

FLORIDA BAR STAFF OPINION 32210
January 16, 2013

Florida Bar ethics counsel are authorized by the Board of Governors of The Florida Bar to issue informal advisory ethics opinions to Florida Bar members who inquire regarding their own contemplated conduct. Advisory opinions necessarily are based on the facts as provided by the inquiring attorney. Opinions are not rendered regarding past conduct, questions of law, hypothetical questions or the conduct of an attorney other than the inquirer. Advisory opinions are intended to provide guidance to the inquiring attorney; the advisory opinion process is not designed to be a substitute for a judge's decision or the decision of a grievance committee. The Florida Bar Procedures for Ruling on Questions of Ethics can be found on the bar's website at www.floridabar.org.

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring attorney's letter are as follows:

The inquirer is the director of the Legal Aid Service of a county (Legal Aid). Legal Aid represented clients in suing a city in a federal lawsuit regarding the city's administration of federal Housing and Urban Development (HUD) funds. The lawsuit involved mainly Community Development Block Grant (CDBG) funds, but funds for Housing Opportunities for People with AIDS (HOPWA) were included in the general category of federal housing funds managed by the city. The court granted summary judgment in favor of the city on all counts. An appeal has been filed in the case. A private law firm is representing the clients on the appeal, although Legal Aid is listed on the notice of appearance.

The city that Legal Aid sued also manages federal funding from HUD in HUD's Housing Opportunities for People with AIDS (HOPWA). Legal Aid applied to the city for funding to provide legal services to persons with Aids and their families. The types of cases that Legal Aid would handle using the HUD funds are general civil legal problems such as landlord/tenant cases which are unrelated to the litigation against the city. Legal Aid will not represent the city in any matters, and Legal Aid will not use the HOPWA funds to file lawsuits against the City. The Community Services Board recommended funding be provided to Legal Aid under the administration process adopted by the city.

The inquirer asks "[w]ill receipt of these HOPWA funds from the City create any ethical or conflict of interest issues for Legal Aid?"

Rule 4-1.7(a)(2) applies, which provides as follows:

Except as provided in subdivision (b), a lawyer shall not represent a client if:

(1) the representation of 1 client will be directly adverse to another client;
or

(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

As applied to the inquirer's situation, if the acceptance of funds administered by the city, an opponent in litigation, creates a substantial risk that the representation of individual clients in their HOPWA matters would be limited by the lawyer's relationship with the city as the administrator of the HUD funds, by the inquirer's adverse relationship with the city as the opposing party in litigation, or by the inquirer's responsibilities to the clients who sued the city relating to the CDBG funds, then the inquirer may not accept the representation of those individual clients in their HOPWA matters. Conversely, if the inquirer's representation of individual HOPWA clients would be unaffected by the relationship with the city as the entity administering the HUD funds, by the inquirer's adverse relationship with the city as the opposing party in litigation, or by the inquirer's obligations to the clients in their CDBG funds case, then the lawyer may accept the representation. Even if the inquirer does not believe that the representation of HOPWA clients would be affected, the inquirer is required to disclose to the individual HOPWA clients that funding for their representation is administered by the city, and should disclose to the clients that the city is an adverse party in litigation in which Legal Aid is involved.

It appears from the inquiry that the actual provider of the funds is HUD, although the city is responsible for administration of the HUD HOPWA funds. Nevertheless, a discussion of Rule 4-1.8(f) is useful. Rule 4-1.8(f) applies when a client's representation is paid for by a third party and provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by rule 4-1.6.

As the rule describes, a lawyer may be paid by a third party with the client's informed consent as long as the third party does not influence the lawyer's independent professional judgment and the lawyer does not disclose any information to the third party without the client's informed consent. In this inquiry, it appears that the third party would be HUD, although the funds are administered by the city. The analysis would not change if the funds are considered funds of the city as opposed to HUD. Under Rule 4-1.8(f), the inquirer would be required under this rule to inform clients that funding for representation is being provided by HUD and administered by the city and obtain the client's informed consent. The inquirer could not accept the representation if the lawyer's judgment in representing the client would be compromised by the HUD funding administered by the city. Additionally, the lawyer could not disclose any information relating to the individual client's representation to either HUD or the city unless the lawyer has the

individual client's informed consent or an exception to the confidentiality rule applies.

Other states have determined that a lawyer's fees may be paid by an adverse party. In a similar situation, Oregon Formal Ethics Opinion 2005-122 (2005) concludes that a lawyer may represent private clients against a city, a county, or a city or county agency in civil matters unrelated to the lawyer's role as special prosecutor paid by the city to represent the state and requiring coordination with the county district attorney's office, because neither the city nor the county are the lawyer's clients. In a somewhat different context, Nassau County Ethics Opinion 03-2 (2003) concludes that a lawyer may be paid by a private school to represent students with special needs and their parents in a lawsuit against a school district over the students' placement in an appropriate school, where the private school paying for the representation may or may not be the appropriate placement, as long as: the representation of the students/parents will not be affected, there is full disclosure of the payment with consent by the students/parents, the attorney does not give anything of value to the school, the attorney's independent professional judgment is not affected by the school and the school does not direct the attorney's actions, and client confidentiality is maintained. Similarly, another Nassau County Ethics Opinion, 98-13 (1998) opines that a lawyer may represent a client (homebuyer) when the lawyer was recommended by the adverse party (home builder) and part of the lawyer's fee will be paid by the adverse party.

Finally, whether there are any statutory or policy prohibitions that would prevent the city from providing funding to Legal Aid under these circumstances is a legal question outside the scope of an ethics opinion. Additionally, whether a court might disqualify the inquirer or other Legal Aid lawyers from individual representation(s) based on the funding issue is also a legal question outside the scope of an ethics opinion. Courts may disqualify lawyers based on the appearance of impropriety, although that standard no longer appears in the Rules Regulating The Florida Bar. *State Farm Mutual Automobile Ins. Co. v. K.A.W.*, 575 So.2d 630 (Fla. 1991).

Index: 4-1.7(a)(2), 4-1.8(f), Legal Aid Receiving Grant from Entity Legal Aid has Sued