

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

Opinion 2006-1
January 26, 2006

This opinion is merely advisory and is not binding on
the inquiring attorney or the Courts or any other tribunal

Background Facts

The inquirer, a Delaware attorney (hereinafter “Attorney”), seeks guidance as to the appropriate professional prospective conduct, in the context of the facts as stated hereinafter. Attorney has indicated a desire to provide a legal service to his/her current client (the “Client”). This service includes the representation of the Client in a “simple” or “uncontested” divorce. This representation would not include a request to have ancillary jurisdiction, such as custody, child support, visitation, property division, alimony or counsel fees. The representation would not include an appeal. The Attorney has informed this Committee that the retainer agreement and information letter to the Client would specifically limit the scope of the representation in such fashion. The retainer agreement and information letter state that: (1) should the matter become a contested divorce, (2) should a divorce decree be appealed, or (3) should ancillary jurisdiction be requested by another party, then the Client would be required to seek other counsel.

The Attorney requests an opinion as to whether he/she could be required to do anything more than as stated in the above retention letter, if the Client or the Family Court (the “Court”) requested that the Attorney represent the Client as to matters outside the scope of the above retention letter.

Conclusion

It is the Committee’s opinion that the Attorney may be required to perform beyond the terms of the retention agreement if the Court requested, or the Client’s circumstances warranted such action.

However, in a proper circumstance, it does not appear an actual agreement to withdraw, or the actual withdrawal if the case goes beyond the expected scope, would violate any ethical requirements. This conclusion is subject to the requirement that Attorney provides proper and adequate advice to the Client concerning the scope of representation. Attorney should exercise diligence in the representation of the Client, and should mitigate any negative consequences to the Client caused by Attorney’s withdrawal as required in LRPC 1.2, 1.3 and 1.16.

It does appear that Family Court Civil Rule 5 could be reasonably interpreted to require the court's permission for an attorney to withdraw from a "simple" divorce petition in certain circumstances. These circumstances include: 1) Respondent filing an Answer or Counterclaim contesting the divorce; 2) Respondent seeking retention of ancillary jurisdiction; 3) Respondent seeking a divorce on alternate grounds; or 4) Respondent filing an appeal from a divorce decree. If the court interprets its rule to require court permission prior to withdrawal, it would be a clear ethical violation to simply cease representation of a Client without the court's approval. If the court does not interpret its rule to require court permission under such circumstances, then there would be no ethical violation for the attorney to withdraw without court permission. Again, this would be subject to LRPC 1.2, 1.3, and 1.16.

Discussion

The applicable provisions of the Delaware Lawyers' Rules of Professional Conduct ("LRPC") are Rules 1.2 (scope of representation), 1.3 (Diligence), and 1.16 (Declining or terminating representation). The relevant portions of those rules are as follows:

Rule 1.2 Scope of Representation.

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Rule 1.3 Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.16 Declining or terminating representation.

...

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

...

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Similarly, the pertinent Family Court Civil Procedure Rule is Rule 5 (Service and filing of pleadings and other papers). In part, it states:

...

(b)(2) Appearance of attorney. When; how made; withdrawal. (A) An attorney shall appear for the purpose of representing a party by filing a written notice of appearance using a Family Court generated form. The notice of appearance shall specify the matter(s) in which the attorney will represent the party. Once an attorney has filed a notice of appearance in a particular matter, copies of all notices given to the party with regard to that matter shall also be given to the party's counsel. No appearance shall be withdrawn except upon application by the attorney and order of the Court for good cause.

(B) Any appearance by an attorney in accordance with subparagraph (A) shall be limited to representation with respect to the specific petition filed and shall terminate when the time for appeal has elapsed from the final order entered by the Court.

In accordance with Rule 5(b)(2), the Family Court has generated Form No. 354, a copy of which is enclosed herewith.

Attorney desires to limit his/her representation of a client to an uncontested divorce without any request for the court to reserve jurisdiction for ancillary matters. Such an objective and limited representation appears to be in compliance with LRPC 1.2.

In fact, the comments to the rule state, in part, "[t]he scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client." However, subpart (7) reinforces the rule and makes clear that "the limitation must be reasonable under the circumstances."

LRPC 1.3 is a general requirement of due diligence and promptness. It appears to apply to general representation, as well as, limited and specific representation – similar to the type to which Attorney refers. A comment to Rule 1.3 also seems applicable to Attorney's proposal. Specifically, subpart (4) of the comment to the Rule states "[i]f a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved." This comment suggests that the lawyer can limit the boundaries of the representation. This is especially applicable if the lawyer represents the client on a variety of matters. The comment further suggests the lawyer should give notice to the client of withdrawal and such notice should be preferably be in writing.

Similarly, Rule 1.16 generally seems to support Attorney's proposal. However, subject to compliance with subsection (c), Rule 1.16(b) allows a lawyer to withdraw from representation if the withdrawal can be accomplished without a material adverse effect on the client's interest; or if... "(7) other good cause for withdrawal exists." It would appear the decision to withdraw, or when to withdraw, would have to be made on a case-by-case basis. Each case should examine whether a lawyer's withdrawal from a case (or failure to act) would have an adverse impact to the Client's interests. If so, the adverse impact affecting the Client should be balanced against the lawyer's "good cause for withdrawal."

For instance, one might envision a case (and indeed it is common) where an attorney files an uncontested divorce petition for a Client, with no request to retain ancillary jurisdiction. Subsequently, a Respondent could file: 1) A counter-petition to the divorce on different grounds, and/or an Answer to the Petition for Divorce that includes a request for ancillary relief; or 2) a contest to the Petition for Divorce could be filed. An attorney's failure to participate in such a proceeding may have an adverse impact on the Client. In those circumstances, this could violate LRPC 1.6(B). Specifically, a lawyer might file a simple divorce petition on behalf of the Client based upon incompatibility. However, Respondent might file a counter-petition to the divorce based upon misconduct. Even though the Client may have agreed in advance to Attorney's withdrawal, it would surely be to the Client's detriment if no action is taken and a fault divorce is entered.

Once again, the comments to Rule 1.16 provide guidance. It states, in part, "[a] lawyer may withdraw if the Client refuses to abide by the terms of an agreement relating to the representation, such as . . . an agreement limiting the objectives of the representation." The comment further provides "[e]ven if the lawyer has been unfairly discharged by the Client, a lawyer must take all reasonable steps to mitigate the consequences to the Client." Therefore, in the appropriate circumstances, the attorney could be required to take reasonable steps to mitigate the consequences to the Client, and not simply be allowed to withdraw without the Court's permission.

Furthermore, Attorney poses the question of his/her ethical obligations if either "the client or court insist that I pursue it further." While subject to the possible exceptions discussed above, it would seem that if an agreement is structured with the Client to allow Attorney to withdraw, he/she should be allowed to do so under the LRPC. However, if a Court requires an attorney to continue representing a Client, then the attorney must do so or it would be a clear violation of LRPC 1.16(c). Assuming this to be the case, Attorney must represent the Client with all of the normal due diligence and promptness that is required in any representation, as defined by LRPC 1.3.

Rule 5(b)(2) of the "Family Court Rules of Civil Procedure," prohibits withdrawal once an appearance has been made, except upon application and order of the Court. Family Court Form 354 allows an attorney to make an appearance for either "Divorce Without Ancillary Matters," or "Divorce With Ancillary Matters." In either case, it appears that Attorney would be required to continue to represent the Client until the Court permits withdrawal if a Respondent either contests the divorce or appeals the entry of a divorce.

It is perhaps less clear in a situation in which a divorce petition is filed that does not request retention of ancillary jurisdiction, and then an Answer to the Petition is filed, requesting retention of ancillary jurisdiction. In such circumstances, although the Attorney entered his/her appearance in a divorce case without ancillary jurisdiction, it would appear that the Attorney is nonetheless still the attorney of record in matters relating to that divorce petition. Unfortunately, there is no case that interprets this rule. The answer to the question lies with the Court's interpretation. If the Court interprets its rule to allow withdrawal, then Attorney may ethically do

so, subject to the requirement to provide proper advice and diligence. Also, in certain circumstances, that Attorney must mitigate the consequences to his/her Client. If the Court interprets its rule to require the Court's permission, then ethically, the Attorney must obtain such permission to withdraw under such circumstances. If the Court refuses to grant that permission, the Attorney may be required to perform beyond the agreement of representation.