NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 PH 518.463.3200 www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1037 (12/6/14)

Topic: Limiting means used to pursue client's objectives; conduct prejudicial to administration of justice; status hearing

Digest: Government attorneys who handle matters before the Immigration Court may, with the informed consent of the client as well as the consent of the Immigration Court, provide the Immigration Court with a position paper and decline to attend in person Immigration Court status hearings at which no substantive or procedural issues can or will be addressed, as long as the government attorneys are not thereby impeded from competently and diligently representing their client.

Rules: 1.1(a) & (c), 1.2(a), 1.4(a); 3.4(c), 8.4(d)

FACTS

1. The New York Office of the Chief Counsel (OCC) of Immigration and Customs Enforcement (ICE) represents ICE in litigating removal proceedings before the Immigration Court.[1] Litigation before the Immigration Court—particularly litigation regarding the removal of unaccompanied alien children—often takes years to resolve because many respondent aliens make external applications to other administrative bodies (such as the U.S. Citizenship and Immigration Service) or courts (such as New York Family Court), and the Immigration Court often cannot decide individual cases until those other administrative bodies or courts issue their decisions.

2. While these external applications are pending, cases pending before the Immigration Court are listed on a master calendar and scheduled for periodic status hearings (each a "Status Hearing"). The purpose of a Status Hearing is to update the Immigration Court on the status of the external applications, but Status Hearings are repeatedly adjourned because there is nothing to report while the external applications remain pending. The ICE attorney generally does not oppose adjournments, changes of venue, or, in certain circumstances, administrative closure or dismissal of the Immigration Court proceedings. Once a respondent-alien has exhausted the external applications, the Immigration Court schedules the case for a merits hearing (the "Merits Hearing"). Under current practice, ICE attorneys appear in person before the Immigration Court for every Status Hearing and Merits Hearing.

[1] A removal proceeding is an administrative proceeding in Immigration Court to determine if an individual is removable under U.S. immigration law. Such proceedings formerly were known as deportation proceedings.

3. The OCC is considering altering current practice regarding its representation of ICE before the Immigration Court during the Status Hearing stage. In order to increase efficiency, the OCC would like to have its attorneys submit position papers in lieu of in-person appearances at the Status Hearings. The OCC has requested an opinion as to the ethical implications of this proposed practice (assuming the Immigration Court would permit it).

QUESTION

4. May OCC lawyers decline to attend the Immigration Court's Status Hearings at which no substantive or procedural issues can or will be addressed?

OPINION

5. The New York Rules of Professional Conduct (the "Rules") prohibit an attorney from engaging in "conduct that is prejudicial to the administration of justice." Rule 8.4(d). The phrase "prejudicial to the administration of justice" is explained in Comment [3] to Rule 8.4:

> The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. . . . The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court.

6. Rule 3.4(c) prohibits a lawyer from disregarding, or advising the client to disregard, a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, with exceptions not relevant here. Thus, if the Immigration Court required personal attendance by OCC attorneys, the attorneys could not ethically refuse to attend. *See* N.Y. State 719 (1999) (a lawyer's retainer agreement may not vary a requirement of a court rule because doing so would constitute a violation of DR 7-106(A) [the predecessor to Rule 3.4(c)]); N.Y. State 613 (1990) (whether a lawyer may help a "pro se" client to draft a pleading depends on whether the lawyer would be disregarding a standing rule of the tribunal that requires disclosing the drafter of the pleadings). The purpose of the prohibition in Rule 3.4(c) is similar to the purpose of the legal doctrine of contempt of court, i.e. engaging in contemptuous behavior tending to impair the respect due to the authority of the court or intentional disobedience to a mandate of the court. *See* NY Penal Law § 215.50.

7. Attorneys who fail to attend court ordered hearings in New York are subject to discipline under Rule 8.4(d). *Matter of Cronk,* 52 A.D.3d 54, 58 (2d Dept 2008) (respondent disciplined for failure to attend scheduled court conferences). Other states' disciplinary authorities have reached similar conclusions. *See, e.g., Oklahoma Bar Association v. Benefield*, 125 P.3d 1191, 1194 (2005); *Attorney Grievance Com'n of Maryland v. Monfried*, 368 Md. 373 (2002); *In re Davidsion*, 761 N.E.2d 854 (2002); *Florida Bar Association v. Ossinsky*, 255 So.2d 526 (1971). Attorneys who disregard the ruling of a tribunal in New York also are subject to discipline. See, e.g. *Matter of Goll*, 27 A.D.3d 131 (2d Dept 2006) (violation of 7-106(A) for failing to prepared and submit documents when court directed lawyer to do so, among other violations, results in a

2-year suspension); *Matter of Fretz*, 88 A.D.3d 470 (4th Dept 2011)(violation of DR 7-106(A), among other violations, results in a 3-year suspension).

8. None of the cited decisions involve situations where the client and the court consented to the non-appearance (or appearance through a position paper in lieu of a personal appearance).

9. As long as the tribunal permits the lawyer to submit a position paper rather than appearing in person at a Status Hearing, the decision whether to forego the opportunity to make an in-person presentation before the judge is for the lawyer to make, in consultation with the client. Rule 1.2(a) requires a lawyer to abide by a client's decisions concerning the "objectives" of a representation, and to consult with the client as to the "means" by which those objectives are to be pursued. Rule 1.4(a)(2) reinforces that provision by providing that a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished. In this case, appearing at a Status Hearing by submitting a position paper rather than appearing in person would be a decision as to "means," not "objectives." Nevertheless, we have warned that a client may not limit the representation in a manner that will compel the lawyer to neglect the matter, to prepare inadequately, or otherwise to represent the client incompetently. *Cf.* N.Y. State 751 (2002) (government agency may not require its lawyers to undertake more matters than the lawyers can competently handle, on the grounds that the agency does not have the funding to hire an adequate number of lawyers). Furthermore, while client consent is sufficient under Rule 1.2(a), the lawyer also needs the concurrence of the court under Rules 3.4(c) and 8.4(d).

10. Other provisions of the Rules also have a bearing on the questions posed here. For example, Rule 1.1(c)(2) prohibits a lawyer from intentionally prejudicing or damaging the client during the course of the representation, except as permitted or required by the rules. This provision demonstrates the importance of having the court approve the proposal to appear at Status Hearings through a position paper. Similarly, Rule 1.1(a) states that the lawyer should provide competent representation to a client.

11. According to the OCC, the submission of position papers in lieu of personal appearance would not undercut their ability to competently and diligently represent their client under Rule 1.1. Memoranda submitted to the Immigration Court would provide it with the same information as would the physical presence of an OCC attorney, and the absence of an OCC attorney would not prejudice the OCC attorney's client (which is ICE). Whether an OCC attorney's failure to attend Status Hearings delays the administration of justice rests ultimately with the Immigration Court. If that court permits OCC attorneys to send a position paper rather than attending a Status Hearing in person, we see no reason why the Rules would prohibit the practice.

CONCLUSION

12. An OCC attorney may, with the informed consent of both the Immigration Court and the client, provide the Immigration Court with a position paper and decline to attend in person an Immigration Court Status Hearing at which no substantive or procedural issues can or will be addressed, as long as OCC attorneys are not thereby impeded from competently and diligently representing their client.

(26-14)