NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1197 (06/22/2020)

Topic: Pro bono, conflicts; fees paid by third-party payors

Digest: A lawyer who provides free, limited scope legal services to a client through a not-for-profit legal services program need not comply with the general rules governing conflicts of interest absent actual knowledge that a conflict exists, whether directly or by imputation. This is true even if the program pays participating attorneys nominal or below-market fees to render the services, though receipt of such a payment means that the lawyer must obtain the client's informed consent, preserve the client's confidential information, and avoid outside interference in even the limited scope representation.

Rules: 1.6, 1.7, 1.8, 1.9, 6.1, 6.5.

FACTS

1. The inquirer, a New York lawyer affiliated with a law school in New York, administers a program to support and encourage the public interest practices of the law school's alumni. One specific program is conducted under a non-profit entity within the law school and allows the school to hire experienced alumni attorneys at nominal fees to deliver legal counseling and referral services, and occasional limited legal assistance to qualifying New Yorkers. The program is funded by government bodies comprised of elected officials and enables the law school to provide the legal services to constituents of these officials in need of legal help without charge.

2. The elected officials or their staff arrange for constituents to come to the officials' district offices, or other community-based organizations, where the constituents can meet with one of the program attorneys free of charge. These meetings are limited to brief one-on-one counseling sessions with an attorney and are not allowed to evolve into a full representation. The law school's non-profit entity pays the program attorneys a nominal or so-called "low bono" hourly rate to render this assistance.

3. The program administrator seeks to ensure that the payment of nominal fees to the participating attorneys does not subject them to the general conflict-of-interest provisions of the N.Y. Rules of Professional Conduct ("Rules").

QUESTION

4. Is a lawyer participating in a free legal services program and receiving a nominal fee from the program administrator subject to the full panoply of provisions governing conflicts of interests set out in the Rules?

OPINION

5. The answer is no. The operative provision is Rule 6.5, which we believe applies to the program as described and relieves attorneys who participate in limited *pro bono* legal services programs from the customary conflict rules when providing short-term limited legal services under the auspices of a program sponsored by certain kinds of entities: a court, government agency, bar association or not-for-profit legal services organization. *See* Rule 6.5(a). These legal services are short-term, limited in scope, and free of charge, "with no expectations that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance." Rule 6.5(c).

6. Rule 6.5(a)(1) provides, in part, that a participating lawyer is required to comply with the conflict provisions of Rules 1.7, 1.8, and 1.9 "only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest." Rule 6.5(a)(2) says that the lawyer is required to comply with the imputation provisions in Rule 1.10 "only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.0." *See* N.Y. State 1012 ¶¶ 7-9 (2014) (discussing the Rule). A lawyer's actual knowledge of a conflict under the more generally applicable conflict rules is not required to trigger their application. Thus, Rule 6.5(a) imposes a less stringent standard on conflicts in the context of limited *pro bono* legal services. Nothing in the Rule dislodges this lessened "actual knowledge" standard for conflicts based on the lawyer's receipt of a nominal fee for participating in the program.

7. Rule 6.5 is in harmony with Rule 6.1, which concerns the profession's provision of voluntary *pro bono* legal services. Rule 6.1(b) defines such services, which fall squarely within the objects of the inquirer's program:

> (1) professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel; (2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and (3) professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

8. The Rules encourage every lawyer to provide at least fifty hours of *pro bono* legal services each year to poor persons, and view these legal services through the intent of the lawyer. *See* Rule 6.1(a)(1). The attorney's intent must be to render free legal services. Rule 6.1, Cmt. [4]. For example, if a fee is anticipated but uncollected, the services rendered cannot be considered *pro bono*. *Id.* If, however, an attorney receives statutory attorneys' fees in a case originally accepted as *pro bono*, the services continue to qualify as *pro bono* and the attorney is "encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means." *Id.*

9. Here, the clients – constituents invited to participate in this program – receive legal services free of charge. The attorneys meet these clients for one session in a government official's district office or other community-based location. The program is paid by the offices of city and state officials and administered by the non-profit arm of a New York law school, and appears to provide

broad legal services to increase the availability and quality of legal services to poor persons. The program administrator is, of course, in the best position to determine whether these services qualify as a *pro bono* program. Nevertheless, assuming that the program does address the legal needs of the poor, because the program participants receive free limited scope legal representation, no basis exists to treat this program any differently from any other *pro bono*, limited scope legal services program, despite the payment of a nominal fee to participating attorneys.

10. The reason for relaxing the conflicts rules for lawyers representing clients in *pro bono*, limited scope representation is one of practicality because participating attorneys will likely not be able to check systematically for conflicts of interests." Rule 6.5, Cmt. [3]; *see* Rule 6.5 Cmt. [1]; N.Y. State 1012. This rationale applies here given that the attorneys in this program have their only contact with their respective clients at the time of services for a brief counseling session, which is not permitted to evolve into a full representation. The actual knowledge standard for the conflict, therefore, is the most practical and effective way to facilitate *pro bono* programs and their attorney participants, as is the case here, in serving communities in need of free legal services. The lawyer's receipt of a small fee for providing free legal services to the poor is not inconsistent with this rationale.

11. Additionally, when a lawyer accepts a fee from a third party to represent someone else, the lawyer must comply with Rule 1.8(f). Rule 1.8(f) prohibits a lawyer from accepting compensation from a third party on a client's behalf unless:

(a) the client gives informed consent;

(b) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(c) the client's confidential information is protected as required by Rule 1.6.

12. These conditions are consistent with the language of Rule 6.5(d), which says that the lawyer in a program such as this "must secure the client's consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6." If these three conditions are fulfilled, the Rules permit a third party to pay a lawyer to represent a client. *See* N.Y. State 1063 ¶¶ 8-9 (2-15); N.Y. State 1000 ¶ 5 (2014).

CONCLUSION

13. General conflicts rules do not apply to lawyers providing free, limited scope legal services to qualifying clients even if the lawyers are paid minimal amounts to participate in the program, though receipt of such payments requires the client's informed consent, preservation of client confidences, and avoidance of interference with the lawyer's independent professional judgment.

(15-19)