

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 93-10**

Issued December 3, 1993

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*

**SYLLABUS:** Under Ohio's Code of Professional Responsibility DR 4-101 and DR 5-105, two attorneys from separate divisions of a legal aid society may not represent opposing parties unless it is obvious the attorneys can adequately represent the interests of the parties and the parties consent after full disclosure. Whether implementation of a "chinese wall" would rebut a presumption of conflict of interest when attorneys from two divisions of a legal aid society represent opposing parties requires a judicial determination on a case-by-case basis.

Under Ohio's Code of Professional Responsibility DR 4-101 and DR 5-105, an attorney who is in private practice, but who also serves as a part-time attorney in the public defender division of a legal aid society, may not privately represent a client who is an adverse party to the client of the legal aid society, unless it is obvious the attorneys can adequately represent the interests of the clients and the clients consent after full disclosure.

**OPINION:** This advisory opinion addresses conflict of interest situations that may arise when a legal aid society has two divisions, one a public defender division and the other a civil division. According to the requester, the public defender division is considered to be only nominally tied to the legal aid society which governs broad policy matters and financial matters. The offices and files of the two divisions are separated. The civil division attorneys have offices located in the building that houses the administrative offices of the legal aid society. The public defender division attorneys are part-time staff members who work out of their own private offices. On occasion a public defender division attorney may represent a defendant in a contempt matter where the opposing party is represented by the civil division.

This opinion, which is limited to the narrow set of facts presented, addresses the following questions.

- 1) Is it ethical for staff attorneys in two separate divisions of a legal aid society to represent opposing parties?

- 2) Will implementation of a "chinese wall" rebut a presumption of conflict of interest so that attorneys from two divisions of a legal aid society may represent opposing parties?
- 3) Is it ethical for an attorney in private practice, but who also serves as a part-time attorney in the public defender division of a legal aid society, to privately represent a party in a matter when the opposing party is represented by an attorney from the civil division of the same legal aid society?

In responding to the questions, the Board must examine Ohio's Code of Professional Responsibility. The relevant provisions are set forth below.

**DR 5-105 REFUSING TO ACCEPT OR CONTINUE EMPLOYMENT IF THE INTERESTS OF ANOTHER CLIENT MAY IMPAIR THE INDEPENDENT PROFESSIONAL JUDGMENT OF THE LAWYER**

(A) A lawyer shall decline proffered employment if the exercise of his [her] independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) (omitted).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he [she] can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his [her] independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his [her] or his [her] firm may accept or continue such employment.

**DR 4-101 PRESERVATION OF CONFIDENCES AND SECRETS OF A CLIENT**

(A) (omitted).

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his [her] client.
- (2) Use a confidence or secret of his [her] client to the disadvantage of the client.
- (3) Use a confidence or secret of his [her] client for the advantage of himself [herself] or of a third person, unless the client consents after full disclosure.

(C) & (D) (omitted).

**DR 9-101 AVOIDING EVEN THE APPEARANCE OF IMPROPRIETY**

(A) (omitted).

(B) A lawyer shall not accept private employment in a matter in which he [she] had substantial responsibility while he [she] was a public employee.

(C) (omitted).

QUESTION 1

Generally speaking, a lawyer may not represent a client whose interests are adverse to another current client. A lawyer's duty of loyalty to a client requires such restraint. However, exceptions to this general rule are allowed when it is obvious the lawyer can adequately represent the interests of the clients and the clients consent after full disclosure. For general discussion regarding representation adverse to an existing client see ABA/BNA Lawyers' Manual on Professional Conduct, 51:101 (1990).

In Ohio, the representation of opposing parties is governed by DR 5-105 of the Code of Professional Responsibility. Under DR 5-105 (A) there is a broad prohibition against accepting employment of a client if the lawyer's independent professional judgment in behalf of another client will be or is likely to be adversely affected by the employment. An exception to the prohibition is found within DR 5-105 (C), which permits representation in such situations if it is obvious that the attorney can adequately represent the interests of each client, and the clients consent after full disclosure of the possible effect of such representation upon the lawyer's independent judgment on behalf of each client. The requirements of disclosure and consent guarantee to the clients that their

confidences and secrets are preserved as required under DR 4-101 (B) (1), and that their confidences or secrets will not be used to their disadvantage or for the advantage of another as proscribed under DR 4-101 (B) (2) and (3).

Under DR 5-105 (D) if an attorney may not accept employment because of a conflict of interest under DR 5-105, then no partner or associate of his or her firm may accept such employment either. The doctrine of imputed disqualification, embodied in DR 5-105 (D), is based on recognition that lawyers in a firm share information and have financial ties. See, Charles W. Wolfram, Modern Legal Ethics §7.6 (1986).

It is unclear whether imputed disqualification applies only to lawyers in firms or also to attorneys in other types of legal organizations. By its language, DR 5-105 (D) imputes disqualification to partners or associates of a "firm." In the Definitions Section of the Code the term "law firm" includes a professional legal corporation or a legal clinic." There is no express inclusion of a legal aid society within the definition.

Nevertheless, it is not unreasonable to extend the DR 5-105 (D) disqualification to attorneys within a legal aid society. In fact, several ethics committees have extended the rule of imputed disqualification to a legal aid society. For example, an Alabama ethics committee imputed disqualification to other lawyers in a legal aid agency, advising that a lawyer for a legal aid agency may not accept employment in a divorce proceeding where the prospective client's spouse was previously represented in the divorce matter by another lawyer in the agency, consent of the parties notwithstanding. Alabama State Bar, Op. RO 390 (1980). A Pennsylvania ethics committee also extended imputed disqualification to legal aid agencies, advising that a legal services lawyer must withdraw from representing a father in a custody action when the mother had been represented by a former lawyer in the agency in a previous custody action involving the same child. State Bar of Pennsylvania, Op. 87-47 (1987).

The duty of loyalty to clients is a basic tenet of the legal profession. Based on this duty, it is this Board's view that attorneys within a legal aid society should be subject to the rule of imputed disqualification found in DR 5-105 (D). Unless the requirements of DR 5-105 (C) are met, representation of opposing parties by two attorneys from different divisions of a legal aid society would be prohibited under the imputed disqualification within DR 5-105 (D).

In general, the requirements of DR 5-105 (C) are more easily met when there is a separation between the attorneys who wish to represent opposing parties. See e.g., Ohio Sup Ct Bd of Comm'rs on Griev & Disc, Op. 89-25 (1989) (A legal aid society using appropriate intake procedures may refer cases to a volunteer lawyers' project without jeopardizing the society's representation of the opposing party when the only connection between the two is that the funding of the volunteer lawyers' project is accomplished through the legal aid society); ABA, Informal Op. 1309 (1975) (A legal aid society and a neighborhood law office may accept employment on different sides of a controversy when the only connection is that the budget of the neighborhood law office is administered by the legal aid society).

Under the facts presented the two divisions of the legal aid society are separate. The two divisions are housed in separate buildings. One division does not have access to the files of the other division, thus confidences and secrets can be protected. The attorneys in the two separate divisions of the legal aid society function independently. As a result of the separate nature of the two divisions of the legal aid society, it may be possible to overcome the imputed disqualification of DR 5-105 (D) through compliance with the requirements of DR 5-105 (C). Thus, in conclusion, this Board advises that under Ohio's Code of Professional Responsibility DR 4-101 and DR 5-105, two attorneys from separate divisions of a legal aid society may not represent opposing parties unless it is obvious the attorneys can adequately represent the interests of the parties and the parties consent after full disclosure.

## QUESTION 2

The Board declines to answer whether implementation of a "chinese wall" will rebut a presumption of conflict of interest so that attorneys from two divisions of the legal service corporation may represent opposing parties since it is a fact specific question that requires judicial determination. However, in situations involving simultaneous representation, chinese walls have generally not been favored. For discussion see, ABA/BNA Lawyers' Manual on Professional Conduct, 51:106 (1990).

QUESTION 3

The issue of whether an attorney in private practice, but who also serves as a part-time attorney in the public defender division of a legal aid society, may privately represent a party in a matter when the opposing party is represented by an attorney from the civil division of the same legal aid society raises several ethical concerns. One potential concern is that the attorney may be exposed to confidences and secrets of the opposing party that would violate DR 4-101. Another concern is that there could be a violation of DR 5-105 if the attorney's independent judgment on behalf of the private client could be affected by loyalties arising from the part-time employment with the legal aid society. An additional concern is the appearance of impropriety under DR 9-101, if the attorney accepted private representation in any matter in which the attorney had substantial responsibility while acting within the public defender division of the legal aid society.

The ethical concerns as to DR 4-101 and DR 5-105 could be overcome through disclosure and consent. However, as to DR 9-101 (B), if the representation involved a matter in which the attorney had substantial responsibility, the conflict could not be overcome since that rule provides no exceptions as to disclosure and consent. Thus, in conclusion, the Board advises that under Ohio's Code of Professional Responsibility DR 4-101 and DR 5-105, an attorney who is in private practice, but who also serves as a part-time attorney in the public defender division of a legal aid society, may not privately represent a client who is an adverse party to the client of the legal aid society, unless it is obvious the attorneys can adequately represent the interests of the clients and the clients consent after full disclosure.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.**