PROFESSIONAL RESPONSIBILITY

WITHDRAWING AS COUNSEL

BY EDWARD J. CLEARY

A few months ago, as a result of intense media coverage of a high-profile case, there was a great deal of discussion as to when an attorney may withdraw as counsel of record. The issue is not a simple one since a number of court rules and an ethical provision all come into play.

COURT RULES

Rule 105 of the General Rules of Practice for the (State) District Courts provides:

> After a lawyer has appeared for a party in any action, withdrawal will be effective only if written notice of withdrawal is served on all parties who have appeared, or their lawyers if represented by counsel, and is filed with the court administrator if any other paper in the action has been filed. The notice of withdrawal shall include the address and phone number where the party can be served or notified of matters relating to the action.
> Withdrawal of counsel does not create any right to continuance of any scheduled trial or hearing.

The comment to the rule notes that the rule "establishes the *procedure* for withdrawal of counsel; it does not itself *authorize* withdrawal nor does it change the rules governing the lawyer's right or obligation to withdraw in any way." *(emphasis added)*

In the U.S. District Court for the District of Minnesota, Local Rule 83.7 makes several distinctions regarding withdrawal of counsel which are not found in the state rules.[1] First, "leave of court" is not required if the Notice of Withdrawal is accompanied by "a Substitution of Counsel," provided that the substitution occurs 90 or more days in advance of trial for a civil matter or 30 or more days in advance of trial for a criminal case and also provided that the substitution does not "delay the trial" (which would defeat the objective of the time limits) "or other progress" of the case. In other words, substituted counsel should be ready to jump on the moving train without asking it to slow down. Without a certificate from substitute counsel, the attorney of record must show good cause by way of a motion before the court.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

As the comment to Rule 105 of the Rules of Practice for the (State) District Courts notes, a lawyer's obligations to the client upon withdrawal is "governed by the Minnesota Rules of Professional Conduct. . . . Enforcement of those rules is best left to the Lawyers Professional Responsibility Board."

Rule 1.16 governs both mandatory withdrawal (such as when the representation results in violation of the Rules of Professional Conduct or the lawyer's services are being used criminally or fraudulently, or when the lawyer is physically or mentally materially impaired, or when she has been discharged) and voluntary or permissive withdrawal. Perhaps the most common instances of mandatory withdrawal occur either when a conflict arises that may result in a rule violation (particularly 1.7, MRPC) or when the lawyer is fired. The most common instance of permissive withdrawal results from a fee or cost dispute (there are other grounds for permissive withdrawal as well).[2] The pertinent provision is 1.16(b)(3), MRPC, which states:

> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
> * * *
> (3) 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.

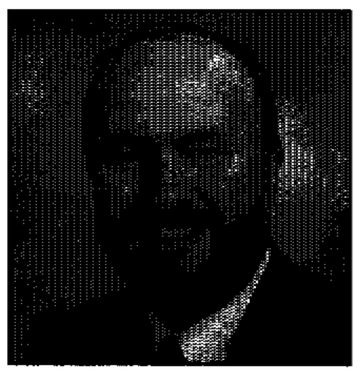
One begins with the understanding that once a lawyer has been appointed to represent a client, in almost all instances, he must have the approval of the court to withdraw. Rule 1.16(c) notes that "if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission." The comment to the rule goes on to note that "when a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority." Most courts now require a signed certificate of representation submitted by an attorney for all criminal cases, whether misdemeanor or felony, high profile or obscure. Likewise, most courts require a notice of representation on civil matters, although motions for withdrawal based on nonpayment of fees are more unusual in those instances.

Failure to pay all fees agreed upon does not automatically mean the client has failed to substantially "fulfill an obligation to the lawyer regarding the lawyer's services." The criminal defense bar has been aware for years that an attorney had best "get it up front" whether fees or collateral, because once the matter is underway, she cannot presume further payment. Recent cases indicate a division of authority on this issue with cases from Massachusetts and Rhode Island allowing attorneys to withdraw for nonpayment of fees while courts in Texas and New Hampshire refused to grant leave to defense counsel to withdraw under similar circumstances.[3]

So what does constitute reasonable grounds for withdrawal? A review of the rules and case law would seem to indicate that the court involved is given wide discretion in deciding whether to grant or disallow a motion to withdraw on grounds of a fee dispute. One factor the court might consider is the basis for the withdrawal; if nonpayment of fees was the issue, the court would want to know the terms of the (preferably written) agreement; why the attorney did not ensure payment at the outset, and whether the client had been given "reasonable warning" that the lawyer would withdraw

---

EDWARD J. CLEARY is director of the Office of Lawyers' Professional Responsibility. He has practiced both privately and as a public defender for 20 years and is past president of the Ramsey County Bar Association. His book, Beyond the Burning Cross, won a national award in 1996.



unless the obligation was fulfilled. Other considerations likely would include how long the attorney has been counsel of record and how soon the case is set for trial, the availability of substitute counsel (is it reasonable to transfer the case to a public lawyer at this stage of the proceedings?), and the possibility that the defendant will be able to raise the issue of incompetence of counsel if the attorney is kept involved against her will.

Under 1.16(b)(3), the initial focus will be on the terms of any agreement between the attorney and client relating to the representation. Attorneys are not allowed to just "dump" clients; if in fact the client has breached a clear understanding regarding fees and costs with the attorney and the matter is still in its early stages, the attorney may well be allowed to withdraw. In the end, however, the paramount issue is the right of the accused to have proper representation and a fair trial.

CONCLUSION

An attorney should understand that becoming counsel of record brings responsibilities, not just to the client but to the court. The presumption is that the attorney will see her client through to the end of the proceedings before the court. In certain situations, the attorney must withdraw (usually because of conflicts); in others, the attorney may withdraw (by leave of the court under certain limited circumstances). Attorneys seeking to withdraw from representation should keep in mind that the court has wide discretion in granting or refusing to grant such a motion and that the parameters of 1.16 must be honored. Fee agreements used in these situations should be in writing, in conformance with the rules and opinions. Note particularly Opinion 14 if collateral takes the form of a lien on the client's homestead and Opinion 15 if there is a nonrefundable retainer involved, so that any breach between the parties is easily ascertainable. Finally, as a duty to the client and as a service to the substituting lawyer, the attorney should make any motion for substitution as early in the proceedings as practicable, or the attorney may find himself a reluctant participant as uncompensated trial counsel. □

NOTES

1. ***LR 83.7 Withdrawal of Counsel***:
(a) In General. *An attorney whose appearance is noted in a cause on file in this Court may be permitted to withdraw from representation as counsel of record only by order of Court, or as otherwise provided herein.*
(b) Withdrawal With Substitution. *Leave of court is not required where a Notice of Withdrawal is accompanied by a Substitution of Counsel, provided that said substitution takes place 90 or more days in advance of trial for civil matters, or 30 or more days in advance of trial for criminal cases, provided the substitution contains a certificate by substituted counsel, and provided that the substitution shall not delay the trial or other progress of the case. The Notice of Withdrawal and Substitution shall set forth the name and address of the substituted and withdrawing counsel. Withdrawal under this section shall be effective upon filing a Notice of Withdrawal and Substitution with the Clerk of Court. The Notice shall be served on all counsel of record and the Judge to whom the case is assigned simultaneously with the District Court filing.*

continued on page 24

continued from page 23

(c) Withdrawal Without Substitution. *Withdrawal without substitution may be granted only by a motion made before the Court, for good cause shown. Notice of the motion shall be provided to the client, and the motion shall be scheduled in accordance with LR 7.1.*

2. ***Rule 1.16 Declining or Terminating Representation:***
(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(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;

(3) the lawyer is discharged; or

(4) the client persists in a course of action using the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) the client has used the lawyer's services to perpetrate a crime or fraud;

(2) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(3) 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;

(4) the representation has been rendered unreasonably difficult by the client; or

(5) other good cause for withdrawal exists.

(c) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

3. See Hammond v. T.J. Little & Co., *809 FSupp 156 (DMass 1992)*; Silva v. Perkins Mach. Co., *622 A2d 443 (RI 1993)*. *In contrast* see Fed. Trade Comm'n v. Intellipay, Inc., *828 FSupp 33 (SD Tex 1993)*; Gibbs v. Lappies, *828 FSupp 6 (DNH 1993)*.