



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1203 (10/08/2020)

Topic: Withdrawal from representation based on attorney health concerns

Digest: An attorney may withdraw from representation, with the permission of the Immigration Court, based on fear of contracting COVID-19 as a result of in-person appearances in the proceeding, where such fear renders it difficult for the attorney to carry out the representation effectively.

Rules: 1.0(w), 1.16(c), (d) & (e)

FACTS

1. The committee has received an inquiry from a lawyer admitted to practice in the State of New York who is presently representing a client in Immigration Court proceedings. Despite the current pandemic, the matter has been scheduled for an in-person appearance. Noting that no COVID-19 safety protocols or procedures to mitigate the spread of the coronavirus have yet been established for such in-person appearances, inquirer is concerned that appearing in-person presents a substantial health risk for the inquirer and, by extension, the inquirer's family.

QUESTION

2. May an attorney who believes that continued representation of a client before a tribunal endangers the attorney's health withdraw from that representation?

OPINION

3. New York Rule of Professional Conduct 1.16 governs the ethical obligations of a lawyer with regard to the withdrawal from representation of a client. Rule 1.16(b) permits withdrawal

when “the lawyer’s mental or physical condition renders it difficult for the lawyer to carry out the representation effectively.” The standard is that effective representation becomes “difficult,” not impossible, a flexible standard that requires us to consider the ways in which the inquirer’s fear of contracting COVID-19 could impede effective representation.

4. The inquirer’s fear of contracting COVID-19 could render it difficult to carry out the representation effectively because the inquirer’s fear might subtly but powerfully undermine the effectiveness of the Immigration Court representation in a number of ways. For example, the inquirer might be reluctant to spend time with the client in-person to understand the case and communicate the client’s options. The inquirer might also consent prematurely to a disposition that ends the proceeding, even though it is likely that a more favorable disposition could be obtained later, following additional appearances, motions, or conferences. In order to limit exposure to the disease, the inquirer might even hasten to complete a hearing without calling witnesses to testify on behalf of the client or by waiving cross-examination of government witnesses. The standard required for Rule 1.16(d) permissive withdrawal would be met by any of these influences, or like influences, to which the inquirer would be susceptible.

5. Independent of the inquirer’s fear of contracting COVID-19, withdrawal would also be permitted pursuant to Rule 1.16(c)(1) if the “withdrawal can be accomplished without material adverse effect on the interests of the client,” or pursuant to Rule 1.16(c)(10) if the client “knowingly and freely assents to termination of the employment.”

6. However, where, as here, a client is being represented before a “tribunal,” permission of that tribunal may be required for the withdrawal regardless of the ground for withdrawal. The first sentence of Rule 1.16 (d) provides:

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.

7. The Immigration Court is a “tribunal” -- *see* Rule 1.0(w) (defining “tribunal,” in pertinent part, as “a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity”) and the Immigration Court Practice Manual, version 7/2/2020, Section 2.3(i) (“Change in Representation”) requires that when an

attorney wishes to withdraw from representation of an individual under the jurisdiction of the Immigration Court, and that individual has not obtained successor counsel, the attorney seeking to withdraw can only do so by motion with consent of the court. Thus, Rule 1.16(d) will require the inquirer to obtain the Immigration Court's permission to withdraw unless the client has already obtained a new attorney.

8. If the Immigration Court grants the inquirer's motion to withdraw, then Rule 1.16(e) will require the inquirer to "take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including by giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly repaying any part of a fee paid in advance that has not been earned and complying with applicable laws and rules."

CONCLUSION

10. An attorney may withdraw from representation, with the permission of the Immigration Court, based on fear of contracting COVID-19 as a result of in-person appearances in the proceeding, where such fear renders it difficult for the attorney to carry out the representation effectively.

(21-20)