New York State Bar Association

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 805 – 1/10/07

Topic: Withdrawal from employment for non-payment of fees and expenses

Digest: A retainer agreement may not ethically provide for a client's advance assent to a lawyer's withdrawal from employment based on the client's failure to pay agreed legal fees and expenses, but the agreement may advise the client of the lawyer's right to withdraw, subject to court approval where applicable, if the client "deliberately disregards" a payment obligation.

Code: DR 1-102(A)(1); DR 2-110(C)(1)(f); DR 2-110(C)(5)

QUESTION

1. May a lawyer include a provision in a retainer agreement that would secure a client's advance assent to a lawyer's withdrawal from employment if the client fails to pay agreed legal fees and expenses in a timely manner?

OPINION

2. A retainer agreement must not mislead the client with regard to the attorney's obligations, "including the obligation to continue as counsel in the absence of a permissible ground for withdrawing from the representation."[1] It would, therefore, be unethical to include a provision that did not accurately set forth the circumstances under which a lawyer may withdraw from representation where the plaintiff fails to pay legal fees and expenses.[2] A retainer agreement that purported to permit a lawyer to withdraw upon a failure to pay agreed legal fees or expenses in a timely manner, without more, would not accurately state the applicable rules, and therefore would be impermissible.

3. Permissive withdrawal from employment is governed by Disciplinary Rule 2-110(C). That rule provides for withdrawal from employment "if withdrawal can be accomplished without material adverse effect on the interests of the client. . . ." In addition, pursuant to subparagraphs (1) through (6) of that section, a lawyer may withdraw upon twelve specifically

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[1] N.Y. State 719 (1999).

[2] *Id. See also* DR 1-102(A)(1) (lawyer shall not violate a Disciplinary Rule).

enumerated grounds. Those grounds include where the client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees"[3] and where the client "knowingly and freely assets to termination of the employment."[4]

4. In N.Y. State 719 (1999), we addressed the issue of advance assent to a lawyer's withdrawal from employment for nonpayment of fees in domestic relations matters. We stated:

> [A]lthough DR 2-110(C)(5) specifically permits withdrawal if the "client knowingly and freely assents to termination of the employment," it does not authorize an agreement *in advance* by which the client assents to termination upon some future occurrence that is unrelated to achieving the objectives of the representation. For assent to be made "knowingly," it must be made with knowledge and understanding of all the facts and circumstances at the time of the termination of the employment.[5]

The same is true outside the domestic relations context.

5. Although it is well established that more than mere failure to pay is required to satisfy the "deliberate disregard" standard, the ultimate determination of whether there has been "deliberate" disregard is highly fact sensitive. For example, an inadvertent failure to pay or a failure to pay a de minimus amount would not, by itself, be "deliberate."[6] Yet, under certain circumstances a client's non-payment of fees because of an inability to pay may be deemed "deliberate."[7] We noted some of the conflicting considerations pertinent to the issue in N.Y. State 598 (1989): potential prejudice to the client, the broad professional obligation to render services to the needy, an attorney's own financial interests, and the need of the tribunal for orderly proceedings. We stated:

> 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 and agreement or obligation" to pay legal fees whenever

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[3] DR 2-110(C)(1)(f).

[4] DR 2-110(C)(5).

[5] N.Y. State 719 (emphasis in original).

[6] N.Y. State 598 (1989).

[7] N.Y. State 719 (1999); N.Y. State 212 (1971); N.Y. State 187 (1971).

> the failure is conscious rather than inadvertent, and is not de minimus in either amount or duration.[8]

6. We also emphasized the particular balancing test that must be employed by a tribunal in evaluating even a conscious failure to pay legal fees, stating:

> 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 to be assessed in ascertaining whether withdrawal is appropriate in a particular case.[9]

7. None of these considerations is reflected in a clause by which a client purports to agree that a lawyer may withdraw if the client fails to pay legal fees and expenses in a timely manner. Accordingly, we conclude that a lawyer may not seek advance assent to the lawyer's withdrawal from employment based on a client's failure to pay legal fees and expenses, and a lawyer may not ethically include such a provision in a retainer agreement.

8. No rule of ethics, however, precludes a lawyer from advising a client in a retainer agreement of the lawyer's right to terminate the employment based on the "deliberate disregard" standard of DR 2-110(C)(1)(f), provided that the client is also advised that if the lawyer is engaged before a tribunal, the lawyer must obtain the tribunal's permission before withdrawing if the tribunal rules so require.[10] Although a lawyer cannot terminate the employment without also taking reasonably practicable steps to avoid foreseeable prejudice to the client, including notice to the client, allowing time for successor counsel to be obtained, and turning over client papers and property,[11] we do not believe that the client must be informed of all these points in the retainer agreement.

CONCLUSION

9. The question is answered in the negative.

(10-06)

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[8] N.Y. State 598 (1989).

[9] *Id.*

[10] DR 2-110(A)(1).

[11] DR 2-110(A)(2).