NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY NEW YORK 12207

# Committee on Professional Ethics

NYSBA

Opinion #489 - 7/31/78 (26-78)

Topic: Conflict of interest; representation of adverse party; legal service organization

Digest: Neither lawyer-member of legal service organization's board of directors nor any lawyer associated with his firm may represent adverse party in suit brought by organization's indigent client.

Code: Canons 5 and 7
EC 5-2, 5-15, 5-24
DR 5-105(A), (B) and (D), 5-107(B)

## Question

May a lawyer-member of a non-profit legal service organization's board of directors, or one of his associates in private practice, agree to defend a person sued by an indigent client of the organization?

## Opinion

The question posed has not previously been addressed in this State. Ethics committees from other jurisdictions, however, have to some extent considered the matter and generally appear to be divided.

Florida, for example, holds that a staff attorney for a federally funded legal service organization may defend an action brought by a party represented by one of the organization's board members provided that, after full disclosure, both parties give their consent and, further provided, that the board is completely removed from the relationship between the organization's staff attorney and its client. Fla. Op. 69-24 (1969), indexed at 6593, O. Maru, Digest of Bar Association Ethics Opinions (1970, Supp. 1975), hereinafter "Maru's Digest".

New Jersey, on the other hand, has held that under no circumstances may a legal service organization represent a party against whom an action has been instituted by a law firm with which one of the organization's directors is associated. N.J. Op. 218 (1971), indexed in Maru's Digest at 8820.

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A third view of the subject is represented by an Idaho opinion which holds that, where both parties to an action are indigent, it is not improper for one side to be represented by a legal service organization staff member and the other to be represented by a member of the organization's board of directors. 18 Advocate 9 (Idaho State Bar Foundation, 1975), indexed in Maru's Digest at 8280. Contra, N.J. Op. 218, supra and N.C. Op. 805 (1972), indexed in Maru's Digest at 9556, which holds that "[a] legal aid society's board members may not represent indigents whom the society, because of conflict of interest, could not itself represent." On the facts presented, we need not consider this third alternative since it clearly appears that only one of the two parties to the lawsuit in question is indigent. Cf., N.Y. State 102 (1969).

We believe that the most appropriate rule is one which not only serves to promote the availability of legal services for the indigent, but secures for them their right to be represented by zealous counsel. Canon 7. The full and fair representation of indigent persons is essential to our system of justice. There should be but one standard bearing upon the manner in which a lawyer is expected to pursue the interests of his client, whether the client be indigent or otherwise. It is just as important for those who serve the poor to be free from divided loyalties as it is for those who serve the more affluent. Indeed, it should be obvious that the appearance of impropriety is only enhanced when conflicting interests are entertained at the expense of those who cannot pay for needed legal services.

The Code of Professional Responsibility states that "[a] lawyer should never represent in litigation multiple clients with differing interests." EC 5-15. Client consent to "multiple employment" is only effective "if it is obvious that [the lawyer] can adequately represent the interest of each [client]." DR 5-105(C). Taken together, these provisions of the Code have traditionally been understood to mean that clients can never confer upon counsel the right to represent adverse parties in litigation. See, e.g., N.Y. County 620 (1973).

Having noted the interaction between EC 5-15 and DR 5-105(C), we also note that the Code draws a distinction between the board of a legal service organization and counsel to its clientele for certain purposes. This distinction is particularly important in determining the board's right of access to confidential information or its ability to control the organization's legal staff. See, ABA Inf. 1137 (1970). Thus, for example, where non-lawyers serve on the board, the organization's staff attorneys are ethically forbidden to tolerate any interference by the board in the staff's handling of individual cases. See, Canon 5 and EC 5-24.

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Nevertheless, in the context of the question posed, we believe that this distinction between the board and the organization's legal staff should have no application. Every lawyer-member of the board owes a duty to the organization which directly involves his professional training and status. The organization's staff, albeit possibly insulated from interference by the board in certain respects, is yet generally subordinate to its directors. Certainly, in the minds of the organization's indigent clientele, the staff could not reasonably be deemed free of compromising influences if the lawyer-members of its board were to accept retainers from relatively affluent adverse parties.

We therefore find it to be wholly inappropriate for a member of the board to accept a private retainer for the purpose of defending in litigation a person who has been sued by one of the organization's clients.

Since the lawyer-member of the board could not properly accept the proposed retainer, under the provisions of DR 5-105 (D), "no partner or associate of his [could] accept or continue such employment." See, N.Y. State 426 (1976) and the opinions collected therein; see also, DR 5-105(A) and (B).

For the reasons stated, the question posed is answered in the negative.

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