

**The Professional Ethics Committee
for the State Bar of Texas
Opinion No. 557**

May 2005

Question Presented

May a lawyer continue to represent in a lawsuit a client who has expressed strong disagreement with the lawyer's recommendation about the settlement value of the case to the point that the client has sought the advice of a malpractice lawyer?

Statement of Facts

Client C believed that he had been wrongfully terminated from his employment and retained Lawyer L to file a lawsuit against Client C's former employer. Lawyer L and Client C entered into a contingency fee contract. Lawyer L engaged in discovery and the case was set for trial in six months.

Lawyer L and counsel for the employer engaged in settlement discussions. Employer's counsel made a settlement offer that Lawyer L presented to Client C. Neither Client C nor Lawyer L thought the offer was acceptable. In their discussion, Lawyer L presented her evaluation of the case and explained to Client C the weaknesses of the case. Lawyer L proposed to Client C a specific recommendation for an acceptable settlement of the case that Lawyer L believed the employer would accept. Lawyer L suggested that Client C agree to this settlement if the employer would agree to pay the proposed amount.

Client C was extremely displeased with Lawyer L's recommendation and believed that the case had a much greater settlement value. Client C would not agree to settle the case for the amount recommended by Lawyer L. Client C then asked Lawyer L to reduce her contingent fee percentage as set forth in the fee contract. Lawyer L declined and their discussions ended without any agreement.

Shortly after these discussions about the settlement value of the case, Client C consulted with a malpractice attorney. Client C then informed Lawyer L that he had contacted the malpractice attorney and asked Lawyer L to discuss the case with the malpractice attorney. The malpractice attorney informed Lawyer L that Client C was extremely dissatisfied and felt that he was being pressured to accept an unfavorable settlement. The malpractice attorney made it clear, however, that Lawyer L had not been terminated and that the malpractice attorney had not been engaged by Client C to take over the case.

Discussion

Rule 1.02(a) (2) of the Texas Disciplinary Rules of Professional Conduct requires that a lawyer abide by a client's decision concerning whether to accept an offer of settlement. Comment 3 to Rule 1.02 states that a lawyer should consult with his client concerning any settlement proposal and that generally it is for the client to decide whether or not to accept a settlement proposal.

Rule 2.01 provides that a lawyer shall exercise independent professional judgment and render candid advice. Comment 1 to Rule 2.01 recognizes that a client is entitled to straightforward advice expressing the lawyer's honest assessment of a matter and, moreover, that legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.

It is not unusual for a client to disagree with or be disappointed with a lawyer's recommendation concerning settlement. A client may seek advice from others, including another attorney. The fact that a client has communicated with other legal counsel or sought a second opinion does not, by itself, require withdrawal. Such communications with other legal counsel are often useful because a second attorney may help minimize misunderstandings between a client and his lawyer.

The facts here, however, reflect much more than a mere misunderstanding between a lawyer and a client. Client C has visited with a malpractice lawyer about Lawyer L's representation in the case, and this fact creates the likelihood that Lawyer L's representation of Client C in the matter could be adversely affected by Lawyer L's personal interest concerning a possible malpractice claim by Client C. Rule 1.06(b)(2) provides that a lawyer shall not (except to the extent permitted by Rule 1.06(c)) represent a person if the representation "...reasonably appears to be or become adversely limited...by the lawyer's or law firm's own interest." Rule 1.06(c) requires that, to continue the representation in such circumstances, the lawyer must reasonably believe that the representation will not be materially affected (Rule 1.06(c)(1) and the client must give his consent after full disclosure of the existence, nature, implications and possible adverse consequences of continuing the representation (Rule 1.06(c)(2)). Comment 7 to Rule 1.06 provides that a client's consent to continued representation, notwithstanding a conflict or potential conflict, should not be requested when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances. If Lawyer L determines that her continued representation is not precluded under Rule 1.06(b)(2) and Rule 1.06(c)(1), it may be prudent for Lawyer L to recommend that Client C consult with the malpractice lawyer concerning whether Client C should consent to further representation by Lawyer L.

Rule 1.15(b) (4) permits a lawyer to withdraw from a representation if the client insists upon pursuing an objective with which the lawyer has a fundamental

disagreement. Rule 1.15(b) (6) also permits a lawyer to withdraw from a representation if the representation has been rendered unreasonably difficult by the client. Moreover, a lawyer must withdraw from a representation pursuant to Rule 1.15(a)(1) if the representation will result in a violation of a rule of professional conduct, which would include a violation of Rule 1.06(b)(2) by continuing representation when there is a conflict of interest for which the requirements of Rule 1.06(c) are not met. If a lawyer withdraws, he is required by Rule 1.15(d) to take steps to the extent reasonably practical to protect the client's interests, including giving reasonable notice and allowing time for employment of other counsel. If a lawyer withdraws, he must also comply with applicable procedural rules, which in the case of pending litigation would normally include seeking permission from the court before which the case is pending.

Conclusion

In the case of a strong disagreement between a lawyer and the lawyer's client as to which the client has sought the advice of a malpractice lawyer, the lawyer is permitted under the Texas Disciplinary Rules of Professional Conduct to continue to represent the client in the matter only if the lawyer reasonably believes that he can continue the representation without being materially affected and the client consents after full disclosure as to the conflict of interest involved. The lawyer is permitted but not required to withdraw if the client insists upon pursuing an objective with which the lawyer has a fundamental disagreement or if the client makes the representation unreasonably difficult. In any case in which a lawyer withdraws from representation, the lawyer must comply with applicable procedural rules and take reasonably practicable steps to protect the client's interests.