IN THE COURT OF THE JUDICIARY OF ALABAMA

In The Matter of	)	
	)	
ANITA KELLY	)	
	)	
Circuit Judge,	)	**Case No.: COJ 50**
	)	
15th Judicial Circuit.	)	

NON-PARTY DEPARTMENT OF HUMAN RESOURCES' RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO MODIFY AND FOR RECONSIDERATION

COMES NOW the Alabama Department of Human Resources (hereinafter "ADHR"), non-party to this action, and submits the following in opposition to the Respondent's Motion to Modify Conditions, and to Reconsider Denial of Identification of Telephone Numbers and Current Employer[1], in Order Compelling Alabama DHR to Identify Former Montgomery County DHR Employees:

I. Introduction

This Court has afforded the Respondent the opportunity to receive from non-party Alabama Department of Human Resources (DHR) a list of the names and addresses of former Montgomery County Department of Human Resources (MDHR) employees while balancing the DHR's interests as a governmental client. It is unclear if the Respondent has made any attempt to take advantage of this Court's Order dated January 12, 2018, by notifying DHR within forty-eight (48) hours in advance and sending letters to any employees on the list.

Respondent does not appear to challenge that DHR is a governmental client. Rather, is alleged that former employees should be contacted without notification to agency counsel and

[1] The Respondent assumes DHR has information as to prospective employment. There is no requirement that former employees provide where they are currently employed.

further has indicated that the personal phone numbers of the former employees is needed. The Respondent has also claimed that DHR has waived the attorney client privilege despite the fact that the attorney client privilege, attorney work product and intra-governmental privilege were asserted from the beginning in its Motion to Quash filed on November 21, 2017. DHR has not wavered in this assertion.

The crux of the Respondent's argument is that somehow non-attorney former employees who are supposedly "whistleblowers" of matters that have not been disclosed by the Respondent. This would require those former employees to be on their own so to speak to figure out what information that they could disclose.

II. The Respondent has that shown that the Attorney Client Privilege is not applicable to former MCDHR staff.

The list provided to the Respondent contains employees that worked in child welfare and in child support. [2]ADHR administers a child welfare program that entails many responsibilities. *See* Ala. Code §§ 38-2-6, 26-14-6.1 (1975) which concern the agency's enabling statue and its child abuse and neglect investigations respectively. Additionally, the agency as a part of its duties, safety and permanency planning is at the core of service for children.[3] Cases are staffed with agency attorneys and county staff every day to address the best possible outcomes for children. The Respondent served as a judge that routinely saw agency attorneys in court with child welfare staff on child welfare matters. Hence, any communications about cases would inherently invade the attorney client-privilege. Moreover, the attorney client relationship is very important because workers consult with attorneys not only about court proceedings but also as to

[2] There are some employees on the list that may be employed by DHR in different counties or at the State Office. Thus, the Respondent has been provided anyone who was a former employee of MCDHR since January of 2012 without regard as to whether they are still working for the agency.

petition filings that are on records with AOC. Those records will reflect names of child welfare involved in terms of who filed petitions and the basis of the said petitions. Motions filed will specify the relief sought on behalf of DHR as a client. The Respondent has provided no guideposts as to what questions would be asked of the former employees of MDHR. This further compounded by the fact that the request to modify the Court's Order is after the status conference of January 25, 2018 and the agreed upon protective order . The Respondent has waited more than thirty (30) days to challenge this Court's Order dated January 12, 2018. The pending motion to modify this Court's Order was filed on February 14, 2018. DHR asserts it is untimely in light of Rule 59 of the Alabama Rules of Civil Procedure .

DHR is also a client as to any employees that handled child support matters before the Respondent. DHR as a state agency is responsible for the establishment, modification, and enforcement of support obligations as provided for and required by Title IV-D of the Social Security Act. The Alabama State Bar has recognized that the agency attorney in an IV-D case represents DHR pursuant to Ala. Code § 38-10-7.1. *See* Exhibit 4 attached and incorporated by reference herein. The attorney client relationship through professional legal services for court representation and preparation of pleadings and motions are inherent in child support cases that are pending before a trial judge.

The agency has cooperated with the Respondent by having the depositions of two agency attorneys scheduled. While the Plaintiff did attempt to elaborate on the testimony of the Chief Legal Counsel in the most recent filing, she did not disclose that her attorney had not concluded questioning so the transcript provided is without the benefit of any questioning by the JIC's counsel or DHR's counsel's attorney. There is nothing in the transcript that relates to why the

[3] DHR also is guided by Adoption and Safe Families Act (ASFA), Public Law 105-89. Additionally, there are state statutes that are referenced in the JIC Complaint which relate to permanency for children.

Respondent could not have mailed letters to the employees on the list provided to the Respondent by now.

DHR cited *Ex parte City of Leeds,* 677 So. 2d 1171 (Ala. 1996), in its response as to Item 28. In the *City of Leeds,* the city and its former its former mayor petitioned for writ of mandamus directing the Jefferson Circuit Court to vacate order in negligence action brought against city directing mayor to disclose certain communications with city attorney made in preparation for deposition, which communications mayor claimed were protected under attorney-client privilege. The Supreme Court held that mayor was a "client" when he made communications with city attorney in preparation for deposition and, thus, mayor could claim attorney-client privilege for confidential communications he had with city attorney. The Court noted that the former mayor was a "client" under Rule 502(a)(1) and that under Rule 502(b), "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client."

All of the cases pending before Judge Kelly on the child welfare cases would have involved an attorney of record for DHR. If the intent of the Respondent and her counsel is to not discuss those cases, one has to wonder why agree to a protective order that protects confidentiality of agency information. Just as the privilege was recognized in this case for a former mayor in *City of Leeds*, it should be recognized in this matter as well for any former child support staff and child welfare staff.

Ethics Opinion, RO-02-03 speaks to Rule 4.2 of the Rules of Professional Responsibility. Rule 4.2 delineates three categories of employees with whom communication is prohibited which includes persons with managerial responsibility on behalf of the organization, and with

any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. *See* Exhibit 1, RO-02-03, attached and incorporated by reference herein. The Office of General Counsel adopted the logic and reasoning of a Massachusetts court decision and concluded that since a cashier did not have authority on behalf of the corporation to make decisions about the course of the litigation, the attorney representing a client in a slip and fall at a retail store was not ethically prohibited form communicating with a cashier at the store. Here, the matters before Judge Kelly involved workers testifying under oath as to recommendations about the lives of children or their families. If it involved child support, then there would be instances of either testimony or information provided on recommendations as to child support guidelines. In other words, DHR staff is not far removed from decision making. In fact, in the child welfare cases, court reports are submitted to the court routinely with recommendations and relief sought in petitions signed by social worker that did bind the agency to a position. The digital access to AOC records should show petitions signed by workers.

Ethics Opinion, RO-92-12 also makes clear that contact with a former employee is ethically permissible, unless the ex parte contact is intended to deal with privileged maters as to divulging prior communications with legal counsel for an adverse party. *See* Exhibit 2, Ro-92-12 attached and incorporated by reference herein.

In the case of *Exxon Corp. v. Dep't of Conservation & Nat. Res.*, 859 So. 2d 1096 (Ala. 2002), the Alabama Appellate Court determined that the disclosure of a letter from an in-house corporate counsel into evidence was highly prejudicial. The Court explained:

> Rule 502(a)(5) states: "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional services to the client or those to whom

> disclosure is reasonably necessary for the transmission of the communication." The evidence must show that the letter was intended to be confidential in order to be protected by the privilege. Whether a party intended the communication to be confidential is dependent on who was privy to the legal advice. In *Upjohn*, the United States Supreme Court abandoned the "control-group" test for determining confidentiality in the corporate setting. The control-group test protected only those communications that were made to employees who had control or who were able to participate in the decision to which the legal advice pertained. 449 U.S. at 390, 101 S.Ct. 677. The United States Supreme Court rejected this test, stating:
>
> "The control group test ... thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy."
>
> 449 U.S. at 392, 101 S.Ct. 677. Reflecting the fact that the scope of the privilege has been broadened beyond the control group, the Advisory Committee's Notes to Rule 502 state that "**the communication may be made only between representatives of the client who are within the 'control group' or whose duties are closely related to the matter about which the communication is made** ...." (Emphasis added.)

Id. at 1104.

DHR child welfare staff and child support workers work closely with DHR attorneys so to allow the relief by the Respondent would circumvent the purpose of the attorney client privilege. Hence, this case does not entail staff that would never have any contact with an agency attorney. Rather the child welfare and child support staff's duties are closely related to any communications about any cases heard by Jude Kelly.

DHR is not a pro se client. Respondent did not cite a case or an opinion that that dealt with attorneys and clients who were in court routinely on matters for an agency.

The American Bar Association (ABA) opposed an attempt to change comprehensive analysis and review data schedules as it related to requiring bank holding companies to report

their legal reserves for pending and probable litigation claims in a letter dated July 13, 2012 to the Board of governors of the Federal Reserve System. *See* Exhibit 3. The ABA noted that the proposal would place the attorney-client privilege and the work product doctrine in serious jeopardy by requiring banks to collect and disclose new quarterly loss data. Further, the ABA noted that banks and other companies establish their legal reserves for litigation claims in close consultation with their lawyers. Because those consultations almost always involve confidential communications between the client and the lawyer as well as extensive legal analysis and the exercise of professional judgment by the lawyer in weighing the relative strengths of claims and defenses, the resulting legal reserve determinations were considered by the ABA to be inherently privileged and work product protected. The ABA also noted that the proposal would severely prejudice the banks' legal position in pending and probable litigation matters and undermine *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

MCDHR staff in cases before a juvenile judge would be represented by counsel in court and would seek advice as needed depending on the facts and circumstances of each case. The exercise of the agency workers judgment about their cases combined with the agency's attorney's professional judgment is very much akin to what the ABA stressed in its letter. The attorney client privilege is vital to state agencies functioning in the court system. Allowing the Respondent and her counsel unfettered access to former MDHR staff without the parameters the Court has put in place would erode the privilege.

III. Conclusion

This Court has afford the Respondent, her counsel, and her counsel's administrative staff to be allowed digital access to information of AOC as to case information in the areas of juvenile dependency, delinquency, child support, and domestic relations. Respondent claims that

there is selective enforcement at issue in this matter. DHR has maintained that the AOC records will reflect that the other juvenile judges did not engage in the same pattern of conduct in terms of delay in ruling in termination of parental rights cases even after one or more motions were filed for entry of order. The defense strategy appears to be to assert that DHR has engaged in some type of conspiracy to expend time and resources to file motions for entry of orders and even seek appellate relief for the purpose of targeting the Respondent. DHR has maintained that its efforts were to serve children contrary to the Respondent's claims. The appellate court cases and the AOC records concerning the Respondent speak for themselves.

RESPECTFULLY SUBMITTED on this the 21st day of February 21, 2018.

STEVE MARSHALL
ATTORNEY GENERAL

SHARON E. FICQUETTE-FIC002
GENERAL COUNSEL

/s/ Felicia M. Brooks
Felicia M. Brooks – BRO153
Deputy Attorney General

COUNSEL FOR NON-PARTY ALABAMA DEPARTMENT OF HUMAN RESOURCES

OF COUNSEL:

State of Alabama
Department of Human Resources
Legal Office
P. O. Box 304000
Montgomery, Alabama 36130-4000

Phone: (334) 242-9330
Facsimile: (334) 242-0689
Email: felicia.brooks@dhr.alabama.gov

CERTIFICATE OF SERVICE

I, the undersigned hereby certify that a true and correct copy of the above and foregoing was filed via electronic mail and first class mail on this the 21st day of February, 2018.

H. Lewis Gillis, Esq.
Kristen J. Gillis, Esq.
Means Gillis Law, LLC
60 Commerce Street, Suite 200
PO Box 5058
Montgomery, AL 36103-5058

Englehart, Esq.
Englehart Law Offices
9457 Alysbury Place
Montgomery, AL 36117-6005

Rosa H. Davis, Esq.
William A. Gunter V, Esq.
Judicial Inquiry Commission
401 Adams Avenue, Suite 720
Montgomery, AL 36104

/s/ Felicia M. Brooks
Felicia M. Brooks – BRO153
OF COUNSEL

ETHICS OPINION

RO-02-03

[Redacted Copy]

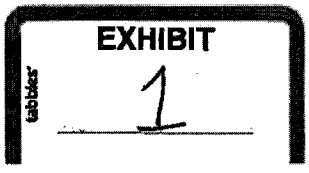
QUESTION:

"I have a slip and fall case in a retail store and I would like an opinion as to whether I can contact directly some of the cashiers. It seems that my client slipped and fell in a certain area of the store. After she fell, she says that one of the cashiers told her that a store employee had been mopping or buffing in that area immediately before the fall and had left moisture. I would like to interview the cashiers to get that straight.

I would be grateful if you would give me an opinion as to whether such an interview would be allowed under the circumstances. It is not my understanding that the cashiers were the people who had done the mopping or buffing."

ANSWER:

Pursuant to Rule 4.2 of the Rules of Professional Conduct of the Alabama State Bar, an attorney may communicate directly with an employee of a corporation or other organization who is the opposing party in pending litigation without the consent of opposing counsel if the employee does not have managerial responsibility in the organization, has not engaged in conduct for which the organization would be liable and is not someone whose statement may constitute an admission on the part of the organization. It is the opinion of the Disciplinary Commission of the Alabama State Bar that the third category, i.e., a "person . . . whose statement may constitute an admission on the part of the organization" should be limited to those employees who have authority on behalf of the organization to make decisions about the course of the litigation.



DISCUSSION:

Communication with persons represented by counsel is governed by Rule 4.2 of the Rules of Professional Conduct, which provides as follows:

> "Rule 4.2 Communication With Person Represented by Counsel
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

When the represented party is a corporation or other organization, communication with some of the employees of the organization is also prohibited.[1]

The Comment to Rule 4.2 delineates three categories of employees with whom communication is prohibited, viz:

> "In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

[1] Obviously, communication is also prohibited with any employee who is individually represented.

The information provided in your letter indicates, and for purposes of this opinion it will be assumed, that the cashier does not fall within either of the first two categories, i.e., she does not have managerial responsibility nor did she engage in conduct for which the organization would be liable. The question, therefore, is whether the cashier falls into the third category, i.e., would her statement to you constitute an admission on the part of the retail store?

There is a significant divergence of opinion among various jurisdictions as to which employees fall within this third category. Some jurisdictions take the position that the prohibition extends broadly to all employees of a corporation. Others have held that the prohibition applies to any employee whose statement would constitute an "admission against interest" exception to the hearsay rule, as provided in Rule 801(d)(2) of the Rules of Evidence. Still others have interpreted the Rule narrowly to prohibit contact with only a "control group", which is limited to the company's highest-level management. There appears to be no case law in Alabama which definitively addresses the issue.

A recent decision of the Massachusetts Supreme Judicial Court provides what the Office of General Counsel considers to be a rationally defensible and well-balanced approach to the question. In *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347, 764 N.E. 2d 825 (2002), a police sergeant with Harvard's security department sued the school for sex discrimination. The plaintiff's attorney interviewed five Harvard employees who were not accused in the lawsuit, two of whom had supervisory authority over the plaintiff. The trial court ordered sanctions against the attorney for violation of the Massachusetts version of Rule 4.2. The Supreme Judicial Court reversed concluding, in pertinent part, as follows:

"The [trial] judge held that all five employees interviewed by MR&W were within the third category of the comment. He reached this result by concluding that the phrase 'admission' in the comment refers to statements admissible in court under the admissions exception to the rule against hearsay.

* * *

However, other jurisdictions that have adopted the sameor similar versions of Rule 4.2 are divided on whether their own versions of the rule are properly linked to the admissions exception to the hearsay rule, and disagree about the precise scope of the rule as applied to organizations.

* * *

Some jurisdictions have adopted the broad reading of the rule endorsed by the judge in this case. (citations omitted)Courts reaching this result do so because, like the Superior Court, they read the word 'admission' in the third category of the comment as a reference to Fed. R. Evid. 801(d)(2)(D) and any corresponding State rule of evidence. Id. This rule forbids contact with practically all employees because 'virtually every employee may conceivably make admissions binding on his or her employer.'

* * *

At the other end of the spectrum, a small number of jurisdictions has interpreted the rule narrowly so as to allow an attorney for the opposing party to contact most employees of a represented organization. These courts construe the rule to restrict contact with only those employees in the organization's 'control group,' defined as those employees in the uppermost echelon of the organization's management.

* * *

Other jurisdictions have adopted yet a third test that, while allowing for some ex parte contacts with a represented organization's employees, still maintains some protection of the organization.

* * *

Although the comment's reference to persons 'whose statement may constitute an admission on the part of the organization' was most likely intended as a reference to Fed. R. Evid. 801 (d)(2)(D), this interpretation would effectively prohibit the questioning of all employees who can offer information helpful to the litigation. We reject the comment as overly protective of the organization and too restrictive of an opposing attorney's ability to contact and interview employees of an adversary organization.

* * *

We instead interpret the rule to ban contact only with those employees who have the authority to 'commit the organization to a position regarding the subject matter of representation.' (citations omitted) The employees with whom contact is prohibited are those with 'speaking authority' for the corporation who 'have managing authority sufficient to give them the right to speak for, and bind, the corporation.'

* * *

This interpretation, when read in conjunction with the other two categories of the comment, would prohibit ex parte contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

* * *

Our test is consistent with the purposes of the rule, which are not to 'protect a corporate party from the revelation of prejudicial facts' (citations omitted) but to protect the attorney-client relationship and prevent clients from making ill-advised statements without the counsel of their attorney. Prohibiting contact with all employees of a represented organization restricts informal contacts far more than is necessary to achieve these purposes. (citations omitted) The purposes of the rule are best served when it prohibits communication with those employees closely identified with the organization in the dispute. The interests of the organization are adequately protected by preventing contact with those employees empowered to make litigation decisions, and those employees whose actions or omissions are at issue in the case. We reject the 'control group' test, which includes only the most senior management, as insufficient to protect the 'principles motivating [Rule 4.2].' (citations omitted) The test we adopt protects an organizational party against improper advances and influence by an attorney, while still promoting access to relevant facts. (citations omitted) The Superior Court's interpretation of the rule would grant an advantage to corporate litigants over nonorganizational parties. It grants an unwarranted benefit to organizations to require that a party always seek prior judicial approval to conduct informal interviews with witnesses to an event when the opposing party happens to be an organization and the events at issue occurred at the workplace.

While our interpretation of the rule may reduce the protection available to organizations provided by the attorney-client privilege, it allows a litigant to

> obtain more meaningful disclosure of the truth by conducting informal interviews with certain employees of an opposing organization. Our interpretation does not jeopardize legitimate organizational interests because it continues to disallow contacts with those members of the organization who are so closely tied with the organization or the events at issue that it would be unfair to interview them without the presence of the organization's counsel. Fairness to the organization does not require the presence of an attorney every time an employee may make a statement admissible in evidence against his or her employer. The public policy of promoting efficient discovery is better advanced by adopting a rule which favors the revelation of the truth by making it more difficult for an organization to prevent the disclosure of relevant evidence."

The Office of General Counsel hereby adopts the logic and reasoning of the Massachusetts Supreme Judicial Court as quoted above and concludes, therefore, that since the cashier does not "have authority on behalf of the corporation to make decisions about the course of the litigation", you are not ethically prohibited from communicating with her.

However, there is an additional ethical consideration which should be addressed. The conclusion reached above means that the cashier is an unrepresented third person within the meaning of Rule 4.1 and Rule 4.3 of the Rules of Professional Conduct. Those Rules provide, respectively, as follows:

> "Rule 4.1 Truthfulness in Statements to Others
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."
>
> * * *
>
> "Rule 4.3 Dealing With Unrepresented Person
>
> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

> When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

These rules mandate the use of extreme caution to avoid misleading the cashier with regard to any material issue of law or fact, and most particularly, to avoid any misunderstanding on the part of the cashier as to your role in the lawsuit. You should initiate any conversation with the cashier by acknowledging that you are an attorney representing a client with a claim against the cashier's employer and that, by virtue of such representation, you have an adversarial relationship with her employer. If, following such disclosure, the cashier indicates a desire to terminate the conversation, you are ethically obligated to respect the cashier's wishes and immediately discontinue any further attempt at communication.

LGK/vf

10/4/02

ETHICS OPINION

RO-92-12

Lawyer may contact former employee of opposing party ex parte unless contact is intended to deal with privileged matter

QUESTION:

"I have filed two (2) complaints against Acme ("Acme"), copies enclosed. The suit in Any County is a proposed class action which alleges improper mortgage balances and interest rates charged to Acme customers. The suit charges Acme with fraud and breach of contract. The crux of the complaint filed in Low County is outrage, slander, invasion of privacy and intentional infliction of emotional distress arising out of the branch manager's treatment of an Acme customer.

The credit union President, John Don, has been named as a defendant in both suits. Mr. Don's former secretary, Amy Honey has retained our firm to represent her in connection with sex discrimination arising out of Mr. Don's treatment of Mrs. Honey when she became pregnant and took maternity leave. Upon return after maternity leave, Mrs. Honey learned that she had been replaced.

As stated, Mrs. Honey was employed by Acme as Mr. Don's secretary. She types correspondence to and received correspondence from Acme's legal counsel pertaining to the two (2) cases I already have pending. She also had specific conversations with Mr. Don about the two (2) cases I have pending.

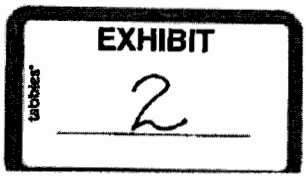
We need a written opinion as to whether Rule 4.2 or any other rule of Professional Conduct precludes me from asking Mrs. Honey about facts or information she knows concerning the two (2) previously filed cases."

ANSWER:

You are not precluded from communicating with this former employee under the set of facts you have described in your request.

DISCUSSION:

Rule 4.2 of the Rules of Professional Conduct prohibits communication about the subject matter of the representation with a "party" known to be represented by other counsel



Consent of the other counsel obviates the problem. Rule 4.2 is a successor to Alabama DR 7-104(A)(1) and two provisions are substantially identical. In RO-88-34 (also published in *The Alabama Lawyer*), the Disciplinary Commission held that a plaintiff's counsel in a tort claim action could contact and interview current corporate employees/witnesses. There can be no ex parte contact when the employee is an executive officer of the adverse party or could otherwise legally bind the adverse party by his/her testimony, or if the employee was the actual tort feasor or person whose conduct gave rise to the cause of action. In any of these situations, prior consent of counsel for the adverse party would be required.

Ex parte contact with a former employee, as here, is not subject to the same scrutiny. In fact, there is a strong argument that Rule 4.2 does not even apply to former employees at any level. A former employee cannot speak for the corporation. The ABA Committee on Ethics and Professional Responsibility in Formal Opinion 91-359 (1991) stated that former employees of a corporation may be contacted without consulting with corporation's counsel because they are no longer in positions of authority and thus, cannot bind the corporation. The Disciplinary Commission believes that contact with a former employee is ethically permissible, unless the ex parte contact is intended to deal with privileged matter, i.e., the inquiring counsel is asking the former employee to divulge prior communications with legal counsel for the adverse party, and these communications were conducted for purposes of advising the adverse party in the litigation or claim. If the former employee was the actual person giving rise to the cause of action, contact is also permissible so long as that person is not represented by counsel.

MLM/vf

7/13/92

ETHICS OPINION

RO-02-03

[Redacted Copy]

QUESTION:

"I have a slip and fall case in a retail store and I would like an opinion as to whether I can contact directly some of the cashiers. It seems that my client slipped and fell in a certain area of the store. After she fell, she says that one of the cashiers told her that a store employee had been mopping or buffing in that area immediately before the fall and had left moisture. I would like to interview the cashiers to get that straight.

I would be grateful if you would give me an opinion as to whether such an interview would be allowed under the circumstances. It is not my understanding that the cashiers were the people who had done the mopping or buffing."

ANSWER:

Pursuant to Rule 4.2 of the Rules of Professional Conduct of the Alabama State Bar, an attorney may communicate directly with an employee of a corporation or other organization who is the opposing party in pending litigation without the consent of opposing counsel if the employee does not have managerial responsibility in the organization, has not engaged in conduct for which the organization would be liable and is not someone whose statement may constitute an admission on the part of the organization. It is the opinion of the Disciplinary Commission of the Alabama State Bar that the third category, i.e., a "person . . . whose statement may constitute an admission on the part of the organization" should be limited to those employees who have authority on behalf of the organization to make decisions about the course of the litigation.

DISCUSSION:

Communication with persons represented by counsel is governed by Rule 4.2 of the Rules of Professional Conduct, which provides as follows:

> "Rule 4.2 Communication With Person Represented by Counsel
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

When the represented party is a corporation or other organization, communication with some of the employees of the organization is also prohibited.[1]

The Comment to Rule 4.2 delineates three categories of employees with whom communication is prohibited, viz:

> "In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

[1] Obviously, communication is also prohibited with any employee who is individually represented.

The information provided in your letter indicates, and for purposes of this opinion it will be assumed, that the cashier does not fall within either of the first two categories, i.e., she does not have managerial responsibility nor did she engage in conduct for which the organization would be liable. The question, therefore, is whether the cashier falls into the third category, i.e., would her statement to you constitute an admission on the part of the retail store?

There is a significant divergence of opinion among various jurisdictions as to which employees fall within this third category. Some jurisdictions take the position that the prohibition extends broadly to all employees of a corporation. Others have held that the prohibition applies to any employee whose statement would constitute an "admission against interest" exception to the hearsay rule, as provided in Rule 801(d)(2) of the Rules of Evidence. Still others have interpreted the Rule narrowly to prohibit contact with only a "control group", which is limited to the company's highest-level management. There appears to be no case law in Alabama which definitively addresses the issue.

A recent decision of the Massachusetts Supreme Judicial Court provides what the Office of General Counsel considers to be a rationally defensible and well-balanced approach to the question. In *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347, 764 N.E. 2d 825 (2002), a police sergeant with Harvard's security department sued the school for sex discrimination. The plaintiff's attorney interviewed five Harvard employees who were not accused in the lawsuit, two of whom had supervisory authority over the plaintiff. The trial court ordered sanctions against the attorney for violation of the Massachusetts version of Rule 4.2. The Supreme Judicial Court reversed concluding, in pertinent part, as follows:

"The [trial] judge held that all five employees interviewed by MR&W were within the third category of the comment. He reached this result by concluding that the phrase 'admission' in the comment refers to statements admissible in court under the admissions exception to the rule against hearsay.

* * *

However, other jurisdictions that have adopted the sameor similar versions of Rule 4.2 are divided on whether their own versions of the rule are properly linked to the admissions exception to the hearsay rule, and disagree about the precise scope of the rule as applied to organizations.

* * *

Some jurisdictions have adopted the broad reading of the rule endorsed by the judge in this case. (citations omitted)Courts reaching this result do so because, like the Superior Court, they read the word 'admission' in the third category of the comment as a reference to Fed. R. Evid. 801(d)(2)(D) and any corresponding State rule of evidence. Id. This rule forbids contact with practically all employees because 'virtually every employee may conceivably make admissions binding on his or her employer.'

* * *

At the other end of the spectrum, a small number of jurisdictions has interpreted the rule narrowly so as to allow an attorney for the opposing party to contact most employees of a represented organization. These courts construe the rule to restrict contact with only those employees in the organization's 'control group,' defined as those employees in the uppermost echelon of the organization's management.

* * *

Other jurisdictions have adopted yet a third test that, while allowing for some ex parte contacts with a represented organization's employees, still maintains some protection of the organization.

* * *

Although the comment's reference to persons 'whose statement may constitute an admission on the part of the organization' was most likely intended as a reference to Fed. R. Evid. 801 (d)(2)(D), this interpretation would effectively prohibit the questioning of all employees who can offer information helpful to the litigation. We reject the comment as overly protective of the organization and too restrictive of an opposing attorney's ability to contact and interview employees of an adversary organization.

* * *

We instead interpret the rule to ban contact only with those employees who have the authority to 'commit the organization to a position regarding the subject matter of representation.' (citations omitted) The employees with whom contact is prohibited are those with 'speaking authority' for the corporation who 'have managing authority sufficient to give them the right to speak for, and bind, the corporation.'

* * *

This interpretation, when read in conjunction with the other two categories of the comment, would prohibit ex parte contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

* * *

Our test is consistent with the purposes of the rule, which are not to 'protect a corporate party from the revelation of prejudicial facts' (citations omitted) but to protect the attorney-client relationship and prevent clients from making ill-advised statements without the counsel of their attorney. Prohibiting contact with all employees of a represented organization restricts informal contacts far more than is necessary to achieve these purposes. (citations omitted) The purposes of the rule are best served when it prohibits communication with those employees closely identified with the organization in the dispute. The interests of the organization are adequately protected by preventing contact with those employees empowered to make litigation decisions, and those employees whose actions or omissions are at issue in the case. We reject the 'control group' test, which includes only the most senior management, as insufficient to protect the 'principles motivating [Rule 4.2].' (citations omitted) The test we adopt protects an organizational party against improper advances and influence by an attorney, while still promoting access to relevant facts. (citations omitted) The Superior Court's interpretation of the rule would grant an advantage to corporate litigants over nonorganizational parties. It grants an unwarranted benefit to organizations to require that a party always seek prior judicial approval to conduct informal interviews with witnesses to an event when the opposing party happens to be an organization and the events at issue occurred at the workplace.

While our interpretation of the rule may reduce the protection available to organizations provided by the attorney-client privilege, it allows a litigant to

> obtain more meaningful disclosure of the truth by conducting informal interviews with certain employees of an opposing organization. Our interpretation does not jeopardize legitimate organizational interests because it continues to disallow contacts with those members of the organization who are so closely tied with the organization or the events at issue that it would be unfair to interview them without the presence of the organization's counsel. Fairness to the organization does not require the presence of an attorney every time an employee may make a statement admissible in evidence against his or her employer. The public policy of promoting efficient discovery is better advanced by adopting a rule which favors the revelation of the truth by making it more difficult for an organization to prevent the disclosure of relevant evidence."

The Office of General Counsel hereby adopts the logic and reasoning of the Massachusetts Supreme Judicial Court as quoted above and concludes, therefore, that since the cashier does not "have authority on behalf of the corporation to make decisions about the course of the litigation", you are not ethically prohibited from communicating with her.

However, there is an additional ethical consideration which should be addressed. The conclusion reached above means that the cashier is an unrepresented third person within the meaning of Rule 4.1 and Rule 4.3 of the Rules of Professional Conduct. Those Rules provide, respectively, as follows:

> "Rule 4.1 Truthfulness in Statements to Others
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."
>
> * * *
>
> "Rule 4.3 Dealing With Unrepresented Person
>
> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

> When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

These rules mandate the use of extreme caution to avoid misleading the cashier with regard to any material issue of law or fact, and most particularly, to avoid any misunderstanding on the part of the cashier as to your role in the lawsuit. You should initiate any conversation with the cashier by acknowledging that you are an attorney representing a client with a claim against the cashier's employer and that, by virtue of such representation, you have an adversarial relationship with her employer. If, following such disclosure, the cashier indicates a desire to terminate the conversation, you are ethically obligated to respect the cashier's wishes and immediately discontinue any further attempt at communication.

LGK/vf

10/4/02

Defending Liberty
Pursuing Justice

Wm. T. (Bill) Robinson III
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5109
Fax: (312) 988-5100
abapresident@americanbar.org

July 31, 2012

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue. N.W.
Washington, D.C. 20551

Re: Federal Reserve System Proposed Agency Information Collection Activities; Comment Request; FR Y-14A/Q/M; OMB Control Numbers: 7100-0341 and 7100-0319; 77 Fed. Reg. 10525 (February 22, 2012)

Dear Ms. Johnson:

On behalf of the American Bar Association ("ABA"), which has nearly 400,000 members, I write to express our serious concerns regarding the above-referenced proposed changes to the Comprehensive Capital Analysis and Review data collection schedules ("Proposal") to the extent that it would require bank holding companies to report their legal reserves for pending and probable litigation claims to the Board of Governors of the Federal Reserve System ("Board").[1]

Although the ABA appreciates the Board's efforts to gather additional data regarding the operational loss exposures of bank holding companies and hence preserve the safety and soundness of our banking system, the ABA is concerned that the new requirements contained in the Proposal could weaken fundamental attorney-client privilege and work product protections, undermine the confidential lawyer-client relationship and the right to effective counsel, and severely prejudice banks in defending against lawsuits. The ABA therefore urges the Board to withdraw that portion of the Proposal requiring enhanced disclosure of legal reserves.

The attorney-client privilege is a bedrock legal principle that enables individual and organizational clients to communicate with their lawyers in confidence and encourages clients to seek out and obtain guidance to conform their conduct to the law. The privilege also facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of society at large. The work product doctrine underpins our adversarial justice system and allows lawyers to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

[1] These ABA comments were prepared in coordination with the ABA Task Force on Financial Markets Regulatory Reform. The ABA Task Force is comprised of 15 prominent financial services lawyers who have served in the top levels of government and private practice. The Task Force includes former general counsels of the Securities and Exchange Commission ("SEC"), the Federal Deposit Insurance Corporation, and the Treasury Department, as well as members and liaisons who have held high-level positions with the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the SEC. Also included on the Task Force is a founder of Public Citizen Litigation Group and leading academics in the law relating to financial entities and administrative law. The complete Task Force roster is available at: http://apps.americanbar.org/buslaw/committees/CL116000pub/materials/publicros

EXHIBIT
3

to the detriment of their clients. The ABA strongly supports the preservation of the attorney-client privilege and the work product doctrine and opposes governmental policies, practices and procedures that have the effect of eroding these protections.[2]

The Proposal would place both the attorney-client privilege and the work product doctrine in serious jeopardy by requiring banks to collect and disclose new quarterly loss data, including the type of loss event, when it occurred, the loss amount, the business line in which it occurred, and other relevant information.[3] As you know, banks and other companies establish their legal reserves for litigation claims in close consultation with their lawyers. Because those consultations almost always involve confidential communications between the client and the lawyer, as well as extensive legal analysis and the exercise of professional judgment by the lawyer in weighing the relative strengths of claims and defenses, the resulting legal reserve determinations are inherently privileged and work product protected. Therefore, requiring banks to report this privileged information to the Board, and the possibility that it later could be disclosed to other third parties, could seriously undermine and weaken the privilege, because as the U.S. Supreme Court has noted, "an uncertain privilege... is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

The Board's Proposal also threatens to seriously undermine both the confidential lawyer-client relationship and the banks' fundamental right to counsel. Lawyers for banks play an essential role in helping them and their leaders understand and comply with applicable law and, when necessary, represent the entities in litigation. To fulfill this important societal role, lawyers must enjoy the trust and confidence of the entity's officers, directors, and other leaders and must be provided with all relevant information in an open and uninhibited manner. Only in this way can the lawyer engage in a full and frank discussion of the relevant legal issues with the client's representatives and provide appropriate legal advice and assistance to the client.

By requiring banks to submit privileged and confidential legal reserves information to the Board, the Proposal risks chilling and seriously undermining the confidential lawyer-client relationship. Lawyers and their bank clients alike may lose confidence that their private communications and the lawyers' professional analysis, judgment, and advice will remain confidential. Even the risk that these confidential communications and the lawyer's mental impressions and advice may be subject to compelled disclosure would be likely to affect the willingness of bank clients to be fully candid with their lawyers and could have an adverse effect on lawyers' willingness to provide expert counsel to banks. In addition, such possible disclosure could discourage banks from seeking and obtaining the expert legal representation that they may need, thereby interfering in a substantial way with their fundamental right to counsel.

The ABA also is concerned that the Proposal could severely prejudice the banks' legal positions in pending and probable litigation matters. Any requirement that banks report detailed information concerning their legal reserves to the Board could harm the banks' position in litigation by informing their adversaries of how the banks and their lawyers weigh the strengths and weaknesses of the subject claims. In many cases, the new legal reserves disclosures could establish a de facto floor for the plaintiffs' settlement demands on those claims or, in some cases, a plaintiff could seek to introduce the legal reserves disclosures as a bank's "admission" of its liability or the amount of

---

[2] *See* ABA Resolution 111, adopted by the ABA House of Delegates in August 2005, available at http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf.

[3] *See* Proposal, 77 Fed. Reg. at 10528.

damages. Such a result would not only be patently unfair to the bank client, but it also would undermine the safety and soundness of our financial system by making banks less able to defend themselves in litigation, as well as further undermining the right to effective counsel and our nation's adversarial system of justice.

Although the Board recently published a notice in the Federal Register finalizing most of its Proposal, it acknowledged some of the concerns raised by various commenters regarding the new proposed disclosure requirements. In particular, the Board noted the commenters' concerns that:

> ...the Federal Reserve may not be able to guarantee the confidentiality of the information in all cases; the data could become discoverable in third-party litigation; and should the information make its way into the public domain, it could significantly jeopardize the BHC's [bank holding companies'] position in litigation.[4]

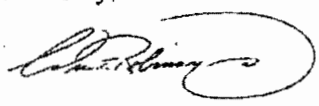
To its credit, the Board also conceded that based on those comments and its subsequent discussions with the commenters, "the Federal Reserve's preliminary view is that these concerns are justified."[5]

The ABA shares these concerns that privileged and confidential legal reserves information submitted to the Board may not remain confidential, which in turn could waive the privilege as to third parties and severely prejudice the legal position of banks in litigation. We also share the concerns that have been raised regarding the difficulty the Board and other bank regulators could face in resisting future congressional attempts to obtain the data, which could further increase the risk of public disclosure and hence result in waiver of attorney-client privilege and work product protections as to all third parties.

For all these reasons, the ABA respectfully requests that the Board withdraw the Proposal to the extent it would require banks to report their legal reserves for pending and probable litigation claims. The ABA also urges the Board to continue its constructive dialogue with the legal profession, the banking community, and other stakeholders in order to craft new data collection procedures that would protect the safety and soundness of the banking system while preserving the attorney-client privilege, the work product doctrine, and the confidential lawyer-client relationship.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA's position on the Proposal, please contact ABA Governmental Affairs Director Thomas Susman at (202) 662-1765 or Associate Director Larson Frisby at (202) 662-1098.

Sincerely,



Wm. T. (Bill) Robinson III

---

[4] *See* Federal Reserve System, "Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB with Request for Comments," 77 Fed. Reg. 32970, 32973 (June 4, 2012)

[5] *Id.* In that Announcement and a subsequent notice published on June 27, 2012, the Board extended the comment deadline on the remainder of the Proposal until August 6, 2012. *See* 77 Fed. Reg. 38289 (June 27, 2012).

cc: The Honorable Tim Johnson, Chairman, Senate Banking, Housing and Urban Affairs Committee
The Honorable Richard C. Shelby, Ranking Member, Senate Banking, Housing and Urban Affairs Committee
The Honorable Spencer Bachus, Chairman, House Financial Services Committee
The Honorable Barney Frank, Ranking Member, House Financial Services Committee
The Honorable Lamar Smith, Chairman, House Judiciary Committee
The Honorable John Conyers, Jr., Ranking Member, House Judiciary Committee
Members of the ABA Task Force on Financial Markets Regulatory Reform
Thomas M. Susman, Director, ABA Governmental Affairs Office

ETHICS OPINION

RO-96-02

[redacted]

QUESTION:

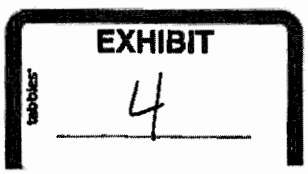
"I am writing on behalf of the Alabama Department of Human Resources (hereinafter 'DHR') to request a formal Ethics Opinion from the Alabama State Bar regarding whether DHR child support policy, established to bring the State agency into compliance with certain federal laws and regulations governing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

The Department of Human Resources is the State agency in Alabama charged with the establishment, modification, and enforcement of support obligations as provided for and required by Title IV-D of the Social Security Act (42 U.S.C. §654 et seq.). As such, the agency must provide support services to all eligible applicants as authorized or mandated by applicable federal and/or State law and regulations. Where necessary and appropriate, DHR establishes agency policy to ensure that proper State and federal laws and procedures are followed at each level of agency responsibility in the provision of support services. By necessity, this policy frequently impacts the provision of legal services in DHR child support cases.

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

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

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



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

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

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

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

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

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

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

* * *

ANSWER QUESTION ONE:

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

ANSWER QUESTION TWO:

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

REASONING:

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

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

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

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

JAM/vf
3/6/96

revised
5/24/96
JAM/vf