

**DELAWARE STATE BAR ASSOCIATION COMMITTEE
ON PROFESSIONAL ETHICS**

OPINION 1990-2

March 23, 1990

A member of the Delaware Bar ("Attorney") has requested the advice of the Committee concerning Attorney's obligation to continue representation of a client ("Client") in civil litigation when client insists that Attorney pursue a claim which Attorney believes is meritless.

FACTS

Attorney represents Client in civil litigation pursuant to a private attorney contract with a legal aid organization. The contract between the legal aid organization and the Attorney provides that Client's legal costs will be paid by the legal aid organization.¹ Accordingly, the litigation imposes no monetary burden upon Client.

Client is the plaintiff in a lawsuit against landlord.² The suit contains two principal claims. The first claim arises out of a specific incident allegedly causing harm to Client (the "First Claim"). The second claim is more general and relates to damages allegedly caused by the land-lord's failure to properly maintain certain property leased by Client (the "Second Claim"). Landlord maintains that any problems were caused by Client.

¹ We have not reviewed the contract between Attorney and the legal aid organization, and we assume that nothing in that contract affects our analysis here.

² Our description of the claims asserted has been disguised to protect certain information subject to the attorney-client privilege.

In the course of preparing for trial, Attorney hired an independent engineer to examine the property leased by Client. The engineer's report did not support the Second Claim and in fact strongly supported the landlord's claim that any damage was the result of actions taken by Client. In light of this report, Attorney believes that the Second Claim is meritless. The Attorney believes that the First Claim continues to be a viable claim, however.

Trial is scheduled to commence shortly. Attorney advised Client of the results of the engineer's report and, based thereon, recommended that Client settle the First Claim and not proceed on the Second Claim. Client has vehemently disagreed with the Attorney's recommendation and wishes to proceed to trial. Attorney advises that Client has made it clear that there is no cost to Client in proceeding, and that Client wishes to cause defendants to incur the expense of going to trial. Attorney has stated that he believes that Client wishes to proceed "at least partially for the purpose of harassing the Defendants."

CONCLUSION

It is the opinion of the Committee that, if the Attorney believes the Second Claim is meritless, the Attorney must seek to withdraw from representation of Client if Client insists that Attorney proceed to trial on that claim.

DISCUSSION

When an attorney is retained to handle a matter for a client, the attorney is generally required to represent the client until the conclusion of the matter. Rindner v. Cannon Mills, Inc., 486 N.Y.S.2d 858, 859 (1985). The circumstances where an attorney may or must withdraw from representation of a client in a matter prior to its conclusion are set forth in Rule 1.16 of the Delaware Lawyers' Rules of Professional Conduct (the "Rules"). Rule 1.16 requires

withdrawal from representation of a client if "the representation will result in violation of the rules of professional conduct or other law. . ."

Rule 3.1 of the Rules provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert any issue therein, when he knows or it is obvious that there is no non-frivolous basis for doing so. . ." The Comment to Rule 3.1 states that a claim falls within its scope if either (a) "the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person," or (b) "the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." See also Superior Court Rule 11. Thus, if a client insists that an attorney pursue a claim which is meritless under Rule 3.1, Rule 1.16 requires that the attorney seek to withdraw from the representation. See ABA/BNA Lawyers' Manual on Professional Conduct, at 61:109 (1990) ("The disciplinary rules on frivolous claims also are pertinent to a lawyer's right to withdraw from representation if the client insists on pursuing an action, defense, or appeal the lawyer believes to be non-meritorious.").

The determination whether a claim is meritless under Rule 3.1 is subjective, rather than objective. See Comment to Rule 3.1. Thus, the test of whether a claim falls within Rule 3.1 is: "Did this lawyer actually believe the litigation was without merit?" ABA/BNA Lawyers' Manual on Professional Conduct, at 61:109 (emphasis in original).³ Under this subjective test,

³ We note that the locus of decision making with respect to whether a claim is meritless under the Rule 3.1 is different than the locus of decision making with respect to whether a claim should be settled under Rule 1.2. The determination whether a claim can be pursued in litigation is for the lawyer, not the client. See Rule 3.1 and Comment to Rule 1.2 ("All lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.") In contrast, the determination of whether a claim should be settled is for the client, not

"the attorney's judgment cannot be the subject of scrutiny unless there is some affirmative evidence of bad faith." Rindner, 486 N.Y.S.2d at 860. Here, there is no evidence of bad faith. The Attorney's belief that the Second Claim is meritless is supported by the expert's report. Similar facts have served as a basis for withdrawal in other cases. See Cohen v. Tzimas, 515 N.Y.S.2d 173 (N.Y. Supr. 1987) (permitting plaintiff's attorney to withdraw where expert reports did not support plaintiff's claim); Rindner v. Cannon Mills, Inc., 486 N.Y.S.2d 858 (N.Y. Supr. 1985) (permitting plaintiff's attorney to withdraw where, after investigating the facts and utilizing expert assistance, the attorney concluded that a prima facie case could not be established against the defendants); see also Goldsmith v. Pyramid Communications, Inc., 362 F. Supp. 694 (S.D.N.Y. 1973).

In sum, we conclude that if Client insists that Attorney pursue the Second Claim which Attorney believes is meritless, Attorney must seek to withdraw from his representation of Client. Only if the Court denies Attorney's motion to withdraw may he advance a claim which he believes to be meritless. Any possible prejudice to Client's First Claim which could be caused by Attorney's withdrawal can be weighed by the Court in considering Attorney's motion to withdraw. Compare In re Welfare of Hall, 664 P.2d 1445 (Wash. 1983) (requiring attorney to assert claims attorney viewed as meritless under the facts of particular case).

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for the lawyer. See Rule 1.2(a) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."). We do not understand that Attorney seeks to withdraw as a result of Client's determination not to pursue settlement of the litigation.