ETHICAL PROBLEMS OF THE LEGAL AID ADVOCATE

by Dennis V. Daly

INTRODUCTION

Statutory legal aid in Jamaica is, for all practical purposes, provided only in criminal cases and then again only for persons charged with more serious crimes such as murder, manslaughter, rape, carnal abuse, robbery with aggravation, etc. This is provided for in the Poor Prisoners Defence Act.

Although there is, on the statute books an act called Poor Persons (Legal Proceedings) Act which provides for legal assistance in civil matters in the Supreme Court to be given to a poor person who cannot afford a lawyer it has been implemented in practice only in relation to petitions for the dissolution of marriage and only to a very limited extent.

Ethical problems in relation to statutory legal aid therefore, at least for the present, tend to be confined to advocacy in criminal cases. One says for the present because government is known to be investigating the feasibility of establishing a Legal Aid Council with the responsibility of dispensing civil as well as criminal legal aid but this is probably years away from implementation.

Ethical rules for the guidance of the legal profession have been formulated under the Legal Profession Act under seven broad Canons. These are:-

1. The Duty to maintain the Dignity and Integrity of the Profession
2. The Duty to avoid Unauthorised or Unprofessional Practice.
3. The Duty to the Public and the State.
4. The Duty to one's Client
5. The Duty to the Courts and the Administration of Justice
6. The Duty to one's Colleagues
7. The Duty to maintain Proper Accounts.

These Rules are theoretically intended to cover all areas of legal practice but in all probability do not. They reflect the practical wisdom of their framers and will probably be expanded and adjusted with time and experience. Those rules which apply to advocates generally apply whether or not the attorney is representing a fee-paying client or is doing so on legal aid, having been assigned by virtue of the provisions of the Poor Prisoner Defence Act.

There is at present only one rule that specifically applies to an attorney in relation to legal aid. This is rule (d) of Canon III and it states:

> "When an attorney consents to undertake legal aid and he is appointed by the Court or is requested by his professional association to undertake the representation of a person unable to

afford such representation or to obtain legal aid such attorney shall not (except for compelling reasons) seek to be excused from undertaking such representation".

It should, first of all, be noted that it is an asterisked provision which means that its breach shall constitute misconduct in a professional respect {Canon VIII Rule (d)} and maybe subject to disciplinary proceedings leading to the most serious consequences. At the same time the rule is so broadly stated that only a glaring attempt to renege from such representation is likely to be regarded as constituting a breach.

In the second place it appears to be directed not only to representation on statutory legal aid but also to situations in which the attorney may have agreed to undertake representation of someone at the request of the Bar Association or, perhaps, the General Legal Council, and accordingly may cover not only representation in criminal cases but possibly Civil actions and disciplinary proceedings.

It is yet to be determined what would be regarded as "compelling reasons" but it may safely be assumed that this would not include the fact that the cause was unpopular either among one's colleagues or the public at large especially having regard to the previous rule which states that " An attorney shall not be deterred

from accepting proffered employment owing to the fear or dislike of incurring the disapproval of officials, fellow Attorneys-at-Law or members of the Public". Nor would it be a "compelling reason", it would seem, that to continue the representation was not sufficiently remunerative unless one could show, presumably, in an unduly protracted matter that one's practice was being detrimentally affected.

Other Rules in Canon III which, although not confined to representation on legal aid are of distinct relevance to the existence provisions for statutory legal aid, are as follows-

(i) Rule (e) - which provides that "An attorney shall not (except for good reasons) refuse his services in Capital offences". This is a somewhat less stringent requirement than "compelling" in Rule (d), but does not require a prior undertaking. Its application may pose some difficulty.

(ii) Rule (g) which provides that "An attorney in undertaking the defence of persons accused of crime shall use all fair and reasonable means to present every defence available at law without regard to any personal views he may hold as to the guilt of the accused".

This rule may be said to have particular relevance to attorneys who represent an accused on legal aid. It embodies that most important principle that an accused

person is entitled to the best possible defence of which his attorney is capable and it is not for his attorney to judge his guilt or innocence but to provide that defence. This is, of course, true of private retainers as well as legal aid.

The reason for its particular relevance to legal aid cases, however, is because it is in this area, including cases of capital murder, that there are the greatest and oft justified complaints that attorneys had failed to provide the convicted men with an adequate defence and, on the contrary, had been less than diligent and industrious in the preparation of their defence. In a recent survey done with a view to the revision and expansion of the legal aid system, 69% of the persons represented on statutory legal aid believed that they were poorly represented at their trial by the attorney assigned.

This perception may be an exaggerated but contains sufficient truth for it to be a serious indictment against the profession and raises serious questions as to the extent to which the profession as a whole is committed to Rule (g) of Canon III.

The criticism is often made that many legal aid cases are tried by young and inexperienced attorneys but this will probably continue to be so except perhaps in Capital Murder cases under the best regulated legal aid system to the extent that more experienced attorneys will invariably have greater competing

commitments and less time to devote to legal aid assignments. The fact is that being young and inexperienced is no excuse for lack of preparation and the complaints seem to point to lack of preparation rather than simply to inexperience, such as the complaint that interviews with and taking of a statement from the accused are all too often done on the date of the trial.

As with a "genius", a successful advocacy requires the proverbial 90% sweat and 10% inspiration. There is no substitute for it. In representing an accused on a criminal charge, whether or not on legal aid the minimum preparation required is (i) reading and knowing thoroughly the depositions and/or statements of the crown witnesses (ii) interviewing and taking statements, and possibly several statements, from the accused, well in advance of the trial date, (iii) visiting the locus in quo where possible and (iv) interviewing all the potential witnesses for the defence, if any, and arranging for them to be present at the trial, if necessary, by subpoenaing them.

This is the minimum that would be done by an attorney who privately represented a client on criminal charges and to do less for a client on a legal aid assignment is to cheat him of the best possible defence to which he is entitled and to render him more likely to be convicted that he otherwise might be.

Providing the best possible defence may mean securing the services of expert witnesses, such as a doctor or a psychiatrist, in which case it would be a good idea to inform the registrar or other certifying authority of your intention, so that you can recover the costs on your legal aid bill. I recall once having to insist on getting another psychiatric opinion in a murder case although there was in the depositions a remarkably negative assessment by a psychiatrist which the prosecution had obtained in the course of the police investigations. In my own assessment, after interviewing the accused, in custody, and members of his family, up in the hills of Clarendon I might add, I came to the view that the accused was insane, so I insisted and obtained the opinion of a very reputable psychiatrist who confirmed my view that the accused was insane but further that he was so insane as to be unfit to plead. For over seven years this man could not be tried on the strength of the second opinion, although the first psychiatrist had been prepared to swear that the accused was of sound mind.

The important principle here, if the reputation of the bar is to be maintained and the system of statutory legal aid respected, is that the quality of representation given to accused persons on legal aid should be as good as if he had privately retained counsel.

Another aspect of the ethics of legal aid advocacy is best illustrated by quoting a seminal work on the English legal aid system {Matthew and Moulton's Legal

Aid and Advice (1971)} At pg. 231 it states "it is fundamental to the working of the legal aid system that an assisted person's (attorney-at-law) have an unfettered right to decide how their client's case should be conducted subject only to his wishes and to the safeguards for avoiding undue expense or the misuse of the scheme..." This relates to Rule (c) of Canon IV which states "An Attorney shall exercise independent judgment within the bounds of the law and ethics the of the profession for the benefit of his client".

Another Rule which would seem to have special relevance to Attorneys in legal aid cases is Rule"G" of Canon V. This states "An Attorney shall be punctual in attendance before the Court and concise and direct with trial and deposition of causes". This is related to the principle that an attorney should treat legal aid cases with equal diligence to cases in which he is substantially privately retained. He should therefore be as punctual in his attendance at court as he is in these cases and avoid leaving an impression that he is less interested in the outcome. Also he should not seek to obtain unnecessary postponements or to drag out the length of the trial simply to obtain greater remuneration for additional days' appearance.

It follows from the foregoing and independently of the Canons of professional ethics set out in the Code that an Attorney-at-Law should not "pad" his legal aid bill by including in it charges for services which he did not provide or out-of-

pocket expenses which were not incurred. it is also probably unethical although there is no specific rule against it and the statute does not prohibit it, for attorneys to supplement the statutory legal aid by requiring payments from the client or his relatives. It would, of course, clearly be unethical for an attorney to withdraw from a legal aid assignment because a client or his relatives failed to pay any sum, promised or not, in addition to the statutory fees.

The list of ethical problems which have reference to legal aid advocacy are not, of course, exhausted but I have attempted to highlight those which are more frequently encountered. There are, as well, specific ethical problems which will relate to civil legal aid if and when this is introduced, such as failing to attend to an assisted person's affairs with reasonable promptness, or picking and choosing cases etc. but time does not allow for these to be dealt with here. In any case it is just as well that a discussion of these problems should wait until we are closer to realising that goal.