NEW YORK STATE BAR ASSOCIATION

ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion 598 - 2/1/89 (4-88)

Topic: Withdrawal from employment for non payment of fees; circumstances in which court's consent is not required for permissive withdrawal in a litigated matter.

Digest: An attorney may apply to withdraw from representation of impecunious client for non-payment of fees in a litigated matter where proper notice is given to client; permission of tribunal is required for permissive withdrawal unless client consents, new counsel is substituted and there is no court rule requiring its permission.

Code: EC 2-16, 2-25; DR 2-110(C)(1)(f); 2-110(A)(2); 5-101(A); 2-110(C) and (C)(5); 2-110(A)(1), (B) and (B)(4)

Former Canon 44

QUESTIONS

1. May an attorney withdraw from employment in a litigated matter because of nonpayment of fees where the client is financially unable to make payment?

2. Must an attorney seek judicial permission to withdraw from representation of a client in a litigated matter where the client has consented to the withdrawal?

OPINION

1. Withdrawal for Non-Payment of Fee

DR 2-110(C)(1)(f) provides that a lawyer in a litigated matter may apply to the court for permission to withdraw from representation of a client who "(d)eliberately disregards an agreement or obligation to the lawyer as to expenses or fees." We have previously noted that a client's "mere failure to pay an agreed fee, which is not deliberate" does not warrant withdrawal by the attorney from the representation. N.Y. State 212 (1971). As we observed in N.Y. State 440 (1976), the "key word is 'deliberately'." We have not had occasion to consider whether a client acts "deliberately" within the meaning of the Rule if the failure to pay fees results from financial inability. For the reasons expressed below, we conclude that a client's non-payment of fees because of an inability to pay may in certain circumstances be deemed a "deliberate" breach of the client's obligation to counsel and, therefore, warrant permissive withdrawal from the representation by counsel. Such withdrawal will be appropriate in a litigated matter only if the attorney has provided clear notice to the client of the attorney's desire to withdraw, taken reasonable steps to avoid foreseeable prejudice to the client and obtained permission from the tribunal to withdraw unless, as noted in our response to Question 2, other counsel has been substituted with the consent of the client.

Withdrawal from representation by an attorney for non-payment implicates a number of conflicting considerations, including potential prejudice to the client, the broad professional obligation to render services to the needy, the attorney's own financial interests, and the need of the tribunal for orderly proceedings. The Code resolves these factors in part by requiring in DR 2-110(A)(2) that counsel shall not withdraw, regardless of the reason, without taking "reasonable steps to avoid foreseeable prejudice to the client." That requirement implies that withdrawal should not occur at a time when such withdrawal would give rise to immediate harm to the client, but does not bar withdrawal where the client may be unable to afford new counsel, even though leaving the client without representation may damage the client's position. While EC 2-25 declares that "(t)he rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . . ," the Code does not require that an attorney provide free services in any particular case. To the contrary, the courts have recognized that coun-

sel do not have an obligation to "finance litigation" or render gratuitous services where a client has declined payment. *See generally, Holmes v. Y.J.A. Realty Corp.*, 128 A.D.2d 482, 483, 513 N.Y.S.2d 415, 416 (1st Dept. 1987); *Cullen v. Olins Leasing Inc.*, 91 A.D.2d 537, 457 N.Y.S.2d 9 (1st Dept. 1982).

It is impossible to determine in the abstract the appropriate resolution of these competing factors; each case must be assessed to determine a result that will be fair to the client, the attorney and the court, taking the rights and interests of each into account. If the requirement of DR 2-110(C)(1)(f) that the client act "deliberately" in refusing to pay were construed to apply only to a purposeful and intentional choice on the client's part, the several competing factors implicated by a client's inability to pay would in effect be automatically resolved against withdrawal; in particular, the reasonableness of the attorney's expectation of and entitlement to payment for services would be eliminated as a consideration in determining the appropriateness of withdrawal. This interpretation would likely give rise to disputes concerning the extent to which the client is in fact unable to pay and the priorities by which the client manages the expenditure of limited resources. Accordingly, we reject this interpretation. We believe that a client "deliberately disregards an agreement or obligation" to pay legal fees whenever the failure is conscious rather than inadvertent, and is not *de minimus* in either amount or duration. A client's knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify the lawyer's withdrawal from employment under DR 2-110(C)(1)(f) or, where a tribunal's permission is required, application to the tribunal for permission to withdraw. This would be so even where the failure results from inability to pay.

We agree with the few judicial decisions that explicitly address the interpretation of DR 2-110(C)(1)(f) in the context of non-payment resulting from financial inability. In *Pennsylvania v. Scheps*, 361 Pa. Super. 566, 523 A.2d 363, 369-70 (1987), a case in which an impecunious client accommodated counsel's desire to withdraw by purporting to "discharge" counsel, the court held:

> This term "deliberate" has not been interpreted or construed in any decision and, to say the least, it is an obtuse term in considering the totality of the circumstances having to do with the attorney-client relationship. The term "deliberate," in our opinion, in the context of an attorney-client relationship does not necessarily mean it has to be done with vindictiveness or in an inimical sense so long as it is intelli-

gent, voluntary and with a full understanding as to what the discharge means.

The court rejected the dissenting judge's position that the client's nonpayment was not "deliberate" because "it was simply impossible for him to make any payment." 523 A.2d at 373. *Accord, e.g., Pennsylvania v. Roman*, __Pa. Super.__, 549 A.2d 1320 (1988) (nonpayment of fee warrants withdrawal: "the principal inquiry under DR 2-110(C)(1)(f) is whether the client was aware of his failure to pay counsel"); *Pennsylvania v. Sweeney*, 368 Pa. Super. 33, 533 A.2d 473 (1987) (client's inability to pay fee warrants counsel's withdrawal); *Boyle v. Revici*, No. 83 Civ. 8997 (MJL), 1987 W.L. 28707 (S.D.N.Y. Dec. 16, 1987) (client "deliberately disregards" fee agreement where client, despite repeated requests, in unable to assure counsel that past due fee or future fees "will be paid at any time"); *see also Tremont Electric Inc. v. Rampinelli Electric Co.*, N.Y.L.J. Jan. 3, 1989, at 22 (N.Y. Sup. Ct.) (counsel granted leave to withdraw from representation of principal of bankrupt company for non-payment of fees); *Cullen v. Olins Leasing, supra*, 91 A.D.2d at 538, 457 N.Y.S.2d at 10 (client's failure to pay fees with notice of consequences warrants permissive withdrawal).[1]

Although withdrawal is, therefore, permissible under DR 2-110(C)(1)(f) where a client has failed to pay counsel a known obligation, withdrawal will not necessarily be appropriate in all such circumstances where the client is financially unable to pay. The amount of work performed and paid for in comparison to the work remaining, the amount of the fees paid to date, and the likely effect on the client are some of the factors that need be assessed in ascertaining whether withdrawal is proper in a particular case. Since the attorney's financial interest is directly at stake in the resolution of the competing interests, the attorney should not make this assessment unilaterally in a litigated matter, where an impartial tribunal is readily available to make the determination. *Cf.* DR 5-101(A). Withdrawal pursuant to DR 2-110(C)(1)(f), in a litigated matter, should be within the discretion of the tribunal with jurisdiction over the matter, which can weigh the facts of the particular case

1 In a similar vein, the court in *SEC v. Musella*, No. 83 Civ. 342 (CSH) (S.D.N.Y. July 27, 1984) (LEXIS Genfed Library, Dist. file), observed that the phrase "'deliberately disregards' is somewhat obscure." *Id.* at 1. The court held that the phrase does not apply to a "failure to pay *promptly*," so that withdrawal was not permitted where the clients were making "good faith efforts" to meet a past-due obligation. *Id.* (Emphasis supplied.) Nonetheless, the court observed that if the clients failed to satisfy a realistic payment schedule to be established with their consent for the overdue fee, the court would grant a renewed motion for withdrawal by their counsel. In so noting, the court implied that failure to meet the payment schedule, even if caused by continuing financial difficulties, would constitute deliberate conduct for purposes of DR 2-110(C)(1)(f).

and reach a fair result. *See, e.g., SEC v. Musella, supra; Charles Weiner Corp. v. D. Jack Davis Corp.*, 113 Misc. 2d 263, 448 N.Y.S.2d 998 (Civ. Ct. 1982) (counsel's motion to withdraw for non-payment of fee rejected); *Isser v. Berg*, 38 Misc. 2d 957, 239 N.Y.S.2d 370 (Sup. Ct. 1963) (same). Consequently, the lawyer should apply to the tribunal for permission to withdraw even if the tribunal's own rules do not require its leave.

This result is consistent with the text of DR 2-110(C), which provides that the various grounds for permissive withdrawal authorize an attorney to "request permission to withdraw in matters pending before a tribunal . . . ." It is also supported by our prior opinions[2] and the opinion of at least one other jurisdiction.[3]

We note that the text of DR 2-110(C) differs from that of its predecessor, Canon 44, in an important respect concerning the role of the tribunal in a litigated matter. Canon 44 by its terms authorized counsel to withdraw in all cases, including litigated matters, without reference to a tribunal, where a client "deliberately disregards" an obligation to pay fees. In contrast, counsel under DR 2-110 as interpreted by this Committee, seeking to withdraw in such circumstances from a litigated matter must apply to the tribunal before which the matter is pending for leave to withdraw (except under the limited circumstances discussed below in the response to the second question posed here). Consequently, to the extent Canon 44 was interpreted to require that a client's failure to pay be "willful, deliberate and inexcusable" before withdrawal was appropriate, see N.Y. County 390 (1950) (withdrawal prior to trial not justified by nonpayment of fee "due to inability to pay . . . especially

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2 *See* N.Y. State 212 (1971) ("Where . . . a client deliberately disregards an agreement or obligation to his lawyer as to expenses for fees the lawyer *may request* the court for permission to withdraw") (emphasis supplied); N.Y. State 187 (1971) (same).

3 Michigan Opinion 870 (1983). ABA/BNA 801:4856 (lawyer may "seek withdrawal" in event of client's inability to pay fees; agreement with client providing in advance for automatic withdrawal in such circumstances is "contrary to the profession's obligation to provide legal services to the needy")

One bar association has suggested that it would be unethical for an attorney even to seek judicial permission to withdraw where the sole ground for such an application is the client's inability to pay fees owing to insolvency. Los Angeles Opinion 362 (1976), 52 L.A.B.J. 300 (1976), indexed in *Maru's* Digest No. 10555 (1980). We disagree with that suggestion for the reasons stated above, and note that the only support offered for that conclusion is a citation to EC 2-16 and to an earlier opinion, Los Angeles Opinion 251 (1959), 34 L.A.B.B. 139 (1959), indexed in *Maru's* Digest No. 494 (1970). In our view, that latter opinion does not stand for the proposition for which it is cited. To the contrary, Opinion 251 provides only that an attorney may withdraw from representation of an insolvent insurance company where he determines that neither the insurer nor the insureds whom he is defending will pay him and his withdrawal will not prejudice the rights of the individual defendants. EC 2-16 states that lawyers "should support and participate in appropriate activities" that assure that indigents are able to obtain necessary legal services.

where, as here, the client has honored his obligations to the attorney by making the various payments required during the earlier stages of the litigation''), such interpretation may have been warranted by the need to assure that the variety of factors discussed above are considered before the appropriateness of withdrawal for non-payment is determined. DR 2-110 satisfies that objective by requiring that application for leave to withdraw be made to the appropriate tribunal, which will consider such factors in deciding the application. Accordingly, the restrictive interpretation of the ''deliberate disregard'' criterion under Canon 44 is not necessary or desirable in construing the current rule, which imposes the requirement of judicial permission.

It is significant that even under Canon 44 there was no suggestion that counsel was ethically barred from applying to the court for leave to withdraw in cases of nonpayment due to inability to pay; to the contrary, that was the preferred course of conduct. *See* N.Y. City Opinion 435 (1938) (client cannot insist that attorney proceed with case where client has failed to pay fee ''either through inability to pay or otherwise,'' but counsel may not unilaterally withdraw for non-payment; proper course in case of non-payment is to ''make application to the Court to be relieved as attorney''); *California v. Prince*, 268 Cal. App. 2d 398, 74 Cal. Rptr. 197 (Ct. App. 1968) (application for leave to withdraw granted, in reliance upon Canon 44, where client unable to pay fees). We conclude that applying for leave to withdraw is also a proper course of conduct under DR 2-110(C)(1)(f) in circumstances of nonpayment of fees owing to the client's inability to pay.

2. **Withdrawal by Consent**

Although judicial permission must be obtained in instances of withdrawal based exclusively upon DR 2-110(C)(1)(f), as we have discussed above, and may well be necessary with respect to other grounds for permissive withdrawal set out in DR 2-110(C), consent of the tribunal is not ethically mandated in all instances of permissive withdrawal in the absence of a rule of the tribunal requiring it. In particular, we conclude that permission is not ethically required in the absence of a court rule[4] where the client has obtained new counsel by the time the first attorney would otherwise seek permission

4 DR 2-110(A)(1) specifically provides that wherever ''permission for withdrawal from employment is required by the rules of a tribunal'' counsel may not withdraw without such permission. We note that CPLR 321 provides that permission of the court is required for withdrawal of counsel except where a stipulation of substitution is executed by retiring counsel and the client.

to withdraw, and where the grounds for withdrawal include DR 2-110(C)(5), which authorizes withdrawal when the "client knowingly and freely assents to termination of employment."

In such circumstances, none of the conflicting considerations raised by permissive withdrawal, as discussed above, is implicated, except for the tribunal's own interest in its proceedings; that interest can readily be protected by the tribunal's ability to promulgate its own rules, independent of ethical obligations, requiring judicial approval for substitution of counsel. As we have previously stated, in N.Y. State 178 (1971), the purpose of requiring judicial permission to withdraw is so that the court may determine "whether the attorney has a right to withdraw *over the client's objection* and, if the Court determines that the attorney has such right, in order that appropriate arrangements may be made to protect the client's interests *until such other counsel is retained*" (emphasis added). Where the client does not object and has engaged new counsel, both these objectives are satisfied without need of judicial intervention. This will be the case even if the withdrawal also involves the client's non-payment of fees, as the client's acquiescence and retention of new counsel obviates the ethical need for judicial review of the first attorney's withdrawal, in the absence of a court rule mandating such review.

We note that mere consent by the client to counsel's withdrawal, unaccompanied by retention of substitute counsel, is insufficient to dispense with an ethical obligation to obtain the court's permission. The client's consent must be provided "knowingly and freely," and that criterion must be met to the tribunal's satisfaction in litigated matters in which the withdrawal will leave the client unrepresented.

Although DR 2-110(C) could be read to suggest that judicial permission is required in every instance of permissive withdrawal in a litigated matter, the Rule has not been so construed. The text of both DR 2-110(A)(1) and DR 2-110(B) make plain that judicial permission is not ethically required in all instances of withdrawal, and our prior opinions have at least implied that permission need be sought for permissive withdrawal under DR 2-110(C) only where the client has not consented to the withdrawal or where the tribunal's rules require it. *See* N.Y. State 178 (1971) ("If the client does not assent to the withdrawal of the attorney in a litigated action, permission of the Court to withdraw should be sought"); N.Y. State 440 (1976) ("If . . . 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"); *cf.* N.Y. State 187 (1971) (improper for attorney to

withdraw without judicial permission or client's consent). We now clarify that, in the absence of a court rule, judicial permission is not required under DR 2-110(C)(5) where the client has consented and successor counsel is available to be substituted for the withdrawing attorney.

We also note that care must be taken to distinguish between a discharge of counsel by the client, an instance of mandatory withdrawal under DR 2-110(B)(4) with respect to which judicial permission is not ethically required in the absence of a court rule, and consent by the client to the attorney's withdrawal, with respect to which we conclude that, in a litigated matter, permission is ethically required under DR 2-110(C)(5), independent of the tribunal's rules, unless successor counsel has been retained. Acquiescence by a client in his or her counsel's desire to withdraw in circumstances where the client is not dissatisfied with the attorney's services is not a "discharge" of the attorney governed by DR 2-110(B)(4); such a termination of the attorney-client relationship is governed by DR 2-110(C)(5), and in a litigated matter the court will need to determine whether the client has acted freely and voluntarily in assenting to the termination.

CONCLUSION

For the reasons and subject to the conditions and exceptions stated above, each question is answered in the affirmative. Upon a client's failure due to financial inability to meet the client's obligation to pay legal fees in a litigated matter, the lawyer may seek the tribunal's permission to withdraw from the representation, but the lawyer may not withdraw without the tribunal's permission except where the client has consented, new counsel has been substituted and there is no rule of court requiring the court's permission.