NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion 613 - 9/24/90 (4-90)

Topic: Provision of legal services.

Digest: A lawyer may advise and counsel a *pro se* litigant to the extent of preparing pleadings for the litigant to sign and file in an action; disclosure to the court and the opposing party is required.

Code: DR 1-102(A)(4); 2-109, 2-110; 6-102; 7-106(A); EC 2-25, 8-3.

QUESTION

May a lawyer, without entering an appearance as attorney of record, agree to counsel and advise an indigent *pro se* litigant to the extent of preparing pleadings for the litigant to sign and file with the court *pro se*.

OPINION

The inquirer is the managing attorney of a legal services office in an upstate rural county who has been unable to obtain attorneys within the county to undertake *pro bono* representation of indigent persons served with a summons and complaint in divorce actions. Those served with these papers, commonly indigent women with small children, typically come into the legal services office seeking representation. Consistent with the inquirer's report to the local bar association and to the presiding state supreme court justice for the district, the inquirer informs these clients that the legal services office does not have the resources to represent them.

To provide some limited assistance to these persons, the inquirer proposes to undertake a practice of preparing responsive pleadings (*e.g.*, answer, affirmative defenses and counterclaims) and a demand for financial disclosure. In some cases, the inquirer may mail such papers prepared by the legal services office to the plaintiff's attorney with an explanation that the defendant is submitting the material "on a *pro se* basis" and that the defendant will be appearing in the action *pro se*. In such circumstances, the cover letter to plaintiff's attorney will contain the following language:

> In accordance with the interim report which I submitted to the _____ County Bar Association, I have advised Mrs. _____ that we cannot represent her in this action. All further pleadings, motions, or notices of hearing or trials must be sent directly to Mrs. _____ . Our representation is limited to assisting her in drafting an answer and counterclaims and providing her with this letter.

Our Committee has recently canvassed the subject of "limiting the scope of representation" in a criminal case in N.Y. State 604 (1989). The following observations in that opinion are pertinent here:

> The lawyer-client relationship is sometimes characterized as a contractual one. *E.g., Hashemi v. Schack,* 609 F. Supp. 391, 393 (S.D.N.Y. 1984); *cf.* Judiciary Law §474 (the lawyer's compensation is governed by agreement). In New York, the courts often characterize the relationship as one of principal and agent. *E.g., Burger v. Brookhaven Medical Arts Bldg., Inc.,* 131 A.D.2d 622, 624 (2d Dep't. 1987). Thus the client, as principal, or the client and lawyer, as contracting parties, have the power to determine the scope of their relationship. It has been held that the lawyer and client may agree to limit the representation to specific transactions. *E.g., The Florida Bar v. Dingle,* 220 So.2d 9 (Fla. 1969) (agreement that litigation will be conducted only at trial level); *Vitale v. LaCour,* 92 A.D.2d 892 (2d Dep't.), *appeal dismissed,* 59 N.Y.2d 607, *appeal denied,* 60 N.Y.2d 556 (1983) (the attorney-client relationship ends with the completion of the trial, so that substitution need not be made to retain new counsel for appeal).

N.Y. State 604, p. 2. Because the arrangement at issue here does not involve an appearance in the litigation by the lawyer, N.Y. State 604 does not otherwise provide an answer to the question posed.

The reported cases that have considered the question condemn the practice. *Ellis v. Maine,* 448 F.2d 1325, 1328 (lst Cir. 1971); *Klein v. H.N. Whitney, Goadby & Co.,* 341 F. Supp. 699, 702-03 (S.D.N.Y. 1971); *Klein v. Spear, Leeds & Kellogg,* 309 F. Supp. 341, 342-43 (S.D.N.Y. 1970). The available ethics opinions are more lenient. ABA Inf. 1414 (1978); N.Y. City 1987-2; Va. Op. 1127 (1988); Me. Op. 89 (1988). Although lawyers should be mindful of any court rule or authoritative judicial determinations on the issue, we do not believe that the cases cited give full guidance on the ethical issue raised. For example, the cases cited proceed almost entirely upon the assumption that a lawyer who prepares pleadings for a *pro se* litigant is engaged in abetting the *pro se* litigant's deception of the court that he or she is proceeding without legal advice. DR 1-102(A)(4). Moreover, the *pro se* litigant in the two Southern District cases cited was found to be "an irresponsible litigant" engaged in

several abusive litigation practices. *Klein v. Spear, Leeds & Kellogg,* 309 F. Supp. at 343. The ethical considerations in such a case obviously are different from those present here. We do not believe that these cases foreclosed the practice of providing limited assistance to *pro se* litigants in all situations.

ABA Inf. 1414 adopted the deception rationale of the cases cited above. The inquiry involved a litigant who had received the advice and counsel of a lawyer, which included the drafting of court papers and memoranda. The lawyer who assisted such a party was said to have been "involved in the litigant's misrepresentation contrary to DR 1-102(A)(4)." *Id.* But the ABA Committee also did not intend to foreclose entirely assistance to *pro se* litigants.

> We do not intend to suggest that a lawyer may never give advice to a litigant who is otherwise proceeding *pro se*, or that a lawyer could not, for example, prepare or assist in the preparation of a pleading for a litigant who is otherwise acting *pro se*.
>
> Obviously, the determination of the propriety of such a lawyer's actions will depend upon the particular facts involved and the extent of a lawyer's participation on behalf of a litigant who appears to the Court and other counsel as being without professional representation. Extensive undisclosed participation by a lawyer, however, that permits the litigant falsely to appear as being without substantial professional assistance is improper for the reasons noted above.

ABA Inf. 1414

The Virginia opinion is more restrictive and provides several caveats. That committee found "no prohibition under the Code of Professional Responsibility against the rendering of legal assistance by an attorney for a *pro se* client such as legal advice, research, and redrafting of documents prepared by the litigant himself, except that the lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding." Va. Op. 1127. The opinion cautioned lawyers that disregard for a legal or court requirement that "the drafter of the pleadings be revealed would be violative of DR 7-105(A)."[0] Like the ABA committee, the Virginia State Bar committee considered that the provision of "active or substantial assistance, including the drafting of pleadings, may be a misrepresentation to the court and to opposing counsel and therefore violative of DR 1-102(A)(4)." Finally, the giving of advice and counsel to a *pro se* litigant

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0 The provisions of Virginia's DR 7-105(A) are contained, in verbatim, in New York's DR 7-106(A).

was said to create an attorney-client relationship such that the "lawyer should be mindful of the prohibition against limiting his liability to a client for personal malpractice [DR 6-102] and his obligations to a client with regard to acceptance of employment [DR 2-107] and termination of representation [DR 2-108]." Va. Op. 1127.[1]

In Me. Op. 89, a lawyer declined representation of an employment discrimination plaintiff who had not succeeded in a state human rights commission proceeding. The lawyer agreed, however, to prepare a complaint for plaintiff to file *pro se* in time to avoid the running of the statute of limitations. The lawyer took a fee for this work. Finding no reason to believe that the complaint was frivolous or that it was interposed for a malicious purpose to harass or injure, the Maine committee found that "the attorney did not act unethically in agreeing with the client to limit the extent of his representation to the preparation of the complaint." *Id.* The Maine committee cautioned that the lawyer in such circumstances "remains responsible to the client for assuring that the complaint is adequate and does not violate the requirements of Rule 11 of the Maine Rules of Civil Procedure." *Id.*

N.Y. City 1987-2 agreed with ABA Inf. 1414 except that the City Bar committee determined that "drafting any pleadings," other than a "previously prepared form devised particularly for use by *pro se* litigants," constitutes the "active and substantial legal assistance" which must be disclosed to adverse counsel and the court. *Id.* (adding that "[l]ess substantial services, but not including the drafting of pleadings, would not require disclosure"). The City Bar recognized, as we do here, that a lawyer who renders advice and counsel to the *pro se* litigant "is taking action consistent with the duty of the legal profession to meet the needs of the public for legal services." *Id.* (citing EC 2-25). But the operative concern in the City Bar opinion was the inappropriateness of according to a *pro se* litigant in such circumstances the "deferential or preferential treatment" customarily given other *pro se* litigants. *Id.*; see *Hughes v. Rowe,* 449 U.S. 5, 9 (1980)(per curiam); *Haines v. Kerner,* 404 U.S. 519, 521 (1972)(per curiam); *Ortiz v. Cornetta,* 867 F.2d 146, 148 (2d Cir. 1989). Thus, the City Bar opinion departs from ABA Inf. 1414 in that the former requires disclosure of the lawyer's role to opposing counsel and the court in any case involving the preparation of a pleading, no matter how extensive the lawyer's participation otherwise might be. *Id.* at n.* On the other hand, the personal identity of the lawyer need not be disclosed; the pleadings need only be endorsed, "Prepared by Counsel." Id.

Our Committee is not unmindful of the substantial abuses that may arise from sanctioning the conduct proposed by our inquirer. Yet we anticipate that

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1 The provisions of Virginia's DR 2-107 are contained, in verbatim, in New York's DR 2-109. Similarly, the provisions of Virginia's DR 2-108 are contained, in verbatum, in New York's DR 2-110.

the courts and lawyers subjected to such abuses will be vigilant to root them out. The overriding concern pertinent to this inquiry is the recognition in EC 2-25 that the *pro bono* "efforts of individual lawyers," together with the availability of legal services offices, "are often not enough to meet the need" of the indigent. *See also,* EC 8-3 ("Those persons unable to pay for legal services should be provided needed services.") We firmly believe that the creation of barriers to the procurement of legal advice by those in need and who are unable to pay in the name of legal ethics ill serves the profession.

Accordingly, we see nothing unethical in the arrangement proposed by our inquirer. Indeed, we note that our inquirer's proposed conduct, which involves disclosure to opposing counsel and the court by cover letter, fully meets the most restrictive ethics opinion described above. We believe that the preparation of a pleading, even a simple one, for a *pro se* litigant constitutes "active and substantial" aid requiring disclosure of the lawyer's participation and thus are in accord with N.Y. City 1987-2. We depart from the City Bar opinion only to the extent of requiring disclosure of the lawyer's name; in our opinion, the endorsement on the pleading "Prepared by Counsel" is insufficient to fulfill the purposes of the disclosure requirement.

We see nothing ethically improper in the provision of advice and counsel, including the preparation of pleadings, to *pro se* litigants if the Code of Professional Responsibility is otherwise complied with. Full and adequate disclosures of the intended scope and consequences of the lawyer-client relationship must be made to the litigant. The prohibition against limiting liability for malpractice is fully applicable. Finally, and most important, no pleading should be drafted for a *pro se* litigant unless it is adequately investigated and can be prepared in good faith.

CONCLUSION

For the reasons stated and subject to the qualifications discussed above, the question posed is answered in the affirmative.