

Removing an Ethical Barrier to Serving the Poor

Michigan's current ethical rules hamper limited legal aid programs

To facilitate the provision of short-term legal services to the poor, the Michigan Rules of Professional Conduct should be amended to include a provision similar to the ABA Ethics 2000 Committee's Proposed Model Rule 6.5. The existing rules governing attorney-client relationships and the imputation of ethical conflicts to an attorney's firm pose a substantial barrier to attorney participation in legal aid programs. Adopting a rule such as Proposed Model Rule 6.5, which relaxes conflict-of-interest provisions in the legal aid context, would remove these barriers and act as a significant boon to legal aid programs throughout the state.

As they are currently written, the portions of the Michigan Rules of Professional Conduct governing conflicts of interest pose a formidable obstacle to many lawyers who would otherwise participate in legal aid programs. "Hotlines, brief advice clinics, and even the Internet have opened new avenues to offer poor people legal assistance."¹ The amount of interaction between an attorney and a prospective client necessary to form an attorney-client relationship, however, is uncertain and fact-specific.² Such a relationship is almost certainly formed in the "unique circumstances"³ of a limited legal aid program,⁴ which typically seeks to ascertain and resolve the indigent patron's legal issues in a single consultation. These *pro bono publico* services "generally provide brief advice and brief service to a large volume of clients, but do not have the capability to identify conflicts of interest of which the [volunteer] attorney is unaware."⁵

The problem of screening potential conflicts is especially acute for lawyers in larger firms. For these attorneys, the sheer number of former, present, and potential future cli-

ents of the firm, coupled with the fact that client-related business decisions are often made by firm executives other than the would-be volunteer, pose an insurmountable barrier to their ability to perform what would otherwise be an invaluable public service.

Proposed Rule 6.5 encourages pro bono service by eliminating the risk that limited legal aid by a volunteer attorney will be construed as a conflict with an unknown interest of a former or current client of that attorney or of his or her firm:

RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) *A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:*

- (1) *is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and*
- (2) *is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.*

(b) *Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.*

"The Rule was devised in response to the concern that a strict application of the conflict of interest rules may be deterring lawyers

as volunteers in [short-term legal aid] programs."⁶ "This proposed rule is necessary to ease the burden on [brief advice clinics]⁷ and their volunteer lawyers. Without this relaxation of the normally applicable conflict-of-interest rules, limited legal aid programs are forced to use only attorneys with a small, easily identifiable client base or otherwise adopt a cumbersome, multiple-interview screening process that unnecessarily inconveniences the indigent patron, who may not be able to return for numerous visits.

In either event, the current Rules needlessly hamper the ability of limited legal aid programs to meet their goal of serving the poor and promoting social justice. The ethical considerations underlying Rule 1.10 on Imputed Conflicts are inapplicable to short-term legal aid:

Because the assistance provided will be limited and provided outside of the context of the lawyer's firm, there is little or no risk that the pressures of other clients of the lawyer's firm will be brought to bear on the lawyer. In this situation, we believe that it is reasonable not to impute conflicts that arise from the lawyer's full-time employment.⁸

When an attorney is providing short-term limited legal assistance and there is no expectation at that time that continuing representation would be provided, the limited nature of the services being provided reduce the risks normally associated with an attorney employed by a law firm. [A] conflict of interest should not be imputed to an attorney because of the attorney's employment with a law firm when such an attorney is providing limited legal assistance to a client through a limited legal services program.⁹

If a volunteer attorney decided to provide the indigent client with further, longer-term representation, the normal rules governing conflicts would still apply under Proposed

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Rule 6.5. There is therefore little danger that the new rules would undermine the policy of Rule 1.10. Nor would this caveat place any undue burden on the clinic or the attorney, since such representation would not be subject to the same time and opportunity constraints as short-term, limited legal aid.

Michigan should act quickly to adopt this common-sense rule. "The evident broad support for proposed Rule 6.5"¹⁰ demonstrates the wisdom of relaxing conflict-of-interest strictures in the limited legal aid context. Although the ABA House of Delegates is not scheduled to consider Proposed Rule 6.5 until mid-to-late 2002,¹¹ several states have begun the process of incorporating its approach into their own rules of conduct.¹² There is no reason for Michigan to delay doing likewise. With every day that passes without this reform, opportunities to better the lives of the state's poorest residents are being wasted. On behalf of these citizens and

the many attorneys who are currently prevented or dissuaded from serving them by overly rigid ethics rules, I urge the State Bar of Michigan to propose to the Michigan Supreme Court that it adopt ABA Proposed Model Rule 6.5. ◆

Brian D. Wassom is an associate at the Detroit law firm of Honigman Miller Schwartz and Cohn LLP. He also serves as a director and officer of Christian Legal Aid of Southeast Michigan, a newly-formed nonprofit corporation that opened its first short-term legal aid clinic in Detroit in July 2002.

FOOTNOTES

1. Letter from Doreen D. Dodson, ABA Standing Cmte. On Legal Aid and Indigent Defendants, to Hon. E. Norman Veasey, Chair of ABA Comm'n on Evaluation of Rule of Professional Conduct, in Support of Proposed Rule 6.5, June 21, 2000 <http://www.abanet.org/cpr/dodson20.html> [Dodson Letter].
2. Thomas K. Byerley, *Lawyer Disqualification After Initial Consultation*, Mich. B.J., Jan. 2001, at 70-71.

3. Dodson Letter.
4. See Boston Bar Assoc. Ethics Opinion 2001-B: Lawyer for a Day Conflicts http://www.bostonbar.org/ethics/op01_B.htm [BBA Opinion].
5. Testimony of Alan W. Houseman on Behalf of Ctr. For Law and Social Policy and the Nat. Legal Aid and Defender Ass'n in Support of, Inter Alia, Proposed Rule 6.5, July 3, 2000 <http://www.abanet.org/cpr/houseman10.html> [Houseman Testimony].
6. Iowa Rules of Professional Conduct Drafting Cmte., Tentatively Approved Proposed Rules <http://cartwright.drake.edu/gregory.sisk/ModelRulesPublicWeb/Rule6.5.html>.
7. Houseman Testimony.
8. Dodson Letter.
9. Houseman Testimony.
10. BBA Opinion.
11. See "ABA Stands Firm on Client Confidentiality, Rejects 'Screening' for Conflicts of Interest," 70 USLW 6, Aug. 14, 2001, at 2093.
12. For example, the Iowa Rules of Professional Conduct Drafting Committee has provisionally adopted language identical to Proposed Rule 6.5, <http://cartwright.drake.edu/gregory.sisk/ModelRulesPublicWeb/TentativelyApprovedRules.html>, while the Boston Bar Association has encouraged attorneys to petition the Supreme Judicial Court of Massachusetts to do likewise. BBA Opinion.