

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-414
Issued: May 2000

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: A Kentucky statute, Kentucky Revised Statute 205.712(7), states:

Where the local county attorney, friend of the court, domestic relations agent, or other designee of the cabinet has been contracted for the purpose of administering child support enforcement pursuant to Title IV-D of the Social Security Act, the contracting official shall be deemed to be representing the cabinet and as such does not have an attorney-client relationship with the applicant who has requested services pursuant to Title IV-D of the Social Security Act nor with any dependent on behalf of the individuals for whom services are sought.

Given the existence of this statute, does an attorney who handles child support enforcement matters pursuant to an arrangement with the Cabinet for Families and Children, Child Support Division, have an attorney-client relationship with the parties who seek the enforcement services such that a conflict of interest might exist with regard to future support enforcement actions against that same party?

Answer: KRS 205.712(7) is not dispositive of the issue of whether an attorney-client relationship exists between an attorney handling child support enforcement matters and a party seeking enforcement services. If a reasonable person would understand that there is an attorney-client relationship, then such a relationship exists. If a reasonable person would understand that there is not an attorney-client relationship, then no relationship exists.

References: KRS 205.712(7); Turner v. Kentucky Bar Association, 980 S.W.2d 560, 562-63 (Ky. 1998); KBA E-316 (1987); Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997); Wyoming State Bar. Riner, 765 P.2d 925 (Wyo. 1988); In re Petrie, 742 P.2d 796 (1987); Slusser v. Billet, 762 P.2d 350 (Wash. Ct. App. 1988); Ala. Op. RO-96-02; Mont. Op. 981212; <http://www.montanabar.org/attorneyinfo/ethicsopinions/981212.htm>); ABA/BNA Lawyers' Manual of Professional Conduct §31:101-106; Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of*

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Section 205.712 (7) of the Kentucky Revised Statutes states that a lawyer affiliated with the Cabinet for Families and Children who pursues child support enforcement matters “does not have an attorney-client relationship with the applicant who has requested services.” The issue of whether an attorney-client relationship exists between the lawyer and the party seeking the service for purposes of ethics is not controlled by that statute, however.

It is a well-accepted principle in this state that the regulation of the legal profession is within the sphere of the courts, not the legislature. Turner v. Kentucky Bar Association, 980 S.W.2d 560, 562-63 (Ky. 1998). Legislative intrusion *may* be tolerated as a matter of comity. Turner v. Kentucky Bar Association, 980 S.W.2d 560, 563 (Ky. 1998). The existence of an attorney-client relationship for purposes of analysis of the ethics of conflicts of interest is an issue well within the sphere of the judiciary. The judiciary has not spoken on the issue of the treatment of the legislative statement in KRS 205.712(7) regarding the existence of an attorney-client relationship. Given this separation of powers history, an attorney cannot rely solely on KRS 207.712(7) as establishing that no attorney-client relationship exists in the child support enforcement setting.

As was stated in KBA E-316 (1987), for purposes of ethics, rules of agency and contract determine whether an attorney-client relationship has been formed. *See also* ABA/BNA Lawyers’ Manual of Professional Conduct §31:101-106. In Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997), the Kentucky Supreme Court, in reviewing a writ of mandamus to disqualify an attorney on the basis of a conflict, stated:

The lawyer/client relationship can arise not only by contract but also from the conduct of the parties. Courts have found that the relationship is created as a result of the client’s reasonable belief or expectation that the lawyer is undertaking the representation. Such a belief is based on the conduct of the parties.

Lovell v. Winchester, 941 S.W.2d 466, 468 (Ky. 1997). *See also* KBA E-316 (1987); Wyoming State Bar. Riner, 765 P.2d 925 (Wyo. 1988); In re Petrie, 742 P.2d 796 (1987); Slusser v. Billet, 762 P.2d 350 (Wash. Ct. App. 1988). *See generally* ABA/BNA Lawyers’ Manual of Professional Conduct §31:103-04.

In the context of an attorney administering child support enforcement pursuant to Title IV-D of the Social Security Act, that attorney can be found to have an attorney-client relationship with the party seeking those enforcement services if that party has a reasonable belief or expectation that an attorney-client relationship exists. The contexts of interaction of such an attorney acting pursuant to Title IV-D are varied, and the individual interactions possible between a particular lawyer and a party are yet more varied. No absolute statements as to the existence or nonexistence of an attorney-client relationship are possible. Each situation, each

interaction, must be evaluated individually.

To the extent that an attorney pursuing a child support enforcement matter wishes to ensure that no attorney-client relationship exists between that attorney and a party seeking child support enforcement services, the attorney must take steps that would make any belief in the existence of an attorney-client relationship unreasonable. To this end the attorney should fully discuss the attorney's role in the proceeding with the party seeking enforcement services and explain the lack of an attorney-client relationship to that party. In making such a disclosure and explanation, the attorney should explain the consequences of the lack of an attorney-client relationship on such issues as confidentiality and the attorney-client privilege. The attorney would be well-advised, though it is not required by the KRPC, to provide a written explanation of the relationship to every party seeking child support enforcement services. *See also* Ala. Op. RO-96-02; Mont. Op. 981212; (<http://www.montanabar.org/attorneyinfo/ethicsopinions/981212.htm>). *See generally* Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney*, 67 Fordham L. Rev. 2155 (1999).

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.