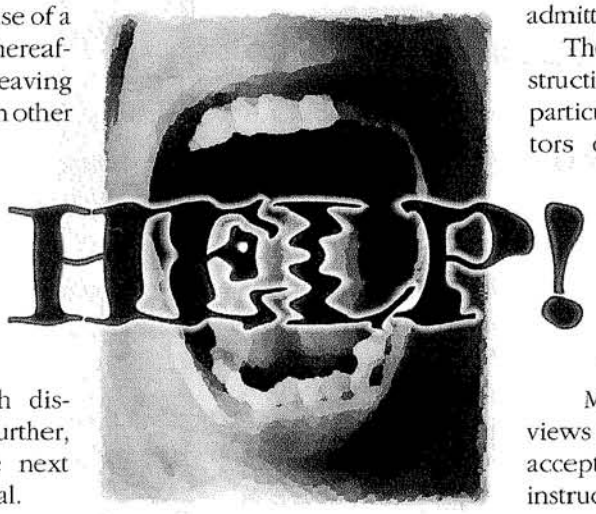
Conduct Column

by Michael Sandor

The ethics of limited representation in a criminal trial (Part 1)

1 This note discusses the question of whether it is ethically proper to accept instructions to represent an accused for only one part or phase of a criminal trial and thereafter to withdraw, leaving the accused to obtain other legal representation.

2 The note is in two parts. The first part presents the issue and the advice by the Guidance Committee. The second part, which discusses the matter further, will appear in the next edition of the journal.



Limited instructions can leave criminal clients without legal help

Issue

The Registrar of the Supreme Court recently wrote to the Law Society as follows:

"In a recent criminal trial in the High Court the accused was privately represented. In the course of a *voir dire,* counsel for the accused indicated that he was briefed only for the purposes of the *voir dire* proceedings and if the cautioned statement in question were to be admitted, the accused would then have to apply for legal aid.

In the event, the statement was admitted into evidence and the judge granted an adjournment to enable legal aid to be arranged.

It was not, however, in any way satisfactory as, of course, new counsel representing the accused needed a transcript of the proceedings to that stage and came new to the matter.

The judge was of the view that discretion over an adjournment had effectively been removed from the court and that at the very least the court should have been informed either at the pre-trial review or at the outset of the trial of the basis upon which counsel was briefed and the solicitors concerned instructed. The court could at that stage have considered the options open to it, which might have included a warning to the accused to elect either to seek legal aid at the outset or to become unrepresented if the cautioned statement were to be admitted.

The question of limited instructions has arisen before, particularly in regard to solicitors or counsel being instructed, usually in the lower courts, simply to apply for an adjournment, with no instructions to deal with the matter if an adjournment is refused.

May I please seek your views on the propriety of the acceptance of such limited instructions and, if they are not considered improper, at what stage the court should be informed of them?".

Advice

The Guidance Committee's response was as follows:

"The issue referred to in your letter is one that has come to the attention of the Law Society. Circular 30/90 "withdrawal of solicitors during criminal trial" (enclosed) was issued on 19 February 1990. The circular provides that during the

course of a criminal trial, a solicitor cannot come off the record without the leave of the court. It is a matter for the court to determine whether good reason exists and reasonable notice has been given when deciding whether or not to grant leave to come off the record. Council has adopted the view that a solicitor should never terminate a retainer without good cause and without reasonable notice. If a solicitor is acting in the defence of a client in criminal proceedings, and the trial is imminent or has commenced, he should be especially concerned about the effect on the client's defence of ceasing to act at such a late stage and should do so only in the clearest circumstances.

A client's failure to pay costs on account is not a good reason for ceasing to act unless there has been a breach of a pre-existing duty to pay them.

Where a solicitor considers that his client may be eligible for legal aid he must inform the client at the outset of the retainer of the availability of legal aid, and where to apply for it and he must recommend that the client apply for it. As the matter proceeds, it is the duty of the solicitor to ensure that any material change of which he is aware in his client's means is at once taken into consideration in the context of eligibility for legal aid. If the client was given such advice and chose not to apply for legal aid, this should be noted on the file. Sufficient funds should have been obtained from the accused for fees and disbursements at the beginning of the case, or agreement should have been recorded in writing as to payment of fees and disbursements. Otherwise, the client should have been advised of the possibility that he may be left unrepresented in the course of the trial.

In such a situation as that outlined in your letter, if the court was of the view that there was no good reason for the solicitor to come off the record, and reasonable notice had not been given to terminate the retainer, the solicitor may be required to continue to act for the period, which in the opinion of the court would constitute reasonable notice, or, where necessary, for the entire trial, depending on the facts of the case.

A client's failure to pay costs on account is not a good reason for ceasing to act unless there has been a breach of a pre-existing duty to pay them. When funds run out during a trial, every assistance should be given to the client to make an immediate application for legal aid. Unless there are exceptional circumstances, the solicitor should continue to act at legal aid rates if he is on the Legal Aid Panel and if he is assigned to act by the Director of Legal Aid.

If the accused was not advised as to his entitlement to legal aid when instructions were first received, this could, in certain circumstances, amount to professional misconduct and could give rise to disciplinary proceedings or a claim in negligence against the solicitor for breach of duty owed to the client.

It is the view of the Guidance Committee that it is not improper, though undesirable, to accept limited instructions provided that:

- the solicitor has fully advised the client of the consequences of only providing limited instructions and ensures that the case can be passed on to the next solicitor with minimum prejudice to the client
- the solicitor has advised the client of his entitlement to Legal Aid, if appropriate, and
- the judge and the opposing solicitors or counsel are advised at the earliest opportunity, in advance of appearance.

It is then for the court to decide whether the solicitor should be allowed to continue, or whether he or she may come off the record upon conclusion of the retainer, with or without conditions. The judge has the power to order the solicitor to continue, if it is in the interests of justice.

The committee is also of the view that there is no general rule, with respect to the question of limited instructions, simply to apply for an adjournment, with no instructions to deal with the matter if an adjournment is refused. It is not improper to apply for an adjournment in exceptional circumstances where it may be appropriate to seek an adjournment because the solicitor does not have adequate instructions to deal with the matter further, but the court and opposing counsel should be advised at the first available opportunity. Further, the client should be advised of the consequences if the application for adjournment is refused". ❖