



“When is a client not a client? New ethics opinion discusses appointed lawyers' ethical duties to unwilling clients”

By Eileen Libby*

Under the rules of ethics, lawyers are bound to act with competence, commitment and dedication to the interest of their clients. Every client wants a fierce and single-minded lawyer who will zealously advocate on their behalf, right?

Not always. Like rejected suitors, lawyers occasionally are turned down by would-be clients. What is a lawyer to do when appointed to represent an individual who does not want the representation?

Appointments of counsel for unwilling clients occur most frequently in the criminal court context, and recently occurred in the representation of Guantánamo Bay detainees. Military lawyers under orders to provide a defense for individuals to be tried as enemy combatants found themselves in the untenable position of having to obey orders that conflicted with their clients' desire to represent themselves because they rejected the legitimacy of the tribunal.

The ABA has taken the position that the trial process is fundamentally flawed and in August 2003, adopted policy calling for the establishment of clear standards and procedures governing the detention and treatment of enemy combatants and urging that that all defendants in any military commission trials have the opportunity to receive the zealous and effective assistance of civilian defense counsel.

An order that accused *must* be represented by pro bono military lawyers directly conflicts with ABA Model Rule of Professional Conduct Rule 1.2(a), which states that a lawyer “shall abide by a client’s decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued.” The Model Rules serve as the basis for most state ethics codes for lawyers.

In Formal Opinion 07-448 (October 20, 2007), “Appointed Counsel’s Relationship to a Person Who Declines to be Represented,” the ABA Standing Committee on Ethics and Professional Responsibility found a solution to this “Catch-22” situation: the ethics rules defining a lawyer’s obligations to a client only apply after a person has accepted the client-lawyer relationship. In the absence of such acceptance, the person is not a “client,” to whom the lawyer owes duties.

According to the Committee, underlying the ethics rule are the premises that a lawyer’s role in the client-lawyer relationship is to further the goals and interests of a client, and that a competent client has the ultimate authority to determine what the client’s goals and interests may be. If a defendant has not accepted the client-lawyer relationship, said the Committee, he has no basis upon which to hold the lawyer accountable under the rules. “The notion that the client-lawyer relationship can be created absent consent by or on behalf of a client – or acquiescence amounting to consent – is foreign to the concepts in the Rules,” says the Committee... There is no client-lawyer relationship unless and until the defendant accepts representation.”

However, lawyers face potential violations of the ethics rules if they proceed against their clients’ wishes, and in the case of military lawyers, court-martials and even dishonorable discharges if they refuse

to follow orders. Even in non-military settings, courts sometimes do not permit lawyers to withdraw, despite client demands to exercise the right to self-representation. What if the tribunal forces a lawyer to act on behalf of a person against that person's will?

The Committee again provided the answer. In the absence of an attorney-client relationship, the person refusing representation is not entitled to expect of the lawyer the duties arising out of the client-lawyer relationship, which include not revealing confidential information relating to the representation, abiding by client decisions about goals of representation, consulting clients about how to pursue goals, avoiding conflicts of interest, and being competent, prompt and diligent. "Any legal obligation owed by the lawyer to the defendant ... arises from the authority of the appointing tribunal and includes whatever obligations the tribunal may identify. The lawyer's ethical duties are limited to complying with the rules defining a lawyer's obligations to persons other than a client."

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