



Committee on Professional Ethics

Opinion #440 - 7/23/76 (54-76) Topic: Withdrawal from employment.

Digest: Guidelines governing lawyer's withdrawal from representation.

Code: DR 2-110, 7-101(A)(2)
EC 2-32, 7-8

QUESTION

Is it proper for plaintiff's lawyer, after the institution of a negligence action, to seek permission from the Court to withdraw from representation of a client where he finds upon investigation or consultation with experts that there is no liability, he has "client problems", or because of recent illness the lawyer has been advised by his doctor to curtail his activities?

OPINION

It is only for the most compelling reason that a lawyer who has accepted employment from a client may be relieved from the obligation he has assumed. EC 2-32; Former Canon 44. If a matter is pending before a tribunal and the rules of the tribunal require its permission for withdrawal, the lawyer may not terminate his representation without first applying to and obtaining the consent of the tribunal. DR 2-110(A)(1). Even if an attorney decides to retire from the practice of law he must obtain the Court's permission to withdraw from a litigated matter. N.Y. State 178 (1971). In every case, before withdrawing, a lawyer must take reasonable steps to avoid foreseeable prejudice to his client's rights, including giving due notice to the client and allowing time for his client to employ other counsel. DR 2-110(A)(2).

In certain situations withdrawal is mandatory (subject always to the Court's consent, if required by its rules), and these include a case where the lawyer's mental or physical condition renders it "unreasonably" difficult for him to carry out his employment effectively. DR 2-110(B)(3). If such condition merely renders it "difficult" as distinguished from "unreasonably" difficult, the Code nevertheless, authorizes a lawyer to seek permission to withdraw. DR 2-110(C)(4). A reasonable application of these rules would permit a lawyer who is partially disabled, or weakened by an illness to curtail his activities to select which of his cases he believes he can effectively handle, and request the tribunal for permission to withdraw from others.

If a lawyer, after instituting suit on behalf of a client, becomes convinced by an investigation or by consultation with experts that there is no liability on the part of the defendant, he may request permission to withdraw. DR 2-110(C)(1)(a). A retainer agreement providing for such withdrawal if the Court permits is proper, but it cannot dispense with the Court's permission in a litigated matter. See, however, N.Y. City 221 (1932), under Former Canon 44.

A different situation exists where a lawyer seeks to withdraw

because of "client problems". The propriety of an application to withdraw in such cases will depend upon the nature of the problems. Many of these are spelled out in DR 2-110(C)(1), wherein it is provided that a lawyer may request permission to withdraw because, among other reasons, his client:

- (a) Insists upon pursuing an unwarranted claim.
- (b), (c) Personally seeks to pursue, or insists that his lawyer pursue an illegal course of conduct.
- (d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.
- (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer. See N.Y. State 115 (1969); N.Y. City 286 (1933); Former Canon 44. See also, DR 7-101(A)(2) and EC 7-8.

DR 2-110(C)(1)(f) also provides for withdrawal by a lawyer if his client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees". The key word is "deliberately". "Mere failure to pay an agreed fee, which is not deliberate, is not a ground for requesting such permission" (to withdraw). N.Y. State 212 (1971); N.Y. State 187 (1971). Application for withdrawal may also be justified where a client refuses to pay for necessary disbursements.

There are of course, many problems which are not explicitly treated in the Rules. For example, in N.Y. County 55 (1914) the Committee's advice was solicited by a lawyer whose client wrote him grossly abusive epistles, found fault with his advice, and did not avail himself of the attorney's efforts to accomplish a substitution. The Committee held that the lawyer could apply to the Court, on notice to the client, to be allowed to withdraw. See also ABA Inf. 807 (1965).

The Code provides relief to a lawyer of a catch-all nature in DR 2-110(C)(6), by providing that a lawyer may request permission to withdraw if "he believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal."
