NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1144 (1/29/2018)

Topic: Communications with Client; Withdrawal from Representation of Difficult Client

Digest: A lawyer may place time and manner limitations on communications with a client provided the lawyer promptly informs and consults with the client on matters within the lawyer's duty of communication. If a breakdown occurs in communications between a lawyer and client such that representation cannot be carried out effectively, the lawyer may seek to withdraw from representing the client subject to any applicable rule of court.

Rules: Rules 1.2(a), 1.4, 1.16, 1.14.

FACTS

1. A court assigned the inquirer to represent an individual who has been charged with several criminal offenses. Prior to the inquirer's assignment, the client had been represented by a number of other lawyers. The client has unsuccessfully moved to have the inquirer relieved as counsel.

2. The client has ongoing mental health issues for which the client receives treatment. According to the inquirer, the client is physically intimidating, verbally abusive, and often non-responsive. The inquirer wishes to impose some restrictions on the time and manner in which the client may communicate with the lawyer, including limiting communications to scheduled appointments and written communications. If the client does not abide by these limits, or otherwise continues to disrupt communications, then the lawyer wishes to consider withdrawing from the representation.

QUESTIONS

3. May a lawyer place reasonable restrictions on the time and manner of communications between the lawyer and client? Under what circumstances may a lawyer withdraw from representation of a difficult client?

OPINION

4. The New York Rules of Professional Conduct (the "Rules"), in Rule 1.4, entitled "Communication," sets out a lawyer's obligations concerning communicating with clients. The Rule says:

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by the Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

5. Three core principles can be drawn from this Rule. First, a lawyer must keep the client apprised of material circumstances and developments in the matter. Second, a lawyer must comply with a client's reasonable requests for information. Third, a lawyer must reasonably consult with a client both about the means of accomplishing the client's objectives and about other decisions regarding the representation, some of which are within the client's province to decide. *See* Rule 1.2(a). On the first two of these – on developments in the matter and requests for information from the client – the lawyer must communicate promptly. Although a lawyer's obligations under this Rule are thus robust, neither Rule 1.4 nor other Rules prescribe a specific manner of communication, except when a Rule requires written instruments in specific circumstances, *see, e.g.*, Rule 1.5(b), (c), (d)(5) (governing legal fees); Rule 1.7(b) (governing informed consent to conflicts); Rule 1.8(a) (governing business transactions with clients).

6. Rule 1.4's obligation that a lawyer keep the client "reasonably informed about the status of the matter" can be fairly read to require a lawyer to use methods of communication that are effective, timely, and not unduly burdensome to the client, but the Rule does not prevent a lawyer from selecting the manner of communication. Rule 1.4(a)(4) specifically indicates that a lawyer need comply only with reasonable requests for information, thereby allowing lawyers the flexibility to curtail conversations or meetings that stray beyond the relevant substance of the representation. This provision expresses the Rule's recognition that some clients may thrust upon their lawyers burdensome, immaterial requests for information and that lawyers need not meet such unreasonable demands.

7. Similarly, Rule 1.4 does not prohibit a lawyer from controlling the timing of client communications. Other than the general requirement that developments in the case and responses to reasonable requests for information be "promptly" communicated, the Rule does not curtail a lawyer's discretion to schedule the specific timing of lawyer-client communications. Notably, Comment [4] to Rule 1.4 provides that when a prompt response to a client's reasonable request for information is not feasible, the lawyer (or a member of the lawyer's staff) should "acknowledge receipt of the request and advise the client when a response may be expected." That Comment is consistent with the notion that a lawyer – often balancing competing obligations – needs to have reasonable latitude to schedule the timing of client communications.

8. Consistent with the foregoing, we believe that the Rules do not prohibit a lawyer from responding to a challenging client by limiting the time and manner of communications with the client as long as the lawyer fulfills the substantive communicative requirements contained in Rule 1.4. *Cf.* N.Y. State 1124 (2017) (noting that no provision in the Rules mandates how lawyers must communicate with each other and that lawyers should work out between themselves the methods of communication that will best facilitate resolution of the matter at hand). Hence, a lawyer may limit communications to scheduled appointments or to some form of written transmission readily accessible to the client.

9. Whether and when a lawyer may seek to withdraw from representing a difficult client is controlled by Rule 1.16, which governs "declining or terminating representation." Rule 1.16(c) provides, in relevant part, that "except as stated in paragraph (d), a lawyer may withdraw from representing when, among other reasons, the "withdrawal can be accomplished without material adverse effects on the interests of the client," Rule 1.16(c)(1), "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out the representation effectively, Rule 1.16(c)(7), or "the lawyer believes in good faith, in a matter before a tribunal, that the tribunal will find the existence of other good cause for withdrawal" Rule 1.16(c)(12). Rule 1.16(d), in turn, provides that "if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

10. Because the inquirer has already appeared as counsel for the client in the pending matter, the inquirer may withdraw only with the permission of the tribunal. The reasons for permissive withdrawal in Rule 1.16(c) are disjunctive, so any one of the reasons set forth there may suffice. The most obvious candidate emerging from the facts – and thus the most apparent reason why the inquirer may seek permission for withdrawal from the tribunal – is whether the client's conduct will prevent the inquirer from "carry[ing] out the representation effectively" under Rule 1.16(c)(7). In most representations, and certainly in defending against a criminal prosecution, effective representation requires meaningful communication between a lawyer and client. If the client's verbal abuse and non-responsiveness result in a collapse of meaningful communication, then effective representation is almost certainly not possible. *See* Roy D. Simon & Nicole Hyland, Simon's New York Rules of Professional Conduct Annotated, 959 (2017) (noting, as examples of client conduct that make it unreasonably difficult to carry out representation effectively, "a client's constant calls to talk about the case or request information beyond what is fruitful or reasonable" and "a client's abusive or threatening communications to the lawyer"); *see also Cahill v. Donahoe*, 2014 WL 3339787 (W.D.N.Y. 2014) (granting motion to withdraw

where "the attorney-client relationship is no longer productive and . . . the discord that has characterized their relationship over many months appears irreparable."). If an irreparable disintegration in communication has occurred, the inquirer may ask the court for permission to withdraw.

11. That the client here has mental health issues for which the client is receiving ongoing treatments makes it appropriate to mention Rule 1.14, which governs a lawyer's responsibilities to clients with diminished capacity. *See* N.Y. State 949 ¶ 20 (2012). Under Rule 1.14, a lawyer must "as far as reasonably possible" maintain a normal lawyer-client relationship. That a client suffers from mental illness does not diminish the lawyer's responsibility to treat the client attentively and with respect. Rule 1.14, Cmt. [2]. Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. "Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities on the lawyer." Rule 1.14, Cmt. [1]. "Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances." N.Y. State 986 ¶ 12 (2013). In N.Y. State 986, we added (at ¶ 13):

> Any protective action taken by the lawyer should be limited to what is essential to carry out the representation. Thus, the lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client. The Rule does not specify all of the potential protective actions that may be undertaken, but it makes clear that seeking the appointment of a guardian is the last resort, when no other protective action will protect the client's interests.

12. If the inquirer remains on the case, the inquirer will need to maintain a normal lawyer-client relationship "as far as reasonably possible," but, in evaluating the situation, the inquirer may conclude that protective actions are available to facilitate communication with the client so that the lawyer may enhance the prospect of effective representation.

CONCLUSION

13. A lawyer may place reasonable limitations on the timing and manner of client communications. When there is a breakdown of communications between a lawyer and client such that representation cannot be carried out effectively, the lawyer may seek to withdraw from representing the client.

(36-17)