Ethics Opinion No. 84-10

Consent to Withdraw Executed when Representation Undertaken.

The Committee has been asked to pass both upon the practice of attorneys obtaining consents to withdraw as a condition of employment by a client and their subsequent tender to the court. It is the opinion of this Committee that an attorney should not lodge with the court such a previously executed document without notice of hearing to his client under the guise of an express consent in writing to the withdrawal of the attorney. Further, a lawyer may not tender to the court such a previously executed document even following motion and notice of hearing to his client and opposing counsel. In the future, an attorney may not obtain a consent to withdraw in advance of an actual intent to withdraw.

The aspects of obtaining such a consent to withdraw are delineated by professional standards and court rules. A lawyer shall not withdraw from employment in a proceeding before a tribunal without its permission, when permission for withdrawal is required by court rules. See DR 2-101 (A)(1). The procedure through which an attorney obtains the tribunal's consent to withdraw is provided by Alaska Civil Rule 81(d), which in pertinent part provides as follows:

- (1) An attorney who has appeared for a party in an action or proceeding may be permitted to withdraw as counsel for such party only as follows:
 - (i) for good cause shown, upon motion and notice of hearing served upon the party in accordance with Rule 77; or
 - (ii) where the party has other counsel ready to be substituted for the attorney who wishes to withdraw; or
 - (iii) where the party expressly consents in open court or in writing to the withdrawal of his attorney.

On one hand, the attorney may withdraw without the express consent of his client when good cause has been shown, but only following motion and notice of hearing. On the other hand, an attorney may withdraw without motion and notice of hearing, but only upon the client's express consent in court or in writing such a withdrawal. It is apparent that the consent pursuant to Alaska Civil Rule 81(d)(1)(iii) is contemplated to be a current consent, rather than one previously obtained. See also, ABA Canon 44. Therefore, the prior accord on withdrawal of counsel made between attorney and client may not be tendered to the court as an express consent in writing. The attorney and client may agree that the attorney may seek to withdraw upon the occurrence of future contingencies. However, this agreement to the attorney's withdrawal

upon the occurrence of future contingencies may *not* be used within the context of Alaska Civil Rule 81(d)(1)(iii), nor does it necessarily establish good cause pursuant to Civil Rule 81 (d)(1)(i). The determination of whether good cause has been established is made by the tribunal involved.

The ethical aspects of this matter are, in large part, covered by the Rules of Professional Conduct which require the lawyer to exercise full honesty toward the tribunal and mandate that the lawyer shall not proffer evidence which is false. A lawyer shall exercise full candor toward the tribunal and shall not knowingly make false statement of material fact or law, nor fail to disclose material facts, nor offer evidence which the lawyer knows is false. See ABA Model Code of Professional Responsibility, Rule 3.3. A lawyer shall represent his client within the bounds of the law and, in his representation, shall not conceal or fail to disclose that which is required by law knowingly use perjured testimony or false evidence, or knowingly make a false statement of law or fact. See DR 7-102 (A)(3)-(5). The lawyer, during trial, shall conduct himself in a manner which comports with honesty, good faith, and full disclosure. See DR 7-106(A), (B) and (C). The Rules of Evidence and Civil Procedure are designed to produce just decisions within the framework of the law. Thus, a lawyer is not justified in consciously violating such rules and should be diligent in his efforts to guard against his unintentional violation of them. The lawyer should not subscribe to or verify pleadings which he believes are not in compliance with applicable law or rules. See EC 7-25.

Therefore, based on all of the above, an attorney may not utilize such a previously executed consent to withdraw in proceedings under Civil Rule 81(d)(1)(iii), as it is not a current consent in writing to said withdrawal. Further, such a document should not be proferred as either a current express agreement to withdrawal nor as evidence thereof even following motion and notice of the hearing served on the client and counsel pursuant to Alaska Civil Rule 81 (d)(1)(i).

The Committee is aware that the obtaining of advance consents to withdraw has been done in the past, and nothing in this opinion is intended to operate retroactively. In the future, the obtaining of consents to withdraw in advance of actual intent to withdraw will be considered improper. An attorney may enter into a contract with a client whereby the client recognizes that the attorney has a right to withdraw from the representation upon the occurrence of future contingencies, but the withdrawal itself must be accomplished by notice and hearing, substitution, or current consent, in accord with the provisions of Alaska Civil Rule 81(d).

Adopted by the Alaska Bar Association Ethics Committee on November 1, 1984.

Approved by the Board of Governors on November 9, 1984.