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Plan Your Route Before Getting Out: Attorney Withdrawal

Sooner or later in a law practice, a problematic client will surface. In some cases, lawyers may take proactive measures, such as increasing communication or reducing legal fees, to mitigate any difficulties and salvage the attorney-client relationship. In other situations, the relationship may continue to deteriorate despite the lawyer's best efforts to accommodate the client. The lawyer's natural instinct may be to "fire" a troublesome client and withdraw from the representation. While the desire to flee may be understandable, the lawyer must carefully analyze the relevant case law and rules of professional conduct prior to withdrawal. Unlike clients, who have an almost unfettered right to terminate an attorney-client relationship, lawyers do not enjoy such freedom. Fiduciary obligations and ethics considerations limit the lawyer's options. Navigating a successful separation from a client requires protecting the client's interests while complying with the rules and laws surrounding lawyer withdrawal. And, in some instances, the facts and circumstances will require a lawyer to continue a representation in spite of any differences with a particular client. Lawyers who recklessly abandon their clients without forethought risk running a road to ruin.

Mandatory Withdrawal

Under some circumstances, the rules mandate that an attorney must withdraw from a matter. *ABA Model Rule of Professional Conduct 1.16(a): Declining or Terminating Representation* enumerates three scenarios where withdrawal is mandatory, which occur when:

1. the representation will result in violation of the rules of professional conduct or other law;
2. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
3. the lawyer is discharged.

With respect to the first scenario, the Comment section to the Rule clarifies that a client merely inquiring about or suggesting an illicit course of conduct does not trigger mandatory withdrawal by the attorney.[1] Rather, mandatory withdrawal applies to the client who insists upon illegal or unethical conduct. Similarly, lawyers must ensure that they abide by their jurisdiction's rules of professional conduct. If, for example, an non-waivable conflict of interest develops, lawyers must withdraw from the representation.

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1 Comment 2 to *ABA Model Rule of Professional Conduct 1.16: Declining or Terminating Representation*

If during the pendency of a matter, the lawyer's physical or mental ability regresses to a point that the lawyer can no longer render effective counsel, the lawyer must inform the client and withdraw from the representation. For example, a New York court denied a motion to dismiss filed by the estate of a deceased lawyer in a legal malpractice case. The deceased lawyer died of cancer shortly before the statute of limitations ran to file a wrongful death action on behalf of his client.[2] The plaintiff did not know for several months that her lawyer died and that her wrongful death case was never filed. The court held that the plaintiff was entitled "to the inference that [the attorney] died as a result of a chronic, terminal illness that he knew, or should have known presented the immediate risk that his ability to represent his clients' interests might be impaired" and failing to timely notify the plaintiff and withdraw from the representation may have constituted legal malpractice.[3]

Clients have the "right to discharge a lawyer at any time, with or without cause."[4] And even when a lawyer believes that the discharge is unfair, the lawyer is obligated to mitigate, within reason, any negative consequences of the withdrawal from harming the client.[5] Lawyers may balk at the apparent inequity in rights and responsibilities between themselves and clients with respect to withdrawal and termination. Interestingly, the commentary to the *New York Rules of Professional Responsibility* places the disparity between the lawyer and client into context:

> [L]awyers are ordinarily better suited than clients to foresee and provide for the burdens of representation. The burdens of uncertainty should therefore ordinarily fall on lawyers rather than clients unless they are attributable to client misconduct. That a representation will require more work or significantly larger advances of expenses than a lawyer contemplated when the fee was fixed is not grounds for withdrawal . . . .[6]

Regardless of the fairness or propriety of a termination by a client, the client remains liable for any unpaid fees and expenses earned by or owed to the lawyer.[7] Conversely, any unearned fees must be returned to the client. The issue of fees will be discussed in greater depth later in the article.

Permissive Withdrawal

Permissive withdrawal situations occur more frequently than mandatory withdrawal situations. Attorneys may withdraw from a representation if:

1. withdrawal can be accomplished without material adverse effect on the interests of the client;
2. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
3. the client has used the lawyer's services to perpetrate a crime or fraud;
4. the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
5. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
6. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
7. other good cause for withdrawal exists.[8]

The seven clauses listed in *Rule 1.16* are independent of each other. Thus, the withdrawal by an attorney may have an adverse effect on the client but may still comply with the Rule if the withdrawal satisfies one of the other reasons listed in the remaining six clauses. In general, lawyers should refrain from charging client for preparing and presenting withdrawal motions, especially when the withdrawal is sought for the lawyer's benefit.[9]

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2 *Cabrera et al. v. Collazo*, 979 N.Y.S.2d 326 (N.Y. App. Div. 2014)
3 *Id.* at 329. *Compare with Estate of Shaw et al. v. Marcus et al.*, 2016 WL 4679734 (S.D.N.Y. 2016) (court allowed lawyer to withdraw from high-profile litigation matter he handled for more than two years due to irregular heartbeat caused by stress; lawyer not required to retire from practice of law).
4 Comment 4 to *ABA Model Rule of Professional Conduct 1.16: Declining or Terminating Representation*
5 Comment 9 to *ABA Model Rule of Professional Conduct 1.16: Declining or Terminating Representation*
6 Comment 8A to *New York Rules of Professional Conduct 1.16: Declining or Terminating Representation*
7 Comment 4 to *ABA Model Rule of Professional Conduct 1.16: Declining or Terminating Representation*
8 *ABA Model Rule of Professional Conduct 1.16(b): Declining or Terminating Representation*
9 *North Carolina State Bar Formal Ethics Op. 2007-8 (July 13, 2007)*

Fee Disputes as a Basis for Withdrawal

One of the most common reasons lawyers seek to withdraw pertains to clients failing to pay legal fees and expenses. Clauses (5) and (6) of the permissive withdrawal section of *ABA Model Rule of Professional Conduct 1.16: Declining or Terminating Representation* would apply to a failure to pay scenario. Clause (5) of the Rule specifically directs a lawyer to provide a client "reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." In any situation where the attorney believes that a change in the client's conduct would eliminate the need to withdraw, the attorney should communicate such a "reasonable warning." Not only does such a cautionary message increase the probability of better attorney-client relations, it is arguably mandated by *ABA Model Rule of Professional Conduct 1.4: Communication*.

A plethora of cases from across the country support the general view that attorneys may withdraw from representations where the clients fail to pay them for legal fees and expenses.[10] Many courts, however, have found exceptions to this standard interpretation of the withdrawal rule. The fact-specific analysis, coupled with the need to consider the interests of the client, the lawyer, the court, the opposing party and its counsel and the public in deciding a withdrawal motion make it difficult to predict whether a particular withdrawal motion will be granted. Some courts have denied withdrawal motions where:

- the client has indicated an inability (as opposed to a deliberate disregard) to pay legal fees and the case is at an advanced stage and ready for trial[11];
- the lawyer assumed the burden of the client's non-payment because he secured a relatively low retainer fee and relied on unsecured promises for further funds"[12]; and
- the court would otherwise have lost its ability to manage its calendar and administer justice.[13]

Lawyers risk losing legal fees they otherwise would be entitled to collect if they withdraw for improper reasons.[14] In a recent Minnesota case, a law firm withdrew from a contingency fee case after the client rejected a $100,000 settlement offer. The law firm did not believe it could obtain a higher amount via settlement or judgment for the client. After successor counsel negotiated a $200,000 settlement offer for the client, the first law firm made a *quantum meruit* claim for the reasonable value of its services. The court held that the law firm's disagreement with the client's refusal to settle did not constitute good cause to withdraw and awarded nothing to the law firm.[15]

Permission of the Tribunal and Protection of Client Confidentiality

The aforementioned cases demonstrate that lawyers seeking withdrawal in litigated matters must seek the permission of the tribunal to do so.[16] This requirement places lawyers in the sometimes uncomfortable position of balancing their duty to protect client confidences against their duty of candor to the court. In a recent ethics opinion,[17] the ABA advised lawyers and judges on how the proper balance between the duties should be achieved. The Opinion reminded lawyers that the rule on confidentiality, Rule 1.6, applies to withdrawal motions. It also cited Comment 3 to *Rule 1.16*, which advises that a "lawyer's statement that professional considerations require termination of the representation ordinarily should be sufficient."[18] Lawyers making such a statement reveal no client confidences, so the suggested language in Comment 3 should be the starting point for all withdrawal motions. But courts do not always find such a general statement sufficient and inform attorneys that withdrawal motions will be denied unless more specific facts in support of such motions are disclosed.

10 See generally Samson Habte, *The Ethics and Financial Impact of Dropping a Client for Nonpayment of Legal Fees*, 31 Law. Man. Prof. Conduct 100 (2015),
11 *People v. Young*, 953 N.Y.S.2d 840, 844 (City Ct., 2012)
12 *United States v. Stein*, 488 F. Supp.2d 370 (S.D.N.Y. 2007)
13 *Miller v. Dunn & Phillips, P.C.*, 839 F.Supp.2d 383, 387-88 (D. Mass. 2011)
14 *In re Petition for Distribution of Attorney's Fees*, 2015 BL 35381 (Minn. 2015)
15 *Id.*
16 ABA Model Rule 1.16(c)
17 *ABA Formal Ethics Opinion 476: Confidentiality Issues when Moving to Withdraw for Nonpayment of Fees in Civil Litigation* (Dec. 19, 2016).
18 *Id.* at 4.

The Opinion cautions judges to recognize the ethical constraints on lawyers who move to withdraw and urges them to decide withdrawal motions without requiring the disclosure of any confidential information when practicable. If judges are uncertain about whether the withdrawal motion is merely a delay tactic, they may wish to consider asking the attorney to "assure the court that the motion is bought in good faith and without the purpose of undue delay."[19] If the court believes that it cannot decide the withdrawal motion without reviewing confidential client information, it should take steps to mitigate any harm to the client that might result from the disclosure. Requiring that the disclosure be made under seal and *in camera* or issuing a protective order represent possible approaches to reduce the damage of disclosures.[20] Even with these shielding measures, however, lawyers are still making a disclosure of confidential information. Therefore, they should disclose only the minimum amount of confidential information reasonably necessary to comply with the court's instructions and orders.

Protecting the Client's Interests

A lawyer's duty of loyalty continues through withdrawal and termination scenarios, regardless of whether the client's conduct caused the attorney-client relationship to end. Per *ABA Model Rule of Professional Conduct 1.16: Declining or Terminating Representation*, part of the duty of loyalty means that the lawyer must surrender "papers and property to which the client is entitled." In order to collect any outstanding fees and expenses, a lawyer may file a charging lien or, where and when permissible, assert a retaining lien. Not all jurisdictions permit retaining liens, and those jurisdictions that do often place severe limitations on their use. See CNA's *Resolving Disputes Regarding the Client File* at www.cna.com for further information.

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Risk Control Measures Concerning Withdrawal

In order to avoid a messy withdrawal issue from occurring, institute effective client screening procedures. While an attorney has limited options for withdrawal with respect to existing clients, those limitations do not apply to potential clients. Law firms should compile as much information as practicable about a potential client and then analyze whether the potential client would be compatible with the practice areas, financial expectations, and culture of the law firm. If red flags appear, such as an inability to pay legal fees and expenses, the law firm may be better served by declining the representation at the outset. In addition, *Rule 1.16* addresses not only withdrawal but declining representations as well. Thus, the conditions listed above for a mandatory withdrawal also apply to declining representations when such conditions exist at the outset. See CNA's *Client Intake Procedures: Avoiding Problematic Clients* at www.cna.com for further information.

At the outset of the relationship, lawyers should have their clients countersign an engagement agreement with clauses that explain the client's responsibilities, which include communication, cooperation and timely payment of fees. The engagement agreement should clarify that a client's failure to abide by the terms of the agreement allows the lawyer to withdraw from the representation. See CNA's *Lawyers' Toolkit 4.0* at www.cna.com for sample language. Lawyers may not, however, use engagement agreements as a vehicle to evade the limitations on withdrawal set forth by the relevant jurisdiction's rules of professional conduct.[21]

Another risk control measure involves confronting problems with clients in a prompt manner. For example, in a contingency fee case where the client makes unreasonable settlement demands or the value of the case appears to be less than the litigation expenses, the law firm must communicate those concerns to the client. If it is clear the client and law firm cannot agree on how to proceed, withdrawal should be sought immediately, in accordance with the rules of professional conduct. As ABA Formal Opinion 476 advises, the sooner that a law firm seeks withdrawal, the easier it should be for a court to grant the withdrawal motion.[22] If, however, the withdrawal forces the client to choose between the equally unattractive options of either settling the case on inferior terms due to the lack of counsel or representing oneself pro se and increasing the risk of an adverse verdict due to their lack of legal proficiency, courts will be more reluctant to grant a withdrawal motion, even those with demonstrable good merit.

19 *Id.* at 7.
20 *Id.* 7-8.

21 See generally *Willis v. Holder*, 842 N.Y.S.2d 841 (N.Y. App. Div. 2007)
22 *ABA Formal Ethics Opinion 476* at 7.

Once the attorney-client relationship ends, due to either discharge or withdrawal, the law firm should send a termination letter to the now former client. Subjects the termination letter should address include the general reason for the separation, the date of the termination, and the need for the client to consult with another attorney promptly about handling the matter so that all deadlines are met and all claims or defenses are preserved. Documenting these details contemporaneously with the termination may protect the attorney later should the client later institute a legal malpractice claim. See CNA's *Lawyers' Toolkit 4.0* at www.cna.com for sample termination/withdrawal letters.

After the withdrawal is accomplished, the lawyer must cease all legal work on the matter for the client. If, for example, a lawyer continues to provide legal advice on the matter after the withdrawal, a court probably will find the withdrawal nullified.[23] Accordingly, any errors or neglect that occurs after the purported withdrawal may be imputed to the lawyer.

Conclusion

Lawyers and clients customarily begin an engagement with positive expectations for a successful relationship. Occasionally, circumstances and events can shift the dynamic of the attorney-client relationship, which may cause either party to exit the relationship. Although the attorney-client relationship may be ending, the lawyer's responsibilities to the client endure. Lawyers who fail to pay heed to the relevant rules, case law and ethics opinions tread upon dangerous ground. But those lawyers who keep their clients' interests and their fiduciary duties in mind ensure a smooth transition for their clients and themselves.

This article was authored for the benefit of CNA by:
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23 *Cesso v. Todd*, 82 N.E.2d 1074, 1080-81 (Mass. App. Ct. 2017)

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