

## Ethical Issues for CJA Counsel

What ethical issues are involved when court-appointed CJA counsel accepts paid representation of the defendant outside the scope of the appointment? The short answer is that counsel is not prohibited from accepting such representation, but the better answer is that there are steps counsel can take to avoid ethical pitfalls.

Every criminal defendant faces multiple procedural options, both in challenging his conviction and sentence, and in enforcing his constitutional rights. Defendants face the gamut of direct appeals through state and federal courts (depending on the original jurisdiction); the multiple post-conviction procedural options; the possibility of post-sentence reductions and cooperation; the prospects of legal representation in prisoner administrative issues; obtaining release through executive clemency and parole eligibility; post-release charges of violation of supervision; and potential 1983 claims for prosecutorial or police misconduct or correctional abuse. This is an exhausting but not exhaustive list.

When counsel is appointed to represent a defendant in federal court, pursuant to the Criminal Justice Act (CJA), it might be for trial, direct appeal, an evidentiary hearing on a habeas petition which was filed *pro se* under 28 U.S.C. § 2254 (state prisoner) or § 2255 (federal prisoner), or even appeal from a district court's habeas decision. Because criminal charges and convictions complicate the life of a defendant and her family, counsel is often faced with not only the single proceeding for which counsel was appointed, but also multiple requests by the client and/or her family for advice on other legal and non-legal matters.

When a lawyer has been so appointed, what are the lawyer's responsibilities, rights, and options in advising the client about other legal representation needs? The Florida Bar Ethics Department advises that there are no ethics opinions on this question, but several ethical

considerations are relevant to the lawyer's conduct, as discussed below.

**General Rules.** First, there are some general parameters that newer attorneys might find helpful:

(1) The lawyer has no obligation to take on any other legal representation or advise the client about any other legal issue outside the scope of the appointment.

(2) If the lawyer decides to render such advice, it is not only free, but it carries with it the duty of being accurate. That is, if the lawyer provides incorrect advice that affirmatively damages the client, the lawyer could be sued for malpractice. Because a defendant's need for advice is frequent, and his options are slim to none, each attorney has to decide where to draw the line between compassion and paranoia.

(3) The appointed lawyer's obligation can end at different points. For example, a lawyer appointed for trial has a duty to advise the client about the right to appeal and other options (e.g., the potential value of foregoing a frivolous appeal when the client is attempting to earn a Rule 35 reduction). Appointed counsel remains obligated to the client through the direct appeal, unless the district court excuses the lawyer for some reason (the most common being a conflict with the client) and appoints other counsel for appeal. An appellate lawyer's obligation ends upon issuance of the mandate by the appeals court, unless counsel believes there are non-frivolous grounds for rehearing and/or certiorari. When appellate options are exhausted, counsel has a duty to advise the defendant about

- a) those options, which include a motion for rehearing and/or rehearing en banc and a petition for writ of certiorari, and
- b) the time limits for pursuing those options.

**Solicitation.** The first potential ethical problem is unrealized because the Rules of Professional Conduct limit solicitation to those who have never been a client of the attorney. Rule 4-7.4 addresses direct contact with “prospective” clients, defined as one with whom the lawyer has no family or prior [or current] professional relationship. The Comment specifically concludes:

These rules apply to advertisements and written communications directed at prospective clients and concerning a lawyer's or law firm's availability to provide legal services. These rules do not apply to communications between lawyers, including brochures used for recruitment purposes.

Thus, communication with an existing or former client about potential representation, or with other attorneys about the availability of counsel’s services, is not solicitation. The appointed attorney may ethically take the initiative and advise the client that he is available to handle such work, as retained counsel, if the defendant chooses to hire him.

**Communications.** If the attorney believes the defendant has other legal remedies, outside the scope of the appointment, such as a viable claim for post-conviction relief, the attorney is ethically free to, and perhaps will feel a personal moral obligation to, point out that the client *might have* such a potential avenue of relief and advise the client to consult counsel or proceed *pro se*. The attorney is free to advise the client that he is available to handle that claim.

The Rules provide guidance for lawyers communicating with potential clients, and the attorney would be prudent to consider these provisions when drafting written communications regarding potential representation, even though these provisions do not strictly control communications with an existing or former client.

First, the Comment to Rule 4-7.1, Information About Legal Services, focuses on

advertising but is also prudent to consider in communications regarding potential legal services. It emphasizes that “The public's need to know about legal services . . . is particularly acute in the case of persons of moderate means who have not made extensive use of legal services.” It notes important information to include in such communications: information concerning a lawyer's name or firm name, address, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other factual information that might invite the attention of those seeking legal assistance.

Second, Rule 4-7.2, Communications Concerning a Lawyer's Services, sets out requirements for “any communication” conveying information about a lawyer or lawyer's services. Subsection (a) sets out required information, and more importantly subsection (b) sets out information that is prohibited in such communications. Subsection (b)(1) outlines various forms of “false, misleading, deceptive, or unfair communication[s] about the lawyer or the lawyer's services” that are prohibited. Subsection (b)(2) focuses on misleading or deceptive factual statements. Statements that describe or characterize “the quality of the lawyer's services,” when made to an existing client, are exempted under subsection (b)(3). Exceptions to Rule 4-7.2 are found in Rule 4-7.9, Information About a Lawyer's Services Provided upon Request; its subsections address requests by potential clients, information regarding qualifications, and disclosure of intent to refer any matters to another lawyer or firm.

Third, Rule 4-7.4(b)(E) also proscribes any communication with prospective clients that “contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.”

**Fair dealing/overreaching.** The Comment to Rule 4-7.1 warns of practices “that are misleading or overreaching and can create unwarranted expectations by persons untrained in the law.” It notes the potential negative impact on “the public's confidence and trust in our judicial system” from such practices.

Also relevant to this issue is Rule 4-7.4, Direct Contact with Prospective Clients; subsection (b)(1) controls written communications. It would be infringed, e.g., if the communication involves overreaching or misleading or unfair statements, or if the lawyer reasonably should know that the mental, physical, or emotional condition of the client makes it unlikely she would exercise reasonable judgment in retaining the attorney.

The appointed lawyer would be wise to consider other subsections of Rule 4-7.4(b), which prohibit written communications with prospective clients where:

(D) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

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(F) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

Similarly, the Comment to Rule 4-7.4 states in pertinent part:

. . . A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect. The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. . . .

Because it can be seriously questioned whether the emotional desperation of the average prisoner allows him or his loved ones to make reasonable judgments about incurring debt to

pursue high-risk legal options, counsel's conscience at least will be burdened with this decision.

Although not required, counsel might also wish to provide the defendant with contact information for other attorneys who handle such representation. If so, counsel should also be clear that he has no association with those attorneys, does not receive any referral fees or other funds for that referral, and does not make any form of recommendation; that is, it is strictly a referral for the client to consider alternate representation. Giving the client this option would remove any appearance of pressure on the client to retain counsel.

**Retainer agreements.** If the client chooses to hire appointed counsel for subsequent or ancillary representation, the terms of representation should be clearly set out in a written document, to be accepted by the client's signature. This protects all parties should disputes later arise about the terms of employment or should the client pursue grievances against the attorney. Copies of the executed agreement, which can be in the form of a letter signed by all parties, should be given to all parties. The retainer could include provisions for third-party payment.

**Third-party payments/communications.** If the attorney's fees are paid by a third party - and they generally are with indigent defendants - the lawyer must make it clear, to both the client and the third party, that the financial contract is with that third party (so that it should be signed by that third party) but the professional duty is to the client and the third party has no right to confidential information. If the client wishes to provide copies of correspondence to that party, the attorney should first obtain written authorization.

The Comment to Rule 4-1.7 approves the scenario of third-party payments, "if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client." However, the retainer agreement needs to clarify that it is the client, and

not the third party, who will control all decisions about the representation.

Rule 4-1.6(a), Confidentiality of Information, requires the lawyer to disclose any proposed disclosure to third parties and obtain the client's consent, before divulging confidential information, except in the specific circumstances otherwise set out in that rule. This clearly include communications with such third parties, although there could be scenarios where the attorney is impliedly authorized to make such disclosures under Rule 4-1.6(c)(1) ("to serve the client's interest unless it is information the client specifically requires not to be disclosed"), if it is essential to the representation, so long as the client has not told the attorney otherwise.

Right on point, conflict of interest Rule 4-1.8(f), Compensation by Third Party, provides:

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 as required by rule 4-1.6.

**Conflicts of Interest.** Rule 4-1.7 sets out the general rule on conflict of interest. In pertinent part, subsection (b) cautions the attorney of her duty to avoid any limitation on her independent professional judgment, including that caused "by the lawyer's own interest." The most obvious is the lawyer's desire for retained employment, which could color the lawyer's recommended courses of action to the client. In fact, the Comment gives the specific example that "a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee." Each attorney will need to decide if subsection (b) applies and requires the client's consultation and consent. Attorneys should be careful not to advise a client to pursue matters that are hopeless or to give a client unfounded hope for success.

An appointed lawyer should advise a client if other legal options may be available, but the lawyer has no obligation to conduct the investigation and research necessary to express an opinion on the merits of those options. The appointed attorney, by virtue of his position of trust conferred by that appointment, has a duty to give the client good advice, and that advice should as accurately as possible assess legal options under consideration and scrupulously avoid encouraging a client to pursue - and his family to pay for - legal efforts that are either doomed or highly risky. This is especially true if the advising attorney might be hired to conduct this work. The odds must be clearly and accurately communicated to the client, or the inevitable failure will come back to haunt the attorney who recommended that course of action.

Rule 4-1.8 provides other conflict of interest rules which may be relevant, and fee agreements with clients should be written with recognition of these provisions. Subsection (a) prohibits a lawyer from “knowingly acquir[ing] an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer’s fee or expenses,” unless the client consents in writing, after full disclosure, to fair terms, and after reasonable opportunity to consult independent counsel. Subsection (c) prohibits lawyers from preparing any instrument giving the lawyer or her family any substantial gift from the client. Finally, subsection (d) prohibits, prior to the conclusion of representation, making or negotiating “an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.”

An apparent potential conflict of interest in this situation exists where appointed *trial* or *appellate* counsel is hired to handle post-conviction claims. The lawyer would be well-advised to inform the client in writing that potential claims of ineffective assistance of counsel which involve

the same attorney **will be waived** by such representation and that consultation with other counsel as to those matters, before a decision is made, would be wise. In fact, the attorney would be wise to insist on the client's prior consultation to avoid or at least defend a future grievance complaint.