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ETHICAL RESPONSIBILITIES OF ATTORNEYS IN LEGAL SERVICES AND PRO BONO PROGRAMS CONCERNING PROSPECTIVE CLIENTS

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Introduction

Colorado Legal Services (“CLS”) is a legal services program that provides free legal representation in civil cases to indigent clients through multiple offices across the state.¹ In addition, approximately twenty pro bono programs sponsored by local bar associations process requests for legal representation and refer indigent or limited means clients to pro bono attorneys participating in those programs. Because the need for legal services by the indigent or persons of limited means is far greater than the resources available to meet those needs, programs are required out of necessity to limit their representation to certain substantive areas of law. When the programs are regulated by federal law or otherwise, they also must limit representation to individuals meeting specified financial guidelines.

To determine an applicant’s eligibility for program services, some pro bono programs conduct joint intakes through CLS, while others maintain separate offices to process applications for services. Generally, a program’s intake process is a “free standing” operation whose primary responsibilities are to determine an applicant’s eligibility for legal services and refer qualifying clients to staff or volunteer counsel. They also serve as a “hub,” working cooperatively with other providers to assist indigent and low income individuals obtain whatever services they may need even when they are not legal services. Because legal services programs are generally just one part of a multi-faceted network delivering services to the poor, which includes other legal services and social services providers, the private bar, and clients representing themselves pro se, working in the intake process has evolved into a functional specialty within legal services organizations.

Most legal services and pro bono programs utilize intake specialists that include both attorneys and non-attorneys. These intake specialists determine whether there are conflicts with existing clients, whether the legal issue presented is within the scope of the program’s services (substantive eligibility) and whether an individual financially qualifies for representation (financial eligibility). The mix of attorneys and paralegals serving as intake specialists varies among programs.

During the intake process, an individual must provide information about the matter for which he or she seeks representation and disclose his or her financial circumstances. This information typically includes the applicant’s name, address, a brief description of the individual’s legal problem, source and amount of income, and any adversary’s name. The intake specialist reviews this information, checks for conflicts of interest, and initially determines substantive and financial eligibility. If the intake specialist determines that there are no conflicts with the program’s existing or past clients, the program offers the services sought by the applicant, and the individual is deemed financially eligible for the program’s services, the applicant is referred to one of the program’s staff attorneys or a private, pro bono counsel who is willing to accept the referral.

Particularly in the domestic relations area, parties who may be adverse to one another sometimes apply for legal assistance from CLS or the same pro bono program. When the information obtained by an intake specialist reveals an actual or potential conflict of interest, CLS and pro bono programs are sometimes unclear how to proceed. For instance, CLS and pro bono legal services programs have questioned whether its intake specialists may continue to obtain limited qualifying information from the applicant once the intake specialist believes there is a potential or actual conflict of interest and whether they may continue to represent an existing client who is adverse to an applicant from whom an intake specialist subsequently has received application information. Other questions concern whether referrals are permitted generally and when, and to what extent, a legal services program can provide financial assistance to volunteer counsel. This opinion provides ethical guidance to resolve these dilemmas.

Syllabus

If the CLS or a pro bono program's intake attorney or non-attorney intake specialist discovers that an individual applying for the program's services is otherwise eligible for the program's services, but has interests adverse to those of an existing client, intake staff may continue to obtain limited qualifying information from the applicant without violating the Colorado Rules of Professional Conduct. Furthermore, if the intake specialist determines that the applicant qualifies for the program's services, but the program cannot undertake representation because of a conflict of interest with an existing client, the intake attorney or non-attorney intake specialist may refer the applicant to other counsel or another program if:

- (1) the applicant provided to the intake specialist no more information than necessary to make an initial determination whether the person was qualified for the program's services;
- (2) the legal services program and the private lawyer to whom the matter will be referred are not considered to be in one firm under Colo. RPC 1.10;
- (3) safeguards are in place to ensure that the program's lawyers who represent a party adverse to the applicant referred to private counsel or other program do not have access to the information about the adverse party gathered during intake; and
- (4) the lawyer to whom the adverse party is referred does not have access to the information in the program's possession regarding the adverse party which triggered the conflict.

If the intake attorney or specialist believes that the conditions above cannot be met or have been breached, both the existing client and the adverse applicant should be referred to other counsel. *See* CBA Formal Ethics Opinion 57, Conflicts of Interest (March 21, 1981, addendum 1995)(providing guidance in situations raising possible conflicts of interest) and CBA Formal Ethics Opinion 68, Conflicts of Interest: Propriety of Multiple Representation (April 20, 1985)(addressing multiple representation in common conflict situations).

When CLS or a pro bono program refers an indigent person or person of limited means to volunteer counsel, it may provide financial assistance to the volunteer lawyer consistent with the requirements of Colo. RPC 1.6 (Confidentiality of Information) and Colo. RPC 1.7 (Conflicts of Interest) applicable to the program's attorneys.

Analysis

No Attorney-Client Relationship at Intake

An intake interview conducted by an intake attorney or non-lawyer intake specialist to screen for possible conflicts, to determine a person's eligibility for services, and to identify his or her legal needs or objectives generally does not establish an attorney-client relationship.

An attorney-client relationship "is established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions." This test is subjective, and an important factor is whether the client believes such a relationship existed. *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991).² Therefore, an intake attorney or specialist may obtain limited information from an applicant to screen for possible conflicts, determine eligibility, and determine a prospective client's legal needs or objectives. Accordingly, the intake attorney or the attorney supervising the intake specialist must ensure that only information necessary for determining eligibility and screening for conflicts is obtained.

The intake attorney or specialist should also stress that no attorney-client relationship can be established until the legal services or pro bono program determines the prospective client is financially and substantively eligible for the program's services. Nevertheless, even if the initial inquiries suggest there is a conflict of interest, the intake specialist may still obtain limited information to determine financial and substantive eligibility for purposes of referral or possible representation, because obtaining such information does not establish an attorney-client relationship. Furthermore, the act of referral does not create an attorney-client relationship between the legal services program and the applicant. *See* ABA Formal Op. 90-358 (Protection of Information Imparted by Prospective Client). The mere act of referral, alone, does not

involve the furnishing of advice or service under circumstances which require the possession or use of legal knowledge or skill. *See* C.R.C.P. 201.3(2)(b)(i) & (ii)(describing acts related to the practice of law).

Conflicts of Interest

The Colorado Rules of Professional Conduct prohibit a lawyer from undertaking representation of one client that is directly adverse to another client, unless the clients consent and the lawyer believes that he or she is able to represent each client without adversely affecting the other. Colo. RPC 1.7 (Conflict of Interest). This means that a lawyer generally may not act as an advocate against a person the lawyer or a member of the lawyer's firm represents in some other matter, even if the matter is wholly unrelated. Colo. RPC 1.7 (Conflict of Interest) and Colo. RPC 1.10 (Imputed Disqualification). The principle underlying these ethical proscriptions is the duty of loyalty that each lawyer owes to a client. *Id.* Additionally, Colo. RPC 1.9 (Conflict of Interest: former client) limits representation by a lawyer who has formerly represented a client in the same or a substantially related matter in which the new prospective client's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

CLS and pro bono programs often face questions regarding conflicts of interest when parties who have interests adverse to one another each seek representation by program staff attorneys or volunteers. Most often, conflict of interest questions arise in connection with dissolution of marriage proceedings. Often, one spouse has come to CLS or a pro bono program to seek representation in a dissolution of marriage and, shortly thereafter, the other spouse comes to the same office also seeking representation. Occasionally, other conflicts of interest questions arise when CLS or a pro bono program formerly represented a party in one matter, such as a husband or a husband and wife in an eviction action, and subsequently, one spouse requests representation in connection with a dissolution of marriage proceeding.

Historically in Colorado, CLS and pro bono programs sometimes have refused services to otherwise eligible applicants because of concerns about the application of conflict of interest and confidentiality rules. Consequently, only the first of two or more equally deserving eligible people may receive free legal services through CLS or a pro bono program. This first come-first served policy unfairly benefits the first party with conflicting interests because the adverse party subsequently may be unable to obtain free or affordable counsel elsewhere.

Ethics opinions in several jurisdictions have addressed questions regarding conflicts of interest when each of two parties who have interests adverse to one another seeks pro bono representation by program volunteers. In some jurisdictions, ethical opinions have been rendered on this issue. *See* Philadelphia Bar Association, Professional Guidance Committee, Opinion 80-41; Maine Commission on Professional Ethics, Opinion #59 (9/4/85); Virginia State Bar Association, Standing Committee on Legal Ethics, Opinion 808 (6/25/86); and The Florida Bar, Professional Ethics Committee, Advisory Opinion 92-1. These opinions have generally concluded that, with appropriate safeguards, a legal services or pro bono program may ethically refer prospective clients with a conflict of interest.

Based on these opinions, the committee believes that CLS and pro bono programs, through its attorneys, may ethically refer to private counsel an eligible applicant it cannot represent because of a conflict of interest without also having to refer the existing client to other counsel if:

(1) the applicant provided to the intake specialist no more information than necessary to make an initial determination whether the person was qualified for the program's services;

(2) the legal services program and the private lawyer to whom the matter will be referred are not considered to be in one firm under Colo. RPC 1.10;

(3) safeguards are in place to ensure that the program's lawyers who represent a party adverse to the applicant referred to other counsel or another program or other employees do not have access to the information about the adverse party gathered during the intake; and

(4) the lawyer to whom the adverse party is referred does not have access to the information in the program's possession regarding the adverse party which triggered the conflict.

Consequently, the committee concludes that where a conflict is detected during the intake process, that because no staff attorney within CLS or a pro bono program has undertaken to represent the individu-

al referred, there is no ethical rule that prohibits the intake specialist from referring the applicant to other counsel or another program. Upon referral to and acceptance of the matter by other counsel, the individual becomes the client of the attorney who agrees to undertake the representation, not a client of the organization making the referral.

Other state bar association opinions have considered the specific issue of whether legal services organizations can establish intake procedures to screen a potential client with interests adverse to those of a current legal services client and then refer the client to other counsel or another program. These opinions reach a similar conclusion to the one reached in this opinion. *See, e.g.*, South Carolina Opinion 96-15 (1996), Tennessee Opinion 93-F-130 (1993), West Virginia Bar Opinion 93-1 (1993), Arizona State Bar Opinion 91-24 (1991), and Alabama Opinion 91-36 (1991). Those opinions held it ethically permissible for legal services intake staff to refer clients with interests adverse to those of legal services clients to an affiliated pro bono panel if there was no client-lawyer relationship established at the intake stage, the legal services organization and affiliated pro bono panels are not considered to be one firm under Rule 1.10 and safeguards are in place to ensure that the legal services staff lawyers do not have access to information gathered at the intake stage.

Furthermore, even if a conflict is discovered after an applicant has been qualified for a program's services and referred to counsel in that program, CLS and pro bono programs, through their attorneys, may subsequently refer the applicant to other counsel or another program subject to the same conditions noted above, if the attorney to whom the client has been assigned has not obtained confidential information or otherwise established an attorney-client relationship with the applicant. *See* ABA Informal Opinion 1334, Fee Arrangements by Legal Aid Organizations, issued May 27, 1975 (holding referral proper even after legal aid society had accepted the client prior to discovery of a conflict).

If the intake attorney or specialist believes that the conditions above cannot be met or have been breached, both the existing client and the adverse applicant should be referred to other counsel. *See* CBA Formal Ethics Opinion 57, Conflicts of Interest (March 21, 1981, addendum 1995) and CBA Formal Ethics Opinion 68, Conflicts of Interest: Propriety of Multiple Representation (April 20, 1985).

The analysis of conflicts of interest in these circumstances has been clarified by the Colorado Supreme Court's adoption of Colo. RPC 1.18 (Duties to Prospective Clients)(effective January 1, 2008). This new rule recognizes that "a lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, the prospective client should receive some but not all of the protection afforded clients." Colo. RPC 1.18, comment [1]; *see also* Oregon Formal Opinion No. 2005-138 (applying Oregon RPC 1.18(b) and (d) to communications between prospective client and legal services intake unit).

Colo. RPC 1.18(a) provides that a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. Thus, individuals who seek representation from CLS or a pro bono program would be considered prospective clients under Colo. RPC 1.18.

Colo. RPC 1.18(b) provides that even when there is no client-lawyer relationship, a lawyer who has discussions with a prospective client shall not use or reveal information learned in the consultation, except as Colo. RPC 1.9 (Conflict of Interest: Former Client) would permit. Further, Colo. RPC 1.18(c) states that a lawyer subject to Colo. RPC 1.18(b) "shall not represent the client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to the prospective client, except as provided in Colo. RPC 1.18(d)." Finally, Colo. RPC 1.18(d) provides that even if the lawyer has received disqualifying information under Colo. RPC 1.18(c), representation is permissible when both the affected client and prospective client give informed consent in writing or the lawyer who received the information takes reasonable screening measures to limit exposure to disqualifying information.

Thus, Colo. RPC 1.18 (Duties to Prospective Clients) establishes a three-tiered procedure to determine whether a conversation with a prospective client establishes a disqualifying conflict of interest. First, Colo. RPC 1.18(b) provides that lawyers should not reveal or use information learned in a consultation,

except as permitted by Colo. RPC 1.9. That rule applies to circumstances involving representation of a second person where the lawyer has formerly represented the first person in “the same or a substantially related matter in which that person’s interests are materially adverse to the interests of a former client unless the former client consents after consultation.” Therefore, if a prospective client speaks with a CLS or pro bono attorney about representation in a dissolution of marriage, and that program previously represented that individual and/or his spouse in an eviction several years earlier, Colo. RPC 1.9 and 1.18(b) generally would not preclude the new representation.

Second, even if CLS or the pro bono program that represents one spouse in a dissolution of marriage proceeding is not disqualified from continuing such representation if an intake attorney or specialist of CLS or the pro bono program meets with the other spouse as a prospective client and obtains certain information from that spouse, there is no disqualifying conflict of interest unless such information could be significantly harmful to the prospective client. Accordingly, if a prospective client divulges basic information in an intake interview concerning the request for representation in a dissolution of marriage proceeding and basic financial information necessary to determine eligibility, it is unlikely that such information would be considered “significantly harmful” to the prospective client.

Third, Colo. RPC 1.18(d) provides that even if the lawyer obtains information that could be significantly harmful to the prospective client, representation is still permissible if (1) both the affected client and the prospective client have given informed consent in writing, or (2) the lawyer who received the information takes reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client and further, if (a) the disqualified lawyer is timely screened from any participation in the matter and (b) written notice is promptly given to the prospective client. In other words, even in this situation, if disqualifying information is obtained by an intake attorney or intake unit, CLS or a pro bono program may continue to represent its existing client as long as the above procedural protections are utilized.

The safe harbor against imputed disqualification under Colo. RPC 1.18(d) applies if the intake attorney or the attorney supervising the intake specialist ensures that the prospective client initially provides information related only to determining eligibility and conflicts of interest. *See* Colo. RPC 1.18(d)(2). Further, if both the prospective and affected clients give informed written consent, imputed disqualification will not be required. Colo. RPC 1.18(d)(1).

The comments to Colo. RPC 1.18 are consistent with the conclusions reached above that the applicant should provide the intake attorney or specialist with no more information than is necessary to make an initial eligibility determination and that information obtained from the prospective client is not shared with the attorney who provides representation to a client with possibly or actually conflicting interests. Thus, the comments note that in order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. *See* Colo. RPC 1.18, comment [4]. Additionally, the comments note that “a lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.” *See* Colo. RPC 1.18, comment [5]. In short, Colo. RPC 1.18 makes it clear that ordinarily, no disqualifying conflict of interest will be presented when CLS or a pro bono program interviews a prospective client to determine whether the applicant is eligible for the program’s services.

To ensure compliance with the applicable ethics rules, as well as the guidance provided in this opinion, CLS and pro bono programs should develop a conflict of interest policy based on the provisions of Colo. RPC 1.7 and 1.18 discussed above. In particular, the Committee believes that such policy should provide that the intake specialist obtain initially only information necessary to determine eligibility and possible or actual conflicts of interest. Further, the prospective client should be specifically informed, in language reasonably understandable to the prospective client, that the prospective client should only disclose information requested concerning eligibility and conflicts of interest. Nevertheless, not all legal services and pro bono programs are the same, and conflict of interest policies will naturally differ. No policy

can anticipate every situation that may arise. Whatever the specific conflict of interest policy that is adopted, the committee believes it should take into account the manner in which the program operates and the availability of free legal assistance from other sources in balancing the need to avoid conflicts of interest against the desire to maximize access to legal representation.

Confidentiality of Information

The committee recognizes that a lawyer has an ethical duty to maintain client confidences and that this obligation may be compromised, either purposefully or inadvertently, if a lawyer represents adverse parties. We do not believe, however, that an applicant is “represented” by CLS or a pro bono program during the intake process or that the information requested from the applicant during the intake process is information “relating to representation of a client,” as that term is used in Colo. RPC 1.6(a). There is a fundamental distinction between an intake interview to determine whether an individual is eligible for representation by CLS or a pro bono program’s lawyer and a consultation with a lawyer to determine rights and responsibilities that may apply to a given set of circumstances.

The limited inquiry necessary for an intake specialist to determine whether an applicant qualifies for assistance from one of the program’s staff or volunteer attorneys does not solicit confidential information protected under Colo. RPC 1.6 because the information is neither given in confidence nor during the course of representation.

The fact that an intake attorney or specialist may obtain information about an applicant who is adverse to an existing client of CLS or a pro bono program does not preclude the intake attorney or specialist from continuing to obtain qualifying information from the applicant or from referring the applicant to a CLS or volunteer lawyer. Furthermore, if an intake attorney or specialist discovers a conflict between an existing client and an applicant during the intake process, the possession of the limited intake information does not trigger a conflict of interest that would preclude CLS or a pro bono program from continuing to represent the existing client.

CLS and pro bono programs must make clear to the applicant that limited preliminary information must be provided by the applicant to determine the applicant’s *eligibility* for representation and that the information provided will not be considered confidential. Likewise, CLS and pro bono programs must make clear to the applicant that the intake information is a necessary *predicate* to determining whether the applicant is eligible for representation, and that the intake process itself is not “representation.” Given those disclosures prior to the intake interview, Colo. RPC 1.6 has no application to the information obtained during the intake process.

Whenever feasible, the committee believes that each prospective client should execute a written informed consent form acknowledging that the limited information given will not be treated as confidential and will only be used to enable the intake specialist to screen for conflicts or to make referrals. Only after a conflicts check reveals no conflict and eligibility is verified should the applicant be asked additional information about himself or herself and the details of the legal matter for which he or she seeks representation to assist in placing the applicant with CLS or pro bono counsel.

Supervision over a program’s intake process by an attorney may be helpful to provide a basis for preserving the confidentiality of intake information received by intake staff when evaluating an applicant for services. As previously noted, obtaining intake information is not obtaining information protected under Colo. RPC 1.6 (Confidentiality of Information). Many applicants, however, generally expect that the information they convey to intake staff will not be disclosed to others. Consequently, CLS and pro bono programs should make clear the extent to which intake information will be protected, if at all, before obtaining intake information and get the informed consent from the applicant to undergo intake questioning. Adopting a privacy policy may be helpful in ensuring uniform advisements.

Imputation of Conflicts

Pursuant to Colo. RPC 1.10 (Imputation of Conflicts) CLS attorneys are considered to be members of the same firm for purposes of imputed disqualification. Pro bono attorneys who agree to accept

referrals from CLS generally are not members of the same law firm and are not considered members of CLS. Colo. RPC 1.10 (Imputation of Conflicts). Therefore, CLS may refer applicants eligible for its services but who are adverse to existing clients or clients it may subsequently determine cannot be further represented because of a conflict to pro bono attorneys who agree to accept referrals from CLS. Similarly, a pro bono program may refer otherwise eligible clients with adverse interests to different attorneys associated with the pro bono program. When the program is required to refer an applicant and the existing adverse client to volunteer counsel, those referrals are permissible as long as they are not attorneys in the same firm. *See Oregon Op. 2005-138; Pennsylvania Bar Op. 94-148 (November 14, 1994).*

Financial Assistance to Pro Bono Counsel

When a pro bono or other legal services program refers an individual to a private lawyer based on a conflict of interest, the program may sometimes provide financial assistance to the pro bono lawyer accepting the representation. Such assistance may include secondary malpractice insurance, reimbursement of litigation costs, or a modest negotiated fee. That assistance does not violate existing ethics rules governing the program's lawyers. A lawyer may be compensated from a source other than the client, if the client is informed of that fact, consents, and the arrangement does not compromise the lawyer's duty of loyalty to the client. Colo. RPC 1.8(f) (Conflict of Interest: Prohibited Transactions).

This issue was addressed by the American Bar Association in Informal Opinion No. 1334 (1975). Interpreting the then-effective Code of Professional Responsibility, the ABA opined that "no Disciplinary Rule forbids a lawyer with a legal aid society from making such a reference or forbids a lawyer from receiving such a reference on any fee basis that is mutually satisfactory and that is not clearly excessive or illegal." ABA Informal Opinion 1334. Such arrangements must also conform to the requirements of Colo. RPC 1.6 (Confidentiality of Information) and Colo. RPC 1.7 (Conflict of Interest).

NOTES

1. This opinion discusses ethical issues concerning Colorado Legal Services and bar association-sponsored pro bono programs throughout the state. However, the principles discussed herein may also apply to other legal services organizations, nonprofit organizations providing pro bono services, or other pro bono programs.

2. Federal courts have considered whether a meeting between a prospective client and a lawyer creates an attorney-client relationship that would require the attorney's disqualification if the attorney declined to represent the prospective client and later represented the client's adversary in subsequent litigation. *See Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373 (10th Cir. 1994)(under Model American Bar Association Rule 1.9 and New Mexico's equivalent of Colo. RPC 1.9, there must be an attorney-client relationship between prospective client and attorney, based on prospective client submitting confidential information to a lawyer with the reasonable belief that the lawyer was acting as the prospective client's attorney); *see also Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1411 (7th Cir. 1978). Further, while the test to determine the existence of an attorney-client relationship is subjective, the client's belief must be reasonable. *See Monus v. Colorado Baseball 1993, Inc.*, 103 F.3d 145 (Table)(10th Cir. 1996).