court that specifically demands advance notice of any intended contacts the state, the county or any of its agents wish to have with the parents regarding the pending matter. Ignoring that, workers from the County Department of Health and Family Services (DHFS) have repeated contacts with the parents without the knowledge of the parents' attorney.

Questions

- 1) If the district attorney directs these contacts or knows of them and allows them to occur, does the DA violate SCR 20:4.2?
- 2) Is the DA's ethical obligation affected by the fact that the county DHFS is a governmental unit separate from the DA's office?
- 3) Is the DA's ethical duty affected if the contacts with the parents could affect separate criminal actions against them?

Opinion

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. SCR 20:4.2.

Under the facts set out above, the DA is not directly violating this rule since the DA is not having contact with the represented parties. However, if this contact violates the rule, the rule could still apply to the DA who directed that the contact occur or knew it was occurring by a person over whom the DA had

direct supervisory authority and did not stop it. Under SCR 20:8.4(a), it is professional misconduct for a lawyer to violate the rules of professional conduct through the acts of another.

Under Rule 4.2, contact with a represented party is not unethical if it is “authorized by law.” DHFS workers are authorized by law to conduct investigations and report their results to the court in CHIPS cases. These investigations are expected to include assessment of the child’s situation and proposals to deal with the problems that led to the CHIPS petition. *See, e.g.*, Wis. Stat. §§ 46.22, 48.069, 48.08, 48.33, 48.57. Those investigations would normally and logically be expected to include contacts with the parents. It is difficult to see how DHFS could do an adequate investigation of the situation that did not include contact with, and input from, the parents. That is especially true since the report to the court may include recommendations on treatment for the parents and on whether the child should remain in the parental home. Wis. Stat. §§ 48.33(1)(f) and (2).

Contact by DHFS workers with represented parents are “authorized by law” when the workers are carrying out their statutory responsibilities. Accordingly, when they are carrying out such responsibilities, their contacts do not violate Rule 4.2.

Many CHIPS cases include allegations of criminal assault, abuse or neglect by parents, so DHFS investigations may affect separate criminal proceedings. However, that does not affect whether these contacts are ethical because Rule 4.2 is not dependent upon whether the contacts it prohibits have criminal or civil implications.

Be that as it may, contacts by DHFS workers are not without ethical limitations in this situation. DHFS workers are not criminal investigators and lack law enforcement authority except to take children into physical custody in limited situations. Wis. Stat. § 48.08(2). Accordingly, if the DHFS investigation has gone outside of its statutory responsibilities to focus on criminal matters not related to those responsibilities, DHFS contacts with represented parents are no longer authorized by law. At that point, the DA who directs such contacts violates SCR 20:4.2. A district attorney who authorizes such contacts by not acting to stop contact by actions of which the DA is aware are being committed by a person over whom the DA has direct supervisory authority also violates SCR 20:4.2.