

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 88-024

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Withdrawn by Adv. 2019-01

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent rule amendments regarding division of fees in DR 2-107, eff. Aug. 1, 1990.]

SYLLABUS: An attorney may withdraw from employment only on the basis of compelling circumstances and must obtain the client's consent prior to withdrawing from the representation. A lawyer may be required to obtain permission from the tribunal before withdrawing from employment in a proceeding before that tribunal. If a lawyer is justified in withdrawing from employment he or she must take considerable care and endeavor to minimize the possible adverse effect on the rights of his or her client and the possibility of prejudice to the client as a result of the withdrawal. In addition, a lawyer should give due notice to his client that he is withdrawing to allow time for employment of other counsel. He should deliver to his client all papers and property to which the client is entitled. A lawyer may not represent a party in an action against a former client in a matter that is substantially related to the former representation. An attorney is entitled to a division of the fee in proportion to the services performed and responsibility assumed in the representation prior to the withdrawal.

OPINION: We have before us your request for an advisory opinion regarding your practice of law. At the present time you represent claimants in Workers' Compensation cases and have been approached by a few employers who wish to hire you to represent them in their Workers' Compensation matters. As you indicate, for each of these employers, you have one or more clients who are employees of theirs. Your specific questions are raised in two scenarios which are quoted below.

First, there are those clients whom I have represented in the past for whom there are no matters pending at this time. ...I do not believe that I could represent an employer against those claimants. ...What is the best way in which to obtain ...representation for [the employer].

Second, there are those clients for whom I have some matter[s] pending. Can I [ethically] withdraw from that employment ...in order to undertake the representation of that client's employer, even though I would not represent the employer in any matter concerning that client? Is there any problem with my referring that client to an attorney... May I reasonably request a fee for that portion of the services rendered in the active matter and earned prior to the date on which alternative counsel is retained?

In regard to your first scenario, we believe that you may not represent a client against a former client in a matter substantially related to the former representation. See, e.g., Wolfram, Modern Legal Ethics, 336 (1986). Your duty of loyalty and confidentiality owed to the former client survives the formal conclusion of the lawyer-client relationship. ABA Committee on Ethics and Professional Responsibility, Informal Op. 1322 (1975). Your ethical duty not to disclose confidences is necessary in order to encourage clients to disclose their problems freely and in depth with you, without fear that one day that information may be used against them. Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 570-571 (2d Cir. 1973).

The best way in which to obtain representation for the employer when you are disqualified from the representation is to leave that decision up to the employer. You may, however, recommend another lawyer to your client but again, the employer should have the ultimate control over who is hired. Your responsibility is to avoid the appearance of impropriety by not being involved in an action against a former client that is substantially related to the former representation. See, e.g., Schloetter, v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976).

In regard to withdrawing from employment, DR 2-110(A) states:

- (1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Disciplinary Rule 2-110(C) which relates to permissive withdrawal states that a lawyer may not withdraw unless one of the reasons set forth in the Rule is met. Withdrawal is permissive if the client knowingly and freely assents to termination of your employment. Code of Professional Responsibility, DR 2-110(C)(5). Therefore, “the Code does not allow a withdrawal without [the client] consent even if withdrawal would not harm an interest of the client.” Wolfram, Modern Legal Ethics 551 (1986). Therefore, whether you may withdraw depends upon whether your clients consent to the withdrawal.

In addition, the requirements of the Disciplinary Rules, Ethical Consideration 2-31 states that a lawyer’s decision to withdraw should be made only on the basis of compelling circumstances. Furthermore, “[a]n attorney who is retained generally to conduct a legal proceeding enters into an entire contract and should not abandon performance without reasonable cause.” Goldsmith v. Pyramid Communication, Inc., 362 F.Supp. 694, 696 (S.D.N.Y. 1973).

We are not going to define what would constitute compelling circumstances; instead we leave that up to the professional judgment of the individual lawyer. However, if you are justified in withdrawing, then you should endeavor to minimize the possible adverse effect on the rights of your clients. Code of Professional Responsibility, EC 2-31.

You may ethically suggest employment of other counsel to your former clients. Id. In addition, you are entitled to your legal fees in proportion to the services performed and responsibility assumed while representing the former client. Code of Professional Responsibility, DR 2-107(A)(2). You should, however, endeavor to avoid any controversies over your fees with your clients and should attempt to resolve amicably any differences on the subject. Code of Professional Responsibility, EC 2-22.

In conclusion, it is our opinion and you are so advised that, an attorney may withdraw from employment only on the basis of compelling circumstances. The client must consent to the withdrawal. A lawyer may also be required by local rule to obtain permission from the tribunal before withdrawing from employment in a proceeding before that tribunal. A lawyer who is justified in withdrawing from employment must take considerable care and endeavor to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. A lawyer should give due notice to his client that he is withdrawing to allow time for employment of other counsel and may suggest such counsel. A lawyer may not represent a party in an action against a former client in a matter that is substantially related to the former representation. A lawyer is entitled to his or her legal fees in proportion to the services performed and responsibility assumed in the representation prior to the withdrawal.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.

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Secretary, Board of
Commissioners