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The Case for Contingent Fees in Presidential Pardons

By Evan T. Barr

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In the wake of several highly controversial presidential pardons handed down earlier this year to white collar defendants, the media reported that numerous similarly situated offenders were now retaining lawyers and lobbyists boasting of ties to the Trump Administration.

According to one story, some clients were willing to spend as much as $1 million or more on legal fees just for the chance to clear their names through the executive clemency process.

Of course, regardless of the choice of counsel, every pardon petition faces long odds against success. For that reason, agreeing to pay a huge upfront retainer under the circumstances would appear to be a poor investment for most applicants.

A contingent fee agreement, however, in which the attorney's compensation depends on the result obtained, might make more economic sense, and have the added benefit of making the process itself more accessible to a larger pool of petitioners.

This article will explore whether such a fee arrangement would pass muster under the applicable ethical rules and if so, whether it would be desirable from a criminal justice standpoint.

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Courtesy photo

Model Rule 1.5

Most practitioners are aware that under ABA Model Rule 1.5 (d), which has been uniformly adopted by jurisdictions around the country, a lawyer may not accept "a contingent fee for representing a client in a criminal case."

Proponents of this rule have put forth several rationales in support of this ban, as described in an excellent article by Cardozo Law Professor Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. Crim. & Criminology 498 (1991).

First, a contingent fee may create a conflict of interest between the lawyer's financial interests and the best interests of the client facing criminal charges. Specifically, if an attorney only gets paid in the event of outright acquittal, the lawyer might be tempted to advise against a reasonable guilty plea offer or fail to request that the court instruct the jury on a lesser included offense.

Second, legal services rendered in criminal cases typically do not produce a *res* (corpus of funds) from which to readily pay the lawyer's fee, as typically exists in a personal injury civil case.

Third, defense attorneys might take advantage of vulnerable criminal defendants who might feel compelled to accept disadvantageous fee terms under the pressure of facing the loss of liberty.

As Professor Lushing points out, however, many of these same concerns can and do equally arise in situations where defense counsel negotiates for a flat (non-refundable) upfront fee or even when he or she is being paid by the hour.

Opinions and Precedents

While there are no decisions on point regarding the propriety of soliciting or accepting a contingent fee in relation to seeking a pardon or commutation, there are at least two opinions (and one Clinton-era anecdote) that touch on the issue of whether such an arrangement can be used in post-conviction proceedings.

In Florida Bar Ethics Opinion 80-5, the inquiring attorney asked for an advisory opinion as to whether the standard prohibition against contingent fees in criminal cases applied where the attorney and client agreed that fees paid up front would be refunded if the attorney were *unsuccessful* in obtaining post-conviction relief from a criminal conviction. The opinion did not describe the specific type of post-conviction relief being sought.

The only open question, for the Ethics Committee, was whether this unconventional monetary arrangement qualified as a contingent fee—as opposed to any analysis of whether *post-conviction* work should be treated differently than a pending criminal case.

Because funds were to be paid in advance with a refund upon lack of success, the Committee concluded there was no operative distinction between the proposed arrangement and a contingent fee as described under Rule 1.5(d), and therefore it was prohibited.

In D.C. Bar Ethics Opinion 262 (1995), a lawyer sought permission to accept a contingent fee in connection with filing a writ of *coram nobis* (an extraordinary court order used to correct a fundamental error) seeking to set aside the client's prior court martial conviction.

In approving this request, the Ethics Committee found that the standard prohibition against such fees under Rule 1.5 (d) was only "intended to apply to criminal cases in which the government proceeds against a criminal defendant" but would not apply to a "petitioner" who "after release from custody, claims error in the previous criminal proceeding" and "initiates the legal action."

In February 2001, the media reported that South Florida lawyer Hugh Rodham, brother of then-Senator Hillary Clinton, was paid a "success fee" of approximately $200,000 for obtaining a pardon on behalf of Almon Glenn Braswell, who had previously been convicted on drug-related charges.

The story generated a firestorm of criticism, leading Rodham to return the fees at the request of former President Clinton and Mrs. Clinton. At the time the media focused on Rodham's allegedly improper access to the White House, not on the ethical propriety of the contingent fee arrangement at issue.

Nature of a Pardon Petition

While the temporal distinction drawn by the D.C. Bar opinion makes sense, pardons cannot automatically be categorized as either pre- or post-conviction proceedings.

Under Department of Justice guidelines related to executive clemency, pardon applications are not supposed to be filed until a waiting period of at least five years after the date of release from prison or (if no jail sentence was imposed) the date of conviction.

From a constitutional standpoint, however, the pardon power indisputably "may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." *Ex Parte Garland*, 71 U.S. 333 (1866). Famously, President Ford pardoned Richard Nixon prior to the filing of any Watergate-related charges against him.

Pardons also differ *qualitatively* from criminal cases. As the Supreme Court has noted, "[c] lemency proceedings are not part of the trial – or even of the adjudicatory process.

They do not determine the guilt or innocence of the defendant and are not intended primarily to enhance the reliability of the trial process. They are conducted by the executive branch, independent of direct appeal and collateral relief…" *Ohio Adult Parole Auth. v. Woodard.* 523 U.S. 272, 284 (1998).

Due to the political nature of the process, at least one federal court has ruled that counsel seeking a pardon are acting principally as lobbyists, not lawyers, and thus their communications may not be covered by the attorney-client or work product privileges. *See In re Grand Jury Subpoenas Dated March 9, 2001* , 179 F.Supp. 2d 270 (S.D.N.Y. 2001).

Conclusion

Given the absence of guidance in almost every jurisdiction, a lawyer contemplating a contingent fee for seeking a pardon must tread very carefully, especially in pre-conviction or pre-indictment settings, where it is much more likely that a bar ethics committee scrutinizing the arrangement would consider such work to be in relation to "a criminal case."

As the legal market for pardon work continues to evolve, it is probably only a matter of time before a court or ethics panel will confront this issue.

Some will argue that contingent fees would add to the appearance of a pay-to-play culture that already allegedly surrounds the pardon process, and for that reason alone should be banned in this context.

On the other hand, the conflict of interest that Rule 1.5(d) is primarily concerned with in criminal cases simply does not apply in most pardon applications, where there are no longer any potentially fraught decisions related to taking a guilty plea, for instance.

And assuming the president (as is most likely) does not grant the pardon, the contingent client is no worse off, from either a financial or litigation standpoint, than the status quo ante.

There is also a public policy argument to consider. As the former DOJ Pardon Attorney recently told *Bloomberg* in bemoaning the present situation with pardons, "it seems like ordinary people who don't have the resources to hire a lobbyist or well-connected lawyer and don't have political connections and access to the White House front door are not being considered for clemency at all."

If that's true, then allowing contingent fee arrangements in connection with pardon petitions might benefit those *less* privileged applicants (including non-white collar offenders) who would otherwise not be able to afford to hire clemency counsel out of pocket, especially to pursue a cause that is always going to be a legal longshot.

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