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

Opinion 1215 (01/15/2021)

Topic: Limited scope representation in criminal cases

Digest: A law firm may not enter into a retainer agreement in a criminal matter limiting the scope of the firm's services to pretrial work unless (i) the limitation is reasonable under the circumstances, (ii) the client gives informed consent, and (iii) the limitation is not prejudicial to the administration of justice.

Rules: 1.1(b), 1.2(a) & (c), 1.16(d), 8.4(c) & (d)

FACTS

1. The inquirer is a New York lawyer who employs of counsel attorneys and pays them a flat fee to represent clients in criminal matters. The firm's retainer agreement with these criminal defense clients states that the representation will be handled by an attorney who is of counsel to the firm, and that the scope of the agreement is limited to obtaining a pretrial disposition (such as a guilty plea or dismissal). The retainer agreement further informs the client that if there is no pretrial disposition and the case proceeds to trial, the client must enter into a new agreement with the of counsel attorney, or with another attorney of the client's choosing, in order to secure trial representation.

QUESTIONS

2. May a law firm enter into a retainer agreement with a criminal defense client stating that the representation will be handled by an of counsel attorney, that the agreement is limited in scope to obtaining a pretrial disposition, and that representation of the client at trial requires the client to separately engage the of counsel attorney, or another attorney, for that purpose?

3. May the law firm pay the of counsel attorney a flat fee for representing the defendant under such a limited scope retainer agreement?

OPINION

4. In general, there is no ethical prohibition on a law firm entering into an agreement with a client that identifies an individual of counsel attorney who will be handling the client's representation, even in a criminal case, provided that the of counsel attorney is competent to perform the agreed upon services. *See* Rule 1.1(b) ("A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it"). Nonetheless, a number of ethical issues must be considered in any such arrangement where, as here, the retainer agreement provides for a limited scope of *pretrial* representation only. Chief among those issues is whether the limited pretrial scope of service is permissible pursuant to Rule 1.2(c) of the Rules of Professional Conduct ("Rules"),

Rule 1.2(c) and limited scope representation.

5. Rule 1.2(c) expressly permits limited scope representation and provides that 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. We addressed limited scope representation in criminal matters in N.Y. State 856 (2011). The inquirer there was a lawyer working with a union legal services plan that regularly retained lawyers to represent union members in criminal matters "for arraignment purposes only." After arraignment, the legal services plan required the union member to retain the original legal services plan attorney, or another private attorney, to continue the representation or, if the member could not afford to retain private counsel, to seek a court-appointed or legal aid attorney. We concluded that "limiting the representation to arraignment pursuant to the union legal services plan is ethical" if the lawyer complies with Rules 1.2(c) and 8.4(d). We said that a lawyer can comply with those rules by satisfying three conditions (N.Y. State 856 ¶ 9):

> ... (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*. [Emphasis added.]

7. The question here is whether extending the end point of a limited scope criminal representation from arraignment to the entire pretrial phase can satisfy these criteria.

What disclosures are needed to obtain a client's informed consent?

8. A lawyer who intends to limit the scope of a representation in any way must obtain the client's informed consent. What information would a lawyer need to disclose to ensure that a client's consent to representation limited to the pretrial stage was informed? Comment [6A] to Rule 1.2, which appears under the heading "Agreements Limiting Scope of Representation," is instructive:

> [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. [Emphasis added.]

9. Thus, the law firm here would first need to disclose "the matters that will be excluded" by limiting representation to pretrial matters. Plainly that limitation would exclude selecting a jury, delivering an opening statement, and calling witnesses at trial, but would it also exclude issuing

trial subpoenas, filing motions *in limine*, or preparing the case for trial? For reasons we discuss later in this opinion, those latter services cannot be prospectively excluded from the representation when they are necessary to provide competent representation. The law firm would also need to disclose the "reasonably foreseeable consequences" of the limitation, including the risk that the trial court might deny the firm's motion to withdraw from the representation were the case to proceed to trial.

10. In N.Y. State 856, we pointed out that "even if a lawyer validly obtains a client's informed advance consent to withdraw after a discrete stage ... the lawyer must also comply with Rule 1.16(d)," which provides as follows:

> (d) 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. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

11. Here, once a lawyer has entered an appearance in a criminal matter in a state or federal court in New York, permission for withdrawal is invariably required by the rules of that tribunal. The very real possibility that the judge presiding over a criminal case might deny the law firm's motion to withdraw, especially if the motion were made on or near the eve of trial, should also be disclosed. *See, e.g.*, *People v. Young*, 38 Misc.3d 381, 953 N.Y.S.2d 840 (N.Y. City Ct. 2012) ("[W]here defendant appears to have met his initial obligation to the firm, but now indicates an inability to pay, and where the matter has gone well past the discovery and motion stages and is ready to be tried, the Court finds that ... withdrawal is improper."). There is also a possibility that a court might deny the defendant's application to substitute successor counsel, despite compliance with the retainer agreement, if that application is made too close to trial. *See People v. Arroyave*, 49 N.Y.2d 264, 271, 401 N.E.2d 393, 397 (1980) ("absent exigent or compelling circumstances, a court may ... deny a defendant's request to substitute counsel made on the eve of or during trial if the defendant has been accorded a reasonable opportunity to retain counsel of his own choosing before that time"). If a motion to withdraw or to substitute other counsel is denied, for whatever reason, the client's representation could be impacted, because the trial would then proceed with the defendant represented by the originally retained lawyer, notwithstanding the understanding of the lawyer and the client to the contrary in the retainer agreement.

Is the limitation to pretrial work "reasonable under the circumstances"?

12. Even if the inquirer's firm makes all of the required disclosures, Rule 1.2(c) permits limited scope representation only if the limitation is "reasonable under the circumstances." We therefore need to consider the "circumstances" carefully to see whether this particular limitation is reasonable.

13. In N.Y. State 856 we said that a lawyer may ethically agree with a client to terminate a representation after "a discrete stage of a matter," and that arraignment was such a "discrete stage." We believe the circumstances are quite different here. In many criminal matters, a bright line cannot be drawn between pretrial work and trial work. The witness interviews, forensic tests, and factual investigation needed to negotiate effectively with a prosecutor are an integral part of pretrial representation in most criminal proceedings. Also, decisions about which legal defenses to present at trial must often be made long before trial. For example, a defense lawyer is required to give advance notice of intent to proffer psychiatric evidence at trial (see C.P.L. 250.10), or when

requested by the prosecutor, to give advance notice of intent to present an alibi defense at trial (see C.P.L. 250.20). Therefore, we believe that limiting the scope of criminal defense legal services to pretrial work would ordinarily be unreasonable in a criminal case of any substantive or procedural complexity, or where there is more than a slight possibility that the case will actually proceed to trial.

14. As a general matter, we believe it would be a highly speculative exercise to attempt to predict, at the inception of a criminal case, the likelihood of a negotiated disposition prior to trial. Too much turns on facts that are unknown when an arrest is made and charges are first filed. For example, the defense lawyer is unlikely to know: the character and criminal record of prosecution witnesses (whose testimony could be sterling or could be thoroughly impeached); the nature and availability of defense witnesses; and the results of forensic blood, DNA and ballistics tests. Information obtained from the police and other law enforcement authorities post-arraignment through pretrial discovery, even in a relatively straightforward misdemeanor case, may reveal a basis for a successful motion to suppress eyewitness testimony, admissions, or physical evidence. And, of course, there are multiple intangible factors that may reveal themselves during the course of the prosecution that could affect the ability to negotiate a reasonable disposition.

15. For these reasons, we believe it will only be the rare criminal case, based on facts and circumstances which are highly specific to the particular situation, in which a competent criminal lawyer could predict with a reasonable degree of certainty at the inception of representation that a case will terminate without a trial.

16. In any event, in every criminal case, an agreement to limit the representation to the pretrial phase of the case cannot include a limitation on taking the same steps – at the appropriate times – that would be required of a competent lawyer whose representation was not limited to the pretrial phase of the case. In other words, in a criminal representation, an agreement that limits the scope of the representation to pretrial matters, must nonetheless require the attorney to provide or take the necessary steps to ensure that successor counsel is able to provide all the defense services that are necessary to the provision of competent and effective representation until the final disposition of the case whether by motion, plea agreement, or verdict after trial. Only in that way can the lawyer ensure that the client is not prejudiced by the first attorney's failure to lay an adequate foundation of preparation.

Is the limitation prejudicial to the administration of justice?

17. The third and final factor we discussed in N.Y. State 856 is whether the limitation is "prejudicial to the administration of justice in violation" of Rule 8.4(d). In most circumstances, we think a limitation in the scope of services provided to the pretrial phase of a criminal matter will be prejudicial to the administration of justice unless the lawyer is fully prepared to proceed to trial on the date scheduled by the court if a pretrial disposition is not reached and the court denies a motion to withdraw or to substitute new counsel.

18. Our opinion is rooted in practical considerations. If a criminal defendant who has signed a limited scope retainer agreement is concerned that counsel may abandon the case in the event of trial, the defendant may feel coerced into pleading guilty, notwithstanding the existence of a viable defense or even innocence. A plea coerced by fear of abandonment would be plainly prejudicial to the administration of justice. "In a criminal case," Rule 1.2(a) provides, "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered ...." A defendant should make the choice between pleading guilty and going to trial freely, without fear

of abandonment by counsel and without fear that successor counsel will lack sufficient time to prepare for trial.

19. Conversely, if the limited scope lawyer is concerned that the court may not allow the lawyer to withdraw before trial despite a retainer agreement limited to the pretrial phase of the case, the lawyer may urge the defendant to accept a plea offer, even if the client would be better served by rejecting it. That, likewise, would be plainly prejudicial to the administration of justice.

20. Additionally, a lawyer who enters into a retainer agreement that is limited to the pretrial phase of criminal cases may not be competent to actually try a criminal case and yet, if a motion to withdraw is denied, that is what the lawyer will have to do. This would present a grave threat of prejudice to the administration of justice.

21. Finally, there is a risk that if a trial court grants a motion to withdraw shortly before trial, successor counsel will not be afforded the necessary time to prepare sufficiently for trial. This too would substantially prejudice the administration of justice.

22. For all these reasons, we think a limited scope retainer agreement would be prejudicial to the administration of justice, and thus impermissible, unless (i) the lawyer who enters into the limited scope pretrial criminal defense retainer is fully competent to represent the client in defense of the charges (including at any trial), and (ii) that lawyer actually prepares the case and will be ready for trial by the time of the scheduled trial date if the court denies a motion to withdraw or to substitute new counsel, and (iii) the client, after full disclosure of the risks inherent in such a limited-scope agreement, has sufficient sophistication and resolve not to be coerced into accepting a plea offer that the client would not have considered if the client had engaged a lawyer who was committed to continue the representation until the conclusion of the case.

Is the inquirer's firm treating of counsel lawyers unethically by paying a flat fee?

23. Rule 8.4(c) prohibits a lawyer or law firm from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." In the unusual circumstances where a limited pretrial scope engagement is permitted by Rules 1.2(c) and 8.4(d) in criminal cases, we see nothing in the Rules of Professional Conduct preventing the inquirer's firm from paying of counsel lawyers a flat fee to represent defendants as long as neither the inquirer nor anyone else at the inquirer's firm misleads the of counsel lawyers about the reality of their situation – namely, that if the client fails to engage successor trial counsel, and if the court denies the of counsel lawyer's motion to withdraw, then the obligation of defending the client at trial may fall to the of counsel lawyer. Armed with the knowledge of this risk, the of counsel lawyers can decline to accept the limited scope representation, or can insist upon additional payment from the law firm if required to continue the representation through trial.

CONCLUSION

24. A law firm may not enter into a retainer agreement in a criminal matter limiting the scope of the firm's services to pretrial work unless (i) the limitation is reasonable under the circumstances, (ii) the client gives informed consent, and (iii) the limitation is not prejudicial to the administration of justice. As criminal cases are commonly high stakes matters with unpredictable twists and turns, this standard will be difficult to meet except in rare cases.

(14-20)