

Ethics Opinion 2010-02

Rules: 1.0, 1.1, 1.10, 1.18
Subject: Conflicts of interest among legal aid attorneys and private attorneys taking legal aid referrals; screening of attorneys; duties to prospective clients
Summary: Legal aid organization lawyers and private attorneys taking referrals are not members of the same “firm” subject to imputed conflict rules, but must be screened from adverse clients; legal aid intake workers need not document all calls seeking potential assistance

Access to Justice, Inc., has asked several questions regarding its representation of clients, management of documents, and interaction with potential clients. Those questions must be viewed in light of the structure of the organization and the process of its operation.

Access to Justice operates through three main agents. The Director of Access to Justice screens candidates to determine if they meet the eligibility criteria and assigns them to one of two classes of attorneys. The first class consists of legal fellows who are attorneys employed by Access to Justice attorneys to represent clients on a variety of matters. Legal fellows do not participate in screening or referral of potential clients and do not learn about the legal issues presented by clients referred to outside attorneys. The second class consists of attorney volunteers who are members of the bar who agree to accept referrals from Access to Justice; they are not employed by Access to Justice nor do they office with Legal Fellows.

Access to Justice may be approached by multiple parties with adverse interests on a particular issue or litigation. It is possible that one party may be assigned to a legal fellow while others are referred to one or more volunteer attorneys. Legal fellows are not provided with confidential information by litigants other than those they are representing and do not participate in the referral of cases to volunteer attorneys.

The Director does receive and retain files and time slips relating to individuals assigned to volunteer attorneys. Legal fellows do not have direct access to these documents. The documents may not be completely barred from being accessed by legal fellows if they sought access, however.

Access to Justice is approached by many potential clients or candidates for referral, often by phone. As part of the screening process to determine eligibility, the severity and urgency of the issue, and to screen for conflicts the receptionist or Director will visit with callers and may obtain a name and summary of the issues involved. Access to Justice suspects that many individuals provide false names and do not subsequently follow up the call and become clients.

Based on this factual background, Access to Justice has presented several questions. We have restated them as follows.

1. May legal fellows employed by Access to Justice and volunteer attorneys taking referrals from Access to Justice represent clients with conflicting interests?
2. What steps must Access to Justice take to screen legal fellows from time slips and other confidential documents regarding individuals referred to volunteer attorneys?
3. What steps must Access to Justice take in screening and documenting potential clients who make contact by telephone?

We have addressed these questions in order below.

1) May legal fellows employed by Access to Justice and volunteer attorneys taking referrals from Access to Justice represent clients with conflicting interests?

The answer to this question turns primarily on application of Rule 1.10, the imputed conflict rule, and the definition of “firm” under Rule 1.0. We conclude that because legal fellows and volunteer attorneys are not members of the same “firm” they may represent clients with conflicting positions.

Rule 1.10 provides that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be barred from doing so under the conflict of interest provisions of Rule 1.7 and Rule 1.9....” Application of that rule here is dependent upon whether legal fellows employed by Access to Justice and volunteer attorneys working elsewhere are members of the same “firm” when representing clients assigned or referred by the Director of Access to Justice. The term “firm” is defined in Rule 1.1(c) to include “lawyers employed in a legal services organization....” Footnote 4 to the rule addresses indicates that lawyers in legal aid or legal services organization may be members of one or more “firms” depending upon the structure of the entity. It is the judgment of the committee that where, as here, legal fellows and volunteer attorneys operate in separate physical locations, operate completely autonomously, do not share direct management or oversight, and are bound only by receiving client referrals from the Director of Access to Justice, they are not members of the same “firm” subject to imputed conflicts of interest pursuant to Rule 1.10.

The Committee would refer you to two California cases which seem to take a similar approach to determine what constitutes a “firm.” *People v. Christian* 41 Cal. App.4th 986, 991-1002(1996); *Castro v. Los Angeles County Bd. of Supervisors* 232 Cal. App.3d 1432, 1435-1445 (1991). Those cases looked at physical locations, shared services or operations, shared oversight or management, shared budget, and similar factors. It is important to note that the courts looked at the types of guidelines put in place to keep attorneys and operations separate in determining “firm” status.

In order to ensure clarity, the Committee recommends developing clear written protocols to screen legal fellows and volunteer attorneys from the client intake process and ensuring that confidential information provided to the Director and intake personnel is not shared with attorneys representing individuals with conflicting interests. These protocols should be shared with legal fellows, volunteer attorneys, office staff, and their substance should be communicated to clients in writing. As practical guidance as to the scope and implementation of such policies, the Committee recommends consulting *In the Matter of R.B., T.Y., and K.S.*, 583 N.W.2d 839 (S.D. 1998) which discusses mechanism for adequate screening of an attorney in conflict situations.

2) What steps must Access to Justice take to screen legal fellows from time slips and other confidential documents regarding individuals referred to volunteer attorneys?

It is the judgment of the Committee that to retain the separation of legal fellows and volunteer attorneys necessary to avoid constituting one “firm” for purposes of Rule 1.10, Access to

Justice must implement appropriate measures so that both groups are “screened” from confidential information of the other group as defined by Rule 1.1(k). This must include prohibiting communication of confidential information between the Director, legal fellows, and volunteer attorneys and physically precluding access to confidential documents.

Your inquiry refers to Ethics Opinion 94-18 which dealt with lawyers who represented adverse parties while being partners in the separate venture of owning the building in which one lawyer had an office. While we believe that the recommendations of that opinion are instructive (e.g., locking files and doors), your case requires a more rigorous and formal process. The conflict in that case was a single episode whereas, given the function of Access to Justice and the systemic risk of such conflicts arising, this is an ongoing situation that must be addressed. It is therefore the judgment of the Committee that confidential documents received by the Director must be unavailable to legal fellows and volunteer attorneys, including being locked. Electronic documents should be password protected or otherwise barred from access by attorneys. While perhaps not necessary, the Committee would also encourage Access to Justice to carefully evaluate what information is provided to the Director in the client intake process and by attorneys through time slips and other reports to minimize the number of confidential records that must be retained.

Again, there should be a stringent written policy provided to office staff, the Director, legal fellows and volunteer attorneys, which is communicated to clients. The policy should address the process to maintain confidential files, screening, and to address any inadvertent disclosure by reporting and remedial measures. You should consult the cases cited above for additional guidance.

3) What steps must Access to Justice take in screening and documenting potential clients who make contact by telephone?

Rule 1.18 provides that attorneys consulting potential clients have obligations not to disclose or use confidential information or assume positions adverse to a potential client. However, as outlined above it appears that the legal fellows at Access to Justice are not involved in the intake process. As such, if the procedures outlined in response to questions 1 and 2 above are complied with, it should not be necessary to keep a log of contacts. It may be prudent to do so, however, for purposes of screening and avoiding referrals or assignments which result in conflicts.

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Ethics Committee
State Bar of South Dakota