

Withdrawing as counsel (ethically)

How to ethically withdraw as counsel is the third most frequently asked question on our advisory opinion/ethics hotline. Annually, hundreds of Minnesota attorneys seek advice on whether and how they may terminate a particular lawyer-client relationship. This Office has written several columns on the subject,¹ but the topic's importance makes it worth revisiting periodically given the care required when the lawyer-client relationship ends prior to its planned conclusion.

Circumstances allowing withdrawal

"A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."² What "completion" means will depend on the agreement of the parties and the type of matter involved. If court rules allow it, a lawyer may limit the scope of representation to specific, agreed-upon services—provided the limitation is reasonable and the client has provided informed consent.³ Lawyers also must ethically communicate the scope of the representation

before or within a reasonable time of commencing representation, preferably in writing.⁴ Compliance with the ethics rules ensures that both lawyer and client are on the same page regarding the services to be provided, and what completion of the representation will involve.

The ethics rules contemplate numerous situations where continued representation is impermissible and withdrawal is mandatory,

as well as several circumstances where withdrawal is permissible prior to completing the representation. Let's start with when you *must* withdraw. There are three scenarios: (1) the representation will result in a 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.⁵ Each is generally self-explanatory. Indeed, while it should go without saying that you must withdraw when you have been discharged, more lawyers than you would think have been disciplined for failing to do so.

Beyond mandatory withdrawal, Rule 1.16(b) establishes a robust list of reasons why a lawyer may permissibly withdraw. A lawyer may withdraw without a specific reason if it can be accomplished without material adverse effect on the interests of the client.⁶ Withdrawal is permissible if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.⁷ (Note, however, that other rules may make withdrawal in this circumstance mandatory, because you cannot assist a client in conduct you know to be criminal or fraudulent.⁸) Similarly, you may withdraw if the client has used your services to perpetrate a crime or fraud, or if the client insists upon taking action that you consider repugnant or with which you have a fundamental disagreement.⁹ You may withdraw if the client fails substantially to fulfill an obligation to you regarding your services and has been given reasonable warning that you will withdraw unless the obligation is fulfilled. You may withdraw if the representation will result in an unreasonable financial burden on you, or your representation has been rendered unreasonably difficult by the client.¹⁰ Finally, an attorney may withdraw if "other good cause for withdrawal exists."¹¹ Given the breadth of these provisions, the question is generally not whether a permissible basis for withdrawal exists, but rather whether timing and the applicable procedural rules will support withdrawal in a particular case, irrespective of the ethical basis for withdrawal.

Where to start

If you are representing a client in a litigated matter, the first consideration is the procedural rules governing withdrawal of the tribunal in the matter. I cannot stress this enough. Even in my short time as director, I have spoken on the ethics line to scores of attorneys who are not familiar with the procedural requirements of the court before which the relevant matter is pending. As Rule 1.16(c), MRPC provides, "A lawyer must comply with the applicable law requiring notice to or permission of a tribunal when terminating a representation." This is true even if withdrawal is ethically mandatory. And don't forget that until you effectively withdraw, you are counsel and owe your client compliance with all other ethical rules pending authorized withdrawal. While a listing of the procedural rules governing withdrawal are beyond the scope of this article, it is typically true that each tribunal has a general rule of practice or local rule governing the procedure and circumstances under which withdrawal may be accomplished.¹² Please do not forget the procedural rules relating to withdrawal as you focus on the ethical rules.

What to say

If you are counsel of record in a matter requiring a motion and order to effectuate withdrawal, what you may say to support that motion is also guided by the ethics rules. Rule 1.6, MRPC, protects confidential information relating to the representation. As I say whenever I have the chance, our duty of confidentiality is broader than simply protecting attorney-client privileged communications; it covers "all information relating to the representation of a client" unless an exception for disclosure exists. Such a broad confidentiality obligation can make it difficult to provide sufficient information to a court to establish good cause, and there is no exception in Rule 1.6(b) that allows disclosure of information specifically to effectuate withdrawal.

Some exceptions can apply. For example, the client may give informed consent to any disclosures.¹³ Information can also be disclosed if it is not protected by the attorney-client privilege, the cli-



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

✉ SUSAN.HUMISTON@COURTS.STATE.MN.US

ent has not requested the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client.¹⁴ This, however, might still be a small universe of information.

Beyond the foregoing, our advice is generally that the lawyer must start with general—and, of course, true—statements supporting withdrawal, such as that there has been a breakdown in the attorney-client relationship, or (as reflected in the comments) professional considerations require termination of the relationship.¹⁵ Another potential disclosure exception is that “the lawyer reasonably believes the disclosure is necessary to comply with other law or court order.”¹⁶ If you are ordered to do so, after communications with your client under Rule 1.4, you can disclose such information as reasonably necessary to comply with such an order. I know this is generally an unsatisfying answer, but the truth is that competing interests present a real dilemma if your client will not authorize disclosure of information. This is a line to walk carefully.

What else to do

In all circumstances, and whether or not the matter is in litigation, there are additional considerations set forth in Rule 1.16 that must be satisfied upon termination of representation. The main requirement is that upon termination, “a lawyer shall take steps to the extent reasonably practicable to protect the client’s interest.”¹⁷ The steps to take may vary according to the facts of the representation, but a non-exhaustive list includes: (1) giving reasonable notice to the client; (2) allowing time for employment of other counsel; (3) returning the client’s file; and (4) refunding any advance payment of fees or expenses that have not been earned or incurred.¹⁸ Please keep in mind your ethical obligation to take steps to protect the client’s interest as well when you are disclosing confidential information under an exception. Requesting to do so in camera, under seal, or *ex parte*—depending on the nature of the information that may be disclosed—is often important to protect the client’s interest, and is a “reasonably practicable” step available to you.

Conclusion

Withdrawal as counsel is generally ethically available but requires thoughtful consideration of timing and procedural requirements. I know that this can be frustrating for lawyers, but the rules are

designed to protect even the most undeserving of clients. Because of the care that must be taken, I’m glad so many lawyers take advantage of the ethics line to obtain advice when they are considering termination of an attorney-client relationship. Please give us a call at 651-296-3952 if you need assistance in complying with your ethical duties when ending a lawyer-client relationship. ▲

Notes

¹ See, e.g., Martin A. Cole, “Withdrawing: Must I? May I?” *Bench & Bar* (November 2014); Kenneth L. Jorgensen, “Ethical and Procedural Withdrawal Requirements,” *Minnesota Lawyer* (11/4/2002); Edward J. Cleary, “Withdrawing as Counsel,” *Bench & Bar* (November 1999), all available at www.lprb.mncourts.gov/articles.

² Rule 1.16, Minnesota Rules of Professional Conduct (MRPC), Comment [1].

³ Rule 1.2(c), MRPC.

⁴ Rule 1.5(b), MRPC.

⁵ Rule 1.16(a)(1)-(3), MRPC.

⁶ Rule 1.16(b)(1), MRPC.

⁷ Rule 1.16(b)(2), MRPC.

⁸ Rule 1.2(d), MRPC; Rule 1.16(a)(1), MRPC.

⁹ Rule 1.16(b)(3), MRPC; Rule 1.16(b)(4), MRPC.

¹⁰ Rule 1.16(b)(5), MRPC; Rule 1.16(b)(6), MRPC.

¹¹ Rule 1.16(b)(7), MRPC.

¹² See, e.g., Minn. Gen. R. Prac. 105 (2019) (“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 document in the action has been filed. The notice of withdrawal shall include the address, email address, if known, 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.”); Minn. Gen. R. Prac. 703 (2019) (“Once a lawyer has filed a certificate of representation [in a criminal case], that lawyer cannot withdraw from the case until all proceedings have been completed, except upon written order of the court pursuant to written motion, or upon written substitution of counsel approved by the court *ex parte*.”); D. Minn. LR 83.7 (2019) (allowing withdrawal with notice of substitution and only within proscribed timelines or upon motion for good cause shown).

¹³ Rule 1.6(b)(1), MRPC.

¹⁴ Rule 1.6(b)(2), MRPC.

¹⁵ Rule 1.16, MRPC, Comment [3].

¹⁶ Rule 1.6(b)(9), MRPC.

¹⁷ Rule 1.16(d), MRPC.

¹⁸ *Id.*