

Advisory Opinion 1987-9

Factual Situation:

An attorney, having taken over the prosecution of a lawsuit initially filed by another attorney, wishes to know whether he may withdraw from representation when the client refuses to pay for legal services rendered. The attorney also wishes to know whether he may advise the judge, at the hearing on the motion to withdraw, that one of the reasons for withdrawal is that he believes the case may be frivolous. The underlying case is for fraud, accounting, and money due, and would therefore be tried to the court rather than to a jury.

Opinion:

The first issue, that of permissive withdrawal, is the subject of Rule 16-116 of the Rules of Professional Conduct. That Rule provides that a lawyer may withdraw if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." (Rule 16-116(B)(4)). The Rule is straightforward and requires no further elaboration. The Committee is not in a position to determine if the client's failure to pay for services is "substantial." The attorney should make that determination and assure that reasonable warning of withdrawal is given to the client.

The second issue, whether the attorney may advise the court at the hearing on the motion to withdraw that he thinks the case may be without merit, should not have to arise since the attorney should be allowed to withdraw under Rule 16-116(B)(4). If the issue does arise, it may perhaps be best resolved by preventing the confrontation. The attorney might simply convey his misgivings to the client and thereby allow the client the opportunity to discharge him. In this regard, the considerations addressed in Advisory opinion No. 1986-10 are related, although the present case does not appear to present a likelihood that the attorney will be participating in a fraud upon the court if he does not withdraw.

If the client steadfastly maintains that his suit is meritorious and will not discharge the attorney, then the attorney is confronted with the conflict between his duty not to prejudice the client's cause if it is in fact meritorious and his duty to the court not to pursue frivolous litigation. The conflict can be avoided if the judge will accept as a reason for withdrawal the simple assertion that there has been an irretrievable breakdown in communication between the attorney and the client. The conflict is inevitable if the judge demands to be informed of the details of the disagreement with the client.

The committee has been unable to find authoritative pronouncements about the proper course of conduct under these circumstances, but the nature of the dilemma suggests that the best resolution would be to separate the issue of withdrawal from the issue of the merits of the case. This could be accomplished in one of two ways. First, the attorney might ask the judge to allow a different judge to hear the motion to withdraw. Second, the attorney could ask the judge to recuse himself from the case if he decides to hear the withdrawal motion himself. The basis for this request is that the attorney cannot disclose his reason for requesting to withdraw without risking prejudice to the client's case.

The committee wishes to point out that both of the problems in this case might have been avoided if the attorney had given more thought to the case before agreeing to represent the client. Because an attorney has a duty not to undertake frivolous litigation, EC 7-4, Rule 16-301 (Rules of Professional Conduct), Rule 11 (New Mexico Rules of Civil Procedure), an attorney should investigate claims thoroughly enough to determine whether they lack merit before agreeing to pursue them.