

NEW YORK STATE BAR ASSOCIATION  
**Committee on Professional Ethics**

Opinion 688 - 5/8/97 (47-96)

Topic: Conflict of interest; lawyer's own personal interests; law school clinic

Digest: A supervising attorney at a law school legal clinic may properly represent a clinic client when the opposing counsel is a member of the law school's Board of Trustees as long as the clinic attorney reasonably believes that his or her professional judgment will not be adversely affected by the relationship of the board member to the clinic, and the clinic attorney discloses to the client the relationship of the board member and the clinic as soon as practicable and obtains the client's consent to continue the representation.

Code: DR 2-103(D); 5-101(A), 5-107 (A), (B); 5-110; EC 2-25.

**QUESTION**

May a supervising attorney at a law school's legal clinic represent a client of the clinic when a member of the law school's Board of Trustees or another member of the faculty represents a party adverse to the legal clinic's client?

**OPINION**

A law school operates a clinical program that provides *pro bono* representation to indigent clients. The clinic is a department of the law school and is supervised by attorneys employed by the school. The clinic's cases are assigned to law school students. The law school is governed by a Board of Trustees that sets the overall policy

of the school, with daily management delegated to the dean of the law school. Many of the members of the Board of Trustees are also attorneys with law practices in the immediate geographic area of the law school.

The clinic inquires whether it may ethically represent a client adverse to a party represented by a member of the Board of Trustees. This question has not previously been addressed in New York State so far as we are aware. In 1993, we addressed the analogous conflict posed by the lawyer who serves on the board of a legal services organization and represents a *pro bono* client who is adverse to the legal services organization's client. The Committee recognized the public policy underlying DR 5-110<sup>1</sup> to encourage lawyers to contribute *pro bono* legal services and to assist in making legal counsel available to clients with limited means. EC 2-25. We concluded that since DR 5-110 permits a lawyer member of a legal services organization's governing board to represent a paying client that is adverse to the organization's client, "it follows *a fortiori* that a board member may represent the opponent *pro bono*." N.Y. State 643 (1993) (emphasis added). DR 5-110 does not control the present inquiry, however, which addresses a similar conflict from the standpoint of the clinic lawyer.

The pertinent rule is DR 5-101(A), which states:

Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.

The essential question is whether the clinic attorney's professional judgment on behalf of the clinic's client will be, or reasonably may be, affected by the role at the law school of the opposing attorney, who may wield power or influence over the clinic attorney's salary, tenure, or working conditions. Whether this is so will depend on many factors, including as examples the nature and extent of the Board of Trustees' involvement in clinic personnel matters, whether the clinic attorney will look to the Board of Trustees for contract renewals or tenure, the role of the particular Trustee in the school's affairs, the

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<sup>1</sup> DR 5-110 states:

- A. A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm, provided that the lawyer shall not knowingly participate in a decision or action of the organization:
1. If participating in the decision or action would be incompatible with the lawyer's duty of loyalty to a client under Canon 5; or
  2. Where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

nature of the relationship between the clinic and the Board, the legal structure of the clinic (whether independent entity with its own governing board, or a unit of the school), and the significance of and contentiousness of the matter at issue. All of these factors, and undoubtedly others, may bear on whether the clinic attorney can reasonably believe that he or she can represent the client with full zeal and without fear of direct or indirect influence from the opposing attorney in that attorney's capacity as a member of the Board of Trustees.

A similar analysis may apply if the opposing attorney is a law school faculty member rather than a member of the Board of Trustees. If the clinic attorney depends on a faculty vote for tenure or contract renewal, or if faculty members can influence the dean on such matters, or if the clinic attorney needs the support of the faculty member in other ways, then the clinic attorney might feel constrained in zealously opposing the faculty member. As with the Board of Trustees, the pertinent factors will vary with each situation.

If on the facts and circumstances of a specific matter, the clinic attorney reasonably believes that his or her professional judgment will not be adversely affected and it is obvious that the clinic attorney can adequately represent the client, the clinic attorney may solve the DR 5-101(A) conflict by obtaining the client's consent to the representation after full disclosure of the risks that the attorney's professional judgment may be affected by the attorney's self interest. The clinic attorney must ensure that the consent is a knowing one obtained after full disclosure of the relevant facts. See N.Y. State 605 (1989). In seeking to obtain consent from the client, the clinic attorney should be particularly sensitive to the fact that the clinic client may be unsophisticated and, equally important, disposed to grant consent for fear of having no alternative source of counsel. See N.Y. State 490 (1978), 485 (1978). Therefore, it is particularly advisable for the clinic attorney where possible to identify alternative representation should the client decide not to consent to the conflict. It is also desirable that the consent be obtained in writing to help assure the client understands the choice presented.

If the clinic attorney concludes that it is not obvious that his or her professional judgment on behalf of the client will not be adversely affected, the clinic attorney must decline the representation. A conflict of this nature cannot be cured by a client consent. As we previously noted, "[w]hile DR 5-101(A) provides that a client may consent to representation by a lawyer whose financial, business, property or personal interests differ from those of the client, thereby waiving the conflict of interest, consent is ineffective if there is a reasonable probability (viewed objectively) that the lawyer's interests will affect adversely the advice to be given or the services to be rendered to the client. See N.Y. State 595 (1988)." N.Y. State 635 (1992).<sup>2</sup>

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<sup>2</sup> Although the text of DR 5-101 contains no limitation on the consentability of conflicts posed by a lawyer's own interests, this Committee has long applied to DR 5-101(A) conflicts the "obviousness" standard found in DR 5-105 with respect to multiple client conflicts. See N.Y. State 660 (1994); N.Y. State 635 (1992); N.Y. State 595 (1988). The New York State Bar Association has recently proposed an amendment to DR 5-101 that

(Footnote continued...)

We note that other jurisdictions have reached a similar result. For example, Oregon has adopted a disciplinary rule that reflects this outcome.<sup>3</sup> See Philadelphia Opinion 89-29 (1989) ("Given the apparently limited involvement of the Board member in [legal services organization] personnel matters, and absent any other facts suggesting that he or she has or will have an opportunity directly to affect your employment, it would appear that you could reasonably believe that the representation will not be adversely affected under the circumstances. You must, however, consider the matter and independently decide whether that is in fact your belief. If it is, you should make full disclosure to your client and obtain his or her consent to your further representation.").

### **CONCLUSION**

For the reasons stated, the question posed is answered in the affirmative, subject to the restrictions noted.

(...Footnote cont'd.)

would explicitly add the same limitation on client consent to DR 5-101(A) as it proposes appear in DR 5-105. The proposed amendment would appear to codify this Committee's existing analysis.

<sup>3</sup> Oregon's DR 5-108(C) provides in pertinent part as follows:

- (2) A lawyer employed by a legal aid program shall not be deemed in violation of DR 5-101(A) or DR 5-108(A) or (B) as a result of the lawyer's representation of a client in an advocacy proceeding in which an opposing party is represented by a member of the board of directors or advisory committee of the legal aid program; if:
  - (a) The lawyer does not permit the lawyer's professional judgment to be influenced by the relationship of the board or committee member to the legal aid program; and
  - (b) The lawyer discloses to the lawyer's client the relationship of the lawyer board or committee member and the legal aid program as soon as practicable after the lawyer becomes aware of such relationship and obtains the lawyer's client's consent to continue the representation.
  
- (3) No lawyer, as a member of the board of directors or advisory committee of any Oregon legal aid program, shall influence or attempt to influence actions of the legal aid program in any manner which may benefit a client of such lawyer or his or her firm differently in kind or degree from members of the general public, regardless of whether any advocacy proceeding involving any client of the legal aid program and client of the lawyer board or committee member or his or her firm is pending or contemplated.

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