

Advisory Opinion 1986-10

Factual Situation:

A young attorney wishes to know the proper course of conduct in the following factual situation. The attorney represents a workmen's compensation claimant in a case pending in state district court. The attorney alleged in the complaint that the claimant was injured in the course and scope of his employment. The allegation was based on representations made to him by his client. The attorney subsequently acquired information which left him "with an abiding conviction that my client was not injured in the course and scope of his employment." The attorney is convinced that continued representation of the client would require the use of perjured testimony or false evidence and conduct which he believes would be fraudulent.

Upon receipt of this information, the attorney served notice of his intent to withdraw as counsel. The attorney sought opposing counsels consent, but opposing counsel refused. Opposing counsel then filed a motion for summary judgment, apparently on the issue of whether the injury occurred within the course or scope of employment. Opposing counsel has indicated to the attorney that he wants the claimant represented at the hearing on the motion for summary judgment and therefore refuses to consent to the attorney's motion to withdraw.

The attorney is concerned that if the summary judgment motion is heard before he has received permission to withdraw, he cannot adequately or properly represent the client.

Opinion:

The Committee does not believe that the attorney will be faced with the above dilemma because his motion to withdraw was filed before the motion for summary judgment and would normally be considered by the court first. In any event, withdrawal appears to be mandatory in this case. Rule 2-110(B) states:

(B) mandatory withdrawal. A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment ... if:

(2) he knows or it is obvious that his continued employment will result in violation of a disciplinary rule.

Certainly the attorney has stated grounds for permissive withdrawal. Rule 2-110(C)(1)(b), (c); (C)(2). If the court proceeds with the motion for summary judgment first, the attorney should alert the court to the motion to withdraw and fully apprise the court of the basis for withdrawal.

If for some inexplicable reason the court would not hear or grant the motion for withdrawal before the motion for summary judgment is heard, the attorney must not participate in fraudulent conduct. The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes disciplinary rules and enforceable professional regulations. EC 7-1. While an attorney should be zealous in his representation of a client and resolve reasonable doubts in favor of his client, Rule 7-102(A) of the New Mexico Code of Professional Responsibility clearly states:

(A) in his representation of a client, a lawyer shall not: * * *

(4) knowingly use perjured testimony or false evidence;

(5) knowingly make a false statement of law or fact;

(6) participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false;

(7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

The model Rules of Professional Conduct (ABA, August 2, 1983) state:

Rule 3.3 Candor Toward the Tribunal.

(a) A lawyer shall not knowingly: * * *

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. * * * (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Finally, Rule 7-101(B) provides:

(B) In his representation of a client, a lawyer may:

(2) refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

A lawyer who knowingly participates in the introduction of perjured testimony or false evidence is subject to discipline. EC 7-26. If the attorney knows his client has in the course of the representation perpetrated a fraud upon a person or tribunal, he should promptly call upon his client to rectify the same and if his client refuses or is unable to do so, he should reveal the fraud to the affected person or tribunal. Rule 7-102(B)(1).

The Committee notes that the nature of the withdrawal motion, if fully explained to the court, may put the client and his case in an unfavorable light before the court. The attorney has stated in his request that he is "not absolutely certain that opposing the motion for summary judgment would result in conduct not within the bounds of the law. " The attorney expresses concern for not violating any duty owed to the client. The attorney should confer with his client immediately, explain the basis for the withdrawal motion, explain his ethical obligations and the action he must take if a fraud is perpetrated. The Committee has no sympathy for the client if the client initially misrepresented facts to the attorney, and does not feel under these circumstances that the attorney violates any duty owed to the client by seeking to withdraw. While conferring with the client, the attorney may find his information is inaccurate or incomplete, or that there are other bases for a meritorious claim by the client. The attorney may then conclude that he can still represent the client with the clear understanding that he will not offer evidence which he knows or reasonably believes to be false. By conferring with the client, though, the attorney will have fulfilled any duty remaining to the client and given the client the opportunity to discharge him and seek other counsel.