

L.E.I. 83-5

(March 25, 1983)

**COMPENSATION OF COUNSEL APPOINTED TO
DEFEND INDIGENT CLIENT**

This complaint was instituted by a trial judge. The respondent attorney and his partner were appointed to defend B, who was indicted on a charge of first degree murder. The complaint alleges that the respondent, although serving as a court-appointed attorney, solicited and accepted an additional payment of \$500.00 from the family of B.

A hearing was held with respect to this complaint on June 14, 1982, before Messrs. Conrad, Dickson and Kizer. The respondent appeared in person and by counsel.

The essential facts in this matter are not in dispute. B was arrested on January 6, 1979, on a charge of first degree murder. He was also charged with driving while under the influence of alcohol and driving with a suspended operator's license, both of which are misdemeanors. On January 17, 1979, the respondent and his partner were appointed by the trial court to defend B on the murder charge, after the required affidavit stating that B was pecuniarily unable to employ counsel had been filed. On April 5, 1979, after a trial, B was found guilty of murder in the first degree. The respondent admits that immediately following the jury verdict he and his partner received a check in the amount of \$500.00 from B's family payable to cash. This money was obtained from a release of a \$1,000.00 cash bond. The respondent contends

that the \$500.00 was for services rendered on the misdemeanor charges and for services rendered prior to the court appointment. However, it appears from the evidence that no action was taken on the misdemeanor charges by the magistrate and that the charges were ultimately dismissed. Nor does the evidence indicate the extent of any services rendered by the respondent or his partner during the period January 6, the date of B's arrest, and January 17, the date of their appointment to defend him on the felony charge.

It is admitted that the respondent and his partner each received a state warrant for \$1,500.00 for their services in representing B in the trial court. This sum is the maximum allowed by law. The respondent and his partner each submitted to the court administrator a verified Defense Counsel Voucher setting forth the services rendered, the time spent, and the expenses incurred. The respondent's voucher listed \$1,921.50 for legal services and \$513.00 for expenses incurred. His partner listed \$2,277.50 for his legal services and \$538.20 for the expenses incurred by him. Neither the respondent nor his partner disclosed to the trial court that they had received additional compensation from B's family. Following B's conviction of first degree murder in the trial court, the respondent and his partner successfully appealed B's conviction to the Supreme Court of Appeals, for which representation they each received additional compensation from the state in the amount of \$1,000.00. Upon remand, B discharged the respondent and his partner and, through his newly appointed counsel, entered a plea of guilty to manslaughter.

The appointment of the respondent as counsel for B was made pursuant to W. Va. Code § 62-3-1. The compensation of court-appointed attorneys is governed by W. Va. Code §§ 29-21-1, et seq.

In an opinion dated April 18, 1959, Legal Ethics Case No. 112, this Committee stated:

This Committee is of the opinion that the statutory fee paid to the attorney involved in this case constituted his exclusive compensation and that he had no right to contract with the defendant by way of an assignment of funds, then thought to be available for payment of attorney fees, to obtain compensation in addition to the statutory fee paid.

In his work, Legal Ethics, Henry S. Drinker states:

In many jurisdictions a statutory fee is paid by the county to the lawyer so assigned. The Chicago Committee has held that a lawyer appointed by the court may, with the court's approval, accept a fee (not suggested by him) from the relative of his clients; or a voluntary gift; but he may not demand a fee, directly or indirectly.

Where one appointed by the court to defend a supposed indigent prisoner finds, on consulting him, that he is not in fact indigent, the lawyer may not make a private employment contract for legal services with him in lieu of the fee to be paid by the county, but must require his client to advise the court of the true facts and abide by the court's redetermination as to his indigency before he can make any agreement. Any retainer paid by the prisoner or his relatives should be returned and they should be free to employ other counsel.

In 7A C.J.S. Attorney and Client § 300, p. 567, the rule is stated to be:

In general, since an attorney is an officer of the court, he may be required to defend an accused person and accept such compensation, within the limits of the statute or rule, as the court may allow, and ordinarily the amount allowed by the court must represent the exclusive compensation of the attorney, and he has no right to contract with other persons for fees.

In Hall v. Brewster, 81 N.M. 342, 467 P.2d 8, 43 A.L.R. 3d 1420 (1970), it was held that attorneys, as officers of the court, have a duty to accept appointments to represent indigents charged with crime, and the payment of statutory fees to appointed counsel should be considered the exclusive compensation of attorneys acting in an appointed capacity.

The evidence in this case indicates that the respondent had represented B and B's family for many years and that he had the court appoint him and his partner to defend B. There was also some evidence that the respondent had demanded a fee of \$5,000.00 to represent B on the murder charge.

The respondent owed the duty of utmost frankness to the trial court. He should have disclosed to the court that he had received additional compensation from B's family when he submitted his request for payment. The Committee is of the opinion that if an accused presents an affidavit that he is pecuniarily unable to employ counsel, the court appoints counsel for him and allows a statutory fee for the attorney's services, and thereafter the

attorney ascertains that the accused has funds or property available for payment, it is the duty of the attorney to report to the court all facts and information he has concerning the accused's funds and property and request that he be relieved from his appointment.

The respondent is hereby reprimanded by the Committee for his failure to inform the trial court that he had received additional funds from B's family. The respondent is reminded that the statutory fee paid to him constituted his exclusive compensation and he had no right to receive additional compensation from B or his family without disclosing that fact to the court which appointed him. In Re L.E.C., ___ W. Va. ___, ___ S.E.2d ___ (No. 15,688; March 25, 1983).