New York State Bar Association

Committee on Professional Ethics

Opinion 786 – 4/28/05

Topic: Pro bono services; expenses of litigation.

Digest: A lawyer representing *pro bono* a provider of legal services to the indigent may not pay the expenses of litigation without the client remaining ultimately liable therefor unless the organization itself is indigent. The test of indigence in these circumstances depends on the financial wherewithal of the organization and not on the purposes it serves.

Code: EC 2-25, 5-7, 508; DR 5-103.

QUESTION

Under what circumstances may a lawyer representing *pro bono* a provider of legal services to the indigent pay the expenses of litigation without the client remaining ultimately liable therefor?

OPINION

Lawyers frequently render legal services to organizations that provide services to the indigent on a *pro bono* basis. That is, in addition to providing services to the clients of the organization, lawyers will offer *pro bono* services to the organization itself on, for example, matters of corporate law, employment issues, or litigation in pursuit of the organization's proprietary interests. Indeed, EC 2-25 encourages lawyers to fulfill their obligation to render public interest and *pro bono* legal service by providing professional services at no fee or a reduced fee to "public service organizations, where the legal services are designed primarily to address the legal and other basic needs of persons of limited financial means." Moreover, that Ethical Consideration encourages lawyers and law firms by providing "financial support for such organizations to assist in providing legal services to persons of limited financial means."

When a lawyer represents a client in litigation, however, the Code prohibits a lawyer from providing financial support to the client except in narrowly defined circumstances. In particular, DR 5-103 provides:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
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> 1. A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.
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> 2. Unless prohibited by law or rule of court, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable expenses of litigation on behalf of the client.

See also DR 2-101(L)(2) (a lawyer advertising contingent fee rates shall disclose "[t]hat, in the event there is no recovery, the client shall remain liable for the expenses of litigation, including court costs and disbursements").

The rule is based on two concerns: (1) that acquiring an excessive financial stake in litigation may have "an adverse effect upon the exercise of free judgment by the lawyer," EC 5-7; *see also* EC 5-8 ("A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to the client."); and (2) excessive subsidizing of lawsuits "would encourage clients to pursue lawsuits that might not otherwise be brought," ABA Model Rule of Prof. Conduct 1.8, comment 10 (2003). *See also* N.Y. State 464 (1977) (opining that "if lawyers were permitted to finance their clients' causes, it would generate unmeritorious suits and ultimately obfuscate the elemental difference between the roles of lawyer and client"); N.Y. State 37(a) (1966) (stating that the "basic purpose" of Canon 42, the predecessor to DR 5-103(B), "is to implement the policies against champerty, maintenance and barratry").

The question addressed by this opinion is whether an organization that provides legal services to the indigent can itself be considered an "indigent client" so as to permit the lawyer to pay the expenses of litigation without the organization remaining ultimately responsible therefor. The question is of some practical importance, as the expenses of litigation can be substantial and the resources of the organization are often fully committed to the service of its mission. Moreover, even if a lawyer has no intention of seeking to enforce the legal right to collect expenses from the organization, the board of the organization may be reluctant to expose the organization to even a theoretical legal obligation in those amounts.

DR 5-103(B)(2) establishes a two-part test for the exception provided: the client must be indigent and the lawyer must be proceeding *pro bono*. In the circumstances we are addressing, the client is the organization, not the organization's clients. The question thus is whether the legal services organization itself can meet a test of indigency.

The Code contains no definition of "indigent." New York courts have defined the term "indigent" as "destitute of property or means of comfortable subsistence; needy; poor; in want; necessitous." *Healy v. Healy*, 99 N.Y.S.2d 874, 877 (Sup. Ct. Kings County 1950); *Brown v. Upfold*, 123 N.Y.S.2d 342, 345 (Sup. Ct. Onondaga County 1953). The term is also frequently used to mean "inability to afford counsel." *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 340, 344 (1963) (using "indigent," "unable to employ counsel" and "too poor to hire a lawyer" interchangeably); *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932) (using "indigent" and "unable to employ counsel" interchangeably); *Matter of Stream v. Beisheim*, 34 A.D.2d 329, 331, 333 (2d Dep't 1970) (using "indigent" and "financially unable to retain counsel" synonymously); *People v. Berkowitz*, 97 Misc. 2d 277, 279-80 (Sup. Ct. Kings County 1978) (using "indigency," "financial inability to pay" and "unable to retain proper representation" interchangeably).

There is considerable difficulty in applying these concepts to corporations and associations. As the United States Supreme Court pointed out in holding that corporations and associations were not "persons" entitled to proceed *in forma pauperis*, "[w]hatever the state of its treasury, an association or corporation cannot be said to 'lac[k] the comforts of life,' any more than one can sensibly ask whether it can provide itself, let alone its dependents, with life's 'necessities.'" *Rowland v. California Men's Colony, Unit II Men's Advisory Counsel*, 506 U.S. 194, 203 (1993).[1]

In at least two cases, courts have suggested that a corporation organized for a public-interest purpose or serving an impoverished population should be permitted to proceed *in forma pauperis*, in part in light of those qualities. *See Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.,* 71 F.R.D. 93, 96 (S.D.N.Y. 1976) (stating that non-profit corporation formed for "a public interest quality" suing under the antitrust laws could proceed *in forma pauperis*) (dictum); *River Valley, Inc. v. Dubuque County*, 63 F.R.D. 123, 125 (N.D. Iowa 1974) (holding that non-profit corporation formed to assist poor

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[1] The statute at issue in *Rowland*, and in the cases cited in the following paragraph of text, provided:

> "[A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor."

28 U.S.C. § 1915(a) (Supp. IV 1988).

people may appear *in forma pauperis* in light of "the nature of plaintiff's operation and the persons served thereby"), *mandamus denied and appeal dismissed on other grounds*, 507 F.2d 582 (8th Cir. 1974). *See also* Comment, *Proceeding In Forma Pauperis in Federal Court: Can Corporations Be "Persons"?,* 62 Calif. L. Rev. 219, 250-52 (1974) (urging adoption of "primary beneficiary analysis" under which leave to appear *in forma pauperis* should be granted when the corporation pursues "nonself-interested claims" and the primary beneficiary of the litigation is the public).

In each of these cases, however, the court also was satisfied that the corporation was impecunious.[2] The public-purpose test was advanced as a test for whether the corporate form was a "subterfuge," *River Valley*, 63 F.R.D. at 125, a consideration that is not relevant in the present context. In any event, these cases (which were overruled by *Rowland*) have been criticized. *See, e.g., Sears, Roebuck & Co. v. Charles W. Sears Real Estate, Inc.*, 686 F. Supp. 385, 387 n.4 (N.D.N.Y. 1988) (stating that "whether a corporation is a 'person' within the meaning of § 1915 does not depend on the purity of the corporation's motives in prosecuting its interests in the court, nor on the sympathy the court holds for the interests being advanced by the corporation"), *aff'd*, 865 F.2d 22 (2d Cir. 1988); *Move Org. v. United States Dep't of Justice*, 555 F. Supp. 684, 692 n.26 (E.D. Pa. 1983) (rejecting *Harlem River* test and commenting with respect to the above-cited Comment, "it is unclear how I should go about determining whether: the plaintiff was formed for 'public purposes'; the financial benefit to be reaped is direct or indirect; the benefit is substantial; the litigation has a 'public interest aspect'; who is the 'primary beneficiary'; and whether the claims are nonself-interested"); *see also Rowland*, 506 U.S. at 207 n.9 ("The language of § 1915 . . . suggests indifference to the character of the litigant and to the type of litigation pursued, so long as it is not frivolous or malicious."); *S.O.U.P., Inc. v. FTC*, 449 F.2d 1142, 1142 (D.C. Cir. 1971) (*per curiam*) ("The public interest motivating SOUP's members, which I join in applauding, does not help make the corporation 'a person . . . unable to pay such costs or give security therefor.'") (statement of Fahy, J.)

The inclusion of the "indigence" requirement in DR 5-103(B)(2) (which is restated in EC 5-8) was the result of a deliberate choice by the drafters of the rule. The ABA Model Rule provision upon which DR 5-103(B)(2) was based was originally drafted to apply to all *pro bono* clients regardless of indigence. Discussion Draft, Model Rules of Professional Responsibility 31 (Jan. 30, 1980)

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[2] *See Harlem River*, 63 F.R.D. at 95 ("The affidavits submitted together with this application establish to the Court's satisfaction the poverty of the plaintiff corporation. Further, they also establish the poverty of the corporation's membership viewed as a group. Thus, the Court finds the requirement of poverty to have been met . . . ."); *River Valley*, 63 F.R.D. at 125 ("Considering the nature of plaintiff's operation and the persons served thereby, and in view of the fact that defendants have effectively cut off all previous sources of funds for plaintiff and directed that plaintiff spend no more money, it appears to the court that the plaintiff is truly in good faith without funds to maintain this action.")

("A lawyer or legal services organization representing a client without a fee may pay court costs and expenses of litigation on behalf of a client.") The drafters of the Model Rule then substituted the "indigence" standard for the "without a fee" standard. The drafters of DR 5-103(B)(2) further restricted the operation of the exception by including both concepts. In addition, in recommending the current text of DR 5-103(B), the drafters of the Code declined to adopt the text of the Model Rules that a lawyer might advance litigation expenses "contingent on the outcome of the matter." Instead, the provision in the New York Code retains the more stringent requirement that the client remain "ultimately liable" for the amounts advanced.

The decision in *Rowland* that organizations are not "persons" within the meaning of the federal statute providing for proceeding *in forma pauperis* was based on a number of "contextual features" of the statute that are not shared by DR 5-103(B)(2). 506 U.S. at 201. We detect no like basis in the Code to conclude that the term "indigent client" is limited to natural persons. While we recognize that determining the meaning of the term "indigent" in the context of organizations is difficult, we do not believe it is impossible. The organization at issue in *Rowland*, for example, was an association of prisoners who were not permitted to have bank accounts. We have little doubt that such an association would meet the definition of indigence.

On the other hand, we do not believe the fact that the organization depends on charity or governmental assistance necessarily qualifies it as "indigent." Many nonprofit organizations -- universities, museums, and perhaps legal services providers -- have very substantial resources. While they may prefer to devote all their resources to the direct service of their mission, all clients would prefer to devote their resources to a cause other than litigation. Basing a test for indigence on the worthiness of the client's cause or on some basis other than financial wherewithal would be inconsistent with the ordinary meaning of the term. Moreover, a test that looked to the purposes the client serves, without further textual guidance in the Code, would be unrestricted in potential scope and potentially arbitrary in application.[3]

We will not attempt in a general opinion such as this to provide monetary guidelines as to what would constitute "indigence." In the end, as with much in the Code, the test will depend on the good judgment of the lawyer. The test

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[3] A New York court has considered a somewhat analogous question and reached the analogous conclusion. *Hospital Credit Exchange, Inc. v. Shapiro*, 59 N.Y.S.2d 812, 816 (N.Y.C. Mun. Ct. 1946) (holding that non-profit membership corporation formed by non-profit hospitals to collect unpaid bills could not take advantage of an exemption for charitable corporations contained in the unauthorized-practice statutes, and noting "[i]t is true that its only clients or customers are charitable hospitals. However, the fact that for a fee it serves only charitable institutions, does not make it a charitable corporation"). Similarly here, the fact that the client represents indigent persons does not without more make the client indigent.

should be one that would apply in like fashion to any organization, non-profit or profit-making, and regardless of the perceived societal value of the organization's purposes. It must, in short, depend alone on the financial wherewithal of the organization.

We are mindful that many lawyers offering *pro bono* services to non-profit providers of legal services to the poor are ready as well to bear the expenses of the suit. That is a choice that a lawyer can exercise by declining to seek recovery of expenses that the lawyer has paid on the client's behalf, just as any lawyer can decline to collect a fee that is owed. But the lawyer may not, "[w]hile representing a client in connection with contemplated or pending litigation," DR 5-103(B) -- that is, during the pendency of the suit -- relieve a non-indigent organization of ultimate responsibility for the expenses.

CONCLUSION

A lawyer representing on a *pro bono* basis an organization that provides legal services to the poor may not pay the expenses of litigation without the organization remaining ultimately liable for those expenses unless the organization is itself indigent. The test for "indigence" in this context is one of objective financial wherewithal, and not one that is based on the worthiness of the cause that the organization pursues or the organization's desire to spend its resources in other ways.

(40-04)