

PRIVATE EMPLOYMENT OF APPOINTED COUNSEL

The Lawyer Disciplinary Board finds there is a need to give guidance to attorneys as to when, if, and in what manner it is appropriate for an attorney who has been appointed by the Court as counsel for an indigent person to accept payment from either the client or someone on behalf of the client and become privately retained counsel. Each case must be reviewed on an ad hoc basis, but there are situations where it may be permissible for counsel who was appointed by the Court to later be retained by the client and to accept payment from the client or a third party.

Applicable Rules of Professional Conduct

The applicable West Virginia Rules of Professional Conduct include, but are not limited, to Rules 1.8(f); 1.6; 1.7(b) 1.16(b)(2); and 3.3(a)(2).

Rule 1.8(f) states a lawyer shall not accept compensation for representing a client from one other than the client unless (1) the client consents after consultation, (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship and (3) information relating to representation of a client is protected. Although the Rule allows under certain circumstances for an attorney to be paid by a third party, the arrangement must not compromise the lawyer's duty of loyalty to his client. An arrangement involving third party payment must conform to the requirements of Rules 1.6 and 1.7(b) of the Rules of Professional Conduct. Rule 1.6 prohibits attorneys from revealing information relating to the representation of a client unless the client consents after

consultation. Additionally, Rule 1.7(b) prohibits a lawyer from representing a client if the representation of that client may be materially limited by the lawyer's responsibilities to a third person.

Additionally, the attorney must also be aware of Rule 3.3(a)(2) which states that a lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. This Rule is of particular import when the issue of whether the client is actually indigent or has falsified his affidavit of indigency to the Court to be eligible for counsel to be appointed. This scenario is further discussed below.

Discussion

Rule 1.8(f) of the Rules of Professional Conduct prohibits the payment by a third party to an attorney unless certain requirements are met and the client's confidentiality is preserved. However, this Rule does not address the special circumstance of an attorney who is appointed by the Court to represent a client. Counsel that is appointed by the Court receives compensation from the public, and therefore it is important to set forth guidelines in order to (1) preserve funds for those who are truly indigent, (2) prevent the appearance of impropriety, and (3) avoid reinforcing the false notion that an attorney will perform better if he/she is privately retained than he/she will perform if appointed by the Court.

In an Indiana case, an attorney who was appointed by the Court to represent an indigent client and was being paid as a public defender, later negotiated and received payment from his client's family in a matter. The attorney also misstated to the client the

obligation that a public defender owed the client, essentially indicating that the attorney would be more prepared on a case in which he was privately retained. The Supreme Court of Indiana found this conduct prejudicial to the administration of justice, and in violation of their Rules of Professional Conduct. The Court issued a public reprimand for the attorney's actions in this matter. ¹

Recommendation of the Board²

This Board recognizes two distinct factual scenarios when addressing this issue: 1) when the client who has previously been deemed financially eligible for appointed counsel wants to personally retain the attorney and 2) when a third party wishes to retain the attorney to represent the client.

Regarding scenario one, if, during the course of representation, a client indicates a desire and ability to personally employ the attorney's services and the attorney becomes convinced that the client does have adequate personal resources to retain private counsel, it is the attorney's duty under Rule 3.3(a)(2) to call upon his client to reveal that circumstance to the tribunal so that the State might be relieved of the burden of supplying counsel and a

¹ It is noted that the public reprimand was an agreed upon sanction approved by the Court. The Court reasoned that such discipline was appropriate in light of the mitigating factors that Respondent had practiced law over twenty years, there had been no prior disciplinary action, and Respondent had otherwise provided competent and diligent representation of the client in the underlying criminal matter. It is further noted that the Court did not find that refunding the money to the client's family after the disciplinary proceedings were initiated was a mitigating factor. In the Matter of J. Frank Hanley, II., 627 N.E.2d 800 (Ind. 1994).

² The North Carolina State Bar published an ethics opinion (NC Eth. Op. RPC 52) in October 1988 which was approved January 1989, which addressed a similar issue and set forth guidelines which this Board deems substantially appropriate.

fraud on the court avoided. Moreover, pursuant to Rule 1.16(b)(2), the lawyer should, in the event his or her client refuses to permit the disclosure of his or her actual financial situation, move to withdraw as counsel.

However, if, after these issues are resolved and the client still wishes to retain him, the attorney should then seek permission to be released from responsibility as appointed counsel, and seek permission to be entered as counsel of record on a retained basis. To avoid the appearance of impropriety, at no time before being relieved from his duties as appointed counsel should the attorney accept compensation for his services. Under Rule 3.3(a)(2), the attorney must disclose to the court the source of the funds by which he will be paid (whether the client or a third party). Moreover, once the attorney has been retained as private counsel by the client, there may be circumstances in which all or a portion of any monies paid by the Public Defender Services should be refunded by the attorney. For instance, if it is clear the client could have initially retained counsel from his own sources, and in fact adequately pays counsel, any monies received by him/her from the PDS should be returned.

The Board stresses the attorney's duty to provide competent, diligent, and zealous representation of the client regardless of the source or amount of the attorney's pay. An attorney cannot essentially extort money from a client by suggesting that the attorney's quality of representation will rise to a higher level if the client can obtain private funds to retain the attorney.

Regarding scenario two, if, a third party indicates a desire and ability to personally employ the attorney's services, the attorney must pursuant to Rule 1.8(f) obtain his client's

consent after consultation, assure that there will be no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship and ensure that information relating to representation of a client is protected as required by Rule 1.6. Then the attorney should advise the court of this development, seek permission to be released from responsibility as appointed counsel, and seek permission to be entered as counsel of record on a retained basis. To avoid the appearance of impropriety, at no time before being relieved from his duties as appointed counsel should the attorney accept compensation for his services.

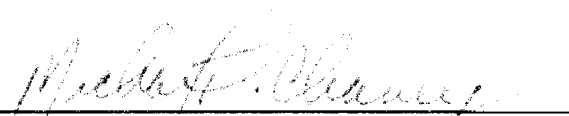
The Board notes that scenario two differs from the first scenario in that when the judicial inquiry is made into whether a defendant is indigent the court looks at the defendant's assets and ability to pay private counsel. In scenario one, if the client has the ability to pay private counsel he is not eligible for appointed counsel and the attorney has the duty to call upon his client to reveal the same, and if the client refuses, to withdraw as counsel to avoid perpetrating a fraud upon the court. However, in scenario two if a third party has the ability or the desire to retain the attorney to represent the client, there seemingly has been no fraud perpetrated upon the Court and the defendant's status as indigent and eligibility for appointed counsel remains unaltered.

In accordance with Rules 1.6 and 1.8(f), the attorney who is retained by a third party on the client's behalf shall advise the third party payor that the attorney's duty is owed to the client; that the attorney must abide by the client's wishes; that the third party cannot interfere

with representation; and that information cannot be disclosed to outside parties without the client's permission.

Lastly, in order to avoid reinforcing the notion that an attorney privately retained will perform better than he/she would as appointed counsel, and to prevent overreaching, a lawyer who knows or suspects that a client or a third party is financially capable of employing counsel should never suggest that the client ought to privately employ him or her. Moreover, attorneys should affirmatively state that regardless of whether they are privately retained or court appointed, they have a duty to represent a client with the same level of skill, zeal, thoroughness and preparation that is reasonably necessary for the representation. An attorney's quality of representation should not improve simply because the attorney receives a higher level of compensation from a client or a third party rather. Attorneys are further reminded that an appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligations to refrain from assisting the client in violation of the Rules of Professional Conduct.

ISSUED on the 26th day of September, 2003.



Michael T. Chaney, Chairperson
Lawyer Disciplinary Board