



## PROFESSIONAL RESPONSIBILITY

# WHEN A FRIEND OR RELATIVE PAYS THE CLIENT'S LEGAL FEE

BY KENNETH L. JORGENSEN

**W**hen a lawyer's fee is paid by someone other than the client, ethical issues abound. Conflict of interest, confidentiality, and the scope of the lawyer's employment are almost always implicated. Resolving these issues can be complicated by substantive law governing the third party's obligation to pay for the client's representation. For example, a client's insurance policy, as well as state insurance laws, play large roles in defining a lawyer's obligation to the client (insured) and the insurer. Similarly, governmental regulations may significantly affect the obligation of lawyers who are appointed to defend criminal clients or undertake to represent indigent clients through a legal service program. While there has been significant discourse about the complexities of these various relationships, less has been said about lawyer obligations when a friend or relative agrees to pay the client's fees.

Fee payment by friends or relatives is a common occurrence in the areas of family law, juvenile law and criminal law. Clients with these types of legal problems typically have an immediate need for legal advice or representation and are without means to pay, even over an extended period time, for a lawyer's services. Where the client does not qualify for public defender or legal aid representation, the financial assistance of a friend or relative may be the only alternative.

The Rules of Professional Conduct authorize a lawyer to accept compensation from someone other than a client under the following circumstances:

- The client consents after consultation or acceptance of the compensation is impliedly authorized by the nature of the representation (i.e., public defender, legal aid or pro bono representation);
- The lawyer does not permit the party paying the lawyer's fee to interfere with the lawyer's independent professional judgment on behalf of the client; and
- The lawyer complies with the confidentiality obligation owed to the

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client under Rule 1.6. (See Rule 1.8(f), Minnesota Rules of Professional Conduct.)

Before obtaining client consent, the lawyer must first determine whether there is a significant risk that the lawyer's representation will be materially limited by the lawyer's responsibilities to the friend or relative. For example, if the friend or relative is already a client, or a coclient, potential conflicts between the clients must be analyzed and where necessary, consent to the conflict should be obtained from both clients. Conflicts that would preclude zealous representation of either client are deemed nonconsentable and under such circumstances it is improper for the lawyer to ask for consent.

Regardless of whether the friend or relative is or is not a client, the consultation contemplated by Rule 1.8(f) includes examination of the differing interests of the client and the third-party payor. The potential effect of the payor's probable interest in minimizing the expense of the representation should be discussed with all clients. For example, will the lawyer's representation be conditioned upon the payor's continuing willingness to pay fees? If a flat fee for a specific service or services has been paid, were the terms or limits of the service clearly communicated in writing to the client?

A third-party payor's desire or need to monitor the progress of the representation must be addressed. Even among

friends and relatives, few are willing to blindly pay another's legal fees without some degree of accountability. Payors may demand status reports as a condition of providing financial assistance to the client. Where the lawyer requires the payor to formally sign a fee agreement, the obligation to provide accountings to the payor for trust account funds belonging to third parties<sup>1</sup> should also be disclosed.

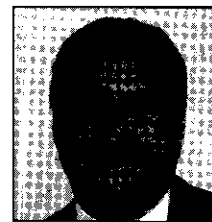
The payor's desire or demand to learn about the progress of the representation will have its largest impact on confidentiality. If a friend or relative conditions payment upon being able to monitor the representation, the effect of such a demand on confidentiality, and more importantly attorney-client privilege, should be made clear to the client.

Where necessary the appropriate waivers should be obtained. If the consequences of jeopardizing the attorney-client privilege could result in client prejudice (e.g., criminal defense cases), the lawyer should make it clear to both parties, at the outset of representation, that disclosures will be tailored to accommodate the payor's desire for accountability without risking waiver of the attorney-client privilege. In some representations, this may require the lawyer to generate two sets of billing statements; a detailed invoice for the client, and a more general progress-oriented statement for the payor.

Although the ethical rules permit lawyers to accept fees from nonclients, they are less clear on the duties owed to the payors of these fees. Unless the payor is a coclient, most friends or relatives who pay, or who agree to pay a client's

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legal fees do not qualify as clients. While those who sign a fee agreement may acquire some rights that mirror those of clients, prudent business practices dictate that the written fee agreement clearly spell out the limits of the lawyer's duties.<sup>2</sup> The status of those who gratuitously pay a friend or relative's legal fees is less clear. This is especially true where the financial assistance is procured by the client without the lawyer's assistance and there has been little or no contact between the lawyer and the payor. A recent ethics complaint filed by a relative who paid a client's legal fee illustrates the vagaries of these as well as the consequences of failing to clarify the lawyer's role.

The lawyer had been retained by an adult son to represent him in an emergency post-decree visitation motion. The motion sought to terminate the son's visitation rights with his children and the son was without the ability to pay the lawyer's fee. Because the son still owed the lawyer for fees incurred in the divorce, the lawyer declined to represent the son in the visitation motion without first being paid a \$2,500 retainer. The son later called his father and related the lawyer's demand for a retainer. The father confirmed the retainer amount by telephone with the lawyer and provided the lawyer a \$2,500 check. Three days later, the son terminated the lawyer and demanded that the unused portion of the retainer (*i.e.*, \$2,250) be refunded to the son. The lawyer refunded the retainer to the son, who then failed to remit any of the funds to his father. The father later filed an ethics complaint against the lawyer for refunding the balance of the retainer to the son instead of the father.

Even though the father's ethics complaint was ultimately dismissed, the manner in which the lawyer handled this problem did not represent good lawyering. Moreover, the father's dissatisfaction with the situation was not entirely attributable to the fraudulent behavior of his son. In his ethics complaint, the father took the not unreasonable position that he had hired the lawyer. In support he offered the receipt given to him by the lawyer and his canceled check evidencing the \$2,500 retainer payment.

The lawyer countered that he did not represent the father. Although he knew the father was the source of the retainer funds, the son had falsely represented to the lawyer that the retainer funds constituted a loan for which the son remained obligated to pay his father. When the

lawyer suggested contacting the father, the son refused to authorize the communication because he did not want his parents to know of his intention to hire new counsel. Citing his client confidentiality obligation, the lawyer claimed he was unable to contact the father to confirm whether the retainer funds were indeed a loan.

Clearly, the son's fraudulent behavior was the primary cause of this unfortunate situation. At the same time, the lawyer's failure to clarify the nature of his relationship with the payor of his client's fees created the opportunity for this problem to occur.<sup>3</sup> Minimal disclosures to the son, the father, or preferably both would have eliminated, or at least minimized, the son's ability to use the lawyer to take advantage of his father's generosity.

Although the lawyer escaped professional discipline, it is doubtful he was unscathed by this incident. Years ago a senior lawyer practicing in greater Minnesota told me, "Out here it takes less than a week for a client with a legitimate beef against a lawyer to negate years and thousands of dollars worth of advertising." This lawyer undoubtedly understood that the Rules of Professional Conduct represent the bare minimum standard below which no lawyer's conduct may fall without being subject to professional discipline. From my experience, he, like most Minnesota lawyers, routinely strives for much more. □

## NOTES

1. See *e.g.*, Rule 1.15, MRPC.
2. When it becomes clear to a lawyer that a nonclient payor misunderstands the lawyer's role and perceives the lawyer as also representing the payor, the lawyer may be obligated under Rule 4.3 to correct the payor's misunderstanding. Even where the ethics rules do not require the lawyer to correct this misperception, sound business practices and good lawyering would entail such a disclosure to minimize the opportunities for client dissatisfaction and malpractice claims alleging client by estoppel.
3. Because of his limited contact with the father, and the son's misrepresentations about the nature of the retainer, there was not clear and convincing evidence that the lawyer had an ethical duty to account to the father for the balance of the retainer funds. Nevertheless, the lawyer could have avoided this problem by simply refusing to release the funds until the son obtained authorization from the father or provided verification or evidence of the purported loan.