NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion 604 - 11/14/89 (11-89)

Topic: Limiting the scope of representation.

Digest: Lawyer may limit scope of representation to grand jury proceedings in certain circumstances.

Code: Canon 6;
EC 7-7, 7-8;
DR 1-102(A)(5), 2-110, 2-110(A), 6-101(A) 7-101(A)(1), 7-102(A)(7).

QUESTION

May a lawyer whose client is the subject of a grand jury investigation that could result in serious felony charges and does not have sufficient funds to pay for the lawyer's services beyond the grand jury stage, use a retainer agreement which limits the scope of the lawyer's services to work performed before an indictment?

OPINION

In many cases, a criminal suspect who is the subject of grand jury investigation does not have sufficient funds to pay a lawyer for representation at both the grand jury and trial stages, but has sufficient funds to engage a lawyer for representation before the grand jury and hopes that an indictment can be prevented.[1] The question presented is whether the lawyer may ethically request or agree to a representation that is limited to the grand jury stage.

1 Although an arraignment may occur before the grand jury has met, we assume for the purposes of this opinion that the client has not yet been arraigned or indicted and is therefore not the subject of formal charges or otherwise the subject of a legal proceeding

The lawyer-client relationship is sometimes characterized as a contractual one. *E.g.*, *Hashemi* v. *Schack*, 609 F. Supp. 391, 393 (S.D.N.Y. 1984); *cf.* Judiciary Law § 474 (the lawyer's compensation is governed by agreement). In New York, the courts often characterize the relationship as one of principal and agent. *E.g.*, *Burger* v. *Brookhaven Medical Arts Bldg., Inc.*, 131 A.D.2d 622, 624 (2d Dep't 1987). Thus the client, as principal, or the client and lawyer, as contracting parties, have the power to determine the scope of their relationship. It has been held that the lawyer and client may agree to limit the representation to specific transactions. *E.g.*, *The Florida Bar* v. *Dingle*, 220 So.2d 9 (Fla. 1969) (agreement that litigation will be conducted only at trial level); *Vitale* v. *LaCour*, 92 A.D.2d 892 (2d Dep't), *appeal dismissed*, 59 N.Y.2d 607, *appeal denied*, 60 N.Y.2d 556 (1983) (the attorney-client relationship ends with the completion of the trial, so that substitution need not be made to retain new counsel for appeal).

Any contractual limitation of the representation must, nevertheless, be consistent with the Code of Professional Responsibility. Although the Code does not deal directly with the question of whether the lawyer may limit the scope of the representation, several Code sections bear indirectly on the problem.

First, DR 7-101(A)(1) provides that a lawyer may not intentionally fail to seek the lawful objectives of the client. In general, the client is the master of the objectives of the representation. EC 7-7. The lawyer should only seek to limit those objectives after full disclosure to the client of the effects of such limitation. In particular, in a criminal trial, the right of a defendant to control some decisions regarding the case are constitutionally guaranteed, and the lawyer has a duty to ensure that such decisions are made after the client is apprised of the practical and legal aspects of available courses of action. See *e.g.*, *Mason* v. *Balcom*, 531 F.2d 717 (5th Cir. 1976); EC 7-8 (A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations).

Among the disclosures that we believe the lawyer should make are:

(1) That the lawyer may not be successful in avoiding indictment or achieving a satisfactory plea bargain, in which case the client will have to hire (or seek court appointment of) another lawyer who will have to begin by going over much of the same investigative ground as the initial lawyer. This may be an inefficient way to handle the matter.

(2) That if the lawyer is unsuccessful, the client may be indicted and incarcerated and may need prompt representation at an arraignment and assistance in making arrangements for bail that will not be provided by the initial lawyer.

(3) Any other facts that may affect the substantive rights of the client or the client's ability to hire replacement counsel.

Another applicable requirement of the Code is contained in Canon 6 and DR 6-101(A), which require a lawyer to provide competent representation to the client. *See also People* v. *Baldi*, 54 N.Y.2d 137 (1981). Competence in representation encompasses several factors. First, the scope of representation must be sufficient for the lawyer to render practical service to the client. We believe that the possibility of avoiding an indictment or effecting a plea bargain to reduced charges constitutes a valuable service to the client which meets this requirement. Second, the limited representation may not materially impair the client's rights. See generally Wolfram, Modern Legal Ethics § 9.1.

Finally, the lawyer's conduct may not be prejudicial to the administration of justice. DR 1-102(A)(5); *People* v. *Arroyaye*, 49 N.Y.2d 264 (1980) (change of attorneys cannot be used to delay the proceedings). We believe that any representation must cover a discreet matter or a discreet stage of a matter and not terminate before the completion of that stage, since such a termination could materially delay the administration of the court's calendar while the defendant hired and prepared new counsel to complete the matter. We believe that the investigative/grand jury stage of a criminal matter is a distinct stage of a legal matter when the services of a lawyer may be extremely useful to the client in marshalling evidence and in bargaining with the prosecutor. Indeed, we understand that there are many criminal lawyers who specialize in these stages, but who are not interested in devoting the time that may be needed to defend criminal charges if an indictment is brought and the matter goes to trial. Since there usually is sufficient time after any indictment for the defendant to employ new counsel and for that counsel to prepare to defend the charges, we believe it is not unethical for a lawyer to enter into a retainer agreement that will end by its terms after an indictment is handed down; not is it unethical for the lawyer to terminate his or her services under the contract upon indictment, as long as there is enough time between the indictment and the trial date for the client to hire and prepare new counsel.

We do not believe that DR 2-110, governing withdrawal from representation, is applicable here, since the lawyer is not withdrawing from representation but rather defining at the outset the scope of the representation as a discreet stage of the matter. The principles enunciated here are consistent with those set forth in DR 2-110. Once the lawyer has entered an appearance on behalf of the client in a judicial proceeding, DR 2-110(A) prohibits withdrawal from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the client. It also requires the permission of the judge where the court rules so require.

We note that the Appellate Division rules in all four departments address the duties of assigned or retained counsel. For example, the rules of the Third Department provide:

> It shall be the duty of counsel assigned to or retained for the defense of a defendant in a criminal action or proceeding to represent defendant until the action or proceeding has been terminated in the trial court.....

(22 NYCRR 821.1 3d Dep't; see also 22 NYCRR 606.5 (1st Dep't)(same); 22 NYCRR 1022.11 4th Dep't) (same); 22 NYCRR 671.2 (2d Dep't)(to same effect). It seems likely that these rules were adopted to prevent the disruption in court proceedings that might occur if lawyers could withdraw arbitrarily from criminal representations without just cause.

Interpreting the rules of the Appellate Divisions is outside the scope of the jurisdiction of this committee. We note, however, that the rules on the duties of criminal defense lawyers provide no guidance on whether the pre-indictment stage constitutes representation of a "defendant" in a "criminal action or proceeding." If so limiting the representation would constitute a violation of the court rules, it would also be unethical. DR 7102(A)(7).

CONCLUSION

If, following disclosure by the lawyer of all relevant considerations, the client agrees to the limitation of the representation to the grand jury stage, and such limitation would not violate any court rule, it is not unethical for a lawyer to limit the scope of the representation in a criminal matter to the grand jury stage.