American Bar Association

LEGAL SERVICES OFFICES: PUBLICITY; RESTRICTIONS ON LAWYERS' ACTIVITIES AS THEY AFFECT INDEPENDENCE OF PROFESSIONAL JUDGMENT; CLIENT CONFIDENCES AND SECRETS.

August 10, 1974

CANONS, DISCIPLINARY RULES AND ETHICAL CONSIDERATIONS CITED: Canon 2; Canon 4; Canon 5; DR 2-101(A) and (B)(6); DR 2-103(D)(1); DR 7-107(G); DR 5-107(B); DR 7-101; DR 2-102; DR 2-104; DR 4-101(B)(1); EC 2-25; EC 2-33; EC 5-1; EC 2- 27; EC 2-28; EC 5-24; EC 5-23; EC 5-21; EC 4-2; and EC 4-3.

Publicizing the services provided by a legal services office is proper within limits herein prescribed. The activities on behalf of clients by the staff of lawyers of a legal services office may be limited or restricted only to the extent necessary to allocate fairly and reasonably the resources of the office and to establish proper priorities in the interest of making maximum legal services available to the indigent and then only to an extent and in a manner consistent with the requirements of the Code of Professional Responsibility. Board supervision of the activities of a legal services office may not interfere with the lawyers' preservation of client confidences and secrets. [FN1]

The Standing Committee on Ethics and Professional Responsibility is limited in its opinions to interpretations of the Code of Professional Responsibility. It is not the committee's function to determine the most effective means of achieving the goal of making adequate legal services available to the indigent. Nonetheless, this Committee wishes to re-emphasize, at the outset of this opinion, the importance of all lawyers striving to make legal services available within the bounds of professional responsibility.

'Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.' EC 2-25.

Most recently, the Legal Services Corporation Act of 1974 has provided funding to legal services offices through a public legal services corporation.

The general subject to which this opinion is addressed falls into three categories, each of which will be dealt with separately. They are publicity, independence of professional judgment, and preservation of confidences and secrets. The opinion does not involve ethical aspects of programs other than those of legal services offices: for example, it does not include prepaid legal service programs, which are concerned with making legal services available to all income groups rather than to the indigent.

1. Publicity

Canon 2 requires a lawyer to assist the legal profession in fulfilling its duty to make legal counsel available. To what extent may a legal services office publicize its activities or suggest to individuals that its services be utilized without involving the lawyers acting on its behalf in a violation of the restrictions on publicity [FN2] or on the seeking of legal business? [FN3]

Previous opinions have allowed legal services offices to make known their availability to potential clients. [FN4] Informal Opinion 1227 states:

'Our view is in keeping with history. In Formal Opinion 148, this committee sanctioned the publicizing of the availability of legal services without charge by lawyers with somewhat different social philosophies from those associated with [name omitted]. Consistency compels that we not waver from the sound principle there set forth to the effect that the various former canons cited by objectors were 'never aimed at a situation such as this, in which a group of lawyers announce that they are willing to devote some of their time and energy to the interests of indigent citizens whose constitutional rights are believed to be infringed. The adoption of the Code of Professional Responsibility only strengthens this observation, observing as it does in the first provision of EC-1: A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the professional services of a lawyer of integrity and competence."

DR 2-101(B), as amended by the House of Delegates of the American Bar Association in February, 1974, provides:

'A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf, except that a lawyer recommended by, paid by, or whose legal services are furnished by, any of the offices or organizations enumerated in DR 2-103(D)(1) through (5) may authorize or permit or assist such organization to use such means of commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. . . .' [FN5]

There are, however, limitations upon the publicity which may be given the activities of a legal services office:

A. General Availability. Publicity reasonably calculated to educate persons as to their legal rights and responsibilities, to spread knowledge of the availability of legal services generally or with respect to representation on specific problems, or to inform others of the activities of a legal service program is ethical if carried on by a legal services office in compliance with DR 2-101(A) and (B), as amended February, 1974. Informal Opinion 1172 construed DR 2-101(A) as prohibiting any publicity which contains an 'element of extolling any individual lawyer for his role in the case.' The publicity of a legal services office should be designed to acquaint its public with the availability of the office's services, not those of individual attorneys it employs. Individual lawyers may be identified in private responses to inquiries to the extent permitted by DR 2-101(B)(6).

B. Particular Causes. A staff lawyer in a legal services office may advise a chient of the client's right to initiate litigation. There is nothing to prevent a lawyer from serving a legal services office which makes known through any method of publicity not proscribed by a disciplinary rule that services are available to indigents with claims to assert such claims on their behalf. EC 2-3 is helpful as a guideline for staff lawyers, where it states in part:

'. . . The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to

protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity or cause litigation to be brought merely to harass or injure another.. . .'

C. Filing of Actions. The publicizing by a legal aid society of the filing of suits by lawyers employed by it was approved by a majority of the committee over a vigorous dissent in Informal Opinion 1172. The majority opinion recognized that there should be 'no element of extolling any individual lawyer for his role in the case,' as this would 'introduce a wholly different consideration.' Informal Opinion 1230 qualified that holding to the extent that, while there is nothing improper in furnishing to public media copies of pleadings which are matters of public record, information should be furnished only upon request because 'the voluntary furnishing by counsel to the public media of pleadings prepared by him constitutes an invitation to those media to publish and comment upon the contents of these pleadings and is itself an extrajudicial statement in contravention of DR 7-107(G).' The practices suggested in the opinion were intended 'to put a brake on any tendency to rush into print or to draft complaints with an eye to biased publicity which might affect the impartiality of the tribunal.'

Within these limitations, we hold that the publicizing of the activities of a legal services office is within the scope of the Code of Professional Responsibility and therefore there is nothing improper in a lawyer acting on behalf of an office which engaged in such publicity.

2. Independence of Judgment

Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client. To what extent may a governing board prescribe organizational rules and regulations or operational methods of a legal services office to limit or restrict the activities of lawyers acting on behalf of clients of the office without placing those lawyers in violation of the duty to exercise their independent judgment in legal matters? DR 5-107(B).

We hold that the activities on behalf of clients of the staff of lawyers of a legal services office may be limited or restricted only to the extent necessary to allocate fairly and reasonably the resources of the office and establish proper priorities in the interest of making maximum legal services available to the indigent, and then only to an extent and in a manner consistent with the requirements of the Code of Professional Responsibility.

A. Board Policy Matters. The committee previously attempted answers to the problems presented in this area in Formal Opinion 324 and Informal Opinions 1232 and 1252. [FN6] Formal Opinion 324 states that:

'. . . [T]he governing board of a legal aid society has a moral and ethical obligation to the community to determine such board 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 of kinds of cases staff attorneys may undertake to handle and the type of clients they may represent.'

B. Case-by-Case Supervision. The committee further held in Formal Opinion 324 that there should be no interference with the lawyer-client relationship by the directors of a legal aid society after a case has been assigned to a staff lawyer and that the board should set broad guidelines respecting the categories or kinds of cases that may be undertaken rather than act on a case-by-case, client-by-client basis.

The above holdings still appear to the Committee to be sound and fully supported by the sections of the Code of Professional Responsibility.

Although no one has really taken issue with the principles embodied in Formal Opinion 324, questions have

arisen in connection with the committee's application of those principles to specific cases, particularly in Informal Opinions 1232 and 1252 cited above.

Informal Opinion 1232 involved class actions, and we turn first to problems concerning them as illustrative.

C. Class Actions. If a staff attorney has undertaken to represent a client in a particular matter and the full representation of that client (aside from any collateral objective such as law reform) requires the filing of a class action in order to assert his rights effectively, then any limitation upon the right to do so would be unethical. Of course, in the case of any proposed class action it is the individual client who must make the decision to expand the suit into a class action after a full explanation of all of the foreseeable consequences. However, if the purpose of expanding the suit to a class action is not solely to protect the rights of the individual client, or a group of similarly situated clients, but primarily to obtain law reform, and law reform, as such, is not one of the authorized purposes of the legal services office, the case cannot be expanded to a class action unless the authorized purposes are changed to include law reform. This follows from our determination that it is a permissible function of the board in allocating resources to determine 'the various services which the society will make available.'

A governing board may legitimately exercise control by establishing priorities as to the categories or kinds of cases which the office will undertake. It is possible that, in order to achieve the goal of maximizing legal services, services to individuals may be limited in order to use the program's resources to accomplish law reform in connection with particular legal subject matter. The subject matter priorities must be based on a consideration of the needs of the client community and the resources available to the program. They may not be based on considerations such as the identity of the prospective adverse parties or the nature of the remedy ('class action') sought to be employed. EC-1.

D. Advisory Committees to Governing Boards. In Informal Opinion 1232, Inquiry No. 3 was: 'Does the requirement in Condition No. 8 of prior consultation with an Attorney Advisory Committee of the Board of Director prior to filing a class action violate the Code?'

This Committee's answer was:

'In our view this requirement does not violate the Code, as it is entirely proper to require a staff attorney or the Executive Director to consult with an Attorney Advisory Committee prior to bringing suit. This prior consultation does not mean that a class action cannot be brought without the approval of the Attorney Advisory Committee, but simply that there must be some discussion of the subject prior to the bringing of the class action. It may well be desirable to have a full discussion to avoid possible errors of judgment due to hasty action or action taken based on a distorted view of the facts, or the exercise of poor judgment.'

We wish to add to that Opinion. It is difficult to see how the preservation of confidences and secrets of a client can be held inviolate prior to filing an action when the proposed action is described to those outside of the legal services office. It could be pointed out that the legal services office lawyers and the Advisory Committee may have equal access to 'possible errors of judgment' or 'exercise of poor judgment.' However, if an Advisory Committee consisted entirely of lawyers, if it had no power to veto the bringing of a suit but was advisory only, and if the requirement of prior consultation did not in practice result in interference with the staff's ability to use its own independent professional judgment as to whether an action should be filed, there would appear to be no harm in requiring such consultation. But if such a requirement did in fact result in interference with the exercise of the staff's independent judgment, it would be improper.

The members of the Advisory Committee should not be given confidences or secrets of the client, for there is no lawyer-client relationship between the client and the Advisory Committee or any member of it. The requirement of prior consultation should recognize that the obligation of the staff lawyers to preserve the confidences and secrets of clients applies to statements to and information conveyed to the advisory committee or for that matter a state bar committee or any other person or body not privy to the lawyer-client relationship.

E. Supervision by Senior Staff Lawyer. This Committee's response to Inquiry No. 2 in Informal Opinion 1232 reiterated that it is improper to require prior approval on a case-by-case basis before a class action is filed, citing Formal Opinion 324. To the extent that this response indicated that the prior approval of a senior lawyer in a legal services office could not be required, it is hereby expressly overruled. It must be recognized that an indigent person who seeks assistance from a legal services office has a lawyer-client relationship with its staff of lawyers which is the same as any other client who retains a law firm to represent him. It is the firm, not the individual lawyer, who is retained. In fact, several different lawyers may work upon different aspects of one case, and certainly it is to be expected that the lawyers will consult with each other upon various questions where they may seek or be able to give assistance. [Staff lawyers of a legal services office are subject to the direction of and control of senior lawyers, the chief lawyer, or the executive director (if a lawyer), as the case may be, just as associates of any law firm are subject to the direction and control of their seniors. Such internal communication and control is not only permissible but salutary. It is only control of the staff lawyer's judgment by an external source that is improper.]

F. State Bar Committee. The final two inquiries in Informal Opinion 1232 raised a different question. The first of these (Inquiry 4) and the Committee's response to it are illustrative:

'Is it proper under any circumstances to permit, in accordance with Condition No. 12, a committee of the State Bar to co-exist with the Board of Directors of a legal service program, regardless of the function of such committee?'

'There is nothing improper in permitting a committee of the State Bar to confer with the Board of Directors of a legal services program in the absence of the exercise of any control by the State Bar committee which would violate the guidelines set forth in Formal Opinion 324 or Informal Opinion 1208.'

The correctness of the above conclusion seems inescapable but, in view of the question, rather meaningless. The final inquiry (Inquiry 5) questioned the ethical propriety of assigning such a committee on the state bar the function of advising the Office of Economic Opportunity on a continuing basis whether the program of the legal services office was operated in a manner consistent with the applicable canons, guidelines, and legislation and within the terms of its grant. This the committee likewise held to be proper.

It is true that the inquiry dealt with the so-called 'watchdog' function of the state bar committee, but that function was exercised over the operation of the legal services office itself and not over the staff lawyers. The same would be true of State Advisory Councils, such as those to be established pursuant to Section 1004(f) of the Legal Services Corporation Act of 1974. It therefore involved no question of legal ethics.

As the Committee held: 'We do not think that the existence of this committee to perform the functions outlined in the correspondence which you have sent us violates the Code of Professional Responsibility. It does not in any way control the actions of the staff attorneys who are responsible for carrying out the functions of the Legal Aid Society.'

There is no ethical reason why a lawyer could not serve upon such a watchdog committee or council so long

as the provisions of the Code of Professional Responsibility were respected, but to the extent that such special scrutiny was motivated by hostility to legal services offices, or the effect of the state bar committee's activities was to impair the rendition of proper legal representation to the indigent, service upon such a committee by a lawyer would be contrary to the ethical considerations of Canon 2.

G. Legislative Activity. Informal Opinion 1252 said:

'In our view this proviso [former DR 2-103(D)(1)] does not bar the governing body of a legal aid society from broadly limiting the categories of legal services that its attorneys may undertake for a client,--in this instance excluding political activity and lobbying in support of a bill, rule, regulation or ordinance drafted for a client. The proviso is directed against interference with the exercise of the attorney's independent professional judgment in those matters which they do undertake on behalf of a client.'

The Opinion certainly does not hold that a lawyer employed by a legal services office may not engage in law reform or seek to secure the passage of legislation. In fact, it says specifically that 'any lawyer, whether he drafted legislation for a client or not, may of course as a citizen, gratuitously engage in activities of a political nature in support of it.' [FN7]

What the opinion does hold is that the governing body of a legal aid society may broadly limit the categories of legal services its lawyers may undertake for a client, and that in doing so it may, but need not, exclude such categories as political activity and lobbying. There are three important qualifications inherent in this statement. First, in the absence of such affirmative action by the board, no such limitation exists. Second, the action of the board must be a broad limitation upon the scope of services established prior to the acceptance by the staff lawyer of representation of any particular client, and preferably made known to its public and staff in advance like any other limitation on the scope of legal services offered. Once representation has been accepted under DR 5-107(B) and DR 7-101 nothing can be permitted to interfere with that representation to the full extent permitted by law and the disciplinary rules, including of course legislative activity.

The phrase 'independent professional judgment' is not specifically defined in the Code of Professional Responsibility and is not susceptible to easy interpretation but a reading of EC 5-1 through 5-24 will establish the spirit with which the lawyer's duty should be carried out. Subordination of the lawyer's own interests is implicit as is the correlative promotion of the client's legitimate objectives.

It has been suggested that even the limitations upon the activities of a legal services office permitted by Formal Opinion 324 are improper because, while a private law office may limit its activities in any way it pleases, as the services which it does not furnish will be available elsewhere, the indigent have nowhere else to turn and therefore any limitation upon the services available at a legal services office amounts to a deprivation of those services. The Code of Professional Responsibility does not ban such limitations. As a practical matter, the resources of a legal services office are always limited, and some allocation of them upon a basis of priorities must be made if they are to be effectively utilized. As long as this is done fairly and reasonably with the objective of making maximum legal services available, within the limits of available resources, it is not improper.

It has been urged that there are certain rights of indigent clients which can only be asserted through legislative means. There can be no limitation on the availability of the staff lawyer to give advice in connection with such legislative means. DR 5-107(B).

Finally, limitations upon the activities of a legal services office which stem from motives inconsistent with the basic tenet set out in EC 5-1 are always improper. As a general proposition it may be stated that the obliga-

tion of the bard to make legal services available to the indigent requires that no such limitations should be imposed upon a legal services office and no staff lawyer should subject himself to such limitations. Whether or not such reprehensible motives are present must necessarily be determined upon the facts of each individual case.

3. Preservation of Confidences and Secrets

Canon 4 requires a lawyer to preserve the confidences and secrets of a client. To what extent may a legal services office allow its activities to be examined and administered without violating the rule requiring the preservation by lawyers of the confidences and secrets of a client?

Formal Opinion 324 held that without causing a violation of DR 4-101(B)(1) or EC 4-2 and 4-3, the board of directors of a legal services office could require staff lawyers to disclose to the board such information about their clients and cases as was reasonably necessary to determine whether the board's policies were being carried out. Procedures to preserve the anonymity of the client approved in Informal Opinions 1081 and 1287 should be followed. It should be noted, however, that the information sought must be reasonably required by the immediate governing board for a legitimate purpose and not used to restrict the office's activities, and that in many contexts a request for such information by a board may be the practice equivalent of a requirement. Hence, a legal services lawyer may not disclose confidences or secrets of a client without the knowledgeable consent of the client. To the extent this is inconsistent with Formal Opinion 324, that opinion is overruled.

4. Conclusion

Much of the difficulty with the interpretation of Formal Opinion 324 and of the informal opinions discussed above lies in a general failure to distinguish between the disciplinary rules and the ethical considerations of the Code of Professional Responsibility. For the most part, the inquiries relate to what could be 'required' and thus for the most part the answers were based upon the disciplinary rules. To say, as we have sometimes done, that a particular restriction upon the staff of a legal services office is not forbidden by the disciplinary rules is not to say that such a restriction is wise or is consistent with applicable ethical considerations. See EC 2-25, quoted above.

Viewing the problems discussed above on the aspirational level of the Code's ethical considerations, we stress that all lawyers should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the rendition of legal services by legal services offices for the benefit of the indigent and should seek to remove such restraints where they exist. All lawyers should support all proper efforts to meet the public's need for legal services.

As modified and interpreted above, the Committee's previous opinions are reaffirmed.

FN1. The Committee has heretofore issued a number of informal opinions upon various aspects of the above subject (Nos. 992, 1081, 1172, 1208, 1227, 1230, 1232, 1234, 1252, and 1287) and one formal opinion upon the subject generally (No. 324), some of which have been misunderstood in some quarters, and one of which (Informal Opinion 1232) it declined a request to reconsider (Informal Opinion 1262). In view of the importance of the subject, the Committee held a public hearing on October 25, 1973, in San Diego, California, on advance notice published in 59 A.B.A.J. 976 (1973). It was held during the annual meeting of the National Legal Aid and Defender Association. A large number of interested persons testified at the hearing. The Committee published a proposed opinion in 60 A.B.A.J. 329 (1974). Numerous comments were received and considered by the Committee. From all of this it is manifest to the Committee that there is widespread interest in the subject which justifies the issuance of

another formal opinion elaborating and clarifying Formal Opinion 324, issued more than three years ago, and relating the various informal opinions cited to it.

FN2. DR 2-101 and DR 2-102.

FN3. DR 2-103 and DR 2-104.

FN4. As early as Formal Opinion 148 (1935) the Committee held that the broadcast of an offer to represent indigent persons in asserting their constitutional rights was not improper. This opinion was cited with approval in Informal Opinion 786 almost thirty years later, the Committee saying 'the problem of defending constitutional rights today is no less important than it was in 1935.' Again three years later in Informal Opinion 992 the Committee reiterated the principles embodied in Formal Opinion 148. In Informal Opinion 1227 the Committee approved Informal Opinion 992, which in turn embodied Formal Opinion 148, indicating that under the Code of Professional Responsibility the same result would be reached as in these two opinions.

FN5. Legal Services offices treated in DR 2-103(D)(1).

FN6. These holdings were based primarily upon DR 2-103(D)(1) and 5-107(B), along with EC 5-24, but the Committee also cited EC 2-25, 2-27, 2-28, 5-1, 5- 21, and 5-23.

FN7. See Formal Opinion 147.

ABA Formal Op. 334

END OF DOCUMENT