FORMAL OPINION NO. 86

The Ethics Committee has been solicited for its opinion on two questions submitted by a legal aid services group, which questions are summarized as follows:

> Is there a conflict of interest presented under circumstances where both sides of the case present themselves to a legal aid services agency for representation, and both are eligible for legal aid services by reason of indigency where:
>
> (a) Aid is being sought from two different attorneys in the same area office;
>
> (b) Aid is being sought of attorneys from different area offices;
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> (c) Aid is being sought from two attorneys in different area offices controlled by different area committees with different board of directors;
>
> (d) Aid is being sought of two attorneys, one of whom is a staff attorney of the legal aid service agency, and the other is a private attorney on the board of directors of the same agency?

As background for the question, it is pointed out that the legal aid services agency, in the past, has relied on cooperation from an attorney outside the agency to represent the indigent person who is the last in time to make the request for representation with the agency undertaking the representation of the person who was first in time. Further, that the case load of the agency has increased to a point where the number of referrals to be made has caused members of the Bar generally to become reluctant to accept the volume of non-paying referrals. The practical result is that disputants tend to race to the agency in order to be first in obtaining representation with the loser in such race experiencing difficulty in finding counsel to defend that side of the dispute.

The second question is related closely enough to be discussed generally with the first. To clarify any misunderstanding that may have arisen from a prior opinion of this Committee, we will quote the inquiring agency's question verbatim:

> "The second question with which we have been presented more and more frequently is the problem of private counsel, outside Idaho Legal Aid Services, accepting a domestic relations referral from our office due to its potential fee generating nature, i.e., the husband is earning an income which appears to be sufficient to satisfy a court ordered temporary attorney fee. Thereafter, private counsel discovers at the hearing on the order to show cause that his initial information was faulty or that in the interim the husband-defendant is no longer employed and could not respond to the court's order for payment of his fee. The question is this: Under such circumstances is it unethical as a corollary to the recent ethics decision by the committee wherein the committee condemned as unethical the practice of refusing to complete a domestic relations case which was initially undertaken but in which the final fee has not been paid, to refuse further representation of the client in the case already undertaken because the clients lacks the funds."

The governing rules in the Code of Professional Responsibility which must be scrutinized in analyzing these questions are found in Canon Five in general. DR 5-101 addresses itself to the duty of the attorney to refuse employment when the interest of the lawyer may impair his independent professional judgment. DR 5-105 deals with the duty of the attorney to refuse to accept the continuing employment if the interests of another client may impair the independent professional judgment of the lawyer. "A lawyer's fiduciary duty is of the highest order and he must not represent interests adverse to those of his client." Smoot v. Lung, 369 P.2d 933. The thrust of the Canons and of the

cases clearly states throughout that the client owns his attorney's undivided loyalty, and the right to look upon his lawyer as advocate and champion.

> "A firm may not accept any action against the person whom they are presently representing, even though there is no relationship between the two cases. While under the circumstances . . . there may be no actual conflict of interest . . . maintenance of public confidence in the Bar requires an attorney who has accepted representation of a client to decline, while representing such client, any employment from an adverse party in any manner even though wholly unrelated to the original retainer." Grievance Committee v. Rattner, 203 A.2d 82.

It is obvious then that members of the same firm cannot accept representation from litigants of the opposite side of a case.

The real question presented here then is with the determination of the interrelationship of the attorneys in the various situations described in the first inquiry above. If the attorneys in any of those situations could be said to be "members of the same firm", "partners", "associates", or related in a business sense one with the other to the extent that their capacity to exercise independent professional judgment on behalf of their client would be colored, or if their independent professional judgment might be impaired, then such representation would fall squarely within the ambit of the prohibitions described in Canon Five. We are not closely enough acquainted with the internal structure of the given legal aid services agency to give other than these guidelines.

It seems to us, however, that question 1(a) above would be proscribed by the Canon by reason of common understanding of the apparent inherent relationship. Questions 1(b), (c), and (d) may well fall outside the ethical restrictions.

Our answer to question 2 in part may be addressed to the entire Bar generally. The query gives rise to a

chronic problem that will no doubt continue to defy adequate solutions. The individual lawyer is confronted daily with the same economic pressures that everyone must endure. On the one hand he must be able to earn an adequate living, while on the other he must discharge what some might consider to be the first ethic of the profession. We have not previously stated as suggested by the quotation of the second question above, an opinion to the effect that an attorney must continue in a case which, when originally undertaken, was thought to be fee generating, and later it turns out to be not. What we have stated is that an attorney may not take a case up through judgment and withhold the preparation and filing of the papers until his fee has been paid. I.S.B. Opinion No. 65 (1974). The question as propounded, therefore, interprets our prior opinion beyond any boundary intended thereby. We interpret the real question to be this:

> May an attorney withdraw from representation in a case undertaken in the expectation of compensation when in fact compensation cannot be paid because of the true indigency of the client?

DR 2-110(C)(1)(f) holds that an attorney may withdraw if the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees. The key word here is "deliberate." A withdrawal must be considered in the light of other ethical Canons as exemplified by ABA Ethical Consideration 2-32 which states,

> "A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effects on the rights of the client and the possibility of prejudice to his client as a result of his withdrawal."

Further, ABA Ethical Consideration 2-25 requires consideration of this doctrine:

> "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 work load 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 . . ."

Regarding the problem in this light, it seems to us that a lawyer should only withdraw from an established representation when a client disregards viable options available to him in sorting out the priorities in meeting financial obligations. True indigency of a client is an insufficient reason for a lawyer to terminate such an established representation. More profoundly, the lawyer has a duty to take his share of indigent cases and see them through a conclusion without thought of compensation.

DATED May, 1975.