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PERSPECTIVE

Balancing ethical duties when a client's claims lack merit

By Shawn Shaffie

What ethical obligations arise when an attorney is required to withdraw from representation because the client's claim(s) lack merit? Do ethical obligations preclude the attorney from settling the action before withdrawing from representation in such a situation? The recently published Formal Opinion Number 2019-198 of the State Bar of California Standing Committee on Professional Responsibility and Conduct purports to answer these questions.

The opinion provides a blended analysis of potential ethical implications stemming from an attorney's duty to withdraw when a claim lacks merit, and balances these in light of a situation where the attorney has the opportunity to settle a client's claims before withdrawal. In in doing so the opinion addresses various Rules of Professional Conduct implicated in this situation including: Rule of Professional Conduct 1.16 (the duty to terminate representation if the attorney knows or reasonably should know that the client is asserting a position without probable cause); , Rule of Professional Conduct 3.1 (an attorney's duty to only advocate meritorious claims); Rule of Professional Conduct 3.4 (duty of fairness to opposing counsel), and: Rule of Professional Conduct 4.1 (duty to be truthful in statements to others).

The starting premise of the opinion acknowledges that an attorney must withdraw where client claims lack merit but that before doing so, the attorney must take reasonable steps to avoid reasonably foreseeable prejudice to the client's rights. Such reasonable steps may include settling the claim, if the attorney is able to do so in a manner that does not violate Rules of Professional Conduct, specifically Rules 1.16, 3.4 and 4.1.

The opinion pragmatically highlights the importance of early vetting and due diligence by law firms, so as to ensure that a potential client's claims do in fact have merit. Indeed, an early investigation into a client's fundamental claims prior to entering into an attorney-client relationship



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may eliminate the need of having to partake in this balancing act of ethical duties to withdraw versus protecting a client's interests, altogether.

Obligations to the client remain until withdrawal. The client's interests cannot be abandoned even if the case lacks merit.

Rules of Professional Conduct 1.16(a) (1) and 3.1 prohibit an attorney from continuing representation and require withdrawal "if the lawyer knows or reasonably should know that the action is being taken without probable cause and for the purpose of harassing or maliciously injuring any person..." The opinion also highlights an attorney's duty to continue satisfying ethical obligations to the client until the very end of their attorney-client relationship by stating that "between the time an attorney determines that because a client's case lacks merit withdrawal is mandatory, and the time actual withdrawal from the case occurs, the attorney's obligation to represent the client's interests remain."

In other words, even if the client's claims lack merit, until the attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, the attorney may not withdraw from representation. In this way, an attorney involved in non-meritorious claims cannot simply stand by the way-side and let such claims be dismissed through "inaction," because protecting

their client's interests remain critical.

To the extent the attorney is not violating ethical duties to be truthful, settlement can be negotiated even if the claim lacks merit.

Because an attorney's obligation to represent the client's interest remains until actual withdrawal, if there is an opportunity to settle prior to the dissolution of the attorney-client relationship, then the attorney must seriously consider it so as to mitigate the client's potential exposure. The only exception to this would be if by participating in settlement, an attorney's ethical duties would be violated.

Ultimately, while an attorney may seek to settle a case where the claims lack merit, the ability to advocate settlement would be significantly limited by their Duty of Truthfulness.

An ethical checklist for when claims lack merit, but settlement is an option.

With respect to negotiating settlement once it is discovered that a client's claims lack merit, attorneys must be very careful in making sure to avoid the following:

(1) *Material Misstatements:* First, an attorney cannot make affirmative material misstatements of fact concerning the merits of the claim. Indeed, a lawyer communicating on behalf of a client with a non-client may not knowingly make false statements of material fact to the non-client, and may be liable for those false statements. (See Rule of Professional Conduct 4.1(a) which states in part "In the course of representing a client a lawyer shall not... make a false statement of material fact or law to a third person...". See also Business and Professions Code Section 6068(d)).

(2) *Concealment of Material Information To Negotiations:* Second, in negotiating any settlement, an attorney may not conceal information material to the negotiations in violation of a Duty to Disclose. (See Rule of Professional Conduct 3.4(b) which states in part that "A lawyer shall not... suppress any evidence that the lawyer or the lawyer's client has a legal obligation to

reveal or to produce." See also Business and Professions Code Section 6106).

(3) *Assisting The Client In Concealment Or Making Material Misrepresentations:* Third lawyers may not knowingly assist the client in negotiating settlement based upon prior material misrepresentations or wrongful concealment of material facts concerning the merits of the claim. (Rule of Professional Conduct 3.4(b). See also Rule of Professional Conduct 4.1(b) which states in part "In the course of representing a client a lawyer shall not... fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client...").

Conclusion

While an attorney's compliance with various ethical duties may limit their ability to navigate a client's meritless case towards full and final resolution, if there is a manner in which the Duty of Truthfulness can be upheld, then the attorney may seek to properly settle the claim on whatever terms can be negotiated. Other reasonable steps aside from settlement that attorneys may take include delaying withdrawal so as to allow the client an opportunity to attempt to retain other counsel, and advising the client to dismiss the case.

Such situations are never easy, but an attorney's duty to protect a client's interests remains paramount until the end. ■

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