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Ernest W. Stephens, Retired

July 30, 1986

Ethics Opinion 86-3

Dear :

This is written in response to your request for an opinion by the Ethics Committee on the following hypothetical question:

> If one party to a dispute seeks assistance from a legal services office affiliated with Dakota Plains Legal Services (DPLS) in one service area, and the opposing party seeks assistance from a legal services office afiliated with DPLS in another service area, may representation of both parties be undertaken.

If other means of representation are first exhausted, a majority of the Committee would answer your question in the affirmative, subject to certain clarifying comments.

As you are aware, DR5-105 generally prohibits an attorney from accepting employment of one party if the interests of another client might impair the independent professional judgment of the lawyer. Therefore, as recognized by the Washington State Bar Association, if the DPLS is to be considered a tradional law firm, then the answer would be that such representation of opposing parties by DPLS affiliates in different areas would be prohibited. A majority of the Committee, however, believe that the restrictions applicable to a private law firm are not appropriate in the present context.

The majority of the Committee who would allow such representation set forth the following prerequisites thereto:

1. The legal services office must in fact be physically separate. It has been noted that attorneys from the same office have an association that is so close that they should be prohibited from appearing on opposite sides of the same case.

2. There should be no common supervising authority controlling the action by the legal services attorney with respect to litigation cases, and there must be no regular exchange of information between the office concerning particular cases. In other words, the independence of the attorneys on the

case must be guarded and the confidentiality of the attorney-client relationship in each case must be assured.

3. Third, and probably the aspect that gave most concern to the minority opinion on the Committee, the circumstances should indicate no apparent impropriety.

The rule that disqualification of one attorney of a firm generally constitutes a disqualification of all affiliated attorneys is a long established and well recognized rule. Some early cases refuse to make any exception for legal services organizations. Borden v. Borden, 277 A. 2d 89 (1971). Other cases have found a basis to distinguish a legal aid society from a private law firm. See People v. Wilkins, 268 NE 2d 756 (1971) and Flores v. Flores, 598 P. 2d 893 (ALA). The cases and opinions that deal with this qualification under DR5-105 make fairly clear the circumstances or factors which warrant relaxation in the application of imputed disqualification under that rule. They are as follows:

1. There is effective screening of the attorneys involved;

2. There are procedures which prevent the flow of information or access to case files and material, including the preservation of confidentiality;

3. There is no economic interest in the outcome of the cases, and there is no infringement on the independence of the attorneys concerned; and

4. There is no appearence of significant impropriety.

Hence, the majority of the Committee felt that representation of opposing parties by DPLS lawyers from different offices is an acceptable response to a difficult situation if the circumstances above expressed are maintained. But, as expressed above, the majority also felt that a preferable solution, where feasible, would be to have the organized Bar provide representation to the second party pro bono.

A minority view on the Committee was that the dual representation presents such a general appearance of impropriety that it should not be encourgaged or approved; as such, the minority felt the better solution in all cases is to call upon the private bar to acknowledge its pro bono obligations to provide such representation.

Very truly yours,

RITER, MAYER, HOFER & RITER

By: 

Robert C. Riter, Jr.
Chairman of the Ethics Committee