

# **OFFICE OF THE DEFENDER GENERAL**

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## **MEMORANDUM**

**MEMO TO:** House Commerce Committee  
**FROM:** Matthew Valerio, Vermont Defender General  
**RE:** H. 208 /Exempting ODG other personal services from the requirements for unemployment insurance and workers' compensation coverage  
**DATED:** April 21, 2021

### **INTRODUCTION/REQUEST:**

The Office of the Defender General (ODG) urges the passage of H.208 to resolve an issue that has arisen between the Department of Labor and the ODG. The resolution of the issue is much simpler than the statement of the problem. Simply put, the resolution is to exempt individuals who provide ad hoc other personal services to the ODG from unemployment and workers' compensation insurance coverage consistent with what has been done with various other classifications of employment.

The DOL has represented to the Defender General that it supports this resolution of the matter.

Currently, the ODG has appealed a DOL auditor's finding that the claimant, G.G., was an employee for purposes of unemployment. Interestingly enough, the claimant did not request unemployment from the ODG, but from another job that G.G. was working where she was clearly an employee.

The issue arose when a Department of Labor (DOL) auditor questioned what other sources of income she had, and discovered that the ODG was paying G.G. for ad hoc services as a family support work on an as-needed basis. G.G. still has never made a claim for unemployment compensation against the ODG. We have not yet had an administrative hearing on the appeal.

The ODG provides other personal case-related services to many clients on an ad hoc basis, these include psychologists, investigators, accident reconstruction experts, transcribers, litigation support services, ballistics, and firearms experts, among many others regularly at the request of the attorney handling the case.

The ODG still has never had a direct claim for unemployment compensation benefits for any of these services.

It is my understanding that the DOL does not oppose the exemption of the ODG from unemployment and workers' compensation coverage, and would welcome the resolution of this dispute in that manner.

**LEGAL ISSUE: Whether the Office of the Defender General has appropriately classified "Family Support Workers" who work as needed in support of families in CHINS cases as independent contractors based upon the State's "A, B, C Test."**

#### HISTORY OF FAMILY SUPPORT WORKERS:

Approximately 10 years ago the ODG established the "Family Support Worker" program to provide parents who were subject to CHINS proceedings with assistance in accessing necessary services to obtain positive outcomes for the family so that they may regain or retain custody of their children. This may include assistance in accessing housing, employment, drug and alcohol screening, counseling and treatment, mental health counseling, educational supports, vocational rehabilitation, family counseling services, domestic and/or sexual violence counseling; or any other need set forth by the Court as part of the CHINS case or disposition order. Almost all parents in CHINS proceedings are represented by assigned counsel conflict contract attorneys because the children are represented (except where there is already another conflict) by the staff public defense office or the primary public defense contract office. It is notable that this program has won an award from the Vermont Supreme Court for excellence in obtaining positive results in reunifying families.

#### POWERS & DUTIES OF THE DEFENDER GENERAL:

The powers and duties of the defender general are established in Title 13, Chapter 163. Pursuant to that title, the Defender General has the primary responsibility for providing needy persons with legal services under this chapter, and no other official or agency of the State may supervise the Defender General or assign him or her duties in addition to those prescribed by this chapter. 13 V.S.A. § 5253(a)

Particular proceedings/Juvenile:

It is the Defender General's duty to ensure that counsel are assigned under section 5231 of this title to represent needy persons in proceedings arising out of a petition brought in a juvenile court when the court deems the interests of justice require representation of either the child or his or her parents or guardian or both, including any subsequent proceedings arising from an order therein. 13 V.S.A. §5232 (Added 1971, No. 161 (Adj. Sess.), § 6, eff. date, see note.)

13 V.S.A. 5253 requires that:

(b) When necessary or appropriate, the Defender General may contract for the services of investigators or additional attorneys-at-law to provide services to needy persons covered by this chapter or to carry out any other function of the Office of Defender General provided that:

(1) the services performed shall meet the professional standards that this chapter prescribes for services performed by the Office of the Defender General;

(2) the services are subject to the supervision and control of the Defender General, except as otherwise provided in section 5205 involving contracts providing for representation in cases involving conflict of interest ...

The Defender General is also constitutionally responsible for payment of necessary services in support of litigation as part of its budget. 13 V.S.A. 5231(a)(2). The Defender General, however, cannot supervise or control the representation arising in cases involving conflicts of interest, and as a result contracts with a member of the bar to provide services as the assigned counsel coordinator. The Defender General may consult regarding the budget for payment of those expenditures. 13 V.S.A. 5205(b).

#### DEFENDER GENERAL EXPERT LIST / OTHER PERSONAL SERVICES:

The ODG expert list contains experts and litigation support services including psychologists, psychiatrists, investigators, accident reconstruction experts, crime scene experts, ballistics experts, experts on wounds and bruises, social workers, experts on police procedure, police use of force experts, and other litigation and case support services. The ODG maintains a separate transcribers list. Both of these lists are on the ODG website. These services are chosen by attorneys as needed on a case-by-case basis. Some are never used. None are on retainer with the ODG. All are free to provide these services on the open market as they wish. FSWs are included on the expert list. There are approximately 16 family support workers on the ODG expert and support services list. The list is available to all attorneys from the staff system and the conflict system, and it can be viewed on the ODG website by others looking for expert services.

#### FACTS REGARDING FAMILY SUPPORT WORKERS (FSWs):

- If an individual is listed as minimally qualified as an FSW, it does not mean that individual is hired by the ODG.
- If an individual is listed as minimally qualified as an FSW, it does not mean that conflict counsel will ever choose that person to work on a case.
- The ODG does not select which FSW will work for any attorney.
- FSWs are not guaranteed any work.
- FSWs are not guaranteed any amount of hours.
- FSWs do not have specific times when they work.

- FSWs are selected for work solely by conflict counsel representing parents in CHINS cases.
- The ODG does not control the details of the work of the conflict counsel attorneys.
- The ODG does not control the details of the work that the FSW does – any direction is obtained from conflict counsel.
- FSWs may work for any attorney in the system subject to Vermont Rules of Professional Conduct governing attorneys.
- FSWs are not precluded from providing their services to any person, group, or entity that is willing to pay them, whether inside the ODG system or outside the ODG system. (Note: We are aware of instances of FSWs being used in divorce cases completely unrelated to the ODG.)
- The Vermont Rules of Professional Conduct apply to the FSWs as agents of the attorneys they work for. V.R.P.C., Rule 5.3
- FSWs provide their own transportation.
- FSWs provide their own equipment, i.e., phones, computers, and peripherals.
- The ODG does not have, nor has it ever had, positions available in the staff system that perform the duties of FSWs.
- The FSW program, as it is structured, is well known to the Secretary of Administration and Commissioner of Finance as it has been on the chopping block numerous times during rescissions.
- FSWs are not funded in the ODG budget; in fact, they are funded from the DCF budget.
- The ODG has nobody on staff who does what FSWs do. This service is unique to the FSWs.

#### ETHICAL ISSUES:

The ODG cannot pay FSWs as employees on the state payroll and comply with the Vermont Rules of Professional Conduct that govern attorneys. In the early 1970s, VBA Ethics Advisory Opinion 76-18 held that the Office of the Defender General was one firm for purposes of conflicts of interest. See also, V.R.P.C., 1.0(c), see Comments 3 & 4. As a result, the conflict in one staff office extended to other staff offices. V.R.P.C., Rule 1.10, see also Rules 1.7 and 1.9. As a result, state employees cannot perform job duties in violation of the ethics rules regarding any client of “the firm” that is the ODG. This is why Title 13, Ch. 163 established a public defender system that, while centrally and fiscally administered, creates an assigned counsel conflict contract system to administer necessary services (experts and case assistance) that is separate from the Defender General. See 13 V.S.A. 5205(b)(2).

If the FSWs were determined to be state employees by the Department of Labor, that would preclude them from being paid to provide families assistance as their ethical duties would align with the services provided by the state employee staff public defense offices. As a result, parents, who are 99 percent of the time represented by assigned counsel conflict counsel would be precluded from accessing FSW services. That would, of course, eliminate the entire purpose of the program.

Notably, FSWs cannot be paid as state employees from the ODG budget. The ODG has no positions in which to hire FSWs. The ODG has nobody on staff who currently does the work that FSWs do. And the funding is not in the ODG budget.

#### MISCELLANEOUS QUESTIONS:

Calculation of Benefits:

I would also pose this question: if an FSW was on the list and received a call to assist a family three times in five years but was never called again, how would the Department of Labor figure out what the ODG portion of the unemployment benefit would be?

Claimant:

It is our understanding that the Claimant, G.G., FSW, has continued to work as an FSW for families on an ad hoc basis as she always had. As to the ODG she has never been “unemployed” and the ODG has never removed her from the list as an FSW. Throughout this inquiry, the Claimant continues to work and be paid as an FSW on an ad hoc basis at the discretion of the requesting attorney subject to the availability of funds.

#### COVERED EMPLOYMENT – ABC TEST:

It appears that the Department of Labor is attempting to base its argument on C. in “the A, B, C” test claiming that the individuals who work as FSWs are not:

Customarily engaged in independently established trade, occupation, profession, or business.

One satisfies the “C” part of the test by being independently established in a similar type of occupation or trade like the one being examined, and generally, the individual must have some history of providing similar services to others.

In the case of FSWs, they provide diverse family support services to attorneys who are independent of the ODG. Some work for many different attorneys, others work for just one or two. But all of the work is performed for attorneys who have a conflict of interest with the ODG, and as such must retain services on an ad hoc basis from independent providers to avoid an ethical violation with the ODG. By any other name, the work of FSWs is social work, which would include case management and at the most basic level, life coach. Social work is an independently established trade, occupation, profession, or business that is not the primary function of the ODG.

The Department of Labor seems to be hanging its hat on trade labels. But no matter what label is used, the function of the FSW is independent of the control of the Defender General, does

not work for any state employees, is not selected for assignment by the Defender General. The details of the work are not controlled by the Defender General, and they work when they want to work, for whom they want to work, and where they want to work. It should not matter that the FSW files taxes under their social security number with a Schedule C, or that their job is not regulated by some other state agency or office. Simply put the label is irrelevant, so long as the FSW holds themselves out as being available generally to a portion of the legal community.

Fundamentally, the ODG provides FSWs with funding in the manner set forth by statute which is structured in a manner to preserve compliance with the Rules of Professional Conduct that govern attorneys and provide necessary litigation support services to conflict counsel.

#### CONCLUSION:

It is the ODG position that the FSWs listed by the ODG are independent contractors not subject to unemployment benefits from the state for all of the reasons set forth above. And even if the FSWs are in a gray area relative to the "C" part of the "A, B, C Test," the Rules of Professional Responsibility require that the ODG structure access to their services in this manner to avoid conflicts of interest with assigned counsel conflict contract attorneys who represent parents in CHINS cases which conflict with the state staff office attorneys and other conflict contract attorneys.

#### THE RESOLUTION:

**As indicated above, the resolution of the issue is actually much simpler than the statement of the problem. Simply put, the resolution is to exempt individuals who provide ad hoc other personal services to the Office of the Defender General (ODG) from unemployment and workers' compensation insurance coverage as the State has for various other classifications of employment. That would be accomplished by the passage of H.208.**

**It is my understanding that the DOL does not oppose the exemption of the ODG from unemployment and workers' compensation coverage, and would welcome the resolution of this dispute in that manner.**