

Ethics Opinion No. 79-4

Whether it is Proper for the ALSC Board of Directors to Review Client Eligibility Determinations and Whether a Conflict of Interest Exists Where a Board Member and His Firm Represents an Opponent of an ALSC Client.

Summary

The Ethics Committee has been asked, 1) whether it is proper for the Alaska Legal Services Corporation (ALSC) Board of Directors to review client eligibility determinations for legal services clients, and 2) does a conflict of interest exist where a Board member or his firm represents an opponent of an ALSC client in the same litigation.

It is our conclusion that the review of client eligibility information by the ALSC board is not prohibited by any ethical principle unless the information is protected by the attorney-client privilege. Whether the information is protected by the attorney-client privilege depends on the facts in each particular case. As a general proposition, absent unusual factual circumstances, it would not appear that the attorney-client privilege ordinarily applies.

We also conclude that members of the ALSC Board of Directors and members of their firms can represent parties adverse to clients represented by ALSC staff lawyers provided requisite consideration is given to the conflict of interest provisions of the Model Code of Professional Responsibility to assure independent professional advice and judgment to each client.

Issue No. 1

The first issue presented for consideration is whether it is proper for the Alaska Legal Services Corporation Board of Directors to review client eligibility determinations for legal services clients.

Outside of the legal services context, eligibility for publicly funded programs is subject to internal review by the program administration and directors. This is true even in a program where eligibility depends upon income (or available assets) being below a certain threshold level. In most cases, the fact that an individual is represented by Alaska Legal Services is a matter of public knowledge and record. The fact of representation carries the implication that the client is eligible for such representation. In other words, the basic fact of eligibility is not ordinarily confidential.

There is nevertheless some authority for the proposition that specific information relating to client eligibility for representation by ALSC may be

protected by the attorney-client privilege. The ALSC Board of Directors is made up of both lawyers and lay persons. The attorney-client relationship between a staff attorney and his client extends to other, attorneys on the staff, but it does not extend to attorney or non-attorney members of the organization's governing body. See, ABA Formal Opinion 324, ABA Informal Opinion 1208, and California Bar Association Opinion 358. In an Informal Opinion, the California Bar Association found that client financial data, including documents related to income and assets, may not be disclosed to the board of directors of a legal aid foundation by a staff attorney (Informal Opinion 358). That opinion is based in part on a California Supreme Court decision that financial eligibility information given by a client to a public defender agency is protected by the attorney-client privilege. *People v. Canfield*, 10 Cal.3rd 699, 527 P.2d 633 (1974). It should be noted however, that in some districts the Alaska Court System, in determining eligibility for representation in criminal cases by the public defendant, examines potential clients on the question of eligibility in open court. Under such a procedure all the factual details are made available not only to the court and to the agency that may provide legal services, but also to any member of the general public who wishes to listen in. While we do not express approval for this procedure, its employment by the court system in Alaska would seem to indicate that there is no present authority for the proposition that eligibility information is inherently privileged. (see endnote 1)

Rule 503 of the Alaska Rules of Evidence provides that the lawyer-client privilege extends to communications "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Communications protected by the privilege include not only those directly to the lawyer, but also those to the lawyer's representatives. The commentary to the rule provides that the definition of "client" extends to a person consulting a lawyer preliminarily with a view to retaining him, even though actual employment did not result. In other words, there is authority for the proposition that communications to ALSC staff, including nonlawyers, may be privileged whether or not the client is determined to be eligible for representation by legal services. Nevertheless, there are factors indicating that communications concerning eligibility are administrative or ministerial in nature and are not necessarily covered by the attorney-client privilege.

It does not appear that determinations of client eligibility by ALSC are necessarily, or even usually, made based on privileged attorney-client communication. ALSC intake procedures are regularly conducted by nonattorneys for the preliminary purpose of determining eligibility for legal representation. If the potential client is found to be ineligible, ALSC declines to take the case and in most cases the applicant never meets with an ALSC attorney to discuss the substance of the matter upon which he was seeking

representation. The potential client is aware that eligibility must be shown before Alaska Legal Service can undertake representation. Moreover, it cannot be assumed that a potential client has any expectation that eligibility information is protected from review by the corporation, and the persons or boards within ALSC which it designates to make internal reviews of eligibility determinations. (see endnote 2) The client may have an expectation that eligibility information will be kept confidential from the general public, but that is not a question here. The Board of Directors can review client eligibility information without disclosing that information publicly.

In some cases information having a bearing on client eligibility may be disclosed as part of a privileged communication between lawyer and client. In those cases, each of which must be considered on its facts, disclosure of the privileged information to the Board of Directors would be prohibited. The possibility of such an occurrence, however, does not mean that eligibility information generally is privileged from disclosure or review by the Board of Directors.

ABA Formal Opinion 324 emphasizes that an attorney has a duty to exercise professional judgment solely on behalf of the client. EC 5-24 warns that:

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 . . . 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.

Opinion 324 concludes that the functions of the board of directors of a legal aid organization should be limited to formulating broad goals and policies, including the establishment of guidelines delineating categories or kinds of clients and cases the staff attorneys may represent.

Once 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. (Formal Opinion 324, p.7).

ABA Formal Opinion 334 states 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 . . . 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. (Opinion 334, p. 5).

Nothing in these admonitions indicates that the legal services corporation, through its Board of Directors or by some other procedure, may not review the question of client eligibility in particular cases (again, assuming no privileged communications will be revealed). Such a review merely seeks to determine whether general eligibility standards previously established are properly being applied. In Formal Opinion 334, the American Bar Association found that the board of directors at a legal aid office may require staff attorneys to disclose information that is reasonably required for a legitimate purpose, such as determining whether the board's policies are being carried out. The review process should not involve interference with decisions and judgments by staff attorneys on how a case is handled as opposed to the more basic question of the client's eligibility for representation by ALSC.

In some cases the question of compliance with eligibility guidelines may involve decisions based upon professional judgment and interpretation of eligibility guidelines rather than simple application of financial or other guidelines. In those cases it may be inappropriate for the ALSC Board of Directors to attempt to alter a decision by staff attorneys to undertake representation in a particular case. Nevertheless, this would not appear to preclude a review of how eligibility standards have been applied so that the Board can assess whether its policies generally need clarification or revision, nor would it appear to preclude a determination by the Board, where appropriate, that under any reasonable interpretation, its eligibility standards have not been complied with.

As a matter of public policy it is desirable for ALSC to be able to review how its client eligibility standards are applied by its staff. The particular entities to conduct the review should be established by ALSC and the National Legal Services Corporation according to their own policies and regulations. It is assumed for purposes of this opinion that ALSC has determined that its Board of Directors is an appropriate entity to review eligibility determinations, absent an ethical prohibition applicable to such a procedure. It should be noted that if client eligibility information is subject to the client privilege, its disclosure would be prohibited not only to the legal services board of directors, but also to the executive director of Alaska Legal Services (who is not currently an attorney) and to the parent national corporation, the very person and entity ultimately charged with administering the operations of ALSC, including the application of prescribed eligibility standards for expenditure of federal (and state) funds. If it were determined that the attorney-client privilege precluded review of eligibility determinations by the Board of Directors, it would also appear to preclude review by virtually everyone except the very staff person whose action was supposed to be the subject for review.

In balancing the competing considerations, it appears that while client eligibility information should generally be kept confidential, its disclosure to

the ALSC Board of Directors, so that it may review questions of client eligibility constitutes a reasonable use of that information to insure compliance by ALSC with its own governing statutes, regulations and policies. It cannot be assumed that clients reasonably expect that the information they provide to ALSC to demonstrate eligibility for services cannot be reviewed by ALSC's own board in accordance with the corporation's established procedures. Any doubt about the client's expectations can be eliminated by advising the client that eligibility is subject to review. In situations where information relating to client eligibility is protected by the attorney-client privilege, disclosure of the particular information involved by a staff attorney to the Board of Directors, or anyone not a party to the direct attorney-client relationship, is prohibited. This prohibition, however, is strictly limited by the parameters of the privilege and does not extend to other eligibility information not protected by the privilege.

Issue No. 2

The question has also been asked whether a conflict of interest exists where a member of the ALSC board or his firm represents an opponent of an ALSC client in the same litigation.

There is conflicting authority on the propriety of legal services board members or their firm representing parties adverse to clients represented by legal services staff attorneys. Some authorities have concluded that such representation may be improper. *E.g.*, *Estep v. Johnson*, 383 F.Supp. 1323 (D. Conn. 1974). *See also* New Jersey Bar Opinion 126, 91 N.J. 257 (1968); ABA Informal Opinions 1309 and 1395. Other authorities suggest that where the board restricts its activities to the formulation of broad policies and guidelines and refrains from involvement with individual cases, board members can appropriately represent such parties providing requisite consideration is given to conflict of interest provisions of the Code of Professional Responsibility. *See, e.g.*, 44 Florida B.J. 407 (1970). ABA Formal Opinion 345 (July 12, 1979) considers the competing authorities and concurs with the latter conclusion. The principles set forth in that opinion are persuasive and should govern in Alaska.

ABA Formal Opinion 345 states:

The committee, upon due reflection, has concluded that these provisions (D.R. 5-101(A) and D.R. 5-105 relating to the exercise of independent judgment by an attorney] would not be violated necessarily by the representation by the board member or his firm of a client involved in litigation with a program client. The program staff lawyers are the lawyers for the client. Accordingly, the lawyer-board member does not have a lawyer-client relationship with the program client so the problem is not one of a lawyer representing clients with conflicting interests.

* * *

Having said all this, the committee does not concur that there is no problem in a board member's representation of a client adverse to a program client. Depending upon the nature of the case, the circumstances of the clients or otherwise, one counsel or the other may feel unexpectedly self-restrained from representation of the client in the fullest sense. From the client's side it should not be overlooked that clients in the poverty group, particularly, may tend to be submissive and to acquiesce in the representation feeling that they have no choice, but at the same time feeling concerned that they may not be getting independent representation. The real possibility of an appearance of impropriety, even though no actual impropriety may exist, is also troubling to the committee.

Accordingly, it is important that the board and clients on both sides be made aware of the board member's role and the fact that he or a lawyer in his firm is representing a client opposing a program client. The clients and counsel on both sides must feel comfortable that in the particular circumstances neither client will be deprived of independent and uninhibited representation. Lawyers on both sides must be sensitive and alert to these possibilities and, if, in the course of the representation, it becomes apparent that independent representation is not being afforded on both sides or one or the other of the clients perceives that it is not afforded, no matter what the reality, then the lawyers should assist in change of counsel for one or both clients.

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Because of the extreme value of having active practitioners who are litigators themselves (or who have partners who are) serve as board members, the committee does not wish to raise artificial barriers to their participation on program boards by forcing them to choose between service on a board and representation of their clients. It should be noted that in some smaller communities it is impossible to secure qualified lawyer-members for boards who would not be involved from time to time representing clients opposing persons represented by program staff lawyers. Recognizing the need for qualified lawyer board members, program staff lawyers should not seek unfairly to gain advantage for their clients by disqualification of the board member or his firm. To the extent that the program can make available to its clients competent volunteer legal counsel in these situations, program clients can be offered an alternative. On the other side, a board member should be sensitive to the possible problems posed by such relationships and should be quick to disqualify himself and his firm in proper cases.

On balance, the committee concludes that the compelling need for resources, not the least of which is strong interest in legal services and participation on program boards by active practitioners, to provide legal services for the indigent outweighs the risk of any possible appearances of impropriety in those cases where adequate representation is provided by board members (or members of their firms) for one side and program staff attorneys for the other. The committee is confident that

there will be no actual impropriety provided the strictures contained in this opinion are followed conscientiously.

As noted in the ABA opinion, in a state with a small population such as Alaska, the need to obtain qualified lawyer members for boards, particularly from smaller communities, indicates that on balance board members should not automatically be disqualified from representing parties adverse to clients of legal services. On the other hand, the propriety of undertaking or continuing such representation is not absolute. It should be obvious that a board member cannot consider client eligibility in a case where he represents an adverse party. It would also seem to be improper for the board to set the salaries of individual staff attorneys where a staff attorney may simultaneously be involved in litigation adverse to a board member. Other potential conflicts of interest must also be recognized, but the mere fact of representation of a party adverse to a client represented by ALSC does not disqualify an attorney from board membership.

Conclusion

The committee concludes that members of the ALSC Board of Directors may review the eligibility of ALSC clients provided that no disclosure is made to them of information protected by the attorney-client privilege. The committee also concludes that an ALSC board member or his firm may represent an opponent of an ALSC client in the same litigation provided that ethical considerations governing conflicts of interest and the need for a lawyer to exercise independent professional judgment are observed in particular cases.

Adopted by the Board of Governors on May 1, 1980.

Endnotes:

Endnote 1

The Alaska Supreme Court has cautioned that requiring a legal aid client to prove his eligibility in court may be undesirable, before the merits of his case are heard, because "this may involve a showing that several attorneys refused to handle the case because it was too weak." *Dimmick v. Watts*, 490 P.2d 483, 486 (1971). It should be noted, however, that in *Dimmick* the Supreme Court also found that: "Eligibility determinations by Legal Services attorneys are reviewed by the Alaska Legal Service Corporation Board of Trustees." 490 P.2d at 487. The court also declined to decide the difficult question of who has standing to challenge the eligibility of a particular Legal Services client.

Endnote 2

As a matter of policy it would seem to be desirable to advise potential clients that the question of financial eligibility is subject to review and to explain

review procedures to the client. The review procedures established by ALSC are not a subject for consideration here. It is assumed for purposes of this opinion that client eligibility may be reviewed by the Board of Directors, but the exact procedure and the persons or entities who should be involved are determined by ALSC according to its own policies and regulations.