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Committee on Professional Ethics

Opinion 856 (3/17/11)

Topic: Limiting the scope of a representation to particular stage of a matter.

Digest: A lawyer may limit the scope of the representation of a client provided that the client gives informed consent to the limitation, the scope of the representation is reasonable under the circumstances, and the limitation is not prejudicial to the administration of justice. However, even if the original limitation is permissible, the ethical obligation to represent the client may extend beyond the initial limitation contemplated by the lawyer and client if withdrawal from the representation requires court permission and the court withholds or denies that permission.

Rules: 1.2(c), 1.16(c)-(e), 8.4(d).

QUESTION

1. May a lawyer limit representation of a client in a criminal case to representation for arraignment purposes only?

OPINION

2. A union legal services plan regularly retains a lawyer to represent union members in criminal matters for arraignment purposes only. After arraignment, the legal services plan requires the union member to personally obtain counsel (either the original legal services plan attorney or some other private attorney) for the remainder of the criminal matter or, if the member cannot afford to retain counsel, to seek a court-appointed or legal aid attorney. Occasionally, however, a court will disregard the terms of the union's legal services plan and order a legal services plan attorney to continue representing the union member after arraignment, even if the member cannot afford the attorney's fees and the member does not personally retain the legal services plan's attorney.

A. Is limited representation ethically permissible?

3. The first question that arises is whether it is ethical for a lawyer to enter into a limited scope representation (in this case, through arraignment only) and then withdraw unless the client personally retains him or her.

4. The attorney-client relationship is generally contractual in nature, and the lawyer and client may ordinarily determine the scope of their relationship, but any contractual limitation on the scope of the lawyer's representation must be consistent with the New York Rules of Professional Conduct (the "Rules").

5. Limited representation is directly addressed in Rule 1.2(c) of the Rules of Professional Conduct, which provides as follows:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

6. Comments [6] and [6A] to Rule 1.2 are helpful in understanding this rule. Those Comments provide, in relevant part, as follows:

> [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.
>
> [6A] In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary or advisable to represent the client adequately, then the client may need to retain separate counsel, which could result in delay, additional expense, and complications.

7. Rule 1.2(c) had no direct equivalent in the former Disciplinary Rules, but this Committee issued an opinion on limited representation under the old Code of Professional Responsibility. That opinion, N.Y. State 604 (1989), is consistent with Rule 1.2(c) and its Comment and is useful in applying Rule 1.2(c) to the present inquiry.

8. In N.Y. State 604, we opined that a lawyer may limit the scope of a representation to the investigative and grand jury proceedings in a matter if three conditions are satisfied. First, the lawyer must obtain the client's agreement to the limitation after the lawyer has disclosed "all relevant circumstances," including: (i) the potential outcomes of the limited representation, (ii) the possibility that the client may

need to promptly retain new counsel depending on the outcome of the limited representation, and (iii) any facts affecting the substantive rights of the client or the client's ability to retain replacement counsel. This condition parallels the "informed consent" requirement in Rule 1.2(c). Second, the scope of the representation must be sufficiently broad to allow the lawyer to render practical (*i.e.,* competent) service to the client. This condition matches the requirement in Rule 1.2(c) that the limitation must be "reasonable under the circumstances." Third, the lawyer's limited representation must not be prejudicial to the administration of justice (*e.g.*, it must not violate a court rule or unreasonably delay the court's calendar). This condition is today found in Rule 8.4(d) of the Rules of Professional Conduct, which prohibits a lawyer or law firm from engaging in "conduct that is prejudicial to the administration of justice."

9. Similarly, on the facts before us here, we believe that limiting the representation to arraignment pursuant to the union legal services plan is ethical provided that the lawyer complies with Rule 1.2(c) and Rule 8.4(d). We believe the lawyer can comply with those rules by satisfying the three conditions set out in N.Y. State 604: (a) the lawyer must obtain the client's consent after giving the client the information necessary to make an informed decision whether to agree to the limitation, (b) the limitation must be reasonable under the circumstances (*i.e.,* the scope of the representation must be sufficiently broad to enable the lawyer to render competent service), and (c) the limitation must not be prejudicial to the administration of justice.

10. As to the language in Rule 1.2(c) concerning notice to the tribunal and/or opposing counsel "where necessary," we think notice of the limited representation is "necessary" under Rule 1.2(c) only if a court rule requires such notice, and we lack jurisdiction to interpret court rules. *See generally* N.Y. County Lawyers 742 (2010) (interpreting the notice clause of Rule 1.2(c) in the context of "ghostwriting").

B. <u>Is withdrawal after arraignment ethically permissible?</u>

11. The second question that arises is whether the union legal services plan lawyer may freely withdraw following arraignment if the client cannot afford to pay the lawyer's fees and does not enter into a new retainer agreement with the lawyer providing for post-arraignment representation.

12. Ordinarily, if a lawyer has obtained, in advance, the client's knowing and free assent to terminate the representation upon the occurrence of certain specified events, then the lawyer may withdraw when those events occur. *See* Rule 1.16(c)(10) ("Except as stated in paragraph (d), a lawyer may withdraw from representing a client when … the client knowingly and freely assents to termination of the employment"). In addition, N.Y. State 604, while not directly discussing advance assent to withdrawal, indicates that a lawyer may ethically agree with a client to terminate a representation after "a discreet stage of a matter," and arraignment is such a "discreet stage."

13. Of course, there are some limitations on advance consent to withdrawal. We expressed some of those limitations in N.Y. State 719 (1999), where a domestic relations lawyer's retainer agreement said that the lawyer would have "good cause" to withdraw if (among other things) the client failed to follow the lawyer's advice, failed to

approve an expert recommended by the lawyer, failed to pay any bill within thirty days, or failed to approve a change in the lawyer's hourly rate. We concluded that these grounds for withdrawal were not authorized under DR 2-110 (the predecessor to Rule 1.16), and that the withdrawal provisions were therefore improper under the general principle that a retainer agreement "may not authorize the attorney to withdraw from the representation under circumstances in which withdrawal would be impermissible under DR 2-110." We also said that the provision in DR 2-110 permitting withdrawal when a client "'knowingly and freely assents to termination' … does not authorize an agreement *in advance* by which the client assents to termination upon some future occurrence that is unrelated to achieving the objectives of the representation." (Emphasis in original.)

14. We applied the reasoning of N.Y. State 719 in N.Y. State 805 (2007). There we concluded that a retainer agreement "may not ethically provide for a client's advance assent to a lawyer's withdrawal from employment based on the client's failure to pay agreed legal fees and expenses," but could "advise the client of the lawyer's right to withdraw, subject to court approval where applicable, if the client 'deliberately disregards' a payment obligation."

15. N.Y. State 719 and N.Y. State 805 are distinguishable from the situation here. Both of those opinions rested on a lawyer's attempts to gain through a retainer agreement the right to withdraw on grounds not set forth in the withdrawal rule (then DR 2-110, now Rule 1.16). The situation before us now, in contrast, is more like the situation in N.Y. State 604, which approved a retainer agreement in which the client agreed that the lawyer could terminate a representation after "a discreet stage of a matter." That describes the facts at hand. Also, the "objectives of the representation" (providing counsel for the client at arraignment, which can occur on short notice) have been met here. Accordingly, our reasoning in N.Y. State 719 and N.Y. State 805 do not prohibit a retainer agreement in which a lawyer obtains a client's informed advance consent for the lawyer to withdraw after arraignment. By representing the client through arraignment, the lawyer has completed the representation that the client expected the lawyer to undertake.

16. However, even if a lawyer validly obtains a client's informed advance consent to withdraw after a discrete stage (such as after arraignment), the lawyer must also comply with Rule 1.16(d), which provides: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission." As N.Y. State 604 observed, the Appellate Division rules in all four departments require both assigned and retained counsel to represent a defendant in trial court "until the action or proceeding has been terminated" in that court. Those rules remain in effect today. *See* 22 NYCRR § 606.5(a)(1) (First Department); 22 NYCRR § 671.2 (Second Department); 22 NYCRR § 821.1(a) (Third Department); 22 NYCRR § 1022.11(a) (Fourth Department). Although interpreting the rules of the Appellate Divisions is beyond the jurisdiction of this Committee, we can confidently observe that permission to withdraw from the representation is likely to be required with respect to representation in a criminal matter once the lawyer has entered an appearance on behalf of a client for purposes of an arraignment, whether or not the client is willing or able to pay the attorney for future stages of the representation.

17. Rule 1.16(d) also provides: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Thus, even if the original limitation on the representation was ethical, and even if the lawyer has good cause for terminating the representation because the client knowingly and freely assented, in advance, to the lawyer's withdrawal after arraignment, Rule 1.16(d) requires the lawyer to continue the representation if ordered to do so by the court. The court may take into account whether or not the client can afford to pay the lawyer's fees for continuing the representation after arraignment – that is up to the court – but if the court orders the lawyer to continue the representation, then Rule 1.16(d) requires the lawyer to continue the representation even if the client cannot pay for the representation.

18. Finally, we caution that even when a court permits the lawyer to withdraw from the representation of a criminal defendant at the end of arraignment, Rule 1.16(e) obligates the lawyer to "take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client …." Rule 1.16(e) notes that these steps may include, among others, (i) "allowing time for the client to employ other counsel," (ii) "delivering to the client all papers and property to which the client is entitled," and (iii) "complying with applicable laws and rules." *Cf.* N.Y. State 604 ("it is not unethical for a 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.").

CONCLUSION

19. A lawyer may limit the scope of the lawyer's representation of a client provided that the lawyer complies with Rule 1.2(c) and Rule 8.4(d). A lawyer can comply with Rules 1.2(c) and 8.4(d) by satisfying three conditions: (a) the lawyer must obtain the client's consent after giving the client the information necessary to make an informed decision as to the limitation, (b) the scope of the representation must be reasonable under the circumstances, and (c) the limitation must not be prejudicial to the administration of justice. However, even if the initial limitation on the scope of the representation is permissible, a lawyer's ethical obligation to represent a client may extend beyond the initial limitation if a court's permission to withdraw from the representation is required and the court denies permission. Finally, if the court does grant permission to withdraw, the lawyer must take steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client.

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