

Nebraska Ethics Advisory Opinion for Lawyers
No. 92-1

QUESTION PRESENTED

DOES AN ATTORNEY-CLIENT RELATIONSHIP EXIST BETWEEN GOVERNMENT ATTORNEYS WHO PERFORM CHILD SUPPORT ENFORCEMENT RELATED DUTIES AND THE PERSONS SERVED BY THE CHILD SUPPORT ENFORCEMENT AGENCY, NAMELY, THE NEBRASKA DEPARTMENT OF SOCIAL SERVICES?

CONCLUSION

Government attorneys represent only the State of Nebraska when performing child support enforcement related duties and no attorney-client relationship ever exists between the government attorney and persons served by the NDSS. The NDSS and the county or authorized attorneys have an affirmative duty to notify persons applying for services or receiving services that the legal services provided by the enforcement program are solely on behalf of the state and that no attorney-client relationship exists between the attorney and the applicant or recipient and that there is no privilege of confidentiality to the individual. Applicants and recipients of services should execute a written acknowledgement, which is fully understood, that no such relationship exists, as early as possible in the process. There is no conflict in the government attorney advocating a reduction in child support payments pursuant to his statutory duties.

FACTS

The Nebraska Department of Social Services ("NDSS") administers the Child Support Enforcement Program pursuant to Title IV-D of the Social Security Act (42 U.S.C. § 651, et seq.) (hereinafter referred to as "Title IV-D"). This program encompasses several child support related services including the collection of delinquent child support payments, paternity establishment and

now, pursuant to new legislation, review and modification of support payment amounts.

The NDSS obtains legal services necessary to implement the program through the county attorney's offices of the various counties and "authorized attorneys" [which are defined at Neb. Rev. Stat.

§ 43-512(6)(a) (Supp. 1991)], which are generally referred to herein as "government attorneys" or "the state's attorney".

In 1991, the Nebraska Legislature enacted LB715 which is now codified in Neb. Rev. Stat. §43-512 et seq. (Supp. 1991). This legislation was mandated by the Family Support Act, [Pub. L. No. 100-485 (codified at 42 U.S.C. § 966 (a) (10) (A))], which was passed by Congress in 1988. The major impact of LB715 was to expand the Child Support Enforcement Program to include review and modification of child support payments. Under the statutory procedure [Neb. Rev. Stat. §§ 43-512.12 to 43-513.18 (Supp. 1991)] the NDSS reviews the support orders and forwards those which are candidates for modification to the county or authorized attorney who makes an independent review and petitions the court for modification when modification is justified. *Id.* Review of support orders may be initiated by the NDSS on its own initiative or at the request of either parent. Neb. Rev. Stat. § 43-512.12 (Supp. 1991). Support payments may be modified either upward or downward.

Considerable debate has been generated by the passage of LB715 by county and authorized attorneys about whether there is an attorney-client relationship between them and recipients of and/or applicants for child support enforcement services with respect to their general statutory duties under § 43-512 et seq., but in particular, with respect to the provisions added by LB715.

SCOPE OF OPINION

This opinion is limited to the question concerning the relationship between the government attorneys

implementing Title IV-D programs and Title IV-D program applicants/recipients. Therefore, our Advisory Opinion [87-5](#), and similar opinions which address conflicts arising from a county attorney's representation of parents in custody disputes in his/her private practice are inapplicable and are not disturbed.

DISCUSSION

Canon 5 of the Code of Professional Responsibility and the Ethical Considerations and Disciplinary Rules thereunder, require an attorney to exercise "independent professional judgment on behalf of a client". ABA Informal Opinion 89-1528 (June 5, 1989), Lawyers Manual on Professional Conduct (ABA/BNA) 901:323 (hereafter ABA Informal Opinion 89-1528), has concluded that government attorneys working on Title IV-D cases are required to adhere to these basic ethical standards. This can become difficult in these cases because of the nature of the relationships involved. Government attorneys are now providing services which in the past were only available to individuals through attorneys engaged in private practice, that is, enforcement and modification of support orders. On the surface, it is not easy to determine for whom the government attorney is working; that is, the State or the persons served.

The problem is how to avoid representation of the conflicting interests involved in these cases as required by the Code of Professional Responsibility. The problem is greatly reduced if these attorneys can limit their representation to the interests of the state. This requires statutory interpretation which should probably be left to our courts. However, this Committee has a duty to provide guidance on ethical questions presented to it and we will do so. The question presented may be restated as: May government attorneys limit their representation in Title IV-D cases to representation of the state? Our reading of the applicable statutes leads us to conclude that the Nebraska Legislature intended government attorneys to represent only the state's interests in these cases.

An excellent analysis of the ethical problems involved when government attorneys are required by state law to represent custodial parents in child support and Title IV-D programs is found in the ABA Informal Opinion 89-1528. Some states require such representation. *Thelen v. Thelen*, 281 S.E.2d 737 (N.C. App. 1981) (holding that their statute created an attorney-client relationship which required the District Attorney to provide more than proforma representation); *Passmore v. Harrison*, 310 A.2d 205 (Md. Ct. Spec. App.) (statute created attorney-client relationship in a Uniform Reciprocal Enforcement of Support Act case between state's Attorney and custodial parent). The ABA Opinion discusses the delicate balancing of interests the government attorney is required to do. He/she must decide when statements made by applicants/recipients of services are confidential and can't be revealed even when that is detrimental to the state's interest. And predictably, an attorney in such a situation sometimes finds that he/she must withdraw to avoid representing actually conflicting interests as required by DR 5-105 (B) of the Code of Professional Responsibility. This obviously makes administration of the program difficult.

We find nothing in our statutes which creates, expressly or implicitly, a statutory attorney-client relationship between government attorneys and recipients/applicants of Title IV-D services. We find express language which limits government attorneys to representation of the state of Nebraska. The state's primary interest in these cases is the protection and support of the children. The whole focus of our statutory scheme implementing the Title IV-D program is providing assistance to children. Neb. Rev. Stat. § 43-512 et seq. (Supp. 1991). Section 43-512.02 provides:

"(1) Any child or any relative, lawful custodian, guardian, or next friend of a child may file... for services ..." (Emphasis added.)

It is the child, not the parent, who asks for services.

Section 16 of LB715 outlines the duties of the county or

authorized attorney upon the referral of such a case from NDSS. Section 16 (3) provides:

"The application for modification of a child support order shall proceed in the original action establishing the support order, and the county or authorized attorney shall represent the state in the Proceeding."
(Emphasis added.) Neb. Rev. Stat. § 43-512.15 (Supp. 1991).

Support for the position that government attorneys represent only the state when performing child support enforcement related duties is found in § 43-1512.15(4), which provides as follows:

"After an application for modification of a child support order is filed, any party may choose to be represented personally by private counsel. Any party who retains private counsel shall so notify the County Attorney or authorized attorney in writing."
(Emphasis added.)

LB715 also amends § 43-512.08 which provides for the intervention of the county attorney or authorized attorney into matters relating to child support. This section was modified to include authorization to intervene in review and modification of support order cases under §§ 43-512.12 to 43-512.18. This would have been enough to coordinate § 43-512.08 with new §§ 43-512.12 to 43-512.18. But the legislature did more. It also added specific language which says for whom government attorneys are working when they intervene into such cases. It is significant that this language was included simultaneously with the provisions for the review and modification of support order sections. The new language included is underlined in the following sentence:

"The county attorney or authorized attorney, acting for or on behalf of the state of Nebraska for the best interests of the child or children, may intervene in any Proceeding

... modifying an order for child support as to the result of a review of such order under Section 43-512.12 to 43-512.18."
(Emphasis added.) Neb. Rev. Stat. § 43-512.08 (Supp. 1991).

We are convinced by this express language which states that the attorney is working for the state in these cases and the absence of any implication of a duty to a parent or relative of-a child, that the government attorney represents only the state of Nebraska in Title IV-D cases. Section 43-512.03 enumerates the duties of county attorneys and authorized attorneys in Article 5 (Assistance For Certain Children) proceedings. Neb. Rev. Stat. § 43-512 et seq. (Supp. 1991). There is no duty to the parents or relatives of the child mentioned. Section 43-512.01 provides that it is the duty of the government attorney to take action against a nonsupporting parent when an application for assistance has been filed under § 43-512. There is no provision made for representation of parents or relatives.

Section 13 of LB715 provides the language which seems to raise questions about the status of parents when they seek review of support orders. It provides in part:

"An order shall be reviewed by NDSS upon its own initiative or at the request of either parent...." (Emphasis added.) Neb. Rev. Stat. § 43-512.12 (Supp. 1991).

This language might be viewed as giving the parents the same status as the NDSS in the review process and therefore, equal status as a "client" of the Title IV-D government attorney. But this takes this language out of context. When read in its entirety, this language can not be read to provide for a statutory attorney-client relationship. Section 13 provides (as codified):

"Child support orders in cases in which a party has applied for services under Title IV-D of the Social Security Act, as amended, shall be reviewed by the Department of Social Services to determine whether to

refer such orders to the county or authorized attorney for modification. An order shall be reviewed by the department upon its own initiative or at the request of either parent when the verifiable financial information available to the department indicates.." (Requisite changed circumstances exist.) (Emphasis added.) Id.

We read this section to merely provide that when the information available shows that the criteria for review have been met, then the order will be reviewed by NDSS. Either parent or NDSS may initiate the review process when the criteria for review have been met. But it is the NDSS who reviews the order. It is NDSS who determines whether the case should be forwarded to the county or authorized attorney for modification. Neb. Rev. Stat. § 43-512.13 (2) (Supp. 1991). This is the state acting on behalf of the child. In our opinion this does not elevate the parent to the status of "client" even though the parent may derive benefit from the process.

Our statute is similar to the Virginia implementing statute which was reviewed by the Virginia State Bar Standing Committee On Legal Ethics (in Informal Legal Ethics Opinion No. 964) when very similar questions were presented to it. The Virginia Committee concluded that the government attorneys represented only the State of Virginia, thus avoiding an attorney-client relationship between government attorneys and applicants/recipients of Title IV-D programs. A critical element pointed out by the Virginia Committee is that to avoid the creation of an attorney-client relationship in the mind of the applicant/ recipient, the government attorney must, as soon as practical in the administration of these cases, fully explain to the applicant/recipient that they represent only the state and that any communication with them is not protected by the attorney-client privilege.

Similarly, our sister committee for the Oregon State Bar found that there was no conflict of interest when its District Attorney, under a statutory duty, prosecuted a

parent for violation of a restraining order (preventing the parent from having contact with her spouse) while simultaneously providing support enforcement services to the parent pursuant to its Title IV-D program statute, which provided such services at the request of the obligee parent.

In its Formal Ethics Opinion No. 527 (1989), the Oregon Committee said that the District Attorney represented only the State of Oregon when his/her office carried out its statutory duty. After discussing the lack of a clearly expressed definition of "client" either in the Disciplinary Rules or in case law, the Committee stated:

"However, the fact is that the District Attorney is representing the interests of the State of Oregon and the beneficiaries of his conduct are not elevated to the status of "client" because of any benefits they may obtain."

Further the Committee said:

"In both enforcement of support orders and enforcement of restraining orders, the District Attorney is enforcing an order by a judge of the State of Oregon and is hired by and working for the interests of the State of Oregon." Oregon State Bar Association Committee on Professional Responsibility Formal Ethics Opinion No. 527 (1989).

We also find Formal Ethics Opinion 90-F-123 of the Board of Professional Responsibility of the Supreme Court of Tennessee to be useful. The fact situation and question presented to the Tennessee Board were almost identical to the ones presented to us. However, the Tennessee Board had a statute which expressly defined the nature of the attorney-client relationship by providing that "attorneys working in the Title IV-D child support programs have an attorney-client relationship only with the (Title IV-D agency) and not with the party seeking assistance and/or services".

The Tennessee statute further provided the next key element in avoiding an attorney-client relationship with the applicant/recipient from arising. Their statute provided:

"(Title IV-D) attorneys have an affirmative duty to notify the individuals applying for services or AFDC recipients that the legal services provided by the enforcement program are solely on behalf of the state and that no client-attorney relationship exists between the attorney and the applicant or recipient and that there is no privilege of confidentiality to the individual."
Tennessee Board of Professional Responsibility, Formal Ethics Opinion 90-F-123 (1990) (hereafter Opinion 90-F-123).

The Tennessee Board stated that under their statutory scheme, all Title IV-D attorneys are advocates of the state and never have a client-attorney relationship with a recipient of funds. Services or grants, provided, "there is a fully informed actual and written acknowledgement by the recipient that no such relationship exists". *Id.*

The point of requiring the applicant/recipient make a "fully informed, actual and written acknowledgment" that no attorney-client relationship exists, can not be over emphasized because even if there is no statutory attorney-client relationship and the attorney does not intend such a relationship, the ABA Informal Opinion 89-528 (*supra*) points out that the attorney-client relationship is generally established when the prospective client reasonably thought there was one; (citing: Model Rules of Professional Conduct Rule 4.3 (1983); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978) which quoted McCormick on Evidence § 89, at 179 (2d ed. 1972); and R. Wice, *Legal Ethics* 284 (1970). Therefore, it is important to avoid even a misunderstanding on the part of an applicant/recipient of Title IV-D services as to his/her relationship with the government attorney.

The following questions have been posed:

1. If a parent who applies for and receives child support services has never been a recipient of public assistance, who does the county or authorized attorney represent when filing an application for modification upward or downward? This would be a situation where a divorce decree with support was previously entered and the parent later applies for child support services.
2. If the custodial parent is currently a recipient of public assistance, who does the county or authorized attorney represent when filing an application for modification upward or downward? This is a situation where the child support order was likely to have been obtained by the county/authorized attorney when the custodial parent was receiving