

## Opinion 535

### QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct (the "Rules") may a lawyer volunteer to participate in a court-sponsored "attorney of the day" program for criminal defendants as described below?

### FACTS

A county criminal court (the "Court") has implemented an "attorney of the day" program in order to expedite the large number of pro se criminal defendant cases appearing on the docket. The "attorney of the day" is a private defense attorney who volunteers to participate in the Court's program.

The representation by the "attorney of the day" is conducted in a two phase process. In the initial phase, the criminal defendant is made aware that he may speak with the "Attorney of the day", who is not appointed by the Court to represent the criminal defendant, for the limited purpose of advising the criminal defendant as to his legal rights and options. The "Attorney of the day" is not paid for this initial consultation by the Court and, at this point, has only reviewed the Court's file on the case. If the criminal defendant elects to consult with the "attorney of the day", he is required to sign a statement (the "Admonishment") agreeing to the limited purpose of the representation and that the representation by the "attorney of the day" terminates at the conclusion of this consultation. The criminal defendant is also advised in the Admonishment that if he chooses to resolve his case that day by an agreed plea, the judge will appoint the "attorney of the day" to represent him for that limited purpose and the "attorney of the day" will be paid by the County.

Presuming the criminal defendant agrees to the initial consultation with the "attorney of the day", one of four things may happen: 1) the criminal defendant may choose to do nothing and "pass" his case until the next Court setting; 2) the criminal defendant may choose to seek a Court appointed lawyer based upon the client's indigency; 3) the criminal defendant may choose to proceed pro se; or 4) the criminal defendant may choose to resolve his case that day by pleading guilty.

The second phase of this program begins if the criminal defendant elects to resolve his case that day and proceed with the Court appointed "attorney of the day." The criminal defendant is advised of his rights and options and required to consent to the following:

#### "Request for Counsel

I am the defendant in the above-styled and numbered cause and in the interests of justice I request the Honorable Court to appoint an attorney to advise me of my rights prior to entering a plea to the charge alleged herein. I understand that the representation of the attorney who is appointed terminates today, and that he/she will not represent me further without a separate written agreement or order from the Court. I further certify that I have read and understand the [Admonishment] and I agree with its terms, and that I am not presently represented by counsel. I understand that the attorney of the day's investigation into the facts of my case will be limited by the contents of the court's file and any information that I provide him today. **I certify that I: AM AM NOT (Circle one) charged with another offense and/or: AM AM NOT (Circle one) currently on probation or parole.**

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*Defendant*

If the criminal defendant's case is then concluded on that day with a guilty plea, a flat fee that is more than nominal is paid by the County to the "attorney of the day."

If, after the criminal defendant determines to plead guilty but before the plea is accepted, a circumstance arises that unexpectedly prevents the case from being finally disposed of that day, the Court either: 1) enters an order and continues the "attorney of the day's" representation of the client until such time that the case is resolved; or, 2) pays the "attorney of the day" for the time that he spend representing the client pursuant to the appointment, and discharges the "attorney of the day" from further service according to the representation agreement. In either event, the "attorney of the day" is paid only if the criminal defendant initially elects to plead guilty.

## **DISCUSSION**

The "attorney of the day" program involves a situation where an attorney receives a fee for limited representation only in the event the criminal defendant elects to plead guilty. Thus a lawyer faces a potential conflict between the lawyer's own interest in receiving the promised fee and the interests of the criminal defendant that may or may not be best served by a guilty plea.

The facts presented in this matter raise issues under Rule 1.06 on conflicts of interest. Rule 1.06(b) provides in pertinent part that:

"(b) ... except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of the that person: ...

(2) reasonably appears to be or become adversely limited ... by the lawyer's or law firm's own interests."

This rule clearly applied because of the lawyer's interest in receiving a fee which is dependent on the criminal defendant's decision to plead guilty on the day of the initial consultation with the "attorney of the day."

The only exception to the prohibition of Rule 1.06(b) is stated in Rule 1.06(c), which provides as follows:

"(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

It is the opinion of the Committee that there could never be an adequate basis for a determination that both requirements of Rule 1.06(c) are met in the case of the "attorney of the day" program. First, the lawyer who volunteers to participate in the "attorney of the day" could not reasonably believe that his advice to the criminal defendant would not be materially affected by the promise of a more than nominal fee if, but only if, the criminal defendant decides to enter a guilty plea on the day of the consultation. Second, it would seem highly unlikely that, with the time constraints that would exist, the lawyer could on the day of the consultation provide "full disclosure" to the criminal defendant concerning the conflict of interest and its implications, obtain a valid consent from the criminal defendant and then counsel with the criminal defendant as to whether the criminal defendant should plead guilty. Since it would be highly unlikely for the lawyer to meet either of the requirements of Rule 1.06(c) and since both requirements must be met before the representation would be permissible under the Rule 1.06(c), the Committee concludes that the proposed arrangement is not permitted under Rules 1.06(b) and 1.06(c).

## **CONCLUSION**

Under Rules 1.06(b) and 1.06(c) concerning conflicts of interest, it is not permissible for a Texas lawyer to volunteer to participate in a court-sponsored "attorney of the day" program under which the lawyer receives a flat fee for limited consultation with a criminal defendant on one day only if the criminal defendant elects to enter a plea of guilty at the conclusion of the consultation.