

## American Bar Association

THIS OPINION HAS BEEN SPECIFICALLY WITHDRAWN BY FORMAL OPINION 334  
THE GOVERNING BOARD OR BODY OF A LEGAL AID SOCIETY HAS THE RIGHT AND  
OBLIGATION TO ESTABLISH AND ENFORCE BROAD POLICY REGARDING THE OPERATION OF  
THE  
AGENCY, BUT BEYOND THIS FUNCTION THE BOARD MUST SCRUPULOUSLY GUARD AGAINST  
UNREASONABLE INTERFERENCE WITH THE HANDLING OF SPECIFIC CASES OR THE  
REPRESENTATION OF SPECIFIC CLIENTS BY STAFF ATTORNEYS.

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CANONS OF ETHICS: 6, 8, 15, 35, 37.

CODE OF PROFESSIONAL RESPONSIBILITY: CANONS 2, 4, 5.

DR 2-103(D)(1), 4-101(B)(1), 5-107(B).

EC 2-25, 2-27, 2-28, 4-2, 5-1, 5-21, 5-23, 5-24.

Recent years have fortunately witnessed a burgeoning of legal aid programs for the poor and others unable to afford reasonable fees for legal services. Subject to local variations, legal aid programs have as their goals one or more of the following: (1) providing legal assistance for persons unable to afford the cost of legal services; (2) educating the community as to the existence of legal problems; (3) achieving law reforms through suggested legislation or test cases; and (4) conducting research into the substantive and procedural law affecting the poor and others whom legal aid programs serve. Depending upon each legal aid society's articles of incorporation, charter or constitution, as the case may be, the programs are often administered by a board of directors or similar body whose membership may consist solely of attorneys, solely of lay persons, or of both attorneys and lay persons. The nature and extent of the control exercised by the board over the lawyers employed by the society does, of course, vary considerably.

The activities of a legal aid society were the subject of criticism by various public officials and certain of the news media. As a result of this criticism, the legal aid society's activities were examined by a special committee of the local metropolitan bar association, which concluded its report by using the following language with respect to the primary complaint directed against the society's representation of 'militant' groups and causes:

'Unquestionably, the Society has, by its representations in certain cases . . . given support, direct or indirect, to causes or activities which may be considered militant. However, up to the present time, representations of this kind have been relatively few in relation to the some 5,000 representations afforded by the Society during the period January 1 to November 30, 1969. It is probable that publicly expressed concern as to the Society's support of 'militant' causes would appear to relate more to what it may do rather than to what it has already done.

'The President and Director of the Society made it quite clear to your Committee, as they have in the press, that the Society intends to undertake the representations of groups of poor persons where it feels they have a just cause, regardless of whether such groups are generally regarded as militant. Such representation may be expected to take a variety of forms, from the representation of rent strikers and a class action to reform the disciplinary procedures of the [Forest Park] Junior College, as had already been undertaken, to suits against governmental agencies to reform their procedures and practices. Further than that, it is the intention of the Society to under-

take legal reform, either by direct suit or by advocating legislative change, in any case where such action would appear desirable in the interest of the poor. As stated by the Director, the only condition is that the action taken be within the law. In short, it is clear that the Society's future activity will be expanded far beyond the traditional concept of simply rendering legal service to individual poor persons. To what extent, if any, this broadened activity may militate against the Society's capacity to serve the individual poor is unknown. The Director of the Society feels that it will not.

'In any event, your Committee believes that the Bar Association should be aware of the broader and more active role that the Legal Aid Society intends to play in support of causes which it deems to be for the good of the poor. Unquestionably, this increased activity will be abrasive and controversial, and the Bar Association, which necessarily assumes a large direct responsibility for the Legal Aid Society will have to keep abreast of its activities to support them or to work for their correction, as the case may require.'

The executive committee of the metropolitan bar association thereafter submitted certain proposals to the legal aid society urging, inter alia, prior approval by the society's board of directors before any legal matter may be undertaken for an organization whose representation has not been authorized by the Board, and before class actions can be instituted by staff attorneys. The statement of the executive committee said in part:

'We feel that the Board of Directors of the Legal Aid Society . . . should assume the dominant and controlling position in directing the policy of the Society. In our opinion, the policy of the Society should be established by its Board of Directors. The members of the Board have a duty to be responsive to the attitudes of the entire community in establishing that policy. They also have a duty to insist that the operating Director abide by the letter and full spirit of the Board's policy, or he should be dismissed.'

The questions presented for decisions are:

(1) To what extent should a board of directors or the governing body of a legal aid society be able to control the activities of lawyers employed by the society to provide legal services for indigents and others?

(2) To what extent can a lawyer employed by a legal aid society submit to such control under the Code of Professional Responsibility and the Canons of Ethics?

Canon 5 of the Code of Professional Responsibility states the broad rule that '[a] lawyer should exercise independent professional judgment on behalf of a client.'

EC 5-1 provides:

'The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.'

Similarly, EC 5-21 provides:

'The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. . . .'

Insofar as is relevant to the specific questions with which we are presented, EC 5-23 provides:

'A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in

furthering their own economic, political or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment.'

EC 5-24 stresses that the functions of the board of directors of a legal aid society should be limited to setting broad policy guidelines for the operation of the society:

'... Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.'

Moreover, DR 2-103(D)(1) clearly provides that a lawyer's professional judgment cannot be interfered with by any legal service agency by whom he is employed:

'A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, providing that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person: (1) a legal aid office. ...'

Finally, DR 5-107(B) provides:

'A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.'

We believe that the foregoing quotations from the Code of Professional Responsibility militate against any interference with the lawyer-client relationship by the directors of a legal aid society after a case has been assigned to a staff attorney.

The questions presented for decision can be more easily resolved by using a two-step analysis of the problem. We must first determine the scope of the authority a legal aid society board of directors has to prohibit its staff attorneys from accepting certain types of cases or representing certain types of clients. Only after this determination is made can we consider the control the directors should exercise over the handling of specific cases assigned to staff attorneys.

We believe that under EC 5-24 of the Code of Professional Responsibility, the governing board of a legal aid society has a moral and ethical obligation to the community to determine such broad policy matters as the financial and similar criteria of persons eligible to participate in the legal aid program, selection of the various services which the society will make available to such persons, setting priorities in the allocation of available resources and manpower, and determining the types or kinds of cases staff attorneys may undertake to handle and the type of clients they may represent. In this regard, the board functions much like the managing or senior partners in a law firm except that the board's role is expressly circumscribed by the Code to making broad, rather

than narrow, policy decisions.

The composition of the board of directors may be important in determining the propriety of board-imposed limitations or restrictions upon the types of cases a legal aid society permits its staff attorneys to undertake or the type of clients it permits them to represent. Where, for example, a board consists partially or solely of lawyers, these members in determining board policy should strenuously attempt to fulfill their broad obligations under Canon 2 of the Code of Professional Responsibility by setting policies designed to make legal services as fully available to all who need them as resources permit. See EC 2-25. Furthermore, just as an individual attorney should not decline representation of an unpopular client or cause, an attorney member of a legal aid society's board of directors is under a similar obligation not to reject certain types of clients or particular kinds of cases merely because of their controversial nature, anticipated adverse community reaction, or because of a desire to avoid alignment against public officials, governmental agencies, or influential members of the community. See EC 2-27 and EC 2-28.

We believe that it is more desirable for a board of directors of a legal aid society, in determining which clients its attorneys may undertake to represent and the cases its attorneys may prosecute, to set broad guidelines respecting the categories or kinds of clients and cases rather than to act on a case-by-case, client-by-client basis. There is in a case-by-case consideration the very real danger that the more controversial causes--those which often provide opportunities for law reforms aiding the poor--will be subject to board veto solely because of a fear of criticism from certain influential segments of the community. A broader policy approach, we believe, is not only mandated by the Code of Professional Responsibility, specifically EC 5-24 and DR 5-107(B), but is also a reasonable accommodation of the sometimes conflicting responsibilities that a legal aid board and its staff attorneys feel towards the community.

In addition to establishing broad policy, the board has the concomitant obligation to insure that its policies are being faithfully carried out by the society's executive director (who, of course, has no more latitude than the Board he represents) and staff attorneys. To this end, the board may employ reasonable procedures to periodically review the actions of society personnel to determine whether the board's policy directives have been adhered to. Although a staff attorney may be asked to divulge certain information pertaining to his clients for the purpose of determining whether the board's criteria have been satisfied, we do not consider this an unreasonable encroachment upon a lawyer's independence nor do we believe that a lawyer breaches Canon 4 and sections EC 4-2 or DR 4-101(B)(1) of the Code of Professional Responsibility, or Canon 37 of the prior Canons of Ethics by divulging such information.

After the attorney has accepted a client or case of the nature and type sanctioned by board policy, the board must take special precautions not to interfere with its attorney's independent professional judgment in the handling of the matter. The staff attorney must similarly prevent his actions in handling particular cases from being directly or indirectly influenced by the board or by individual board members, thus impairing his primary obligation of loyalty to his client. It goes without saying he must also act in accordance with the Code of Professional Responsibility or the Canons of Ethics, whichever is applicable.

Difficulties may arise, however, where a case assigned to or otherwise in the hands of a staff attorney is suitable for expansion into a class action, thereby offering greater possibilities for broader relief or substantial law reforms. Whether or not an attorney should be able to expand his case into a class action without prior board approval will depend on the guidelines established by the board determining priorities among the goals of the particular legal aid society. If, for example, the board establishes law reform as the primary goal of its program, it

would be reasonable to allow the attorney in charge of a particular case to expand the action into a class suit without the prior approval of the board. On the other hand, if law reform is not one of the primary goals of the particular legal aid society, prior approval of the board may well be required before an ordinary suit is enlarged into a class action.

As we have noted earlier, it has been proposed that prior approval of the legal aid society board of directors be required before any legal matter may be undertaken for an organization whose representation has not been authorized by the board, and before class actions can be instituted by staff attorneys. These restrictions, if adopted by the board of directors of the society, would, we believe, extend the board's authority beyond the limits prescribed by the Code of Professional Responsibility and the Canons of Ethics in that such restraints would grant to the board the power to make narrow rather than broad policy decisions and would, in addition, constitute an unreasonable interference with the lawyer-client relationship. Although the board may establish policy relating to financial criteria and other general matters governing the representation of organizations and individuals, it should not make this determination on a case-by-case basis. By its inherent nature, a case-by-case or client-by-client determination makes representation more vulnerable to board veto where the particular organization, individual, or cause is controversial or unpopular in the community and/or among the directors. So long as the board's general criteria are satisfied the society should undertake to represent the client if sufficient resources are available so that other more pressing work is not neglected. Further, if the goals of the society, as its president and director have stated, encompass broad-scale legal reforms in addition to the rendering of legal services to individual clients, the requirement of board approval of each contemplated class action would be an unwarranted interference with the lawyer's handling of the case.

We believe, therefore, that the following principles should govern the relationship between the board of directors of a legal aid society and the society's staff attorneys:

- (1) The board's functions are limited to formulating broad goals and policies pertaining to the operation of the society.
- (2) To this end, the board may establish guidelines respecting the categories or kinds of clients staff attorneys may represent and the types of cases they may handle.
- (3) The board may require staff attorneys to disclose to the board such information about their clients and cases as is reasonably necessary to determine whether the board's policies are being carried out.
- (4) Staff attorneys should endeavor at all times to fulfill the broad policies formulated by the board and should insure that their conduct in representing clients or causes is in conformity with the Code of Professional Responsibility or the Canons of Ethics, whichever is applicable.
- (5) Attorney members of the board of directors are proscribed by the Code of Professional Responsibility from exercising their authority so as to discourage the representation of controversial clients and causes or matters which would align the legal aid society against public officials, governmental agencies or influential members of the community.
- (6) Once the attorney has accepted a client of case of the nature and type sanctioned by board policy, the board must take special precautions not to interfere with its attorney's independent professional judgment in the handling of the matter.

We believe that the foregoing opinion would be equally appropriate under the former Canons of Ethics.

ABA Formal Op. 324

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