

**OPINION NO. 87-033****Syllabus:**

1. Where a county prosecuting attorney, either in his official capacity or under a cooperative agreement with the local title IV-D agency, provides legal services pursuant to title IV-D of the Social Security Act, as amended, 42 U.S.C. 651-667 (1985), if the person who is owed child or spousal support has assigned or subrogated his right to receive support payments to this or any other state or to an agency, department, or political subdivision of this or any other state as a condition to the receipt of public assistance, then the client of the prosecutor is the state or agency, department, or political subdivision of the state which has provided the assistance.
2. Where a county prosecuting attorney, either in his official capacity or under a cooperative agreement with the local title IV-D agency, provides legal services pursuant to title IV-D of the Social Security Act, as amended, 42 U.S.C. 651-667 (1985), if the person who is owed child or spousal support has not assigned or subrogated his right to receive support payments to this or any other state or to an agency, department, or political subdivision of this or any other state

as a condition to the receipt of public assistance, then the client of the prosecutor is the person to whom the support is owed.

3. The Attorney General will abstain from rendering an opinion where another governmental entity has been granted the authority to render advisory opinions concerning the relevant subject matter.

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To: John W. Allen, Richland County Prosecuting Attorney, Mansfield, Ohio  
By: Anthony J. Celebrezze, Jr., Attorney General, May 29, 1987

I have before me your request for my opinion regarding certain legal services provided by the county prosecutor, either in his official capacity or under a cooperative agreement with the county's local title IV-D agency. Specifically, you ask whether the county prosecutor represents the child, the custodial parent, the local title IV-D agency, or the state in title IV-D and related child and spousal support cases. You note that it is necessary to resolve this issue in order for you to determine to whom you owe an ethical obligation, and so that you may advise your staff as to their ethical obligations. You also state that a determination of this issue is necessary so that you may correctly caption the documents filed in these cases.

Pursuant to title IV-D of the Social Security Act, 42 U.S.C. 651-667 (1985), Congress has appropriated funds for federal financial participation in state programs designed to locate absent parents, establish paternity, and obtain and enforce child and spousal support obligations owed by absent parents. 42 U.S.C. 651 (1985). In order to insure that the program is fully and effectively implemented, Congress has also required that each state designate an organization to provide the services specified by the Act. 42 U.S.C. 654(3). The General Assembly has enacted statutes in compliance with this provision, designating the Ohio Department of Human Services as the state title IV-D agency and each county department of human services "or other agency designated by the county to provide for the enforcement of support orders under Title IV-D of the "Social Security Act," 88 Stat. 2351 (1975), 42 U.S.C. 651" as the local title IV-D agency. See R.C. 5101.31 (designating the Ohio Department of Human Services as the state's title IV-D agency); R.C. 329.04 (designating the local title IV-D agency).

Pursuant to 8 Ohio Admin. Code 5101:1-29-51(C), the local title IV-D agency may enter into a cooperative agreement with the county prosecutor to provide legal services for the agency. The local title IV-D agency may retain other counsel if the county prosecutor refuses to enter into a cooperative agreement. *Id.* The legal services provided either by the county prosecutor or other counsel generally include the initiation and prosecution of actions to establish paternity under R.C. Chapter 3111, to establish and modify child support under R.C. 3109.05, to establish and modify spousal support under R.C. 3105.18, to obtain past-due child and spousal support under R.C. 2301.37-.38 and R.C. 3113.21, to seek contempt orders under R.C. Chapter 2705, and to enforce actions referred to the local title IV-D agency by other states under the Uniform Reciprocal Enforcement of Support Act, R.C. Chapter 3115. Your staff has confirmed that it is these actions with which you are primarily concerned.

Turning to your question, I note that issues regarding the identification of an attorney's "client" have not traditionally presented great difficulty to the practicing bar. In private practice an attorney's client can usually be easily identified as the person or organization that contacted the attorney to represent them in some legal matter. See e.g., Code of Professional Responsibility EC 2-6; EC 2-26. Presumably because the issue seldom presents many practical problems in this context, few authorities have analyzed how a lawyer should determine whether or not a person or organization is his client. However, as is demonstrated by the cases and authorities which have recently addressed this issue, the determination of who is the client of the government attorney presents considerable difficulty.

The few cases and authorities which have addressed this issue, have generally concluded that the client of the government lawyer is the person or agency the lawyer has been designated to represent. See Professional Ethics Committee, Federal Bar Association, Op. 73-1, 32 Fed. B.J. 71, 72 (1973). Where such designation has been made pursuant to a statutory plan, it has been deemed controlling. See e.g., Gibson v. Johnson, 35 Or. App. 493, 582 P. 2d 452, 456 (1978).<sup>1</sup> Further, where litigation has been involved and there has been no statutory designation, the person or agency which holds the primary interest in the outcome of the litigation has usually been identified as the client. Id. I have not located any single provision in the Revised Code which expressly identifies the client of the attorney retained by the title IV-D agency. As noted above, however, the county prosecutor may be requested, either in his official capacity or under a cooperative agreement with the local title IV-D agency<sup>2</sup> to initiate and prosecute actions under various provisions. Several of these sections strongly suggest the scheme intended by the General Assembly with respect to the issue presented herein.

One such section is R.C. 2301.38, which provides in pertinent part:

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<sup>1</sup> See also M. Henry et al., Essentials for Attorneys in Child Support Enforcement 26 (1985).

<sup>2</sup> Several of the statutory provisions concerning the enforcement of child and spousal support provide that the actions are to be brought by the county prosecutor. These sections do not specify, however, whether the prosecutor is required to bring the action in his official capacity or whether he is only required to bring the actions where he has entered into a cooperative agreement with the local title IV-D agency. In most instances, this issue is an academic question only, because the county prosecutor generally enters into a cooperative agreement to represent the local title IV-D agency. See 8 Ohio Admin. Code 5101:1-29-51(C) ("cooperative agreements shall be made with the county prosecutor whenever possible"). It is unnecessary, however, for me to finally resolve this issue since the authority of the county prosecutor is not in question and the determination of the issue would not affect the resolution of the question which you present.

(A) Upon receipt of a notice under division (C) of section 2301.37 of the Revised Code, the obligee may make application to the agency set forth in the notice or, if no agency in the county has been designated to enforce support orders, to the prosecuting attorney to maintain an action on behalf of the obligee....

...  
 (B) An action on behalf of the obligee shall be commenced by the agency or prosecuting attorney as required by division (A) of this section within twenty days after the completion of an application by the obligee. (Emphasis added.)

This section requires the attorney for the local title IV-D agency,<sup>3</sup> upon application by the obligee,<sup>4</sup> to either obtain a judgment and execution against the property of a defaulting obligor<sup>5</sup> or to obtain an order withholding the personal earnings or assigning the wages of the obligor. In either instance, pursuant to R.C. 2301.38(A) the attorney maintains the suit "on behalf of the obligee...." R.C. 2301.38(B) further emphasizes this point by providing that the action "on behalf of the obligee" must be commenced by the local title IV-D agency within twenty days after the obligee has applied to the agency.

In contrast, R.C. 2301.372 provides that:

(A) If the court fails to comply with the requirements of section 2301.37 or 3113.21 of the Revised Code and if the rights to support have been assigned to the department of human services under section 5107.07 of the Revised Code or the responsibility for collection of support has been assumed under Title IV-D of the "Social Security Act," 88 Stat. 2351 (1975), 42 U.S.C. 651, as amended, the bureau of support and the county department of human services shall notify the prosecuting attorney of the county in which the obligee resides who shall commence either of the following:

(1) Proceedings under section 3113.21 of the Revised Code requesting issuance of one or more orders under division (D) of that section;

(2) A civil action in the small claims division of the municipal or county court within whose jurisdiction the obligor resides.

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<sup>3</sup> Where a local title IV-D agency has not been designated, R.C. 2301.38 provides that the county prosecutor must maintain the specified actions on behalf of the obligee.

<sup>4</sup> Although R.C. Chapter 2301, does not define the term "obligee," R.C. 3113.21(O)(5) provides with reference to similar subject matter that the obligee is "the person who is entitled to receive support payments under a support order."

<sup>5</sup> While again R.C. Chapter 2301 does not define the term "obligor," R.C. 3113.21(O)(4) provides that the obligor is "the person who is required to pay support under a support order."

This statute provides that where the court fails to comply with the portions of R.C. 2301.37 and R.C. 3113.21, providing for, inter alia, the issuance of wage withholding orders, the county prosecutor must initiate the specified actions. While the meaning of the phrase referring to instances where the "responsibility for collection of support has been assumed under title IV-D" is unclear,<sup>6</sup> at least where the obligee has assigned his right to support to the Ohio Department of Human Services under R.C. 5107.07,<sup>7</sup> the obligee no longer maintains a direct pecuniary interest in the action to enforce the

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<sup>6</sup> This phrase is capable of several interpretations. One possible interpretation is that the legislature intended for the county prosecutor to bring an action in every case which falls under the provisions of title IV-D of the Social Security Act. As such, the prosecutor would be required to bring suit regardless of whether or not the obligee was the recipient of public assistance. However, this interpretation would effectively render the provisions of R.C. 2301.38 requiring the title IV-D agency to maintain similar actions upon application by the obligee, a mere surplusage. Such an interpretation is disfavored. Cf. Sloan v. Hubbard, 34 Ohio St. 583 (1878) (an interpretation nullifying a provision is never favored when a reasonably supportive interpretation is available); 1987 Op. Att'y Gen. No. 87-020. Instead, where it is possible, statutes should be construed harmoniously to give full effect. State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, 132 N.E.2d 191 (1956). Here, the context of the phrase suggests another possible interpretation. As quoted above, the first portion of the sentence concerns the duties of the prosecutor with reference to persons who have assigned their right to support as a condition to the receipt of Aid to Families with Dependent Children (ADC). Thus, the second portion of the sentence may provide for other situations in which the obligee has made a similar subrogation or assignment under provisions of state law other than R.C. 5107.07; see e.g., R.C. 5101.58 (the Ohio Department of Human Services or a county department of human services receives a right of subrogation to any amounts received by a recipient of aid for certain medical expenses); R.C. 5101.59 (an application for ADC, medicare, or poor relief constitutes an automatic assignment of the right to receive certain medical support); R.C. 5107.07 (the acceptance of ADC constitutes an assignment of the right to receive support); R.C. 5113.041 (the acceptance of poor relief constitutes an assignment of the right to receive support to the Ohio Department of Human Services). This language may also refer to assignments made under the laws of other states enacted in compliance with the governing federal statutes. See e.g., 42 U.S.C. 602(a)(26) and 656(a)(1) (the recipient of ADC must assign the right to support in order to receive such public assistance); 42 U.S.C. 1396k (the recipient of medical assistance must assign the right to support in order to receive such public assistance). These actions would be brought in Ohio courts under the Uniform Reciprocal Enforcement of Support Act.

<sup>7</sup> R.C. 5107.07 provides:

The acceptance of aid under sections 5107.02 to 5107.15 of the Revised Code constitutes an assignment to the department of human services of

support obligation. Instead, the Ohio Department of Human Services, as assignee of the obligee's right to support, holds the primary interest in assuring that the support is collected. Therefore, it is apparent that at least where the obligee has assigned his right to support under R.C. 5107.07, the General Assembly intended for the Ohio Department of Human Services to be the client of the county prosecutor in cases brought under R.C. 2301.372.

This distinction between persons who have assigned or subrogated their right to support to the state and those who have not is also employed by the statutory provisions which apply to actions brought under the Uniform Reciprocal Enforcement of Support Act (URESAs), R.C. Chapter 3115. These actions are referred to an Ohio court by an out-of-state court when the defendant is believed to be an Ohio resident. The suits are usually brought to establish paternity, or to enforce child and spousal orders issued by the out-of-state court. R.C. 3115.16 provides that upon referral of a URESA action by an out-of-state court:

(B) The prosecuting attorney shall prosecute the case diligently. He shall take all action necessary in accordance with the laws of this state....

(C) If the prosecuting attorney neglects or refuses to represent the obligee, the county director of [human services] may undertake the representation. (Emphasis added.)

Thus, by providing for instances where the prosecutor "neglects or refuses to represent the obligee," R.C. 3115.16 implicitly suggests that the prosecutor is generally expected to maintain the action on behalf of the obligee. Again, however, R.C.

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any rights an individual receiving aid has to support from any other person, excluding medical support assigned pursuant to section 5101.59 of the Revised Code. The rights to support assigned to the department pursuant to this section constitute an obligation of the person who is responsible for providing the support to the state for the amount of aid payments to the recipient or recipients whose needs are included in determining the amount of aid received. Support payments assigned to the state pursuant to this section shall be collected by the county administration, and reimbursements for aid payments shall be credited to the county, state, and federal governments in the same proportions as they participate in the financing of such payments. Support obligations owed to children shall be distributed in accordance with laws and rules applicable to the federal child support program under the "Social Services Amendments of 1974," 88 Stat. 2351, 42 U.S.C. 651, as amended.

R.C. 5107.02-.15 provide for the distribution of Aid to Families with Dependent Children. The final sentence of R.C. 5107.07 is an apparent reference to 42 U.S.C. §§654(5) and 656 which provide, inter alia, for payment to the obligee of support amounts which exceed the amount of assistance distributed.

Chapter 3115 provides an exception where the obligee has effectively assigned the right to receive support to the state or one of its political subdivisions. R.C. 3111.07 provides that:

If a state or a political subdivision furnishes support to an individual obligee, it has the same right to initiate a proceeding under sections 3115.01 to 3115.34, inclusive, of the Revised Code, as the individual obligee for the purpose of securing reimbursement for support furnished and of obtaining continuing support.

This provision recognizes that in order to receive federal financial participation in most welfare programs, each state's public assistance program must require that as a condition to the receipt of public assistance, the recipient assign his right to support to the state in which the recipient is a resident. See e.g., 42 U.S.C. 602(a)(26) and 656(a)(1) (the recipient of ADC must assign the right to support in order to receive such public assistance); 42 U.S.C. 1396k (the recipient of medical assistance must assign the right to support in order to receive such public assistance). Thus, the adoption of this statutory scheme again strongly suggests that the General Assembly intended for the county prosecutor to represent the interests of the referring state or political subdivision where the obligee has been the recipient of public assistance. Where, however, the obligee has not received public assistance, R.C. 3115.16 requires that the prosecutor act on behalf of the obligee.

Finally, this distinction is also employed in the sections which provide for paternity actions. Pursuant to R.C. 3111.04, only certain parties may bring suit to determine the paternity of a child. R.C. 3111.04 provides in pertinent part:

(A) An action to determine the existence or non-existence of the father and child relationship may be brought by the child or the child's personal representative, the child's mother or personal representative, a man alleging himself to be the child's father, or the alleged father's personal representative.

It is noteworthy that the statute fails to mention the state or any agency of the state as a proper party to these actions. Thus, this provision again suggests that as a general rule, the legislature intended for the person who is owed the support to be the county prosecutor's client in actions brought under R.C. Chapter 3111. However, R.C. 3111.07(B) provides that:

If an action is brought pursuant to sections 3111.01 to 3111.19 of the Revised Code and the child to whom the action pertains is or was being provided support by the department of human services, a county department of human services, or another public agency, the department, county department or agency may intervene for purposes of collecting or recovering the support.

Like the sections discussed above, R.C. 3111.07 provides that where the person who is owed support has been provided public assistance by an agency or department of the state or one of

the specified subdivisions of the state, the department or agency may intervene in the action to recover the amount distributed to the person. Again, this provision recognizes that where public assistance is accepted, the department which provides the assistance receives in return a right of subrogation, see R.C. 5101.58 (the Ohio Department of Human Services or a county department of human services receives a right of subrogation to any amounts distributed to a recipient of aid for certain medical expenses) or an assignment of the right to receive support. See R.C. 5101.59 (an application for ADC, medicare, or poor relief constitutes an automatic assignment of the right to receive certain medical support); R.C. 5107.07 (the acceptance of ADC constitutes an assignment of the right to receive support); R.C. 5113.041 (the acceptance of poor relief constitutes an assignment of the right to receive support to the Ohio Department of Human Services). Thus, because the recipient of public assistance no longer maintains a direct pecuniary interest in seeking the full reimbursement of uncollected support, this provision again suggests that the General Assembly intended for the department or agency which receives an assignment or subrogation of the right to receive support to be the client of the prosecutor in cases brought under this section.

Admittedly, none of these provisions is wholly dispositive of the issue which you present. I nevertheless believe that the foregoing analysis strongly suggests the statutory plan intended by the General Assembly. I am cognizant of the fact that other statutory provisions concerning child and spousal support do not suggest on whose behalf the attorney for the local title IV-D agency or the county prosecutor brings suit. However, each of these provisions was enacted by the legislature as a response to the federal mandates of title IV-D of the Social Security Act. Furthermore, in most instances each of the actions is brought by the prosecutor under a single cooperative agreement with the local title IV-D agency. Thus, absent any substantive reason for treating these actions differently, any dichotomy between these provisions would necessarily constitute a formal distinction without any statutory indication that the General Assembly intended for there to be a difference. I am not aware of any reason why such a distinction should be made.

The foregoing analysis may not, however, be completely dispositive of the issues underlying your request. At least in the context of the public practice of law, the determination of who is the government lawyer's client may not also answer the correlative issue: to whom does the government lawyer owe an ethical obligation.<sup>6</sup> The identification of the client may be an important step in resolving this second issue. However, the factors which must be considered in identifying to whom the government attorney owes an ethical obligation may extend beyond the statutory analysis included herein.

Pursuant to Gov. Bar R. sec. V(2)(b), the Supreme Court Board of Commissioners on Grievances and Discipline of the Bar is empowered to render advisory opinions relating to the

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<sup>6</sup> For an analysis of the distinction between these two issues, see R. Lawry, Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question, 37 Fed. B.J. 61 (1978).



ethical obligations of members of the bar. As a rule, the Attorney General has abstained from rendering formal opinions where another governmental body has been granted authority to render advisory opinions concerning the relevant subject matter. See 1987 Op. Att'y Gen. No. 87-025. This policy has been established in order to avoid the possibility of conflicting opinions. Thus, it would be improper for me to render an opinion concerning the professional responsibilities of an attorney.

Therefore, it is my opinion and you are hereby advised that:

1. Where a county prosecuting attorney, either in his official capacity or under a cooperative agreement with the local title IV-D agency, provides legal services pursuant to title IV-D of the Social Security Act, as amended, 42 U.S.C. 651-667 (1985), if the person who is owed child or spousal support has assigned or subrogated his right to receive support payments to this or any other state or to an agency, department, or political subdivision of this or any other state, as a condition to the receipt of public assistance, then the client of the prosecutor is the state or agency, department, or political subdivision of the state which has provided the assistance.
2. Where a county prosecuting attorney, either in his official capacity or under a cooperative agreement with the local title IV-D agency, provides legal services pursuant to title IV-D of the Social Security Act, as amended, 42 U.S.C. 651-667 (1985), if the person who is owed child or spousal support has not assigned or subrogated his right to receive support payments to this or any other state or to an agency, department, or political subdivision of this or any other state, as a condition to the receipt of public assistance, then the client of the prosecutor is the person to whom the support is owed.
3. The Attorney General will abstain from rendering an opinion where another governmental entity has been granted the authority to render advisory opinions concerning the relevant subject matter.