New York State Bar Association

Committee on Professional Ethics

Opinion 751 – 1/31/02
(Revised 5/6/02)

Topic: Competence; excessive case load

Digest: An attorney representing a government agency may not undertake more matters than the attorney can competently handle, but the attorney may accept his or her superior's reasonable resolution of an arguable question of professional duty.

Code: DR 1-104(F), 2-110(B)(2), 4-101, 6-101(A), 6-102(A), 7-101(A)(2)-(3); EC 7-7, 7-8, 7-13, 7-14.

FACTS

A lawyer is employed as a staff attorney by a government department of social services ("Department") to represent the Department in various matters. These include representing the Department in child welfare, paternity and support proceedings and other proceedings in Family Court, representing the Department in administrative proceedings and state court proceedings, providing legal opinions to the Commissioner of the Department, and providing legal advice to the Department regarding the interpretation of and compliance with laws and regulations relating to the Department's work.

The office in which the lawyer works has a large case load in relation to the number of staff attorneys. The case load cannot be significantly reduced by the Department, because the Department is required by law to participate in certain legal proceedings. For example, the Federal Adoption and Safe Families Act of 1997, Pub. L. 105-89 (codified in various sections of 42 U.S.C.) requires states to initiate or join proceedings to terminate parental rights of children under ten years of age who have spent 18 of the prior 24 months in State foster care; further, after 12 months in foster care, a child is entitled to a disposition or

"permanency" hearing to determine the child's future status, including whether the child should be returned to the parent, continued in foster care, or placed for adoption. Despite the Department's heavy case load, the Department has been unable to obtain approval to hire additional staff attorneys. The staff attorney believes that more matters are being assigned than can be competently handled by any given attorney.

QUESTION

May a lawyer for a government social services agency accept more matters than the lawyer believes that he or she may competently handle?

OPINION

The question whether a government lawyer may accept more matters than the lawyer can competently handle is governed by several principles applicable to lawyers generally. To begin with, once a lawyer undertakes to represent a client in a particular matter, the lawyer must conduct the representation competently. The duty of competence is derived from agency law and is expressed in DR 6-101(A)(2) and (3), which provides that a lawyer shall not "[h]andle a legal matter without preparation adequate in the circumstances" or "[n]eglect a legal matter entrusted to the lawyer." *Accord* American Law Institute, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ("RESTATEMENT") (2000) § 16 (1), (2) (in matters within the scope of a lawyer's representation of a client, the lawyer must "proceed in a manner reasonably calculated to advance [the] client's lawful objectives, as defined by the client after consultation," and "act with reasonable competence and diligence"). Whether particular conduct would entail neglect or inadequate preparation or would otherwise involve incompetent representation depends, of course, on the nature and scope of the particular representation.

Second, a lawyer must decline to represent a client in a particular matter if the lawyer is incapable of providing competent representation. *See* DR 6-101(A)(1) (a lawyer shall not "[h]andle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it"). If it becomes apparent after undertaking a representation that the lawyer is unable to render competent representation consistent with DR 6-101(A), and the lawyer is unable to become competent by associating with another lawyer or by other means, the lawyer must seek to withdraw from the representation. *See* DR 2-110(B)(2) (lawyer must seek to withdraw from employment (after first obtaining court's permission where required) if the "lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule"); DR 7-101(A)(2) ("A lawyer shall not intentionally ... [f]ail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under DR 2-110 ...").

Third, implicit in these obligations is a lawyer's duty to avoid accepting more matters than the lawyer can competently handle, and a duty to reduce one's workload if it has become unmanageable. *See* ABA 399 (1996) (legal services lawyers will be required "to withdraw from some matters if funding and staff reductions greatly increase these lawyers' workloads, since maintaining an unmanageable case load violates the lawyer' s duty ... to provide competent representation"); ABA 347 (1981) ("only those matters that can be handled consistently with each lawyer 's duty of competent, non-neglectful representation should be continued. When faced with a work load that makes it impossible for the remaining lawyers to represent existing clients competently, Legal Services Lawyers should withdraw from a sufficient number of matters to permit proper handling of the remaining matters"); Mich. Op. RI-252 (1996) (disciplinary rules "require lawyers to monitor their workloads and decline new clients if taking them on would create overloads that make competent representation impossible"); Wis. Op. E-84-11 (1984) (an assistant public defender must decline new legal matters and, if necessary, withdraw from a sufficient number of cases to ensure adequate representation in the remaining matters, and a lawyer may not accept an overly burdensome caseload if it interferes with his duty to render competent legal services to his clients); Charles W. Wolfram, MODERN LEGAL ETHICS 187 (1986). [1]

Fourth, when it is clear that the lawyer will be compelled to neglect matters or to prepare inadequately in violation of DR 6-101(A), a subordinate lawyer may not comply with a supervising lawyer's instruction to undertake particular matters. In general, the subordinate lawyer may "act[] in accordance with a supervisory lawyer's *reasonable* resolution of an *arguable* question of professional duty," DR 1-104(F) (emphasis added), at least with respect to the subordinate lawyer's obligations under the disciplinary rules. Therefore, if the question of the lawyer's competence is uncertain, the subordinate lawyer may accept the supervising attorney's reasonable resolution of that question. However, a subordinate lawyer has an independent obligation to determine whether particular conduct comports with the duty of competence under DR 6-101(A) and, thus, whether the lawyer is competent to handle the cases the lawyer has been assigned.

Finally, the duty to represent a client competently cannot be avoided by obtaining the client's consent to provide incompetent representation. The lawyer and client *may* agree on how to define or limit the scope of the lawyer's representation (that is, they may limit the objectives of the representation, the number or type of matters that will be undertaken, or the particular proceedings

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[1] Thus, the lawyer may not justify neglecting a matter, preparing inadequately, or otherwise performing incompetently on the ground that the lawyer had too many matters to handle. Although DR 6-101(A)(2) provides that the lawyer must undertake preparation that is "adequate in the circumstances," this refers to the circumstances of the particular representation. The relevant "circumstances" would not include the excessiveness of the lawyer's work load.

in which the lawyer will render assistance). *See, e.g.*, N.Y. State 713 (1999); N.Y. State 604 (1989); *see also* EC 7-8 ("the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer"). However, they may not limit the scope of the representation in a manner that, under the circumstances, will compel the lawyer to neglect the matter, prepare inadequately, or otherwise represent the client incompetently. *See, e.g.*, Model Rules of Professional Conduct Rule 1.2, Comment ("An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [which requires a lawyer to provide competent representation to a client]..."); N.Y. State 664 (1994) (lawyer may give legal advice over telephone only if, *inter alia*, "the limited representation [does] not materially impair the client's rights"). Likewise, although lawyers must comply with certain directions given by the client, *see, e.g.*, ECs 7-7, 7-8, this does not include an obligation to comply with a direction to neglect a matter, to handle a matter without adequate preparation, or otherwise to represent the client incompetently. *Cf.* DR 6-102(A) (a lawyer may not "limit prospectively the lawyer's individual liability to a client for malpractice").

These principles fully apply to lawyers employed by the government to represent government agencies. Nothing in the disciplinary rules suggests that the duty of competence is inapplicable to lawyers who are employed by a client as distinguished from those who are retained by a client.[2] Nor is the duty inapplicable to lawyers who represent the government as distinguished from those who represent private parties. On the contrary, if a government lawyer were to neglect matters or to prepare inadequately, the lawyer might violate not only the duty of competence, but also the duty "to seek justice and to develop a full and fair record." EC 7-14; *see generally* N.Y. State 728 (2000); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest*, 41 B.C.L. REV. 789 (2000); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. OF PUBLIC LAW 235 (2000).

Accordingly, a government attorney representing a department of social services in judicial or administrative proceedings may not neglect a matter or prepare inadequately. The attorney may not comply with the direction of an agency official to "just show up" or "just do the best you can" without preparation, if the result will be to represent the department incompetently. On the contrary, the staff attorney, as a government official and lawyer for the government, has an independent professional obligation to carry out the department's legal

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2 Although DR 6-101(A)(3) provides that a lawyer shall not "[n]eglect a legal matter entrusted to the lawyer," this does not impose a disciplinary obligation on an employed lawyer to agree to handle every matter that the employer seeks to entrust to the lawyer. Obviously, the rule was not meant to impose such an obligation, since, if it did, the employed lawyer would be obligated to undertake representations even when doing so would result in a disciplinary rule violation.

responsibilities in judicial and administrative proceedings in which the staff attorney represents the department, and cannot comply with instructions that would require the lawyer to act antithetically to the law and to the general ethical responsibility to "seek justice." Nor may the staff attorney accept so many matters that the attorney would have no choice but to handle some neglectfully or incompetently. In making the judgment whether handling a matter in a particular way would be incompetent, or whether a case load has become unmanageable, a staff attorney may give weight to a supervising lawyer's reasonable resolution of these questions where they are in doubt, but may not defer where the question is unarguable or the supervising attorney's resolution of it is unreasonable.

Although a staff attorney who is asked to take on an overwhelming number of matters may not accept so many that the lawyer will be unable to handle them all competently, other alternatives are not foreclosed by the disciplinary rules. The staff attorney must consult with the client (through a supervising lawyer or officials in the agency) to attempt to resolve concerns about the excessiveness of the caseload. Indeed, in determining how to proceed in the face of an excessive caseload the staff attorney must, in the first instance, seek direction from the client. *Cf.* DR 7-101(a)(3) (lawyer may not prejudice or damage the client during the course of the professional relationship). The staff attorney should seek the supervising attorney's permission for the staff attorney to reassign matters or withdraw from matters in which the Department does not require legal representation, so that the staff attorney has time to handle essential matters. The staff attorney may assist the department in seeking court appointments of lawyers from the private bar to handle some of the department's cases. If the client refuses to exercise its authority to decide which of the matters should be reassiged or withdrawn from, the lawyer may resign or decline to handle cases that cannot be handled competently and then deal with whatever employment consequences may follow. [3]

CONCLUSION

An attorney who represents a government agency may not undertake more matters than the attorney can competently handle.

(18-01)

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[3] Whether a staff attorney may be discharged for declining to accept matters that the staff attorney cannot competently handle is a question of employment law that is beyond this Committee's jurisdiction. *Cf.* Wisconsin E-91-3 (committee declined to answer question whether supervising attorney in public defender's office may sanction staff attorney who declined new matters because of an excessive case load, since the "committee cannot address issues of employment relations").