

STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 00-113

Legal Representation of Community Services Agencies

QUESTIONS

1. To what extent may attorneys with the Tennessee Department of Children's Services ("DCS") represent Community Service Agencies ("CSAs"), including matters which may not involve DCS functions?
2. In matters in which the DCS attorneys represent the DCS and a CSA takes a conflicting legal position, is there an ethical conflict of interest, and if so, is the CSA entitled to legal representation by the state under these circumstances?
3. To what extent does the Attorney General provide legal representation of CSAs in legal matters not addressed in Attorney General Opinion No. 97-092?
4. May CSAs hire private attorneys to represent them?

OPINION

1. Staff attorneys for the DCS may represent CSAs to the extent deemed necessary and appropriate by the Commissioner of the DCS, even on matters which do not entail normal DCS functions.
2. CSAs may not take a conflicting legal position from that of the DCS; accordingly, there is no need to address the issue of an ethical conflict of interest.
3. The Attorney General may provide legal representation to the extent the Attorney General, in his discretion, deems necessary and appropriate on a case-by-case basis. Only the Office of the Attorney General and Reporter may initiate, supervise and direct litigation on behalf of CSAs, whether it is before the Claims Commission or any other judicial tribunal.
4. Yes, CSAs may hire private attorneys if approved through the prescribed statutory process.

ANALYSIS

BACKGROUND

The Community Services Agency Act of 1996 transformed Community Health Agencies operating under the Tennessee Department of Health to Community Service Agencies (“CSAs”) operating under the Tennessee Department of Children's Services. *See* Tenn. Code Ann. § 37-5-304(a) (Repl. 1996). This section also provides that CSAs coordinate funds and programs for the care of children and other citizens of the state. The four urban and eight rural CSAs are political subdivisions and instrumentalities of the state and are deemed to be “acting in all respects for the benefit of the people of the state in the performance of essential public functions.” Tenn. Code Ann. § 37-5-304 (d) (Repl. 1996).

1. Although the Office of the Attorney General and Reporter generally performs all legal services required by any state agency, agencies such as the DCS are authorized to and do maintain internal legal departments with staff attorneys pursuant to statutory authority:

This section [regarding the duty of the Attorney General to represent state agencies, departments and other state instrumentalities] shall not prevent the various offices, departments, agencies, boards, commissions, or instrumentalities of the state of Tennessee from employing other attorneys, working solely under the supervision and at the direction of the agency, for the purpose of conducting investigations, advising, consulting, and assisting the office, department, agency, board, commission, or instrumentality in the administration of its duties.

Tenn. Code Ann. § 8-6-301(a) (Repl. 1993). Accordingly, staff attorneys for the DCS may conduct all of the above listed legal services, “working solely under the supervision and the direction of the agency,” that is, the DCS. *Id.* Therefore, the Commissioner for the DCS (“Commissioner”) has the authority, responsibility and duty to supervise and direct staff attorneys for the DCS to provide legal services for the DCS.¹

Although each CSA is “a political subdivision and instrumentality of the state,” CSAs are clearly subject to the authority and control of the Commissioner. *See* Tenn. Code Ann. § 37-5-304(d) (Repl. 1996). “Commissioner” is defined in Title 37, Chapter 5, Part 3 as “the commissioner of children’s services or the commissioner’s designee.” Tenn. Code Ann. § 37-5-303(4) (Repl. 1996). The General Assembly statutorily empowered the Commissioner to establish all CSAs. *See* Tenn. Code Ann. § 37-5-304(a), (b) and (c) (Repl. 1996). The Commissioner has the “duty and

¹*But see* Tenn. Code Ann. § 8-6-301(b) (Repl. 1993), *infra*, “the attorney general and reporter shall direct and supervise all investigations and litigation necessary to the administration of” all state departments, boards and all other state instrumentalities and only the attorney general may institute civil proceedings on their behalf.

responsibility” of appointing an executive director for each CSA, subject to the approval of each respective CSA board², Tenn. Code Ann. § 37-5-307(4) (Repl. 1996), must approve “all written policies, procedures or rules and regulations” which govern the CSAs’ internal operations before they may be adopted, Tenn. Code Ann. § 37-5-306(1) (Repl. 1996), and has the power to “[p]erform other acts necessary or convenient to exercise the powers granted or reasonably implied in this part.” Tenn. Code Ann. § 37-5-307(6) (Repl. 1996). Further, the Commissioner has the power and duty to [p]erform all duties and exercise all authority set forth in title 68, chapter 2, part 11, regarding community services agencies . . .”³ Tenn. Code Ann. § 37-5-105(11) (Repl. 1996).

This statutory control and authority, as well as the responsibilities and duties set forth above, establish that, pursuant to the Commissioner’s discretion and direction, staff attorneys for the DCS may provide any legal advice and counseling necessary to a CSA’s ordinary daily operations. This includes matters such as advice pertaining to business contracts with third parties, pre-litigation advice and representation, whether it relates to normal functions of the DCS or not, and any other legal representation, with the exception of that which may be provided at the Attorney General’s discretion and direction, or which statutorily must be provided by the Attorney General and Reporter. *See* Atty. Gen. Op. 97-001; Tenn. Code Ann. § 8-6-301(a) (Repl. 1993).

2. Because a CSA is political subdivision of the state and subject to the control of the Commissioner, it is not possible for it to take a legal position adversarial to that of the DCS. Should a CSA, through its executive director, attempt to take such a position, the Commissioner has the authority to countermand that decision. Therefore, there is no need to address the question posed regarding an ethical conflict of interest, as none should exist.

3. The general statutory provisions governing the duties and responsibilities of the Office of the Attorney General and Reporter pertaining to legal representation provide that the Attorney General’s duties include “the trial and direction of all civil litigated matters and administrative proceedings in which the state of Tennessee or any officer, department, agency, board, commission or instrumentality of the state may be interested . . .” Tenn. Code Ann. § 8-6-109(b)(1) (Repl. 1993). Coordination with other state agencies and attorneys is outlined in Tenn. Code Ann. § 8-6-301 (Repl. 1993), which provides:

(a) The attorney general and reporter, either in person or by assistant, shall represent all offices, departments, agencies, boards,

²Members of the boards of directors for the CSAs are appointed by the Governor and include representatives of the counties where they serve. Tenn. Code Ann. § 37-5-305 (Repl. 1996). The boards must submit their plans of operation for approval by the commissioners of the DCS and the Department of Finance and Administration, as well as the Comptroller of the Treasury. Tenn. Code Ann. § 37-5-310 (Repl. 1996). CSAs must also submit annual reports to the Governor and the Commissioner of the DCS. Tenn. Code Ann. § 37-5-312 (Repl. 1996).

³ Tenn. Code Ann. §§ 68-2-1101 through 68-2-1118 were transferred to §§ 37-5-301 through 37-5-316 by the Acts of 1996, ch. 1079, § 149, except for former Tenn. Code Ann. §§ 68-2-1110 and 68-2-1116, both of which were repealed by § 149.

commissions, or instrumentalities of the state of Tennessee now in existence or which may hereafter be created. All legal services required by such offices, departments, agencies, boards, commissions, or instrumentalities of the state of Tennessee shall be rendered by the attorney general and reporter or under his direction. . . .

(b) The attorney general and reporter shall direct and supervise all investigations and litigation necessary to the administration of the duties of the various departments, boards, commissions, or instrumentalities of the state of Tennessee, and no such entities shall institute any civil proceeding except through the attorney general.

Tenn. Code Ann. § 8-6-301(Repl. 1993). Accordingly, only the Office of the Attorney General may initiate civil litigation for a CSA. The Office of the Attorney General must represent, supervise and direct all other litigation involving a CSA, unless this duty, at the discretion of the Attorney General, and with the Commissioner's concurrence, is expressly delegated to a DCS staff attorney with written authorization:

The attorney general and reporter, in his discretion and with the concurrence of the head of the executive agency involved, may permit, by express written authorization, staff attorneys employed by the various departments, agencies, boards, commissions or instrumentalities of the state, to appear and represent the state of Tennessee in a certain case or certain classes of cases under the direction and control of the attorney general and reporter.

Tenn. Code Ann. § 8-6-302 (Repl. 1993). Even when representation is delegated pursuant to the forgoing statute, the Attorney General must still maintain "direction and control" of the case or "classes of cases" so delegated. *Id.*

4. Tenn. Code Ann. § 8-6-106 (Repl. 1993) provides that where the interest of the state requires, "in the judgment of the governor and attorney general and reporter, additional counsel to the attorney general and reporter or district attorney general, the governor shall employ such counsel, who shall be paid such compensation for such services as the governor, secretary of state, and attorney general and reporter may deem just" *Id.* A CSA may only retain private counsel through this procedure and may not do so independently.

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