

# Advisory Opinion 1995-1

## QUESTION OF DISAGREEMENTS BETWEEN LAWYERS AND THEIR CLIENTS OVER COURSES OF ACTION TO BE TAKEN

The Advisory Opinions Committee of the State Bar of New Mexico has been asked for advice concerning a lawyer's ethical course of conduct in circumstances where the lawyer's client seeks control of a litigated matter such that the lawyer's independent exercise of judgment and duty to the tribunal would be substantially impaired.

The matter at issue involves a somewhat complex dispute that has been in civil litigation for some time. The court is located some distance from the lawyer's city, such that additional time is necessitated by court appearances. A preliminary resolution was reached in mediation. However, the client was not satisfied with the written memorandum of agreement generated following the mediation. The client wants to draft the documents, including those which are to be filed with the court, and wishes to have the lawyer sign on the client's behalf. A hearing has been scheduled by opposing counsel to bring the client back to the table and the client has instructed the lawyer that the client, not the lawyer, will attend and handle matters at the hearing. At the same time, the client wants the lawyer to continue as the attorney of record and to represent the client if the matter develops further. Pending such further developments, however, the client has instructed the lawyer to expend no more than one hour of time on the client's case.

Under the situation presented, what are the lawyer's duties to the client and to the court and under what circumstances should the lawyer withdraw from the representation?

### THE LAWYER'S DUTIES TO THE CLIENT

The lawyer's obligation is to provide the client with competent representation, and to use his or her professional skill and legal knowledge for the benefit of the client. SCRA 1986, 16-101 (Repl. Pamp. 1991). The lawyer shall abide by the client's decision concerning the objectives of the representation and shall consult with the client concerning the means by which those objectives are to be accomplished. SCRA 16-102(A). The objectives of the representation may be limited, after consultation with the client. SCRA 16-102(C). The lawyer shall also consult with the client concerning limitations which may be imposed on the lawyer's conduct by applicable law or by the Rules of Professional Conduct. SCRA 16-102(E).

A conflict of interest may arise between the lawyer and the client where the client directs the lawyer to accomplish the representation through means which conflict with the lawyer's duties to the court or under the Rules of Professional Conduct. See SCRA 16-107(B). The lawyer is also bound to exercise his or her independent professional judgment concerning the representation and to render candid advice to the client. SCRA 16-201.

Moreover, the lawyer shall decline or terminate representation where the representation will result in a violation of the Rules of Professional Conduct or other law and may terminate representation where it has been rendered unreasonably difficult by the client. SCRA 16-116(A) & (B). As discussed in the Comment to Rule 16-116, the lawyer should not accept the representation unless it can be performed competently and promptly to completion, without conflict of interest. If the client demands conduct in violation of the Rules, the ordinary solution is for the lawyer to withdraw. At the same time, it is the right of the client to discharge the lawyer at any time. SCRA 16-116(A)(3). However, the lawyer should counsel the client concerning the consequences of discharging the lawyer. A client's discharge of counsel is an exercise of an inherent right. *Olsen & Brown v. City of Englewood*, 889 P.2d 673, 676 (Colo. 1995). *But* see *Mass v. McClenahan*, No. 93-CIV-3290, 1995 WL 272551, 67 Fair Empl. Prac. Cas. (BNA) 1597 (S.D.N.Y. May 8, 1995). (While it is a worthwhile goal to protect a client's right to discharge his or her lawyer at any time, where there was clear evidence that termination was for prohibited discriminatory reason, lawyer's claim of discrimination was upheld.)

The relationship between the lawyer and the client rests on the agreement between them. See ABA/BNA Lawyers' Manual on Professional Conduct 31:302. The relationship between the lawyer and the client is contractual, resulting from the mutual agreement and understanding of the parties. *Delta Equip. & Const. Co.*, 186 So.2d 454, 458 (La. Ct. App. 1966). However, in general, because of the lawyer's superior knowledge and status as a member of the bar, the procedural aspects of the case are within the lawyer's control, while the client retains final say over the ultimate resolution of the matter. ABA/BNA Lawyers' Manual on Professional Conduct 31:302. The client's control over the resolution does not absolve the lawyer of his or her duty to exercise independent judgment. *Id.* At the same time, the lawyer may not

proceed without the client's informed consent. *Id.* at 31:306; *Graves v. P.J. Taggares Co.*, 616 P.2d 1223, 1227 (Wash. 1980) (attorney without authority to bind client to stipulations or compromises in the conduct of litigation absent special authority granted by client).

### **THE LAWYER'S DUTIES TO THE COURT**

The lawyer is obliged to make reasonable effort to expedite litigation and to advance only meritorious claims or contentions. See SCRA 16-302,-301. Consistent with the dictates of Rule 16-301, the Rules of Civil Procedure require that the lawyer signing a pleading or other paper certify that there is good ground to support it and that it is not interposed for delay. SCRA 1986, 1-011 (Repl. Pamp. 1992).

Once the lawyer has entered his or her appearance in a case, the lawyer may not withdraw without the written consent of the court. SCRA, 1-089. Local rules of court also require that withdrawal be approved by the court, pursuant to Rule 1-089. See, e.g., LR1-210(B), LR2-117(C); *see also* D.N.M. LR-CV. 83.3(e). Thus, until an attorney of record has been relieved by the court, he or she is under a continuing obligation to attend and appear on behalf of the client.

Under the facts of the questions presented to the Committee, the client's wish to draft documents and to appear in court without the lawyer are at odds with the lawyer's obligation to represent the client before the court and to continue to assure that the documents presented to the court are appropriate under the rules.

The instant tension arises because the attorney must represent the wishes of the client and allow the client, after consultation, to determine what is in the client's best interests, and to act accordingly, within the limits of the law. *Orr v. Knowles*, 337 N.W.2d 699, 702 (Neb. 1983). The lawyer's duty to consult with and to advise the client may be met by writing to explain the consequences of the actions to the client. See Ethics Advisory Panel of the Rhode Island Supreme Court, Opinion 90-3 (January 18, 1990), ABA\BNA Manual 901:7807.

In a litigated matter, the lawyer should continue the representation until the court has granted permission to withdraw. Standing Committee on Professional Responsibility and Conduct of the State Bar of California, Opinion 1994-134 (undated) ABA/BNA Manual 1001:1603. Further, if the lawyer's motion to withdraw is denied by the court, the lawyer will be obliged to disregard the client's direction to cease work and to follow the court's orders to take reasonable steps to continue to protect the client's interests. Ethics Advisory Panel of the Rhode Island Supreme Court, Opinion 92-49 (July 23, 1992), ABA/BNA Manual 1001:7812-13. However, the lawyer may be entitled to receive compensation for services rendered on a quantum meruit basis. See *Olsen & Brown v. City of Englewood*, 889 P.2d 673, 675 (Colo. 1995); Committee on Professional Ethics of the Illinois State Bar Association, Opinion 92-22, (May 12, 1993), ABA/BNA Manual 1001:3012.

Under the circumstances presented to the Committee, there are several obligations which the lawyer must observe and follow. The lawyer is under an obligation to assure that each of the documents to be presented to the court is well founded and accurate. This duty cannot be delegated to the client. The lawyer should not permit the client to appear pro se unless, upon motion, the court has consented to the lawyer's withdrawal. Note that the client, as a pro se party may be held to the same standards as if represented by an attorney. See *Nwachuku v. Yellow Cab Co.*, 895 P. 2d 741, 743 (Okla. Ct. App. 1995).

Most importantly, the lawyer should advise the client that the lawyer may not ethically continue to represent the client if the client wishes to limit the scope of the representation such that the lawyer is prohibited from the independent exercise of his or her professional judgment and, absent discharge and withdrawal from the case, precluded from representing the client before the court in which the lawyer has entered an appearance on behalf of the client. The client should be counseled, preferably in writing, concerning the ramifications of the client's decision. If, after consultation, the client persists in refusing to permit the lawyer to appear and to exercise the necessary judgment and control over the pleading or other papers, the lawyer should, upon proper motion, request permission of the court to withdraw from the case. It is the opinion of the Committee that the lawyer should first provide the client with the information necessary to ensure that the client understands the lawyer's obligations to represent the client within the strictures of the Rules of Professional Conduct and the applicable rules of court. The client may then choose to retain the lawyer under mutually acceptable terms, or discharge the lawyer. If the client does not choose to discharge the lawyer, but determines that the representation should continue under conditions which do not permit the lawyer to fulfill the lawyer's professional duties,

the lawyer should withdraw. In the case of discharge and of withdrawal, the lawyer must also seek an appropriate order of the court permitting the withdrawal.