

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion #643 - 2/16/93 (51-92)

Overrules: N.Y. State 489 (1978)

Topic: Conflict of interest; preserving client confidences and secrets; legal service organization

Digest: Legal service organization may organize panel of volunteer lawyers to represent financially eligible clients that the organization cannot represent because of a conflict of interest. Conflicts panel volunteers may be covered by organization's professional liability insurance. Lawyer-member of organization's governing board may represent an opponent of the organization's client on a paying or pro bono basis.

Code: Definition 2; DR 2-103(D)(1), 4-101,5-101(A), 5-105(A), (D), 5-107, 5-110, 6-101(A)(1); EC 2-25

QUESTIONS

- (1) May a legal aid office establish a panel of volunteer lawyers to represent financially eligible clients where the office cannot undertake the representation because it represents a client with differing interests?
- (2) May the services of the conflicts panel members be covered under the same professional liability insurance policy as the legal aid office?
- (3) May closed files in cases handled by conflicts panel lawyers be stored at the office of the bar association that co-sponsors both the legal aid office and the conflicts panel?
- (4) May a conflicts panel volunteer be a member of the legal aid office's governing board?

OPINION

A bar association and a nonprofit corporation jointly sponsor a project to provide pro bono legal services to financially eligible clients. The project is a "legal aid office" as that term is used in DR 2-103(D)(1). The project occasionally must decline to represent an otherwise eligible client because the project already represents another client with differing interests. See DR 5-105(A), (D). (*1) As a result, there are situations where only one of two or more equally deserving eligible people can receive free legal services through the project, giving the person who first engages the project a potentially unfair advantage over others with conflicting interests who may be unable to obtain counsel elsewhere.

In order to provide legal services to indigents who are now turned away, the project proposes to establish an independent panel of volunteer lawyers to provide services where the project itself cannot do so because of a conflict of interest. Where the project cannot accept a prospective client because of a conflict of interest, the project would advise the prospective client to call the local bar association for referral to a member of the conflicts panel. An individual so referred first would be screened by a conflicts panel volunteer lawyer for eligibility for legal assistance, based on eligibility standards that the project would teach to conflicts panel volunteers. If eligible for legal assistance, the client would be referred to a conflicts panel member (possibly including the screening lawyer) with the appropriate area of legal expertise. Cf. DR 6-101(A)(1).

In representing eligible clients referred to them, conflicts panel lawyers would represent their clients independently from the project and its lawyers. Conflicts panel lawyers would not discuss client

confidences or secrets with the project's lawyers, see DR 4-101(B), although conflicts panel lawyers would convey anonymous statistical information about the referred matters to the project to satisfy the project's reporting requirements. See ABA 334 § 3 (1974); EC 4-3. Neither the project nor its lawyers would exercise any supervision or control over the legal services provided by conflicts panel volunteers. See DR 5-107(B). The assigned conflicts panel lawyer would keep the file pertaining to the representation in the lawyer's own office so long as the matter is active; when the representation is completed, the file would be stored at the bar association's headquarters.

(1) The Code of Professional Responsibility encourages lawyers to contribute pro bono legal services and to assist in making legal counsel available to clients with limited means. EC 2-25. We see no ethical impropriety in the establishment or operation of the conflicts panel as proposed above. So long as conflicts panel volunteers are independently engaged by, and independently render legal services to, their indigent clients, there is no reason to regard conflicts panel lawyers as being part of the same law firm either with one another or with the project itself for conflict of interest purposes.

Candidates for representation by a conflicts panel volunteer would be screened for legal assistance eligibility by a panel lawyer. Even assuming *arguendo* that a prospective client's communication of the information necessary to establish eligibility for legal assistance is a confidence or secret under DR 4-101(A), we believe that it would be equally permissible for the project's own staff to perform the eligibility screening, so long as the information thus obtained would neither be communicated nor available to the lawyers who are rendering services to a client with a conflicting interest. (*2)

(2) The project asks whether the performance of legal services by conflicts panel volunteers may be covered by the same professional liability insurance policy that covers the project's own services. We do not see how such insurance coverage would inhibit either the project's or the conflict panel's lawyers from rendering vigorous, independent legal representation to their respective clients. DR 5-101(A); DR 5-107(A)(2). Purely administrative relationships between the project and the conflicts panel are permissible where they would not be expected in the circumstances to compromise a lawyer's exercise of independent professional judgment on behalf of a client. Cf. ABA Inf. 1309 (1975) (permissible for two otherwise independent legal services organizations to represent clients with conflicting interests even though one organization receives and disburses the other's public funding).

(3) We also see no ethical impropriety in storing closed files in matters that were handled by a conflicts panel lawyer at the sponsoring bar association, so long as client confidences and secrets are protected from unauthorized disclosure. DR 4-101 (B). The files should be stored in a secure location and should be available only to the client, the client's present or former lawyer, or another with the client's informed consent.

(4) Fourteen years ago, we held that where a lawyer in private practice serves on the governing board of a nonprofit legal assistance organization, neither that lawyer nor another in the lawyer's firm could represent a private client in an action where the organization represents an adverse party. N.Y. State 489 (1978); accord ABA Inf. 1397 (1977). The opinion recognized that the question was a close one and that other ethics committees had reached the opposite result. One year later, the ABA Committee on Ethics and Professional Responsibility rejected the holding of N. Y. State 489 and overruled its own ABA Inf. 1397. ABA 345 (1979). Effective September 1, 1990, DR 5-110 was added to New York's Code of Professional Responsibility:

A. A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm, provided that the lawyer shall not knowingly participate in a decision or action of the organization:

1. If participating in the decision of action would be incompatible with the lawyer's duty of loyalty to a client under Canon 5; or
2. Where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

The adoption of DR 5-110 requires that we overrule N.Y. State 489. To the extent that DR 5-110 permits a lawyer-member of a legal services organization's governing board to represent a paying client as an opponent of the organization's client, it follows a fortiori that a board member may represent the opponent pro bono.

CONCLUSION

For the reasons stated, the questions posed are answered in the affirmative.

NOTES

(*1) The pro bono project assumes in its inquiry that it constitutes a single law firm for conflict of interest purposes. If the project or one of its staff lawyers appears as counsel of record or actively participates in rendering legal services to the clients, this assumption is correct. See Code of Professional Responsibility Definition 2; N.Y. State 102 (1969); ABA Inf. 1309 (1975). On the other hand, if the legal services organization serves merely to refer clients to lawyers who have volunteered to provide pro bono services, if the lawyer-client relationship is solely between the lawyer and client both in form and in fact, and if the organization plays no role in the rendition of legal services, the organization would not necessarily be regarded as a law firm for conflict of interest analyses. In that case, it would be permissible for the organization to refer two clients with conflicting interests to independent volunteer lawyers, with each lawyer owing a duty of undivided loyalty solely to the client referred to that lawyer.

(*2) In many instances, it will be necessary for the project's staff or one of its lawyers to elicit from a prospective client information other than the prospective client's name to determine whether the project already represents client with differing interests. Private law firms face the same problem in screening prospective clients for potential conflicts of interests. The project must take care in the first instance to elicit from a prospective client the minimum information necessary to ascertain eligibility for legal assistance and the existence of a conflict of interest. If a conflict of interest is found, the information obtained from the prospective client must not be made available to the lawyers who represent the project's client having the conflict of interest. If, however, despite precautions, a confidence was revealed in the intake interview with the prospective client that would be relevant to the representation of the project's existing client, the project would have to withdraw from that representation and refer both individuals to separate lawyers on the conflicts panel.