CHAPTER FOUR –
ETHICAL AND REGULATORY REQUIREMENTS GOVERNING ATTORNEYS IN THE CHILD SUPPORT PROGRAM

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INTRODUCTION

Attorneys have always been an integral part of the child support program. When the Title IV-D program began, its mission was recoupment of public assistance. The IV-D attorney's role was primarily one of law enforcement. Attorneys and prosecutors had few tools at their disposal, so the enforcement of child support occurred mainly through criminal nonsupport and contempt cases in court. As the program has evolved into one with a more family-centered approach, which assures that parents have the financial and other resources they need to support their children, the role of the IV-D attorney has also evolved. While court enforcement is still a necessary tool in some circumstances, the IV-D attorney must have a broader perspective and embrace a variety of options that increase regular, on-time child support payments and the number of noncustodial parents working and supporting their children.

IV-D attorneys work in many different environments; some primarily court-based, some primarily administrative, and some mixed. The rapid expansion of tribal child support programs means that many attorneys now work in tribal environments as well.[1] Regardless of the environment in which they work, all attorneys are subject to the ethics laws and rules of the state or jurisdiction where they are licensed to practice. Tribal attorneys are often also subject to ethics codes implemented by the individual tribe to which they belong.[2]

The first three paragraphs of the preamble to the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules)[3] highlight the various roles that all attorneys play, including IV-D attorneys.

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[1] Although federal regulations for tribal child support programs do not contain the specific requirements for attorneys or prosecutors that are found in regulations for state programs, [see 45 C.F.R § 303.20(f)(1)], regulations at 45 C.F.R. § 309.65(a)(2) require a tribal child support plan to provide evidence that the "Tribe or Tribal organization has in place procedures for accepting all applications for IV–D services and promptly providing IV–D services required by law and regulation."

[2] *See, e.g.,* Standing Rock Sioux Tribal Code of Justice T. XXVII*, Tribal Employees Code of Ethics*, (2007); Bay Mills Indian Community Tribal Court Rule 105.2 *Code of Ethical Conduct for Judges; Court Personnel; Lawyers and Lay Advocates* (2003). *See in general* Native American Rights Fund, National Indian Law Library, https://www.narf.org/nill/. For more information on the tribal child support program, *see* Chapter Thirteen: Intergovernmental Child Support Cases.

[3] ABA Model Rules of Professional Conduct (2017) (hereinafter, Model Rules). The Model Rules are adopted verbatim or in substantially similar form in the District of Columbia and all states except California. Even in California, the Model Rules play a significant role in the formulation of the state's Rules of Professional Conduct.

> A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
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> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
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> In addition to these representational functions, a lawyer may serve as a third-party neutral; a nonrepresentational role in helping the parties to resolve a dispute or other matter.[4]

A IV-D attorney should be prepared to proactively represent the state or tribal agency in a variety of settings, such as in court, to the public, and to the parties involved in the cases. This role requires the attorney to keep abreast of all new developments, legislation, and regulations. It further requires the attorney to place the proper emphasis on the current program direction, in order to effectively advocate for the program.

GENERAL ETHICAL CONSIDERATIONS

Attorneys are governed by rules of ethics promulgated through the state bar association or other entity with authority to regulate the practice of law in the state in which they are licensed, as well as the rules of any jurisdiction in which they appear *pro hac vice*. These rules of ethics are, in most cases, based on the ABA Model Rules of Professional Conduct. As stated above, tribal attorneys may also be subject to the ethics code of the particular tribe to which they belong. These rules determine appropriate conduct in a variety of situations and apply, therefore, to actions taken in the child support arena. IV-D attorneys should also consult their state's or tribe's ethical opinions for guidance regarding conduct in specific situations. Finally, most states have enacted legislation, promulgated court or administrative rules, or have ethics opinions regarding the IV-D attorney's scope of representation.

Who is the Client?

One of the first ethical questions that arose in the child support program was, "Who is the client?" Identification of the client might appear simple, but it

[4] Model Rules, Preamble, paragraphs 1, 2, and 3 (2017).

often seems ambiguous for attorneys working for large organizations or government agencies. This was especially true for IV-D attorneys, given the similarity of interests of the custodial parent and the IV-D agency, and the availability of certain child support services to noncustodial parents.[5]

The representation issue came to a head with enactment of the Family Support Act of 1988,[6] which required states to enact legislation providing for the review and adjustment of child support orders. Client identification became a priority for states, as attorneys queried how they could pursue requests from noncustodial parents to re-examine their ability to pay support under state guidelines while also seeking modifications on behalf of custodial parents.

Early legal ethics opinions and court decisions addressing the identity of the IV-D attorney's client reached conflicting results.[7] However, they increasingly began to conclude that the client of a IV-D attorney was the state, not any individual party. For example, in 1978 the Oregon Court of Appeals concluded that there was no attorney-client privilege created under the statute requiring the Support Enforcement Division of the Department of Justice to "represent" the recipients of public assistance. The court likened the relationship between a recipient of services and a state child support program to one of assignor-assignee. The court also stated that "The mere fact that the assignor is required to cooperate with the attorney for the assignee does not establish an attorney-client relationship…the state may enforce the obligation whether the recipient cooperates or even over the specific objection of the recipient-assignor."[8]

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[5] *See, e.g.,* Virginia Sablan, *Attorney-Client Dilemma within the Child Support Program,* 8 ABA Juv. & Child Rptr. 94 (1989); C. Bryant, *Ethics in IV-D Practice: The Real World Problems of IV-D Lawyers*, ABA Third Nat'l Child Support Conference Manual (May 1989)*;* J. Fahey, *Special Ethical Considerations of Counsel for Government,* 33 Fed. Cir. B.J. 331, 335 (1974); J. Malzahn, *Ethics: The Deliberate Dilemma,* NCSEA News (April & June 1988); Paula Roberts, *Attorney-Client Relationship and the IV-D System: Protection against the Inadvertent Disclosure of Damaging Information,* 19 Clearinghouse Rev. 158 (1985); V. Williams & G. Truglio, *State Child Support Legislative Agendas: A Sampling,* NCSEA News (June/July 1991). The Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, added "noncustodial parent" to the definition of "parent" for the purpose of requesting a review of a child support order for modification. This meant that, for the first time, a custodial and noncustodial parent in the same case could separately become recipients of IV-D services. *See also* 45 C.F.R. § 303.8 (2019).

[6] Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343.

[7] *Compare, e.g.,* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 89-1528 (1989) (the client of the IV-D agency is the state when the recipient receives benefits, but a custodial parent is the client, where no benefits are received) *with* Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Op. 90-10 (1990) (the client of a Child Support Enforcement Attorney (CSEA) is the state) and Ala. Office of General Counsel Formal Op. 1996-02 (1996) (no attorney-client relationship exists with service recipients). *See also Gibson v. Johnson*, 582 P.2d 452, 456 (Or. App. 1978) (The relationships between an AFDC recipient and the state, which collects support from the obligor, is that of assignor-assignee. The contact is for the benefit of the state's recoupment of benefits; it does not create an attorney-client relationship.).

[8] *Gibson v. Johnson*, 582 P.2d 452, 456 (Or. App. 1978).

In 1990, the Ohio Supreme Court Board of Commissioners on Grievances and Discipline reached the same conclusion, making the point that while the state has an obvious interest in collecting support when a recipient is receiving benefits, "custodial parents who obtain sound support orders, with the help of the child support enforcement agency, are less likely to have to ever rely on AFDC."[9]

Today, there is greater agreement in the opinions of state bar ethics commissions and case law, with the consensus being that the IV-D attorney represents the state, not individual parties.[10] Additionally, more than half of the states have enacted legislation identifying the state or child support agency as the client of the IV-D attorney.[11] Such a conclusion is consistent with the long-held view of the federal Office of Child Support Enforcement (OCSE) that the IV-D attorney does not represent individual parties. Rather, the IV-D attorney represents "the agency in court or administrative proceedings with respect to the establishment and enforcement of orders of paternity and support."[12]

Identification of the state or child support agency as the IV-D attorney's client has practical as well as ethical implications. For example, if the individual parent is not a client, there is no conflict of interest when the former support obligor subsequently becomes the custodian/recipient and applies for the same child support services that the agency previously furnished to the other parent. In most states, there are no privileged communications with the parent, including

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[9] Ohio Supreme Court Board of Commissioners on Grievances and Discipline, Op. 90-10 (1990) [hereinafter Ohio Ethics Op.].

[10] *See, e.g.,* Indiana State Bar Association Legal Ethics Committee, Op. 03 (1991); Kansas Ethics Op.96-2 (1996); Neb. State Bar Ass'n, Advisory Op. 92-1 (1992); New Hampshire Bar Ass'n, Ethics Committee Advisory Op. #1992-93/3(1993); North Carolina State Bar 2010 Formal Ethics Op. 5 (2010); Ohio Ethics Op. 90-10 (1990); Oregon State Bar Formal Ethics Op. 2005-57 (2005); Board of Professional Responsibility of the Supreme Court of Tenn., Formal Ethics Op. 90-F-l23 (1990); 89 Vermont Advisory Ethics Op., 89-08 (1989). *See also Dep't of Revenue v. Collingwood*, 43 So. 3d 952 (Fla. 1st DCA 2010).

[11] *See, e.g.,* Ala. Code § 38-10-7.1 (2019); Ariz. Rev. Stat. Ann. § 25-509 (2019); Ark. Code Ann. § 9-14-210(e)(2) (2018); Cal. Fam. Code § 17406 (West 2019); Colo. Rev. Stat. § 26-13-105(2) (2019); Fla. Stat. § 409.2564 (2019); Guam Code Ann. § 34106(i) (2019); Ind. Code § 31-25-4-13.1(e) (2019); Iowa Code § 252B.7 (2017); Kan. Stat. Ann. § 39-755(b) (2019); Ky. Rev. Stat. Ann. § 205.712(7) (West 2019); La. Rev. Stat. Ann. § 46:236.1.7 (2018); Mass. Gen. Laws ch. 119A, § 3 (2019); Me. Rev. Stat. Ann. tit.19A, § 2103(5) (2019) ; Minn. Stat. § 518A.47 (2019); Miss. Code Ann. § 43-19-35 (2019) ; Mont. Code Ann. § 40-5-202(3) (2019); Mo. Rev. Stat. § 454.513 (2019); Neb. Rev. Stat. § 43-512.03(5) (2019); N.M. Stat. § 27-2-27(c) and (d) (2019); N.Y. Soc. Servs. Law § 111-c(4)(b) (McKinney 2019); N.C. Gen. Stat. § 110-130.1(c) (2019); N.D. Cent. Code § 14.09-09.27. (2019); Okla. Stat. tit. 56, § 237.3 (2019); 23 Pa. Cons. Stat. § 4306 (2019); S.C. Code Ann. § 43-5-590(j) (2018); Tex. Fam. Code § 231.109(d) (West 2018); Utah Code Ann. § 78B-12-113 (West 2018); W.Va. Code § 48-18-110 (2019). Although many states have enacted legislation identifying the IV-D agency as the client, defining the attorney-client relationship for IV-D attorneys continues to be a topic of discussion. *See, e.g.,* John L. Saxon, *Who are The Parties in IV-D Child Support Proceedings? And What Difference Does It Make?* Vol. 22 Fam. Law Bull. (2007); and Florida Bar, *Professional Ethics of the Florida Bar,* Op. 11-1 (2011).

[12] 45 C.F.R. § 303.20(f)(1) (2019). *See also* OCSE-IM-93-03: *Role of IV-D Agency and Its Staff in Delivering Program* Services (July 23, 1993), and OCSE-DCL-93-42: *Role of IV-D Agency and Staff in Delivering Program Services* (Sept. 21, 1993).

conversations involving welfare fraud.[13] The IV-D attorney should not accept service of process on behalf of the custodial parent, nor should the IV-D attorney attempt to bind the custodial parent in settlement negotiations without the custodial parent's consent and approval.

It is crucial that the IV-D attorney clearly disclose his or her role to the custodial and noncustodial parents. Full disclosure can eliminate honest misunderstandings or implied representation.[14] Most child support agencies have developed a written document that each recipient of child support services must sign, acknowledging that there is no attorney-client relationship between a IV-D attorney and the parent. Another way to ensure that the parties and the tribunal understand who the attorney represents and the extent of the representation is to include notice in pleadings, motions, or other documents filed by the attorney with the tribunal and served on the parties.[15] Some states require the IV-D attorney who appears in a family law matter to file a notice informing the recipient of Title IV-D services and other parties that the attorney represents only the Title IV-D agency and not any individual party.[16]

Where a IV-D attorney encounters a situation in which the interests of the recipient of child support services diverge from those of the agency, the attorney should inform the individual and suggest that the recipient of child support services might want to consult independent counsel. IV-D attorneys should exercise any opportunity to inform and educate the bar, the judiciary, and the public as to the extent and limitation of their representation.

Communication with the Child Support Agency

Model Rule 1.4 deals with the subject of "Communications." Subsection 1.4 (a)(3) states that "[a] lawyer shall keep a client reasonably informed about the status of a matter." Paragraph (a) (4) of the same rule requires a lawyer to "promptly comply with reasonable requests for information." Subsection (b) requires the attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

This ongoing communication is necessary for a IV-D attorney so that actions the attorney takes on a case are consistent with the goals, objectives, and administrative direction of the IV-D agency for whom the attorney works, as well as in compliance with relevant state and federal law and regulations.

Frequent communication is particularly important for IV-D attorneys who may be in a different physical location than their client agency. In jurisdictions where the attorneys are employed directly by the child support agency, the

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[13] *But see* Fla. Stat. § 90.502(5) (2019).
[14] *See* Ariz. State Bar Comm. on Rules of Prof'l Conduct, Op. 91-21 (1991) [hereinafter Ariz. Ethics Op. 91-21].
[15] *See, e.g.,* Fla. Fam. Law R.P., Rule 12.040(c)(2) (2014).
[16] *Id*.

referral of a case to the attorney will be an in-house procedure, and may be as simple as transferring the case to the attorney through the statewide computer system or other computer network. Similarly, the attorney can easily communicate with caseworkers through the statewide system. In states or tribes where attorneys do not have access to the statewide computer system or other computer network, however, hard copy files or stand-alone electronic files may be in the possession of attorneys and out of the possession of agency personnel for long periods of time. If the attorney is located within the agency, frequent communication is relatively easy, but the longer a case is in a physical location different from that of the agency, the more difficult the flow of communication on cases can become.

For these reasons, the agency and the attorney should agree on the extent of communication regarding each specific case. In the case of attorneys employed by a IV-D agency, the agency's procedures and protocols for case handling should specify how and when communication should occur. In other agency-attorney relationships, the cooperative agreement or contract between the attorney and agency should clearly establish what information the attorney must communicate to the agency, at what intervals, and in what form. If email or other electronic communication is used between the attorney and the agency, the attorney should be aware that certain communications may require special precautions.[17]

LINE ATTORNEY

The line attorney handles the day-to-day legal responsibilities for a case. Clearly, this attorney has the most contact with the service recipient, which increases the potential for ethical issues to arise.

Routine Disclosure about Representation

As noted earlier, to avoid honest misunderstandings and misperceptions, it is strongly recommended that the agency or IV-D attorney provide a written document to each recipient of child support services prior to an attorney's initial involvement in the case. The document should fully explain the nature of the relationship between the attorney and the recipient and should clearly state that the IV-D attorney does not represent the recipient. Once the recipient of services reads and signs the document, the agency should provide the recipient with a copy and maintain the original (or an electronic image) in the agency file.

[17] Model Rules, Rule 1.6, Comment 17 (2017). *See* a more detailed discussion of email confidentiality later in this chapter. The IRS requires encryption for the electronic transmission of Federal Tax Information (FTI). *See* 26 U.S.C. § 6103 (2018). *See also* Internal Revenue Service, *Encryption Requirements of IRS Publication 1075,* http://www.irs.gov/uac/Encryption-Requirements-of-IRS-Publication-1075 (Sept. 20, 2016).

A recipient of child support services could have certain expectations about the attorney's duty and accountability. Model Rule 4.3 addresses “Dealing with Unrepresented Person.” It states in part, “When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”

Support staff and caseworkers handling various aspects of the case should also be apprised of the attorney's role. The IV-D attorney should also ensure that all communications from the child support agency are consistent with the view that the attorney represents the agency, not the individual parent. For example, letters asking the custodial parent to schedule an interview with the attorney in preparation for court should always refer to the “agency’s attorney” – never “your attorney.” Pleadings should also clearly state that the IV-D attorney represents the state or agency.

All too often, not only the recipient of child support services but also the judiciary and the defense bar assume that the child support services recipient is the "client" of the IV-D attorney and refer to the child support service recipient as such. If necessary, the IV-D attorney should correct this misunderstanding to remove the impression and expectation that certain attorney-client duties and responsibilities exist. Because of the meaning attached to the word “client” in ethics parlance, child support agencies should avoid use of such terminology in reference to the child support recipient of services to reduce the likelihood of a mistaken perception.

Relationships of the Line Attorney

Relationship with unrepresented parties. Model Rule 4.3 states that when an attorney, who represents one client, comes into contact with an unrepresented person, the attorney must take reasonable steps to ensure that the unrepresented person understands that the attorney is not disinterested or unbiased regarding the case. Comment 1 to the rule notes that unrepresented persons “might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client." While such an assumption might be unreasonable or naive regarding the role of a private attorney, it is neither when applied to government attorneys who are public officials and ministers of justice in addition to the other roles they fulfill.

IV-D attorneys must be very careful to fully explain their role to both parties and inform the parties that they should seek legal counsel if they want legal representation. According to Model Rule 4.3, this is especially the case “if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”

Relationship with represented parties. Model Rule 4.2 addresses "Communication with a Person Represented by Counsel." If a parent has obtained private independent counsel, further communications regarding the subject of the representation should be conducted through that attorney.[18] Indeed, Rule 4.2 clearly prohibits communication in such circumstances "unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. There are also private entities that provide child support collection services to custodial parents. In many instances, the custodial parent assigns certain rights or a power of attorney to the organization as a condition of obtaining services. It is important to note that federal regulations prohibit the disclosure of confidential and personally identifiable information to private child support collection agencies (PCAs).[19]

Relationship as a third-party neutral. The role of a IV-D attorney in today's child support program is often much broader than it has traditionally been. Mediation or other dispute resolution, and practices of a problem-solving court, can all give rise to the attorney's role as a third-party neutral. Model Rule 2.4, "Lawyer Serving as Third Party Neutral," says that "[s]ervice as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter." In this role, it is especially important to explain to the parties that the attorney does not represent them. The Model Rule goes on to say that "the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." [20]

Relationship as an advocate for the program. The IV-D attorney's role as a program advocate involves reaching out to the public, the bench and bar, and to those working in other child support or related programs so they are aware of the services provided and the ways in which those services work together. This role can take the form of public speaking, training, or written communication, including legal pleadings and briefs, and requires the attorney to have an overall knowledge of the history of the program and latest developments in legislation, regulations, and program direction, as well as an understanding of the overall goal of improving the lives of children and families.

Conflicts of Interest

The large volume of cases typically handled by IV-D line attorneys increases the potential for conflicts of interest to arise. The relevant ABA Model

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[18] Model Rules, Rule 4.2 (2017).
[19] *See* 75 Fed. Reg. 81,894 – 81,908 (Dec. 29, 2010). 45 C.F.R. § 301.1 (2019) defines "agent of a child" to receive confidential and personally identifiable information as "a caretaker relative having custody of or responsibility for a child." This definition does not include PCAs.
[20] *See* Carrie Menkel-Meadow, *The Lawyer As Consensus Builder: Ethics For a New Practice,* 70 Tenn. L. Rev. 63-119 (2002).

Rules, as well as some of the potential conflict situations and suggested resolutions, are discussed below.

Relevant Model Rules. Five separate Model Rules address conflict of interest:

- ABA Model Rule 1.7 "Conflict of Interest: Current Clients," states, *inter alia*, that an attorney "shall not represent a client, if the representation involves a concurrent conflict of interest." The Rule then goes on to state that a concurrent conflict of interest exists if

  "(1) the representation of one client will be directly adverse to another client; or

  (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

- ABA Model Rule 1.8, "Current Clients: Specific Rules," lists prohibited transactions bearing on conflict of interest, and it restates the confidentiality rule discussed below.

- ABA Model Rule 1.9, "Duties to Former Clients," prohibits an attorney who has represented one client to "thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing." Disclosure of a possible conflict should be made both to the previous client and the other parent. The rule further states that information relating to representation of the first client cannot be used to that client's disadvantage, except as allowed or required by the Model Rules or where the information has become general knowledge.

- ABA Model Rule 1.10, "Imputation of Conflicts of Interest: General Rule," states that "while attorneys are associated with a firm, none of them shall knowingly represent a client when any of them practicing alone would be prevented from doing so. …"

- ABA Model Rule 1.11, "Special Conflicts of Interest for Former & Current Government Officers & Employees," discusses special conflicts of interest for former and current government officers and employees. The Rule states in part, "Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government. … (1) is subject to Rule 1.9(c); and (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public

> officer or employee, unless the appropriate government agency gives its informed consent, in writing. …" Paragraph (d) of the Rule also states that "… a lawyer currently serving as a public officer or employee ... is subject to Rule 1.7 and 1.9, and shall not participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing. …"

Prior representation of a party. The above conflict of interest rules may come into play with IV-D attorneys who were formerly in private practice or who have been allowed to maintain a private practice in addition to their child support responsibilities. The most likely conflict situation is where the IV-D attorney represented one of the parents regarding the support obligation in the attorney's capacity as private attorney. Model Rule 1.9 seems to preclude the attorney from representing the agency in a child support case in which the attorney was involved as private counsel representing one of the parents, except where the former private client consents after consultation, confirmed in writing. Even if the former client consents, the attorney should explain the attorney's new relationship to the child support agency as a part of the consultation required by the rules. Disclosure to both parties, and written consent to continue, is strongly recommended although consent from the party who was not a former client is not mandated as is consent from the former client.

Model Rule 1.10 may not immediately appear to apply to IV-D attorneys, but it can be important in this situation. Comment 1 of the Rule defines a "firm" as "lawyers in a law partnership … or lawyers employed in a legal services organization or the legal department of a corporation or other organization."[21] According to this definition, a IV-D attorney's office falls under the category of an "other organization," and therefore can be considered a "firm" for purposes of the Rule.[22] Although Comment 11 of Model Rule 1.10 clarifies that conflicts a government lawyer may have after serving clients in private practice are not to be imputed to other government lawyers in the same "firm," it is still important to be aware of this Rule and avoid even the appearance of a conflict of interest.

Model Rule 1.11 points out that lawyers who are officers or employees of a governmental agency are personally subject to the Rules of Professional Conduct. Comment 4 of that Rule also says that the Rule is a balancing of interests between the risk that power or discretion vested in that agency might be used for special benefit of the other client, and the government's "legitimate need to attract qualified lawyers as well as to maintain high ethical standards." [23]

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[21] Model Rules, Rule 1.10, Comment 1 (2017).
[22] Model Rules, Rule 1.0, Comment 3 ("With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.").
[23] Model Rules, Rule 1.11, Comments 1 and 4 (2017).

The important thing for a IV-D attorney to remember, in light of these Model Rules, is that conflicts and the appearance of conflicts do exist in the child support environment. For this reason, care should be taken to fully disclose any conflict as soon as possible and provide a clear explanation to all recipients of services regarding the role of all of the attorneys in the office as representatives of the state.

Inappropriate establishment of an attorney-client relationship. A second potential conflict of interest occurs when the IV-D attorney conducts his or her relationship with the custodial parent as though a formal attorney-client relationship exists, despite the presence of contrary statutes or ethical opinions, and the interests of child support agency conflict with the interests of the custodial parent.[24] Such conduct can give rise to implied representation of the parent, who may have conflicting interests from the child support agency. This potential conflict can be avoided by following the disclosure suggestions presented in the section on Routine Disclosure about Representation*, infra,* and by ensuring that the child support agency provides continuing training to all employees on the role and obligations of the IV-D attorney.

Application by both parents for child support services. Another area of potential conflict is where both the custodial parent and noncustodial parent apply for services within the same child support agency. Congress has mandated that each party to a child support order that is being enforced through the child support program has a right to request a review of that order for possible modification of the support amount. Again, the issue is one of implied representation. Although most states have statutes or ethics opinions stating that there is no attorney-client relationship between the parents and the IV-D attorney, if the IV-D attorney implies that they are representing one of the individual parties, there could be a conflict of interest regarding the other parent. To avoid this situation, as discussed above, agencies should routinely present a written explanation of the role of the IV-D attorney as a representative of the state or tribe, not any individual party, to a recipient of services at the beginning of the process. This document should explain to the parties that the attorney does not “represent” the parties in the process of conducting a review or adjusting the order. In fact, the state’s role is not to advocate either for an increase or a reduction in the amount of the order, but to facilitate an appropriate resolution in accordance with the child support guidelines.

Change of custody. A fourth potential conflict is where the noncustodial parent, against whom a child support case is brought, later becomes the custodial parent and seeks the services of the child support agency.[25] In an Arkansas case,[26] the trial court granted a motion by a former noncustodial parent

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[24] *See* Ariz. Ethics Opinion 91-21, *supra* note 14.
[25] *See* Child Support Enforcement Program: Review and Adjustment of Child Support Orders, 57 Fed. Reg. 61,559 (Dec. 28, 1992) (codified at 45 C.F.R. pt. 302 and 303), disseminated in OCSE-AT-92-12 (Dec. 28, 1992).
[26] *Office of Child Support Enforcement v. Terry*, 985 S.W.2d 711 (Ark. 1999).

who sought to restrain the child support agency from enforcing an obligation now owed to the other parent. The court granted his motion, finding that the agency had theoretically represented him and was now prohibited from representing the other parent. The Chancellor acknowledged the language of the statute that clearly delineates the interest the IV-D attorney represents, but nonetheless found that "the ethical considerations are of paramount concern when opposing parties have used the same agency or attorneys for the same or similar issues in litigation against each other." On appeal, the court overturned the trial court decision. Adhering to the basic rule of statutory construction that gives effect to the intent of the legislature, the appellate court concluded that, where child support rights are assigned by a custodial parent to the state, the state is the real party in interest for purposes of enforcement of the support rights and that IV-D attorneys therefore represent the interest of the state and not the individual assignor of the support rights. Moreover, because IV-D attorneys represent the state, the court held that there is no conflict of interest when the agency provides services to one parent and then the other.

Competence

Model Rule 1.1, "Competence," requires that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." The Comment to the rule states that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation."[27]

This level of competence in the child support field requires diverse knowledge and skills. Attorneys must be fully aware of the substantive and procedural issues that might arise as a case is worked and of how to apply their jurisdiction's case law, court rules, and statutes to resolve those issues. In addition, attorneys must be aware of federal statutes and regulations that affect the implementation and administration of the child support program in the state.[28] The first seven Comments to Module Rule 1.1 provide additional guidance with regard to competence in handling issues that typically arise in legal practice.

A IV-D attorney must also be comfortable and careful with technology and electronic information systems. The ABA acknowledged that fact in 2012 by amending a Comment to Model Rule 1.1. By adding the words "including the benefits and risks associated with relevant technology" to Comment 8 of Model Rule 1.1, the ABA expressly identified the need for lawyers to be mindful of technology as an aspect of professional competence. Being comfortable with technology is not enough. It is clearly important for an attorney to understand the

[27] Model Rules, Rule 1.1, Comment 5 (2017).
[28] OCSE's website, https://www.acf.hhs.gov/css, is a good place to start when searching for federal and state statutes or regulations, and is the official repository for all communication from OCSE.

risks associated with the technology used. An example of a risk that must be evaluated by an attorney is the risk of using unsecured or "open" wireless communications networks to transmit sensitive or confidential information.[29]

> A couple of comparative examples may suffice to explain the import of the amendment to Comment 8. A lawyer sitting in a coffee shop drafting a memorandum about the details of a client's case on a lined yellow legal tablet incurs little or no risk vis-à-vis her professional responsibilities in doing so, as long as she takes care to maintain possession and control of the tablet. Similarly, a lawyer in [sic] sitting in a quiet corner of a hotel lobby conversing with a partner in his firm about the details of a client's case is also unlikely to run afoul of his professional duty so long as he takes care to ensure that any confidential client information referenced in the conversation is not open to an eavesdropper sitting nearby.
>
> Now, suppose that the lawyer drafting the legal pleading in the coffee shop is using a laptop instead of [a] lined yellow tablet and is remotely accessing and updating a draft of the memorandum on the personal computer in her office using the free wireless service made available to the coffee shop's patrons. Or suppose that the lawyer in the hotel lobby discussing the details of the case with his partner is doing so not in person but by exchanging emails or instant chat messages with the partner, using the hotel's free wireless service. In both instances, the potential risk evaluation may have changed, perhaps significantly, and for the worse.
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> The new language in Comment 8 indicates that the attorneys in the latter scenarios have an obligation to be mindful of the risks associated with using technology for doing business—in both cases here, conducting transactions using a publicly available wireless system. Questions about whether the attorneys acted competently in the circumstances may well arise if it turns out that the privacy of their work product was compromised because it was transmitted in a way that was unsecured or if reasonable steps were not taken to ensure as far as possible that the method of transmission was as secure as possible.[30]

Finally, line attorneys must also be flexible and creative in searching for the best solutions to problems arising in particular cases and be willing to work

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[29] *See* Wayne Doss and John Cardoza, *Lawyers and Technology: A Question of Competence,* NCSEA Child Support Quarterly (July 2013) for a discussion of this topic. *See also* John J. Saxon, *Technology-Augmented Advocacy: Raising the Trial Lawyer's Standard of Care; Changing Traditional Legal Education; and Creating New Judicial Responsibilities,* 25 Ohio N.U. L. Rev. 569 (1999). For more on the use of technology, *see* the later discussion herein.

[30] Doss and Cardoza, *supra* note 29.

cooperatively with other jurisdictions, courts, or agencies, when necessary, to effectively ensure that children receive the support they deserve.

Professional Judgment

Model Rule 2.1, “Advisor,” requires an attorney to “exercise independent professional judgment and to render candid advice” to a client. It also allows the attorney to supplement purely legal advice with reference to relevant nonlegal considerations, "such as moral, economic, social, and political factors.”

For IV-D attorneys, these nonlegal considerations may be the best interest of the child or the dynamics of the specific family in deciding a particular litigation strategy. For example, the attorney may consider social and economic factors in a foster care case where the biological parents are making significant efforts towards reunification and need financial consideration to meet that goal.

Impartiality

Model Rule 3.5, “Impartiality and Decorum of the Tribunal,” prohibits an attorney from seeking to influence a judge, juror, prospective juror, or other official by means prohibited by law or from communicating *ex parte* with these persons except as permitted by law. IV-D attorneys often deal with the same judges or other bench officers on a constant basis. In some circumstances, this can give rise to an atmosphere of familiarity in which it may not seem out to place to discuss specific cases without providing notice to adverse parties. IV-D attorneys should avoid such *ex parte* communications, which violate Model Rule 3.5. (Such communications would independently raise ethical considerations for judges who engage in them).[31]

It is just as important to note, however, that discussions with the judiciary regarding the goals and challenges of the child support program, as well as the efficient processing of cases through the court, do not violate this rule and are strongly encouraged. Communication between IV-D attorneys and the judiciary on matters relating to legislation, regulations, or procedures is vital to the effective operation of the program and to appropriate results for the families served by the child support program.

The growth of social media platforms has also raised questions about impartiality. Facebook is a good example. Several state ethics commissions and the ABA have issued opinions providing guidance.[32] While some opinions have

[31] See American Bar Association Model Code of Judicial Conduct (2011), Comment 3 to Rule 1.2, *Promoting Confidence in the Judiciary.*

[32] *See* California Judges Assoc. Judicial Ethics Committee, Formal Opinion No. 66, *Online Social Networking* (2011); Florida Supreme Ct. Judicial Ethics Advisory Committee Opinion No. 2009-20 (Nov. 17, 2009); Kentucky Judicial Ethics Opinion JE-119 (Jan. 20, 2010); Maryland Judicial Ethics Advisory Opinion #2012-07 (June 12, 2012); Massachusetts Comm. on Judicial Ethics, Opinion No. 2011-6 (Dec. 28, 2011); N.Y. Advisory Opinion 08-176 (Jan. 29, 2009); N.Y. Advisory Opinion 13-39 (May 28, 2013); Ohio Judicial Ethics Advisory Opinion 2010-7 (Dec. 3, 2010);

approved of a judge "friending" an attorney on Facebook,[33] other opinions have provided caveats for judges and attorneys to follow. In concluding its analysis of the potential concerns with a judge's use of Facebook, the Florida Judicial Ethics Advisory Committee stated that "listing lawyers who may appear before the judge as 'friends' on a judge's social networking page reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge."[34]

Caseload Management

Government attorneys who may face excessive caseloads are in a very different situation than attorneys in a private law firm who face too many clients seeking their services. The private law firm can simply refuse to accept the cases of new clients or can easily hire additional attorneys. IV-D attorneys, however, are subject to agency budgets over which they have no control. Excessive caseloads can result in inadequate preparation for negotiations and hearings.

"In evaluating whether a lawyer's caseload is reasonable, relevant factors include the complexity of the cases, the availability of support services" (such as caseworkers and paralegals), "and the speed at which cases proceed through the court system."[35] Excessive caseloads implicate a number of state rules of professional conduct. The most important of these require "competence" and "diligence." Model Rule 1.1 requires that an attorney "provide ... the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rule 1.3 states that "a lawyer shall act with reasonable diligence and promptness in representing a client." The Comments to this rule specifically address the control of workload so that matters can be handled competently.

A New York Ethics Opinion is directly on point. It involved a staff attorney for the government department of social services (Department). The attorney's duties included representing the Department in child welfare, paternity and support proceedings and other proceedings in Family Court, representing the Department in administrative proceedings and state court proceedings, providing legal opinions to the Commissioner of the Department, and providing legal advice to the Department regarding the interpretation of and compliance with certain

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Oklahoma Judicial Ethics Opinion 2011-3 (July 16, 2011); S.C. Advisory Comm. on Standards of Judicial Conduct, Opinion No. 17-2009; Washington Ethics Advisory Comm., Opinion 09-05.

[33] Ohio Judicial Ethics Advisory Opinion 2010-7 (Dec. 3, 2010)**;** ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 462: *Judge's Use of Electronic Social Networking Media* (2013).

[34] Florida Supreme Ct. Judicial Ethics Advisory Committee Opinion No. 2009-20 (Nov. 17, 2009). *See also* Florida Judicial Ethics Advisory Committee, Opinion 2012-12 (2012), which extends the caveats to the use of LinkedIn; and Wayne Doss and John Cardoza, *Can We Be Friends? Lawyers, Judges, and Social Media,* NCSEA Child Support Quarterly (June 2012).

[35] Norman Lefstein, ABA Standing Committee on Legal Aid and Indigent Defendants, Securing Reasonable Caseloads: Ethics and Law in Public Defense (2011). The book can be accessed at https://www.in.gov/publicdefender/files/SecuringReasonableCaseloads.Book.pdf (last visited Aug. 3, 2020).

laws and regulations. The office in which the lawyer worked had a large caseload in relation to the number of staff attorneys. Despite the Department's heavy caseload, the Department had been unable to obtain approval to hire additional staff attorneys. The staff attorney believed that more matters were being assigned than could be competently handled by any given attorney. In addressing the question of whether a lawyer for a government social services agency can accept more matters than the lawyer believes that he or she may competently handle, the New York Ethics Opinion held that a government attorney representing a department of social services in judicial or administrative proceedings may not neglect a matter or prepare inadequately:

The attorney may not comply with the direction of an agency official to "just show up" or "just do the best you can" without preparation, if the result will be to represent the department incompetently. On the contrary, the staff attorney ... has an independent professional obligation to carry out the department's legal responsibilities in judicial and administrative proceedings in which the staff attorney represents the department. ... Nor may the staff attorney accept so many matters that the attorney would have no choice but to handle some neglectfully or incompetently.[36]

A IV-D attorney must realize when the caseload becomes unmanageable, and convey to his or her supervising attorney the need for additional staff and resources. A lack of adequate resources or time is not a valid exception to ethical requirements.[37] As one writer explained: "All attorneys, including subordinate attorneys, are responsible for their own misconduct even if it occurred at the direction of a supervisor, and even if the attorney acquiesced from a fear of loss of employment."[38]

In making the judgment whether a caseload has become unmanageable, the line attorney may accept a supervising attorney's reasonable resolution of an arguable question of professional duty.[39] In other words, if there is an "arguable question" about whether the subordinate attorney has an excessive caseload, and the subordinate attorney continues to provide representation at the direction

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[36] N.Y. Ethics Opinion 751, 2002 WL 1303477, 4 (N.Y. State Bar Ass'n. Comm. Prof'l Ethics 2002).

[37] *See, e.g., Thelen v. Thelen*, 281 S.E.2d 737 (N.C. App. 1981); Vt. Bar Ass'n, Ethics Opinion 86-7 (1986). *See also* Va. State Bar Legal Ethics Opinion 1798, *Are Commonwealth's Attorneys Held to the Same Ethical Requirements as Other Attorneys* (2004) ("This Committee . . . opines that a Commonwealth's Attorney who operates with a caseload so overly large as to preclude competent, diligent representation in each case is in violation of the ethics rules.). Federal regulations at 45 C.F.R. § 303.20(f) (2019) require a child support program to have attorneys or prosecutors to represent the agency in court or administrative proceedings in sufficient numbers to achieve the standards for an effective program.

[38] Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 Notre Dame L. Rev. 259, 295–297 (1994). *See also* Douglas R. Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W. Va. L. Rev. 449, 463 (2003).

[39] Model Rules, Rule 5.2 (2017).

of the supervisor, no violation of the professional conduct rules has occurred.[40] However, if the situation is not arguable because the size of the caseload clearly interferes with providing competent and diligent representation, the line attorney who proceeds may be found guilty of professional misconduct. What is an "arguable question" is a matter of judgment about which there can be disagreement. If the line attorney thinks the supervisor's resolution is unreasonable, the line attorney must continue to raise the issue up the chain of command.[41]

Unauthorized Practice of Law

Experienced child support professionals, who are not attorneys, are often tasked with functions that normally might fall to an attorney. Handling matters before an administrative hearing officer, calculating guidelines, and meeting with parties to negotiate settlements are just a few of the areas in which there is potential for unauthorized practice of law. Attorneys could also face problems in intergovernmental cases in which they "appear" in a jurisdiction where they are not licensed to practice law.

Supervision of nonlegal staff. Model Rule 5.3, "Responsibilities Regarding Nonlawyer Assistance," addresses questions regarding the duties of attorneys "who employ, are associated with, or have direct supervisory responsibility for, nonlawyers." Lawyers who are partners in a firm or who with other lawyers have comparable management authority, have responsibility under Rule 5.3(a), to have policies and procedures in place governing conduct of nonlawyers. Their responsibility is to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."

Lawyers with direct supervisory authority over nonlawyers have a similar but more direct responsibility under Rule 5.3 (b). For them, the role is one of oversight of the nonlawyers activities. Their duty under the rule is "to make reasonable efforts to ensure that the nonlawyers' conduct is compatible with the professional obligations of the lawyer."

Rule 5.3(c) makes clear that an attorney can be held accountable for the action (or inaction) of a nonlawyer:

The lawyer is responsible for conduct of the nonlawyer that would be an ethical violation if engaged in by the lawyer, if:

1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

[40] *See* Lefstein, *supra* note 35 at 28.
[41] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 06-441 (2006) [hereinafter ABA Formal Opinion 06-441].

2) The lawyer is a partner or has comparable managerial authority in a law firm that employs the nonlawyer, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.

The child support program employs thousands of nonlawyers to prepare cases for litigation, conduct pretrial negotiation, and attempt to collect arrears. In the day-to-day operation of the child support office, nonlegal staff might be called on to negotiate with parties, prepare affidavits, and provide information to the court informally. These quasi-legal tasks, if performed by nonlawyers outside the context of a IV-D office, could give rise to the appearance that the individual is engaged in the unauthorized practice of law. Within the structure of a IV-D governmental or contract office, these activities must be governed by policies and procedures developed by legal staff with an eye to adhering to the rules of professional responsibility. Further, nonlawyers who carry out those activities must be properly supervised by legal staff. The extent to which the nonlegal staff engages in these activities will depend on local practice. Communication with the local tribunal that handles child support matters may be advisable to clarify the limitations of nonlegal staff in assisting in case litigation and collection attempts.

To avoid ethical accountability for unauthorized practice by nonlegal staff, it is critical for responsible IV-D legal managers and supervisors to demonstrate that:

- Nonlegal staff was provided clear and appropriate instructions and supervision regarding the ethical aspects of their employment and scope of their responsibilities, and that they were informed that they were not qualified or authorized to give legal advice;

- Responsible managerial and/or supervising attorney staff had no contemporaneous knowledge of, and thus did not ratify, the unauthorized practice of law (e.g., the attorney was not in the room when the caseworker advised the custodial parent to agree to an arrearage settlement); and

- After learning of the conduct of the nonlegal staff, immediate necessary corrective action was taken and appropriate disciplinary action imposed on the nonlawyer.

Such advice is not meant to discourage IV-D attorneys from delegating appropriate responsibilities to nonlegal personnel. The attorney must, however, be conscientious about reviewing and monitoring all delegated functions of nonlegal staff to avoid problems later.[42] Best practice would suggest that periodic training should be conducted to reinforce the permissible bounds of conduct for

[42] Model Rules, Rule 5.3, Comment 1 (2017).

nonlawyer staff. Such efforts should be documented with respect to ensuring that all nonlawyers have been trained.

Telephone hearings. Under the Model Rules, an attorney has the duty to prevent the unauthorized practice of law. Whether an attorney is engaged in the unauthorized practice of law might become problematic in intergovernmental child support cases. While helping a party in the initiating state to prepare paperwork, respond to discovery, and gather evidence might not be considered "appearing" in the responding forum state, other actions taken in the case could. IV-D attorneys need to be aware that each state defines the types of activities that constitute the practice of law. If that line is crossed and the attorney has not been admitted to practice in the other state (either full admission or admission *pro hac vice*), the attorney could be subject to an action for unauthorized practice of law in the other state. He or she might also be subject to disciplinary action in his or her home state.[43]

One area on which attorneys need to focus is the telephone hearing under Section 316(f) of the Uniform Interstate Family Support Act (UIFSA).[44] Section 316 provides that the state conducting the child support hearing permit a party or witness residing in another state to be deposed or testify by telephone, audiovisual, or other electronic means. A telephonic hearing can be used to present testimony of an out-of-state expert witness. It can also be used by the out-of-state petitioner, especially in a complicated enforcement action, or by the out-of-state respondent in a long-arm paternity action.[45]

Most often, the attorney in the initiating jurisdiction will not be licensed to practice in the responding state's tribunal. Similarly, in a long-arm action, the respondent's attorney might not be licensed to practice in the state conducting the hearing. Questions arise about an attorney's ability to participate in the proceeding by asking questions of a party or witness.[46] Ethical rules require that the attorney be either fully admitted to the forum state's bar or admitted through a *pro hac vice* motion. States have different rules regarding the *pro hac vice* process, and there are often fees involved. The "sponsoring" local attorney might be required to be physically present at every proceeding or to co-sign all pleadings. There are also different rules regarding ethical responsibility for misconduct by the out-of-state attorney. As a consequence, IV-D attorneys, in

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[43] See Model Rules, Rule 8.5 (2017).
[44] The Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301, 128 Stat. 1919, 1944-45 (2014) required states to enact UIFSA (2008) as a condition of receiving federal funds. All states have enacted UIFSA (2008). See Unif. Interstate Family Support Act (2008), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e12481bd-ac36-07ba-7d64-7841e9db5e09&forceDialog=0..
[45] *See* OCSE-IM-06-02: *Interstate Child Support Enforcement Hearings* (Dec. 2005). For a discussion of UIFSA, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[46] *See* David Glebe, *Interstate Practice and the Unauthorized Practice of Law: Uncertainties Mandate Professional Caution,* Del. Law (Spring 1996), at 20; Susan Paikin & William Reynolds, *Ethical Issues in Interstate Family Support Litigation,* Del. Law (Spring 1996), at 10.

conjunction with the child support agency, need to develop policy regarding the following:

- Whether the IV-D attorney in certain cases will seek to be admitted *pro hac vice* in another state (e.g., in order to participate in a telephone hearing or to file an appeal);
- Whether the IV-D attorney will "sponsor" a IV-D attorney from another state through the *pro hac vice* process;
- Whether the IV-D attorney will "sponsor" an out-of-state attorney who represents the defendant through the *pro hac vice* process;
- Whether nonlegal staff will participate in telephone hearings and, if so, what their role will be; and
- What the response of the IV-D attorney will be if he or she believes that an unauthorized person is practicing law in his or her state through participating in a telephone hearing.

National legal associations continue to address how to deal with multi-jurisdictional practice in an effort to facilitate future intergovernmental practice in child support. In the interim, the IV-D attorney should recognize the ethical and practice considerations that intergovernmental and international cases present and consult state policy and ethics opinions when questions arise.[47]

Confidentiality and the Safeguarding of Information

Confidentiality of client information under ABA Model Rules. Model Rule 1.6, "Confidentiality of Information," addresses attorney responsibility for maintaining the confidentiality of information that arises during the client-lawyer relationship. Model Rule 1.6(a) provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." There are exceptions to this general prohibition, although most if not all are unlikely to arise in the course of a IV-D attorney's practice on behalf of an agency client and need not be discussed in detail here.[48]

Model Rule 1.6(c) was added in 2012. It addresses inadvertent disclosure of information. It requires that a lawyer "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[49] The definition of

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[47] *See* OCSE-IM-06-02: *Interstate Child Support Enforcement Hearings* (Dec. 2005), *supra* note 45, for a discussion of *pro hac vice* use in intergovernmental hearings.
[48] Model Rules, Rule I.6(b) (2017).
[49] *See* August 2012 Amendments to ABA Model Rules of Professional Conduct, https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.authcheckdam.pdf.

"reasonable steps" is the subject of much discussion, especially in the area of electronic communication.

Confidentiality in an electronic environment. As technology evolves and the use of more types of electronic and social media communication becomes common, attorneys must be aware of the issues such communication raises with regard to conflict of interest, consequences of using these forms of communication, and the need to protect confidentiality. While technological advances have brought welcome changes to the child support community, these advances also present potential problems. For instance, the use of email has been a boon to the attorney in developing documents. Information can be obtained from outside sources without mail or phone expense. Drafts can be sent quickly for review. The confidential nature of attorney communications, however, might be jeopardized by the use of electronic means for dissemination. The Electronic Communications Privacy Act, enacted by Congress in 1986 and amended in 1994,[50] protects email communications from hacker interception but fails to address other problems, such as inadvertent disclosures as a result of attorney error in addressing the recipient of the message. These issues have become increasingly critical to the IV-D attorney in light of the increasing use of private contractors, particularly those off-site from the child support agency.

The ABA Standing Committee on Ethics and Professional Responsibility addressed inadvertent disclosure of information during electronic communications in Formal Opinion 11-459. The opinion states in part, "A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device or e-mail account, where there is a significant risk that a third party may gain access."[51] One year following the issuance of 11-459, new Rule 1.6(c) was added to the Model Rules, mandating that attorneys take reasonable steps to prevent inadvertent or unauthorized disclosure of confidential information.

Subsequent to the addition of Rule 1.6(c), the ABA has issued Formal Opinion 477 dealing with protecting client information."[52] The opinion lists a number of considerations to guide lawyers generally in taking reasonable steps to secure communications with clients in an environment of ever evolving technological risks. Some of these considerations include:

- Understanding the nature of technological threats;

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[50] Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. §§ 2701-2712 (2018)).
[51] ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 11-459 (2011). *See also* ABA Comm. on Ethics and Prof'l Responsibility Formal Opinion 99-413 (1999) (protecting the confidentiality of unencrypted email) [hereinafter ABA Formal Opinion 99-413].
[52] ABA Comm. On Ethics and Prof'l Responsibility, Formal Opinion 477 *Securing Communication of Protected Client Information* (May 2017).

- Understanding how client confidential information is transmitted and where it is stored;
- Understanding and using reasonable electronic security measures;
- Determining how electronic communications about client matters should be protected; and
- Training lawyers and nonlawyer assistants in technology and information security.

In addition to the ABA ethical opinion, many state ethics opinions and law review articles have addressed the need to take reasonable steps to protect confidential email communication.[53] For example, California directs an attorney to evaluate six factors before deciding to use a particular type of technology to transmit or store confidential information: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the

[53] *See, e.g.,* Alaska Bar Ethics Comm. Opinion 98-2 (1998); State Bar of California Standing Comm. on Prof'l Responsibility and Conduct, Formal Opinion No. 2010-179 (2010) (encrypting email may be a reasonable step for an attorney to take in an effort to ensure the confidentiality of such communications remain so when the circumstance calls for it, particularly if the information at issue is highly sensitive and the use of encryption is not onerous); Connecticut Ethics Opinion Informal 99-52 (1999) ("… while it may be technically feasible to intercept e-mail communications, there is relatively little risk of unauthorized disclosure associated with the use of unencrypted e-mail. … it is also unreasonable and unnecessary to expect a lawyer to encrypt every e-mail message as a protection against those who may, intentionally or in violation of the law, chance to intercept that email transmission"); Massachusetts Ethics Opinion 2000-01(1998) (the lawyer must be careful, however, to ensure that confidential messages are not sent to email addresses that are reasonably accessible to persons other than the client, and to avoid using unencrypted Internet email in contravention of the client's express instructions); Prof'l Ethics Comm. for the State Bar of Texas Opinion No. 648 (2015) (in general, the use of email, including unencrypted email, is a proper method of communicating confidential information. "First, the risk an unauthorized person will gain access to confidential information is inherent in the delivery of any written communication including delivery by the U.S. Postal Service. ... Second, persons who use email have a reasonable expectation of privacy based, in part, upon statutes that make it a crime to intercept emails." While the use of unencrypted email is permitted, "a lawyer should consider whether circumstances are present that would make it advisable to obtain the client's informed consent to the use of email communication." In some circumstances, it may be prudent to use encrypted email or another form of communication.); Vt. Bar Ass'n Comm. on Prof'l Responsibility, Opinion 97-5 (1997) (An attorney does not violate DR 4-101 by communicating with a client without encryption protection. However, in "instances of a very sensitive nature in which even ordinary phone calls would be deemed inadequate, encryption might be prudent."); Washington Ethics Opinions, Advisory Opinion 2217 (2012) (an attorney has an obligation to advise the client that confidentiality may be jeopardized, when the client uses an employer's computer or email account). *See also* Nancy A. Wanderer, *E-mail for Lawyers: Cause for Celebration and Concern,* Maine Bar J., Vol. 21, Number 4, Fall 2006; and Stephen Masciocchi, *Internet E-mail and Encryption: Privilege, Confidentiality, and Malpractice Risks*, Colorado Lawyer, p.21 (1998).

possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications.[54]

In addition to the question of confidentiality and the possible need to encrypt certain sensitive emails, IV-D attorneys need to take some common sense precautions when using electronic communication or advising staff on its use. For example:

- Train all employees that voice mail and email should be treated in the same manner as formal presentations or written correspondence.
- Develop a general email policy that confirms that email should only be used for business-related purposes and that the sender should assume that it will be read by others.
- Do not put something in an email message that would not be put in a letter.
- Discourage re-routing of privileged communications to third parties.
- Periodically reinforce policy with written memoranda and signed acknowledgments.
- Develop agency policy on the retention of electronic data, in conjunction with legal personnel, to prepare for inevitable discovery requests.
- Mark each email message as "confidential," "attorney-client communication," or "attorney work product," just as a similar faxed or written document might be marked.[55]
- Use some type of security measure for confidential information, such as encryption, strong passwords, digital signatures, firewalls, or service access policies.
- Obtain written acknowledgment by the client of the risk of losing confidentiality.

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[54] State Bar of California Standing Comm. on Prof'l Responsibility and Conduct, Formal Opinion No. 2010-179 (2010).

[55] Although many law offices and agencies commonly use a disclaimer regarding the confidentiality of email communication, there is an ongoing discussion about the effectiveness of these, given that they usually appear at the end of an email, and are so widely used that they can be ignored. *See* Eric Cooperstein, *This post is privileged and confidential, but you read it anyway,* The Lawyerist (2008). *See also W. Norman Scott v. Beth Israel Medical Center Inc. et al*, 847 N.Y.S.2d 436 (2007), and ABA Formal Ethics Opinion 11-459, *supra* note 51.

The result of removing confidentiality protection from the communication opens the communication to discovery. Under the Federal Rules of Civil Procedure, upon which many states' rules of procedure are based, electronic transmissions are just as discoverable as paper documents.[56]

Technology advances mean that email communication is not the only area where confidentiality issues arise. For example, "cloud" computing is another new technology that raises confidentiality issues. Ethics Commissions have dealt with issues such as the operation of a virtual law office (VLO) with information storage in the "cloud." In California, the State Bar Standing Committee on Professional Responsibility and Conduct has found no greater or different duty to maintain confidentiality of data by an attorney operating a VLO, as one operating a traditional office, and states that an "[a]ttorney may be required to take additional steps to confirm that she is reasonably addressing ethical concerns raised by issues distinct to this type of VLO. Failure by Attorney to comply with her ethical obligations relevant to these issues will preclude the operation of a VLO in the cloud as described."[57] In New Hampshire, the Ethics Committee issued an advisory opinion in 2013, listing 10 different considerations for attorneys wishing to use cloud computing. The Committee concluded, however, that it "concurs with the consensus among states that a lawyer may use cloud computing in a manner consistent with his or her ethical duties by taking reasonable steps to protect client data."[58]

Other security issues also arise over an attorney's use of cell phones and smart phones, flash drives, wireless networks and the mining of "metadata" which has been described as "'data about data' that is commonly embedded in electronic documents. …"[59] and includes such things as date of creation and authors of documents as well as editing information and comments.

Unsecured wireless networks create the risk that any information transmitted using this method of communication might be seen by anyone using the same network,[60] while the concern about metadata is that it "can reveal a cache of information, including the names of everyone who has worked on ... a specific document, text and comments that have been deleted, and different drafts of the document."[61] IV-D attorneys should be aware of the existence of this

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[56] Fed. R. Civ. P. 34.
[57] The State Bar of California Standing Comm. on Prof'l Responsibility and Conduct, Formal Opinion No 2012-184 (2012).
[58] New Hampshire Ethics Comm. Advisory Opinion ETH-2012-4(2012-13). *See also* Massachusetts Bar Association Ethics Opinion 2012-03 (2012); New York State Bar Association Comm. on Prof'l Ethics, Opinion 842 (2010); Pennsylvania Bar Association Comm. on Legal Ethics and Prof'l Responsibility, Formal Opinion 2010-200 (2010).
[59] New Hampshire Bar Association Ethics Opinion 2008-09-4 (2009).
[60] *See* Doss and Cardoza, *supra* note 29.
[61] David Hricik and Chase Edward Scott, *Metadata: The Ghosts Haunting e-Documents*, GSB Vol.13, No.5, pg.16 (2007), citing Jason Krause, Hidden Agendas, 90 A.B.A. J. 26 (July 2004).

hidden data and should know how to eliminate it from a document to protect confidentiality.[62]

Clearly, IV-D attorneys need to be aware of the ethics and security issues that exist with the use of these and potentially other new forms of social media and electronic communication. This is certainly an area that deserves a high level of scrutiny by line attorneys, as well as those in supervisory or executive-level roles.[63]

Confidentiality of program information under federal law and policy. In addition to the Model Rules that apply to all attorneys in their professional capacity, the IV-D attorney is also bound by confidentiality requirements that apply to attorneys in their capacities as employees or agents of the child support agency.

For example, federal law provides that each

> State plan … must … have in effect safeguards, applicable to all confidential information handled by the state agency, that are designed to protect the privacy rights of the parties including –
>
> (A) safeguards against unauthorized disclosure of information … ; (B) prohibitions against the release of information on the whereabouts of 1 party or the child to another party against whom a protective order … has been entered; (C) prohibitions against release of information … [that] may result in physical or emotional harm. …[64]

Other provisions in federal law, which focus on Title IV-D employees, address confidentiality and safeguarding issues. 42 U.S.C. § 654a(d) requires the state agency to safeguard "the integrity, accuracy, and completeness of, access to, and use of data" in its automated system.[65] 42 U.S.C. § 669a prohibits disclosure of financial information obtained from a financial institution for any purpose other than child support establishment, modification, and enforcement.[66] Additionally, the employees of the child support agency are bound by the provisions of the Internal Revenue Code (IRC), particularly IRC Sec. 6103, which

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[62] *See* Hricik and Scott, *supra* note 61, for a thorough discussion of metadata. *See also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 06-442: *Review and Use of Metadata* (2006).

[63] For discussions of ethics issues in the use of electronic communication in general, *see* Colorado Bar Journal, *Ethical Considerations in Using Blogs, Lawyer Websites, and Social Media*, Vol. 41, No.1, Page 63 (2012) and Monica A. Sansalone and Jamie A. Price, *Boundaries of the Attorney-Client Privilege in the Tech Age: How to Ensure Your Multi-Media Communications are Protected*, Lawyers Professional Liability Update, 12 Lawyercare No. 2 (Summer/Fall 2012).

[64] 42 U.S.C. § 654(26) (2018).

[65] 42 U.S.C. § 654a(d) (2018).

[66] 42 U.S.C. § 669a(b) (2018).

prohibits disclosure of tax return information, and IRC Sec. 6103(p)(4), which outlines the safeguards the child support agency must have in place.[67] Thus, federal law imposes confidentiality requirements on the IV-D attorney that complement the ethical rules applicable to all attorneys.

Federal regulations also contain rules governing the disclosure of information. There are rules about how and with whom child support information can be shared, as well as rules setting forth the requirements for the release of certain information to authorized persons for an authorized purpose.[68] IV-D attorneys are bound by the same federal rules of confidentiality regarding case information that binds all child support personnel. This is true regardless of whether the attorney is an employee of the agency or works under cooperative agreement.

It is important to note that federal regulations require the child support agency to secure compliance with the requirements of the IV-D state plan by any person or official under contract or cooperative agreement with the child support agency.[69] Thus, even if an attorney is not an employee of the child support agency, the agency bears responsibility for ensuring that an attorney, under contract or cooperative agreement with the child support agency, complies with the requirements of the IV-D state plan, including the state plan requirement specified in 42 U.S.C. § 654(26).

Confidentiality of program information under state law and policy. Finally, state laws or rules can also affect a IV-D attorney's authority to disclose information maintained by the child support agency. For example, such laws could include statutes pertaining to public records, or state court rules requiring the redaction of personal identifying information on pleadings filed in court.[70] Rules that require this type of redaction are of particular concern in the matter of petitions in UIFSA cases, where federally mandated forms containing personal identifying information are often filed in court, thereby becoming public record. Agencies should carefully review any rules in their jurisdiction and develop internal procedures to assure compliance, so that confidentiality of personal information is protected.

Common child support scenarios raising confidentiality questions. Confidentiality considerations are crucial in at least the following four situations that arise in the context of child support enforcement:

- When it becomes apparent to the IV-D attorney that a public assistance recipient, or former recipient, has committed some form of welfare fraud during the period in which he or she received benefits.

[67] 26 U.S.C. §§ 6103 and 6103(p)(4) (2018).
[68] 75 Fed. Reg. 81,894 (Dec. 29, 2010) and 45 C.F.R. § 302.35 (2019).
[69] 45 C.F.R. § 302.12(a)(3) (2019).
[70] *See, e.g.,* Rule of Superintendence for the Courts of Ohio, Rule 44(H) and 45(D) (2020).

- When the IV-D attorney knows or suspects that there is abuse or neglect of a child.

- When a noncustodial parent, or his or her attorney, seeks to discover the location of the custodial parent, usually in order to visit the children or to serve pleadings.

- When the IV-D attorney obtains information from sources that prohibit further release of information.

Welfare fraud. Over the years the area of welfare fraud has produced a number of bar ethics opinions, as program attorneys have sought to define the extent of the attorney-client relationship that might exist between themselves and custodial parents or relatives. Bar ethics opinions from Nebraska and New Hampshire have held that such situations present no confidentiality or conflict of interest problems because the assistance recipient is not a client.[71]

The above-cited opinions concerned assistance cases. However, in most states, the same conclusion would be reached in nonassistance cases: there is no attorney-client relationship between the IV-D attorney and the custodial parent and, therefore, no confidentiality restrictions. Even if the attorney learns of facts that suggest that the nonassistance applicant committed welfare fraud during an earlier period, there would appear to be no problem with reporting that fact to the welfare agency.

As noted earlier, federal regulations in general prohibit a child support agency from disclosing confidential information except to an authorized person for an authorized purpose.[72] A separate regulation, however, specifically permits disclosure of confidential information for investigations, prosecutions or civil or criminal proceedings in conjunction with the administration of the program, such as investigations relating to welfare fraud.[73]

Child abuse or neglect. Consistent with Model Rule 1.6 and federal regulations, IV-D attorneys can disclose information upon request, concerning known or suspected physical or mental injury, sexual abuse, exploitation, negligent treatment, or maltreatment of children. (Authority to disclose information about known or suspected abuse or neglect is not limited to attorneys.)[74]

Release of information to the noncustodial parent. Noncustodial parents and their attorneys frequently seek to discover the whereabouts of

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[71] Neb. State Bar, Advisory Opinion 76-15 (1976); New Hampshire Ethics Comm. Advisory Opinion 1992-93/3 (1993). *See also* Oklahoma Rule of Prof'l Conduct 1.6 (2008) (A lawyer may reveal information to prevent a fraud).
[72] 45 C.F.R. § 302.35 (2019).
[73] 45 C.F.R. § 303.21(d)(1)(i) (2019).
[74] 45 C.F.R. § 303.21(d)(1)(ii) (2019).

children for the purpose of establishing or enforcing a child custody or visitation order. Even in the absence of any attorney-client privilege, there are other sources of authority that prevent a IV-D attorney and any other child support employee from disclosing location information for custody or visitation purposes. As noted earlier, federal regulations at 45 C.F.R. § 302.35 restrict disclosure of confidential information maintained by the Federal Parent Locator Service (FPLS) only to an authorized person for an authorized purpose.[75] Authorized persons include only those listed in paragraph (c) of this regulation and authorized purposes are only those listed in paragraph (d) of this regulation. Any other disclosure of information by a IV-D attorney or employee is prohibited.[76]

Information from outside sources. The new tools and automation brought about by PRWORA[77] have resulted in new responsibilities. Data safeguards, and prohibitions on unauthorized disclosure and use of information, are crucial to the continued operations and relationships with the source of the information. Child support agency employees are required to comply with any relevant regulations and restrictions when dealing with the data.

Model Rule 1.13, "Organization as Client," reminds IV-D attorneys that their relationship is with the agency as a whole, not with any of its individual employees or officers. For instance, when the attorney becomes aware of some improper action by another employee, the attorney's relationship with the agency should prevent disclosures to outside parties, but there is no ethical prohibition against the attorney's disclosure to the appropriate agency officials using proper agency channels. Thus, recipients of child support services, child support workers, and child support administrators should be made aware that a IV-D attorney's paramount duty is always to the agency.

In summary, in addition to the ethical rules that apply to IV-D attorneys by virtue of their status as attorneys, the attorney is subject to the same confidentiality requirements that apply to all employees of the child support agency. The IV-D attorney should be aware of these statutes and regulations and act in accordance given their status as a child support agency employee, his or her professional capacity as an officer of the legal system, and as a public citizen having a special responsibility for the quality of justice.

SUPERVISORY ATTORNEY

In addition to attorneys who handle court and administrative process cases, the child support agency may also have one or more senior staff attorneys

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[75] *See* Chapter Five: Location of Case Participants and Their Assets for a complete discussion of privacy, security, and access to data, particularly as they relate to individuals at risk for domestic violence or child abuse.
[76] 45 C.F.R. § 302.35(c) and (d) (2019).
[77] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

who act as a supervisor to other attorneys in the office and to non-lawyer staff. This non-lawyer staff could include paralegals and caseworkers who assist the legal staff. While supervisory attorneys must adhere to the ethical rules and standards presented herein for line attorneys with regard to representation of the client, confidentiality, conflicts of interest, and communications, they must also deal with additional issues arising out of their unique supervisory role. These include responsibilities with respect to staff and their behavior, conflict resolution, hiring and training, and assistance with caseload management.[78]

Attorneys with direct supervisory responsibility for other attorneys also must make reasonable efforts to ensure that those attorneys conform to the state's ethical rules governing attorneys.[79] For example, under the ABA Model Rules, supervisory attorneys are responsible for violations of the Rules by other attorneys under certain circumstances.[80] This includes any violations that may occur due to exceptionally large caseloads that prevent line attorneys from adequately researching and preparing a case. Model Rule 1.16, "Declining or Terminating Representation," Comment 1 states that "A lawyer should not accept representation in a matter unless it can be performed competently, promptly . . . and to completion."[81] Supervisory or executive-level attorneys should take this into account when assigning caseloads to line attorneys and take all practical steps to ensure that caseloads are manageable.[82] Pursuant to ABA Formal Opinion 06-441, supervising attorneys in the government sector must "make reasonable efforts to ensure that their other lawyers in the agency or department conform to the Rules of Professional Conduct."[83] Caseload standards may be considered in deciding whether the workload of a lawyer is excessive but they are not determinative. Whether a workload is excessive "depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentation responsibilities."[84] If supervisors know of a lawyer's excessive caseload and do not take reasonable remedial action, supervisors themselves are responsible for the lawyer's ethical violations.

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[78] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 467: *Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3* (2014) [hereinafter ABA Formal Opinion 467].

[79] *See, e.g.,* Model Rules, Rule 5.1(b) (2017).

[80] Model Rule 5.1(c) (2017) states that "A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer…knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action."

[81] Model Rules, Rule 1.16, Comment 1 (2017). *See also* ABA Formal Ethics Opinion 467, *supra* note 82.

[82] Virginia State Bar Legal Ethics Opinion 1798, *Are Commonwealth's Attorneys Held to the Same Ethical Requirements as Other Attorneys* (2004), stating that "Where a supervising attorney assigns a caseload so large as to preclude any hope of the supervised attorney's ethically representing the client (or clients), that supervisor would be in violation of Rule 5.1."

[83] *See* ABA Formal Opinion 06-441, *supra* note 41.

[84] *Id*.

The supervisory attorney needs to be aware that friendships between agency employees and applicants for services or opposing parties might raise conflict-of-interest problems and confidentiality concerns that the supervisory attorney must address. In addition, there might be animosities that arise among employees, or between employees and individuals outside the agency, that could require intervention by the supervisory attorney.

The supervisory attorney might also assist the agency head in hiring staff, both lawyers and non-lawyers. In this role, the supervisory attorney should keep in mind the competency requirements to ensure that the individuals meet the standards set forth above. The supervisory attorney might be called on to develop or deliver training for both lawyers and non-lawyer staff and must, therefore, maintain a high level of awareness of changes in legislation, case law, and policy. Because the supervisory attorney is in a position to oversee the work of all staff, it is important for the attorney to remain abreast of the division of labor among attorneys and staff and to delegate work accordingly.

EXECUTIVE-LEVEL ATTORNEY

At the state level, the agency might hire attorneys who provide input on policy, draft and analyze legislation, and oversee legal issues and concerns. They might also serve as legal counsel at the local level in the event of a conflict or in emergencies. Like the local line and supervisory attorneys, these attorneys have the professional and ethical responsibilities previously noted. However, in addition to those requirements, these attorneys must maintain professional responsibility as they reconcile differences between federal and state requirements, deal with state personnel issues, and represent both the state and the child support agency in the public arena.

ABA Model Rule 1.13 discusses the role of an attorney "employed or retained by an organization" who "represents the organization…" and places that attorney in the role of counselor and gatekeeper regarding actions taken by the organization. Comment 9 of the Rule states that the duty defined by it applies to government organizations or specific agencies.[85] While the role of policy makers is to set policy, as the agency gatekeepers, executive-level attorneys can offer legal advice on the legal issues intrinsic in the policy. During implementation of the policy, executive-level attorneys should be vigilant to ensure that there is no infringement on their right to state a professional opinion, or that implementation does not violate the constitutional or legal rights of affected parties.

Because the government attorney is also a public official, he or she has a responsibility to the public at large, and a professional obligation to the agency, that exceeds his or her responsibility to any individual administrator. Model Rule 1.13 specifies a number of appropriate responses for the attorney who knows

[85] Model Rules, Rule 1.13, Comment 9 (2017).

that an individual in the organization intends to enter into an action that violates the law and is likely to result in substantial injury to the organization. The attorney can make internal requests for review, except where the organization's highest authority insists on taking action that is clearly illegal. At that point, the lawyer may reveal information to higher governmental officials. It is noteworthy that the list of appropriate responses does not include a refusal to provide legal services to the administrator in defense of questionable action. Where the attorney believes that participation in the action would itself be unethical and no other alternatives exist, the attorney could be forced to resign.

CONCLUSION

In the past, ethical issues, such as "Who is our client?" presented dilemmas for IV-D attorneys. It is now generally agreed that attorneys, employed by or on behalf of the child support agency to administer child support services, represent the state's interests in determining parentage and securing financial and medical support for the children involved. Therefore, they do not represent either the custodial or the noncustodial parent. Modern technology presents new issues for attorneys, including IV-D attorneys, especially with regard to confidentiality of information. The evolving child support environment also raises questions for program attorneys. What is clear is the need to communicate with other legal professionals, to engage in discussions to resolve problems, and to maintain professional responsibility as required by any licensing authority.

CHAPTER FOUR

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