

CHAPTER FOUR

THE ROLE OF THE ATTORNEY IN CHILD SUPPORT ENFORCEMENT

INTRODUCTION

Attorneys are an integral part of the Child Support Enforcement (CSE) program. Although CSE attorneys (also referred to as “IV-D attorneys”) work in many different environments—some primarily court-based, some primarily administrative, and some mixed—there are professional responsibilities common to all. The first two paragraphs of the preamble to the American Bar Association’s Model Rules of Professional Conduct (Model Rules)¹ highlight some of these roles.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

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 intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesman for each client.² A lawyer acts as evaluator by examining a client’s legal affairs and reporting about them to the client or to others.

GENERAL ETHICAL CONSIDERATIONS

Attorneys are governed by rules of ethics promulgated through the American Bar Association (ABA) and the licensing organization or State bar association of the State in which they are licensed. These rules determine appropriate conduct in a variety of situations and are, therefore, relevant to actions taken in the child support arena. The IV-D attorney should also consult his or her State’s ethical opinions for guidance regarding conduct in specific situations. Finally, most States have enacted legislation regarding the IV-D attorney’s scope of representation.

¹ Model Rules of Prof’l Conduct (2000). The Model Rules of Professional Conduct are currently being updated. Where appropriate, the new language is included.

² The language regarding an attorney as an intermediary between clients is a proposed deletion from the Model Rules of Professional Conduct.

Who is the Client?

As the CSE program has evolved, IV-D attorneys have struggled with the question, “Who is the client?” Identification of the client might appear simple, but it is often somewhat ambiguous for attorneys who work for large organizations or government agencies. This is especially true for child support enforcement line attorneys, given the similarity of interests of the custodial parent and the IV-D agency.³

It is the 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[.]”⁴ In 1993, OCSE released an Information Memorandum entitled “Role of IV-D Agency and Its Staff in Delivering Program Services.” This memorandum examined the role of IV-D attorneys vis-a-vis the public that they serve. It provided an appendix of State-specific information and examples of how States were addressing representation.⁵

OCSE’s opinion that the IV-D attorney represents the State’s interest is consistent with a long line of cases. As early as 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 child, caretaker, parent, or other dependent person receiving public assistance. The court stated that:

the general statutory plan is that the recipient must assign support rights to the State, and the State, with the required cooperation of the recipient-assignor, collects the support from the obligor. The support is collected on behalf of the recipient. The essence of this statutorily created relationship is that of assignor-assignee. The mere fact that the assignor is required to cooperate with the attorney for the assignee does not establish an attorney-client relationship. The contact between the recipient and the SED attorneys is for

³ See, e.g., Model Rules of Professional Conduct R. 1.13 cmt (2000); 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); P. 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).

⁴ 45 C.F.R. § 303.20(f)(1) (2000).

⁵ Office of Child Support Enforcement, U.S. Dep’t of Health & Human Services, Information Memorandum (IM-93-03) (1993).

the benefit of the State in recouping some of the funds paid out for aid to dependent children. The State may enforce the obligation whether the recipient cooperates or even over the specific objection of the recipient-assignor. If the SED attorneys were representing the recipient in an attorney-client relationship, it would seem the wishes of the recipient would have to be given some status in the decision to proceed.

It is true the ADC [Aid for Dependent Children] recipient can reap the benefits of a support decree, obtained by the SED on behalf of the State, after the ADC benefits are terminated. This is merely an ancillary benefit of the State's enforcement of the support obligation for its own purposes; it does not create an attorney-client relationship.⁶

A Federal court reached a similar conclusion. In affirming the dismissal of a public assistance recipient's suit to force State authorities to establish paternity and obtain a child support obligation on her behalf, the Eleventh Circuit, in *Wehunt v. Ledbetter*,⁷ held that "Title IV-D's goal was to immediately lower the cost to the taxpayer as well as to lessen the number of families enrolling in welfare in the future-benefits to society as a whole rather than specific individuals. Title IV-D is also not a legal assistance program."⁸ Even with welfare reform, the message is still clear: The goal of the IV-D attorney is to further the State's interest in supporting children and providing for families, and not to provide individuals with legal representation.⁹

Noncustodial parents have also raised the representation issue. In a number of instances, noncustodial parents have attempted to avoid collection actions by challenging the State's involvement in the program, typically on equal protection grounds. They argue that, by providing legal counsel for custodial parents but not for noncustodial parents, the State violates the latter's right to equal protection. They have also argued that the CSE program violates State constitutional provisions prohibiting legislatures from spending public monies to effect private purposes. Both arguments historically have failed.¹⁰

In a more recent decision by the Supreme Court of Illinois, the noncustodial parent contended that the legislation that authorized the Illinois Department of Public Aid to intervene on the behalf of a custodial parent violated the Illinois constitutional mandate that public funds can only be used for public

⁶ *Gibson v. Johnson*, 35 Or. App. 493, 500, 582 P.2d 452, 456 (1978).

⁷ 875 F.2d 1558, 1565 (11th Cir. 1989).

⁸ *Blessing v. Freestone*, 520 U.S. 329 (1997); *Albiston v. Maine Comm'n of Human Servs.*, 7 F.3d 258 (1st Cir. 1993); *Corelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991).

⁹ See, e.g., *In re Marriage of Lappe*, 176 Ill. 2d 414, 680 N.E.2d 380 (1997).

¹⁰ See, e.g., *Dep't of Health & Rehab. Servs. v. Heffler*, 382 So. 2d 301 (Fla. 1980); *State ex rel. Leet v. Leet*, 624 S.W.2d 21 (Mo. 1981); *Johnson v. Johnson*, 96 Wash. 2d 255, 634 P.2d 877 (1981).

purposes. She argued that the legislature provided a private benefit to the custodial parent in the form of free legal services. The court held that the child support enforcement services were provided for the benefit of the child and not the custodial parent and that child support payments were intended to go directly for the benefit of the child. Further, the Illinois statute specifically negated the contention that the purpose of these provisions was to provide free legal representation to custodial parents. Illinois law provided that “an attorney who provides representation pursuant to this section shall represent the Illinois Department exclusively ... and an attorney client relationship does not exist ... between the attorney and ... an applicant for or recipient of child and spouse support services.” The court went on to say that the fact that the recipient might be incidentally benefited did not alter the intent of the legislation.¹¹

Early legal ethics opinions, addressing the identity of the CSE attorney’s client, were inconsistent. For example, in response to a fact scenario, the ABA issued an Informal Ethics Opinion that held (1) where the custodial parent received Aid to Families with Dependent Children (AFDC), the State was the attorney’s client due to the parent’s assignment of support rights to the State; (2) where the custodial parent no longer received AFDC and the State had recouped all of its AFDC monies, the custodial parent was the client; and (3) where the custodial parent was no longer receiving AFDC but the State had not received full reimbursement of public benefits expended on the family, both the State and the custodial parent were clients of the IV-D attorney.¹²

Yet, in a Virginia Informal Opinion,¹³ the ethics committee considered the issue of whom Assistant Attorneys General represent when employed in the support division, and the committee opined that the “Attorneys General represent the State, deriving their authority through State and Federal support enforcement legislation.” The opinion also enunciated that, in all circumstances involving the custodial parent, regardless of whether the parent was a current or former recipient of public assistance and whether a State debt for the payment of public assistance existed, the Attorney General represented only the State when establishing or enforcing an order. Because the Attorney General represented only the State in these cases, there was no potential conflict of simultaneous, multiple representation for which the Assistant Attorneys General were ethically required to withdraw.¹⁴

The Family Support Act of 1988¹⁵ required States to enact legislation providing for the review and adjustment of IV-D 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

¹¹ *In re Marriage of Lappe*, 176 Ill. 2d 414, 437, 680 N.E.2d 380, 390 (1997).

¹² ABA Comm. on Ethics and Professional Responsibility, Informal Op. 89-1528 (1989).

¹³ Virginia Standing Comm. on Legal Ethics, Informal Op. 964 (1988).

¹⁴ *Id.* (citing Model Code of Professional Responsibility DR 7-103(A)(1) (1980)).

¹⁵ P.L. No. 100-485 (1988).

under State guidelines. As a result, nearly every State has now enacted legislation identifying the State or IV-D agency as the client of the IV-D attorney.¹⁶

But the question remains: Does a State statute concerning representation protect a IV-D attorney in a situation where a bar ethics committee has concluded differently? The ABA discussed a similar issue years ago.¹⁷ An opinion was issued in response to a hypothetical situation based on a Tennessee statute. The Committee construed the statute to authorize the insurance company's attorney to solicit and contact the uninsured motorist to gain his or her permission to proceed with representation and to file defensive pleadings on behalf of the uninsured motorist or in the insurance company's own name. Based on this interpretation of the statute, the Committee held that (1) the attorney would violate the Canons of Professional Ethics if she or he solicited the representation of the uninsured motorist, and (2) the representation would create a conflict of interest. The Committee concluded its discussion by indicating that the Tennessee statute did not "obviate the necessity for attorneys to strictly adhere to the Canons of Professional Ethics." This opinion suggests that, in the case of a IV-D attorney, the attorney's decisions are constrained by ethical rules, regardless of a State statute that discusses representation.

Fortunately, there is now greater agreement in the opinions of State bar ethics commissions, with the consensus being that the IV-D attorney represents the State, not individual parties.¹⁸

Identification of the State or CSE agency as the IV-D attorney's client has practical as well as ethical implications. For example, the IV-D attorney cannot give advice to the custodial parent on custody matters. 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 IV-D services previously furnished to the other parent. There are no privileged communications with the parent, including conversations involving welfare fraud. 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.¹⁹ Where a CSE attorney encounters a situation in which the interests of the IV-D recipient diverge from

¹⁶ See, e.g., Kan. Stat. Ann. § 39-756(e) (2000); Nev. Rev. Stat. § 125B.150(3) (1999).

¹⁷ ABA Comm. on Ethics Responsibility, Informal Op. 1065 (1969).

¹⁸ See, e.g., Neb. State Bar Ass'n, Advisory Op. 92-1 (1992); Ohio Ethics Op. 90-10 (1990); Board of Professional Responsibility of the Supreme Court of Tenn., Formal Ethics Op. 90-F-123 (1990); Or. State Bar, Formal Ethics Op. 527 (1989).

¹⁹ See Ariz. State Bar Comm. on Rules of Professional Conduct, Op. 91-21 (1991) [hereinafter Ariz. Ethics Op. 91-21].

those of the agency, he or she should inform the individual and suggest that the recipient of IV-D 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 IV-D Agency

Model Rule of Professional Conduct 1.4(a) states that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."²⁰ 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."

Some attorneys serve the CSE community through cooperative agreement with the State or county IV-D agency, while others are actually employed by the agency or the State. The IV-D agency typically investigates the facts in a case and refers the matter to the attorney if legal action is appropriate. In States where the Attorney General's Office is the IV-D agency, the referral will be an in-house procedure, but otherwise identical. Either way, a case file could be in the possession of an attorney, and out of the possession of agency personnel, for weeks or months at a time.

Model Rule 1.4 clearly requires that the attorney and the IV-D agency maintain some level of communication. The attorney need not communicate with the agency to the same extent as with a private client. Nevertheless, the attorney must defer to the agency regarding the purposes served by the representation, thus allowing the agency to assume the role assigned to the client by Model Rule 1.2 (Scope of Representation). The agency and the attorney should agree on the extent of communication regarding each specific case. The cooperative agreement between the attorney and agency should clearly establish what information is to be communicated by the attorney to the agency, at what intervals, and in what form.

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.

²⁰ The proposed changes to the Model Rules of Professional Conduct expand the role of the attorney in the area of communication. They would require the attorney to keep the client reasonably informed about the status, to promptly comply with reasonable requests for information, to reasonably consult the client about ways to accomplish the client's objectives, and to consult with the client about limitations on the attorney's ability to assist the client.

Routine Disclosure about Representation

To avoid honest misunderstandings and misperceptions, the CSE attorney should disclose, clarify, and fully explain to recipients of IV-D services the nature of the relationship and the scope of representation. This disclosure should be made not only at the time of initial involvement with the case, but also at later stages. Support staff and caseworkers handling various aspects of the case should also be apprised of the attorney's role. A recipient of IV-D services could have certain expectations about the attorney's duty and accountability. Model Rule 4.3 requires a lawyer to make reasonable efforts to correct any misunderstanding that a lawyer-client relationship exists.

A written statement outlining the CSE attorney's role, signed and acknowledged by the IV-D service recipient, as well as an oral explanation, can help reduce misunderstandings. It might be useful to affirmatively state, "I am not your attorney. I represent the interests of the State. Your interests might coincide with those of the State, but I am not your attorney." The CSE 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 CSE attorney represents the State (or agency).

All too often, not only the recipient of IV-D services, but also the judiciary and the defense bar, assume that the IV-D service recipient is the "client" of the CSE attorney and refer to the IV-D service recipient as such. This belief must be corrected 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, such terminology should not be used in reference to the IV-D recipient of services to avoid any mistaken perception.

Relationship with the Parties

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. The comment to the rule notes that unrepresented persons could assume that an attorney is "disinterested in loyalties" or that he or she is a "disinterested authority on the law." 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.

The IV-D attorney must be very careful to fully explain his or her role to both parties and to clearly suggest that seeking legal counsel might be in their best interest.

Represented parties. If a parent has obtained private independent counsel, further communications regarding the case should be conducted through that attorney.²¹ 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. The relationship of the IV-D attorney to these organizations remains unclear. When handling a case involving a private collection agency, communication with the organization might be necessary due to its relationship with the custodial parent. The IV-D attorney should keep in mind several key questions in communications with private collection agencies:

- Does the private collection agency represent the custodial parent in a manner that gives rise to an attorney-client relationship or allows the agency to act on the parent's behalf?
- Does the power of attorney, given by the custodial parent to the collection agency, authorize release of information by the IV-D agency to the collection agency as if it is the parent?
- Does the private collection agency stand in the parent's place, so that notices and communications from the IV-D agency and the tribunal must be directed to the private company in lieu of, or in addition to, the parent?

The IV-D agency's relationships with and responsibilities to private collection agencies remain relatively new and uncharted territory. As these relationships continue, policy will emerge that should provide additional direction. Before disclosing information, the IV-D attorney should consult Federal and State provisions that address these communications.

Conflicts of Interest

Representation in the volume of cases typically handled by CSE line attorneys increases the potential for conflicts of interest to arise. The relevant ABA Model Rules, as well as some of the potential conflict situations and suggested resolutions, are discussed below.

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

²¹ See *In re Wehringer*, 135 A.D.2d 279, 525 N.Y.S.2d 604 (N.Y. App. Div. 1988).

- Model Rule 1.7 states, *inter alia*, that an attorney shall not represent a client, if representation of that client will be directly adverse to another client, or if representation might be materially limited by the lawyer's responsibilities to another client, to a third person, or by the lawyer's own interests.²²
- Model Rule 1.8 lists prohibited transactions bearing on conflict of interest, and it restates the confidentiality rule discussed below. Subsection (f) of this rule prohibits an attorney from accepting compensation from a third party on behalf of a client, unless (1) the client consents after consultation, (2) the third party judgment does not interfere with the attorney's "independence of professional judgment" or with the attorney-client relationship, and (3) information related to the representation is protected as required by Model Rule 1.6, which requires client consent.
- Model Rule 1.9 prohibits an attorney, who has represented one client, from thereafter representing another client in the same or in a substantially related matter in which the second client's interests are materially adverse to the interests of the former client, unless the former client consents after consultation. 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 by Model Rules 1.6 or 3.3, or where the information has become general knowledge.

Prior representation of a party. The above conflict of interest rules are relevant to IV-D attorneys in at least four important contexts. The first is where the attorney has represented one of the parties regarding the support obligation in his or her capacity as private attorney. This can be troublesome for IV-D attorneys who were formerly in private practice or who are allowed to maintain a private practice in addition to their child support enforcement responsibilities. These three rules would seem to preclude the attorney from representing the IV-D agency in a child support case in which he or she was involved as private counsel, except where the former private client consents after consultation. Even if the former client consents, the attorney should explain his or her new

²² See, e.g., *Nemet v. Nemet*, 112 A.D.2d 359, 491 N.Y.S.2d 810 (N.Y. App. Div. 1985); *Forbush v. Forbush*, 107 A.D.2d 375, 485 N.Y.S.2d 898 (N.Y. App. Div. 1985); *Clooten v Clooten*, 520 N.W.2d 843 (N.D. 1994); D.C. Bar Comm. on Legal Ethics, Op. 143 (1984) (an attorney may, in limited circumstances, represent both parties in a divorce); Wis. State Bar, Formal Op. E-86-11 (1986) (IV-D director may not represent former client's spouse). *But see Board of Overseers of the Bar v. Dineen*, 500 A.2d 262 (Me. 1985); *Walker v. Walker*, 707 P.2d 110 (Utah 1985) (trial court placed attorney in "directly conflicting roles"); Pa. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Op. 85-59 (1985) (a conflict of interest exists where an attorney may serve both as public defender and as child abuse prosecutor).

relationship to the IV-D agency as a part of the consultation required by the rules. Disclosure to both parties, and written consent to continue, is recommended.

Inappropriate establishment of an attorney-client relationship. The 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 IV-D agency conflict with the interests of the custodial parent.²³ 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 IV-D agency provides continued training to all employees on the role of the IV-D attorney.

Application by both parents for CSE services. Another area of potential conflict is where both the custodial parent and noncustodial parent apply for services within the same IV-D agency. Congress has mandated that each party to a child support order, which is being enforced through the IV-D program, has a right to request a review of that order. In addition, if appropriate, the State must adjust the order, in accordance with State guidelines for setting child support award amounts. Although most states have statutes or ethics opinions stating that there is no attorney-client relationship between the parents and the CSE attorney, the parties can provide information, believing that there is such a relationship. To avoid this situation, the attorney should explain to the parties that he or she 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 adjustment in accordance with the 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.²⁴ In the *Terry* case, the trial court granted a motion by a former noncustodial parent who sought to restrain the IV-D 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 adhered to the basic rule of statutory construction, giving effect to the intent of the legislature, and concluded that, where child support rights are assigned by a custodial parent to the State,

²³ See Ariz. Ethics Op. 91-21, *supra* note 19.

²⁴ Office of Child Support Enforcement, U.S. Dep't of Health & Human Services, Action Transmittal (AT-92-12) (1992). See *Office of Child Support Enforcement v. Terry*, 336 Ark. 310, 985 S.W.2d 711 (1999).

the State is the real party in interest for purposes of enforcement of the support rights and that CSE attorneys therefore represent the interest of the State and not the individual assignor of the support rights. Moreover, because CSE attorneys represent the State, there is no conflict of interest when the agency provides services to one parent and then the other.

Competence

Model Rule 1.1 requires that the lawyer provide competent representation to his or her 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.”²⁵

This level of competence in the child support enforcement field requires diverse knowledge and skills. The attorney must be fully aware of the substantive and procedural issues that might arise as a case is worked and of how to apply his or her jurisdiction's case law, court rules, and statutes to resolve those issues. In addition, the attorney must be aware of Federal statutes and regulations that affect the implementation and administration of the IV-D program in the State.²⁶

Professional Judgment

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

Maintaining truly independent professional judgment can be difficult for the prosecuting or district attorney who has local constituents to please in addition to the child support enforcement responsibilities prescribed by statute or cooperative agreement. This rule requires that the interests of the IV-D agency, and the families and taxpayers it represents, must not suffer because of local political or commercial interests.

Impartiality

Model Rule 3.5 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. A IV-D attorney, who deals with the same judge or judges on a constant basis, might be

²⁵ Model Rules of Professional Conduct R. 1.1 cmt. para. 5 (2000).

²⁶ Many of these statutes and regulations can be obtained on the official OCSE web site at www.acf.dhhs.gov/programs/cse/.

inclined to discuss specific cases without providing notice to adverse parties. Such *ex parte* communications violate Model Rule 3.5 and should be avoided.

It is just as important to note, however, that discussions with the judiciary regarding the goals and problems of the CSE program, as well as the efficient processing of cases through the court, do not violate this rule.

Caseload Management

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. This could present an issue for a IV-D attorney, who might manage a caseload that far exceeds that of the typical private attorney. CSE attorneys must realize when the caseload becomes unmanageable, and convey to the IV-D agency a need for additional staff and resources. A lack of adequate resources or time is not a valid exception to ethical requirements.²⁷

Unauthorized Practice of Law

Experienced child support enforcement 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 interstate cases in which they “appear” in a jurisdiction where they are not licensed to practice law.

Supervision of nonlegal staff. Model Rule 5.3 requires attorneys, who employ, are associated with, or have direct supervisory responsibility for, nonlawyers, to make reasonable efforts to ensure that the nonlawyers' conduct is compatible with the professional obligations of the lawyer. The lawyer is responsible for conduct of the nonlawyer that would be an ethical violation if engaged in by the lawyer, if:

- the lawyer orders or ratifies the conduct involved; or
- the lawyer is a partner 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 CSE program employs thousands of nonlawyers to prepare cases for litigation, conduct pretrial negotiation, and attempt to collect arrears. In the day-

²⁷ See, e.g., *Thalen v. Thalen*, 53 N.C. App. 684, 281 S.E.2d 737 (1981); Vt. Bar Ass'n, Ethics Op. 86-7 (1986).

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 could give the appearance that the individual is engaged in the unauthorized practice of law and should be properly supervised. 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 is important to determine the limitations of nonlegal staff in assisting in case litigation and collection attempts.

To avoid being held responsible for unauthorized practice by nonlegal staff, the CSE attorney should be able to demonstrate that:

- he or she gave the nonlegal staff clear and appropriate instructions regarding the scope of the non-legal staff's responsibilities and that the staff was not qualified to give legal advice;
- the attorney had no 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); or
- after learning of the conduct of the nonlegal staff, the attorney immediately contacted the involved parties to repudiate the action and sought disciplinary action against the staff person.

Such advice is not meant to discourage CSE 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.²⁸

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 interstate 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

²⁸ The ABA Committee on Ethics and Professional Responsibility is proposing that Model Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer) and Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance) be amended to make clear that the responsibilities imposed by the provisions apply to all lawyers with managerial authority, to include procedures designed to detect and resolve conflicts of interest, and to ensure proper supervision of inexperienced lawyers as well as nonlawyer staff. See Ala. Ethics Op. RO-87-142 (1987) (addressing issues raised about the activities of caseworkers and the unauthorized practice of law).

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.²⁹

One area on which attorneys need to focus is the telephone hearing permitted by Section 316(f) of the Uniform Interstate Family Support Act (UIFSA).³⁰ 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.³¹

Most often, the IV-D 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. 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 conjunction with the IV-D 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 CSE 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

²⁹ See Model Rules of Professional Conduct R. 8.5 (2000).

³⁰ Unif. Interstate Family Support Act § 316(f) (amended 2001), 9 Pt.1B U.L.A. 327(1999). 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.

³¹ For a more in-depth discussion of UIFSA, see Chapter Twelve: Interstate Child Support Remedies.

- 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 interstate practice in child support enforcement. In the interim, the IV-D attorney should recognize the ethical and practice considerations that interstate cases present and consult State policy and ethics opinions when questions arise.

Confidentiality

Under Model Rule 1.6(a), a lawyer is prohibited from disclosing information relating to the representation of a client unless the client consents after consultation. However, Model Rule 1.6(b) and the amendments proposed by the ABA establish exceptions if the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act, if nondisclosure is reasonably certain to result in imminent death or substantial bodily harm, or if disclosure is necessary to establish a claim or defense on behalf of the lawyer or to respond to allegations in any proceeding concerning the lawyer's representation of the client.³²

In addition to the Model Rules that apply to any attorney in his or her professional capacity, the IV-D attorney is also bound by confidentiality requirements that apply to the attorney in his or her capacity as an employee or agent of the IV-D agency.

For example, Section 454(26) of the Social Security Act 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"³³

Other provisions in Federal law, which focus on Title IV-D employees, address confidentiality and safeguarding issues. Section 454A(d) of the Social Security Act requires the State agency to safeguard "the integrity, accuracy, and

³² Ill. State Bar Comm. on Professional Responsibility, Op. 87-9 (1988) (attorney may disclose that his or her client intends to abduct a child from the custodian, where the disclosure is necessary to establish a claim or defense on behalf of the lawyer in a dispute between the attorney and the client or where it is necessary to "[r]ectify the consequence of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."). See also Conn. Bar Ass'n Comm. on Professional Ethics, Op. 87-8 (1987); Ill. State Bar Ass'n Comm. on Professional Responsibility, Op. 87-15 (1988).

³³ Social Security Act § 454(26), codified at 42 U.S.C. § 654(26) (Supp. V 1999).

completeness of, access to, and use of data” in its automated system.³⁴ Section 469A(b) prohibits disclosure of financial information obtained from a financial institution for any purpose other than child support establishment, modification, and enforcement.³⁵ Additionally, the employees of the child support agency are bound by the provisions of the Internal Revenue Code (IRC), particularly IRC Sec. 6103, which prohibits disclosure of tax return information, and IRC Sec. 6103(p)(4), which outlines the safeguards the IV-D agency must have in place.³⁶ Thus, Federal law might impose confidentiality requirements on the IV-D attorney that complement the ethical rules applicable to all attorneys.

In addition to Federal law, Federal regulations might also subject the IV-D attorney to restrictions on the disclosure of information maintained by the IV-D agency. Limitations on disclosure of information were found at 45 C.F.R. § 303.21.³⁷ However, that regulation was eliminated by Interim Final Rule, dated February 9, 1999, due to inconsistencies with PRWORA and its technical amendments. Because amended sections of the Social Security Act contain numerous new provisions regarding use, disclosure, and safeguarding of information about both the custodial and noncustodial parents, and the purposes for which the information can be disclosed,³⁸ the limited scope of 45 C.F.R. § 303.21 rendered it inconsistent with the Act. New regulations are being considered that will provide guidance consistent with PRWORA’s provisions concerning safeguarding information. In the meantime, provisions of the Act and other applicable statutes continue to govern the safeguarding, use, and disclosure of information.

It is important to note that Federal regulations require the IV-D 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 IV-D agency.³⁹ Thus, even if an attorney is not an employee of the IV-D agency, the agency bears responsibility for ensuring that an attorney, under contract or cooperative agreement with the IV-D agency, complies with the requirements of the IV-D State plan, including the State plan requirement specified in Section 454(26) of the Social Security Act.

Finally, State laws might 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.

³⁴ Social Security Act § 454A(d), codified at 42 U.S.C. § 654a(d) (Supp. V 1999).

³⁵ Social Security Act § 469A(b), codified at 42 U.S.C. § 669a(b) (Supp. V 1999).

³⁶ 26 U.S.C. §§ 6103 and 6103(p)(4) (1994 & Supp. V 1999).

³⁷ 45 C.F.R. § 303.21 (1999) (eliminated by Interim Final Rule, 64 Fed. Reg. 6237 (Feb. 9, 1999)).

³⁸ See Social Security Act § 453, codified at 42 U.S.C. §§ 653(b)(2), 653(l), and 653(m) (Supp. V 1999).

³⁹ 45 C.F.R. § 302.12(a)(3) (2000).

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;
- 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; and
- when the IV-D attorney obtains information from sources that prohibit further release of information.

Welfare fraud. 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 Missouri, Nebraska, Oregon, and Tennessee have all held that such situations present no confidentiality or conflict of interest problems because the assistance recipient is not a client.⁴⁰ Moreover, the Missouri and Tennessee opinions hold that the prosecuting attorney not only can disclose the information to the social services agency, but also might bring criminal charges against the public assistance recipient for fraud. The Oregon opinion adds the caveat that the attorney should inform the recipient that the attorney "does not represent the AFDC recipient for any purpose, and that the recipient may wish to consult with a private attorney or an attorney from a legal aid society."⁴¹ The child support enforcement attorney has no duty to protect the recipient or child support obligee from disclosure to the welfare agency of facts that would call present or past eligibility into question.

All of the above-cited opinions concern 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. However, it is unclear whether the attorney would be required to report the earlier fraud. Prior to 1999, 45 C.F.R.

⁴⁰ Mo. Office of Disciplinary Counsel, Informal Op. #15 (1979); Neb. State Bar, Advisory Op. 76-15 (1976); Or. State Bar, Formal Ethics Op. 322 (1976) [hereinafter Or. Op. 322]; Board of Professional Responsibility of the Supreme Court of Tenn., Formal Ethics Op. 83-F-55 (1983).

⁴¹ Or. Op. 322, *supra* note 40, at 2.

§ 303.21(a)(1), (2), and (3) specifically addressed this issue. With the rescission of that regulation, the issue remains unaddressed by regulation.

Child abuse or neglect. Consistent with Model Rule 1.6, IV-D attorneys can disclose information concerning known or suspected abuse or neglect of children. (Authority to disclose information about known or suspected abuse or neglect is not limited to attorneys.)

Release of information to the noncustodial parent. The third situation that is noted at the outset of this discussion is more difficult to resolve. Noncustodial parents and their attorneys frequently seek to discover the whereabouts of children for the purpose of establishing or enforcing a child custody or visitation order.⁴² Even in the absence of any attorney-client privilege, there are other sources of authority that prevent a CSE attorney—and any other IV-D employee—from disclosing location information for custody or visitation purposes. State agencies should comply with the privacy safeguards required under sections 453, 454, and 463 of the Social Security Act⁴³ and disclose only information as authorized by the Act. These sections particularly deal with information and data obtained from the Federal Parent Locator Service. Provisions in State law might delineate the type of State information that can be disclosed for these purposes and the manner in which disclosure is to be made.⁴⁴

Information from outside sources. With the new tools and automation brought about by PRWORA have come 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. As discussed previously, IV-D agency employees are required to comply with any relevant regulations and restrictions when dealing with the data.

Model Rule 1.13 reminds the attorney that his or her 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 enforcement services, child support workers, and child support administrators should be made aware that a child support attorney's paramount duty is always to the agency.

⁴² See *Howard v. Texas Dep't of Human Servs.*, 791 S.W.2d 313 (Tex. Civ. App. 1990); *Derrickson v. Derrickson*, 541 A.2d 149 (D.C. 1988).

⁴³ Social Security Act §§ 453, 454, and 463, codified at 42 U.S.C. §§ 653, 654, and 663 (1994, Supp. IV 1998, & Supp. V 1999).

⁴⁴ See Chapter Five: Location of Noncustodial Parents 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.

In summary, in addition to the ethical rules that apply to the CSE attorney by virtue of his or her status as an attorney, the attorney is subject to the same confidentiality requirements that apply to all employees of the IV-D agency. The IV-D attorney should be aware of these statutes and regulations and act in accordance given his or her status as a IV-D 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.

Attorney-Client Privilege

Related to the issue of confidentiality is the evidentiary attorney-client privilege. The purpose, as stated by the U.S. Supreme Court, is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice.”⁴⁵ Not all communications are protected by the privilege, however. Because the attorney-client privilege may prevent the disclosure of relevant evidence, its availability is limited to those communications expressed in a situation where confidentiality is intended. Assuming a communication is privileged, the privilege can be waived by the client. The waiver can be expressed, after disclosure, or implied, based on conduct.

While technological advances have brought welcome changes to the child support enforcement community, these advances also present potential problems. For instance, the use of e-mail 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 1994,⁴⁶ protects e-mail 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 IV-D agency.

Some States have addressed electronic communication in legislation. For example, California law provides that a communication between a client and his or her attorney is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular phone, or other electronic means.⁴⁷ However, the California statute is silent regarding inadvertent disclosure to a third party.

⁴⁵ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁴⁶ P.L. No. 99-508 (1986), codified at 18 U.S.C. §§ 2701-2718 (1994).

⁴⁷ Cal. Evid. Code § 952 (2001).

Federal case law has taken three approaches to the issue of inadvertent disclosure. The first is a traditional or strict responsibility approach, under which any disclosure of confidential information constitutes a waiver of the privilege.⁴⁸ The second is the limited approach, under which inadvertent disclosure does not constitute a waiver absent intentional relinquishment by the client; the negligent acts of an attorney are not imputed to the client.⁴⁹

In the third approach, constituting the majority view, courts look at a number of factors, including precautions taken to prevent inadvertent disclosure, the number of disclosures, the time taken to rectify the error, the extent of the disclosure, and whether overriding issues of fairness are served by relieving the party of the consequences of his or her error.⁵⁰ While the communications might be protected, there are no standards for what constitutes reasonable precautions. The reasonable precautions standard is a key element of State bar ethics opinions that have addressed the use of electronic communications.⁵¹

Absent clear directives or statutory guidance, the following recommendations are made:

- Train all employees that voice mail and e-mail should be treated in the same manner as formal presentations or written correspondence.

⁴⁸ *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).

⁴⁹ *See, e.g., Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936 (S.D. Fla. 1991), *aff'd in part*, 991 F.2d 1533 (11th Cir. 1993).

⁵⁰ *See, e.g., Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993); *Monarch Cement Co. v. Lone Star Industries, Inc.*, 132 F.R.D. 558 (D. Kan. 1990).

⁵¹ *See, e.g., Alaska Bar Ass'n Ethics Comm.*, Op. 98-2 (1998); *Ariz. State Bar Comm. on Rules of Professional Conduct*, Op. 97-04 (1997) ("Lawyers may want to encrypt the messages to prevent inadvertent disclosure of confidential information. At a minimum, e-mail transmissions to clients should include a cautionary statement indicating that the transmission is confidential, similar to the cautionary language used on facsimile transmittals."); *Ill. State Bar Ass'n Comm. on Professional Ethics*, Op. 96-10 (1997) (Encryption is not required because there is the same reasonable expectation of privacy for e-mail as for telephone calls and the unauthorized interception of e-mail is illegal. Nor is it necessary to obtain specific consent to the use of unencrypted e-mail. However, for extraordinarily sensitive material, enhanced security measures like encryption may be required.); *Iowa Supreme Court Board of Professional Ethics and Conduct*, Formal Op. 97-01 (1997) (amending Op. 96-1 and 96-33); *Ky. Bar Ass'n Op.*, E-403 (1998) (lawyers may use e-mail, including the Internet, to communicate with clients without encryption unless unusual circumstances require enhanced security measures); *N.Y. State Bar Ass'n CPLR 4547* (1997); *Pa. Comm. on Legal Ethics and Professional Responsibility*, Op. 97-130 (1997) (this is not an official opinion of the entire committee but an advisory committee of one member of the committee); *S.C. Bar Ethics Advisory Comm.*, Op. 97-08 (1997); *Board of Professional Responsibility of the Supreme Court of Tenn.*, Formal Ethics Op. 98-A-650 (1998); *Utah State Bar Ethics Comm.*, Op. 97-10 (1997); *Vt. Bar Ass'n Comm. on Professional Responsibility*, Op. 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."). *See generally* www.legalethics.com. *See also* www.computerbar.org/netethics; www2.law.cornell.edu/cgi-bin/foliocgi.exe; <http://zeus.bna.com/hub/bna/legal/mpcindex.html>.

- Develop a general e-mail policy that confirms that e-mail 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 e-mail 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 e-mail message as “confidential,” “attorney-client communication,” or “attorney work product,” just as a similar faxed or written document might be marked.
- 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.

The result of removing confidentiality protection from the communication opens the communication to discovery. Under the Federal Rules of Civil Procedure, electronic transmissions are just as discoverable as paper documents.⁵²

SUPERVISORY ATTORNEY

In addition to attorneys who handle court and administrative process cases, the IV-D agency might also have a senior staff attorney who acts 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 the supervisory attorney 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, he or she must also deal with additional issues arising out of his or her unique supervisory role.

⁵² Fed. R. Civ. P. 26(a)(1); Fed. R. Civ. P. 34 (Advisory Committee notes to the 1970 amendment).

These include responsibilities with respect to staff and their behavior, conflict resolution, hiring and training, and assistance with caseload management.

The supervisory attorney needs to be cognizant of potential conflicts with respect to staff members. Friendships between agency employees and applicants for services or opposing parties might raise conflict-of-interest problems and confidentiality concerns that must be addressed by the supervisory attorney. 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 IV-D agency in the public arena.

In a presentation made to the New York City Bar Association, Dean Redlich labeled the proper role of the government attorney as “gatekeeper.”⁵³ As the agency gatekeeper, the executive-level attorney allows the policy makers to set policy. However, he or she can offer legal advice on the legal issues intrinsic in the policy. During implementation of the policy, the executive-level attorney should be vigilant to ensure that there is no infringement on his or her right to state a professional opinion, or that implementation does not violate the constitutional 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,

⁵³ See Address by Dean Redlich, *Professional Responsibility of the Lawyer in Government Services*, New York City Bar Ass’n (Jan. 28, 1975).

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 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 his or her action. Where the attorney believes that his or her 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 child support enforcement attorneys. With the passage of welfare reform, the use of modern technology, and the introduction of innovative tools for child support enforcement, new issues complicate the practice of law in this area. Many questions facing the IV-D attorney remain unanswered. 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. It is generally agreed that attorneys, employed by or on behalf of the IV-D agency to administer child support services, represent the State's interests. They are, therefore, obliged to seek justice in the administration of its programs and benefits.

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