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Committee on Professional Ethics

NYSBA

Opinion #551 - 10/4/83 (21-83)

Topic: Assigned counsel: acceptance of unrelated fee-generating matters for same client.

Digest: Assigned counsel may represent client in unrelated fee-generating matters under certain circumstances.

Code: EC 2-16, 2-25, 2-29, 8-3, DR 2-103(D), 2-104(C), 2-106(D).

QUESTION

May a private attorney who accepts an assignment to represent an indigent under Article 18-B of the N.Y. County Law also represent that client in unrelated fee-generating matters after the 18-B assignment has been concluded? May he do so while his 18-B representation for that client is continuing?

OPINION

Article 18-B of the N.Y. County Law (McKinney 1972) provides that the governing body of each county and of each city in which a county is wholly contained shall provide counsel for all those "financially unable to obtain counsel" who are charged with crimes or are entitled to counsel in certain prescribed Family and Surrogate Court matters, in accordance with one of three prescribed plans or combinations thereof: (1) a public defender; (2) a legal aid bureau or society, or certain qualified corporations, voluntary associations or organizations in proceedings under the Family Court Act; or (3) representation by private counsel pursuant to a plan of a bar association whereby the services of counsel are rotated and coordinated by an administrator. N.Y. County Law § 722 (McKinney Supp. 1982-1983).

While, on a limited number of prior occasions, the Committee has been called upon to address related questions concerning the ethical conduct of those who were serving or had served in the office of a public defender or a legal aid society, this marks the first occasion for the Committee to explore the nature and dimension of the relationship between the private 18-B counsel and his assigned client.

I

With respect to the Committee's decisions concerning the public defender, it was determined in N.Y. State 165 (1970) that it would be ethically inappropriate for a part-time county public defender to be retained as a private practitioner by a criminal defendant who had initially contacted the public defender's office, and would have been assigned to this attorney, but was found unqualified for public assistance. Relying upon the broad reach of Canon 9's admonition that "[a] lawyer should avoid even the appearance of professional impropriety," it was held that "for a lawyer to accept compensation from a client who has previously sought uncompensated public assistance from that same lawyer would clearly undermine confidence in the integrity of the profession," the rationale being that "[t]he public might get the impression that the office of the public defender is being used for the personal advantage of the members of the public defender's staff."

Shortly thereafter, in N.Y. State 173 (1970), it was held that a part-time public defender would not, by reason of that status, be barred from representing criminal defendants as a private practitioner, provided, unlike the situation in N.Y. State 165, supra, that the client had not previously requested the services of the public defender's office. The Committee reasoned that "since the defendant never sought Public Defender aid and is not indigent, there is no appearance of impropriety." The opinion cited with approval ABA Inf. 1112 (1969) which, while reaching the same conclusion, issued the caveat that the public defender must not use his office "as a feeder to enhance his private law practice."

Two years later, in N.Y. State 260 (1972), it was held that the proscription set forth in N.Y. State 165, supra, would attach to all members of a public defender's office, even if a matter never would have been referred to a particular member of the office, since "the various deputy public defenders are all part of a single law unit, the public defender's office, and are subject to the same rule as would apply to a partnership." The opinion further held that it would not be proper for a deputy public defender who previously represented a defendant in his official capacity subsequently to represent him as his private attorney upon the transfer of the case to a court to which the deputy public defender was not assigned.

With respect to legal aid lawyers, the Committee has issued one opinion, N.Y. State 534 (1981), holding that a former staff attorney of a legal aid society may in any matter represent one whom he had previously served through the society, regardless of eligibility for free assistance,

whenever such subsequent service is rendered without charge, pro bono publico. If the service was not to be rendered without charge, the Committee ruled that the lawyer would be prohibited from representing the client in connection with matters for which the lawyer had substantial responsibility while employed by the society, if the former client was still eligible to receive representation without charge. With respect to other matters, the Committee stated that "former staff attorneys may furnish legal services for a fee to persons whom they previously served through the Society, provided such persons are fully informed of their eligibility to receive those services without charge from another source."

II

The Committee's holding in N.Y. State 534 supports our conclusion in the present case that a private attorney who has completed his 18-B assignment may subsequently represent the former 18-B client for a fee on unrelated new matters which have arisen or come to the lawyer's attention after he has concluded his 18-B assignment. However, as in the case of the former legal aid lawyer, the 18-B attorney should first determine whether the client remains eligible for continued 18-B assistance, and if so, the attorney should advise him of his entitlement to free representation. Services with respect to matters related to the 18-B assignment may be rendered without charge after the conclusion of the 18-B assignment; no fee may be charged by the 18-B attorney for such services.

III

The fresh question of whether the private 18-B attorney may also represent his indigent client in unrelated fee-generating matters while simultaneously representing him under an 18-B assignment poses greater difficulties and requires closer analysis of the nature of 18-B assignments for private practitioners than was previously required of the Committee in its opinions concerning part-time public defenders and former legal aid attorneys.

Prior to the enactment of Article 18-B of the County Law "it was seen as the obligation of attorneys to represent indigent defendants without any compensation." People v. Washington, 83 Misc. 2d 807, 809, 373 N.Y.S.2d 790, 792 (1975). In enacting 18-B the Legislature "sought to ameliorate what to some seemed an unfair burden upon those attorneys who would accept assignments." Ibid. However, while provision was thereby made for modest compensation (N.Y. County Law § 722-b (McKinney Supp. 1982-1983)), it was not the Legislature's intent to compensate assigned counsel to the full extent

that attorneys are paid under the accepted criteria for determining the value of their services. People v. Perry, 27 A.D.2d 154, 157, 278 N.Y.S.2d 323, 326 (1967).

Thus, mindful that "a license to practice law carries with it the noble burden of defending the poor" (Application of Armani, 83 Misc. 2d 252, 258, 371 N.Y.S.2d 536, 569 (1975); see also Application of Sullivan, 297 N.Y. 190 (1948)), the statutory scheme "was not intended to completely eliminate the pro bono publico aspect of a lawyer's role in representing indigent defendants." People v. Washington, supra, 83 Misc. 2d at 809, 373 N.Y.S.2d at 792; see also Castelonia v. Castelonia, 99 Misc. 2d 191, 415 N.Y.S.2d 745 (1979).

Accordingly, Article 18-B was not designed to change the nature of assigned counsel's obligations and expectations, except insofar as it provides for some limited compensation. While it has been noted "that 18-B assignments are even eagerly awaited and sought, if not for monetary recompense, then for interest and added trial experience" (People v. Elliot, 98 Misc. 2d 424, 428, 413 N.Y.S.2d 1001, 1005 (1979)), it remains, nonetheless, that lawyers who participate in assigned counsel plans "undertake an important public service" and act "in the highest traditions of the profession, knowing that the limited fees provided fall short of full, or even fair, compensation." Werfel v. Agresta, 36 N.Y.2d 624, 627 (1975).

In recognition of the importance of public service to the vitality and integrity of our profession, our Code of Professional Responsibility makes repeated reference to the lawyer's aspirational responsibility to donate his time and talent to the poor. In particular, EC 2-25 provides as follows:

> Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . . .

See also EC 2-16; EC 2-29; DR 2-103(D); DR 2-104(C)(D); EC 8-3.

It is of vital interest to the profession, therefore, that lawyers be encouraged to accept pro bono assignments, and unrealistic obstacles should not be placed in the path of attorneys who are sensitive and responsive to their obligations to the poor.

However, the 18-B attorney must not use his office or position "as a feeder to enhance his private law practice" (see again, ABA Inf. 112, supra), or convert an assignment into a private matter. Castelonia v. Castelonia, supra, 99 Misc. 2d 191, 192, 415 N.Y.S.2d 745, 746. Thus, "[a]n attorney, who, by reason of preference in being designated as assigned counsel in a particular matter, should not, by this appointment, be placed in a priority position to secure fees other than those fees as 'contracted' (per fee schedule for assigned counsel) as a panelist on the assigned counsel list" (ibid) and, indeed, the statutory scheme specifically provides that "[n]o counsel assigned . . . shall seek or accept any fees for representing the party for whom he is assigned" unless the court otherwise approves. N.Y. County Law § 772-b (McKinney Supp. 1982-1983).

Should, however, counsel learn that the defendant is financially able to obtain counsel or to make partial payment for legal representation, Article 18-B provides that "counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise." N.Y. County Law § 722-d (McKinney Supp. 1982-1983); see also People v. Wheat, 81 Misc. 2d 934, 367 N.Y.S.2d 161 (1975).

Aside from the need to foster and encourage pro bono publico services and the ethical responsibilities attendant upon the discharge of such services by assigned counsel, a further interest is present which merits significant consideration - the right of a person to select counsel of his choice. People v. Gomberg, 38 N.Y.2d 307 (1975); United States v. Kitchin, 592 F.2d 900, 903 (5th Cir.), cert den., 444 U.S. 843 (1979). As recently stated by the Fourth Department in Matter of Moxham, 89 A.D.2d 300, 305, 455 N.Y.S.2d 424, 428 (1982):

> [A]n attorney should not be disqualified from representing a criminal defendant unless there is a reasonable possibility that some specifically identifiable impropriety will occur, or where, in the

> light of the interests underlying the standards of ethics, the social need for the ethical practice outweighs the party's right to counsel of choice.

Balancing the foregoing considerations and precedents, we are of the opinion that an 18-B attorney may not with ethical propriety represent his assigned client in connection with matters unrelated to the 18-B assignment while that assignment is ongoing, if an uncontingent fee is to be charged for such services. We do not perceive the need for such an ethical proscription if no fee is to be charged for the unrelated services, or if the fee is contingent, that is, payable solely out of the proceeds of the representation. In the latter case, however, the client should be informed at the outset that the representation will be reported to and subject to the approval of the court which made the 18-B assignment, and warned that the outcome of the representation may itself have a bearing on the client's continued eligibility for 18-B assistance. If the client elects to proceed on that basis, the representation in the unrelated matter for a contingent fee may be undertaken with court approval.

We accordingly answer the first question posed in the affirmative and the second in the negative, except with respect to court-approved representations undertaken for a contingent fee.