ISBA Advisory Opinion on Professional Conduct

ILLINOIS STATE BAR ASSOCIATION

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This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.2(c) and (d) with its Comments [6-8], 1.16(d) with its Comments [9-10], 3.3, and 8.4(d) with its Comment [3]. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 85-6
December 6, 1985

Topic: Duty to adequately represent client

Digest: It is improper for a lawyer to advise client, prepare pleadings, motions and petitions for client as a pro se litigant, file documents in court on client's behalf, but not appear for and on behalf of client during judicial proceedings.

Ref.: Rule 6-101, 7-101, 5-101
People ex rel. Attorney General v. Beattie, 137 Ill. 553
ISBA Opinion No. 849

FACTS

Attorney practices in Federal Court, representing debtors in Chapter 7 bankruptcy proceedings. Attorney attempted to obtain a waiver from his clients excusing his presence from the first meeting of creditors. The court ordered that only the court had the power to waive the attorney's presence and ordered the attorney to appear. The attorney did not appear at the first meeting of creditors and was found to be in contempt of court. Subsequently, the attorney modified his method of representing petitioners in bankruptcy cases by advising the clients, preparing the

petitions on behalf of the clients as if they were "pro se", filing the petitions with the Clerk and at the same time advising the court that the petitioners are "pro se". The petitioners then attend the first meeting of creditors and all other hearings without the assistance of counsel. However, the attorney files motions to avoid liens and motions to amend schedules for the pro se debtors, when appropriate, and requests that the court advise the attorney when orders discharging the debtors are entered. The attorney has the debtors list fees paid to him for his services on the schedules.

QUESTION

Is it proper for an attorney to advise clients, prepare petitions and pleadings on their behalf, and otherwise hold himself out as the attorney for an individual, but not appear in court on the client's behalf?

OPINION

An attorney has a duty to his clients and to the courts. Canon 6 provides that "a lawyer should represent a client competently." Canon 7 provides that "a lawyer should represent a client zealously within the bounds of law." Pursuant to these two Canons, the Supreme Court has adopted Rules 6-101 and 7-101 which provide that a lawyer shall not handle a legal matter without preparation adequate in the circumstances nor intentionally fail to be punctual in fulfilling all professional commitments or fail to treat with courtesy and consideration all persons involved in the legal process.

A lawyer is bound to provide the best professional service, duty and integrity on behalf of his client. In addition, he owes the same duty to the court.

In the situation presented to the Committee, a lawyer has attempted to avoid a court appearance by agreement with his client. When that failed, he attempted to be excused by the court; and when that failed, he intentionally failed to appear in court and was found to be in contempt of court. The Committee has not been furnished with the reason why the lawyer did not want to appear in court on a particular case. Because the lawyer did not appear and because he was held in contempt of court for failing to appear, the Committee can only take the position that the court felt inadequate reason existed for the lawyer's absence. Assuming this to be correct, the failure to appear falls short of the duty and obligation owed by the lawyer. The subsequent actions on the part of the lawyer in attempting to represent clients by giving advice and preparing document, but not going to court to complete the representation of that client fall far short of the ethical and professional obligations of a lawyer to a client.

It is impossible to begin to enumerate all the things that could happen during the course of the court proceedings that the client would not be prepared to address and only with the presence of the lawyer could that client's interest be fully and properly presented to the court. The client under these circumstances can hardly be considered to be adequately prepared or represented competently without the lawyer's presence. By sending the client to court after preparation of the petitions showing the client to be pro se, the lawyer has taken part in a plan or scheme to avoid his punctual fulfillment of professional commitments and he has failed to treat the court

with the proper courtesy and consideration.

Rule 5-101 states that subject to certain exceptions which do not apply in this case, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests. It appears from the facts given to the Committee that there is a dispute between the attorney and the court, to the extent that the court found the attorney to be in contempt of court.

By accepting limited employment under the terms and conditions described, the lawyer may be putting his interests ahead of the best interests of his client and thus violating the spirit and intent of Rule 5-101. If a conflict of interest between the attorney's personal interests and that of his client does exist, the client cannot waive that aspect of the attorney-client relationship and the attorney is putting his interests ahead of his clients.

In ISBA Opinion 849, we determined that a lawyer could limit his representation in a proceeding for dissolution of marriage to the preparation of pleadings, without appearing or taking any part in the proceeding itself and we discussed the obligation of the attorney to fully inform the client of the effect of the limitation of employment. While the present situation may appear to be similar to Opinion 849, there is a material difference in that here an attorney, while still appearing of record in the case, is attempting to limit the scope of his employment.

As previously stated, a lawyer has an obligation to the court. Justice Magruder, in The People ex rel. Attorney General v. Beattie, 137 Ill. 553, at page 574, stated:

> The lawyer's duty is of a double character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court--a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions.

To allow a lawyer to conduct the practice of law as presented by these facts would allow the lawyer to only represent his or her clients halfway. We cannot take on the responsibility of representing a client only in those facets or portions of the case that interests us while ignoring or leaving the client to fend for himself if we are inconvenienced or for some reason do not have the time, ability or inclination to assist the client in all matters. If we cannot represent the client completely, in all aspects of the case, we should obtain the assistance of co-counsel or refuse the employment.

The attorney in the factual situation presented to this Committee has done a disservice to his client, the court and the bar. This conduct does not meet the ethical or professional standard that the legal profession is expected and required to adhere to and is the type of activity that casts a shadow over the entire legal profession.

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