LEGAL ETHICS OPINION 1633

ADVERSITY TO CURRENT CLIENT; ATTORNEY-CLIENT RELATIONSHIP; LEGAL AID; CONFIDENCES; EXCEPTION TO CONFLICT OF INTERESTS; REFERRAL PRO BONO CASES.

Subject to the conditions and circumstances below, the committee believes that a legal aid office may refer potential clients, initially interviewed by nonlawyer staff, to private attorneys serving on a volunteer pro bono panel, and still represent a party adverse to such potential client in the same or substantially related matter.

You have presented a hypothetical situation in which a five-person legal aid branch office (two attorneys, one paralegal, two support staff) maintains a panel of local private attorneys to whom are periodically referred for pro bono representation low-income clients who have been pre-qualified as financially eligible for legal aid services. The legal aid program of which the branch office is a part receives an annual allocation of Neighborhood Assistance Act tax credits from the state, and most of the panel members are given tax credits for the hours of work they perform on these referral cases. One of the office's staff persons serves as Pro Bono Coordinator. In this capacity she makes the referrals to the panel members, maintains in-house file jackets on each referral, periodically contacts the attorney and client regarding case status, and keeps track of the reported pro bono hours to ensure that the office does not run out of tax credits.

A client who is dissatisfied with the services rendered by a pro bono referral attorney, just as are dissatisfied clients of the in-house staff attorneys and paralegal, is informed of his or her right to file an administrative grievance with the program's executive director, with appeal to the board of directors. All pro bono cases are assigned an internal case number and are included as a separate category in the program case statistics. The attorneys on the panel are covered by the legal aid office's malpractice insurance for work performed for pro bono clients.

Certain financial information is obtained from all persons seeking services from the legal aid office to determine their eligibility for services. This information includes the amount and source of all income coming into an applicant's household, and the identification and valuation of all assets such as houses, real property, vehicles or bank accounts. The legal aid office's guidelines allow for deduction of necessary employment expenses, medical expenses actually paid, and support paid to outside family members, so such information is also gathered if necessary to financially qualify the applicant. In general terms, an applicant financially qualifies if his or her household income is at or below 125% of the federal poverty guidelines for that particular household size and total assets are less than $5,000 excluding the house, lot of residence and essential motor vehicles. All of this information is taken from applicants at their initial contact with the office, along with a brief description of their legal problem. They are recontacted to schedule an interview with a casehandler if the office's managing attorney determines they are eligible. Initial applications are taken both by the office's intake specialist and the pro bono referral staff person.

The legal aid office also uses its pro bono panel for referral of otherwise eligible applicants who cannot be accepted for services in-house due to a conflict of interest. If the staff person taking the application determines that a conflict exists, she will complete the application in the normal manner, obtaining financial information and a brief description of the case, and give it to the pro bono coordinator for referral. If there is a question regarding eligibility or whether there really is a conflict, the managing attorney

is consulted after first being informed that the question concerns a conflict referral case. Only that information necessary to determine the eligibility or conflict question is revealed to the managing attorney, who is not informed of the identity of the applicant nor given any substantive information about the applicant's legal matter.

Once the applicant is qualified, the pro bono coordinator attempts to refer the case to an attorney on the panel, informing the attorney that this is a conflict of interest case and therefore has not been screened by the managing attorney for merit. If the pro bono coordinator is unable to find an attorney to take the case, a letter is written to the applicant so stating and giving him or her the number of the Virginia Lawyer Referral Service, there being no other bar association panels or pro bono organizations in the area. If a panel attorney is found, then from that point on the case is handled like any other pro bono referral case; it is assigned a case number, tickled periodically to monitor status, and the referral attorney is given the opportunity to claim Neighborhood Assistance Act tax credits for his or her hours. However, unlike regular pro bono referral cases, the three office casehandlers would be shielded from any knowledge about the conflict referral case.

Based on the facts presented, you have asked the committee to address these questions:

1. Are persons whose cases are being handled by attorneys on the pro bono panel properly considered to be clients of the legal aid program, clients of the private attorney, or both? Is the answer different for those referred due to a conflict?

With respect to both regular and conflict referrals to a pro bono panel attorney, the committee believes that since no casehandler (attorney) within the legal aid office undertakes to represent a person whose case is referred to panel attorney, that person is the client of the panel attorney, but not any of the attorneys in the legal aid office. The relationship of attorney and client is consensual and the parties must consent, either expressly or by conduct, to the representation. 2A Mich. Jur. § 12 Attorney & Client, p. 501 (1990). The committee has previously opined that the existence of an attorney-client relationship is determined by the definition of the practice of law set forth in Part 6, Subsection A of § I of the Virginia Rules of Court. LE Op. 1184. An intake interview by non-lawyer staff personnel to determine a person's eligibility for legal aid services, their legal needs or objectives, and to screen for possible conflicts is not giving legal advice nor providing a legal service as defined by the Supreme Court of Virginia. The committee further believes that the referral of a person's legal matter to a pro bono panel attorney by a non-lawyer staff person in the legal aid office does not create any attorney-client relationship between the legal aid office and such person. Such activity does not involve the furnishing of advice or service under circumstances which require the possession or use of legal knowledge or skill.

2. Do the conflict referral procedures used by the legal aid office comport with the requirements of Canons 4, 5 and 9, specifically DR:4-101, DR:5-101 and DR:5-105 of the Code of Professional Responsibility?

3. Under what circumstances, if any, may a legal aid staff attorney represent a party who is adverse to a person referred to and represented by a pro bono panel attorney?

4. Under what circumstances and to what extent is the household and financial information collected on the eligibility application for legal aid services considered a "confidence" or a "secret" subject to the provisions of DR:4-101? Is such information confidential if the applicant is found to be ineligible? Is such information confidential if

the applicant is found eligible but referred to a pro bono panel attorney either in the routine course of business or due to a conflict? Do the conflict referral procedures outlined above adequately maintain the confidentiality of such information? If not, what changes in the conflict referral procedures need to be made?

The committee believes that the controlling disciplinary rules applicable to the situation presented in your hypothetical are DR:4-101 which requires a lawyer to protect client confidences and secrets, and DR:3-104(C) which requires a lawyer or law firm to exercise a high standard of care to assure compliance by nonlawyer personnel with the applicable provisions of the Code of Professional Responsibility. The committee does not believe that Canon 5, specifically DR:5-105, applies to the facts presented in your hypothetical because the legal aid office is not representing multiple clients with conflicting interests, nor clients adverse to former clients in substantially related matters.

DR:4-101(A) defines "confidences" to include any information protected under the attorney-client privilege. The term "secrets" is defined more broadly to include "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." The committee has previously opined that identifying data about a client of a legal aid office is a secret since it might be an embarrassment to the client to have it revealed that he or she sought or received services from a legal aid office. See LE Op. 1300. Even if client information is shared with others or is a matter of public record, such information may still require protection as a "secret" if the client so directs or if the disclosure to others would embarrass the client or is likely to be detrimental to the client. LE Op. 1147, LE Op. 1309. Moreover, secret information may not be revealed voluntarily even if it is subject to discovery. LE Op. 1546.

The committee has on prior occasions opined that when a person discusses with a lawyer the possibility of employing the attorney for a legal matter, but no attorney-client relationship ensues, the information revealed by such person to the attorney is nevertheless protected under DR:4-101. Thus, an initial consultation with an attorney creates an expectation of confidentiality even where no attorney-client relationship arises in other respects. See LE Op. 1546 (lawyer must obtain consent of wife who had one office consultation regarding divorcing husband and lawyer undertakes to represent husband three years later); LE Op. 1453 (university student who has initial consultation with local attorney participating in prepaid legal services plan for students must protect confidentiality of interview although no attorney-client relationship has arisen in other respects).

In LE Op. 949 the committee addressed a situation somewhat similar to the facts presented in your hypothetical. A woman was seen in a legal aid office and received preliminary information regarding a divorce. Some background information was obtained and she received information on the cost of filing a divorce. No further action was taken in that matter for over a year until the woman was interviewed by a pro bono program, in cooperation with the legal aid office and referred to a private attorney with respect to the same legal matter. In the interim, the woman's husband had also consulted the legal aid office on an unrelated matter prior to the filing of the divorce. When served with the wife's divorce suit, the husband had the legal aid office file the appropriate answer and cross bill. While acknowledging that the wife did not actually retain the legal aid office for the divorce, but merely sought some preliminary information, the committee concluded that it would be improper for the legal aid office to continue representing the husband, citing DR:4-101 and DR:5-105.

While the initial consultations in these prior opinions were with a lawyer, rather than nonlawyer staff as in your hypothetical, lawyers are charged with the responsibility of making sure that nonlawyer staff preserve client confidences and secrets. DR:3-104(C); EC:4-5.

In addition, information obtained by nonlawyer staff is imputed to the attorneys in the legal aid office. See, e.g., Glover Bottled Gas Corp. v. Circle M. Beverage Barn Inc., 514 N.Y.S.2d 440 (App. Div. 2d 1987)(disqualification of defendant's firm that hired paralegal previously employed by plaintiff's counsel on same case).

These prior opinions notwithstanding, the committee is mindful of the admonition by the Court of Appeals for the Fourth Circuit in Aetna Cas. & Sur. Co. v. United States, 570 F.2d 1197 (4th Cir. 1978):

> It behooves this court, therefore, while mindful of the existing Code, to examine afresh the problems sought to be met by that Code, to weigh for itself what those problems are, how real in the practical world they are in fact, and whether a mechanical and didactic application of the Code to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits.

570 F.2d at 1202. The committee believes, and is persuaded by legal ethics opinions from other states that while legal aid staff attorneys are considered to be members of the same firm for purposes of imputed disqualification under DR:5-105(E), the pro bono attorneys on the volunteer panel are not members of that law firm. Therefore the legal aid office may refer to the pro bono attorneys potential clients who are adverse to existing or future legal aid clients. See Oregon Op. 1994-138 (August 1994); Pennsylvania Bar Op. 94-148 (November 14, 1994). The screening procedures described in your hypothetical appear sufficient to preclude in-house staff attorney access to the preliminary, but nevertheless confidential information taken by the nonlawyer staff person. Though such a screening system would be inadequate in the private firm setting, nearly identical procedures have been approved in other states giving proper recognition to the reality that a more stringent application of the rules and disqualification would result in decreased access to legal services for the indigent. Alabama St. Bar Op. 91-02 (February 21, 1991).

Thus, the Committee is of the opinion that nonlawyer staff in the legal aid office may obtain minimum information from a prospective client to determine their eligibility for legal aid services and to determine whether a conflict exists, and make referrals as required. As an added precaution, however, the committee believes that the legal aid intake specialist should require each prospective client to execute a written informed consent at the intake interview in which the prospective client acknowledges that the limited information given will not be treated as confidential for purposes of enabling the legal aid office to screen for conflicts or to make referrals. The information revealed during the intake interview may include only that information necessary to determine financial eligibility and to check for conflicts. Only after a conflicts check reveals no conflict and eligibility is verified should the individual be asked more information about himself or herself and the legal matter.

The committee recognizes that other legal aid branch offices in Virginia have different procedures for conflict referrals. This opinion does not address the propriety of screening and referral procedures different from those discussed herein, nor does the committee suggest that legal aid offices employing other procedures must operate in the manner set out above.

Committee Opinion
June 9, 1995