

BBA ETHICS COMMITTEE OPINIONS

BBA Ethics Opinion 98-A

Summary of Opinion. Lawyers may provide *pro bono* representation to complainants before the Massachusetts Commission Against Discrimination ("MCAD"), provided that certain safeguards are utilized to avoid conflicts of interest. The fact that the volunteer lawyers, or other lawyers in their firms, represent employers and other respondents in unrelated cases before the MCAD, would not preclude such representation if (i) they reasonably believe the representation of complainants will not adversely affect the relationship with their or their firms' respondent clients, (ii) they reasonably believe that the representation of respondent clients will not adversely affect their ability to represent complainants, (iii) both the complainants and the lawyers' respondent clients consent to the simultaneous representation after consultation, whenever "issue conflicts" crucial to the case arise, and (iv) the lawyer declines to take on any representation where a critical issue conflict exists.

Summary of Facts. The inquiring attorney reports that he and a group of other attorneys are forming a program to provide *pro bono* assistance in the prosecution of discrimination cases before the MCAD after a finding by the MCAD of probable cause.

The MCAD is an agency charged with investigating certain claims of discrimination on the basis of race, gender, and other specified characteristics. Complainants are permitted to proceed without counsel and, during the initial stages of the MCAD's investigations, often do. Once the MCAD determines that there is probable cause to sustain the complaint, in many cases the Commission's staff assumes a quasi-prosecutorial role in pursuing the Complainant's claim in administrative hearings. Such hearings may result in the imposition of monetary and other sanctions upon respondents found by the MCAD to have engaged in illegally discriminatory activity. Alternatively, at the post-probable cause stage, complainants may obtain private counsel to represent them in administrative hearings.

The program contemplated by the inquiring attorney and his colleagues would involve private sector lawyers' volunteering their time to serve as lawyers for complainants in cases as to which a probable cause finding has been made. The inquiring attorney reports that such volunteers will only be assigned to cases in which neither the volunteer nor his or her firm have any current or prior professional relationship with either the complainant or the respondent. We are invited to assume, however, that most if not all such volunteer attorneys will be engaged in the private practice of law, and that the practice of many of those attorneys or their firms will include the ongoing representation of respondents in unrelated matters before the MCAD.

Issues Presented. The contemplated program, as described by the inquiring lawyer, raises a number of questions concerning potential conflicts of interest.

First, the simultaneous representation of respondents and complainants creates the possibility of "issues conflicts," i.e. situations in which a legal position advanced on behalf of the complainant in one matter would, if accepted by the Commission, have a potentially adverse impact on the position of a respondent represented by the lawyer or the firm in an otherwise unrelated matter.

Second, the program raises the possibility that lawyers who provide volunteer representation to the MCAD may generate understandable feelings of gratitude on the part of the MCAD and its staff, since the program, if successful, will expand the ability of the MCAD to accomplish its statutory mission. While we assume that no volunteer attorney would seek in any explicit way to exploit any "good will" that volunteer activity might generate, it may be appropriate at least to consider whether a perception of "favoritism" - or what former Canon 9 referred to as an "appearance of impropriety" - may be created.

Analysis. Rule 1.7 of the Massachusetts Rules of Professional Conduct governs the ability of lawyers to represent a client in a matter that is directly adverse to another client:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Potential Conflicts Between the MCAD and Respondents in other Matters

The first question is whether a lawyer's participation as counsel for an MCAD complainant while the lawyer or the lawyer's firm simultaneously represent employers in proceedings before the MCAD creates a conflict of interest permissible only if the requirements of Mass. R- Prof. C. 1.7 are satisfied.

Rule 1.7 expresses the lawyer's fundamental duty of loyalty to clients by prohibiting the representation of a client when such representation conflicts with the interests of another client, of the lawyer, or of a third person for the protection of whose interests the lawyer is responsible. Rule 1.7 requires lawyers considering whether to participate in the Program to ask whether the representation of a complainant in one case is directly adverse to the interests of an employer or other respondent represented by the lawyer or the lawyer's firm in unrelated matters before the MCAD.

The answer ordinarily would appear to be no. In most situations, successfully advocating the

position of a complainant before the MCAD will have no impact on the interests of respondents in unrelated matters. The one exception that we see involves a case in which advocacy on behalf of a complainant involves advancing an argument on an unsettled question of law which, if resolved in favor of the complainant, will operate to the disadvantage of respondents in similar cases.

The comments to Rule 1.7 address the question of "Issue conflicts" as follows:

A lawyer may ordinarily represent parties having antagonistic positions on a legal question that has arisen in different matters. However, the antagonism may relate to an issue that is so crucial to the resolution of a matter as to require that the clients be advised of the conflict and their consent obtained. On rare occasions, such as the argument of both sides of a legal question before the same court at the same time, the conflict may be so severe that a lawyer could not continue the representation even with the client's consent.

Mass. R- Prof C. 1.7, comment 9. Where a lawyer participating in the Program must address an unsettled question of law in advocating on behalf of a complainant, the lawyer should consider whether the question is presented in any matters that the lawyer or the lawyer's firm is currently handling for a respondent before the MCAD. If not, neither disqualification nor consent are required. If, however, after taking on the representation on behalf of the complainant, a respondent subsequently seeks to retain the firm in a matter in which the issue is presented and the issue is crucial, the firm should disclose the pending matter before the MCAD to the prospective client (and seek the consent of the *pro bono* complainant if the prospective client is willing to retain the firm despite the issue conflict).

Similarly, if a legal issue crucial to the resolution of a matter in which the lawyer or firm is currently representing a respondent before the MCAD is present in a matter which the lawyer is asked to undertake for a *pro bono* complainant, then disclosure and consent of both the *pro bono* complainant and the respondent/client is required. If the issue is so critical that the lawyer either harbors doubts about the ability of the firm to resist the temptation to "pull punches" or recognizes that a reasonable lawyer would harbor such doubts, then the lawyer should not take on the matter for the *pro bono* complainant at all. Volunteers from firms that routinely represent respondents in MCAD proceedings should consider advising *pro bono* complainant clients of that fact before they commence representation of those complainants.

Issue conflicts may arise more often than anticipated, since certain legal issues arise regularly in MCAD cases, even those centered primarily on factual disputes. For example, as of the date of this writing (December 1998) complainants routinely argue that back pay damages should not be reduced by unemployment compensation benefits received, while respondents with equal predictability take an opposing stance. The MCAD has not yet addressed this issue definitively. In any case in which a claim for back pay is an issue and a complainant has received or is eligible for unemployment benefits, a significant issue conflict may arise, unless and until the issue is definitively decided by the MCAD.

As another example, in MCAD litigation in which complainants seek damages for emotional distress, respondents typically argue that the defense is always entitled to discovery of all of a

complainant's psychological records and that any asserted privilege attendant thereto has been waived by operation of law. Complainants frequently resist the turnover of such records on the ground of privilege, arguing that as a matter of law, no waiver could exist or be efficacious. As of the date of this writing, the MCAD has also not addressed this issue definitively. In any case in which emotional distress damages are sought and a complainant has received psychological counseling, a substantial issue conflict may exist, unless and until the issue is definitively decided by the MCAD.

Careful lawyers should examine any potential representation closely for issue conflicts in order to insure that the pro bono client will have the benefit of the lawyer's undivided loyalty. ¹

Appearance of Impropriety

We note what might be a perception by some that lawyers who participate in the program will enjoy more favorable treatment at the hands of the MCAD or its staff as a result of gratitude for the volunteers' efforts. While it would plainly be improper for a participating lawyer to take any steps to "leverage" his or her status as a participant in the Program to obtain any favors from the MCAD - or for the MCAD to extend favorable treatment to volunteers - the theoretical risk that some MCAD members or staff might cut participating lawyers somewhat more "slack" than those who do not participate does not strike us as an adequate basis for criticizing the Program on ethical grounds. We do not believe that such speculative risks cast any ethical cloud on what otherwise seems a worthwhile form of pro bono service.

Judicial and administrative decisionmakers strive for impartiality but are inevitably affected, consciously and unconsciously, by many things, including the extent to which they hold particular lawyers in high regard. Lawyers undertake pro bono work for a variety of motives, including, no doubt, a desire to be held in high regard by peers and other members of the legal establishment. It strikes us as unnecessary and unwise to attempt to probe the hearts and minds of either group to discover mixed motives in the absence of more objective indicia of impropriety.

The new Rules of Professional Conduct, following the ABA Model Rules, no longer include as an ethical rule the admonishment set forth in Canon 9 of the Code of Professional Responsibility that lawyers seek to avoid even the appearance of impropriety. This is not because such appearances are to be encouraged, but because such appearances *alone* are rarely, if ever, grounds for discipline. We do not think that this Program creates such an appearance.

ENDNOTES

¹ The considerations outlined above are applicable to a *pro bono* program in which volunteer lawyers are expressly engaged to represent individual complainants, not one in which volunteers serve as special counsel to the MCAD, representing the MCAD itself in prosecuting post-probable cause cases. The latter type of program would face far more significant ethical hurdles. Many of these arise under Mass. R. Prof. C. 4.3, which prohibits lawyers from advising unrepresented persons if those persons' interests are, or have a reasonable possibility of being, in conflict with the interests of that lawyer's client.

Difficulties under R. 4.3 would be likely to arise because MCAD counsel, whether those on the MCAD staff or volunteers, despite maintaining the role of an advocate for the complainant, would not actually represent complainants. Yet in the course of the prosecution the lawyer would necessarily be constrained to give advice to the complainant in matters where there is a reasonable possibility of conflict with the lawyer's MCAD role. For example, if the lawyer concludes that the probable cause determination was improper, under MCAD rules the lawyer has an obligation to bring that fact to the attention of the MCAD. As another example, if the lawyer determines that a complainant has refused a reasonable offer of

settlement, the lawyer may decline to proceed with the prosecution of the case.

The possibility of such conflicts would present ethical challenges, creating significant risks of Rule 4.3 violations. Hence, it is clear that the *pro bono* program's present structure, under which volunteer lawyers represent complainants and not the MCAD, is far better designed to facilitate compliance with lawyers' ethical obligations.