

Nebraska Ethics Advisory Opinion for Lawyers
No. 79-8

AN ATTORNEY MEMBER OF THE BOARD OF DIRECTORS OF A LEGAL AID SOCIETY AND MANAGING OR STAFF ATTORNEYS OF THE SAME SOCIETY MAY REPRESENT THEIR RESPECTIVE CLIENTS AGAINST ONE ANOTHER IN AN ADVERSARY PROCEEDING OR OTHERWISE WITHOUT BEING SUBJECT TO DISCIPLINARY ACTION UNDER DISCIPLINARY RULE 5-101(A) OR ANY OTHER PROVISION OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE NEBRASKA STATE BAR ASSOCIATION WHERE THE BYLAWS OF THE SOCIETY VEST AUTHORITY OVER INDIVIDUAL PERSONNEL MATTERS PRINCIPALLY IN THE EXECUTIVE DIRECTOR OF THE SOCIETY AND THE ATTORNEY BOARD MEMBERS HAVE UNIFORMLY AND CONSISTENTLY REFUSED TO DISCUSS OR VOTE ON SUCH MATTERS AS INDIVIDUAL MANAGING AND STAFF ATTORNEYS' SALARIES, PROMOTIONS OR EVALUATION IF THE SITUATION IS FULLY DISCLOSED TO THE RESPECTIVE CLIENTS AND THE CLIENTS CONSENT TO CONTINUATION OF REPRESENTATION.

AN ATTORNEY MEMBER OF THE BOARD OF DIRECTORS OF A LEGAL AID SOCIETY AND THE EXECUTIVE DIRECTOR OF THE SAME SOCIETY MAY REPRESENT THEIR RESPECTIVE CLIENTS AGAINST ONE ANOTHER IN AN ADVERSARY PROCEEDING OR OTHERWISE WITHOUT BEING SUBJECT TO DISCIPLINARY ACTION UNDER DISCIPLINARY RULE 5-101(A) OR ANY OTHER PROVISION OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE NEBRASKA STATE BAR ASSOCIATION WHERE THE BOARD OF DIRECTORS HAS AUTHORITY OVER THE HIRING, FIRING AND SALARY OF THE EXECUTIVE DIRECTOR IF THE SITUATION IS FULLY DISCLOSED TO THE RESPECTIVE CLIENTS AND THE CLIENTS CONSENT TO CONTINUATION OF REPRESENTATION.

FACTS

The Board of Directors of a Legal Aid Society has requested an Advisory opinion regarding the following questions:

1. May an attorney member of the Board of Directors of a legal aid society and managing or staff attorneys of the same society represent their respective clients against one another in an adversary proceeding or otherwise without being subject to disciplinary action under Disciplinary Rule 5-101(A) or any other provision of the Code of Professional Responsibility of the Nebraska State Bar Association where the bylaws of the society vest authority over individual personnel matters principally in the Executive Director of the society and the attorney board members have uniformly and consistently refused to discuss or vote on such matters as individual managing and staff attorneys' salaries, promotions or evaluation if the situation is fully disclosed to the respective clients and the clients consent to continuation of representation?

2. May an attorney member of the Board of Directors of a legal aid society and the Executive Director of the same society represent their respective clients against one another in an adversary proceeding or otherwise without being subject to disciplinary action under Disciplinary Rule 5-101(A) or any other provision of the Code of Professional Responsibility of the Nebraska State Bar Association where the Board of Directors has authority over the hiring, firing and salary of the Executive Director if the situation is fully disclosed to the respective clients and the clients consent to continuation of representation?

DISCUSSION

The potential conflict of interests between lawyer members of the Board of Directors of legal services programs or corporations and the staff attorneys of such programs or corporations is the subject of Formal Opinion 345 of The American Bar Association's Committee on Ethics and Professional Responsibility. Such Formal Opinion 345 is a reconsideration of Informal Opinion 1395 originally issued October 10,

1977, which was subject to considerable comment and criticism. Our Advisory Committee for the Nebraska State Bar Association adopts and approves the Formal Opinion 345 which states, in part, as follows:

"Canon 5 requires that a lawyer exercise independent professional judgment on behalf of a client. DR 5-101(A) requires that, except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests. DR 5-105 requires that a lawyer decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment or if it would be likely to involve him in representing differing interests. It also requires that a lawyer not continue multiple employment if such a circumstance exists because of the multiple employment, unless it is obvious that the lawyer can adequately represent the interest of each of the clients and if each consents to the representation after full disclosure of the possible effect on the exercise of the lawyer's independent professional judgment on behalf of each. DR 5-105 also provides that if a lawyer is required to decline or withdraw from employment under a Disciplinary Rule, then no partner, or associate, or other lawyer affiliated with him or his firm may accept or continue the employment."

* * *

"The Committee, upon due reflection, has concluded that these Provisions 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."

* * *

"The Committee in Formal Opinion 334 stressed the ethical duty of Board members to use their positions to set broad policy guidelines for priorities based on consideration of client community need for legal services and the resources available to the Program. We stated specifically that consideration could not be given to the identity of prospective adverse parties or the nature of the remedies that would be employed. Board members must be mindful of their proper role and sensitive to the need to recuse themselves in respect of any policy decision which might be influenced by the actual or potential effect of the decision on their own clients."

* * *

"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."

* * *

"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."

In addition to the foregoing Opinion members of the Board of Directors of legal services programs or corporations are specifically restricted by Federal Regulations and special attention should be given to 45 CFR Section 1607.4(b) which provides as follows:

"A governing body shall establish and enforce broad policies governing the operation of a recipient, but shall not interfere with any attorney's professional responsibilities to clients."

In this regard, both lawyer members of the Board of Directors of legal services corporations or programs, and staff attorneys, including the Executive Director thereof, should be governed by the principle set forth in Formal Opinion 334 of the Committee on Ethics and Professional Responsibility of the American Bar Association, dated August 10, 1974, which specifically provides: "...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..."

CONCLUSION

It is the opinion of this Committee that if the lawyer members of the Board of Directors of a legal services program or corporation and staff attorneys, including the Executive Director of the program, comply and observe the principles and standards referred to in Formal Opinions 345 and 334 of the Committee on Ethics and Professional Responsibility of the American Bar Association, that they would not be subject to any disciplinary action or criticism under the Code of Professional Responsibility of the Nebraska State Bar Association.

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