
**E-75-18 Conflict of interest: Representation of
indigent co-defendants by Legal Aid
Society**

The Legal Services Center (hereinafter, “the Center”) is obligated by contract with the County to provide criminal and juvenile representation for indigent defendants in county courts. Under that contract, the Center agrees to “Furnish staff attorneys who will directly accept all criminal-juvenile court appointments offered by the Judges of the County.” The Board of Directors has directed that, when staff attorneys represent co-defendants charged with the same crime and having possibly conflicting interests, the attorneys are to file appropriate motions to have private counsel appointed for one or more of the defendants. Such motions had been filed occasionally before the Board’s directive, and have always been denied.

It is asked whether the Board or the individual staff attorneys are obliged to refuse to represent indigent co-defendants “. . . where there *is* a conflict of interest” (emphasis ours). As the italics suggests, the answer to the question depends in part on whether the conflict is actual or merely potential.

Three Canons of Professional Ethics are particularly relevant to this question: Canon 2, requiring a lawyer to assist the legal profession in fulfilling its duty to make legal counsel available to all persons who need it; Canon 4, requiring a lawyer to preserve the confidences and secrets of a client; and Canon 5, requiring a lawyer to exercise independent, professional judgment on behalf of a client.

Disciplinary Rule (hereinafter, “DR”) 2-109, acceptance of employment, does not preclude the staff attorney from initial acceptance of the obligation to represent co-defendants charged with the same crime. DR 2-110, concerning withdrawal from employment, should be read in its entirety for guidance concerning mandatory and permissive withdrawal. Withdrawal from the defense would appear to be mandatory under DR 2-110(B)(2) if a staff attorney “. . . knows or it is obvious that” his continued representation will result in violation of a disciplinary rule. In the situation here raised the disciplinary rule would probably be DR 5-105. To a limited extent, DR 4-101 might also apply.

The staff attorneys should be familiar with DR 5-105 in its entirety. When a staff attorney decides that he or she *can* exercise independent professional judgment on behalf of a co-defendant, all of the co-defendants must be fully advised of the possible adverse effects of representation by lawyers from the same firm, and must consent to the continued representation. It was indicated that staff members are careful not to discuss cases where a potential conflict may exist. This is commendable and necessary under Canon 4, regarding preservation of a client's confidences.

If one or more of the indigent clients does not consent, or if they consent and the staff attorney still believes withdrawal to be mandatory, the attorney may have to consider DR 2-110(A)(1), which requires permission of the tribunal to withdraw, *if* the tribunal's rules prohibit withdrawal without permission. Thus, the attorney's obligation to withdraw under DR 5-105 appears to be superseded by the requirement of permission from the court, if the county courts have such a rule. (The terms of the Center's contract would also make prior permission advisable.)

DR 2-110(C) states criteria for permissive withdrawal from a case. The attorneys are most likely to be concerned with paragraph (2) of that section, regarding withdrawal when representation "*is likely*" (emphasis added) to result in violation of a disciplinary rule. In deciding whether all of the foregoing standards require him or her to seek withdrawal from a case, the attorney should weigh Ethical Consideration (EC) 2-29 which states that a lawyer should not seek to be excused from a court appointment to represent a person unable to obtain counsel, "*except for compelling reasons.*" A lawyer should not withdraw without considering carefully, and attempting to minimize, possible adverse effects on the rights of his client as a result of the withdrawal (EC 2-32). Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved (EC 2-31). For Ethical Considerations cautioning against conflicting interests among multiple clients, see EC 5-14 through 5-17.

The importance of furnishing counsel to indigent defendants has led the ABA Committee on Ethics to hold that part-time police court and juvenile court judges could represent indigents in superior criminal courts, in a rural area where the entire bar consisted of seven attorneys, three of whom were judges or prosecutors. ABA Op. 55 (1931). There has been some question whether legal services staff attorneys were bound by the DR 5-105(D) restriction, which

prevents a lawyer's partner or associate from accepting or continuing employment which the lawyer cannot accept or continue. However, the ABA Ethics Committee stated in an opinion on a civil conflict (ABA Informal Opinion 1233, 8/24/72) that professional standards regarding representation of differing interests apply to legal aid offices the same as to other lawyers, citing *Borden v. Borden*, 277 A.2d 89 (D.C. Ct. App. 1971). In Formal Opinion 334, the ABA Committee states:

“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 is retained.” (#334, page 7)

Two staff attorneys represent conflicting interests, and *must* request permission to withdraw, whenever it is the duty of one attorney to contend for something, in the interest of his client, which another staff attorney is duty-bound to oppose. (*See* Wis. Adv. Op. 12—1965, quoting ABA Ethics Committee Op. 30.) If such a request is refused by the court, it would be appropriate to seek review of the court's ruling, particularly where the staff attorney has concluded that withdrawal is mandatory. If permission is still denied, your attorneys have fulfilled their obligations under the Canons of Ethics.

It was asked whether the Board of Directors of the Legal Services Center has any ethical responsibility to refuse representation. The ABA Ethics Committee has addressed the problem of a legal services board's responsibility in Formal Opinions 324 and 334 (8/10/74) and in Informal Opinions 1232 and 1252. Opinion 324 stated that the governing board of a legal aid society “. . . has a moral and ethical obligation to the community” to determine *broad* policy matters, such as financial criteria and priorities in the allocation of available resources and manpower. The committee cautioned, however, that a board of directors should not interfere with the lawyer-client relationships once cases had been assigned to staff lawyers. The Board of Directors may thus communicate these ethical guidelines to the legal services staff attorneys, but may not instruct individual attorneys to request permission to withdraw from specific cases. *See* DR 5-107(B).

On the other hand, a senior Legal Services staff lawyer or executive director (if a lawyer) may properly instruct a subordinate attorney to seek permission to withdraw. As elaborated in Formal Opinion 334, internal communication and

control within the office “. . . is not only permissible but salutary.” (#334, page 7)

In summary, the Center’s attorneys are not forbidden to accept, nor are they automatically required to withdraw from, representation of indigent co-defendants in criminal actions. The staff attorney should exercise individual judgment in determining whether a specific fact situation requires him to withdraw or apply for permission to withdraw. The attorney should carefully balance the guidelines of DR 5-105, DR 2-110, EC 5-14 to 5-17, and EC 2-29. The Board of Directors may set general ethical guidelines for representation of multiple defendants, but must leave the decision to withdraw from a specific case to the judgment of staff attorneys.