



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

Opinion 1214 (01/11/2021)

Topic: Frivolous arguments to a court; withdrawal.

Digest: A lawyer is ethically prohibited from presenting a frivolous argument to a court. If the lawyer cannot find a non-frivolous basis on which to proceed with a client's motion and the client persists on putting before the court arguments the lawyer believes to be frivolous, the lawyer may seek permission from the court to withdraw from the representation. If the court will not permit the lawyer to withdraw, the lawyer must competently represent the client without engaging in frivolous conduct.

Rules: 1.2(c), 1.4(a)(2), 1.16(c)(4) & (d), 3.1(a)

FACTS

1. The inquirer is a lawyer at a legal services office that represents homeowners in residential foreclosure proceedings without charge. That office was initially contacted by a homeowner seeking to challenge a judgment of foreclosure. Generally, the inquirer's office does not accept post-judgment cases, and the homeowner's case was declined. Thereafter, the homeowner filed a *pro se* application to vacate the judgment of foreclosure alleging defective service of process. The justice presiding in the matter, rather than deciding the motion, requested that the inquirer represent the homeowner and attempt a settlement. The inquirer agreed, and made it clear to the homeowner that the representation was limited to negotiating settlement terms with the foreclosing bank.

2. The settlement negotiations failed, and the court contacted the inquirer to continue the homeowner's representation in connection with the homeowner's previously submitted application to vacate the judgment of foreclosure. The inquirer protested that the agreed scope of the representation had been limited to settlement negotiations, but the court stated, to the contrary, that the inquirer's scope of representation was unlimited and for the entire case.

3. The inquirer has reviewed the motion papers prepared by the homeowner without

the benefit of counsel and has concluded that there is no non-frivolous factual or legal basis for vacating the judgment of foreclosure, including the sole ground asserted in those papers.

QUESTIONS

4. At oral argument of the motion to vacate the foreclosure judgment, may the inquirer rest on the motion papers prepared by the homeowner or, alternatively, simply state the homeowner's position, even though the inquirer believes the homeowner's position to be frivolous?

5. Having never agreed to take on the homeowner's representation beyond attempting to reach a settlement with the foreclosing bank, may the inquirer refuse to participate any further in the matter?

OPINION

A. Frivolous arguments

6. Rule 3.1(a) of the New York Rules of Professional Conduct (the "Rules") provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." Here, the inquirer has concluded that there is no basis in law or fact that would support the sole ground the homeowner has raised for seeking to vacate the judgment of foreclosure, or any other ground.

7. Frivolous conduct within the meaning of Rule 3.1(a) is not materially different from frivolous conduct as defined in 22 NYCRR Part 130. In the context of sanctioning attorneys for frivolous conduct in litigation, 22 NYCRR § 130-1.1(c) provides that conduct is "frivolous" if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false."

8. The inquirer may not argue or advance frivolous arguments to support the homeowner's motion. It is, however, important for the inquirer to distinguish between arguments that meet the high standard for "frivolous conduct" set forth in 22 NYCRR § 130-1.1(c) and Rule 3.1(a), on the one hand, from arguments that are merely unlikely to succeed but are not frivolous,

on the other hand. The inquirer may ethically continue representing the homeowner by advancing any non-frivolous arguments the inquirer reasonably believes support a vacatur application. If the inquirer develops such non-frivolous arguments, then the inquirer must discuss the proposed new or modified position with the homeowner before presenting it to the court. *See* Rule 1.4(a)(2) (a lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”).

9. If the homeowner insists that the inquirer pursue the frivolous arguments contained in the motion papers the homeowner prepared while acting *pro se*, the inquirer may seek permission from the court to withdraw on the basis that “the client insists upon taking action with which the lawyer has a fundamental disagreement,” *see* Rule 1.16(c)(4), as well as on any other mandatory or permissive grounds the inquirer has for withdrawal under Rule 1.16. The inquirer must be mindful, however, that : “The nature and extent of information about a client that a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6.” N.Y. State 1057 ¶5 (2015).

10. If permission to withdraw is denied by the court, the inquirer must continue the homeowner’s representation. *See* Rule 1.16 (d) (“When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”). But even in that circumstance, the inquirer may still not engage in “frivolous conduct” at the direction or behest of the homeowner. A client has no right to instruct a lawyer to violate a Rules of Professional Conduct, and a lawyer has no right to follow an instruction that the lawyer violate a Rule. Thus, the inquirer must find a means to competently represent the homeowner without putting forth frivolous arguments. Since the homeowner rather than the inquirer submitted the frivolous motion papers, the lawyer is not required to renounce or disavow them, but the inquirer may not rely on any frivolous factual or legal arguments in those papers.

Scope of representation

11. We turn now to the inquirer’s second question – may the inquirer refuse to continue the homeowner’s representation because the inquirer made it clear to the homeowner that the representation would be limited to negotiating settlement terms with the foreclosing bank. Such limited scope representation is acceptable under Rule 1.2(c) “if the limitation is reasonable under

the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.” However, whether the inquirer may refuse the judge’s request to continue the representation after settlement negotiations failed, whether the judge’s request constituted an order and, if an order, whether such order might not be binding on the inquirer under the circumstances, are all questions of law beyond this committee’s jurisdiction.

CONCLUSION

12. A lawyer is ethically prohibited from presenting frivolous arguments on behalf of a client who seeks to vacate a judgment of foreclosure. The lawyer’s duty of competence is fulfilled by presenting whatever non-frivolous arguments can be developed to support vacatur. If the lawyer determines that there are no non-frivolous arguments in support of an application to vacate, then the lawyer shall not proceed with the motion. If the client insists on proceeding based on factual claims or legal arguments that are frivolous, the lawyer may seek permission of the court to withdraw from the representation, but the lawyer must not reveal confidential information unless an exception to the duty of confidentiality applies. If the court does not permit withdrawal, the lawyer must continue to represent the client and must provide competent representation to the client without engaging in frivolous conduct. Whether and under what circumstances a lawyer may decline a court order or request to represent a client is a question of law that is beyond this committee’s jurisdiction.

(27-20)