

You advise that the Ninth District Committee has received nine complaints involving six attorneys who have withdrawn from the representation of claimants in black lung cases pending before the U.S. Department of Labor. The attorneys have withdrawn from representation pursuant to the Rules of Practice and Procedure for Administrative Hearings. 29 C.F.R. Section 18.34(g) states that "any attorney of record must file prior notice in writing of intent to withdraw as counsel."

Disciplinary Rule 2-108(C) [DR:2-108] of the Virginia Code of Professional Responsibility, however, requires an attorney to give notice of intent to withdraw as attorney of record and to receive permission of the court.

You pose two questions relative to the above. First, you wish to know if the state has been preempted from regulating the conduct of Virginia attorneys practicing before federal administrative agencies. Second, you ask if the state has not been preempted from regulating the conduct, do the current rules of the Code of Professional Responsibility apply.

Your first question regarding preemption is beyond the jurisdiction of the Committee.

With regard to your second question, if the Virginia Code of Professional Responsibility is not preempted by federal law, then it must be determined if DR:2-108 applies to the subject tribunal. DR:2-108(C) states that "in any court proceeding, counsel of record shall not withdraw except by leave of court after notice to the client of the time and place of a motion of leave to withdraw. In any other matter, a lawyer shall continue representation, notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal."

The definition section of the code defines tribunal as follows: "'Tribunal ' includes all courts and all other adjudicatory bodies." "Courts and all other adjudicatory bodies" are defined as subsets of tribunals and are, therefore, considered separate entities. Thus, an administrative hearing would not be considered a court proceeding. Based upon this analysis, DR:2-108(C) would not be violated unless the tribunal had given notice that it required court approval prior to any attorney withdrawing from the administrative hearings.

Ethical Consideration 2-34 [EC:2-34] states that "a decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal" (emphasis added). Since an administrative hearing would not fall under the guidelines for withdrawal in a court proceeding as set forth in DR:2-108(C), the rules for withdrawing from administrative law proceedings would be found in 29 C.F.R. Section 18.34(g). According to the facts you have submitted, 29 C.F.R. Section 18.34(g) was followed by the six attorneys who were the subject of complaint.

Committee Opinion
January 12, 1988