BBA Ethics Opinion 93-1

Summary: A lawyer who is discharged by the client shortly before trial should seek leave to withdraw and a continuance of the trial. If both motions are denied, the lawyer should request the client to find new counsel. If new counsel is not obtained, the lawyer should appear at trial and again request a continuance and leave to withdraw. Courts have generally recognized, particularly in civil litigation, that attorneys should not be compelled to proceed to trial where the attorney-client relationship has deteriorated, especially if the client has discharged the lawyer. If the trial court nonetheless refuses a continuance and refuses to permit counsel to withdraw, the lawyer, after considering whatever options for immediate appellate review might be available, should nonetheless comply with the court's orders to the best of the lawyer's ability and proceed to trial. The lawyer may renew a motion to withdraw or move for mistrial or a new trial if the circumstances are appropriate.[1]

Facts: The inquiring lawyer is the second attorney to represent the wife in a very contested divorce proceeding in which the wife has resisted efforts to dissolve the marriage and has not been cooperative during discovery. The attorney-client relationship deteriorated when the wife suggested that a Chapter 209A complaint be brought in district court, and the attorney declined to do this because he believed it to be groundless. On the eve of trial, the lawyer received communications orally and twice in writing that he was discharged, that he should turn his file over to the wife who had retained or would retain another lawyer (not identified), and that he should have nothing further to do in his representation of her. The attorney moved for leave to withdraw and also moved to continue the trial. Both motions were denied, and the trial was scheduled for several days hence. The trial judge stated that he would not continue the trial. The facts warrant a conclusion by the trial judge that the wife has not been cooperative during discovery and has tended to use the legal process so as to avoid having any trial on the merits.

The lawyer inquires as to his ethical obligations under the circumstances.

Discussion:

D.R. 2-110(B), Mandatory Withdrawal, provides in relevant part that:

"A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(4) he is discharged by his client."

(Emphasis supplied).

The lawyer acted properly in seeking leave to withdraw after he was discharged by his client and in seeking a continuance in order that new counsel could be obtained and become familiar with the case. After both motions had been denied, the lawyer must promptly advise his client of the denial and request that the client obtain new counsel. If new counsel is obtained, then the lawyer should seek to have new counsel substituted at once. In the event these efforts are not fruitful, the lawyer should consider the efficacy of seeking interlocutory review of the orders pursuant to G.L. c. 231, § 118, or G.L. c. 211, § 3.

The harder issue is what should be done on the day of trial if new counsel has not been obtained. Clearly, the lawyer should renew the previously denied request for a continuance and for leave to withdraw. Courts have recognized that "When the lawyer- client relationship deteriorates, it is both impractical and subversive of the legal profession to persist in the relationship." LoCicero v. Hartford Ins. Group, 25 Mass. App. Ct. 339, 344 (1988) (holding, however, that there was no

abuse of discretion in the trial judge's denial of plaintiff's counsel's motion for leave to withdraw where it was untimely because a motion for summary judgment had already been heard). Indeed, if trial is not imminent, appellate courts have been critical of trial judges who refuse to permit counsel to withdraw from civil litigation. See, for example, A Sealed Case, 890 F.2d 15, 17-18 (7th Cir. 1989) (writ of mandamus issued where law firm's ability to withdraw from representation of civil defendant was based on well-founded belief that client would commit perjury), and Conticommodity Services, Inc. v. Ragan, 826 F.2d 600, 602-03 (7th Cir. 1987) (trial court exceeded its jurisdiction by appointing counsel for debtor, against counsel's will, in litigation initiated prior to filing a bankruptcy petition because at time of appointment debtor was no longer real party in interest in litigation).

Where trial is imminent, however, different considerations apply inasmuch as the courts must have the power to prevent the disruption of trial proceedings by obstreperous clients firing their lawyers on the eve of or during trial (or other dispositive proceedings). See LoCicero, supra; Cotrone v. Brian Production Credit Association, 502 S.W.2d 954, 956 (Tex. 1973) (no abuse of discretion in not permitting defendant's second attorney to withdraw on eve of summary judgment hearing), and Ohntrup v. Firearm Center, Inc., 802 F.2d 676, 679-80 (3d Cir. 1986) (no abuse of discretion in denying a motion to withdraw after counsel was discharged by its client, a wholly-owned company of the Turkish government, following verdict against client where many of the client's officers and agents did not speak or understand English and client had been an intractable litigant so that withdrawal would leave court without possibility of effective communication with client and without reliable mechanism for responsible supervision of post-judgment aspects of litigation). Also see Fessler v. Weiss, 107 N.E.2d 795, 798 (Ill. App. 1952) (no error in refusing to permit counsel retained by insurer to withdraw because of insolvency of insurance company where trial Nwas only a few days offo). Occasionally, where the client has discharged the attorney, the court has requested that counsel remain in the case as a friend of the court. See Morrill v. Tong, 390 Mass. 120, 121 n.1 (1983) (shortly before oral argument, the defendant's counsel received a letter of discharge from the client and moved to withdraw; court instructed counsel to argue the case as a friend of the court).

In Massachusetts it has been recognized that "As a general proposition, individuals may prosecute or defend their own action. G.L. c. 221, § 48." LoCicero, supra, 25 Mass. App. Ct. at 344. Also see Curtis v. J. J. Duffy Adjustment Service, Inc., 31 Mass. App. Ct. 949, 950 (1991). In this case, it is not clear whether the wife may wish to proceed pro se if substitute counsel is not available to try the case. If so, G.L. c. 221, § 48 must be brought to the attention of the judge. The bottom line, however, is that under Rule 11(c) of the Massachusetts Rules of Civil Procedure, court permission is required for counsel to withdraw, and under D.R. 2-110(B), counsel needs court permission to withdraw even though he has been discharged by the client. Accordingly, while the Committee believes that trial judges in the circumstances posed by the inquiring lawyer should be sympathetic to motions for leave to withdraw, it is the province of the Appeals Court and the Supreme Judicial Court to correct trial court error, not that of trial counsel. Therefore, counsel must continue with the trial if withdrawal is not permitted.

ENDNOTE

[1] Emergency advice was given on this inquiry pursuant to the Rules of the BBA Ethics Committee; however, after subsequent Committee discussion, a conclusion was reached that the initial advice was incorrect in the final conclusion,

i.e., the lawyer's obligation when on the day of trial substitute counsel has not been found and motions to withdraw and continue have again been denied. Because this is a recurring issue, the Ethics Committee believed that it should be addressed in a formal opinion.