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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 96-07

Approved August 30, 1996

Issue: What are the ethical implications of federal funding reductions and practice restrictions to Utah Legal Services lawyers?

Opinion: A Utah Legal Services lawyer must give all clients adequate notice of legislative changes and the effect they will have on a client's representation. Funding reductions and practice restrictions may necessitate withdrawal from pending matters and intake restrictions on new matters. The attorney must make reasonable efforts to arrange for substitution of lawyers to handle pending matters, such as referring them to the Utah State Bar's statewide pro bono coordinator.

Analysis: Congress has imposed dramatic funding cutbacks and imposed certain practice restrictions as part of the fiscal-year 1996 appropriations bill signed into law on April 25, 1996. Some of the practice restrictions are: a ban on advocacy before legislative or administrative rule-making bodies; a ban on initiating, participating or engaging in new class actions; a ban on collecting attorney fees; a ban on welfare reform litigation; a ban on abortion representation; a ban on prisoner representation; a ban on representation of certain aliens; and a requirement to make pre-litigation disclosures.

Two formal opinions of the ABA address the subject of funding reductions and practice restrictions and give reasonable guidance in this area. (fn1)

A. Giving Notice of Practice and Budgetary Limitations. Rule 1.4, Communication, Utah Rules of Professional Conduct, provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

A legal services attorney has an obligation to make an assessment with respect to ongoing provision of legal services to existing clients in light of funding reductions and new practice restrictions. Under Rule 1.4(a), the attorney is required to provide to existing clients and new clients as they are accepted notice of the risk or the likelihood that representation may be limited or terminated. When the risk is known and cutbacks must be made, clients must be promptly advised of terminating representation.

Rule 1.16, *Declining or Terminating Representation* , provides:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law; . . .

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: . . .

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Legal Services lawyers must determine if existing clients fall within representation practice restrictions or will be affected by present and future funding cuts. ABA Formal Opinion 96-399 does not permit lawyers to decide which clients to keep and which clients to let go solely on the basis of whether abandoning certain cases will facilitate future funding. With respect to the indigent client, the lawyer must do more than give reasonable notice to the client allowing time for employment of other counsel. An

effort to arrange for substitution of *pro bono* lawyers to handle pending matters needs to be made.

The Bar's statewide pro bono program is one possible source of alternative counsel. The responsibility for coping with funding reductions and practice restrictions does not fall solely on the shoulders of modestly paid legal services attorneys. The Comment to Rule 6.1 of the Utah Rules of Professional Conduct, Pro Bono Publico Service, makes clear that members of the Bar have an ethical duty to assist in the provision of legal services for those unable to pay:

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal service to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the professional and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

If more than lip service is to be paid to this ethical duty, the Bar, individually and collectively, must respond to the coming crisis in indigent representation imposed by the recent funding reductions and practice restrictions.

ABA Formal Opinion 96-399 also holds that "A representation cannot be terminated solely because it would violate the funding restrictions." The opinion permits a legal services organization to make its own determination as to whether forgoing legal services funding and maintaining prohibited representations is more desirable than keeping the legal services funding and terminating prohibited representations. Where a legal services organization's funding from the Legal Services Corporation is a small percentage of its overall funding, the organization may have two viable choices. However, where, as here, the Utah Legal Services' budget is 84% funded by the Legal Services Corporation, (fn2) the option of forgoing Legal Service Corporation funding is not a real choice.

A lawyer has a continuing duty to communicate restrictions to existing and new clients and to advise them, for example, that representation in an eviction case may be limited in important respects (such as not pursuing unlawful denial of welfare benefits because of welfare reform litigation restrictions). Additionally, the legal services lawyer must communicate that he may not be able to continue to represent a client in certain new matters where a change in circumstances such as incarceration or change in immigrant status may involve practice restrictions. It may be difficult for the legal services lawyer to anticipate the restrictions that may arise with each client, and clients should be advised of practice restrictions so they understand that the lawyer's services are or may be limited.

B. Client Consent to Restrictions and Withdrawal. Rule 1.7(b)(2), Utah Rules of Professional Conduct, provides that "A lawyer may not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person or by the lawyer's own interests, unless: . . . the client consents after consultation." Some restrictions on providing a client full-service representation will require the legal services attorney to advise the client of those restrictions and, if the representation is to continue, to obtain a consent of the client to continue the representation after consultation with the client.

ABA Formal Opinion 96-399 in this regard provides, "A lawyer must abide by the client's refusal to consent to limitation on representation and cannot withdraw solely because the client refuses his consent." This is not to say that the lawyer will be unable to withdraw, but that the refusal of an existing client to consent to limitations on the representation cannot be the sole reason the lawyer is withdrawing. The lawyer may be facing malpractice issues if he is unable to resolve a client's legal needs because of practice restrictions. If those practice restrictions will jeopardize funding that constitutes 84% of the budget of the legal services organization, the lawyer's responsibility to other clients would also weigh in the decision to terminate representation for a client that did not consent to the restrictions. The legal services attorney would also be exploring the obtaining of alternative counsel outside the legal services organization.

Caseload restrictions are not new to legal services organizations, but the recent funding and practice restrictions create a new dimension for existing procedures already in place at legal services organizations. If practice restrictions or funding restrictions would create a caseload that adversely affects the representation of existing clients by defunding the organization or stretching resources too thinly the legal services lawyer may not be able to accept new cases. New clients, prior to engagement of representation, may sign an agreement that explains the limited scope of representation in light of practice restrictions. Even with client consent, if the representation of the client is so limited that its practical effectiveness is severely compromised, then the attorney should decline

representation. (fn3)

The scope of representation can be limited by either the client or by the lawyer. Rule 1.2(b), *Scope of Representation*, provides: "A lawyer may limit the objectives of the representation if the client consents after consultation." The official comment to Rule 1.2 states in part that, "Representation provided through a legal aid agency may be subject to limitations on the type of cases the agency handles." In addition, the comment also states: "An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law." Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 or to surrender the right to terminate the lawyer's services or the right to settle the litigation the lawyer might wish to continue.

In some cases, a lawyer may need to advise a client that he may be better off with another lawyer rather than consent to continue with the legal services lawyer where those activities would be restricted either through funding or practice restrictions under Rule 1.2, 1.7(b), and 2.1. (fn4)

C. Caseload Maintenance and Lawyer Competence. Rule 1.1 requires a lawyer to provide competent representation. The official comment to Rule 1.1 requires adequate preparation and attention to the case being represented for the client. Rule 1.3, *Diligence*, requires a lawyer to act with reasonable diligence and promptness in representing a client. A lawyer must manage his caseload so as to provide competent representation, acting with reasonable diligence and promptness. This would require a legal services attorney to decline new cases if budget cutbacks and staff reductions prevent prompt and diligent work for a client.

D. Pre-Litigation Disclosures. A troublesome practice restriction in the legal services appropriation bill covers mandated pre-litigation disclosures. The legislation requires legal services lawyers, when filing a complaint, to identify each plaintiff by name and to prepare a statement of facts written in English or in a language the plaintiffs understand that enumerate particular facts known to plaintiffs on which the complaint is based, signed by the plaintiffs. The statement would be kept on file by the legal services organization and made available to any federal department or agency who is auditing or monitoring the activities of the legal services organization. There is an escape clause on the disclosure of the identity of the client in the complaint that permits the party to move the court to avoid disclosure of the identity of any potential plaintiff pending outcome of litigation or negotiations until after notice and an opportunity for a hearing is provided. ABA Formal Opinion 96-399 observed that these disclosures could conflict with the lawyer's obligations under Rule 1.6, *Confidentiality of Information*. A lawyer is required to consult with such clients about these requirements and include the client's right to refuse to reveal his identity. The lawyer cannot ask for a consent to limitation on representation if the representation from the client's point of view would be compromised.

The lawyer must advise future clients that they may proceed anonymously if they are represented by a non-legal services funded lawyer. If court permission to proceed anonymously is denied under the escape provision, the lawyer cannot obtain a consent to proceed if the disclosure would adversely impact the client. Otherwise, the client can give his informed consent and continue litigation with disclosure of his name. (fn5)

Rule 1.6 does not permit a lawyer to make the statement of facts required by this legislation available to federal auditors without the client's consent. Legal Services Corporation-funded lawyers must use the same kind of caution in obtaining these consents as they do with regard to revealing a client's identity. (fn6)

Footnotes

1. ABA Comm. of Ethics and Prof. Responsibility, Formal Op. 96-399 (1996); *see also* ABA Comm. of Ethics and Prof. Responsibility, Formal Op. 347 (1981).

2. According to Toby Brown, Utah State Bar Statewide Pro Bono Coordinator.

3. Rule 1.16(a)(1); ABA Formal Opinion 96-399.

4. ABA Formal Opinion 96-399.

5. *Id.*

6. *Id.*

Rules Cited:

1.11.41.7