

ABA Informal Op. 1208

ABA Comm. on Ethics and Professional Responsibility, Informal Op. **1208**

American Bar Association

LIMITATIONS ON THE OPERATION OF A LEGAL CLINIC BY A COLLEGE OF LAW

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You have presented to us the following situation:

‘A legal clinic was established by a state law school primarily as a ‘skills’ educational program for students but also as a legal aid project. It has a total of five licensed lawyers. It has both a criminal component and a civil component. Student work ranges from investigations of facts through the conduct of trials pursuant to a court rule regulating student practice. Classroom seminars use actual clinic cases for discussions of tactical, ethical, and substantive law problems. Two of the five lawyers are faculty members who accept or reject cases on the basis of the anticipated educational value of each case. The clinic represents only indigents, and no fees are charged; but in addition to individual clients, the clinic has represented certain state and municipal officers and agencies.

‘Some of the clinic’s suits have been against state and local officers, and some of its suits have been controversial on social or political grounds. The clinic does not select cases, however, on the basis of social or political considerations. Because of the controversial nature of some suits, the clinic’s appropriation was questioned or jeopardized.

‘A state ethics committee has held that it was not improper for the Clinic lawyers to handle suits against the state or suits in which the constitutionality of state statutes was challenged. The law school promulgated a set of general guidelines for the conduct of the clinic, and included are general standards for accepting cases. For example, no case against the University or any of its senior officials may be accepted. The guidelines also provide for acceptance or rejection of cases by the clinic’s two faculty lawyer-directors to be appealed (in certain instances including acceptance of cases against governmental officials) to a faculty committee.

‘Three proposals are being considered as alternatives to the guidelines. The *first* would prohibit the lawyer-directors from accepting any case involving an affirmative lawsuit against a federal, state or municipal officer or agency. The second would prohibit acceptance of a case ‘for the purpose of initiating an affirmative civil rights suit’ against a federal, state or municipal officer, ‘provided that this would not prohibit suing the State in order to judicially review or otherwise defend against prior action which had been directed against the prospective client.’ The third would require the lawyer-directors to seek, ‘on a case-by-case basis,’ the prior approval of the dean or a faculty committee before accepting a case involving an affirmative lawsuit against a federal, state or municipal officer. *Habeas corpus* cases are exempted from each proposal.’

Collectively you ask five questions, which we will discuss separately.

At the outset, we observe that the law school clinic is a legal aid office even though occasionally nonindigents are represented. The purposes of the law school clinic indicate that a prime goal is to assist indigents, and one main purpose is to provide skill opportunities and other educational benefits to students. The governing body of the law school clinic

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is a hierarchy consisting of the law school faculty and its committees and its dean, the university administration, and the university board of trustees. Some of the individuals in this hierarchy are lawyers and some are not.

*‘Question One.* Would any of the proposed limitations violate the professional ethics and responsibilities of (a) the dean, who is a lawyer, or (b) the lawyer-directors of the clinic?’

The lawyer-client relationship exists between the clients and the five clinic lawyers, not between the client and the governing body or the lawyer members of the governing body. Thus, the question involves the dean's situation as a member of the governing body and involves the lawyer-directors of the clinic as lawyers operating the clinic and as lawyers representing clients.

Canon 2, CPR, stresses that every lawyer should aid in making legal services fully available. EC 2-26 tells us that each lawyer should accept his share of the burden of rendering legal services in those matters which are unattractive to the bar generally. EC 2-28 adds,

*‘The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.’*

And according to EC 2-29, a lawyer is not justified in declining to handle legal matters which are repugnant because of *‘the subject matter of the proceeding (or) the identity or position of a person involved in the case . . .’*

It follows that lawyer-members of a governing body of a legal aid clinic should seek to avoid establishing guidelines (even though they state only broad policies; *see* Formal Opinion 324) that prohibit acceptance of controversial clients and cases or that prohibit acceptance of cases aligning the legal aid clinic against public officials, governmental agencies or influential members of the community; *see* Formal Opinion 324. Acceptance of such controversial clients and cases by legal aid clinics is in line with the highest aspirations of the bar to make legal services available to all. Lawyer-members of a governing body of legal aid clinic should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases, and this is particularly true if laymen may be unable otherwise to obtain legal services.

Failure of a lawyer-member of a governing body to obtain establishment of guidelines as described is, however, not a matter involving the possibility of disciplinary action. The Code of Professional Responsibility, taking the realistic view that the lawyer-member of a governing body may be unable to cause the body to adopt guidelines conforming to the higher aspirations of the profession, does not contain a Disciplinary Rule subjecting a lawyer to discipline who participates, as a member of a governing body, in setting broad policies which restrict the legal aid clinic in the representation of controversial clients and causes.

It is our opinion, therefore, that establishment of the limitations contained in the first and second proposal would not constitute the violation of any Disciplinary Rule on the part of a lawyer-member of the governing body, even though the two proposals run counter to the ethical precepts urged upon lawyers in the Code of Professional Responsibility.

The third proposal is a different matter, for it contemplates that the lawyer-directors will see ‘on a case-by-case basis’ the prior approval of certain members of the governing body, namely, the dean and a faculty committee. We assume that these members are lawyers.

As pointed out in Formal Opinion 324 (copy enclosed), EC 5-24 stresses that the functions of the governing body of a legal aid office should be limited to the setting of broad policy guidelines for the operation of a clinic. The underlying policy is to avoid the possibility that the judgment of a lawyer will be in any way influenced by the governing body, for the loyalty of the lawyer runs to his client and not to the governing body. It is not important whether the members of

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the governing body which furnishes or pays for legal services for another are lawyers; for the loyalty of the lawyer is to his client and not to the entity paying him. EC 5-21 says,

‘The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment.’

Based on these and similar considerations, Formal Opinion 324 said that the proper functions of a governing body is only to formulate broad goals and policies and establish guidelines respecting the categories or kind of clients that may be represented, and that the governing board must be particularly careful not to interfere with the handling of a particular matter once it is accepted. More specifically, the Opinion stated that the governing board should not

‘. . . act on a case-by-case, client-by-client basis . . . . A broader policy approach, we believe, is not only mandated by the Code of Professional Responsibility, specifically EC 5-24 and DR 5-107(B), but is also a reasonable accommodation of the sometimes conflicting responsibilities that a legal aid board and its staff attorneys feel towards the community.’

DR 5-107(B) is highly relevant to the position of the lawyer-directors of the law school clinic. That rule states:

‘A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.’

EC 5-24 points out that a lawyer should avoid violation of DR 5-107(B) by refusing to accept employment from 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.’

Likewise, lawyer-members of the governing body should not attempt to place the lawyer-members of the clinic in the position of violating DR 5-107(B); see DR 1-102(A)(2) and DR 1-103(A).

In our opinion, the establishment of the limitations contained in the third proposal are unacceptable because the case-by-case review makes it likely that the independent judgment of the five clinic lawyers and their loyalty to their clients will be impaired. Thus the proposed limitations in the third proposal violate the professional ethics and responsibilities of the dean and of the lawyer-directors of the clinic. The fact that the dean is a lawyer is not relevant for the reason that the Ethical Considerations and Disciplinary Rules of Canon 5 do not contemplate an exception permitting outside influence by one who happens to be a lawyer.

‘*Question Two.* Would answer number one be the same if the limitations were imposed by (a) the university board of trustees, (b) the university administration, (c) the law school faculty, or (d) the law school dean?’

Yes. *See* the discussion under Question One.

‘*Question Three.* Are the reasons for imposing the limitations an important determinant of whether or not they are ethical?’

No. *Cf.* EC 5-23.

‘*Question Four.* Would the above answers be different if the clinic did not provide legal assistance to indigent clients?’

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Some organizations, such as those operating legal aid offices, provide legal services to indigents. Other organizations, often referred to under the catch-all heading of 'group legal services,' furnish or pay for legal services to laymen on the basis of criteria other than indigency. An organization providing aid to indigents should more than other organizations using other criteria, feel obligated to avoid guidelines that fail to comply with the Ethical Considerations of Canon 5. Use of guidelines that avoid controversial cases and controversial clients is particularly unfortunate if the organization happens to be the only local organization providing aid to indigents. To this extent it is relevant that the law school clinic provides legal assistance to indigent clients.

*'Question Five.* Would the answers be the same under the Canon of Ethics and the Code of Professional Responsibility?'

The answer is yes; *see* Formal Opinion 324, and Canons 4, 29, 32, and 35, former ABA Canons of Professional Ethics.

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