NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 653 - 8/27/93 (22-93)

Topic: Liability for litigation expenses; withdrawal of attorney if client does not advance or accept liability for expenses

Digest: Attorney may not assume ultimate liability for litigation expenses; attorney may request client to advance expenses for trial; attorney may seek leave to withdraw if (a) no material adverse effect, (b) client refuses ultimate responsibility for expenses, (c) client deliberately disregards prior agreement to advance expenses, (d) "unreasonably" difficult for attorney to proceed, (e) client knowingly and freely assents, or (f) other good cause exists.

Code: DR 2-110(A), DR 2-110(C), DR 5-103(B), DR 7-101(A)(2); EC 2-19, EC 2-23, EC 2-32

QUESTIONS

(1) May an attorney ethically ask a client to advance expenses?

(2) If the client refuses to advance the expenses or to assume ultimate liability for the expenses, may the attorney withdraw?

OPINION

DR 5-103(B) of the Code of Professional Responsibility (the "Code") provides that, other than with respect to certain pro bono matters, a lawyer shall not advance or guarantee financial assistance to the client except that the lawyer may advance or guarantee expenses of litigation provided the client remains ultimately liable for such

expenses. It would be prudent for the lawyer to make this obligation clear to the client at the commencement of the representation, in writing (possibly in the retainer agreement) or by full explanation. EC 2-19. In the case of a contingent fee arrangement, DR 2-106(D) requires a lawyer promptly to provide the client with a writing that states, among other things, expenses to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated. In any event, the lawyer's ethical obligation requires that the client remain ultimately liable for litigation expenses and that reimbursement to the lawyer not be contingent on the outcome of a lawsuit.[1]

Although litigation expenses often are deducted from any recovery at the conclusion of a matter, there is no ethical bar to asking a client to advance some or all of these expenses prior to trial. While there is no ethical bar, even at a later date in the representation, to asking a client to advance litigation expenses, the client may choose not to do so.

A lawyer has an obligation not to intentionally fail to carry out a contract of employment for professional services. DR 7-101(A)(2). This obligation is tempered, however, by the right (and, in some instances, the requirement) of the lawyer to withdraw as permitted under DR 2-110.[2]

Assuming there is a basis for withdrawal, if permission for withdrawal is required by court rules, the lawyer must obtain permission of the court.[3] DR 2-110(A)(1). Furthermore, the lawyer must first take steps to the extent reasonably practicable to avoid foreseeable prejudice to the client, including giving the client notice and time to employ other counsel and delivering papers and property. DR 2-110(A)(2); *see also* EC 2-32. Where the lawyer has complied with both steps, if necessary, the lawyer may withdraw provided one of the following applies:

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1 The Code contains a "long recognized distinction between the propriety of a lawyer's fee being made contingent on the outcome of litigation and the impropriety of making litigation expenses contingent thereon … grounded upon the concept that if lawyers were permitted to finance their clients' causes, it would generate unmeritorious suits and ultimately obfuscate the elemental difference between the roles of lawyer and client." N.Y. State 464 (1977). *See also* EC 5-8, N.Y. State 288 (1973), N.Y. State 37(a) (1968) (the lawyer cannot become a joint venturer in a lawsuit), ABA Inf. 1005 (1967); N.Y. City 282 (1933), N.Y. City 175 (1931). In further recognition of the foregoing, DR 2-101 of the Code was amended effective July 1, 1993, to require advertising of contingent fee rates in civil matters to disclose that, in the event there is no recovery, the client will remain liable for the expenses of litigation, including court costs and disbursements.

2 The lawyer's obligation to fulfill a contract of employment is also subject to the lawyer's need to withdraw under DR 5-102 or DR 5-105. *See* DR 2-110(B)(2).

3 CPLR §321 permits an attorney to withdraw by order of the court in which the action is pending or by filing a consent to substitution of counsel executed by retiring counsel and executed and acknowledged by the client.

Permissive Withdrawal Without Material Adverse Effect

Prior to September 1, 1990, the Code allowed permissive withdrawal under DR 2-110(C) only on an enumerated ground and provided withdrawal would not have a material adverse effect on the interests of the client. The preamble to DR 2-110(C), as amended**,** now permits a lawyer to withdraw if withdrawal can be accomplished without material adverse effect, regardless of whether it is based on an enumerated ground. Whether an adverse effect will occur is a factual matter to be determined in the first instance by the attorney and in the second instance by the court. There might be a material adverse effect on the interests of the client if, for example, the client were unable to obtain a new lawyer or unable to obtain a new lawyer in a timely manner.

Permissive Withdrawal Even if Material Adverse Effect.

Even if withdrawal would cause a material adverse effect on the interests of the client, DR 2-110(C) still permits withdrawal provided it is based on one or more of the specific grounds listed in DR 2-110(C). The listed grounds most relevant to this inquiry are discussed below.

1. <u>Deliberate Disregard of Agreement or Obligation as to Expenses.</u>

DR 2-110(C)(1)(f) permits withdrawal if the client deliberately disregards an *agreement* with the lawyer as to expenses. If the client had agreed to pay litigation expenses in advance of trial, the client's refusal to do so would be in deliberate disregard of that agreement and would be a basis for permissive withdrawal.

Similarly, DR 2-110(C)(1)(f) permits withdrawal if the client deliberately disregards an *obligation* to the lawyer as to expenses. *Cf.* N.Y. State 440 (1976) (withdrawal may be justified for refusal to pay necessary disbursements). If the client has an obligation to remain ultimately liable for litigation expenses,[4] a subsequent refusal to accept that responsibility (even if the refusal results from financial inability) would be in deliberate disregard of the obligation to the lawyer as to expenses and would be a basis for permissive withdrawal[5]. Where the client does not refuse ultimate

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[4] The Committee cannot opine on the legal obligation of this client to be ultimately liable for litigation expenses. We have suggested that the prudent lawyer make clear to the client at the commencement of representation that the lawyer's ethical obligations require the client to bear such liability.

[5] *See* N.Y. State 598 (1989)(permissive withdrawal from representation may be warranted even if the client's nonpayment of fees results from financial inability since such nonpayment would be viewed as a "deliberate" breach of the client's obligation to counsel if the failure is "conscious rather than inadvertent, and is not *de minimus* in either amount or duration").

liability for litigation expenses, but does refuse to pay expenses in advance, such refusal, absent an agreement requiring advance payment, would not be in deliberate disregard of an obligation and would not be a basis for permissive withdrawal under DR 2-110(C)(1)(f). "Where there is no agreement as to the amount of compensation or the time for the payment, it cannot be said that the client 'deliberately disregards an agreement or obligation."' N.Y. State 187 (1971).

2. Conduct Prohibited Under the Code.

DR 2-110(C)(1)(c) permits withdrawal if the client insists the lawyer pursue a course of conduct which is prohibited under the Disciplinary Rules. Where the client refuses to be ultimately liable for litigation expenses, the attorney's advancement of expenses without ultimate client liability would violate DR 5-103(B) and would be a basis for permissive withdrawal under DR 2-110(C)(1)(c). The client's refusal to pay expenses in advance of trial would not provide such a basis, however, unless accompanied by the client's clear refusal to accept ultimate liability for the expenses after full explanation of both the attorney's ethical requirements and the possible withdrawal of the attorney as a result.

3. Unreasonably Difficult to Carry Out Employment.

DR 2-110(C)(1)(d) permits withdrawal if the client's conduct renders it unreasonably difficult for the lawyer to carry out employment effectively. For example, if the client instructs the lawyer to do no further work and those instructions are not timely revoked, it is likely the lawyer would not be able to carry out the employment effectively. If, however, the client's instructions are intended to be of limited duration (for example, pending resolution of the expense payment issue), it is unlikely that the client's conduct would make it "unreasonably" difficult for the attorney to proceed. Similarly, the lawyer may be unable to carry out the employment effectively (for example, the lawyer may be unable to retain expert witnesses) if the client refuses to advance litigation expenses. It is unlikely, however, that the client's conduct would make it "unreasonably" difficult for the attorney to proceed if the expenses reasonably could have been anticipated, permitting the attorney to reach an agreement on the subject with the client at the commencement of representation, or if the expenses do not place an undue financial burden on the attorney.[6]

4. Assent to Termination of Employment.

DR 2-110(C)(5) permits withdrawal if the client knowingly and freely assents to

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[6] *Cf.* Model Rule 1.16(b)(5) which lists representation resulting in an unreasonable financial burden on the lawyer as a specific ground for permissive withdrawal. This provision is not contained in to DR 2-110(C), but in appropriate instances, representation resulting in an unreasonable financial burden on the lawyer might make it unreasonably difficult for the lawyer to carry out employment effectively under DR 2-110(C)(1)(d) or constitute "other good cause for withdrawal" under DR 2-110(C)(6).

termination of the employment.[7] As suggested in N.Y. State 598 (1989), where the attorney and client disagree about payment for services in a litigated matter, unless the client has consented to the substitution of new counsel, the court should determine whether the client's assent is knowingly and freely given.

5. <u>Other Good Cause</u>.

DR 2-110(C)(6) permits attorney withdrawal if the attorney believes in good faith that the court, in a matter pending before it, will find the existence of other good cause for withdrawal. This determination must be made by the attorney in the first instance and subsequently by the court. It is possible, depending upon the facts and circumstances, that a court could find good cause for a lawyer's withdrawal in his client's failure to advance some or all expenses.

CONCLUSION

An attorney may ethically ask a client to advance expenses.

A lawyer may withdraw, with the leave of the court if required, if withdrawal would not have a material adverse effect on the client's interests. If withdrawal would have such a material adverse effect, the lawyer may nevertheless withdraw, again with the leave of the court if required, provided the attorney satisfies one of the enumerated conditions of DR 2-110 (C).

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[7] DR 2-110(B)(4) on its face provides an additional and mandatory basis for attorney withdrawal where the attorney is discharged by his client. Written instructions from the client to the attorney not to do any further work on the case might not be treated as a "discharge." Because the instructions result from a disagreement as to payment, rather than dissatisfaction with legal services, there is no basis for mandatory withdrawal. In N.Y. State 598 (which involved a client's inability to pay legal fees), this Committee stated that

> 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.