**BBA ETHICS OPINION 2001-B: Lawyer For A Day Conflicts**
**SUMMARY OF OPINION:**

A lawyer working for a legal services office who volunteers to participate in a Lawyer for a Day (LFD) Programs in a state court who provides to a pro se litigant advice and assistance concerning the litigant's matter in most instances establishes an attorney-client relationship with the litigant and is subject to the rules of professional conduct that govern conflicts of interest. The lawyer may not assist the pro se litigant if she is aware that the litigant's interests are adverse to an existing client of the lawyer or her firm or to a former client with regard to a matter substantially related to the litigant's case. No further conflict check is required. The attorney-client relationship that is established is terminated at the conclusion of the courthouse consultation and the pro se litigant is a former client of the lawyer. Under Mass. R. Prof. C. 1.9 and 1.10, neither the lawyer nor her firm may subsequently represent an adversary of the litigant in the same or a substantially related matter without the pro se litigant's consent after consultation. LFD programs may obtain the pro se litigant's consent to such subsequent representation by other lawyers in the lawyer for a day's firm, but not the lawyer herself, so long as the lawyer herself discloses no confidential information concerning the pro se litigant to her colleagues.

**FACTS:** The inquiring lawyer works for a legal services organization. She participated as a volunteer in the LFD program in the Family and Probate Court in one Massachusetts county. The purpose of LFD programs is to provide information and assistance to individuals who appear pro se to enable them to understand the procedural and substantive aspects of the matter in which they are involved so that they may more effectively advocate for themselves and thereby lessen the burden on the judge to provide that guidance. We are informed that similar programs exist in many courts in the Commonwealth, including several Housing Courts.

The inquiring lawyer gave what she described as "general advice to a man about his divorce proceeding and helped him fill out some forms," adding that this is customary for lawyers who participate in LFD programs.

Some time later the man's wife asked the lawyer's legal services organization for assistance in the divorce. Although the wife was eligible to be accepted as a client, the lawyer asks whether the LFD service provided to the husband by the lawyer precludes her firm from accepting the wife as a client; and, if so, whether there is a way to proceed with her office to avoid conflicting out other future needy clients.

**OPINION:** The lawyer will be precluded from representing the wife in the divorce proceeding unless it is clear that the husband had provided no confidential information, and had no reasonable basis for believing that there was an attorney-client relationship between him and the lawyer for the day. In most cases, those conditions will not be met, and thus the lawyer will be disqualified from representing the wife. Whether another staff attorney at her firm may represent the wife depends on the consent of the husband.

The Supreme Judicial Court has held that an attorney-client relationship may be created in the absence of express agreement. See DeVaux v. American Home Assurance Co., 387 Mass. 814

(1983) (attorney-client relationship created when a secretary advised prospective client that tort claim would be accepted even though there was no actual contact between attorney and prospective client). Cf. Mailer v. Mailer, 390 Mass. 371 (1983) (trial judge did not commit reversible error in denying motion to disqualify counsel for the husband who had earlier been consulted by the wife some five years earlier where no intimate confidential information about the marriage had been provided).

Assistance in filling out the Probate Court forms and "general" advice concerning the jurisdiction of the Probate and Family Court and how it applies to the pro se party's case almost certainly constitutes the practice of law on behalf of the pro se party. See, e.g., Fifteenth Judicial District Unified Bar Association v. Glasgow, No. M1996-00020-COA-R3-CV, 1999 Tenn. App. LEXIS 815 (Tenn. Ct. of App., Dec. 10, 1999) (non-lawyer who assisted pro se litigants in preparing divorce complaints and advised them when and where to file engaged in the unauthorized practice of law). Although it is possible that in certain consultations a "lawyer for the day" will learn so little about the pro se litigant's situation and will provide so little by way of legal services that no attorney-client relationship will arise, we believe that in most instances the lawyer for the day will actually engage in the practice of law on behalf of the pro se litigant. Since the advice will be tailored to the particular individual who seeks the assistance of the lawyer for the day, the situation is distinguishable from the situation of the lawyer who participates in seminars or other educational programs geared toward prospective clients that deal with general legal principles and not in the application of those principles to a particular client's circumstances. The latter is one of the hallmarks of the practice of law. See generally C. Lanctot, Attorney-Client Relationships In Cyberspace: The Peril And The Promise, 49 Duke L. J. 147 (1999) (this article is available online at http://www.law.duke.edu/shell/cite.pl?49+Duke+L.+J.+147)

If in most instances the provision of assistance by the lawyer for the day gives rise to an attorney-client relationship, we must consider what obligations that relationship imposes on the lawyer for the day and her firm. Initially, we must ask whether lawyers who serve as lawyers for the day must perform a conflict check before giving advice to the pro se litigants who seek assistance to make sure that the pro se litigant's interests do not conflict with those of an existing client of the lawyer's firm (or a former client if the pro se litigant's problem is substantially related to the former representation).

Certainly, if the lawyer knows that the pro se litigant's interests materially conflict with the interests of an existing client of the lawyer or her firm, Rules 1.7 and 1.9 would preclude the representation absent effective consent from both the existing or former client and the pro se litigant. Beyond that, the lawyer's responsibilities are described in Mass. R. Prof. C. 1.7, comment 1: "The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest." We recognize that, as a practical matter, there is very little the lawyer for the day faced with a line of pro se litigants can do to run a conflict check beyond searching her memory for potential conflicts. Under the circumstances, we believe that such a limited conflict check satisfies the requirement of a "reasonable procedure." We suspect that the probability of a conflict is fairly

low, and the lawyer for a day's involvement is so limited that the risk of serious prejudice to any client is likely to be low as well even if a conflict unknown to the lawyer exists.

In some rare circumstances, a lawyer will later learn, despite having searched her memory in the courthouse and finding no apparent conflict, that another lawyer in her firm is engaged in ongoing representation of a client in a conflicted position with the pro se litigant. In this unusual circumstance the lawyer's firm should not be disqualified from its ongoing representation of the existing client because of the LFD contact, as long as the LFD volunteer maintains strictly confidential any information learned from the pro se litigant, and as long as the pro se litigant consents to this arrangement as described below.

The next question is whether the limited advice given to the pro se litigant by the lawyer for the day precludes that lawyer or her firm from later representing adversaries of the pro se litigant in the same or a substantially related matter. In the inquiring lawyer's situation, she assisted a husband concerning his divorce proceeding and the wife later sought the assistance of the inquiring lawyer's legal services office--which we treat as her law firm, see Mass. R. Prof. C. 9.1(d)--in connection with the divorce.

Initially, we believe the situation is governed by Mass. R. Prof. C. 1.9 and 1.10 which deal with former clients. The circumstances of the meeting and the likely disclosures presented to the pro se litigant ought to make it clear enough that any attorney-client relationship that is created is terminated with the end of the consultation in the courthouse. The lawyer for the day is entitled, therefore, to treat the husband and the other persons assisted in the courthouse as former clients.

However, since the representation of the wife in her divorce by the inquiring lawyer's office is "substantially related" to the assistance earlier given to the husband, Rule 1.9 precludes the inquiring lawyer from representing the wife and Rule 1.10 disqualifies the rest of her office from doing so, unless the husband consents after consultation to the representation. The inquiring lawyer would be free to request the husband's consent so long as she furnishes sufficient information to satisfy the rules' "consultation" requirement, but must abide by the husband's decision.

We recognize that this conclusion might discourage some lawyers from participating in lawyer for a day programs. We consider, therefore, whether intake procedures could be developed to avoid the risk that participation in the program might disqualify the participating lawyers and their firms from later business.

Since the question is governed by Mass. R. Prof. C. 1.9 in the first instance, the former client's informed consent will avoid any later disqualification. One can imagine an intake form that, in substance, informs the pro se litigant that the lawyer for the day will be free to undertake subsequent representation adverse to the litigant, including representation of the litigant's adversary in this very proceeding in which the lawyer for the day has assisted the litigant, and that in that eventuality the lawyer obviously will be in a position to use any information to the litigant's disadvantage. It is, however, difficult to imagine that many pro se litigants will feel comfortable giving that kind of consent, or that the sponsors of lawyer for a day programs will consider the attempt to obtain such a consent appropriate. We doubt that many lawyers would

want to take advantage of such a consent. We do not recommend that such a consent be sought, although we believe that nothing short of such a consent would allow the lawyer for a day herself to represent the pro se litigant's adversary in the same or a substantially related matter.

On the other hand, we believe it is reasonable to craft a consent provision for the intake form that would have pro se litigants waive their right to require the imputed disqualification of the lawyer for a day's entire firm under Rule 1.10. In other words, we believe the consent form can advise pro se litigants that the lawyer with whom they consult will not thereafter represent their adversaries, but that other lawyers in their firms will be free to do so, and the lawyer for the day agrees not to discuss the matter with her colleagues.

The pro se litigant's consent would likely cover not only any future work that the volunteer lawyer's firm might engage in that might be substantially related to the advice given through the LFD program, but also any ongoing work in the law firm of which the LFD volunteer is unaware at the time. The consent must, of course, be knowing and informed, and a lawyer will always face the risk that a pro se litigant will later object that his consent was not voluntary. That kind of risk exists in any context where the interests of the lawyer are not entirely coincident with those of the client, including in fee arrangements and other advance waiver situations. The presence of that risk does not, it seems to us, preclude a lawyer from obtaining a knowing and informed waiver from a pro se litigant.

The approach that we have described above largely tracks, but is in fact preferable to, a draft Model Rule 6.5 that the American Bar Association's Commission on the Evaluation of the Rules of Professional Conduct (referred to as "Ethics 2000") has proposed. (The proposed rule together with the Reporter's explanation for the proposal can be viewed online at http://www.abanet.org/cpr/e2k-rule65.html.) That proposal redefines the conflicts of interest rules to eliminate any disqualification of the lawyer's firm in a setting such as a LFD program. The suggestion here goes less far, for it only eliminates the disqualification in those cases where the pro se litigant has consented after some conversation. The evident broad support for proposed Rule 6.5 gives us some comfort that the approach we have taken is a reasonable one.

We understand that this issue is an important one for lawyer for a day programs and the courts who rely heavily on those programs to relieve the serious burdens on the court created by pro se litigants. If, in order to maintain these programs, it becomes important to have greater certainty than the mere opinion of a bar association ethics committee without the force of law can provide, we encourage the inquiring lawyer or the sponsors of the lawyer for a day programs or the Probate and Family Courts themselves to request that the Supreme Judicial Court consider adopting a rule along the lines of proposed Model Rule 6.5.