

# Advisory Opinion 1986-5

A lawyer may ethically stipulate to dismiss an action without prejudice under N.M. R. Civ. P. 41(a)(1)(ii) with the intention of refile in order to obtain a new judge if he makes the determination that it is lawful to do so. Upon refile, if the same judge is assigned to the case, the lawyer may take advantage of a change in the statute and rule governing judicial disqualification to exercise a peremptory challenge to the judge.

## A. Facts Set Forth in the Request for Advisory Opinion:

1. Counsel represents the plaintiff in a civil case filed in district court before April 1, 1985.
2. Counsel and the defense attorney are both of the opinion that the district judge to whom the case is assigned has "little or no ability to understand the issues presented" and will commit numerous errors in trying the case, possibly resulting in one or more appeals and retrials.
3. Under the version of N.M. Stat. Ann. § 38-3-9 (1978) (1984 Supp.) and R. Civ. P. 88.1 (Original Pamphlet) in effect before April 1, 1985, neither party was entitled to a peremptory challenge to the judge. The judge could be disqualified only by showing bias. Counsel makes no claim that the judge is biased. Under the versions of the statute and rule which became effective April 1, 1985, each party is entitled to a peremptory challenge; no showing of bias is required.

## B. Advisory Opinion Requested:

Question 1: May the attorneys for the plaintiff and defendant stipulate to dismiss the case without prejudice, with the understanding that the plaintiff will later refile?

Question 2: If the same judge is assigned to the case when it is refiled, may counsel exercise a peremptory challenge in order to remove the judge?

## c. Opinion:

Question 1: The attorneys for the parties, with the consent

of their clients, may ethically stipulate to dismiss the action without prejudice if they determine that there is no legal bar to doing so.

## Discussion:

The question presented involves both legal and ethical problems. It is not this Committee's function to decide questions of law; counsel must satisfy himself as to the legality of his proposed actions.

Counsel proposes to dismiss the action by stipulation pursuant to N.M. R. Civ. P. 41(a)(1)(ii), which provides in pertinent part:

Subject to the provisions of Rule 23(e) of any statute, an action may be dismissed by the plaintiff without order of the court... (ii) by filing a stipulation of dismissal signed by all parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice ....

Counsel must determine for himself the legality of using a Rule 41(a)(1)(ii) stipulated dismissal in order to change judges. By way of assistance, counsel is directed to the following cases, many of which are dismissed in Annot., Plaintiff's Right to File Notice of Dismissal Under Rule 41(a)(1)(i) of Federal Rules of Civil Procedure, 54 A.L.R. Fed. 214 (1981). We have found no cases on Rule 41(a)(1)(ii); because all parties must stipulate to dismissal under 41(a)(1)(ii), there is ordinarily no one with standing to challenge the right of the parties to dismiss. The reasoning applicable to unilateral dismissals by the plaintiff under Rule 41(a)(1)(i) appears generally applicable to Rule 41(a)(1)(ii) dismissals by stipulation, however.

For cases taking the view that the plaintiff's reason for dismissing an action under Federal Rule 41(a)(1)(i) is immaterial, see *Thorp v. Scarne*, 599 F. 2d 1169 (2d Cir. 1979) ; *Littman v. Bache & Co.* , 252 F. 2d 479 (2d Ci r. 1958) ; *Tele-Views News Co. v S.R.B. TV Publishing Co.* , 198 F. Supp. 365, 28 F.R.D. 303 (E.D. Pa. 1961); *Wilson & Co. v. Fremont Cake & Meal Co.*, 83 F. Supp. 900 (D. Neb. 1949); *Moffatt v. Provorse*, 8 Fed. Rules Serv. 41 a 111, Case 3 (W.D. Mo. 1945); *Flaig v. Yellow Cab Co.*, 4 F.R.D. 174 (D. Mo. 1944).

The court stated in *Moffatt v. Provorse*, *supra*:

It would, indeed, be a strange procedure that would foreclose a litigant from the exercise of a right [to dismiss under Rule 41(a)(1)(i)] guaranteed by law and protected by a clear and unequivocal rule of court. The court would have no right to question the purpose of the plaintiff in dismissing the action. It was a right springing from the law and protected by rule. 8 Fed. Rules Serv. 41 a 111, Case 3, at 709.

For cases considering the plaintiff's purpose in seeking dismissal under Rule 41(a)(1)(i) as a factor in denying the plaintiff's right to dismiss, see, *Harvey Aluminum v. American Cyanamid Co.* , 203 F.2d 105 (2d Cir. 1953), *cert. denied*, 345 U.S. 964, 73 S. Ct. 949, 97 L. Ed. 1383 (1953) *Love v. Silas Mason Co.* , 66 F. Supp. 753 (W.D. La. 1946) ; *Baker v. Sisk*, 1 F.R.D. 232 (E.D. Okla. 1938).

Canon 7 of the New Mexico Code of Professional Responsibility requires that a lawyer should represent a client zealously within the bounds of the law. Rule 1.3 of the ABA Model Rules of Professional Conduct is of similar effect. Zeal on behalf of a client can easily lead to excesses, however, and Rule 7-101(A)(1) of the New Mexico Code of Professional Responsibility requires a lawyer to seek his client's lawful objectives "through reasonably available means *permitted by law and the Disciplinary Rules....*" (Emphasis added).

The question of how far a lawyer may go in representing his client while remaining within the bounds of the law is addressed in EC 7-3 and EC 7-4, ethical considerations contained in the ABA Model Code of Professional Responsibility, which provide in pertinent part:

EC 7-3: Where the bounds of law are uncertain-the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law....

EC 7-4: The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail ....

The obligation to act zealously on behalf of the client would seem to permit counsel to use the Rule 41 dismissal procedure if he concludes that he may legally do so and he believes that another judge would be substantially less likely to commit multiple errors that might result in appeals, retrials, additional expense, and possible miscarriage of justice.

Rule 7-106(C)(7) prohibits a lawyer from "intentionally or habitually violating any established rule of procedure or of evidence." Here again, counsels position on the legality of using a Rule 41 dismissal to obtain a new judge will determine whether he is in compliance with a rule of ethics.

A basic ethical concern that is not addressed specifically by any of the New Mexico Canons or disciplinary rules or by the ABA Model Rules is that our system of justice may be degraded in the eyes of the parties to this case if they see their lawyers dismissing the action in order to obtain a new judge. Canons 1, 8, and 9 all bear on this situation, but none of them gives specific guidance in this situation. Rule 8-102 of the New Mexico Code of Professional Responsibility and ABA Model Rule 8.2(a) apply by their terms only to false statements and accusations against judges, but they derive from the principle that the office of judge is worthy of respect, no matter what the shortcomings of the person filling the office. In explaining to his client why he desires to change judges, counsel is advised to express his reservations about the judge now assigned to the case in moderate and objective terms, without overtones of insult or contempt. if counsel decides to dismiss under Rule 41, he should also be sure his client understands that he has taken pains to establish that he is legally and ethically entitled to use a Rule 41 dismissal as a means of having the case assigned to another judge.

Question 2: If the same judge is assigned to the case when it is refiled, counsel may exercise a peremptory challenge in order to remove the judge.

Discussion:

The answer given to question 2 is dependent on the result under question 1. If counsel determines that he may legally use a Rule 41 dismissal without prejudice, he may then refile the action. Changes in N.M. Stat. Ann. § 38-3-9 (1978) and N.M. R. Civ. P. 88.1 have become effective since the case was originally filed, so that upon refileing, counsel will be entitled to a peremptory challenge to the judge. We see no ethical bar to exercise of the peremptory challenge.