

ETHICS OPINION

RO-96-02

[REDACTED]

QUESTION:

"I am writing on behalf of the Alabama Department of Human Resources (hereinafter 'DHR') to request a formal Ethics Opinion from the Alabama State Bar regarding whether DHR child support policy, established to bring the State agency into compliance with certain federal laws and regulations governing the operation of the State's IV-D child support program, creates any ethical problems for attorneys handling child support cases for DHR through its IV-D program. In particular, the agency is requesting an opinion regarding whether this policy contains any potential conflicts of interest which would prohibit its attorneys from handling certain cases DHR refers for legal action.

The Department of Human Resources is the State agency in Alabama charged with the establishment, modification, and enforcement of support obligations as provided for and required by Title IV-D of the Social Security Act (42 U.S.C. §651 et seq.). As such, the agency must provide support services to all eligible applicants as authorized or mandated by applicable federal and/or State law and regulations. Where necessary and appropriate, DHR establishes agency policy to ensure that proper State and federal laws and procedures are followed at each level of agency responsibility in the provision of support services. By necessity, this policy frequently impacts the provision of legal services in DHR child support cases.

The establishment or enforcement of child support usually requires legal action in Alabama. In these cases, DHR is represented by district attorneys or private attorneys authorized to represent the State of Alabama. DHR staff attorneys are utilized in Jefferson and Mobile counties. The parents or guardians are usually separate parties to the action.

It has long been the position of the State Bar and of DHR that no attorney-client relationship exists between the IV-D service recipient and the attorney handling IV-D cases for DHR, provided the service recipient has assigned his or her rights of support to DHR, either by operation of law or written assignment. (See, Ethics Opinion 87-57.) Under this rule, where the service recipient did not assign support rights, the IV-D attorney did represent the service recipient individually. However, in 1994 the Alabama Legislature passed Act 94-800 (now Code of Alabama 1975, §38-10-7.1), which provides that the attorney in a IV-D case represents DHR exclusively and that there is no attorney-client relationship between the IV-D attorney and any applicant or recipient of DHR's support services, regardless of the style of the case in which legal proceedings are initiated. This law went into effect May 6, 1994.

The federal Office of Child Support Enforcement has interpreted federal law and regulation to require that the State IV-D agency accept an application for support services from any individual, and where possible and appropriate, provide all available services to any applicant. Under this interpretation, DHR must accept applications from the noncustodial parent and must assist said applicants by providing all services such as establishing paternity, establishing a support obligation from an immediate income withholding order, and modifying an existing order of support.

Additionally, the Code of Federal Regulations, at 45 C.F.R. §303.8, provides that, effective October 13, 1993, the State must have procedures in place for the review and, where appropriate by application of the child support guidelines, adjustment of existing child support orders. This review must be performed every three years in all AFDC cases. Additionally, the three year review must be performed at the request of either parent in a non-AFDC case, regardless of which parent originally applied for and/or received support services from DHR. The federal regulation further requires that where indicated by application of the guidelines, DHR must pursue modification of the child support order, whether the adjustment warranted is an increase or decrease of the existing order.

The above-referenced federal requirements present a real dilemma for DHR and its child support attorneys, since applying the federal principles outlined herein requires the agency to accept, investigate, and refer cases to its attorneys based solely on DHR's interest in pursuing proper awards of support and the enforcement thereof, without regard to which parent has requested the service and/or without regard to whether the other parent is or has been a IV-D service recipient through DHR. Since the federal review and adjustment mandates require that the IV-D agency pursue the guidelines regardless of the effect on the support amount, the possibility exists that, in some instances, the agency will be referring a case to its attorney to pursue a downward modification of support. In some of these cases, DHR, through the same attorney, may have previously pursued legal action for the establishment or enforcement of the existing order of support on behalf of or at the request of the custodial parent.

DHR takes the position that, because Code of Alabama 1975, §38-10-7.1 makes clear that there is never an attorney-client relationship between the IV-D attorney and the IV-D service recipient, there should be no attorney conflict of interest issue in IV-D cases originating since passage of the Act. However, since potential conflicts of interest may exist in some cases predating the enactment of this law, DHR policy has been established to address these issues in cases which were initiated prior to the passage of the law.

Under current policy, where there has always been an effective assignment of support rights from the original IV-D support service recipient, a child support case requiring legal action will be forwarded to the 'regular' IV-D attorney, regardless of whether DHR is pursuing an increase or decrease in the current support amount, and regardless of which parent has requested the services presently being provided by DHR. However, if prior to the passage of Act 94-800, the child support case was handled by a particular attorney during a period of time when there was no assignment of support rights to DHR, referral for court action will be made to a different attorney when DHR seeks a reduction in support or other action at the request (or application) of the noncustodial parent or other party (such as a caretaker relative) who may have interests adverse to the 'original' IV-D service recipient. A copy of the policy setting out these procedures is attached for your review and consideration.

There is some concern among attorneys representing DHR in child support matters that the pursuit of action at the request of the noncustodial parent gives at least the appearance of a conflict of interest for the IV-D attorney, particularly when services have previously been pursued on behalf of the custodial parent, and that the policy established by DHR does not adequately address the conflict problem. Therefore, I am requesting a formal opinion addressing the following questions:

1. May a IV-D attorney, who had previously represented the State in an assigned IV-D case brought on behalf of one parent or guardian, continue representing the State in further or subsequent action for child support, modification, or enforcement referred by DHR at the request (or application) of another parent or individual who may have interests adverse to the 'original' IV-D service recipient?

2. Are there other ethical considerations, not identified by DHR in the above-outlined policy, which may affect the ability of the IV-D attorney to handle such cases for DHR on behalf of the State?"

* * *

ANSWER QUESTION ONE:

A Title IV-D attorney, who previously represented the State in an assigned IV-D case brought on behalf of one parent or guardian, may continue representation of the State in subsequent actions for child support, modification, or enforcement referred by DHR at the request of another parent or individual who may have interests adverse to the "original" IV-D recipient.

ANSWER QUESTION TWO:

The IV-D attorney who represents the State should make full disclosure to a IV-D service recipient as to the attorney's role in the proceedings and the fact that the attorney, pursuant to Code of Alabama 1975, §38-10-7.1, has no attorney-client relationship with the applicant or recipient.

REASONING:

Pursuant to the provisions of Code of Alabama 1975, §38-10-7.1, the IV-D attorney represents the State of Alabama, Department of Human Resources, exclusively, and has no attorney-client relationship with any applicant or recipient of the agency's Support Enforcement Services. The Commission hereby modifies RO-87-57 to reflect the mandates of this provision of the Code of Alabama, recognizing that the true client of the IV-D attorney in IV-D cases is DHR, "without regard to the style of the case in which legal proceedings are initiated."

The Commission further reasons that the role of the attorney in IV-D cases is an administrative act of procedure on behalf of DHR whereby the rights of service recipients under Title IV-D are effectuated. The IV-D attorney, as counsel for DHR, pursues the matters under IV-D, state law, or other rules and regulations of the federal Office of Child Support Enforcement. The federal agency's requirements, pursuant to 45 C.F.R. §303.8, which mandate DHR's reviewing all AFDC cases every three years, and the requirement that DHR pursue modification of any child support order, whether upward or downward, in no way abrogate the statutory provision which defines the attorney-client relationship as being between DHR and the IV-D attorney, and not the applicant or recipient of such services.

In an effort to ensure that IV-D service recipients understand that concept, the IV-D attorney should fully explain to any eligible recipient the attorney's role in the process. The service recipient should be made to understand that no attorney-client relationship exists between the IV-D attorney and the service recipient.

The IV-D attorney should explain to the service recipient the lack of confidentiality or privileged communication by and between the IV-D attorney and the service recipient, other than that where it might be established by federal or state law independent of the Rules of Professional Conduct. DHR is encouraged to develop some type of uniform disclosure requirements for its IV-D attorneys to ensure full and adequate disclosure to service recipients of the role of the IV-D attorney, and the fact that no privilege or confidentiality attaches to communications between the service recipient and the attorney other than those mandated by federal or state law.

JAM/vf

3/6/96

revised

5/24/96

JAM/vf