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DISQUALIFICATION FOR CONFLICTS OF INTEREST AND THE LEGAL AID ATTORNEY†

MARSHALL J. BREGER*

I. INTRODUCTION

This Article analyzes the effect of doctrinal developments regarding disqualification of counsel for conflicts of interest on the practice of legal aid. "Conflict of interest" is the term used by lawyers to describe situations in which an attorney is unable to represent or to continue representing a client because of a competing allegiance. Although such conflicts may result from the personal or financial self-interest of attorneys, this Article focuses

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From 1975 through 1978, the author was a member of the Board of Directors of the Legal Services Corporation, Washington, D.C.


2 Many of the ideas on which this Article is based derive from the results of a 1977 survey undertaken with the assistance of Ernest Reynolds III of the Texas Bar to whom thanks are deservedly proffered. A questionnaire was sent to 300 legal services programs to determine how they approached conflict of interest problems. Fifty-two of the offices responded, with 44.67% of those offices sending in fully completed responses. See Preliminary Report on the Design, Administration, and Data Derived from a Survey Research Inquiry into Conflicts of Interest Problems Faced by Legal Service Offices (1977) (on file at the Boston University Law Review) [hereinafter cited as Survey]. A 1982 review of the files of the Legal Services Corporation suggests that recent legal services developments have not outdated the survey.
primarily on those conflicts which arise out of the intrusion of competing allegiances caused by clients with adverse or potentially adverse interests.

After considering the impact of the conflict of interest dilemma on the delivery of legal services to the poor, this Article explores whether non-profit, government-subsidized legal aid organizations should be subject to the same conflicts rules as the rest of the legal profession. It argues that, because the fiduciary relationship between lawyer and client demands loyalty to one's client, attorneys who represent legal aid clients should be subject to the same ethical obligations as members of the private bar. Moreover, this Article argues that, once a legal aid office steps in to provide legal assistance to the adversaries of conflicted clients, the government owes a special duty to those conflicted clients and must ensure that they receive legal representation. It examines several means of providing representation to conflicted indigents without compromising any ethical obligations. This Article concludes that some form of private sector involvement in the provision of legal services to the poor will often be necessary to provide representation to eligible conflicted clients without compromising the fiduciary relationship between lawyer and client.3

II. CONFLICT OF INTEREST LIMITATIONS ON THE PRACTICE OF LAW

The ethical boundaries of our discussion of the conflict of interest proscriptions on attorneys are set by Canons 4, 5, and 9 of the American Bar Association (the "ABA") Code of Professional Responsibility (the "Code").4 Canon 5 focuses on the attorney's duty to exercise independent

3 Significant controversy now exists regarding the future of the Legal Services Corporation and whether the government subsidy for legal aid should flow through a federal appropriation, tax credits, or other funding sources. The argument of this paper bears only indirectly on the resolution of that controversy. Conflict of interest problems will arise regardless of which funding format is utilized.

4 The new ethics code that has been proposed by the ABA, the Model Rules of Professional Conduct, differs in several respects from the Code of Professional Responsibility in its treatment of conflicts of interest. See Model Rules of Professional Conduct (Proposed Final Draft 1981). The proscription on appearances of impropriety has been eliminated in the new code. Compare Model Code of Professional Responsibility Canon 9 (1979) with Model Rules of Professional Conduct Rule 1.7 (Proposed Final Draft 1981). Under the Model Rules, an attorney may not represent "another person in the same or a substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure or the information has become generally known." Model Rules of Professional Conduct Rule 1.9 (Proposed Final Draft 1981).

The Model Rules clarify the Disciplinary Rules of Canon 5 by providing that a lawyer shall not represent a client "if [his or her] ability to consider, recommend or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client . . . ." Id. Rule 1.7.
professional judgment on behalf of a client, and requires that a lawyer refuse to accept proffered employment if such representation would be likely to affect this judgment adversely. Canon 4 mandates that attorneys preserve the confidences and secrets of their clients. This duty extends indefinitely into the future, even after the attorney-client relationship has been terminated. Canon 9 suggests that an attorney must decline employment or withdraw from representation when the appearance of impropriety exists. Courts have been reluctant to require disqualification on this ground alone, however, and have looked to the facts and circumstances of each particular case before requiring disqualification solely on this basis. Once attorneys have agreed to represent their clients, Canon 7 requires that they represent those individuals "zealously within the bounds of the law." Underlying all these proscriptions is the goal of preserving the fiduciary relationship between attorneys and their clients. This relationship demands the encouragement and protection of trust, and prohibits attorneys from disclosing professional confidences or simultaneously representing clients with differing interests. Attorneys must remain loyal to their clients and must place their knowledge and ability at their clients’ exclusive command. This exclusivity cannot be shared with other persons or causes—one cannot easily serve two masters at once.

Representation of clients with differing interests may be concurrent or successive. As the Canons of Professional Ethics, which preceded the present code, stated: a "lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." The proscription extends to interests which

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In general, the Model Rules focus specifically on the central problems raised by the conflicts dilemma—problems which the present Code addresses obliquely if at all.

5 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1979).
6 Id. DR 5-105(A).
7 Id. Canon 4.
8 Id. EC 4-6.
9 Id. Canon 9.
10 See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 753 (2d Cir. 1975).
11 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979).
14 Id.; see United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981) ("Having retained the Rosenman Colin firm as their counsel, the BusTop investors were entitled to the undivided loyalty of its partners."); Agnew v. Walden, 84 Ala. 502, 505, 4 So. 672, 673 (1888) (A retainer "exacts undivided loyalty and allegiance to the client, equal to that demanded by the veriest despot that ever scourged a people."). But see Developments, supra note 1, at 1265-70 (critiquing fiduciary model of professional ethics).
15 ABA CANONS OF PROFESSIONAL ETHICS No. 6 (1937).
affect the judgment or loyalty of a lawyer to a client, and includes conflicting, inconsistent, diverse, or other interests. Moreover, the representing attorney's obligation to a client becomes a duty of the entire law firm, not merely of the attorney; under traditional doctrine the entire law firm is deemed "tainted" and disqualified if any member of that firm is in a conflicts situation. Courts are often reluctant to apply this inflexible taint rule in practice, however, particularly with regard to public defender organizations.

Conflict of interest problems are also raised by the successive representation of adverse parties by the same attorney. The case law makes clear that an attorney may not represent successive clients with adverse interests.


17 ABA Comm. on Professional Ethics, Informal Op. 1199 (1971); see also ABA Comm. on Professional Ethics and Grievances, Formal Op. 104 (1934) (attorney who shared offices with a police judge could not represent persons arraigned before that judge); ABA Comm. on Professional Ethics and Grievances, Formal Op. 33 (1931) ("[T]he relations of partners in a law firm are so close that the firm, and all members thereof, are barred from accepting any employment that one member of the firm is prohibited from taking."); Model Code of Professional Responsibility DR 5-105(D) (1979). The most recent proposal for the Code adopts a similar view. See Model Rules of Professional Conduct Rule 1.10 (Proposed Final Draft 1981).

18 See, e.g., People v. Robinson, 79 Ill. 2d 147, 158-59, 402 N.E.2d 157, 161-63 (1979) (rejecting application of per se taint rule in concurrent representation case and drawing no distinction between attorneys in private practice and those employed by the state with regard to ethical restraints); People v. Dallas, 85 Ill. App. 3d 153, 405 N.E.2d 1202 (1980) (codefendants not denied effective assistance when represented by same public defender's office); State v. Bell, 90 N.J. 163, 447 A.2d 525 (1982) (multiple representation in the same action by different associates of a public defender office does not in itself give rise to a presumption of prejudice); People v. LaBrake, 28 N.Y.2d 625, 625-27, 320 N.Y.S.2d 242, 243, 269 N.E.2d 33, 33-34 (1971) (hearing required to determine extent of public defender's participation in a potential conflict situation); People v. Wilkens, 28 N.Y.2d 53, 56, 320 N.Y.S.2d 8, 10, 268 N.E.2d 756, 757 (1971) ("cannot presume [that] . . . complete and full flow of client information between staff attorneys exists in order to impute knowledge to each staff attorney within [public defender's] office").


when the matter involved is "substantially related" to the former representation. With respect to such matters, courts have traditionally established an irrebuttable presumption that the former client has communicated confidences that could injure the attorney's subsequent representation of the adverse client. An attorney may represent a new client on an unrelated matter, however, even if that matter would hurt the former client.

Conflict of interest problems thus exist when the representation of adverse interests raises the spectre of disloyalty to present or former clients. Too strict a definition of what constitutes a conflict, however, would unduly limit attorney and client mobility. For this reason, the adverse interest prohibition is limited to the representation of adverse legal interests, and does not include positional conflicts, which occur when two clients have differing political or ideological views, or economic or legal interests which affect each other adversely. Of course, attorneys occasionally refuse to involve themselves in positional conflicts for financial or ideological reasons. However, such representation is not precluded on ethical grounds.

19 T. C. Theatre v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953); see Model Rules of Professional Conduct Rule 1.9(a) (Proposed Final Draft 1981) ("[A] lawyer who has represented a client in a matter shall not thereafter . . . represent another person in the same or a substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure."). Of course, the definition of an "adverse interest" and a "substantially related matter" are open to judicial interpretation. See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754-57 (2d Cir. 1975) (attorney not disqualified when subject of litigation not substantially related to prior representation); NCK Org. v. Bregman, 542 F.2d 128, 132-35 (2d Cir. 1976) (substantial relationship held to exist when there is some evidence of the possibility of past improper disclosure by counsel). Compare Trone v. Smith, 621 F.2d 994, 998 n.3 (9th Cir. 1980) (subject matter of suits must be related), with Government of India v. Cook Indus., Inc., 569 F.2d 737, 739-40 (2d Cir. 1978) (issues of suits must be related).

20 See Realco Servs., Inc. v. Holt, 479 F. Supp. 867, 871 (E.D. Pa. 1979) (attorney disqualified when "might have acquired" confidential information during previous litigation substantially related to issue in present suit). The Realco court explicitly rejected the argument that both clients must be involved in the same cause of action. Id.

21 For example, a private attorney who once represented a bank in a reorganization case could later represent a debtor suing the same bank on a truth-in-lending matter. A lawyer could also sue a former commercial client on behalf of another client on a products liability claim.

22 See O'Dea, supra note 1, at 701 n.32.

23 To some extent, the ethical problem is definitional. At the point where a positional conflict may have an actual effect on representation or otherwise "taint" the trial process, such a conflict would rise above being "positional" only, and continued representation would become improper.

24 Thus, an attorney who represents corporations with large environmental concerns may ethically lobby on behalf of environmental groups such as the Sierra Club
The extent to which consent vitiates an ethical conflict is unclear. The Code provides that a lawyer may represent conflicting clients if both clients consent to dual representation and "it is obvious that [the lawyer] can adequately represent the interest of each." A number of cases have upheld the validity of dual representation when informed consent has been obtained. Before consent will be deemed "informed," however, the client must be made aware of all the facts related to, the possible effects of, and the legal implications which will result from the proposed dual representation.

Nonetheless, the question remains as to whether consent, even when informed, should be sufficient to abrogate conflict prohibitions. The answer depends on whether this prohibition is seen as a client-centered rule, or a rule designed to enforce the integrity of the judicial system. Although there is debate over the extent of the client's role in the legal decision-making process, the Code explicitly provides that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer." At the same time, the lawyer's


Consent must follow full disclosure to the client. Id.

See, e.g., City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 205 (N.D. Ohio 1976) ("[I]t is axiomatic that the client's right to object to an attorney's allegedly adverse representation may be waived."). aff'd mem. 573 F.2d 1310 (6th Cir. 1977). Recently the waiver concept has been extended to prospective conflicts. See Kennecott Copper Corp. v. Curtiss-Wright Corp., No. 78-1295 (S.D.N.Y. Apr. 11, 1978) (enforcement of retainer agreement permitting counsel to represent its other clients against consenting client in any future litigation). Several commentators have discussed the prospective waiver issue. See, e.g., O'Dea, supra note 1, at 725-30; Note, Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest, 79 Mich. L. Rev. 1074 (1981).


One commentator has described the consent issue as flowing from a libertarian model of lawyer-client relations based on the "free choice of one's associates and the terms of one's associations." Developments, supra note 1, at 1262. This model requires that "both parties act voluntarily and with full understanding of the issues about which they are bargaining," and that the client "has enough information validly to consent to a given set of terms." Id. at 1262-63.


responsibility to serve a client is restricted by the attorney’s conception of professional integrity.\textsuperscript{31}

Conflict of interest constraints were not developed solely to protect the client. The role of consent in vitiating conflicts highlights vital interests of the judicial system and of society in general. Clients cannot consent away conflicts. They can only declare that they are prepared to live with them. The courts have a nondelegable responsibility to ensure that members of the bar adhere to proper ethical standards in the management of cases.\textsuperscript{32} A client’s consent will not always resolve the doubts as to the propriety of dual representation. Court thus may always prohibit dual representation, even when consent is given, when irreconcilable problems are anticipated,\textsuperscript{33} or it appears that the interests of both parties cannot be adequately represented.\textsuperscript{34}

\textsuperscript{31} Many commentators argue that attorneys should not be forced to make decisions that conflict with their personal subjective codes of professional conduct, client desires notwithstanding. See, e.g., Spiegel, supra note 29, at 117.

\textsuperscript{32} Kesselhaut v. United States, 555 F.2d 791, 794 (Ct. Cl. 1977).

\textsuperscript{33} The multiple representation of clients by one lawyer in a criminal case has raised analogous problems. Although recognizing that the right to counsel of one’s own choosing is a significant goal, courts have held that no absolute right to a particular counsel exists. United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1215 (3d Cir. 1969) (due process satisfied if party given “fair and reasonable opportunity to obtain particular counsel”), cert. denied, 397 U.S. 946 (1970). This is true both for retained counsel, see, e.g., Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976) (delay may vitiate right to choose counsel); Ross v. Reda, 510 F.2d 1172, 1173 (6th Cir. 1975) (attorneys must be licensed to practice in particular jurisdiction), cert. denied, 423 U.S. 892 (1975), and for appointed counsel, see, e.g., Drumgo v. Superior Court, 8 Cal. 3d 930, 934, 506 P.2d 1007, 1009-10, 106 Cal. Rptr. 631, 635 (Constitution does not guarantee appointment of attorney requested by defendant), cert. denied, 414 U.S. 479 (1973); Diehl v. State, 200 So. 2d 240 (Fla. 1964) (insolvent attorney not constitutionally entitled to choose own counsel). See generally Tague, An Indigent’s Right to the Attorney of his Choice, 27 STAN. L. REV. 73 (1974). Thus, when the court determines that multiple representation will result in the ineffective assistance of counsel, such representation should be barred even though it may constrain a defendant’s freedom of choice. Since sixth amendment considerations do not apply in the civil arena, courts should balance the competing interests carefully to ensure that consent does not lead to a travesty of the trial process.

Nonetheless, this does not mean that clients should not be given a chance to express their own preferences. See J. P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring) (Although “that expression will . . . not be binding on the court,” the client’s desires, albeit not dispositive, should be carefully weighed.). As the 5th Circuit has urged: “[A] court should be conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, which include the litigant’s right to freely chosen counsel.” Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976).

\textsuperscript{34} See, e.g., In re Holmes, 290 Or. 173, 619 P.2d 1284 (1980) (dual representation
III. The Code of Ethics and Legal Aid Practice

A. The Legal Aid Lawyer as Attorney of Last Resort

It has been generally argued that present ethical doctrine constitutes a unified code of ethics which applies to the entire profession. According to this view, an indigent person seeking assistance from a legal services office forms the same lawyer-client relationship with its staff of lawyers as any other client who retains a firm to represent him. Ethical committees and courts have held traditional conflicts doctrine applicable to Legal Aid Societies. Moreover, the Legal Services Corporation Act explicitly provides that legal aid attorneys must respect the Code of Professional Responsibility and the high standards of the legal profession.

improper despite full disclosure and consent when attorney cannot adequately represent interests of each client).

35 The Preliminary Statement to the Model Code of Professional Responsibility declares that "the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement (1979).

Commentators have asserted that the Code of Professional Responsibility is applicable to public interest and legal service attorneys. See Cole, Freedom of Choice and Group Legal Services, 9 Suffolk U.L. Rev. 671, 678 (1975); Stoehr, Are Legal Aid Societies, Lawyer Referral Services, and Group Legal Services Adequate Under the Code of Professional Responsibility?, 51 Neb. L. Rev. 486, 486 (1973).

36 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974). An attorney is also prohibited from giving advice to a person who is not represented by counsel, except for the advice to secure legal assistance, if the interests of such person are or have a reasonable possibility of conflicting with the interests of the attorney's client. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(2) (1979). The suggestion that a pro se litigant secure counsel may of course offer the indigent little assistance, since the only source of counsel may be legal aid. See generally Meltsner & Schrag, Report from a CLEPR Colony, 76 Colum. L. Rev. 581, 618 (1970).

37 The ABA Committee on Professional Ethics has noted in an informal opinion that the ethical standards concerning the representation of differing interests apply to legal aid offices in the same way as they do to other lawyers. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1233 (1972); see N.Y. State Bar Ass'n Comm. on Professional Ethics, Informal Op. 102 (1969) (concluding that the operation of legal aid office is in the nature of legal partnership).

38 See, e.g., Borden v. Borden, 277 A.2d 89, 92-93 (D.C. 1971) (rejecting dual representation by legal aid office). But see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (Proposed Final Draft 1981) ("Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units.").

The consequences of applying strict conflicts rules in the legal aid context have led some to suggest that traditional doctrine ought not to apply when clients are represented by legal aid attorneys. Unlike the clients of private lawyers, the clients of legal aid attorneys seek their particular legal representatives less out of choice than out of necessity. Clients of private attorneys generally can seek aid elsewhere should they be unable to receive representation from a particular attorney because of a conflict of interest. Conflicted legal aid clients, however, are likely to go without legal assistance if a legal aid office cannot represent them, as significant alternatives to legal aid and supplemental modes of legal representation for indigents exist in only a few areas of the country. This unavailability of alternative representation effectively bars conflicted clients from access to legal counsel, making the legal aid attorney their lawyer of last resort.

This conflicts dilemma also creates problems for legal services providers, who may feel obligated to represent those who cannot afford legal representation, and for society at large, since


41 1979 Legal Servs. Corp. Ann. Rep. at 10 (cited in Developments, supra note 1, at 1398 n.6). The income eligibility limits for legal services clients are set by local programs themselves but may not be more than 125% of the official poverty threshold as defined by the Office of Management and Budget. See 45 C.F.R. § 1611.3(b) (1981). For 1982, this threshold figure was $5,850 for an individual and $11,625 for a family of four. See Fed. Reg. 25,148 (1982) (to be codified at 45 C.F.R. § 1611 app. A); see also 45 C.F.R. § 1611.4 (1981) (additional bases for eligibility); Breger, Legal Aid for the Poor: A Conceptual Analysis, 60 N.C.L. REV. 262, 315 (1982).

42 See Developments, supra note 1, at 1398.

43 For example, in Nevada, the Nevada Indian Legal Services Program was barred from representing an individual Indian in an action against an Indian tribe previously represented by the program. See State Bar of Nevada, Ethics Op. 5 (Oct. 5, 1976); see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1233 (1972).

44 The question of the legal aid lawyer's duty to an unrepresented indigent adversary raises complex theoretical issues. The traditional view maintains that although attorneys should endeavor to inform the adversary of his right to counsel...[and] inform the judge or tribunal of that individual's need for a lawyer[,] once the lawyer has done all he can to find representation for his opponent, he should conduct himself as zealously on behalf of his client as always.

J. WEISS, NEIGHBORHOOD PRACTICE AND LEGAL ETHICS 2 (1978); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1979); id. ED 7-18. The proposed Model Rules of Professional Conduct do not presently require an attorney to advise an indigent of the existence of free legal services or require an attorney to advise an unrepresented party to seek the assistance of counsel before the attorney takes any action. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (Proposed Final Draft 1981). It is still likely that many legal aid attorneys feel some ambiguity about vigorously representing a client against an unrepresented indigent, taking full advan-
the impossibility of providing legal services to all needy clients raises questions about the distribution of welfare goods.

The impact of this conflicts dilemma on legal aid practice is substantial, and affects cases of both concurrent and subsequent representation. Domestic relations matters involving divorce, child custody, and parental neglect cases constitute over one-third of the legal aid caseload. In many instances, both parties to domestic relations actions will be income-eligible and dependent upon legal aid for representation. Courts, however, have traditionally forbidden both legal aid offices and private law firms from representing both parties to a divorce, even if both parties consent. This lack of representation. See supra note 36. This problem must be differentiated from that faced by legal aid attorneys who represent "helpless" clients because the ethical problems there turn on how to effectuate duties toward your "own" client, not your adversary. See Gassel, Levy-Warren & Weiss, Representing the Helpless: Toward an Ethical Guide for the Perplexed Attorney, 5 W.S.U. L. Rev. 173 (1978).

Legal Services Corporation, Characteristics of Field Programs Supported by the Legal Services Corp. Start of 1982—A Fact Book 7 (Feb. 1982) (29.5% of cases closed in 1981 were family problems); accord Stumpf, Law and Poverty: A Political Perspective, 1968 Wis. L. Rev. 649, 699 ("Since the first neighborhood office opened its doors, family problems (primarily divorce) represented the largest single category of cases handled, 35%.").


47 See, e.g., Gregory v. Gregory, 92 Cal. App. 2d 343, 349, 206 P.2d 1122, 1126 (1949) (husband and wife should be represented by separate counsel in property settlement negotiations); King v. King, 52 Ill. App. 3d 749, 752-53, 367 N.E.2d 1358, 1360 (1977) (improper for attorney to represent wife in maintenance action while maintaining attorney-client relationship with husband); In re Frith, 361 Mo. 98, 233 S.W.2d 707 (1950) (attorney suspended for, inter alia, representing both husband and wife in divorce annulment suits); In re Braun, 49 N.J. 16, 18-19, 227 A.2d 506, 507-08 (1967) (attorney disqualification based on initial consultation with both husband and wife); In re Gilchrist, 208 A.D. 497, 203 N.Y.S. 720 (App. Div. 1924) (suspension of attorney who represented both husband and wife in divorce action despite consent of both parties); In re Bryant, 242 Or. 562, 410 P.2d 824 (1966) (permanent suspension for, inter alia, representation of husband and wife). Disqualification may even result when the prior representation was not connected with material issues. See Sokoloff v. Sokoloff, 82 Misc. 2d 797, 799-800, 371 N.Y.S.2d 106, 108-09 (Fam. Ct. 1975). But see Note, Attorney Mediation of Marital Disputes and Conflict of Interest Considerations, 60 N.C.L. Rev. 171 (1981) (representing both parties in divorce to mediate settlement agreement a permissible alternative to litigation); Simon, The Growth of Divorce Mediation, Nat'l L.J., Aug. 30, 1982, at 1 (bar associations developing ethical standards to regulate burgeoning mediation practice).


Dual representation has only been permitted in rare instances. See, e.g., Klemm v.
prohibition rests on the assumption that the interests of the spouses in divorce proceedings necessarily differ. In domestic relations matters, the legal aid agency thus will be unable to represent a large number of otherwise eligible clients; as many as one-half of the parties in divorce proceedings may be left without counsel. This situation understandably exerts pressure on the legal community to relax conflicts rules and to develop structural mechanisms for securing counsel for conflicted indigents from alternative sources.

Conflicts problems are prevalent in matters involving subsequent representation as well. Legal aid lawyers are limited in their ability to accept proffered cases by the requirement that they respect client confidences after the termination of the attorney-client relationship. If a legal services office represents a husband in a bankruptcy proceeding, that office may not be able to represent the client's wife in a subsequent divorce action involving a dispute over her husband's finances. Similarly, if a poor landlord is sued by an indigent tenant who is represented by a legal aid attorney, that landlord may be excluded from access to legal aid in later litigation involving the tenant.

The impact of conflict of interest proscriptions is particularly great when legal aid offices undertake group representation. Federally funded legal services programs historically have represented many indigent groups. Under current regulations, legal aid offices may represent groups when the majority of the members of the group are themselves eligible for legal services. A legal aid lawyer may also represent individual indigents whose


49 See Callner, Boundaries of the Divorce Lawyer's Role, 10 FAM. L.Q. 389, 394 (1977) (situations in which husband and wife have similar interests exceptionally rare); accord N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 258 (1972) (substantial likelihood of conflict inherent in all matrimonial problems).


51 See Letter from Stuart Clio, Keystone Legal Services, to Legal Services Corporation (Oct. 10, 1980).

52 See 45 C.F.R. § 1611.5(c) (1982). Group representation has been defended on the ground that it is cost-effective and that through such representation one serves the ideological concerns of poor people and raises their group consciousness. See E. JOHNSON, JUSTICE AND REFORM 231, 248-84 (1974).
cases raise group concerns. A legal services program that represents a community group in one action may be barred by traditional conflicts rules from representing another group with differing interests in a subsequent action.

Legal aid attorneys may serve as house and general outside counsel for poverty organizations such as the National Welfare Rights Organization. As house counsel, a legal aid lawyer provides expertise not merely on specific, discrete legal matters, but on a wide range of indeterminate issues. An attorney who serves as house counsel to one group may not ethically be able to switch allegiance to an adverse group. The organization through the door first may effectively exclude all other client organizations with competing perspectives from access to legal aid. One segment of the poor thus may be able to use legal counsel to pursue their aims, while all other segments will not.

This dilemma would be less serious if the poor could be viewed as a "monolithic client" with common across-the-board interests. Under this view, the interests of one group of poor people would never conflict with those of other indigents, as the underlying interests of all poor persons would coincide. Unfortunately, this myth of homogeneity cannot survive close scrutiny. The heterogeneity of interests among eligible clients reflects the rich diversity of cultural and ethnic life in America. Cleavages between members of the poverty community exist, and can be based on ethnic or religious differences, on the neighborhood orientation of poverty com-

53 The National Welfare Rights Organization was a major organizational client of the Center for Law and Social Policy, a legal services support center. See Legal Services Corporation, Support Center Study vol. I, 1-5 (Feb. 16, 1976). The National Tenants Organization was a client of the National Housing Law Project. Id. at 8-3.
55 Conflicts exist between social groups even when both groups represent interests normatively favored by liberals or conservatives. See, e.g., T. Morgan & R. Rotunda, supra note 24, at 48.
56 See generally Ehrlich, Legal Services for the People, 30 Cath. U.L. Rev. 483 (1981). It has been argued that all poor people have certain across-the-board interests common to them as poor persons and that legal services should focus priorities on those common concerns. Id. at 491-92. Such interests include government welfare or food stamp policies, national health insurance, and proposals for redistribution of income or power. However, divergencies exist even where one would often assume a homogeneous position within the poverty community. For example, competing health insurance schemes may allocate benefits and burdens disproportionately between poor and near poor, Jewish elderly and black children, rural and urban poor. The poor will naturally have conflicting interests in these matters.
57 Diversity is most apparent when pluralist politics use interest group representation as a criteria for allocating federal and state funds. R. Dahl, Pluralist Democracy in the United States: Conflict and Consent 397-404 (1967); see also S. Makielski, Jr., Pressure Politics in America 193-94 (1980); A. Holtzman, Interest Groups and Lobbying 36-39 (1966).
CONFLICT OF INTEREST

munities, or even on disputes as to strategy and tactics within specific poverty groups. Conflicts among the poor are inevitable and unavoidable. They create competition for the federally funded legal services that are available.

B. Preserving the Fiduciary Relationship Between Legal Aid Lawyer and Client

Because of the legal aid lawyer's special position as attorney of last resort, the argument may be made that traditional conflicts rules should not apply in the legal aid setting. The unremitting caseload pressure generated by the extensive client base of the legal aid practice, and exacerbated by the continuing scarcity of available fiscal resources, creates incentives for downgrading the quality of services to ensure that all clients receive some representation. The time pressures involved in administering these caseloads make it difficult for legal aid lawyers to represent every client fully and adequately. Still, many legal aid attorneys find it difficult to turn eligible persons away at the door. Moreover, the emotional character of many situations is such that any division of the available resources is likely to cause friction among the poor themselves. For example, in New York, poor Jews concerned with community cohesion are at odds with the Puerto Rican community over redistricting and housing. See United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974), refiled sub nom. Wilder v. Bernstein, 499 F. Supp. 980 (S.D.N.Y. 1980). See generally P. BERGER & R. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 31, 33 (American Enterprise Institute 1977).


This resource scarcity has led legal aid services to reduce caseload levels through the use of priority schedules, a practice which has now been mandated by Congress. Legal Services Corporation Act, 42 U.S.C. § 2996f(a)(2)(C) (Supp. IV 1980). For a general discussion of the different approaches to priority setting, see Breger, supra note 41.

This tendency to give all indigents some, although perhaps inadequate, service is premised both on philosophical notions of equal treatment and subjective responses to the strain of legal aid practice. See generally Bellow, Reflections on Case-Load Limitations, 27 LEGAL AID BRIEFCASE 195 (1969); Silver, The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload, 46 J. URB. LAW 217 (1969). But see Getzels, Legal Aid Cases Should Not Be Limited, 27 LEGAL AID BRIEFCASE 195 (1969).
legal aid cases and the lack of programmatic standards of quality control increase the likelihood that attorneys will prefer subordinating full representation to more, thus increasing the pool of clients served. Even partisans of legal aid have recognized that the legal aid practice contains elements of bureaucratic "people-processing." This tension between quality representation and open access has led some commentators to discuss the possibility of reducing "the care and energy given to any particular case." These sentiments suggest that a firm adherence to the fiduciary relationship between lawyer and client may be ill-advised when juxtaposed against the possibility that otherwise eligible clients will be left unrepresented.

Although this argument may be superficially appealing, it is, in fact, misguided. Legal aid clients should receive the same quality of legal care as private clients, and should be ensured the loyalty and confidentiality which


This underrepresentation perspective is a more sophisticated version of the caseload limitation position, discussed supra at note 60. Professors Bellow and Kettleson suggest that in its most extreme form the underrepresentation position results in:

(1) permitting caseloads to rise . . . ; (2) providing routine, minimal service, primarily oriented to defusing crises; (3) trading off affirmative actions or claims—often without a careful assessment of their worth . . . ; (4) not informing clients of the minimum level of service they are receiving or of the range of affirmative actions available to them; and (5) making no effort to bring to the client's attention legal matters on which the client has not requested assistance.


Some legal services partisans have been among the first to admit that their programs are "demoralized and unfocused," Letter from Deborah McCutcheon and Paul R. Collier III, 14 CLEARINGHOUSE REV. 134, 135 (1980), and have raised concerns about "the calcification and the increasingly bureaucratic orientation of some programs." Krakow, Bleeding the Poor Again, 14 CLEARINGHOUSE REV. 1031, 1034 (1981); see also M. Lipsky, Street-Level Bureaucracy 120-22, 150 (1980).

In the traditional model of attorney-client relations, attorneys work for clients on a fee-for-service basis. As a result, they will remain sensitive to the needs, desires, and even idiosyncracies of their clients. In contrast, legal services lawyers are largely salaried employees. They are employed by local programs and work only indirectly for clients. Although third-party payment mechanisms should not affect the attorney-client relationship, they will eliminate many economic incentives that usually derive from that relationship. As a result of this lack of economic nexus, attorneys will have less need to please clients and thus may treat them in a bureaucratic mode.

See Bellow, Legal Aid in the United States, 14 CLEARINGHOUSE REV. 337, 342 (1980). This phenomenon stems from the philosophical notion that publicly-funded legal aid programs should not turn anyone away who seeks service. See Bellow & Kettleson, supra note 61, at 355; Silver, supra note 60, at 223.
CONFLICT OF INTEREST

is characteristic of the attorney-client relationship. Various forms of caseload control can be proffered to alleviate the tensions inherent when scarcity exists. The quality of legal services to the poor cannot be reduced without sacrificing the rights of indigent clients and compromising the integrity of our legal institutions.

Furthermore, the quasi-public position of legal aid attorneys as recipients of federal funds affects their responsibility in service allocation decisions. Although legal aid providers must follow principles of equity in allocating their services, this obligation does not dictate that indigents be represented when attorney resources are not available to provide quality representation. Since legal services are not divisible, limited resources cannot be shared equally among all potential claimants. Equity in allocation does not mean adequate service for all but rather requires that the methodology of case selection and resource allocation recognize the right of each individual to the

64 The ABA has approved priority-setting by local programs to restrict caseloads so that the quality of services is not reduced. See ABA Informal Op. No. 1359 (1976); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974); Finman & Schneyer, The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the ABA Committee on Ethics and Professional Responsibility, 29 UCLA L. Rev. 67, 108-09 (1981). Priority-setting as a method of resource allocation is discussed in Breger, supra note 41, at 330-36. Priority-setting refers to the decision to provide service according to specific preferred areas of the law. Although priority-setting has been defended as a quality control device, it has a hidden agenda—it serves not only to limit the legal aid caseload to a manageable number of clients, but also to determine the categories of cases that a legal aid office will accept. Caseloads can also always be controlled merely by restricting intake whenever quality representation would be threatened by the size of an office’s clientele.

Other avoidance mechanisms can be used to reduce client intake. Eligible clients whose cases are low priorities can be asked to wait months for appointments. In certain cases, such as domestic relations matters, a limited number of appointments can be given out each month and others can be told to queue up next month. Neighborhood offices can be shut down, increasing the opportunity costs, such as time and effort, for clients who seek legal services.

65 Legal aid lawyers represent the means through which the state fulfills its commitment to provide legal services to the poor. Since they are supported by public funds, legal aid attorneys possess certain responsibilities. The legal status of legal aid employees is more complex. See Spokane County Legal Servs., Inc. v. Legal Servs. Corp., 614 F.2d 662 (9th Cir. 1980) (Legal Services Corporation not federal agency for purpose of suits under Administrative Procedure Act); White v. N. La. Legal Assistance Corp., 468 F. Supp. 1347, 1350-51 (W.D. La. 1979) (local legal aid organizations are autonomous in employment decisions since not agents of the Legal Services Corporation); Gurda Farms, Inc. v. Monroe County Legal Assistance Corp., 358 F. Supp. 841, 847 (S.D.N.Y. 1973) (legal aid attorney funded by Office of Economic Opportunity considered a federal officer for purpose of statute permitting removal to federal court).
good being distributed. The fiduciary relationship between attorney and client must not be sacrificed on the altar of caseload pressure.

The nature of the legal aid office's clientele underscores the need for maintaining a high standard of fiduciary loyalty and trust. The legal aid client traditionally lacks experience in legal matters and in relating to the judicial bureaucracy. This putative lack of legal competence places clients at a distinct disadvantage in controlling and guiding their attorneys' activities. Although legal aid attorneys are not the only members of the bar who serve a weak and generally dependent clientele, this condition must be recognized when exploring the application of ethical rules to legal aid practice. The legal aid attorney represents clients who cannot easily articulate their desires. This places great power in the hands of legal aid attorneys in organizing their clients' affairs. Strict adherence to fiduciary principle is essential for ensuring that indigents are treated fairly and retain confidence in the legal system.

Moreover, the lack of economic motivation characteristic of legal aid work does not eliminate the threat that an attorney's independent judgment will be impaired by representing clients with conflicting interests. Since legal aid attorneys are generally salaried employees whose livelihoods are not dependent upon the particular cases they accept, they lack the economic impetus to prefer one client over another. However, any claim that this

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66 The term "legal competence" is drawn from J. CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR 61-63 (1966), and suggests that the poor fail to use the legal system effectively because they lack knowledge about and psychological confidence in the legal system. In contrast, the legally competent person is aware that he possesses rights and takes action by turning to the legal system to vindicate those rights. But see M. ZANDER, LEGAL SERVICES FOR THE COMMUNITY 289 (1978) ("[T]he kind of [legal] problem seems to cause much greater differences in lawyer use than the kind of potential client.").

67 The legal aid client's lack of legal confidence arguably could justify a firm adherence to the Canon 9 requirement that attorneys refuse to accept or continue employment when the mere appearance of impropriety exists. See infra notes 72-85 and accompanying text.

68 The increased resort to court-awarded attorneys' fees to augment legal aid budgets has introduced an element of economic calculation in the case selection process. Thus, courts have acknowledged that community legal services must take the likelihood of obtaining attorneys' fees into account in rationing litigation resources. See Shadis v. Beal, 520 F. Supp. 858 (D.C. Pa. 1981).

69 Although the fee-for-service view is the dominant mode of attorney compensation, many attorneys today work in the salaried sector, either for the government or for corporations. The percentage of lawyers working as salaried employees in private industry increased from 5% of the profession in 1951 to 7.8% in 1960 to 9.4% in 1970. See Galanter, Megalaw and Mega-Lawyering In The Contemporary United States, in SOCIOLOGY OF DOCTORS AND LAWYERS (R. Dingwall & P.S.C. Lewis eds. 1982). The number of house counsel increased from 11,000 in 1951 to 50,000 in 1979. Schwartz, The Reorganization of the Legal Profession, 58 TEX. L. REV. 1269, 1275 (1980) (quoting Nat'l L.J., Feb.4, 1980, at 1, col. 4). Even many attorneys in private
lack of economic motivation permits a relaxation of conflicts constraints reflects a narrow view of human nature. Economic incentives are not the only pressures on professional autonomy. Legal aid lawyers may have ideological interests in the results obtained by their representation. Indeed, to sustain their interest in a case, many legal aid lawyers find it necessary to "redefine . . . an individual client's problem . . . so that it impinges on greater interests." Attorneys may have personal or emotional interests in the results of lawsuits they undertake. The fighting spirit required in zealous representation may, and arguably should, bias an attorney's judgment. The mere lack of economic contingencies in legal aid work, therefore, does not justify the relaxation of traditional conflicts doctrine.

C. Redefining the Boundaries of the Conflicts Proscription

A tension thus exists between the need to preserve the fiduciary relationship between lawyer and client and the special obligations of the legal aid attorney to the poverty community as lawyer of last resort. The primacy of the fiduciary principle to the legitimacy of our legal institutions mandates that the fiduciary relationship between attorney and client not be compromised, particularly when the clients lack legal competence. Care must be taken, however, to ensure that disqualifications are not compelled when they would not further the goal of preserving this relationship. The extraordinary result of disqualification—the inability of the conflicted client to obtain legal counsel—dictates that disqualifications be avoided unless absolutely essential to this goal. If the fiduciary relationship would not be compromised by permitting dual or subsequent representation, disqualification arguably should not be mandated.

1. The Legal Aid Attorney and the "Appearance of Impropriety"

Canon 9 unequivocally mandates that an attorney avoid even the appearance of impropriety. Yet, courts traditionally have been reluctant to disqualify attorneys if their representation of a client would violate solely this.

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firms work as associates on a salaried basis. In fact, only 10% of all 1978 law graduates were self-employed one year after graduation. Id. at 1274-75.

70 A recent study of the legal aid lawyer stressed the continuing tension between the "expectations of routine that are presented by the local environment," id. at 115, and the "symbolic transformation of moral pressures toward routine into themes of transcending significance," id. at 113. For the legal aid attorney to maintain involvement in his work requires his participation in reform litigation, id. at 108, even in a discouraging environment, id. at 113. The need to fight routinization, however, is never-ending and attorneys must "intensify their involvement in order to sustain it." Id. at 118. Routinization is one cause of the "burn-out" phenomenon and the attendant "turnover" crisis in legal aid. See Katz, Lawyers for the Poor in Transition: Involvement, Reform and the Turnover Problem in Legal Services Programs, 12 Law & Soc'y Rev. 275 (1978).

The proposed Model Rules of Professional Conduct would eliminate the appearance of impropriety alone as a basis for attorney disqualification. The view adopted by the drafters of the Model Rules illuminates the fact that appearances must be treated gingerly when used to justify disqualification, particularly when a conflicted client might otherwise be unable to obtain legal counsel.

Appearances of impropriety should carry some weight when those who may perceive impropriety are already cynical about perceived restrictions on their opportunities for justice because of indigence or social and economic disadvantage. Appearances alone, however, do not frustrate the fiduciary relationship between attorney and client. The prohibition on appearances of impropriety should give way when rigid adherence to the rule would result in an inability to deliver legal services to the poor effectively.

A legal aid attorney may be disqualified on the basis of the Canon 9 proscription in a number of factual settings. Disqualification for appearances alone occurs perhaps most frequently in instances when differing interests exist between members of legal aid program boards of directors and their staff attorneys. Conflicts between board members and other legal aid attorneys cannot be equated with the usual conflicts between two staff attorneys, since the relationship between a board member and a staff attorney differs substantially from that of two legal aid lawyers. Specifically, board members, unlike staff attorneys, do not enter attorney-client relationships with program clients. Members of a board of directors do not participate in

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72 See supra note 10 and accompanying text.
76 Under present law, the Board of Directors of a legal services program must be composed of at least 60% attorneys who are members of the bar of the state in which legal assistance is to be provided. Legal Services Corporation Act, 42 U.S.C. § 2996f(c) (Supp. V, 1980). At least one third of the Board members must be eligible clients or their representatives. 45 C.F.R. § 1607.3(d), (e) (1982). Attorney members are selected by current members or appointed by bar associations or other community groups depending on the organizational framework used by the local programs. They serve without compensation. Attorney members may also be selected to be client representatives. If the representative is not an eligible client, only eligible clients may participate in the selection process. Legal Services Corporation Opinion Letter (Aug. 14, 1978) [1978-80 Transfer Binder] Pov. L. Rep. (CCH) ¶ 27,360. See also 45 C.F.R. § 1607.3(c) (1982) (attorneys shall be selected from or designated by organizations of eligible clients).
Congress recently increased regulation of local boards of directors by requiring that the majority of the members of such boards be attorneys appointed by the governing bodies of local bar associations that represent a majority of attorneys practicing in the recipients’ service area. Legal Services Corporation Continuing Appropriations Resolution. Pub. L. No. 97-276, 96 Stat. 1186 (1982); see also 47 Fed. Reg. 50,659-10 (1982) (proposing amendment to 45 C.F.R. § 1607.3).
policy decisions of the legal aid office that involve individual clients. Although board members are responsible for the welfare of a legal aid program in a fiduciary sense, they are not generally involved in hiring decisions and do not review the progress of specific litigation matters. Little likelihood exists that client confidences will be revealed, or that the loyalties of the client or the board members will be divided.

Despite the lack of any real threat to the fiduciary principle, the representation by a board member of an interest adverse to a client of the legal aid office may create a significant appearance of impropriety. The board’s authority over staff attorneys’ salaries and questions of promotion could reasonably raise the inference of subtle influence by members of the board on a staff attorney’s action. It is also conceivable that, absent the imposition of screening mechanisms, a director could have access to otherwise confidential information.

Some courts have eliminated the adverse impact of disqualification on conflicted indigents based solely upon appearance by requiring the Board

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77 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974). This requirement derives from the need to eliminate conflicts, and is not inherent in the operation of a legal aid society.

To satisfy the need for total confidentiality, a board member should not have access to confidential client files, even when those files contain only documents that are publicly available. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974).


79 In Estep v. Johnson, 383 F. Supp. 1323 (D. Conn. 1974), the court found that a board member should either give up a case or resign from a local board of directors if he represented an interest sufficiently adverse to a staff attorney to make them “adversaries in the same litigation.” Id. at 1325. Although the court recognized that there is less opportunity “for shared knowledge by the board member of the affairs of the staff attorney’s client” than in a law firm, it found the appearance of impropriety to be substantial. Id.

Several state bar associations also have been wary of the appearance of impropriety when a board member represents interests adverse to a legal aid staff attorney. See, e.g., N.Y. State Bar Ass’n Comm. on Professional Ethics, Op. 489, at 3 (1978) (“Certainly, in the minds of the organization’s indigent clientele, the [legal aid] staff could not reasonably be deemed free of compromising influences if the lawyer-members of its board were to accept retainers from relatively affluent adverse parties.”).


81 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 345 (1979). The Committee does not require such screening procedures, but “urges that the Board member’s firm provide screening procedures such as those suggested in [ABA Comm. on Ethics and Professional Responsibility] Formal Op. 342 so that the Board member has no knowledge and no access to knowledge concerning the particular litigated matter.” Id.
members to resign when their interests conflict with those of legal aid clients. This rule severely restricts the ability of members of the private sector to participate on local boards. Members of large corporate law firms will often be prohibited from serving on boards of legal aid societies since conflicts will inevitably occur. The impact of this requirement is especially acute in rural areas where there are generally fewer attorneys. Large law firms may also be discouraged from contributing money to legal aid work for fear of accusations that the money will be used to influence a program's case selection process.

Disqualification of board members based upon the appearance of a conflict thus exacts a heavy price on local legal aid societies without serving the purpose of protecting the fiduciary relationship between attorneys and clients. Appearances should not be enough to require the disqualification of board members when little likelihood exists that actual conflicts will occur.

2. The Legal Aid Attorney and Positional Conflicts

Legal aid practitioners sometimes refuse to enter into positional conflicts even though such conflicts are not proscribed by the Code. Examples of positional conflicts include a legal aid office's representation of indigent Ku Klux Klan members, landlords, or of individual indigents with interests that differ from those of community groups traditionally favored by the office. Legal aid agencies that avoid entering into positional conflicts may

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82 Estep v. Johnson, 383 F. Supp. 1323, 1325-27 (D. Conn. 1974). Should a conflict exist, it is unclear why it is the board member who should withdraw. If the board member or his law firm has a continuing relationship with an adverse client, the conflict is caused by the legal aid attorney, not the board member. Although the court in Estep found that it must always be the director who resigns, because the impact of withdrawal would have a far more serious impact upon the staff attorney than upon the director, id., the Legal Services Corporation does not take this position. See Letter from Toby Sherwood, Asst. Gen. Counsel, Legal Servs. Corp., to Stan Zahorsky, Cent. Minn. Legal Servs. (June 20, 1979) (“Each client must consent to continued representation by his or her lawyer [but this does not] mean that a board member’s client who objects to the situation may force the legal services staff to withdraw, nor . . . that a legal services client may force a board member to withdraw or resign from the board.”).

83 If many board members are directly or indirectly involved with clients who have interests adverse to legal aid clients, such a rule might make it difficult to satisfy the requirement that 60% of all board members be local attorneys. See Letter from Dean Nance, Delaware County Legal Assistance Ass’n, to Legal Servs. Corp. (May 2, 1979).


85 Some commentators have argued that appearances of impropriety may be obviated in some cases by making full disclosure to the client and gaining informed consent. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 345 (1979).


87 Such a conflict arises when a legal services program considers whether to accept
base their decisions on the judgment that such representation would diminish their acceptability among members of the poverty community. This concern is political rather than ethical, and flows from a belief that attorneys should not take on cases which offend their existing client base.

Legal aid offices should not be permitted to deny representation to otherwise eligible clients in order to avoid positional conflicts. The legal aid lawyer's position as attorney of last resort should create a duty to accept clients who do not present ethical conflicts regardless of whether positional conflicts may result. The Code does not prevent legal aid attorneys from entering into positional conflicts and the definition of an "adverse interest" should not be permitted to extend to nonethical conflicts. Legal aid lawyers should not be permitted to avoid representing eligible clients solely on this basis.

3. Consent as a Means of Vitiating Conflicts in Legal Aid Offices

The number of conflicted and thus potentially unrepresented clients can be substantially reduced by permitting dual representation when both parties give their informed consent. However, legal aid clients may not be able to as a client an otherwise eligible individual who wishes to oppose affirmative action in an employment context.


The legal aid society claimed that such representation would be "destructive" of its efforts in "establishing and maintaining an image of a place that represents the interests of low-income people." Id. Underlying this contention is the belief that the goal of legal aid is to serve as "general counsel to the poor." See infra notes 97-99 and accompanying text.

Law firms who engage in pro bono litigation often take a broad view of what constitutes a conflict of interest and reject cases not because of a direct conflict but because of possible embarrassment to paying clients. As one commentator has noted, "many firms represent very large businesses and corporations and will think twice about taking a consumer case or an environmental case, only because they say those cases are posing economic threats to potential clients." Tubor, The Pro Bono Debate: Flap Over Working For Free, Nat'l L.J., June 15, 1981, at 1.

The refusal to accept an indigent client because of a positional conflict also conflicts with the access rights theory of legal aid. See infra notes 102-07 and accompanying text.

But see G. Bellow & B. Moulton, The Lawyer Process 249-50 (1978), Bellow & Kettleson, supra note 61, at 349. Professor Bellow argues that favored community groups could be allowed to screen potential legal aid clients. This would prevent cases inconsistent with the community groups' interests from being represented by legal aid. Implementation of Bellow's analysis would mean the denial of representation of eligible clients on the basis of political, as well as ethical grounds. Id. at 343-53.
give free and informed consent.\textsuperscript{93} Waivers by clients of public defenders frequently have been disallowed because of judicial skepticism over the reliability of consent when given by unsophisticated clients.\textsuperscript{94} The legal aid client, having no place else to go to seek legal representation, is not really free to withhold such consent. The signing of an informed consent form presents the indigent with a Hobson's choice and in no way ensures that a client has given his or her blessing to dual representation.\textsuperscript{95} Consent should not be relied upon as a viable or realistic means of reducing the number of unrepresented clients in conflicts cases.

IV. The Legal Aid Lawyer's Responsibility to Conflicted Clients

A legal aid attorney should not be disqualified from representing a client or accepting an otherwise eligible client when the fiduciary relationship between the two would not be adversely affected by dual representation. This relationship must be protected at all costs, however, despite the position of the legal aid attorney as the lawyer of last resort. To protect this relationship, legal aid offices, when confronted with a conflicts situation, may choose to reject both parties or to serve only one of the parties seeking legal assistance. In the latter situation, rather than informing the rejected client that the office is unable to provide representation because of ethical considerations, the legal aid office should ensure alternative means of legal representation.


\textsuperscript{94} This skepticism predominates in the criminal law context. See, e.g., United States v. Bernstein, 533 F.2d 775, 788 (2d Cir. 1976) (consent does not vitiate conflict); United States v. Gains, 529 F.2d 1038, 1044 (7th Cir. 1976) (trial court has duty to ensure that waiver is deliberate and made with understanding of conflict and its implications); Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965) (trial judge must assure himself that defendant's consent was informed). This problem has traditionally been considered in the context of waivers of sixth amendment rights. See, e.g., Johnson v. Zerbst, 304 U.S. 458, 462-64 (1938) (Determination of "intelligent waiver" depends on particular facts of case, "including background, experience, and conduct of accused."). It is highlighted in the conflicts context by the relative esoteric nature of the issues at stake. See United States v. Garafola, 428 F. Supp. 620, 623-24 (D.N.J. 1977) ("[The] average defendant cannot possibly understand fully and completely" the implications of dual representation.).

\textsuperscript{95} One might argue that legal services clients are unable to give free and informed consent because of factors connected with their indigency. Thus, any consent which is given should be held void. An analogy to informed consent to medical treatment is relevant here. See Epstein & Lasagna, \textit{Obtaining Informed Consent: Form or Substance}, 123 Archives Of Internal Med. 682-88 (1969); Ingelfinger, \textit{Informed (But Uneducated Consent}, 287 New Eng. J. Med. 465 (1972).
A. Case Selection Criteria for Selecting Between Two Conflicting Clients

There are two methods by which legal aid offices may select which of two conflicting clients it will represent. A legal aid office may select clients on utilitarian grounds, accepting that individual whose representation will best serve the interests of the poor. The office also may select between conflicting clients on the basis of temporal priority. Underlying these case selection perspectives are two alternative theoretical models upon which the allocation of legal aid services may be based—a social utility model and a model based on principles of access rights.\textsuperscript{96}

1. The Social Utility Approach

The utilitarian method of case selection is an offshoot of the social utility model of legal aid distribution. Under this model, the goal of the legal aid office should be to serve as "'general counsel' to the poor."\textsuperscript{97} Cases should always be selected on the basis of their propensity to maximize the position of the poor as a group. Eligible clients would be given priority if their problems are of social significance, if their cases provide an efficient means of aggregating a large number of complaints, or if the individuals involved are sufficiently important to the poverty community.\textsuperscript{98} Under this view, the legal aid lawyer should refuse to represent indigent clients if their legal needs diverge from those of the poor generally.\textsuperscript{99}

A practical approximation of this social utility approach to allocating scarce resources among eligible clients is the priority-setting process mandated by the Legal Services Corporation Act Amendments of 1977.\textsuperscript{100} This process attempts to provide legal representation in a manner consistent with

\textsuperscript{96} See Breger, supra note 41, at 344-60; see also J. Gordley, Variations on a Modern Theme, in Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies 77-132 (M. Cappelletti, J. Gordley & E. Johnson eds. 1975) (distinguishing legal aid as a "juridical" right from legal aid as a "welfare" right).

\textsuperscript{97} See H. Sacks, Legal Services Corporation: A Plan For The Future 5 (adopted Mar. 6, 1981) ("Legal services must be judged on the extent to which they address the needs of significant segments of the poor and not only on actions with respect to specific clients.").

\textsuperscript{98} Under this approach, the provision of legal services to the poor is less a good in itself than an instrumental goal whose value derives from the good achieved through the benefits provided.

\textsuperscript{99} Breger, supra note 41, at 344-52.

the desires of the poverty community. Through priority-setting, those clients whose legal problems have a low programmatic priority can be rejected systematically, thus permitting the legal aid office to represent those cases which have been given priority in program resource allocation.

An individual legal aid program could arguably rely on the same ideological criteria by which it makes its initial case selection to choose between opposing parties seeking legal assistance. A legal aid office could represent the party that best reflects the use of community resources, and whose representation is thus ideologically more compatible with the program's selection criteria. An office could choose to give priority to claims brought by groups traditionally perceived to be poor. For example, if an indigent tenant and landlord sought representation in the same matter, the legal aid office could choose to accept the tenant. Similarly, if a battered wife sought a divorce from her indigent husband, the program could refuse to serve the husband.

The utilitarian model also enables legal aid programs to choose between opposing applicants at the same priority level. Thus, in the case of two tenants, the legal aid program could examine the claims of each similarly situated applicant and could again choose that client whose cause would maximize the position of the poor generally. Under the social utility view of legal aid, therefore, conflicts can be resolved by accepting the party that has a greater claim to the resources of the legal aid office.\(^1\)

2. The Access Rights Position—Temporal Priority of the Client

One non-utilitarian approach to case selection in a conflicts context focuses on the temporal priority of indigent claimants. Underlying this method of case selection is the access rights theory of legal aid, which requires the state to provide legal assistance to individuals wishing to make effective use of society's dispute resolution processes.\(^2\) Under an access rights approach, the legal aid lawyer is the attorney of individual clients rather than of the poor generally.\(^3\) This view prohibits the selection of clients based on the moral or social worth of their claims, and stresses the equal right of all individuals to have those interests that they consider important vind-

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\(^1\) Within the social utility model, an act-utilitarian approach may be distinguished from a rule-utilitarian approach. An act-utilitarian approach would require that every resource allocation decision be premised on what is best for the poverty community. In a rule-utilitarian approach, a program would allocate resources according to what it considered most beneficial to the long range interests of the poor and would refrain from making ad hoc changes. Under a rule-utilitarian approach, a legal aid program might conceivably choose an access rights conflicts approach depending on its assessment of the best interests of the poor. In contrast, the act-utilitarian position would require continual determinations of which side to accept in a particular conflicts case.

\(^2\) See Breger, supra note 41, at 287.

\(^3\) Id. at 294-97, 350-51.
cated. 104 Under this model, the first client through the door would, in most circumstances, be served first.

In a conflicts setting, a legal aid office applying an access rights method of case selection should accept the first client who requests representation and should reject conflicted clients who subsequently apply for aid. 105 Temporal priority is presently the basis for selecting clients in cases of subsequent representation, as the presumption that confidences have been transmitted by the previous client prohibits accepting a subsequent client on a substantially related matter. 106 In cases of both simultaneous and subsequent representation, the impact of a temporal priority selection scheme on potential recipients of legal aid is particularly great when a legal aid office serves as house counsel to a community group or represents a class over a wide range of issues. By accepting this organization or class as a client, the legal aid office may be closing its doors to a substantial portion of the poverty community which may have interests that differ from the represented group. 107

B. The Government's Special Obligation to Conflicted Indigents

Both the utilitarian and temporal priority methods of case selection leave the unrepresented indigent in a precarious position. Had the party accepted by the legal aid office been denied representation, both parties to the lawsuit would most likely have lacked counsel, because of the position of the legal aid lawyer as attorney of last resort. The party chosen by the legal aid office not only has received the benefit of counsel at the expense of the government, but has deprived his or her adversary of the opportunity for a two-

104 Id. at 295-96.
105 The problem is misrepresented in Developments, supra note 1, at 1402 n.29, which suggests that the "first in time is first in right" logic of legal ethics "produces a systematic bias in favor of past and present clients over future ones." That difficulty is caused by the Canon 4 obligation that an attorney protect client confidences. The problem of temporal priority is unavoidable since whoever gives an attorney confidences, including strangers and potential clients, creates constraints for the attorney.
106 See supra note 19 and accompanying text.
107 The applicability of this doctrine becomes questionable when the contact between the attorney and the indigent consists only of brief interaction or discussion. Attorneys in the United States are not duty bound to accept as a client every person who seeks advice. Absent the transmission of confidences, an attorney may ignore temporal priority in client selection when choosing between two clients who serially seek assistance. Of course, precisely when the provision of advice becomes an attorney-client relationship is a complex question. See, e.g., Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1316-17 (7th Cir. 1978) (explicit consent to attorney-client relationship is not essential to its formation); United States v. Constanzo, 625 F.2d 465, 468 (3d Cir. 1980) ("[T]he attorney-client relationship is not dependent upon . . . the execution of a formal contract.").
sided pro se battle. The conflicted indigent, who may not have chosen to bring the suit, has been left worse off because of government action.

The government should have an obligation to repair the balance between the represented and conflicted clients. A conflicted client has a special claim to representation that takes precedence over other claims for legal assistance. The government should provide representation for conflicted indigents prior to expending resources to represent any other indigent person. If an individual is sued by a plaintiff represented by a legal services attorney, that individual—if otherwise eligible for legal aid—should receive the next available quantum of legal assistance provided by the government.

The position of a conflicted indigent may be viewed as analogous to that of defendants sued by the state. Since these defendants do not voluntarily initiate the need for legal assistance, their claims to legal assistance should arguably take priority. The problem is aggravated when a defendant is incarcerated as in Payne v. Superior Court of L.A. County, in which the California Supreme Court held that state to be constitutionally required to

108 Breger, supra note 41, at 354-55.

109 The equity argument for state responsibility to conflicted parties may be analogized to the more developed "fairness doctrine" in the broadcasting and public utility area. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 369-70, 377 (1969) (radio and television broadcasters required to present adequate and fair coverage of both sides of public issues). But see Miami Herald Publishing v. Tornillo, 418 U.S. 241, 256-59 (1974) (state statute requiring newspaper to provide free space to candidates whose characters have been assailed held unconstitutional). See generally Harrison, Public Utilities in the Marketplace of Ideas: A 'Fairness' Solution for a Competitive Imbalance. 1982 Wis. L. Rev. 43, 49-64, 73 (public utilities should be held to fairness standard in speech because of state regulated control over scarce resources). Under the fairness doctrine, the federal government, which monopolizes access to the airwaves and regulates utilities, may require broadcasters and utilities to provide opportunities for opposing viewpoints to be heard. This focus on limited resources with the concomitant government involvement in resource allocation suggests some of the equity problems presented in government subsidy of legal services. In the legal services context, this state monopoly will make it unlikely that parties will be able to secure counsel absent state assistance. As one commentator stated, "the state creates and allocates a limited number of natural monopoly 'soapboxes.'" Id. at 59.

This argument is extremely relevant for legal service allocation in the event of disputes between poverty groups over social reform. In such cases, by subsidizing one sector of the poor, the state has provided an advocate for particular political and social views as well as a litigator for particular disputes. As a result, the functional result of a local program's case selection policy is for the state to abandon the neutrality between ideological viewpoints and enter, albeit in the legal arena, into a partisan fray. The significance of the fairness analogy must be seriously considered in allocating resources among poverty groups.

provide counsel for an indigent prisoner incarcerated in the state penitentiary after the state denied his request for release from jail to prepare and argue his case pro se. Thus, California was required to provide counsel to indigent prisoners irrespective of its general legal aid policy. The California Supreme Court also has held that an indigent defendant in a paternity proceeding must be provided with government appointed counsel when the state appears as a party or on behalf of the plaintiff.

Defendants do not choose to use the judicial process to vindicate perceived wrongs. They are forced into using the legal system and must default if they lack functional access to the courts. When defendants are placed at a distinct disadvantage by action of state or federal government, appointment of counsel has been held essential to fundamental fairness. Although the analogy between conflicted indigents and defendants sued or incarcerated by the state is by no means exact, one common theme exists: state intervention should not be permitted to skew a litigant's position in relation to an adversary. Fairness and equity considerations demand that the state provide appointed counsel to the party whom it injures through its intervention in the litigation process.

C. Accommodating the Special Duty to Conflicted Clients

The special duty owed a conflicted client dictates that once clients are accepted, their adversaries must be accepted as well. The legal aid office thus has the option of accepting or rejecting both parties. Although either choice is feasible, application of the case selection models to this decision suggests that representation of both parties is the more appropriate choice in the conflicts situation.

1. The Avoidance Position—Reject Both Parties

Of course, the legal imbalance between the two indigents in a conflicts case could be eliminated if the legal aid office rejected both prospective clients instead of choosing one indigent to represent. Such an alternative

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111 See Bounds v. Smith, 430 U.S. 817, 828-32 (1977) (states must provide prisoners with law libraries or adequate legal assistance); Johnson v. Avery, 393 U.S. 483, 487-90 (1969) (state may not prohibit inmates from giving legal assistance to other prisoners if no other source of legal assistance is provided).


114 Some commentators have argued that legal services offices should be prohibited entirely from representing indigents and poverty groups in lawsuits directed against another portion of the poverty community. See Minutes of Legal Services Corporation Board of Directors Meeting, App. B5-6 (Oct. 7-8, 1977) (statement of
presents a convenient resolution to the conflicts dilemma by simply avoiding
government-fostered inequity between parties. It is unhelpful, however, in
those cases of concurrent representation in which the conflict does not
emerge until after representation is undertaken.\footnote{115} Similarly, in all cases
involving subsequent representation, conflict cannot be avoided by rejecting
both parties since one client has already received representation.

The avoidance position is consistent with the social utility model only in
limited instances, and directly conflicts with the access rights model. Avoid-
ance is acceptable on utilitarian grounds only if the claim of the third party
who receives representation in lieu of both conflicted indigents has a higher
priority than those of the parties denied representation.\footnote{116} In general, how-

Professor Marvin Schick) (dispute over allocation of legal aid resources between
ethnic groups). The fact that both clients of a legal aid office are indigents in a
conflicts setting would require rejection of both plaintiff and defendant. At a mini-
imum, local programs would be required to examine the possible adverse effect on the
poor resulting from such litigation. \textit{Id.}

The prohibition on representing indigents in matters adverse to the poverty commu-
nity is based on the belief that such representation violates the program’s purpose as
defined by Congress. The legislative history of the Legal Services Corporation Act
1-4, 6-12, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 3872, 3873-75, 3877-83
(Legal Services Corporation established as independent program, free from political
interference, and funds should not be used to further the interests of particular groups
in the poverty community). Although this position is clearly inconsistent with the
access rights theory of legal aid, \textit{see Breger, supra} note 41, at 357-60, it does raise
conceptual problems for legal aid case selection by suggesting that legal aid attor-
neys, unlike other lawyers, must consider the consequences of their representation
on third parties in making decisions on whether to accept employment. This view
may be based on the belief that the legal aid lawyer should represent the poor as a
class. \textit{See supra} note 97 and accompanying text. If this position were adopted,
advocacy for the poor would be seriously limited, due to the heterogeneity of
interests within the poverty community. \textit{See supra} notes 55-56 and accompanying
text.

\footnote{115} Although it may be unfair to use state funds to help one poor person sue
another while leaving the conflicted client unrepresented, this fairness problem may
not be completely alleviated by a promise to refer away conflicts once litigation
commences. \textit{See infra} notes 146-86 and accompanying text. The lead time advan-
tage which plaintiffs secure by having counsel available to plan and contour litigation
provides significant benefits to plaintiffs which may not be remedied by referral after
litigation commences. When legal services organizations systematically act as house
counsel for one poverty group at the expense of another, serious questions about bias
in the methodology of representational choice may be raised.

\footnote{116} \textit{See Developments, supra} note 1, at 1409 ("[W]hen a legal aid office must
choose between two cases, both of equal importance under the caseload priorities but
one involving a conflict, it is perfectly permissible to take only the conflict-free case,
for it does not present the systemic and client-centered difficulties that may arise in
the conflict-ridden one.").
ever, caseload priorities will be frustrated if the existence of a conflict is
enough to deny representation to a client who is next under the priority
scheme.\(^{117}\) Because conflicted indigents whose cases are clearly priorities
may be denied representation because of conflicts of interest, their quantum
of legal aid may then be allocated to clients whose cases are of substantially
less benefit to the poor generally.

The avoidance alternative also directly conflicts with the access rights
model of legal aid distribution.\(^{118}\) Indigents who are next in line under the
legal aid queuing scheme should not lose their places to claimants who
sought legal assistance at a later point in time. Under an equal access view,
legal aid is unfairly distributed if clients are bypassed for representation
solely because a conflict exists.\(^{119}\) Avoidance is therefore an unsatisfactory
means of resolving the conflicts dilemma under one case selection model and
of limited value under the other.

\(^{117}\) Id.

\(^{118}\) As a conceptual approach, this "plague on both your houses" position raises
considerable problems for legal services case selection. The suggestion that it is
"obligatory on anybody who's going to bring . . . [an] action to take account of the
impact on poor people living in that area, and on their ability to defend against action
of that kind," Minutes of Legal Services Corporation Board of Directors Meeting,
Transcript p. 43 (Oct. 7, 1977) (statement of Nathan Lewin), would suggest that legal
aid attorneys, unlike other attorneys, must consider the consequences of their rep-
resentation on third parties. Lewin correctly points out that prospective clients on
one side of a group dispute may prove fearful of using legal services because of the
simultaneous representation of an antagonistic group. Although probably correct,
this position is no different from the decision of some legal aid organizations not to
represent landlords because of the negative effect this representation might have on
the primary poverty community of tenants.

Such concern for "prospective clients" comes close to the claim that the client of
the legal aid lawyer is the poor as a class. See H. Sacks, supra note 97, at 5. But see
Breger, supra note 41, at 347-52 (reviewing problems in the position that the Legal
Services Corporation should be general counsel to the poor).

\(^{119}\) An example of this trade-off approach to group representation can be found in
recent discussion of class action regulations, as required by the Legal Services
1186, §§ 1012-1122 (1982). In discussing what constraints, if any, should be placed on
class actions, some Board Members urged that such actions should be barred unless
the program director has determined that "the court judgment in the class action will
not result in the expenditure of public funds on a group of eligible clients which is
smaller than the group of all eligible clients which is found within the jurisdiction of
the taxing authority which has raised the public funds being administered." See 47
Fed. Reg. 50,664 (1982) (proposing amendment to 45 C.F.R. § 1617(a)(4)). This
requirement would imply that legal aid attorneys must consider the impact of their
actions on the poverty community as a whole prior to instituting suit.
2. Ensuring Legal Representation for Both Parties

The balance between both parties in a conflicts case will be preserved if the legal aid office acknowledges its special responsibility to secure counsel for conflicted parties once their adversaries receive federally funded legal assistance. This position—unlike the decision to reject both parties in conflict situations—does not conflict with the access rights model and can be harmonized with the social utility perspective. Under the social utility approach to case selection, programs make judgments about clients and their causes. Once a utilitarian judgment has been made, the model does not recognize any programmatic responsibility to conflicted parties. However, the model does not prohibit the representation of conflicted clients, particularly when the litigants are on the same priority level, making the choice between the clients of marginal import to the poor generally. Moreover, a distinction can be drawn between direct responsibility to accept a case, and a residual duty, based on the need to preserve the integrity of the adversary system, to see that a conflicted indigent with a disfavored position receives some legal service. Although utilitarian considerations might affect the decision as to who can provide a conflicted client with legal assistance, they need not prohibit a legal aid office from ensuring that such a client is directed to an attorney who can provide the necessary service.

The recognition of this special obligation to conflicted clients is also consistent with the access rights model of legal aid distribution. The decision to accept a conflicted client, when that client is the next applicant in line for assistance, will not require an exception to the general queuing scheme. When the conflicted client is not next in line, exceptions may sometimes be necessary when emergency considerations may override any one individual's claim to equal treatment in the distribution of legal aid. Permitting emergency claims to receive legal assistance before others with valid claims to such assistance need not promote an arbitrary distribution of scarce resources. No restriction on the ability to provide representation for conflicted clients inures from either the social utility or the access rights limitations on legal aid distribution. Thus, given the choice between representation and avoidance, representation clearly would be preferable. However, this determination creates the problem of how to provide service to both clients without violating the constraints of the Code of Professional Responsibility, and thus compromising the fiduciary relationship.

120 This alternative was endorsed by the Washington Superior Court in a case in which the propriety of a legal aid organization's refusal to represent both indigent parties in a divorce action was questioned. See In re Holbrook, No. D-89762 (Superior Ct., King Cty., Wash. 1976).

121 Breger, supra note 41, at 295-97.
V. PROVIDING REPRESENTATION TO THE CONFLICTED INDIGENT WITHOUT COMPROMISING THE FIDUCIARY RELATIONSHIP

Although legal assistance should be provided to conflicted clients for whom the legal aid office may be the attorney of last resort, such services must be offered without compromising the fiduciary protections of the attorney-client relationship. In the past, some programs have attempted to accommodate conflicted clients by developing strategies on an informal, ad hoc basis for locating alternative sources of counsel. Formal mechanisms have rarely been established, however, to guarantee legal representation to conflicted indigents. Several methods of providing such assistance can be suggested that adhere to traditional ethical obligations and philosophical considerations of equity and fairness. These strategies can be divided into two classes. First, the "taint" rule disqualifying an entire law firm from representing a conflicted client may be reconsidered in the legal aid context when the use of screening or "Chinese Wall" mechanisms will be adequate to ensure that the interests of both clients will be protected. Second, a legal services organization may institutionalize procedures to secure alternate sources of counsel for conflicted clients. This may be accomplished by a number of options—requests for court-appointed counsel, use of lawyer referral programs, use of formal conflicts referral procedures, and adoption of a judicare method of hiring outside counsel. This last option is perhaps the most promising means of ensuring that conflicted clients will receive adequate representation.

A. Reinterpreting Conflicts Constraints: The Chinese Wall Solution

The conflicts dilemma may be alleviated by reinterpreting traditional conflicts rules to permit subsequent and, on occasion, concurrent representation if such representation can be accomplished without undermining the ethical principles behind the Code and sacrificing the fiduciary relationship between lawyer and client. Commentators have suggested that a legal aid office should not be deemed "tainted" merely because a conflicts situation exists. Dual representation should be permitted if barriers between the conflicted attorney and the rest of the legal aid office can be erected that will protect the confidences and interests of both clients. Under this "Chinese Wall" solution, screening mechanisms are employed to isolate a tainted attorney so that the rest of the law office is not disqualified. Screening mechanisms have been used effectively in the private sector, primarily in instances of subsequent representation. In a Chinese Wall situation, all communication about the conflicted matter between the tainted attorney and other attorneys at the firm is prohibited. The conflicted attorney is denied access to relevant documents and court files, and may even be physically

122 See, e.g., Developments, supra note 11, at 1409.
123 See The Chinese Wall Defense, supra note 1, at 678.
isolated from other members of the firm.\textsuperscript{124} A mechanism may also be established to segregate fees so as to prevent the conflicted attorney from sharing in the economic benefits resulting from dual representation.\textsuperscript{125}

In subsequent representation cases, the Chinese Wall functions primarily to protect the communication of confidences between client and attorney. If such communications are in fact shielded, the need for disqualification is vitiated. Although Professor Hazard has criticized the Wall solution as "like the alleged New England practice of bundling, having neither the credibility of real prophylaxis nor the dignity of real self-control,"\textsuperscript{126} its use has been accepted by numerous courts\textsuperscript{127} and commentators\textsuperscript{128} as a sophisticated approach to the conflicts problem.

In instances where concurrent representation is desired, the ethical problems are more complex. An office that represents both parties to a lawsuit not only will have problems protecting client confidences, but also may have difficulties in exercising independent judgment for each client because of divided loyalties. Law firms will attempt to alleviate this situation by segregating fees, but it is doubtful that this response will ever be satisfactory to guard against Canon 5 problems in matters involving concurrent representation. It may be argued that the threat of divided loyalties is less serious in legal aid offices, because legal services providers are not compensated on a fee-for-service basis. Yet, the judgment of a legal aid attorney may conceivably be impaired by ideological or personal considerations.\textsuperscript{129} Cases may be imagined, however, in which the concurrent representation of clients might not interfere with the fiduciary relationship if adequate screening mechanisms are employed.

Since most legal aid offices operate as law firms employing staff attorneys,\textsuperscript{130} the Chinese Wall seems to offer a superficially attractive solution to

\begin{itemize}
  \item\textsuperscript{124} Id.
  \item\textsuperscript{125} Id. This would presumably be the case where pro bono representation is adverse to a firm’s paying clients as well. See Developments, supra note 1, at 1401.
  \item\textsuperscript{126} G. HAZARD, ETHICS IN THE PRACTICE OF LAW 113 (1978).
  \item\textsuperscript{127} See, e.g., Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc), vacated, 449 U.S. 1106 (1981). The case was vacated for lack of subject matter jurisdiction, in accordance with Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981), holding that an order denying a motion to disqualify opposing counsel in a civil case is not a final decision.
  \item\textsuperscript{129} See supra notes 68-71 and accompanying text.
  \item\textsuperscript{130} There were approximately 4,500 salaried legal services attorneys in 326 legal services programs funded by the Legal Services Corporation in January 1982. Legal Services Corporation, Characteristics of Field Programs Supported by the Legal Services Corp. Start of 1982—A Fact Book 2, 10 (Feb. 1982). There are only 56 local
the legal aid program's conflicts dilemma. Its application would enable programs to provide services to conflicted indigents without requiring a restructuring of the present delivery system. The use of screening mechanisms in legal aid offices was endorsed by the Supreme Court of Alaska in *Flores v. Flores.* However, in this case, involving a child custody proceeding, the court narrowed its holding to cases in which a "denial of the right to counsel will necessarily be fatal to the petitioner's case." Nonetheless, several programs using some aspects of judicare. Legal Services Corporation, *Private Attorney Involvement: Directions for 1983 and Beyond* 4 (Nov. 23, 1982). The bulk of these programs have only a small judicare component, accounting for a small percentage of the total federal funding for legal aid. Under this delivery system the legal aid attorney is employed on a salaried basis by an autonomous legal services program which, in most instances, secures funds through the federally-funded Legal Services Corporation. A few legal aid schemes in other countries use this method of distribution. For example, one component of the English legal aid scheme is styled Neighborhood Law Centres which employ salaried solicitors and provide comprehensive civil and criminal legal assistance to the surrounding community. See Legal Advice and Assistance Act of 1972, ch. 50, rewritten and consolidated in Legal Aid Act of 1974, ch. 4; Lord Chancellor's Office & The Law Society, *Legal Aid Handbook* (1976); see also M. Partington, *Perspectives on Legal Aid* 158, 164 (F. Zemans ed. 1979). In 1977-78, two million pounds were allotted to these law centres, while 85 million pounds were allocated for the traditional judicare approach. B. Garth, *Neighborhood Law Firms for the Poor* 63 (1980). By 1980, 31 centres had been established and 30 more were seeking government funding. J. Cooper, Public Legal Services in Three Countries: A Study of the Relationship Between Policy and Practice 107-08 (June 1981) (unpublished doctoral dissertation). For case studies of individual law centres in Brent and Manchester, England and Adamsdown, Wales, see id. at 134-73, 174-88, 189-203.


Although a large number of attorneys in the United States are employed on a salaried basis rather than as "free" professionals, most salaried attorneys work for the government or corporations and few are engaged in direct service to the public.

131 598 P.2d 893, 896-97 & n.14 (Alaska 1979) (indigent wife has constitutional right to court appointed counsel in private custody proceeding in which husband represented by legal services). The Court stated that "[r]egulations might be developed relating to such matters as record keeping, access to files, supervision, and physical separation of offices which would be sufficient to ensure that two attorneys employed by Alaska Legal Services Corporation could represent conflicting positions in litigation, each having undivided loyalty to his client and fully able to exercise that independent professional judgment which is required by the Code of Professional Responsibility." *Id.* at 896-97.

132 *Id.* at 896.
bar associations also have indicated support for the use of the Chinese Wall to alleviate the effects of conflicts of interest in legal aid offices.\textsuperscript{133}

Despite the success which the Chinese Wall solution may have in alleviating the effect of conflict constraints in the private sector, the Wall solution can be applied to legal aid offices only with difficulty. The successful Wall requires the complete isolation of a tainted attorney from other lawyers in the firm and the restriction of access to all relevant files. Such isolation is difficult to ensure in a large law firm. It is almost impossible to achieve in a legal aid office where the permeability of attorneys' roles and small office size militate against the Wall concept.

Legal aid offices face all the problems of a small firm trying to develop screening procedures. They also face some special problems as well, created by the nature of the legal aid office, the character of its firm relations, and general fiscal limitations. High turnover is endemic to legal aid programs. Thus, one or two senior attorneys, often including the project director, may supervise, counsel, and advise a large number of junior attorneys. Attorney interaction is crucial if a legal aid program is to operate successfully. The need for constant on-the-job training makes the successful erection of a wall almost impossible. Moreover, the small size of most legal aid offices calls for a permeability of roles which hinders the isolation necessary for an effective wall.

The character of firm relationships also militates against the success of the Wall solution in the legal aid context. Close collaboration is prevalent among legal aid attorneys, reflecting the office's general social and intellectual camaraderie. Many of the lawyers share a sense of common purpose—to serve the legal needs of the poverty community—and a common political and social culture. This esprit de corps detracts from the effectiveness of screening mechanisms, since attorneys must guard against unintentionally disclosing confidences in social as well as work settings.

In addition, if a wall is to be anything more than a court affidavit, isolating a tainted attorney will cost money. The legal aid office may have to devise special filing systems. Attorneys and secretaries may have to reorganize their work patterns along less efficient lines. Tainted employees must be provided with separate offices and communal areas must be declared off-limits to conflicted counsel. Because of their limited funds, legal aid offices

\textsuperscript{133} For example, the Allegheny County (Penn.) Bar Association permitted two branches of the same legal aid office to represent a child and an adverse parent in a child deprivation case, provided that the attorneys did not share offices and maintained separate files. Ethical Considerations of Separate Legal Services Attorneys Representing Parent and Child in Deprived Child Proceedings, 7 CLEARINGHOUSE REV. 194 (1973). The Boston Bar has permitted attorneys from separate offices of the Greater Boston Legal Services to represent opposing sides in litigation matters, with court approval and client consent, when diligent efforts could not locate alternative counsel to represent the opposing party. See Boston Bar Ass'n Comm. on Ethics, Op. 76-2 (1976).
usually lack the fiscal ability to properly effectuate putative wall requirements.

Although there are no cases directly analyzing the efficacy of the Wall in the legal aid setting, two recent decisions, Cheng v. GAF Corp.,134 and Yaretsky v. Blum,135 suggest that courts may be reluctant to permit the use of the Chinese Wall by legal aid offices when they are small in size, as most are. Although the Cheng case was subsequently vacated on procedural grounds by the United States Supreme Court,136 and its precedential value is thus doubtful, the opinion remains persuasive as authority on the area of substantive law that it addresses.137 In Cheng, a legal aid attorney whose agency represented an indigent plaintiff in an age discrimination suit, obtained new employment with the firm that represented the defendant in that suit. The attorney worked exclusively in a department of the firm that had no contact with the case. In disqualifying the attorney and law firm from representing the defendant, the Second Circuit held that the screening procedures instituted by the law firm, which was comprised of only thirty attorneys, could not eliminate the danger that the attorney in question might intentionally transmit confidential information.138

This judicial skepticism over the effectiveness of the Chinese Wall solution in small firms was reconfirmed by the United States District Court for the Southern District of New York in Yaretsky v. Blum,139 a case involving the same attorney. In Yaretsky, however, the attorney had been directly involved in the case when employed by legal aid,140 and later worked in the law firm department that handled the defendant’s case.141 The court was not convinced that isolating the attorney and locking up all files would be

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136 The case was vacated because of a lack of subject matter jurisdiction in accordance with Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). See supra note 127.
137 Yaretsky, 525 F. Supp. at 27 (“[T]he Supreme Court’s judgment in vacating the Cheng judgment should not be interpreted as a decision on the merits.”).
138 Cheng, 631 F.2d at 1058. The plaintiff alleged that although the attorney in question had not represented him in the legal aid office, he had actual knowledge of client confidences. Id. at 1054. The attorney testified that he had not discussed the case with anyone at the firm. Id. at 1057.

140 Id. at 27. The attorney had no personal contact with the plaintiffs when he was employed by the legal aid office. Id.
141 Id. at 30.
sufficient to provide adequate screening given the small size of the office.\textsuperscript{142} The court noted that "the relatively small group of professional colleagues with whom [the attorney] interacts on a daily basis is [sic] also the group of people who must screen their activities from [him], and who must, in turn, be screened from [his] disclosure, however inadvertent, of confidential information . . . ."\textsuperscript{143} As legal aid programs are generally small in size, courts thus may be reluctant to permit offices to represent conflicted indigents even if screening mechanisms are put in place.

Some courts have permitted dual representation despite their uncertainties about the effectiveness of screening mechanisms when important public policies would be vindicated by permitting such representation. Law firms that employ former government attorneys, for example, have been shown special solicitude in many Chinese Wall cases,\textsuperscript{144} because of concerns that disqualification would discourage attorneys from accepting public employment during their careers. This reasoning arguably could be extended to matters involving legal aid attorneys, because of their special position as attorney of last resort for the poor. Special exceptions should not be made, however, at the expense of the fiduciary relationship between legal aid attorneys and their clients. The fiduciary principle is so central to the legitimacy of the judicial system that no policy justification can be advanced that would outweigh the need to preserve this relationship. The nature of a legal aid attorney’s employment should not dictate whether traditional conflicts rules should apply.\textsuperscript{145}

B. Avoiding Conflicts Constraints Within the Framework of Traditional Doctrine

Given the practical difficulties in effectuating a Chinese Wall in legal aid offices that will adequately protect the fiduciary relationship between legal aid lawyer and client, it might be thought that the special obligation to conflicted clients cannot be met without deviating from traditional conflicts rules. Uncompromised representation can be provided to conflicted clients, however, if the staff attorney approach to legal service distribution is re-

\textsuperscript{142} Id. at 29-30.
\textsuperscript{143} Id. at 30.
\textsuperscript{144} Armstrong v. McAlpin, 625 F.2d 433, 442-44 (2d Cir. 1980) (en banc), vacated, 449 U.S. 1106 (1981). The Code of Professional Responsibility established restrictions on the ability of a government attorney to participate in matters in which he had substantial responsibility once he or she accepts employment in a private capacity. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1979).
\textsuperscript{145} See People v. Shinkle, 51 N.Y.2d 417, 421-22, 415 N.E.2d 909, 910-11, 434 N.Y.S.2d 918, 919-20 (1980) (requiring appointment of special prosecutor to represent state whenever defendant represented by legal aid office formerly headed by present Chief Assistant District Attorney). The court recognized that this requirement might "impede the transfer of attorneys between offices of Legal Aid or Public Defender and of District Attorney," but would not compromise the fiduciary principle in fact or appearance. Id. at 421; 415 N.E.2d at 910; 434 N.Y.S.2d at 919.
structured to allow some private sector involvement. Private sector participation will add flexibility to legal aid distribution, and form the basis of a satisfactory resolution to the conflicts dilemma.

1. Court Appointment of Counsel

All conflicted indigents could receive adequate representation if legal aid lawyers were able to secure legal counsel for these individuals from sources outside of and independent from the legal aid office. One solution would be for legal aid offices to request that courts appoint counsel in all cases in which a conflicted indigent would otherwise be left unrepresented. Such appointments were the method by which poor persons historically received legal assistance. The decision to appoint counsel is left to the trial court’s discretion. Although courts generally look to the circumstances and complexity of a lawsuit in determining whether to appoint counsel, they rarely articulate the criteria upon which appointment decisions are based. Since the right to counsel in civil cases is limited, appointments are usually reserved for criminal cases. Few courts have based appointment decisions on the existence of conflicts of interest.

Mandatory appointment of counsel may not ensure that conflicted indi-

146 But see Developments, supra note 1, at 1409 (advocating the Chinese Wall solution).
147 As early as 1713 in New York and 1721 in Maryland, attorneys were assigned to represent plaintiffs in civil court without a fee. SELECT CASES OF THE MAYOR’S COURT OF NEW YORK 1674-1784, 176 (Morris ed. 1935); PROCEEDINGS OF THE MARYLAND COURT OF APPEALS 1695-1729, 303 (Bond ed. 1933); see Patterson, LAWS OF N.J. 339 (1800), cited in S. MOORE, RELIEF OF INDIGENTS FROM FINANCIAL BARRIERS TO EQUAL JUSTICE IN AMERICAN CIVIL COURTS 3 & n.18 (1971) (requiring appointment of counsel in civil and criminal cases).
149 The New York Court of Appeals has suggested, however, that “conflict of interest problems are taken up by the discretionary assignment of uncompensated counsel.” Matter of Smiley, 36 N.Y.2d 433, 439, 330 N.E.2d 53, 56, 369 N.Y.S.2d 87, 91 (1975); see also Tobak v. Mojika, N.Y.L. J., May 16, 1973, at 20, col. 3 (appointment made because of conflict between clients of the same legal aid organization).
gents are zealously represented. Unlike pro bono programs, which rely on the generosity of attorneys who voluntarily provide services, appointment schemes create a mandatory obligation on attorneys. This obligation is idiosyncratic, if not arbitrary, since it is limited exclusively to those called upon by the judge to serve. Most court appointment schemes are uncompensated, and force attorneys to respond under compulsion and often at inopportune times. A few courts have held that it is unconstitutional to compel attorneys to render uncompensated legal counsel to indigent civil litigants, although the majority have upheld the constitutionality of this method of providing legal assistance to the poor. The fear of exacerbating pro bono caseloads for the private bar, and perhaps compromising the quality of representation, has generally created a bias against establishing formal appointment schemes.

150 The view that legal aid for the poor should flow from the "spontaneous charity of individuals" has long been a traditional approach to the problem. See M. CAPPELLLETTI, J. GORDLEY & E. JOHNSON, TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 11 (1975). In recent years the American legal profession has debated whether this obligation is individual, professional, voluntary, or mandatory. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1979) (lawyers should assist the legal profession in fulfilling its duty to make legal counsel available); see also id. EC 2-16, 2-25. The idea that this obligation should be mandatory was proposed in the Kutak Commission discussion draft but was withdrawn in the final version of the Model Code. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (Proposed Final Draft 1981); Slonim, Kutak Panel Report: No Mandatory Pro Bono, 67 A.B.A.J. 33 (1981). See generally Christensen, The Lawyer's Pro Bono Publico Responsibility, 1981 A.B.F. RES. J. 1; Rosenfeld, Mandatory Pro Bono: Historical and Constitutional Perspectives, 2 CARDOZO L. REV. 255 (1981); Shapiro, The Enigma of the Lawyer's Duty To Serve, 55 N.Y.U. L. REV. 735 (1981).

151 Under the common law rule, when an attorney was appointed he could not refuse to serve without good reason. See Weatherby v. Pittmann, 24 Ga. App. 452, 453-54, 101 S.E. 131, 132 (1919).


153 See, e.g., Williamson v. Vardeman, 674 F.2d 1211, 1215-16 (8th Cir. 1982) (forced appointments without compensation unconstitutional); State v. Bell, 244 Ind. 701, 704-05, 195 N.E.2d 464, 466 (1964) (violation of state constitution); Bradshaw v. Ball, 487 S.W.2d 294, 298-99 (Ct. App. Ky. 1972) (violation of state and federal Constitution); State v. Green, 470 S.W.2d 571, 573 (Mo. 1971) (violation of state constitution); Bedford v. Salt Lake County, 22 Utah 2d 12, 14-15, 447 P.2d 193, 194-95 (1968) (civil appointments without fee unconstitutional while criminal assignments are not).


155 In one New York case in which over a hundred divorce defendants requested
Even if courts could be persuaded to appoint counsel routinely in civil suits, non-compensating appointment schemes cannot provide indigents with enough legal counsel to satisfy their legal needs. Although courts may have temporary success with their efforts to dragoon attorneys into mass appointment programs, these efforts may also generate ill-will among members of the bar. Appointment schemes thus may be difficult to sustain over long periods of time. Moreover, many attorneys lack competence in trial litigation and cannot effectively provide the type of legal assistance that conflicted clients need. The burden thus may be too great for the trial bar alone to bear.

2. Lawyer Referral Programs

Efforts to increase public access to legal services often concentrate on the development and operation of lawyer referral services. Under a referral scheme, individuals who seek legal assistance may contact their local bar association referral service to obtain the name of an attorney with whom they can consult for a nominal fee. Many programs supplement their regular referral schemes with a low or no-fee component for legal services for indigents. Indeed, referral programs in Chicago, Washington, D.C., and Louisville, Kentucky require each participating attorney to accept at


158 The Chicago bar requires referral panels to take some no-fee cases. N. LEVIN & J. STEIGER, TO LIGHT ONE CANDLE: A HANDBOOK FOR ORGANIZING, FUNDING AND MAINTAINING PUBLIC SERVICE ACTIVITIES 38 (1978).

159 The District of Columbia Lawyer Referral and Information Service requires that each of its participating attorneys agrees to accept at least one pro bono or no-fee case per year. Carlin, supra note 157, at 656.

160 Bardenwerper, LRIS Report, 2 LOUISVILLE LAWYER 38, 39-40 (1981); see also...
least one pro bono case each year, tying fee-generating referrals to legal services work.\textsuperscript{161}

The private bar has demonstrated a willingness to participate informally in conflict of interest matters.\textsuperscript{162} In a few regions, conflicted indigents are referred through no-fee panels established by local bar associations.\textsuperscript{163} Some legal aid organizations also have established pro bono conflicts panels that are supported by the local bar.\textsuperscript{164} Not all referral schemes contain pro bono components, however. Bar associations usually develop referral programs primarily to provide information about sources of representation to paying clients who are the victims of communication or market failure.

The Legal Services Corporation has initiated a major drive to develop pro bono panels and other forms of private bar involvement in the delivery of legal services to the poor.\textsuperscript{165} In 1982, the Corporation required each legal aid

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\textsuperscript{161} This tie-in arrangement has been approved by the American Bar Association. \textit{See} ABA Standing Comm. on Lawyer Referral Serv., \textit{Statement of Standards and Practices for a Lawyer Referral Service} Rule 3.3 (Feb. 1978). Indeed, the Superior Court of the District of Columbia requires family lawyers to accept pro bono representation of parents in child neglect cases as a condition to receiving paying appointments to represent children charged with acts of delinquency or charged with being in need of supervision under the Criminal Justice Act. \textit{See} Family Division Trial Lawyers of the Superior Court of the District of Columbia, Inc. v. Moultrie, Civ. No. 82-1373 (D.D.C. Dec. 20, 1982).

\textsuperscript{162} D. Bricking, \textit{supra} note 160, at 1-2 n.4.

\textsuperscript{163} \textit{See} Memo, \textit{Lawyer Referral and Conflict of Interest Systems} (Land of Lincoln Legal Assistance Foundation, May 11, 1978).

\textsuperscript{164} \textit{See} Letter from Charles E.K. Vasaly, Exec. Dir., Legal Services of Northern Virginia, to Professor Marshall Breger (June 30, 1982) (discussing such a program established by two branches of the Legal Services Office of Northern Virginia). In the first six months of 1982, both branches screened about 1200 applicants for client eligibility. Six hundred and fifteen were accepted as clients. Of this number, 19 or about 1.5\% were referred to the conflicts panel. \textit{Id.} Because pro bono panels are available, cases are sent out if there is the slightest doubt about the legal service office handling an applicant. \textit{Id.}

Similar policies are informally used in the Tidewater, Virginia program. Over 40 attorneys participate in a Conflict of Interest Panel, with most agreeing to take one case per year. The conflicts cases are primarily domestic relations matters, including divorce and child custody issues. Landlord-tenant and consumer problems are also referred. The program represents the first client requesting service. About 2-3 cases are referred each month. \textit{See} Memo, \textit{TLAS Pro Bono Referral Systems} (unpublished) accompanying Letter from Linda Pederson to Marshall Breger (Aug. 17, 1982).

\textsuperscript{165} Nearly 100 programs have used private lawyers in pro bono efforts through
organization to devote 10% of its annual grant to the development and support of programs involving the private bar in the delivery of services. These funds can be used to develop Legal Services-sponsored referral schemes as well as other forms of private sector involvement.

Although referral schemes can be a useful tool in resolving the conflicts dilemma, such schemes alone will not sufficiently meet the needs of all conflicted indigents. It is highly unlikely that referral programs will have the capacity to accommodate all conflicted indigents. Even if the needs of all indigents could be met, however, there is no guarantee that conflicted clients will receive representation. Lawyers who participate in referral programs are generally under no obligation to accept indigent clients. Conflicted indigents will thus receive legal aid as a matter of grace, while their adversaries will be provided representation as a matter of entitlement.

3. Referral to Another Legal Aid Office

When two independent legal aid societies exist in one locality or in two geographically contiguous communities, an exchange program can be

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1980. Legal Services Corp. Ann. Rep. 8. The Corporation has provided special grants to local bar associations and legal services offices to create pro bono programs. See id. at 27.

166 See 46 Fed. Reg. 61,017, 61,018 (1981). Referral schemes do not seem to be the major avenue of private bar involvement. As of October 29, 1982, 245 of the 292 basic field grantees had reported on their efforts to comply with the 10% requirement. Two hundred and one programs were engaged in organized pro bono work, 56 in judicare programs, 100 in contracts with private attorneys, and 72 were using direct delivery models. Legal Services Corporation, Private Attorney Involvement: Directions for 1983 and Beyond 4 (Nov. 23, 1982). Referral services were included in the “other” category. Id. at 28 n.2.

167 In the legal aid context, an attorney should be permitted to refer a client directly to another attorney and should not be required to refer a conflicted client to a referral panel only. Without such a rule, an indigent would be denied an alternative source of counsel merely because no referral panel existed. An indigent who cannot receive legal aid should be referred to a specific pro bono volunteer should one be available. See Alaska Bar Ass'n Comm. on Ethics, Op. 78-5 (1978); ABA Comm. of Ethics and Professional Responsibility, Informal Op. 1334 (1976).

168 Cities with two legal aid organizations include New York, Chicago, and Buffalo among others. Most cities lack two societies. Over time, United-Way funded programs have closed down or amalgamated with Legal Services Corporation programs. The Chicago situation is unusual in that the United Way program merged with and then “divorced” program funded by the Office of Economic Opportunity. See J. Katz, supra note 70, at 135.

169 With the expansion of the Corporation into all areas of the country, this solution is no longer possible only in populated areas. In Lakeland, Florida, for example, Florida Rural Legal Services, Inc. declined to represent a tenant of the Lakeland Housing Authority in an eviction proceeding because such representation would conflict with the prior representation of another tenant whose fight with the conflicted tenant led to the eviction. The problem was solved when the Polk County
developed for referring conflicted clients to offices where conflicts will not exist. Since each program is essentially a separate firm, such exchanges would be permissible.\textsuperscript{170} The conflicts dilemma could be alleviated if legal aid programs accepted responsibility for such referrals.

A two-office exchange will clearly be feasible when the offices belong to separately organized legal aid programs.\textsuperscript{171} The approach may prove unacceptable when both offices belong to one legal services organization, particularly if the relationship of the offices extends beyond solely administrative matters.\textsuperscript{172} Although it is possible that an adequate Chinese Wall can be constructed to separate the offices, such screening mechanisms may not always be successful.\textsuperscript{173} Of course, many geographic communities do not have two independent legal aid societies, and may not even have two autonomous offices.

Office exchanges also raise significant problems in cases involving group representation. Local programs that attain house counsel status for community groups will be unable to accept conflicted clients if their interests conflict with those of the group they represent. This may substantially limit the opportunity for organized exchanges.

Legal Aid Society agreed to take the case. See Letter from Gerald Caplan, Acting Pres., Legal Services Corp., to Senator Lawton Chiles (June 2, 1982).

\textsuperscript{170} See Kelly v. Kelly, [1972-1974 Transfer Binder] Pov. L. REP. (CCH) \textsuperscript{\textcopyright} 17,599 (Pa. Ct. of C.P., Del. County 1972) (ordering legal aid office to obtain "other competent counsel" to represent one of parties in contested divorce).

Although it is theoretically possible for programs in contiguous cities to exchange conflicts cases, it is unlikely, given the scarcity of resources, that program directors will agree to accept such cases before those from their own community. A legal aid office may, of course, be willing to accept conflicts from neighboring communities if its own conflicts will be accepted on a reciprocal basis.

\textsuperscript{171} One legal aid organization in New York City, the Community Action for Legal Services (CALS), attempted to resolve its conflicts problems by requesting that one of its constituent organizations represent adverse conflicted clients who otherwise would be unrepresented because of conflict of interest proscriptions. See Letter from Marttie L. Thompson, General Counsel, Community Action for Legal Services, to Rabbi Joseph Langer, Executive Director, United Jewish Counsel of the Lower East Side, Inc. (Mar. 18, 1977). That policy is still in effect. Constituent agencies are not required to intervene, however. Id. Yet, the question of whether such constituent organizations are sufficiently independent from the CALS to justify dual representation must be raised. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1309 (1979) (two legal aid organizations funded by same governmental source operated as separate law firms when no exchange of personnel or information, and no controlling or supervisory relationship).

\textsuperscript{172} Cf. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1309 (1979) (no conflict where two offices had no such relationship).

\textsuperscript{173} See supra notes 122-145 and accompanying text.
4. Hiring Outside Counsel: The Judicare Option

The most comprehensive solution to the conflicts dilemma would require the institutionalization of a program to hire outside counsel to represent conflicted clients who are otherwise eligible for legal aid. Some legal aid programs are already using federal funds to hire outside counsel to solve conflicts problems. A number of programs contract with outside counsel on a regular basis. This practice is, of course, a partial application of the judicare approach to legal aid allocation. In a judicare system, government subsidies are provided to private sector attorneys who offer direct legal assistance to poor persons. The subsidies are based on a fee schedule which, although unlikely to parallel market prices, provides a sufficient incentive to general practitioners to participate in the program. The judicare approach is widely used in England and other countries.

The judicare approach to providing legal services to the poor has caused considerable controversy within the legal services community. Indeed, the concept of “pure” judicare raises a variety of problems for structuring a legal services delivery system. These problems include concern over quality control, cost, and attorney availability. Regardless of the validity of these

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174 This practice, unlike that of referring clients on a no-fee basis to attorneys not formally affiliated with the legal services program, recognizes the legitimacy of departing from the staff attorney system to fulfill societal commitments to the poor.

175 A survey conducted by the author revealed that as of 1977, 28.3% of all responding legal aid programs considered hiring outside counsel and that 15.7%, or 21 programs, did so. A few programs took the position that they should represent neither client if it was impossible to ensure representation for both. See Survey, supra note 2.

176 Some programs have even extended their hiring of outside counsel beyond the conflicts context to provide expertise for specialized legal work such as bankruptcy and probate proceedings, see D. Bricking, supra note 160, at 2 n.6, or for complex litigation.

Conflicts can also exist in nonlitigation contexts. Twenty per cent of the responding offices admitted to having acted as draftsmen for parties with actual or potential differing interests. Often the drafting conflicts occur in the writing of or lobbying for legislation, in the preparation of administrative regulations, in the preparation of divorce documents, or in the drawing up of real estate agreements. See Survey, supra note 2.


178 See S. Pollock, Legal Aid: The First 25 Years (1975). A critical assessment of this scheme appears in J. Cooper, supra note 130, at 24-56.

Although the proponents of judicare have argued that the system maximizes client satisfaction by providing freedom of choice in legal representation, it is unlikely that this feature of judicare is relevant if its application is limited to conflicts cases.

179 Present judicare fees in Wisconsin, for example, are $30.00 per hour. There is a
concerns, they should not be relied on to impede efforts to create private attorney supplements to legal service programs for accommodating conflicted clients. The judicare option mitigates the risk of inadequate representation resulting from compelled representation which may exist under lawyer referral or appointment schemes. Since otherwise independent lawyers or firms provide services directly to indigent clients, this approach also avoids any reliance on potentially faulty screening devices. Further, financial concerns alone should not outweigh the government’s duty to represent the conflicted client. 180 Private attorney supplements for conflicts purposes can serve as experiments for examining how private attorneys can be used most effectively within the general legal services context.

The hiring of outside counsel may not eliminate conflicts situations in all cases, since attorneys may be unwilling to vigorously oppose the legal aid societies that hired them. 181 A number of structural mechanisms can be created to restrict administrative control of outside counsel by the legal services agency. Local programs can establish conflicts funds which can be administered by local bar associations or lawyer referral panels to ensure that the legal aid office does not control the outside counsel. Several law firms can be placed on retainer to provide conflicts representation. 182 A federal conflict of interest fund can also be created to pay for outside counsel

$500.00 maximum per case which can be waived. Divorces and bankruptcies are paid for on a flat fee basis. Wisconsin Judicare Participating Attorney’s Handbook 8-9 (Jan. 1982). Most judicare programs utilize some staff support system, and even the English system, long the exemplar of the private attorney approach, contains a salaried attorney approach.

The dispute over comparative cost structures has been a dispute over how overhead should be included in the wage rate and what a “case” means for purposes of cost per case. Although the subject is still open, the Legal Services Corporation, in its own delivery system study, did find that “private attorney projects, as a group, are not greatly higher or lower in cost than the staff attorney model.” Legal Services Corporation, The Delivery Systems Study: A Policy Report to the Congress and the President of the United States A-96 (June 1980) [hereinafter cited as Delivery Systems Study].

180 See supra note 109 and accompanying text.

181 Conflicts of interest may also exist in the judicare context. For example, a lawyer retained by a local bank cannot be expected to handle clients who have collection activity complaints against the bank. See J. Martin, Private Attorney Involvement in Rural Legal Services Delivery (Delivery Research Unit, Legal Services Corporation, October 1982). In such a situation, a private attorney “might be urged to accept a compromised resolution” to the dispute. Id. at 13. Multi-county judicare programs have responded to this concern by referring conflicted clients to private attorneys in adjacent counties. The Minnesota judicare program takes this approach. See Swanson, A Close Look at Two Programs, NLADA Briefcase 104, 110 (November 1980).

182 See, e.g., Mass. Bar Ass’n Comm. on Professional Ethics, Op. 79-5 (1979) (referral agency established by Legal Services Corporation to direct indigents to one of eleven private law firms paid by Legal Services Corporation).
when local programs certify that conflicts exist. That a local legal aid program has contracted with the private attorney who provides a conflicted indigent with representation need not create any concern about the attorney's autonomy.

Similarly, no impropriety should result in either appearance or fact from the realization that these private referrals are funded by the Legal Services Corporation, which also supports the legal aid office that represents the other party to the conflict.\(^1_{183}\) ABA Informal Opinion 1309 states clearly that where administrative control of two legal service providers is separate, funding may be derived from a common source.\(^1_{184}\) If the existence of common funding were sufficient to require disqualification, a legal aid office in one city could not represent a client who sued a defendant in a city thousands of miles away.\(^1_{185}\) Legal aid offices could contract with attorneys on a salaried or retainer basis to handle conflict referrals. In urban areas, the use of pre-paid legal insurance might well prove expedient.\(^1_{186}\) Some use of the judicare option will enable many conflicted clients to obtain the legal representation that they require.

This approach will also eliminate many of the problems surrounding group representation. The use of the judicare option enables legal aid programs to represent groups in intracommunity disputes without depriving adverse community interests of effective representation. It further ensures that legal services programs do not associate themselves with one section of the poverty community at the expense of heterogeneous sectors of the poor.

The relationship between the outside attorney and the legal aid agency must be carefully structured to ensure that the conflicted client is truly the client of the supplementing private attorney and not of the legal aid program itself. The "whose client" issue becomes more problematic when legal aid


\(^{185}\) See discussion of referrals to other legal aid agencies, supra notes 168-173 and accompanying text. The Multinomah, Washington legal services program has institutionalized a program that refers conflicted clients to private lawyers. The attorneys must agree to a fee schedule established by the program. Over 95% of the cases handled are domestic relations cases. Description of the Multinomah Bar Ass'n DSS Demonstration Project at 2. Positional conflicts occasionally were referred to the panel as well. Id. at 5. This program thus utilizes a judicare supplement to the traditional staff attorney program. See Delivery Systems Study, supra note 179, at A-7.

\(^{186}\) See Delivery Systems Study, supra note 179, at A-28; R. Kramer, Norwalk Demonstration Project (December 1977) (prepaid legal insurance offered for all cases as part of Delivery Systems Study).
programs receive confidential information at initial intakes, workup cases prior to referrals, or maintain quality control follow-ups on cases that are referred. Care should be taken to see that legal aid offices refer conflicted indigents as soon as potential conflicts surface, to ensure that confidential information is not disclosed. Once the organizational relationship between the staff attorney program and the private supplement is carefully worked out to avoid ethical violations, the judicare option provides an effective and comprehensive solution to the conflicts dilemma.\footnote{187}

VI. CONCLUSION

Conflict of interest rules are designed to protect the fiduciary relationship between lawyer and client by preserving client confidences and ensuring untrammeled loyalty. The legal aid attorney's special position as lawyer of last resort to the poor, and the scarcity of resources inherent in this period of economic contraction have created pressures to reinterpret conflict of interest constraints in the legal aid setting. The nonprofit nature of legal aid practice reinforces the belief that special rules can be developed for legal aid practice without compromising ethical values.

This Article has argued that conflict of interest constraints cannot be relaxed in the legal aid context without endangering traditional values of client loyalty and fidelity. Reaffirming traditional ethical constraints does not necessitate abandoning conflicted yet eligible clients who seek legal assistance. Once a legal services program agrees to represent one party in a dispute, however, the program has a responsibility to ensure representation for conflicted indigent parties. This obligation may in rare cases be fulfilled by the legal aid office itself, if adequate screening methods can be developed to protect the confidences of the client. Most often, legal aid offices will have to seek assistance from the private bar in order to satisfy this ethical responsibility. Federal funds can be used to hire outside counsel to represent clients whom the legal aid office itself cannot represent. The conflicts dilemma can thus be resolved without compromising the fiduciary relationship between attorney and client, and without rejecting the special responsibilities of legal aid lawyers, the attorneys of last resort for the poverty community.

\footnote{187} To the extent that legal aid lawyers view their enterprise as distinguishable from private sector lawyering, they may oppose the use of private attorneys to serve the poor. Although often cloaked in the garb of efficiency claims, opposition to the judicare option has been largely ideological in tenor. See \textit{Bellow, supra} note 63, at 337. Judicare attorneys were deemed suspect insofar as they were prejudged as lacking sufficient sympathy and commitment to the needs of the poor. Although the legal aid community may have changed its articulated position in this regard, arguing that there is no longer room for a "we-they" approach by either legal services or the private bar, NLADA and ABA Perspectives: Legal Services and the Private Bar 1982 and Beyond 5 (remarks of Steven Lowenstein), antipathy still exists. This antipathy should not affect the decision to employ members of the private sector to alleviate the impact of the conflicts dilemma on legal aid distribution.