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## From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney

### Cover Page Footnote

Associate Professor of Law, University of Missouri-Kansas City School of Law. Thanks to Dean Burnele Venable Powell for his support and to the members of the Missouri Child Support Enforcement Association for their dialogue.

# FROM REPRESENTING "CLIENTS" TO SERVING "RECIPIENTS": TRANSFORMING THE ROLE OF THE IV-D CHILD SUPPORT ENFORCEMENT ATTORNEY

Barbara Glesner Fines\*

## INTRODUCTION

ATTORNEYS for the poor are being asked to serve more clients for less money and with more restrictions on their practice than ever before. These restrictions, both on amounts and uses of funds, influence the attorney's independent professional judgment. Determining when that influence is inappropriate becomes a difficult practical and ethical issue. Is this issue resolved if one simply reconceptualizes the role of the entities and individuals involved? What if the government becomes the client and the individual receiving legal services becomes something other than a client? Examining the development of governmental funding of child support enforcement, one finds just such a change in characterization has occurred. Even in the face of massive cutbacks on federal support for welfare and legal assistance alike over the past twenty years,<sup>1</sup> the governmental role in child support enforcement has swelled and no cutbacks are forecast. Accompanying this growth has been an increasing focus on the ethical issues presented by this representation. When the attorneys enforcing private child support orders are employed by the state, identifying the client becomes a critical ethical task. Looked at from the client's perspective, the role of the attorney appears little different than the role of other legal services attorneys. The government is simply a third-party funder or, at best, a co-client similar to insurance companies whose attorneys represent both insurer and insured. Under either of these views, the attorney would owe a duty to the parent as client.

Ten years ago, the states were significantly split on the this issue of client identity.<sup>2</sup> Today, nearly all states have statutes that specifically

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1. See Steven Epstein et al., *The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions*, 25 *Fordham Urb. L.J.* 279, 279-80 (1998) (describing the history of "devastating funding cuts" of the Legal Services Corporation and its effects on poverty representation); Nancy A. Wright, *Welfare Reform Under the Personal Responsibility Act: Ending Welfare As We Know It or Governmental Child Abuse?*, 25 *Hastings Const. L.Q.* 357, 376 (1998) (noting that "average welfare benefits decreased an estimated 26% between 1972 and 1992").

2. See *infra* text accompanying notes 81-84.

exclude the custodial parent as a client.<sup>3</sup> These statutes seemingly resolve the issue of dual representation or third-party interference with the lawyer-client relationship. New issues arise, of course, regarding the attorney's duty to be forthright with the recipients of legal services about the nature of the relationship—but there is little question about who gets to define the scope of representation or agree to limitations on that scope.

Could this same recharacterization occur in other areas of government funding of legal services? Would such a recharacterization truly solve the ethical dilemmas presented by government restrictions on attorney representation? Part I of this Article provides some background on the role of child support enforcement attorneys. Parts II and III explore the reasons for characterizing the parent as client and the issues such a characterization raises. Finally, part IV examines statutes that deem the state to be the sole client in these actions and will consider their philosophy, legality, and effectiveness.

### I. THE ROLE OF THE ATTORNEY IN CHILD SUPPORT ENFORCEMENT

To appreciate the complex ethical issues presented to child support enforcement attorneys, one must understand what they do. For purposes of comparison, I begin by describing the role of private attorneys in this field and then develop the powers and duties of public enforcement attorneys. Custodial parents who can afford private attorneys can pursue a variety of enforcement avenues. As *in personam* orders to pay money, the child support order is a unique beast, having the characteristics of both a legal and equitable remedy. Thus, the remedies for enforcement include not only the range of traditional creditor's remedies, including garnishment, attachment, and liens,<sup>4</sup> but also civil contempt actions.<sup>5</sup> Income withholding and other payment systems have become popular recent adjuncts to the collection process in all states.<sup>6</sup>

For most custodial parents, however, finding an attorney to pursue these actions is at best problematic. Parents who need support are

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3. See *infra* note 84 and accompanying text.

4. See Jane Massey Draper, Annotation, *Enforcement of Claim for Alimony or Support, or for Attorneys' Fees and Costs Incurred in Connection Therewith, Against Exemptions*, 52 A.L.R.5th 221, 264-70 (1997).

5. See Janelle T. Calhoun, Comment, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 Mercer L. Rev. 921, 933-35 (1995) [hereinafter Calhoun, *Juggernaut*]; see also *Pettit v. Pettit*, 626 N.E.2d 444 (Ind. 1993) (holding that the trial court had the authority to use its contempt powers to enforce a child support obligation in an instance of willful refusal to pay, and that the assignment of support rights to the state does not deprive the court of this inherent power).

6. See Pamela Forrestall Roper, Note, *Hitting Deadbeat Parents Where It Hurts: "Punitive" Mechanisms in Child Support Enforcement*, 14 Alaska L. Rev. 41, 45-48 (1997); Samuel V. Schoonmaker IV, *Consequences and Validity of Family Law Provisions in the "Welfare Reform Act"*, 14 J. Am. Acad. Matrimonial L. 1, 22-35 (1997).

least likely to be able to afford an attorney. Enforcement is expensive, especially in interstate enforcement actions. Moreover, traditional mechanisms for shifting or reducing legal fees are unavailable or ineffective for most custodial parents.<sup>7</sup> While most state statutes allow the shifting of attorneys fees in actions to establish or enforce support,<sup>8</sup> the possibility of having a fee judgment against a “deadbeat parent” seems a minimal incentive for attorneys to extend their services contingent on that outcome. The rules of professional conduct in most states prohibit the more traditional contingent fee arrangements.<sup>9</sup> Thus, in the past, those parents unable to afford attorneys were left with few options. Unless the public attorney or court trustees were willing to provide prosecution, custodial parents were left to fend for themselves. During the 1970s, the problem of non-custodial parents abandoning their children and moving to other jurisdictions to avoid child support obligations escalated—the default rate for child support payments averaged fifty percent. Nonpayment of child support was identified as a prime cause of poverty.<sup>10</sup> In response, the public focus on child support has sharpened in recent years and the enforcement mechanisms available have increased and diversified. More significantly, the state and federal governments have made en-

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7. As one article notes:

Unfortunately, those individuals who are the most in need of support payments are usually the least likely to have the personal, social, and financial resources to initiate and pursue a legal action or actions. Moreover, the fact that legal actions placed on backlogged court dockets can consume inordinate amounts of time coupled with the frequent need for repeated legal actions means that even those with access to the courts may have difficulty ensuring that they receive an ongoing stream of child support.

Mark R. Fondacaro & Dennis P. Stolle, *Revoking Motor Vehicle and Professional Licenses for Purposes of Child Support Enforcement: Constitutional Challenges and Policy Implications*, 5 Cornell J.L. & Pub. Pol’y 355, 359-60 (1996); see also Sharon J. Badertscher, Note, *Ohio’s Mandatory Child Support Guidelines: Child Support or Spousal Maintenance?*, 42 Case W. Res. L. Rev. 297, 309 (1992) (noting that the initial costs of bringing enforcement actions is a factor explaining low collection rates).

8. See generally Wenona Y. Whitfield, *Where the Wind Blows: Fee Shifting in Domestic Relations Cases*, 14 Fla. St. U. L. Rev. 811 (1987) (noting that domestic relations cases are an exception to the American rule in which parties bear their own costs and proposing guidelines for setting fees in domestic relations actions).

9. See Model Rules of Professional Conduct Rule 1.5(d)(1) (1998); see also *In re Jarvis*, 869 P.2d 671, 674 (Kan. 1994) (per curiam) (finding that a contingent fee agreement in a domestic relations matter is a clear violation of the Model Rules); *Davis v. Taylor*, 344 S.E.2d 19, 22-23 (N.C. Ct. App. 1986) (voiding contingent fee arrangement in child support recovery as contrary to public policy); *Oklahoma Bar Ass’n v. Fagin*, 848 P.2d 11, 14-16 (Okla. 1992) (“[A]ny type of fee [in a domestic relations matter] which has some aspect of a contingency is impermissible.” (emphasis omitted)); cf. Kathleen Pepi Southern, Note, *Professional Responsibility—Contingent Fees in Domestic Relations Actions: Equal Freedom to Contract for the Domestic Relations Bar*, 62 N.C. L. Rev. 381 (1984) (arguing for judicial scrutiny of contingent fee arrangements in domestic relations cases).

10. Harry D. Krause reviews the history of child support legislation and its link to poverty in *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 Fam. L.Q. 1 (1990) [hereinafter Krause, *Child Support*].

forcement assistance more widely available.<sup>11</sup> With this assistance, the role of the public attorney has grown dramatically.

Public attorneys have always had a role to play in support enforcement through the prosecution of criminal contempt or criminal non-support actions. The role of public attorneys in child support enforcement, however, grew dramatically with the creation in 1975 of the Child Support Enforcement ("CSE") Program under Title IV-D of the Social Security Act ("IV-D Program").<sup>12</sup> The IV-D Program is designed to provide aid to children in poverty due to parental desertion, death, or disability.<sup>13</sup> The IV-D Program conditions the state's receipt of federal welfare funds on the state act establishing a plan and program to provide child support enforcement assistance.<sup>14</sup> Under the federal guidelines, state child support enforcement services must be available to custodial parents currently receiving welfare benefits (formerly Aid to Families with Dependant Children ("AFDC"), now Temporary Assistance to Needy Families ("TANF"))<sup>15</sup> or foster care benefits,<sup>16</sup> and to parents who have received AFDC in the past.<sup>17</sup> Assistance to these parents is automatic because both the federal and state law require that these parents assign their support rights to the state.<sup>18</sup> Even those parents who do not receive public assistance must be provided enforcement services upon application.<sup>19</sup>

All states participate in the IV-D Program.<sup>20</sup> The programs are structured as separate divisions or agencies, generally within the social

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11. "The total IV-D child support caseload grew by 867 percent between 1976 and 1995 from 2.1 to 20.1 million. The average increase in caseload was 740,000 per year through 1984 and 1.1 million per year from 1985 to 1995." Office of Child Support Enforcement, *20th Annual Report to Congress* (visited Feb. 21, 1999) <<http://www.acf.dhhs.gov/programs/cse/rpt/20t/ch14.htm>> [hereinafter OCSE, *Annual Report*].

12. See 42 U.S.C. § 651 (1994).

13. See 42 U.S.C. § 601 (Supp. II 1996).

14. See 42 U.S.C. §§ 602(a)(2), (a)(27), 652(a)(7)-(8) (1994 & Supp. II 1996).

15. See 42 U.S.C. § 654(4)(A)(i)(I) (Supp. II 1996). From 1984 until 1996, federal law required that the state disregard the first \$50 of current child or spousal support paid to the state in calculating AFDC payments and required this \$50 to be paid by the state agency directly to the family. See *id.* § 657(b)(1). These "pass through" requirements offered a cash incentive to aid recipients to ensure their cooperation. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 eliminated this "pass through" requirement. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2112 (codified at 42 U.S.C. §§ 601-603(a) (Supp. II 1996)) (detailing the TANF program). Although the \$50 pass-through has been eliminated, former welfare recipients will be given priority over the state in receiving collected child support arrearages. See 42 U.S.C. § 657(a)(2).

16. See 42 U.S.C. § 654(4)(A)(II).

17. See *id.* § 654(6).

18. See 42 U.S.C. § 602(a)(26)(A) (1994).

19. See 42 U.S.C. § 654(4)(A)(ii) (Supp. II 1996).

20. See OCSE, *Annual Report*, *supra* note 11.

services department of the state.<sup>21</sup> These child support enforcement agencies ("CSEAs") provide a wide range of enforcement assistance to custodial parents. State programs locate non-custodial parents; establish paternity; establish, enforce, and modify child and medical support orders; and collect support.<sup>22</sup> These programs may not handle custody or visitation issues.<sup>23</sup>

Attorneys work within the system in a variety of ways. Most CSEAs have staff counsel,<sup>24</sup> however, the caseloads far exceed what staff counsel could handle in almost all states.<sup>25</sup> Thus, CSEAs also use other government attorneys to assist in enforcement actions, including local prosecuting attorneys, attorneys from the state attorney general's office staff, or court trustee attorneys.<sup>26</sup> In the past, much of IV-D enforcement was accomplished through contract with private attorneys.<sup>27</sup> Increasingly, states have full-time government attorneys perform the legal services needed. Some states have begun to contract out with private collection agencies for a portion of their work.<sup>28</sup> These agencies charge a certain percentage of collected support funds and most have attorneys on staff to handle court enforcement.<sup>29</sup>

Funding for these legal services comes from a variety of sources. Some revenue is generated by the cases themselves. States may retain

21. John Engler & Karen Quinn, *On the Trail of Deadbeat Parents*, 77 Mich. B.J. 276 (1998) (describing Michigan's organization and operation of its child support enforcement program, which was a model for the IV-D program). For a comprehensive set of tables describing the structure of each state's IV-D program, see the state profiles index at Office of Child Support Enforcement, *View Basic Facts Related to Child Support* (visited Feb. 21, 1999) <<http://www.acf.dhhs.gov/programs/cse/fctdsc.htm>> [hereinafter OCSE, *View Basic Facts*].

22. See Office of Child Support Enforcement, *Handbook on Child Support Enforcement* (visited Feb. 21, 1999) <<http://www.acf.dhhs.gov/programs/scelfct/cshdbk.htm>>.

23. See 42 U.S.C. § 652(a)(1)-(2); Paula Roberts & Michael Allen, *An AFDC Mother's Right to Counsel: Custody Issues in Proceedings Instigated by the IV-D Agency*, 19 Clearinghouse Rev. 278, 279 (1985).

24. See OFCE, *View Basic Facts*, *supra* note 21.

25. "Recent estimates of child support caseloads nationwide range from 300 cases to as many as 2,500 cases per worker." Office of Child Support Enforcement, *Privatization, Competition, and Partnership* (visited Feb. 21, 1999) <<http://www.acf.dhhs.gov/programs/cse/rpt/pvt/ch2.htm>> [hereinafter OCSE, *Privatization*]; see Calhoun, *Juggernaut*, *supra* note 5, at 941-42.

26. See *supra* note 24.

27. For example, the history of Kentucky's IV-D evolution is described in an action to recover from the state payments for IV-D services. See *Kenton County Fiscal Ct. v. Elfers*, No. 1997-CA-001971-MR, 1998 WL 754457, at \*1-\*3 (Ky. Ct. App. Oct. 30, 1998).

28. See OCSE, *Privatization*, *supra* note 25 (noting those services that "traditionally are contracted out such as genetic testing, legal services, and automated systems" and describing efforts to privatize other aspects of child support enforcement).

29. See Nina Bernstein, *Giant Companies Entering Race to Run State Welfare Programs*, N.Y. Times, Sept. 15, 1996, at A1; Robert Elder, Jr., *A Strange But Happy Story; Venture Capital Meets Child Support*, Tex. Law., Jan. 19, 1998, at 2; Tamar Lewin, *Private Firms Help Single Parents Get What's Due*, N.Y. Times, May 21, 1994, at A1.

a share of the support collected in some cases to reimburse their own welfare expenditures.<sup>30</sup> Awards of attorneys fees have been made to agency attorneys in some states.<sup>31</sup> Most funding comes from the federal government. The federal government pays sixty-six percent of state administrative costs, with higher percentages for certain aspects of the programs.<sup>32</sup> Additionally, an elaborate system of "incentive payments" tied to the effectiveness of enforcement efforts provides additional funding to the states.<sup>33</sup> In fact, so effective are these funding mechanisms that all but eight states operate their programs at a profit.<sup>34</sup>

The enforcement tools available to IV-D attorneys include all those available to private attorneys.<sup>35</sup> IV-D attorneys also have a range of enforcement tools uniquely available to them in their role as government attorneys. Access to government information sources allows for easier location of absent parents. These sources include: state departments of motor vehicles, corrections, or human resources; records of licenses, criminal files, and employment earnings; and federal data from the IRS, SSA, or the Federal Parent Locator Services.<sup>36</sup> Legal remedies uniquely available to IV-D attorneys include forfeiture of licenses.<sup>37</sup> Another highly effective collection method is to intercept tax refunds, unemployment compensation payments, lottery winnings, or other government funds the non-custodial parent may have coming.<sup>38</sup> Finally, only government attorneys may prosecute criminal sanctions, whether under criminal contempt for violation of the court order of support or under the distinct criminal statute prohibiting criminal non-support.<sup>39</sup> Most recently the federal government has

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30. See 42 U.S.C. § 657(a)(1) (Supp. II 1996).

31. See, e.g., *Patch v. Patch*, 760 P.2d 526, 531 (Alaska 1988) (granting attorneys fees to Child Support Enforcement Division attorney); *Florida Dep't of Revenue v. Barranco*, 673 So. 2d 923, 923-24 (Fla. Dist. Ct. App. 1996) (ruling that in support enforcement actions, the state agency is entitled to pay the attorney's fees based on non-custodial parent's ability to pay).

32. Ninety percent of the costs of genetic testing and 80%-90% of automation costs are paid by the federal government. See 42 U.S.C. § 655. The Secretary of Health and Human Services promulgated regulations for determining exactly which state expenditures are reimbursable. See 45 C.F.R. § 304.20 (1997).

33. 42 U.S.C. § 658 (1994 & Supp. II 1996).

34. See Administration for Children and Families Office of Child Support Enforcement, U.S. Dep't of Health and Hum. Servs., *Nineteenth Annual Report to Congress* (visited Feb. 21, 1999) <<http://www.acf.dhhs.gov/programs/cse/rpt/chorwa.htm>>.

35. See Schoonmaker, *supra* note 6, at 29-35 (cataloguing enforcement tools).

36. See *id.* at 10-16.

37. See Fondacaro & Stolle, *supra* note 7, at 390-93.

38. See Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. Ill. L. Rev. 695, 697.

39. See Mark S. Coven, *Welfare Reform, Contempt and Child Support Enforcement*, 30 Suffolk U. L. Rev. 1067, 1080-95 (1997); Diana J. Vogt, Note, *Modern Discussion of a Venerable Power: Civil Versus Criminal Contempt and Its Role in Child Support Enforcement: Hicks v. Feiock*, 22 Creighton L. Rev. 163, 164-170 (1988).



stepped in to provide Federal prosecution for non-support where parents cross state lines to avoid paying support obligations.<sup>40</sup>

The role of public attorneys in the future is in question. There is no question of the program's success in terms of utilization: approximately sixty percent or more of all child support cases are brought through IV-D programs.<sup>41</sup> As in other publicly assisted legal services, IV-D attorney staffs carry overwhelming caseloads, and funding for these efforts is justified only to the extent that the welfare rolls are reduced as a result of enforcement. Recent studies have questioned the effectiveness of child support enforcement in altering the amount of public assistance required.<sup>42</sup> With current welfare reform otherwise reducing public assistance, it may be that public-assisted enforcement will be on the wane, with a return to privatization. To the extent that government attorneys continue to play a predominant role in child support enforcement, the ethical issues presented by their unique role will continue to present problems for the attorneys, the participants, and the programs. Even if the government role in child support enforcement does change, however, the approach to providing legal assistance in this program may become a model for other government legal assistance.

## II. THE EVOLVING RELATIONSHIP BETWEEN CUSTODIAL PARENTS AND CHILD SUPPORT ENFORCEMENT ATTORNEYS

The ethical dilemmas created by the IV-D Program of child support enforcement are in many respects similar to those of many attorneys providing legal assistance to low-income persons through the auspices of programs funded by governments or other third parties. Who is the client? Who can decide who is the client? What are the attorney's duties to those who are not clients?

Even for the private attorney, child support practice presents ethical issues of client identity and the fairness to third parties. A private attorney, hired by a custodial parent to establish, modify, or enforce a child support order, is nominally representing the parent.<sup>43</sup> Yet the custodial parent is acting in a representative capacity on behalf of the

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40. See Kathleen A. Burdette, Comment, *Making Parents Pay: Interstate Child Support Enforcement After United States v. Lopez*, 144 U. Pa. L. Rev. 1469, 1470-75 (1996).

41. See Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 Fam. L.Q. 519, 522 (1996).

42. See, e.g., Krause, *Child Support*, *supra* note 10, at 15-17 (noting that "child support enforcement has not significantly improved the poorest children's lot").

43. See John David Meyer, Note, *The "Best Interest of the Child" Requires Independent Representation of Children in Divorce Proceedings*, 36 J. Fam. L. 445 (1997-98) (noting that children are rarely appointed representatives in divorce actions and arguing that this independent representation should be required).

child.<sup>44</sup> Thus, does the attorney representing a custodial parent in a child support action have any ethical duty that runs to the child? The problem is present whenever an attorney is representing a party acting in a fiduciary capacity, but is aggravated because the beneficiary is a minor.<sup>45</sup>

A non-custodial parent does not owe a duty of child support to the custodial parent.<sup>46</sup> Rather, both parents have a duty of support that is owed to the child.<sup>47</sup> Nonetheless, when it comes to actual enforcement of that duty, one finds some ambiguity in the law's attitude toward the parent's representative role. Thus, in paternity actions, the courts are split on the extent to which a prior paternity action brought by a mother will preclude her child's subsequent action against the same putative father.<sup>48</sup> Some courts hold that the parent represents the child's interests in these actions, creating privity for preclusion analysis.<sup>49</sup> Others do not find that the interests of the parent are co-extensive with those of the child.<sup>50</sup> Likewise, in child support actions,

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44. See Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents and Attorneys*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 423, 423-27 (1993).

45. See Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. Rev. 659, 696-98 (1994); Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 Fordham L. Rev 1319, 1321-22 (1994).

46. See Harry D. Krause, *Child Support in America: The Legal Perspective* 6 (1981) (noting the equalization of child support obligations between fathers and mothers).

47. See *id.*

48. See *Jessica G. v. Hector M.*, 653 A.2d 922, 926-28 (Md. 1995) (providing extensive review of various state court decisions).

49. See, e.g., *Department of Human Servs. v. Seamster*, 820 S.W.2d 298, 299-300 (Ark. Ct. App. 1991) (en banc) (holding that a mother's unsuccessful paternity action for child support barred her child's subsequent paternity action); *Bradley v. Division of Child Support Enforcement*, 582 A.2d 478, 480-82 (Del. 1990) (same); *Department of Health & Rehab. Servs. v. Ricks*, 530 So. 2d 370, 371 (Fla. Dist. Ct. App. 1988) (same); *J.D. v. E.W. by C.W.*, 610 N.E.2d 289, 290-91 (Ind. Ct. App. 1993) (same); *T.R. v. A.W. by Pearson*, 470 N.E.2d 95, 96-97 (Ind. Ct. App. 1984) (same); *O'Bannon for O'Bannon v. Azar*, 506 So. 2d 522, 526 (La. Ct. App. 1987) (same); *E.I.B. by I.J. v. J.R.B.*, 611 A.2d 662, 663-65 (N.J. Super. Ct. App. Div. 1992) (same). Cf. *Guziejka v. Desgranges*, 571 A.2d 32, 34 (R.I. 1990) (adopting the privity-preclusion principle but refusing to ban the child's suit where the earlier case was procedurally flawed).

50. See, e.g., *Ex parte Snow*, 508 So. 2d 266, 268 (Ala. 1987) (holding that the differing interests of mother and child foreclose the application of *res judicata* when the child was not a party to the prior action); *Department of Health & Rehab. Servs. v. Wyatt*, 475 So. 2d 1332, 1333-34 (Fla. Dist. Ct. App. 1985) (same); *P.N.B. ex rel J.L.S. v. J.L.D.*, 531 N.E.2d 1203, 1203 (Ind. Ct. App. 1988) (same); *Johnson v. Hunter*, 447 N.W.2d 871, 874-77 (Minn. 1989) (same); *Johnson v. Norman*, 421 N.E.2d 124, 127 (Ohio 1981) (same); *Department of Soc. Servs. ex rel. Gray v. Johnson*, 376 S.E.2d 787, 790 (Va. Ct. App. 1989) (same); *State ex rel. Div. of Human Servs. v. Benjamin P.B.*, 395 S.E.2d 220, 223-25 (W. Va. 1990) (noting that "there is a clear distinction between the interests of the [mother] and the child in this proceeding since the right to an adjudication of parentage and to support is primarily that of the child").

various legal doctrines recognize that parents might not truly represent the child's interests. For example, parents cannot by agreement waive the right to child support.<sup>51</sup> Such agreements between the parents regarding child support are not legally binding on either the public or the child, though they may be enforceable against one another as to the parents' relative support obligations.<sup>52</sup> Given courts' reluctance to bind a child to a parent's choice that is against that child's best interest, a private attorney representing a custodial parent may also view the client solely as a parent, rather than as a fiduciary for the child. Attorneys are, of course, always free to discuss with their clients the ethical, moral, or practical effects of their choices.<sup>53</sup> For the private attorney, however, there is little danger in identifying the client to whom one owes the duties of loyalty, confidentiality, communication, and competence—the client is the parent.

When the attorney in a child support action is hired by the state under a IV-D Program, the identification of the client is far more complex. The problem goes beyond that faced by most prosecuting attorneys, whose nebulous client is called "The State." While some crime victims, for example, may believe that a prosecuting attorney is "their lawyer," in general the public is aware that the prosecutor acts on behalf of the state in criminal enforcement.<sup>54</sup> This may be in part because the elected nature of most prosecutor positions helps to inform the public of their role, or it may be in part because throughout most of the twentieth century, private prosecution has been so rare.<sup>55</sup> With child support enforcement, however, the "victims" (i.e., custodial parents seeking establishment of paternity or enforcement of support) are far more likely to view the CSEA attorney as representing their interests. "Since the inception of the IV-D program, State IV-D agencies have wrestled with the public perception that lawyers who work for the program—such as prosecutors under cooperative agree-

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51. See generally John J. Michalik, Annotation, *Divorce: Power of Court to Modify Decree for Support of Child Which Was Based on Agreement of Parties*, 61 A.L.R.3d 657, 659 (1975) (considering "the question of the power of a court to modify a decree for child support which was based upon a predivorce agreement of the parties" (footnote omitted)).

52. See *id.* at 661.

53. See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 515-521 (1994) (reviewing the history of private prosecutors in the United States).

54. Indeed, the struggle of victims to have a greater role in criminal prosecutions is evidence of this recognition. See David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim"*, 17 Pepp. L. Rev. 35, 53-56 (1989); cf. *State ex rel. Romley v. Superior Court of Maricopa County*, 891 P.2d 246, 250 (Ariz. 1994) (rejecting the argument that the Victims' Bill of Rights created so many duties toward victims that prosecutors represented the victims for purposes of conflicts of interest).

55. See Bessler, *supra* note 53, at 558-66.

ment or as hired counsel for the agency—'represent' in an 'attorney-client' sense, the individuals the program serves."<sup>56</sup>

If one applies the same type of analysis used to identify clients in any other legal setting, it is difficult to avoid the conclusion that the custodial parents, acting on behalf of their children, are the clients of these public enforcement attorneys. Whether an attorney-client relationship exists is determined by principles of substantive law. Under the law of agency, an attorney-client relationship arises when "[a] person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and . . . [t]he lawyer manifests to the person consent to do so."<sup>57</sup> This approach to defining the client is based largely on client expectations. Were this approach to apply to IV-D representation, the client would often include the custodial parents.<sup>58</sup>

Although the IV-D Program was designed primarily to serve those parents receiving AFDC, any parent or guardian may apply to receive legal services to assist in paternity or child support issues.<sup>59</sup> Parents who do not receive public assistance ("non-recipients") may have an entirely reasonable expectation that the attorney who proceeds with their case is representing them. They apply for the legal services, pay (in most states) an application fee, and are not required to assign their rights to the state.<sup>60</sup> Any child support collected must be paid to the family.<sup>61</sup> After all, the state has no direct financial interest in enforcing child support for these parents; rather, the assistance is based on the general interest in preventing parents from reaching such dire financial conditions that public assistance will be necessary.<sup>62</sup>

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56. Office of Child Support Enforcement, *Role of IV-D Agency and Its Staff in Delivering Program Services* (visited Feb. 21, 1999) <<http://www.acf.dhhs.gov/programs/cse/pol/im-9303.htm>> [hereinafter OCSE, *Delivering Program Services*].

57. Restatement (Third) of The Law Governing Lawyers § 26 (Proposed Final Draft No. 1, 1996).

58. See Paula Roberts, *Attorney-Client Relationship and the IV-D System: Protection Against Inadvertent Disclosure of Damaging Information*, 19 Clearinghouse Rev. 158, 158-59 (1985).

59. Under the Social Security Act of 1935, 42 U.S.C. § 654(6)(A) (1994) (amended 1996), states are required to provide to families not receiving public assistance all of the services provided to families that do receive public assistance. See generally *Carelli v. Howser*, 923 F.2d 1208, 1210 (6th Cir. 1991) (stating that "[s]tates are required to provide child support enforcement services to families that receive AFDC benefits as well as families that do not"); *Thaysen v. Thaysen*, 583 So. 2d 663, 666 (Fla. 1991) (citing 42 U.S.C. § 654(6)(A)); *Cabinet for Hum. Resources v. Houck*, 908 S.W.2d 673, 674 (Ky. Ct. App. 1995) (citing similar provisions in the Kentucky Revised Statutes).

60. See 45 C.F.R. § 302.33 (1994).

61. See 42 U.S.C. § 657(a)(3) (Supp. II 1996).

62. Challenges to the constitutionality of allowing enforcement actions on behalf of financially-able custodial parents have been based on state constitutional provisions requiring the expenditure of public funds only for public purposes. The challenges have met with little success. Courts have held that "[s]pending public funds in aiding an obligee to enforce support payments is analogous to, and as much a public

As a practical matter, however, many of these non-recipient cases are more accurately viewed as "continuation" cases: that is, the parents applying for support enforcement services had received public assistance in the past.<sup>63</sup> Even after parents cease receiving public assistance, federal law requires that state agencies continue to provide child support enforcement services.<sup>64</sup> In some of these cases, the state may have a more direct financial interest. If child support arrearages exist, they can be applied toward unreimbursed public assistance.<sup>65</sup> The factual basis for an attorney-client relationship with the parents, however, is not eliminated by the fact that the state also has a direct financial interest in these cases. Regardless of the priority of financial interests, these continuation case parents also have a reasonable expectation that the enforcement attorney is acting on their behalf.

Moreover, it appears that an increasing percentage of IV-D enforcement actions are brought on behalf of non-recipients. "Enhanced enforcement in Title IV-D cases will encourage many medium and high income obligees, who traditionally have not enforced support obligations through state child support agencies, to opt into the system."<sup>66</sup> In 1990, AFDC cases outnumbered non-AFDC cases by two to one in IV-D collection actions. By 1994, the ratio was much smaller, due to an increase of nearly four million non-AFDC cases.<sup>67</sup>

Parents receiving public assistance or foster care assistance present an arguably different situation. For these parents, no application for legal services is necessary. In fact, these parents have little choice as to whether to seek legal assistance. Under federal law, these parents

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purpose as, relief expenditures to needy individuals." Department of Human Servs. *ex rel. Pavlovich v. Pavlovich*, 932 P.2d 1080, 1084 n.7 (Okla. 1996) (citation omitted); *see also Houck*, 908 S.W.2d at 674-75 (holding that non-recipients were entitled to the services of the county attorney in an enforcement proceeding); *In re Marriage of Lappe*, 680 N.E.2d 380, 388-89 (Ill. 1997) (holding that "public purpose" includes promoting the rights of children in enforcement actions).

63. *See Implementing Welfare Revision: Congressional Testimony Before the Subcomm. on Human Resources of the Senate Comm. on Ways and Means*, 104th Cong. (1996) (Prepared Testimony of Leslie L. Frye, Chief of the California Office of Child Support) (estimating that "about 50% of the families we serve as 'non-welfare' are actually 'continuing services' families who entered our system through an application for cash benefits. In low grant states the continuing service population is even higher, up to 75% in Texas"), available in 1996 WL 10831315.

64. *See supra* note 59.

65. Until recently, states had the option of recovering past welfare costs before paying families for post-welfare arrearages. Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, families have the priority in receiving arrearages. *See* 42 U.S.C. § 657(a)(2)(B)(i)(II)(aa) (Supp. II 1996).

66. Schoonmaker, *supra* note 6, at 69.

67. *See id.* "In 1990, there were 8.0 million AFDC and 4.8 million non-AFDC Title IV-D cases. Four years later, there were 10.4 million AFDC and 8.2 million non-AFDC Title IV-D cases." *Id.* (footnote omitted); *see also In re Marriage of Lappe*, 680 N.E.2d at 390-91 (indicating that half of IV-D cases involved non-AFDC litigants).

are required to assign their rights to past-due support to the state<sup>68</sup> and must agree to cooperate in establishing and enforcing paternity and support rights as a condition of receiving aid.<sup>69</sup> Whenever rights are assigned, the attorney's client may change with that assignment. One may argue, then, that the state agency to whom support rights are deemed assigned becomes the sole client of the public attorney.

Unlike many voluntary assignments of rights of action, however, these parents retain a significant interest in the paternity and support actions the law deems "assigned" to the state.<sup>70</sup> Custodial parents retain the right to enforce support obligations, though recoveries must be used to reimburse the state to the extent of AFDC payments received.<sup>71</sup> The situation is better analogized to the relationship between attorneys for insurers and the insured they represent. In that setting, all courts hold that there exists an attorney-client relationship between the recipient of the legal services (the insured) and the attorney providing those services.<sup>72</sup> Attorneys in child support actions speak on behalf of parents to some extent. Because attorneys as a rule may not speak on behalf of persons they do not represent, the recipient parent should be considered a client.<sup>73</sup>

Many recipient parents may indeed expect that the IV-D attorney is representing their interests. One can argue that this is an unreasonable expectation given the assignment of rights required by the statutes. That argument assumes, however, that the reasonable person would be aware of the required assignment, its legal effect, and the resultant impact on the formation of an attorney-client relationship. That argu-

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68. See 42 U.S.C. § 608(a)(3) (Supp. II 1996); *Langan v. Weeks*, 655 A.2d 771, 781 (Conn. App. Ct. 1995) (upholding the statutory assignments of child support benefits as consistent with substantive due process).

69. See 42 U.S.C. § 608(a)(2). Parents may refuse to cooperate if they have "good cause," see *id.*, often defined in terms of cooperation leading to physical harm, see *id.* § 654(29).

70. "[I]t does not necessarily follow from the combination of federal and state statutes and regulations that the assignment utterly destroys any interest the custodial parent had in the other parents' [sic] duty to pay or payments which are made." *Medsker v. Adult & Family Servs. Div.*, 601 P.2d 865, 867 (Or. Ct. App. 1979) (holding that an AFDC recipient has no due process right to be informed of the effect of the law on her rights to collected support).

71. See, e.g., *Office of Child Support Enforcement v. Wallace*, 941 S.W.2d 430, 432 (Ark. 1997) (involving an AFDC recipient who had assigned her rights to child support to the state, in which the court ruled that, because the state refused to assist her in this action, it was estopped from claiming those support payments awarded).

72. See 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 28.3, at 487 (4th ed. 1996) (noting that most courts find that the attorney represents the insurer as well); Thomas D. Morgan, *Whose Lawyer Are You Anyway?*, 23 Wm. Mitchell L. Rev. 11, 11-16 (1997) (defending the Restatement's position that insurance company attorneys represent only the insured).

73. Cf. Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L.J. 255, 276 & n.47 (1995) (citing Model Rules of Professional Conduct Rule 1.8(f)(2) (1994) for the proposition that an attorney's primary duty runs to the represented child and not to a third-party payor).

ment seems a far stretch. What the recipient parents are most likely to realize is that they have a financial interest in these legal actions. Establishing paternity and support orders will inure to the financial benefit of the custodial parent even after public assistance has ended. Even in the recovery of current support, recipient parents may receive a portion of the recovered amounts.<sup>74</sup>

Moreover, enforcement attorneys and the courts may act as if the parent is client, referring to parents as "clients" or entering appearances "on behalf of" the parent.<sup>75</sup> It is not uncommon for pleadings to be filed in the parent's name. Even when the state proceeds on its own, the action may be styled "State *ex rel.* Parent," which, as one court noted, indicates that the parent is "*quasi* the plaintiff in the proceeding."<sup>76</sup> The parents are required to act as if the attorneys are representing them. It is not unreasonable for the parents to expect that representation truly is on their behalf.

Indeed, even if one were to conclude that the state is the client when there has been an assignment of rights, the attorney has a duty to fully explain his or her role to the custodial parent, as the duties of confidentiality and loyalty may still attach to the parent. As the ABA Informal Opinion addressing the role of the IV-D attorney notes:

If the lawyer fails to make an explanation sufficient to satisfy the requirements of Rule 4.3 and receives a communication from the custodial parent who reasonably misunderstands the lawyer's role, the lawyer may be prohibited, under Model Rule 1.6, from disclosing the communication to the lawyer's actual client, the state. . . . Under these circumstances there is a conflict of interest requiring the lawyer to withdraw from the representation.<sup>77</sup>

Because attorneys do not normally advocate for interests that they do not represent, one method of identifying the client is to ask: "Who owns the rights being asserted?" Rather than focusing on the expectations of the parties, this approach looks to the ownership of the rights. This analysis, often used in establishing rights of action for third-party beneficiaries of legal services, is especially helpful in identifying the parents as "clients" in IV-D actions. On the other hand, this analysis

74. See 42 U.S.C. § 657(a)(1) (Supp. II 1996).

75. See, e.g., Brief of Amici Curiae for the National District Attorneys Association, et al., *Blessing v. Freestone*, 520 U.S. 329 (1997) (No. 95-1441) ("Attorneys and paraprofessional staff practicing under Title IV-D are committed to serving families, and particularly, children in need."), available in 1996 WL 419711, at \*27.

76. *State Dep't of Family Servs. v. Peterson*, 960 P.2d 1022, 1023 (Wyo. 1998) ("The Department may bring this action in its own name, without regard to the obligee's status as a recipient of non-recipient of public assistance." (quoting Black's Law Dictionary 1159 (5th ed. 1979))).

77. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 89-1528 (1989) (citing Model Rules of Professional Responsibility Rules 1.7(b), 1.16(a) (1987)).

may create only a "quasi-client" status: with a duty of competence, perhaps confidentiality, but not control.<sup>78</sup>

Under this approach, attorneys would clearly be representing non-recipient parents, as well as parents in paternity actions. Unless legislation gives the state a more direct interest, the only party who owns a right to paternity or support in these cases must necessarily be the custodial parent acting on behalf of the child. Indeed, in many states, prior to legislation allowing intervention by state agencies, CSE attorneys were considered to be representing the parent because the state had no standing to intervene in paternity cases.<sup>79</sup> In the past, this view of the parent as client was the approach taken by the ABA<sup>80</sup> and a number of states.<sup>81</sup> A 1993 study by the United States Office of Child Support Enforcement indicated that as many as fourteen states created attorney-client relationships with the parents or children.<sup>82</sup> While no state clearly takes that position today, a few states do provide that the attorneys performing child support functions represent or act on behalf of either the state, the parties, or both.<sup>83</sup>

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78. See Restatement (Third) of the Law Governing Lawyers § 73 (Proposed Final Draft No. 1, 1996). The Restatement suggests several circumstances in which an attorney might be liable for negligence to one who is not a client. These include circumstances in which the lawyer's client is a "fiduciary acting primarily to perform similar functions for the non-client" and when "the non-client is not reasonably able to protect its rights." *Id.* These provisions suggest a duty of competence to non-clients. However, the Restatement is careful to limit the reach of this duty, indicating that no duty should be implied at all unless "such a duty would not significantly impair the performance of the lawyer's obligations to the client." *Id.* One of the fundamental reasons courts will reject third-party liability is the danger that it might interfere with the real client's control in the representation. For a thorough discussion of the issues of third-party liability, see the articles in the symposium, *The Lawyer's Duties and Liabilities to Third Parties*, 37 So. Tex. L. Rev. 957 (1996).

79. See Telephone Interview with Geraldine Hasegawa, Hawaii Corporation Counsel, Family Support Division (Dec. 9, 1996); see also *Cabinet for Human Resources v. Houck*, 908 S.W.2d 673, 675 (Ky. Ct. App. 1995) (reversing a denial of intervention by a county attorney in a divorce proceeding, and commenting that "the county attorney . . . was attempting to represent the applicants").

80. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 89-1528 (1989) (concluding that a IV-D attorney represents the parent in non-AFDC cases; the state in assignment cases; and both the state and the parent in continuation cases).

81. See *infra* note 95.

82. See OCSE, *Delivering Program Services*, *supra* note 56.

83. The Minnesota statute provides that:

If the public authority charged by law with support of a child is a party, the county attorney shall represent the public authority. If the child receives public assistance and no conflict of interest exists, the county attorney shall also represent the custodial parent. If a conflict of interest exists, the court shall appoint counsel for the custodial parent at no cost to the parent. If the child does not receive public assistance, the county attorney may represent the custodial parent at the parent's request.

Minn. Stat. § 257.69 (1992); see Ala. Code § 30-3-63 (1989) (payment of fees section indicates that "when representing or otherwise acting on behalf of the obligee neither the state of Alabama nor any agency thereof . . . shall be required to pay the fees prescribed by this subsection"); Ark. Code Ann. § 9-14-210 (Michie 1998) (stating



The problems posed by this approach were the same as those faced by attorneys employed by any third party who significantly controlled the terms of the representation. From the custodial parent's perspective, the IV-D attorney's representation was an encyclopedia of ethics violations. Government funding was often inadequate to provide a satisfactory level of competence or diligence.<sup>84</sup> Parents were not afforded their rightful control over the objectives of representation.<sup>85</sup> IV-D attorneys might regularly find themselves in a conflict of interest.<sup>86</sup> The attorney representing both the parent in recovering current support, and the state in seeking reimbursement for past support assigned as a condition of receiving AFDC, for example, could face conflicting goals and loyalties to these two clients.<sup>87</sup> Former client conflicts would be common, as attorneys would bring actions against former parent-clients as custody changed or as federal regulations required IV-D services in modifying awards.<sup>88</sup>

Perhaps the most difficult ethical dilemma arises from the parent's communications with the IV-D attorney. If the custodial parent is the client, he or she is owed the duty of confidentiality as to any information relating to the representation<sup>89</sup> and the attorney-client privilege would attach to communication between the parent and the attorney.<sup>90</sup> If the attorney also represents the state, there is a duty to keep the state informed of relevant information<sup>91</sup> and there is no privilege

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that the attorney shall represent the petitioner); Haw. Rev. Stat. § 576D-3(b) (1993) ("The agency may commence or appear in any action on its own behalf, on behalf of any dependent child or custodial parent, or on behalf of any other person for whom the agency has a duty to obtain or enforce an order of support under this chapter."); Idaho Code § 56-203C (1994) (stating that an attorney can represent a child or appear as a friend of court); Md. Code Ann., Fam. Law § 10-115 (1991) ("Administration or an individual whom the Administration approves for child support services shall be represented"); Mass. Gen. Laws ch. 209C, § 7 (Law. Co-op. 1992) (stating that a plaintiff "may be represented by the IV-D agency"); N.H. Rev. Stat. Ann. § 546.12 (1997) (stating the title of the section as Official to Represent Oblige); Tex. Hum. Res. Code Ann. § 76.007 (West 1990) ("may represent the state or other parties"); Wash. Rev. Code § 74.20.220 (Supp. 1999) (stating that the attorney involved in child support obligation actions "represents the state, the best interests of the child relating to parentage, and the best interests of the children of the state, but does not represent the interests of any other individual"); Wyo. Stat. Ann. § 20-6-106 (Michie 1997) (stating that "Department has cause of action which may be brought and maintained either in the department's own name or in the name of the obligee or obligor").

84. For rules concerning a lawyer's competence and obligation to communicate with the client, see Model Rules of Professional Conduct Rules 1.1, 1.4 (1998).

85. For a rule on the scope of representation, see Model Rules of Professional Conduct Rule 1.2.

86. For a rule on conflicts of interest concerning former clients, see *id.* Rule 1.9.

87. For a general rule on conflicts of interest, see *id.* Rule 1.7.

88. All TANF cases must be reviewed every three years and the pursuit of modification of any order, whether upward or downward, not in compliance with support standards also must be reviewed. See 45 C.F.R. § 303.8 (1997).

89. See Model Rules of Professional Conduct Rule 1.6.

90. See *id.*; Roberts, *supra* note 58, at 159.

91. See Model Rules of Professional Conduct Rule 1.4.

among co-clients. Under these circumstances, attorneys in any other setting could simply inform the client of the limitations on confidentiality and the client could then choose the extent to which he or she would disclose information to the attorney. The IV-D Program, however, requires that states mandate the cooperation of each applicant or recipient<sup>92</sup> as a condition of eligibility for aid.<sup>93</sup> This duty to provide information without the protections of confidentiality presents a nearly irresolvable conflict if the attorney is viewed as representing both the parent and that state.

These difficulties and conflicts began to surface dramatically in a series of actions brought under § 1983<sup>94</sup> against IV-D agencies. These actions required the federal courts to determine whether the IV-D Program created private rights enforceable under the Civil Rights Act. This determination, analogous to the identification of the client,

92. See 42 U.S.C.A. § 654 (29)(A)–(B) (West Supp. 1998). This statute provides: [T]he State agency responsible for administering the State plan—

(A) shall make the determination (and redetermination at appropriate intervals) as to whether an individual who has applied for or is receiving assistance under the State program funded under part A of this subchapter, the State program under part E of this subchapter, the State program under subchapter XIX of this chapter, or the food stamp program, as defined under section 3(h) of the Food Stamp Act of 1977 (7 U.S.C. § 2012(h)), is cooperating in good faith with the State in establishing the paternity of, or in establishing, modifying, or enforcing a support order for, any child of the individual by providing the State agency with the name of, and such other information as the State agency may require with respect to, the noncustodial parent of the child, subject to good cause and other exceptions which—

(i) in the case of the State program funded under part A of this subchapter, the State program under part E of this subchapter, or the State program under subchapter XIX of this chapter shall, at the option of the State, be defined, taking into account the best interests of the child, and applied in each case, by the State agency administering such program; and

(ii) in the case of the food stamp program, as defined under section 3(h) of the Food Stamp Act of 1977 (7 U.S.C. § 2012(h)), shall be defined and applied in each case under that program in accordance with section 6(1)(2) of the Food Stamp Act of 1977 (7 U.S.C. § 2015(1)(2));

(B) shall require the individual to supply additional necessary information and appear at interviews, hearings, and legal proceedings; . . .

*Id.* § 654 (29).

93. See *id.* § 608(a)(2). The statute provides:

If the agency responsible for administering the State plan approved under part D [of this subchapter] determines that an individual is not cooperating with the State in establishing paternity or in establishing, modifying, or enforcing a support order with respect to a child of the individual, and the individual does not qualify for any good cause or other exception established by the State pursuant to section 654(29) of this title, then the State—(A) shall deduct from the assistance that would otherwise be provided to the family of the individual under the State program funded under this part an amount equal to not less than 25 percent of the amount of such assistance; and (B) may deny the family any assistance under the State program.

*Id.*

94. 42 U.S.C. § 1983 (1994).

split the circuits. A number of courts held that parents are intended beneficiaries of Title IV-D,<sup>95</sup> basing their decisions on the express language of Congress in the Social Security Act<sup>96</sup> and the provision of services that directly benefit custodial parents.<sup>97</sup> These courts also relied on the abundant legislative history providing evidence that Title IV-D was designed to benefit parents and children. In the original legislation, the bill noted that "all children have the right to receive support from their fathers" and that in fact "the right to have their fathers identified so that support can be obtained" was identified by the Senate report as a key purpose of the IV-D program.<sup>98</sup> Likewise, the House Report on the Child Support Enforcement Act of 1984 (which amended the IV-D Program) identified the purpose of the legislation as "the larger social responsibility for making sure that all children receive financial support. . . . The objectives behind the program are greater than merely recouping federal and state AFDC expenditures."<sup>99</sup>

Other courts concluded that Title IV-D created no enforceable rights.<sup>100</sup> The analysis of the Eleventh Circuit Court of Appeals in *Wehunt v. Ledbetter* represents this position:<sup>101</sup>

Title IV-D is also not a legal assistance program. AFDC recipients do not apply for nor request support enforcement services. They assign their child support rights to the state and are required to co-

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95. See, e.g., *Doucette v. Ives*, 947 F.2d 21, 24 (1st Cir. 1991) ("The CSE program [was] designed both to assist parents in collecting child support . . . and to reduce state and federal government AFDC expenditures"); *Carelli v. Howser*, 923 F.2d 1203, 1211 (6th Cir. 1991) (finding that Title IV-D was intended both "to protect needy families with children [and to protect] the public fisc"); *Monzon v. Martinez*, 833 F. Supp. 479, 484-85 (E.D. Pa. 1993) (stating that custodial parents in need of Title IV-D services have enforceable rights under the statute); *King v. Bradley*, 829 F. Supp. 989, 992 (N.D. Ill. 1993) (stating that "Title IV-D is intended to benefit the plaintiffs"); *Howe v. Ellenbecker*, 774 F. Supp. 1224, 1226 (D.S.D. 1991) (noting that Congress intended to provide assistance to all children in need); *Behunin v. Jefferson County Dep't of Soc. Servs.*, 744 F. Supp. 255, 257-58 (D. Colo. 1990) (finding that Congress primarily intended Title IV-D to secure support enforcement services for children and their families); *Beasley v. Harris*, 671 F. Supp. 911, 921 (D. Conn. 1987) (finding that Congress intended to enlarge the assistance to the family). *But see Albiston v. Maine Comm'r of Human Servs.*, 7 F.3d 258, 265 (1st Cir. 1993) (concluding that IV-D is meant to benefit children and that it is mandatory).

96. 42 U.S.C. § 651 (noting that the purpose of Title IV-D is to "assur[e] that assistance in obtaining support will be available . . . to all children").

97. In *Howe*, 8 F.3d at 1262, the court found the following provisions to indicate an intent to benefit parents: the required availability of Title IV-D services to non-AFDC families, 42 U.S.C. § 657(c); the fifty dollar "pass through" requirement, *id.* § 657(b); and the required annual notice to families of the support collected on their behalf, *id.* § 654(5).

98. S. Rep. No. 93-1356, at 51-52 (1974), reprinted in 1974 U.S.C.C.A.N. 8133, 8146.

99. H.R. Rep. No. 98-527, at 29-30 (1984).

100. See *Wehunt v. Ledbetter*, 875 F.2d 1558, 1565-66 (11th Cir. 1989); *Mason v. Bradley*, 789 F. Supp. 273, 277 (N.D. Ill. 1992).

101. 875 F.2d 1558 (11th Cir. 1989).

operate (unless good cause for refusing to do so is determined to exist) in whatever legal action the state undertakes. By assigning their child support rights in return for AFDC aid, they give the states the opportunity to recoup the financial drain imposed by the welfare system on the state and federal treasuries. As was its intent, as evidenced by the language of the statute and the legislative history, diminishing the welfare outlay benefits society as a whole. Consistent with that intent, we cannot hold that Title IV-D creates enforceable rights . . . .<sup>102</sup>

The court's analysis then, focused on the intent of Congress in recouping welfare expenditures, and relied on the automatic provision of legal services and assignment of rights in finding no intent to directly serve parents.<sup>103</sup> This same analysis had been a determinative basis for finding no attorney-client relationship with parents at the state court level as well, even in instances where there is no receipt of public assistance.<sup>104</sup>

The Supreme Court addressed these conflicting authorities in *Blessing v. Freestone*.<sup>105</sup> In *Blessing*, the Ninth Circuit Court of Appeals held that Title IV-D created an enforceable right to have Arizona's child support program achieve "substantial compliance" with the requirements of Title IV-D.<sup>106</sup> The Supreme Court reversed, but its opinion did not entirely resolve the issue of whether IV-D creates any enforceable rights. The Court found that the Ninth Circuit erred by taking a blanket approach to determining whether Title IV-D grants rights to plaintiffs.<sup>107</sup> The Supreme Court noted that it is "impossible to determine whether Title IV-D, as an undifferentiated whole, gives rise to undefined 'rights.'"<sup>108</sup> Rather, the Court concluded that plaintiffs need to plead with particularity the specific rights created and the specific laws creating those rights.<sup>109</sup> If done, the lower court would then conduct a "methodical inquiry" applying a three-part test for determining whether such a right exists.<sup>110</sup> The test requires that:

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102. *Id.* at 1566 (footnotes and emphasis omitted).

103. *See id.*

104. *See County of Santa Clara v. Support, Inc.*, 152 Cal. Rptr. 754, 763 (Ct. App. 1979); *Haney v. State*, 850 P.2d 1087, 1090-92 (Okla. 1993); *Medsker v. Adult & Family Servs. Div.*, 601 P.2d 865, 867 (Or. 1979); *Gibson v. Johnson*, 582 P.2d 452, 456 (Or. 1978); *State ex rel. Dep't of Human Servs. v. Huffman*, 332 S.E.2d 866, 869-70 (W. Va. 1985).

105. 520 U.S. 329 (1997).

106. *Freestone v. Cowan*, 68 F.3d 1141, 1156 (9th Cir. 1995). Substantial compliance is "(a) full compliance with requirements that services be offered statewide . . . (b) 90 percent compliance with case opening and closing (c) 75 percent compliance with most remaining program requirements." *Blessing*, 520 U.S. at 335 (summarizing 45 CFR § 305.20 (1995)).

107. *See Blessing*, 520 U.S. at 344.

108. *Id.* at 342.

109. *Id.* at 342-43.

110. *Id.* at 343.

[First,] Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.<sup>111</sup>

While the Court concluded that the “substantial compliance” standard did not create enforceable rights under this test, it posited that other parts of the statute might.<sup>112</sup>

Since *Blessing*, litigants have attempted to establish private rights of action to enforce a broad range of specific aspects of the IV-D law—all without success. In *Brinkley v. Hill*,<sup>113</sup> the United States District Court for the Southern District of West Virginia held that a broad range of specific provisions created no private rights of actions.<sup>114</sup> These included requirements that the agency pursue support procedures within thirty days of identifying delinquency; provide an opportunity for alleged fathers to voluntarily establish paternity; establish substantial compliance standards; maintain an adequate case record; notify employers of the duty to withhold wages; create a Federal Parent Locator Service; and pay the fifty dollar pass through<sup>115</sup> (the requirement Justice O’Connor suggested might create a private right).<sup>116</sup> The court found that the intent of each of these sections was to improve the overall efficiency of the program rather than to benefit individual custodial parents.<sup>117</sup> Once again, however, the court suggested other provisions in the IV-D statutes relating to notice might create a private right.<sup>118</sup> The court followed its analysis of legislative intent with some telling reflections on the nine previous years in which it had recognized a private right of action.

[W]hile the Court makes no apologies for its actions over the past nine years, and in fact feels as though its endeavors have required the CAO to achieve higher standards, the Court none-the-less [sic] recognizes that it ultimately became part of a process that involved micro-management of the CAO. The ensuing micro-management should truthfully come as no surprise. After all, what alternate path is left a court which begins from a premise that holds custodial parents have a generalized right to have the state agency efficiently comply with all statutory and regulatory requirements? Requiring Defendants here to effectively comply necessitates delving into the

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111. *Id.* at 340-41 (citations omitted).

112. *See id.* at 345-46. The Court identified one such possible provision as § 657, requiring “pass through” to recipients of the first fifty dollars of support payments obtained by the program. *See id.*; 42 U.S.C. § 657(b)(1) (1994).

113. 981 F. Supp. 423 (S.D. W. Va. 1997).

114. *See id.* at 439.

115. *See id.* at 438-41.

116. *See Blessing*, 520 U.S. at 345-46.

117. *See Brinkley*, 981 F. Supp. at 439-41.

118. *See id.* at 436-37.

minutia of the Defendants' day-to-day operations. Clearly the United States Supreme Court now recognizes that fact, as well as the impropriety of following such a course, or beginning with such a premise.<sup>119</sup>

In the court's opinion, one can hear a sigh of relief at having found a solution to the obvious ethical difficulties presented by identifying the parent as the client, and the administrative nightmare of courts trying to protect the interests of the parents so identified. The solution—characterizing parents as “recipients” or “witnesses” rather than clients—was consistent with the changing structure of IV-D enforcement as well. IV-D attorneys were increasingly incorporated into state government agencies with “other significant law enforcement responsibilities, such as the Attorney General's Office or the State Department of Revenue.”<sup>120</sup> The attorneys in these agencies would be less likely to view themselves as private attorneys hired by the state to represent individuals and more in the role of “prosecutors” enforcing state laws.<sup>121</sup>

Implicit in this analysis was an assumption that the role of IV-D attorneys is an either/or choice. Prosecutors serve the public interest.<sup>122</sup> They may not simultaneously serve conflicting private interests.<sup>123</sup> Likewise, attorneys for private interests may not be delegated prosecutorial power.<sup>124</sup> Therefore, IV-D attorneys must either represent parents' private interests or the public's interest, but dual representation is not possible.<sup>125</sup> An interpretation that the IV-D attorney represents the parents presents too many ethical conflicts given the constraints placed on that relationship by the statutes. Thus, the preferred solution would be to characterize parents as something other than clients.

This “solution” to the ethical dilemmas presented by IV-D representation spread quietly but rapidly through state legislatures. For example, Texas law had long provided that “[a]ttorneys employed by the

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119. *Id.*

120. Ira Mark Ellman et al., *Family Law* 578 (3d ed. 1998).

121. “Texas has dramatically improved its collection rates by recognizing child support collection as a law enforcement problem instead of merely a ‘welfare problem.’” Calhoun, *Juggernaut*, *supra* note 5, at 957.

122. *See Berger v. United States*, 295 U.S. 78, 88 (1935); Model Rules of Professional Conduct Rule 3.8 cmt. (1998).

123. *See ABA Comm. on Professional Ethics*, Informal Op. C-772 (1964).

124. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793-96 (1987); *see also Department of Social Servs. v. Montero*, 758 P.2d 690, 695 (Haw. Ct. App. 1988) (stating that the appointment of an interested prosecutor is never harmless error); *Woodside v. Woodside*, Appeal No. 01-A-01-9503-PB-00121, 1995 Tenn. App. LEXIS 694, at \*8 (Tenn. Ct. App. Oct. 25, 1995) (finding it unconstitutional to appoint a wife's attorney as the private prosecutor of a criminal contempt action brought against the husband for failure to pay child support).

125. This was the analysis relied upon by the court in *Haney v. State*, 850 P.2d 1087, 1092 (Okla. 1993).

attorney general may represent the state *or other parties* in a suit to establish or modify a child support obligation, collect child support, or determine paternity . . . .<sup>126</sup> In 1996, however, this language was amended to disclaim any representation of individual parties and to declare the state the sole client.<sup>127</sup> Similar amendments have occurred or have been proposed in the laws of most other states.<sup>128</sup> In some states, the effect of this legislation has been clarified further through ethics opinions.<sup>129</sup>

Today, it is difficult to locate a state in which one can fully support the assumption that the parent is the client of a IV-D attorney. Nearly all state statutes expressly disclaim an attorney-client relationship with parents or children or define the relationship as one in which the enforcement attorney represents the state or enforcement agency alone. The majority of states avoid the conflict of interests in representation of parents by negative language precluding any attorney-client privilege between the agency attorney and the parents.<sup>130</sup> Some state statutes indicate that the IV-D agency or attorneys performing child support enforcement functions represent the state<sup>131</sup> or the de-

126. Tex. Hum. Res. Code Ann. § 76.007 (West 1990) (emphasis added).

127. See Tex. Fam. Code Ann. § 231.0012 (West Supp. 1999).

128. For a look at pre- and post-amendment statutes, compare Ark. Code Ann. § 9-14-210 (1991), with Act of Apr. 1, 1997, (visited Feb. 27, 1999) <<http://www.arkleg.state.ar.us/ftproot/acts/1997.htm/1296.htm>> (codified as amended at Ark. Code Ann. § 9-14-210(d) (1995)); Minn. Stat. Ann. § 257.69 (1992), and Act of June 1, 1995 (visited Feb. 27, 1999) <<http://www.revisor.leg.state.mn.us/slaws.1995/c257.html>> (codified as amended at Minn. Stat. Ann. § 518.255 (1996)).

129. See Board of Prof'l Responsibility, Supreme Court of Tenn., Formal Ethics Op. 90-F-123 (1990); Committee on Legal Ethics, Oregon State Bar Ass'n, Formal Op. 527 (1989); Standing Comm. on Legal Ethics, Virginia State Bar, Opinion 964 (1988) (stating that the department is the sole client and specifically negating a relationship with parents or others); J. Anthony McLain, Opinions of the General Counsel, *Alabama's Child Support Program: Ethical Procedures*, Ala. Law., Nov. 1996, at 361, 361-63.

130. See Ala. Code § 38-10-7.1 (Supp. 1998); Ariz. Rev. Stat. Ann. § 25-509 (West Supp. 1998); Ark. Code Ann. § 9-14-210(d) (Michie 1995); Cal. Welf. & Inst. Code § 11478.2(a) (West Supp. 1999); Colo. Rev. Stat. § 20-1-102 (1998); Fla. Stat. Ann. § 409.2564(5) (West 1998); Ga. Code Ann. § 19-11-23 (Supp. 1998) (stating that the "department shall be the sole client"); 305 Ill. Comp. Stat. Ann. § 5/10-3.1 (West Supp. 1998); Kan. Stat. Ann. §39-756(b)(3)(e) (1995); Ky. Rev. Stat. Ann. § 205.712 (Michie 1995); Me. Rev. Stat. Ann. tit. 19A, § 2103(5) (West 1998); Mass. Ann. Laws ch. 119A, § 3 (Law Co.-op. 1994); Minn. Stat. Ann. § 518.255 (West Supp. 1999); Miss. Code Ann. § 43-19-35(3) (1993); Mo. Ann. Stat. § 568.040(1) (West 1979); Nev. Rev. Stat. Ann. § 125B.150(3) (Michie 1998); N.D. Cent. Code Ann. § 14-09-09.27 (1997); Okla. Stat. Ann. tit. 56, § 237.3(B) (West Supp. 1999); Or. Rev. Stat. Ann. § 25.080 (1988); S.C. Code Ann. § 43-5-590 (West Supp. 1998); Tenn. Code Ann. § 71-3-124(d) (1995); Tex. Fam. Code Ann. § 231.109 (West 1996); Utah Code Ann. § 78-45-9(3) (1996); Wash. Rev. Code Ann. § 74.20.220 (West Supp. 1999); W. Va. Code Ann. § 48A-2-21(b) (Michie 1998); Wis. Stat. Ann. § 767.075(2)(b) (West 1993).

131. See Ariz. Rev. Stat. Ann. § 25-509 (West Supp. 1998) (authorizing the district attorney to intervene); Conn. Gen. Stat. Ann. § 46b-231(t)(1) (West 1995); Iowa Code Ann. § 252B.7(4) (West Supp. 1998); N.Y. Fam. Ct. Act § 254 (McKinney 1999); N.C. Gen. Stat. § 110-135 (1995).

partment,<sup>132</sup> often with no explicit indication that the representation is intended to be exclusive. Some use both affirmative and negative language, with some detail as to the effect on powers.<sup>133</sup> Kansas, for example, provides:

[T]he social and rehabilitation services' attorney or the attorneys with whom such agency contracts to provide such [enforcement of child support and establishment of paternity] services shall represent the state department of social and rehabilitation services. Nothing in this section shall be construed to modify statutory mandate, authority or confidentiality required by any governmental agency.<sup>134</sup>

Statutes as comprehensive as these significantly impact the ethical responsibilities of the enforcement attorney, seemingly eliminating the conflicts and limitations imposed when parents are considered clients. Query, however, whether an attorney-client relationship be precluded so simply. Can one simply waive a magic legislative wand and characterize those who appear to be clients as something other?

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132. See Fla. Stat. Ann. § 409.2564(5) (West 1998) (defining attorney as one representing the department); Ga. Code Ann. § 19-11-23(b) (Supp. 1998) (noting that the department shall be the sole client); R.I. Gen. Laws § 15-9-3 (1996) (stating that the enforcement attorney "shall represent the department of children, youth, and families"); S.D. Codified Laws § 28-1-11 (Michie 1998); Utah Code Ann. § 78-45-9 (2)(C) (1996).

133. For example, the California statute states:

In all actions involving paternity or support . . . the district attorney and Attorney General represent the public interest in establishing, modifying, and enforcing support obligations. No attorney-client relationship shall be deemed to have been created between the district attorney or Attorney General and any person by virtue of the action of the district attorney or the Attorney General in carrying out these statutory duties.

Cal. Welf. & Inst. Code § 11478.2(6) (West Supp. 1999); see Col. Rev. Stat. § 20-1-102 (1998) (authorizing the district attorney to use any remedy, including criminal and civil sanctions, and specifying the state as the client); La. Rev. Stat. Ann. § 46:236.1 (West Supp. 1999) (stating that the attorney "shall represent the state of Louisiana, Department of Social Services exclusively"); Me. Rev. Stat. Ann. tit. 19A, § 2103(5) (West 1998) (stating that the attorney represents solely the interest of the state); Miss. Code Ann. § 43-19-35(3) (1993) (stating that the attorney represents State Department of Human Services exclusively); Nev. Rev. Stat. Ann. § 125B.150(3) (Michie 1998) (stating that the attorney represents the state, specifically negating other attorney-client relationships); N.D. Cent. Code Ann. § 14-09-09.27 (1997) (same); Okla. Stat. tit. 56, § 237.3 (West Supp. 1999) (same); Or. Rev. Stat. Ann. § 25.080 (1988) (stating that the attorney is responsible for providing support enforcement services on behalf of the state); S.C. Code Ann. § 43-5-590 (Supp. 1998) (stating that the attorney represents state, and specifically negates other attorney-client relationships). Even in the few states that do retain statutes indicating that the public attorney represents the parent or child, the practice is to treat the representation as a dual representation and have the client waive any conflicts or confidentiality restrictions.

134. Kan. Stat. Ann. § 39-756(e) (1993).



### III. THE POWER OF LEGISLATURES TO DISCLAIM AN ATTORNEY-CLIENT RELATIONSHIP

State courts have the authority to regulate the practice of law even without any legislative or express constitutional authorization. Most courts say that the power to regulate attorneys is simply "inherent," that is, essential to what it means to be a court.<sup>135</sup> Most courts maintain that these inherent powers vest in the courts upon their creation.<sup>136</sup> The definition of a court's inherent powers to regulate the practice of law has been described as "nebulous, and its bounds as 'shadowy.'"<sup>137</sup> For most courts, however, the power is interpreted broadly to include the power to "define and regulate all facets of the practice of law, including the admission of attorneys to the bar, the professional responsibility and conduct of lawyers, the discipline, suspension and disbarment of lawyers, and the client-attorney relationship."<sup>138</sup>

Whether a IV-D attorney represents a parent as a client would be the type of determination that traditionally falls within the inherent power of the courts. Any determination of a lawyer's duty must first identify to whom that duty is owed. Indeed, one of the most common exercises of courts' inherent power is ruling on disqualification mo-

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135. See, e.g., *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856) ("[I]t has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed.").

136. See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 224 (1821); see also *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962) (stating that inherent powers are "necessarily vested in courts to manage their own affairs"). Some state constitutions provide that their supreme court has power to make rules governing attorney admission and discipline. See, e.g., Ark. Const. amend. 28 ("The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law."); Fla. Const. art. V, § 15 ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."); Ky. Const. § 116 ("The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar."); Mont. Const. art. VII, § 2 ("The supreme court . . . may make rules governing . . . admission to the bar and the conduct of its members."); N.J. Const. art. VI, § 3 ¶ 3 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."); Pa. Const. art. V, § 10 ("The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . including . . . admission to the bar and to practice law . . ."). Most other courts derive their inherent power from the more general grants of power to courts provided for in their constitutions. This inherent power of the judicial branch of government to regulate the practice of law does not depend on any express constitutional grant or on the legislative will; rather, it exists because of the intimate connection between the practice of law and the exercise of judicial power in the administration of justice. See *De Krasner v. Boykin*, 186 S.E. 701, 704-05 (Ga. 1936). At the federal level, while federal courts claim an inherent power to regulate attorneys appearing before them, Congress has also expressly delegated that power to the lower federal courts. See Judiciary Act of 1789, ch. 20, 28 U.S.C. § 1654 (1994).

137. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) (en banc).

138. *Succession of Wallace*, 574 So. 2d 348, 350 (La. 1991) (citations omitted).

tions. In ruling on those motions, courts must regularly decide the "client identity" issue.

The question truly is not whether courts have the power to deem an attorney-client relationship present. The question is whether that power is exclusive to the courts. Courts are extremely reluctant to directly address the constitutionality of state legislation under this "negative inherent powers" doctrine.<sup>139</sup> Courts avoid facing this issue by finding that the statutes are ones of broad general application or, to the extent the statutes are addressed to the practice of law only, are compatible with or supplement the courts' powers. While many courts say that they have the exclusive power to regulate the practice of law, they nonetheless will enforce legislation regulating lawyers as a matter of comity.

Under this doctrine of exclusive inherent powers, would a state statutory disclaimer of an attorney-client relationship be constitutional? Can these statutes effectively preclude an attorney-client relationship? To predict the answer to that question, one might look to the treatment by courts of legislation allowing attorneys to practice in corporate forms that limit liability.<sup>140</sup> A number of courts have held that the statutes insulating those who operate within professional corporations and limited liability partnerships could not be applied to attorneys, as the determination of liability for breach of an attorney's duty is within the sole province of the courts to determine.<sup>141</sup>

Likewise, it seems that courts could rightly conclude that statutes disclaiming an attorney-client relationship between IV-D attorneys and parents would also be unconstitutional under a separation of powers analysis. Such statutes are not ones of general applicability—they are directed at attorneys only—and so within the court's authority. Moreover, a fairly strong argument exists "that a direct and funda-

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139. Charles W. Wolfram, *Modern Legal Ethics* § 2.2.3, at 27-31 (1986) (discussing negative inherent powers of the courts).

140. See Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. Tex. L. Rev. 359, 370-73 (1998); see also Debra L. Thill, Comment, *The Inherent Powers Doctrine and Regulation of the Practice of Law: Will Minnesota Attorneys Practicing in Professional Corporations or Limited Liability Companies Be Denied the Benefit of Statutory Liability Shields?*, 20 Wm. Mitchell L. Rev. 1143, 1163-70 (1994) (discussing the courts' use of inherent powers to invalidate the liability shield for attorneys).

141. See, e.g., *In re The Fla. Bar*, 133 So. 2d 554, 557 (Fla. 1961) (approving lawyer practice in professional corporations but noting that the court would have the power to decide otherwise); *First Bank & Trust Co. v. Zagoria*, 302 S.E.2d 674, 675-76 (Ga. 1983) (holding that attorneys may limit liability through the corporate form), *overruled by Henderson v. HSI Fin. Servs., Inc.*, 471 S.E.2d 885, 886 (Ga. 1996) (overruling *Zagoria* "to the extent it states that this court, rather than the legislative enabling act, determines the ability of lawyers to insulate themselves from personal liability"); *In re Bar Assoc.*, 516 P.2d 1267, 1268 (Haw. 1973) (refusing to allow limited liability); *Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp.*, 943 P.2d 104, 107-09 (N.M. 1997) (holding that a professional corporation statute cannot confer limited liability for an attorney-shareholder).

mental conflict exists between the operation of the statute in question, as it applies to attorneys, and attorneys' settled ethical obligations, as embodied in this state's Rules of Professional Conduct or some well-established common law rule."<sup>142</sup> The rules governing the creation of the attorney-client relationship increasingly base the existence of that relationship on the reasonable expectations of the client.<sup>143</sup> The Restatement (Third) of the Law Governing Lawyers, for example, declares that an attorney-client relationship is established when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person" and either the lawyer "manifests to the person consent to do so" or "the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services."<sup>144</sup> Thus, a statute that would attempt to disclaim an attorney-client relationship where the facts are such that the parent reasonably expected they were being represented would indeed interfere with the function of the courts in regulating the ethical standards of attorney practice.

IV-D attorneys appear to recognize that these statutory disclaimers will not, by themselves, free the attorney from representation of the parents. For example, in a memorandum distributed to child support enforcement attorneys, the Kansas Child Support Enforcement Program instructs attorneys that they should advise all applicants and recipients of the child support enforcement program's services of their role and refer to the applicant or recipient of services as their "client" in order to avoid even an "implied" attorney-client relationship.<sup>145</sup> Other steps that IV-D programs require of attorneys include:

removing references to the parent or child as 'clients' in all statutes, regulations, policies, forms, and legal pleadings; captioning all legal pleadings relating to the delivery of IV-D services for establishment and enforcement of child support in the name of the State, and clearly specifying that the IV-D attorney is not the attorney for either of the parents; and, notifying both parents in writing that the IV-D agency or its attorneys do not represent either parent and that either parent may obtain private counsel.<sup>146</sup>

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142. Santa Clara County Counsel Attorneys Ass'n v. Woodside, 869 P.2d 1142, 1152 (Cal. 1994) (en banc).

143. See Note, *An Expectations Approach to Client Identity*, 106 Harv. L. Rev. 687, 688 (1993) (discussing the newly emerging "reasonable constituent's expectation approach" to determining the attorney's relationship with corporate constituents).

144. Restatement (Third) of the Law Governing Lawyers § 26 (Proposed Final Draft No. 1, 1996).

145. Memorandum from Kansas Dep't of Soc. & Rehabilitation Servs., Child Support Enforcement Program, to CSE Attorneys (March 9, 1992) (on file with author). For more information, contact Chief of Litigation, Child Support Enforcement Program (913) 296-2629.

146. OCSE, *Delivering Program Services*, supra note 56 (quoting State Best Practices in Child Support Enforcement (OCSE-IM-92-05, Oct. 19, 1992)).

Despite the strong basis for declaring these statutes void under separation of powers analysis, this argument has not been addressed directly by the courts called upon to use these statutes. Rather, the courts have simply concluded that there is no attorney-client relationship between the IV-D attorney and the parent.<sup>147</sup> The only decision with language even appearing to recognize the issue is *Gibson v. Johnson*,<sup>148</sup> an Oregon Court of Appeals decision in which a class action was filed seeking injunctive relief against the Department of Human Resources to improve its child support collection practices. The class was made up of public assistance recipients who had or would be asked to cooperate in enforcing support orders.<sup>149</sup> The court held that, given the assignment of rights required by Oregon law and the duty of cooperation imposed on parents, the IV-D attorney must obviously represent only the state.<sup>150</sup> No statute dictated this result, however, and in a concurring opinion, Judge Joseph commented, "This is not a case in which a trial judge has exercised his inherent power to control the conduct of lawyers involved in litigation before him. It is a class action on behalf of a very large and ever changing class."<sup>151</sup>

Accordingly, while it seems that courts might indeed have a basis for invalidating these statutory disclaimers, they are unlikely to take on this battle. Professor Wolfram has opined that the inherent powers doctrine has been so seriously undermined as to make it an unlikely battleground: "Both the splintering of bar support for or at least interest in preserving the doctrine and its obvious internal weakness may mean that in the future it will be resorted to less frequently by courts."<sup>152</sup> Certainly, courts are unlikely to invoke their exclusive power to regulate the practice of law when the result of declaring void a statutory disclaimer of liability would be to place the courts in the managerial center of "a tactical stage in a wide-ranging strategic dispute between the Attorney General and the [child support enforcement agencies] on one side and the class [of parents] and its counsel on the other."<sup>153</sup>

#### IV. STATUTORY DISCLAIMERS OF LIABILITY: A SOLUTION TO ETHICAL DILEMMAS IN GOVERNMENT FUNDING OF LEGAL SERVICES?

What is the impact of these statutory disclaimers? Does the IV-D attorney have no duty to the parents? Clearly the IV-D attorney does

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147. See, e.g., *Haney v. Oklahoma*, 850 P.2d 1087, 1090-91 (Okla. 1993) (concluding that "the State was always intended to be the client").

148. 582 P.2d 452, 456 (Or. Ct. App. 1978).

149. See *id.* at 453.

150. See *id.* at 456.

151. *Id.* (Joseph, J., concurring).

152. Wolfram, *supra* note 140, at 395.

153. *Gibson*, 582 P.2d at 456 (Joseph, J., concurring).

not have those duties that one would owe to a client, though legislation may place some closely analogous duties upon enforcement attorneys. One effect of these statutes is to deny custodial parents any control in pursuing paternity or child support actions. Because the state is the client, the state alone has the right to control the actions of the attorney.<sup>154</sup> The client is “forced” to communicate and cooperate with the attorney in the pursuit of pre-determined goals, even if these goals and communications may be against the parent’s interest. For example, the custodial parent may wish to use the threat of a formal support action to encourage the non-custodial parent to resume or begin to provide informal (financial or in-kind) support. The custodial parent may disclose that he or she has received such informal support in the past without disclosing that to the public assistance agency (thus raising fraud issues). Other custodial parents may want to sever all ties with the non-custodial parent because of a fear of excessive interference or abuse.<sup>155</sup> While states do have good cause exceptions to the rules of mandatory cooperation,<sup>156</sup> where an action would pose a safety threat, these exceptions are very narrow and poorly communicated to the parents. In nearly all cases where there is a finding that good cause excusing cooperation exists, the result is that the support action is simply dropped.<sup>157</sup>

Because the state—not the parents, the child, or any other individual—is the “client,” the recipient of state child support enforcement services is afforded no attorney-client privilege protection for communications with the enforcement attorney. Statutory mandates of confidentiality, however, may provide some measure of protection for parents.<sup>158</sup> Several state statutes follow their statutory disclaimer with language indicating that the statute should not be construed to modify

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154. See, e.g., Kan. Stat. Ann. § 39-756(e) (1993) (stating that “[a]ny representation by such attorney shall not be construed to create an attorney-client relationship between the attorney and any party”).

155. See Irwin Garfinkel, *The Child-Support Revolution*, 84 Am. Econ. Ass’n Papers & Proceedings 81 (1994); Joel F. Handler, *Welfare Reform: Is It for Real?*, 3 Loy. Poverty L.J. 135, 150 (1997) (citing Kathryn Edin, *Single Mothers and Child Support: The Possibilities and Limits of Child Support Policy*, 17 Children and Youth Servs. Rev. 203 (1995)).

156. Forty-three percent of unwed mothers do not want a paternity and support order. There is some evidence that for never-married fathers, increased support actions will exacerbate tensions and actually harm the children. See David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 Va. L. Rev. 2575, 2600-03 (1995) [hereinafter Chambers, *Virtues and Perils*].

157. See 42 U.S.C. § 654(29)(A) (Supp. II 1996) (providing that states must provide such a good cause exemption). For an overview of the various state approaches to good cause, see Center for Law and Social Policy, Inc., *State Child Support Cooperation and Good Cause—A Preliminary Look at State Policies* (last modified Oct. 30, 1998) <<http://www.clasp.org/pubs/childsupport/coopsum.htm>>.

158. See Center for Law and Soc. Pol’y, Inc., *Implementing the Family Violence Option: Lessons from Child Support* (last modified Mar. 8, 1998) <<http://www.clasp.org/pubs/childrenforce/fvo.htm>>.

any "statutory mandate, authority or confidentiality required by any governmental agency."<sup>159</sup> While these provisions might protect a custodial parent's privacy as against the general public—in open records or freedom of information act actions, for example, it would not provide nearly the scope of confidentiality implicit in an attorney-client relationship. In particular, custodial parents would have no confidentiality vis-à-vis the government. For example, an attorney representing a custodial parent who learns of the client's fraud on the government (as when a parent is accepting, but not reporting, informal support), the attorney is under a duty in most jurisdictions to refrain from disclosing the fraud.<sup>160</sup> The enforcement attorney, however, would not only be able but also would be required to disclose this information as a representative of the state-client.<sup>161</sup>

Likewise, the parent-recipient cannot expect any duty of loyalty from the enforcement attorney. If a custodial parent has been represented by an enforcement attorney, and there is a later change in custody or the non-custodial parent seeks IV-D assistance in modifying the support order, the enforcement attorney would face no conflict of interest bar to bringing an action against the parent whom he or she previously "represented."<sup>162</sup> While courts have found in other contexts that attorneys may be disqualified based on their receipt of confidential information, even if no attorney-client relationship is established, the waiver of confidentiality these statutes imply may foreclose even that analysis. To be sure, some statutes require that enforcement attorneys make this situation clear through mandated disclosures of the limits of confidentiality.<sup>163</sup>

Finally, there is no duty of competence that runs to the parent.<sup>164</sup> One effect of these statutes is to negate the privity upon which malpractice actions depend. Even without privity, however, attorneys may be liable in malpractice in some circumstances. One might question whether an enforcement attorney could be liable to a custodial parent under a third-party beneficiary analysis. In his concurring

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159. 45 C.F.R. § 307.13 (1998) (noting that states must have written policies concerning access to IV-D data, regularly monitor access and use of data, train employees on confidentiality policies, and enact administrative penalties for unauthorized disclosure or use).

160. See Model Rules of Professional Conduct Rule 1.6 (1998).

161. See *id.* Rule 1.3.

162. *Monterey County v. Cornejo*, 812 P.2d 586, 595 (Cal. 1991) (en banc). *But see In re Marriage of Abernethy*, 7 Cal. Rptr. 2d 342, 344-45 (Ct. App. 1992) (holding that prior private representation of a father disqualifies the district attorney from representing the mother in proceedings for modification of support orders).

163. See, e.g., Tenn. Code Ann. § 71-3-124(D) (1995) (requiring an attorney to inform recipients that they are owed no confidentiality or other "incidents of the lawyer-client relationship").

164. *Jager v. County of Alameda*, 10 Cal. Rptr. 2d 293, 294 (Ct. App. 1992) (noting that a mother alleged that a district attorney negligently released her child support lien despite an undercalculation of arrears and interest).

opinion in *Blessing*, Justice Scalia raised just such a possibility when he commented that the third-party beneficiary theory was not available at the time § 1983 was adopted.<sup>165</sup> While that might preclude a § 1983 action, it does suggest a state law basis for liability. It seems likely, however, that even under a third-party beneficiary doctrine, these statutes would be interpreted to go beyond merely disclaiming privity and would create a form of sovereign immunity for the attorneys involved.<sup>166</sup>

Even with immunity, there may be exceptions. Florida's child support enforcement disclaimer, for example, notes that the disclaimer makes enforcement agents "immune from liability in tort for actions taken to establish, enforce, or modify support obligations if such actions are taken in good faith, with apparent legal authority, without malicious purpose, and in a manner not exhibiting wanton and willful disregard of rights or property of another."<sup>167</sup> Even without this limiting language, courts have adopted a functional approach in applying common law prosecutorial immunity doctrine to public attorneys in other contexts.<sup>168</sup> They could also, again under the inherent powers doctrine, limit the application of these statutory grants of immunity to child support enforcement attorneys.

Courts are likely to apply these immunity doctrines broadly to encompass liability, disqualification, and privilege doctrines because the courts recognize that the legislative purpose in extending these immunities is to create efficient programs on limited budgets. The one clear exception to immunity, however, regardless of its source, is in discipline. To the extent IV-D attorneys violate their ethical duties, they are subject to discipline just as any other attorney.<sup>169</sup> This discipline could encompass not only violating duties to the client (the state) but also duties of fairness to third parties and candor to the court. Even here, however, effective control of IV-D attorneys is unlikely. Studies

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165. See *Blessing v. Freestone*, 520 U.S. 329, 349 (1996) (Scalia, J., concurring).

166. Cf. *Department of Human Resources v. Money*, 473 S.E.2d 200, 201 (Ga. Ct. App. 1996) (holding that sovereign immunity barred tort claims against the department in a child support collection action); *Noble v. Office of Child Support*, 721 A.2d 121, 124 (Vt. 1998) (noting that sovereign immunity bars actions under the state fair debt collection statute against the child support agency).

167. Fla. Stat. ch. 409.2564(6) (1998).

168. See, e.g., *Collins v. Tabet*, 806 P.2d 40, 52-53 (N.M. 1991) (treating the role of guardian *ad litem* as one subject to judicial immunity).

169. See *Impler v. Pachtman*, 424 U.S. 409, 429 (1976) (holding a prosecutor immune from civil suit for damages for initiating and pursuing a criminal prosecution but noting that the immunity does not exempt the prosecutor from professional discipline); see also *Malley v. Briggs*, 475 U.S. 335, 343 n.5 (1986) ("The organized bar's development and enforcement of professional standards for prosecutors also lessen the danger that absolute immunity will become a shield for prosecutorial misconduct.").

of discipline of prosecutors indicate that sanction is rare, with the primary sanction being comments in judicial opinions.<sup>170</sup>

Obviously, then, these statutes can have a profound impact on the provision of child support enforcement services. Without these statutes, attorneys enforcing child support orders on behalf of the state and the parent would be left with irreconcilable conflicts of interest and unethical limitations on their independent professional judgment. Courts would face the burden of sorting out the mess. Instead, these statutes shift the burden to the attorneys—to provide adequate notice of the limitations of their role—and to the parents—to insure that their relationship with the attorney walks the fine balance between mandated cooperation and guarded privacy. It is not a comfortable solution for many of the attorneys and clients involved, but it may be the only practical solution.

#### CONCLUSION

The child support enforcement attorney assists parents and the state in establishing paternity and in setting, modifying, and enforcing child support awards. While the facts of the representation might in many instances look as if this is a dual representation, state legislatures have acted to counter that appearance. Statutes disclaim any attorney-client relationship between the public attorney and anyone other than the state. While one might argue that this type of legislation conflicts with the court's inherent power to control the practice of law, courts are unlikely to accept that argument for both theoretical and practical reasons.

The real question for this conference, however, is not the scope and effectiveness of these statutes in avoiding the ethical dilemmas posed by the government attorney's role in child support enforcement. The interesting question is whether this same approach could be taken to avoiding ethical dilemmas in a wide variety of settings in which the government funds legal assistance to low-income persons. Is it too far-fetched to imagine recipients of federal or state housing assistance also being provided—and then required to cooperate with—legal assistance in enforcing their rights against private landlords? How about legal assistance in pursuing actions against employers or doctors as a benefit/condition of unemployment compensation or medical benefits? Could legal aid offices be slowly transformed into government agencies for enforcement of public rights against those who commit the "crime" of "causing poverty"?<sup>171</sup>

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170. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *Fordham L. Rev.* 851, 896-99 (1995).

171. Recall that courts have held legal aid attorneys to be government officials for other purposes. See, e.g., *Dixon v. Georgia Indigent Legal Servs., Inc.*, 388 F. Supp. 1156, 1161-62 (S.D. Ga. 1974) (considering a legal aid attorney funded by the Office



Would this approach be preferable to more limited restrictions on attorneys funded by the government? Would it more accurately reflect the relationship of the entities and parties involved? Which is better: for attorneys to “mirandize” the individuals they serve with an “I am not your lawyer” speech; or for attorneys to ask their clients—many of whom have no alternative sources for legal assistance—to “consent” to limitations on the attorney’s representation imposed by the government funding? The former approach casts the “deserving poor” in the role of victims and does little to empower them or allow them individualized representation. The latter approach places attorneys in the thick of the ethical dilemmas and resource limitations which have been the subject of this conference. Of course, neither approach is optimal of course. Neither approach is an effective substitute for adequate, unrestricted funding to ensure equal access to justice. Advocates for low-income persons may find, however, that the battle against funding restrictions may only be the first step in an overall trend toward redefining government-funded legal services in even more fundamental ways.

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of Economic Opportunity to be a federal officer for the purpose of a statute permitting removal to federal court), *aff'd*, 532 F.2d 1373 (5th Cir. 1976); *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841, 847 (S.D.N.Y. 1973) (same).

*Notes & Observations*