

LITIGATION AND ADMINISTRATIVE PRACTICE SERIES
Criminal Law and Urban Problems
Course Handbook Series
Number C-224

Prison Law 2010

Chair
Alexander A. Reinert

To order this book, call (800) 260-4PLI or fax us at (800) 321-0093. Ask our
Customer Service Department for PLI Order Number 23055, Dept. BAV5

Practising Law Institute
810 Seventh Avenue
New York, New York 10019

PROGRAM HYPOTHETICALS

Submitted by:

Ellen Yaroshefsky

Benjamin N. Cardozo School of Law

Selected ABA Model Rules of Professional Conduct:

ABA Model Rules of Professional Conduct, 2009 Edition. Copyright © 2009 by the American Bar Association. Reprinted with permission. Copies of ABA Model Rules of Professional Conduct, 2009 Edition are available from Service Center, American Bar Association, 321 North Clark Street, Chicago, IL 60654, 1-800-285-2221.

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.

1. RETAINER AGREEMENTS

Your standard retainer agreement in civil rights cases attempts to provide, in part, regarding settlement that:

“If the case results in the recovery of a single sum of money, without a separate award of attorneys’ fees, the attorneys fees will be the greater of a) 1/3 of the recovery or b) the attorneys’ fees computed at their regular hourly rate. The attorney’s current hourly rates are Boss: \$450; Associates 175-250; paralegals \$125.

Under no circumstances shall the client’s obligations to the attorney at the end of the case exceed the total monies recovered from the defendant.”

You have a signed standard agreement with John Jones in a 1983 action for money damages. After extensive discovery, Jones, who has been extremely difficult during the case, is offered \$67,000 to settle the case. He is ecstatic. Your firm has 80,000 worth of fees in the case. You believe the case to be worth \$250,000 and encourage Jones to wait but he is adamant about taking the settlement.

What may the attorney do regarding the attorneys’ fees?

What provisions should you include in your retainer agreement to deal with this issue?

2. MULTIPLE PLAINTIFFS

Your office represents five plaintiffs in a 1983 action for money damages against State Facility and other named defendants. The plaintiffs, who are all physically disabled sustained significant injuries in State Facility which has had a reputation for dangerous conditions for many years.

Your clients have different injuries. Your standard retainer agreement acknowledges the possibility of a potential conflict because some plaintiffs may have stronger claims than others. It specifies that the plaintiffs may be offered a lump sum payment to settle all claims and the attorneys’ fees and that each plaintiff agrees that the claims will not be settled without agreement among all of them. You indicate that you will advise each of them as to the appropriate distribution upon a proposed settlement. You have successfully navigated settlement with plaintiffs in past cases with such an agreement.

After depositions have been completed, the State offered \$1 million to settle the case. The state has not imposed any conditions on the distribution of the monies.

You prepare an analysis of the damage claims and send it to the plaintiffs with your recommendation for damages to be awarded to each plaintiff.

Four of the five plaintiffs consent to settle on the proposed terms. One plaintiff objects and claims that she is entitled to an additional \$50,000. You meet with the plaintiffs as a group and will each plaintiff individually. She still refuses to settle.

What are your options and obligations?

3. THE NO CONTACT RULE

You represent three clients who were assaulted by the Triage Gang at the local prison. Triage it has operated in State Facility for many years with little intervention by the prison authorities. You file suit alleging that the prison and named supervisory personnel have been aware of the Triage gang for at least five years and have inadequate policies, practices, training and supervision to prevent gang violence.

In discovery, you learn that a low level sergeant, Sam Sneed, is likely to provide information supporting the claim that the prison has known about the Triage gang for years and has inadequate policies to protect against gang violence. You take his deposition. During the deposition, as is the policy, he refuses to give his home address.

Three years elapse and you are preparing for trial. You plan to serve Sneed with a trial subpoena. You contact the Assistant Attorney General defending the case but they will not accept service for Sneed because he is no longer a State employee. The Assistant Attorney General will not tell you his last known address.

You hire an investigator who finds Sneed. As you prepare to conduct an interview with Sneed, you receive a telephone call, followed by a letter from the Assistant Attorney General telling you that you are prohibited from interviewing Sneed because his statements may be deemed admissions on behalf of the State.

What do you do?

4. PROTECTION AND ADVOCACY ORGANIZATIONS

The Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) (42 USC 10801 *et seq*) permits advocacy organizations to sue on behalf of institutionalized individuals with mental illness.

Disability Rights Inc., one such organization, files suit on behalf of thirty people housed in State Mental Facility for grossly inadequate care. There are no individually named plaintiffs in the lawsuit.

Disability Rights Inc., lawyers have minimal contact with the individuals at State Mental Facility, other than to obtain factual information in support of the lawsuit. They have not discussed potential remedies with the individuals nor explained the lawsuit.

What are the lawyers' obligations toward the individuals at State Mental Facility in connection with this case?

5. CLASS ACTION

Your office filed a state court class action on behalf of prisoners alleging lack of adequate treatment for those who test as HIV positive. There are two named plaintiffs. The complaint alleges injunctive relief for the class and includes a damage claim for the named plaintiffs only.

Your office has a retainer agreement with the named plaintiffs that specifies, *inter alia*, that the damage claim is for those two persons only and that to extent that there is any conflict between them as to differing amounts for the damage claims that they agree that neither will settle without consent of the other plaintiff. The class has been certified.

What are your options and obligations?

SELECTED ABA MODEL RULES OF PROFESSIONAL CONDUCT

Client-Lawyer Relationship

Rule 1.0 Terminology

- (a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.
- (b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
- (c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
- (d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
- (e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- (f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.
- (g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

- (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.
- (l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.
- (m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.
- (n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Client-Lawyer Relationship

Rule 1.5 Fees

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.
- (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.
- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
 - (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
 - (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.

Client-Lawyer Relationship

Rule 1.7 Conflict Of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

- (4) each affected client gives informed consent, confirmed in writing.

Advocate

Rule 3.3 Candor Toward The Tribunal

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Advocate

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material

- having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
 - (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
 - (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
 - (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
 - (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Transactions With Persons Other Than Clients

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Transactions With Persons Other Than Clients

Rule 4.2 Communication With Person Represented By Counsel

In representing 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.

Maintaining The Integrity Of The Profession

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

NOTES