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LIMITED REPRESENTATION IN A CRIMINAL MATTER

Adopted: July 22, 2022

Opinion rules that a privately retained lawyer may provide limited representation to a criminal defendant who has been appointed counsel if the limitation is reasonable under the circumstances.

Facts:

Criminal defendant qualifies as indigent and is appointed counsel. Private lawyer (“Lawyer”) is contacted by Defendant or Defendant’s family for potential representation in filing a motion for bond on behalf of Defendant. If Lawyer takes on the representation, he will make a limited appearance solely for the purpose of representing Defendant at the bond hearing. Lawyer is informed that Defendant has been appointed counsel in the underlying criminal matter.

Inquiry #1:

May Lawyer communicate with Defendant knowing Defendant is represented by appointed counsel?

Opinion #1:

Yes. The prohibition on a lawyer speaking with a represented individual does not apply in this scenario. Rule 4.2 provides that, during the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. However, the comment to Rule 4.2 provides, “[t]his Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation.” Rule 4.2, cmt. [2]. Lawyer is therefore permitted to meet with Defendant to discuss potential representation. Lawyer should, but is not required to, inform appointed counsel of his participation and advice. Rule 4.2, cmt. [2].

Inquiry #2:

May Lawyer undertake a limited representation of Defendant knowing Defendant has appointed counsel?

Opinion #2:

Yes, if the limitation is reasonable under the circumstances, Lawyer has fully informed Defendant of the possible ramifications of privately retaining Lawyer for the limited representation, and Defendant consents.

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client. Rule 1.2(c); Rule 1.2, cmt. [6]. Although Rule 1.2 “affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.” Rule 1.2, cmt. [7].

Before agreeing to represent Defendant on a limited basis for the sole purpose of handling a bond hearing, Lawyer must consider whether the limited representation is reasonable under the circumstances. As stated in the facts, Defendant has qualified as indigent and has been appointed counsel. Lawyer must therefore consider the effect his representation will have on Defendant’s ability to remain indigent and qualify for appointed counsel. N.C. Gen. Stat. § 7A-450 (Indigency; definition; entitlement; determination; change of status) and N.C. Gen. Stat. § 7A-453 (Duty of custodian of a possibly indigent person; determination of indigency) govern. Whether Defendant remains indigent considering the ability to pay Lawyer for the bond hearing is a legal question outside the purview of the Rules of Professional Conduct. Therefore, no opinion is expressed as to whether Defendant remains indigent despite having retained Lawyer. Nevertheless, Lawyer has a duty to review the law and render objective, candid, and thorough advice to Defendant regarding the same. *See* Rule 1.1, Rule 1.4(b), and Rule 2.1. Lawyer must discuss the limitations of representation and the effect, if any, the representation will have on Defendant’s qualification as indigent to enable Defendant to make an informed decision regarding the representation. Rule 1.2(a), Rule 1.2(c), and Rule 1.4(b). If Defendant consents to the limited representation after Lawyer’s thorough review and explanation of the legal ramifications of the limited, private representation, Lawyer must inform the court of his limited appearance so that the court may also evaluate Defendant’s indigent status. *See* Rule 3.3(a)(1); RPC 52. At the earliest time possible, Lawyer should also inform the appointed counsel of his involvement, preferably prior to accepting the representation, to ensure Defendant is sufficiently protected and informed of the

impact the limited representation may have on Defendant's ability to continue representation with appointed counsel.¹ Failing to communicate Lawyer's involvement with appointed counsel under these circumstances might be prejudicial to the administration of justice. Rule 8.4(d).

If Lawyer obtains Defendant's informed consent to limit representation to just the bond hearing, Lawyer must provide competent and diligent representation to Defendant and must not do anything that jeopardizes Defendant's case. Rule 1.1, Rule 1.3, and Rule 8.4(d). Rule 1.1 provides in pertinent part, "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Before Lawyer can make a limited appearance, Lawyer must educate himself on Defendant's case, which includes understanding the underlying charges. Lawyer must therefore communicate with Defendant and the district attorney's office and review any available discovery. Competent representation also requires Lawyer to communicate with appointed counsel.

Inquiry #3:

Assume Lawyer has obtained Defendant's consent to limit representation and agrees to accept the legal fee from Defendant's family in accordance with Rule 1.8(f). May Lawyer withdraw if the family is unable to pay Lawyer's fee?

Opinion #3:

It depends. Lawyer may limit representation if the limitation is reasonable under the circumstances. *See Opinion #2*. Generally, a lawyer should not accept representation in a matter unless it can be performed competently, promptly, without conflict of interest, and to completion. Rule 1.16, cmt. [1]. Additionally, "[u]nless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved." Rule 1.3, cmt. [4].

Before Lawyer agrees to represent Defendant in a limited capacity, Lawyer must determine whether his fee can be paid in full. If not and Lawyer is unwilling to finish representation without getting paid, the limitation on representation is not reasonable in accordance with Rule 1.2 and Lawyer must therefore decline the representation. However, should Lawyer accept representation but later conclude that he cannot continue representation because the family is unable to continue paying his fee, Lawyer may withdraw only if withdrawal can be accomplished without material adverse effect on the interests of the client. Rule 1.16(b)(1). Lawyer must also seek the court's permission to withdraw. Rule 1.16(c). Prior to seeking the court's permission to withdraw, Lawyer must inform the client of his intent to withdraw. Lawyer must either obtain the client's consent to withdraw or provide client with notice of hearing on Lawyer's motion to withdraw. Furthermore, before Lawyer can withdraw, Lawyer has a duty to protect Defendant's interests, and therefore Lawyer must communicate with appointed counsel to ensure the withdrawal will not cause irrevocable harm to Defendant. Rule 8.4(d).

Inquiry #4:

Is the analysis in this opinion applicable to lawyers who limit representation of a criminal defendant in both misdemeanor and felony cases?

Opinion #4:

Yes. Under Rule 1.2(c), a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances. Whether limitation is allowed is not contingent on whether the pending criminal matter is a misdemeanor or a felony. Instead, the determining factor should be based on the class of charges levied against the defendant. The lawyer should also consider the possible levels of punishment based on the charges. For example, a series of multiple felonies that will result in significant punishment for Defendant may make limiting representation unreasonable under the rule. Similarly, limited representation may be unreasonable when representing a client on a single misdemeanor charge that by itself generally will not result in significant punishment, but when added to Defendant's prior record increases the punishment. Therefore, the lawyer must consider these and other factors and review the totality of the circumstances to determine if limited representation is reasonable under the circumstances.

Endnote

1. Lawyer should endeavor to involve appointed counsel and discuss the best strategies to ensure Defendant is protected and not harmed by Lawyer's limited role. Lawyer should also discuss with appointed counsel the evidence he intends to introduce at the bond hearing, including a list of witnesses and the expected testimony of those witnesses.