

AT ODDS WITH YOUR CLIENT

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One of the most frequent areas of inquiry for advisory opinion callers to the Office of Lawyers Professional Responsibility is under what circumstances an attorney may withdraw from representation of a client. The answer lies in Minnesota's version of Rule 1.16 of the Rules of Professional Conduct.

BEGIN AT THE BEGINNING

The best time to deal with, and hopefully avoid, termination of representation issues, or withdrawal, is at the beginning of the representation, long before anyone expects problems to occur. Screening prospective clients for conflicts of interest is mandatory, of course, but beyond that an attorney should make realistic evaluations of the merits of the client's case, of how demanding a client this person will be, and of the attorney's own time limitations and qualifications to handle the matter. Declining representation, in some instances, may be the prudent course.

Once representation has been agreed to, many issues that cause friction between a lawyer and client, such as fees, payment expectations and copying costs^{Ftn 1} should be dealt with in a written retainer agreement. Being reasonably diligent and adequately communicating with the client during the representation will prevent most remaining problems from reaching the level where withdrawal becomes an issue.

Once the representation has commenced, if the relationship between the attorney and client breaks down, then Rule 1.16 governs what circumstances are sufficient to warrant withdrawal. The rule divides the bases for withdrawal into two general categories: 1) mandatory, and 2) permissive, or discretionary.

Withdrawal from representation is mandatory if the client discharges the lawyer. This sounds extremely obvious but has too often been the source of problems. Unless the matter is a criminal case or is in federal court, where court permission to withdraw is required even if the lawyer is discharged, or unless the client specifically authorizes the attorney to complete some particular limited action, such as filing a responsive pleading, the discharged attorney should cease all actions on the client's behalf immediately. Problems have arisen for some lawyers who felt they were close to settling a matter, for example, and have tried to continue the negotiations after being discharged, presumably in an effort to secure their fees. This is improper.

Other situations which require the attorney's withdrawal under Rule 1.16 include when the representation involves violations of the Rules of Professional Conduct (a conflict of interest that cannot be waived is discovered after representation begins, or the lawyer becomes a necessary witness to the proceeding, for

example), or when the lawyer discovers that the client is using the lawyer's services in an ongoing crime or fraud. ^{Ftn 2}

The crime/fraud situation is one where Minnesota's Rule 1.16 differs from the ABA Model Rule and from rules of most other states. Withdrawal is mandatory in Minnesota if a lawyer knows or reasonably believes that a client is using the lawyer's services in furtherance of a course of conduct which constitutes a crime or fraud, and persists in doing so once the attorney becomes aware of the use. Withdrawal is discretionary, however, if the specific legal services related to the fraud are completed and the fraud no longer is ongoing. The ABA Model Rule makes a distinction between what the lawyer knows (mandatory withdrawal once you know) and what she only reasonably believes (withdrawal remains discretionary). Minnesota's clearer approach eliminates many stressful judgment calls for the lawyer.

The most common reason for discretionary withdrawal (indeed for withdrawal in general) is nonpayment of fees by a client. Rule 1.16(b)(3) allows the lawyer to withdraw if the client has failed to substantially comply with a payment obligation and the lawyer has given reasonable notice to the client that the lawyer will withdraw if the obligation is not brought current. Timing is often the key in this situation: how long a notice period is reasonable? How close to an upcoming event (such as a trial or motion, or a closing or an offering) can I decide to withdraw because the client is behind in payment? There are no bright lines in such cases, but the easy advice is not to wait; if you will expect your client to be current with their payments before some major event, then tell the client this fact all along, and often.

Rule 1.16 also contains two "catch all" phrases allowing withdrawal if the client has made the representation unreasonably difficult or for other good cause. What do these phrases mean? Many problems between lawyer and client simply can't be cataloged in the context of the rule, so a "catch all" phrase is necessary. These terms must mean something, however, and should not be read so broadly as to allow the lawyer to withdraw without notice for any reason whatsoever, especially if close in time to some important event in the representation, and where substantial prejudice to the client's position is likely. While there may be some exceptions, a client's rejection of what the lawyer believes to be a reasonable settlement offer does not render representation so difficult as to warrant withdrawal. That the lawyer is not prepared, or now realizes that the client's case is weak is not the "other good cause" for withdrawal which the rule envisions.

MAY I FIRE THE CLIENT?

There is occasionally some confusion as to whether a lawyer can withdraw only if the client has done something to cause the lawyer to withdraw; that is, once representation has commenced, must the lawyer continue to represent the client as long as the client pays her bill and the objectives of the representation are not criminal or fraudulent? Or can the lawyer "fire" the client? A lawyer may end representation prospectively for any good reason (there may be some legally bad reasons) or for no reason at all. ABA Model Rule 1.16(b) specifically recognizes this ability ^{Ftn 3}, but since Minnesota's rule does not contain the language of the Model Rule, does that mean that the concept is not applicable here? No. An attorney may choose to terminate any attorney-client relationship by giving notice that she will cease representing the client as of some prospective date. It may be that some pending aspect of the representation must be completed before such withdrawal, since otherwise prejudice to the client (who hasn't done anything to otherwise justify withdrawal) could occur. The Rules of Professional Conduct do not permanently bind a lawyer to the client, however.

There are some situations in which the lawyer may not "fire" the client. Rule 1.7(a) of the Rules of

Professional Conduct prohibits representation adverse to a current client, even in totally unrelated matters. Rule 1.9, however, permits representations against former clients if the matters are not the same or substantially related. So, if you are presented with an opportunity to sue an "unimportant" current client on behalf of a "better" client, can you "fire" the first clients, thus making them into former clients, who you then can sue if it's an unrelated matter? Short term, the answer is no. Here perhaps is one time that the requirement of "good cause" to withdraw has meaning. It is unlikely that the lawyer's own pecuniary interest in obtaining more lucrative representation meets this standard. Immediately suing a now former client likely constitutes harm under Rule 1.16(d) as well.

From a disciplinary standpoint, few public cases have dealt with what constitutes a proper justification for withdrawal. The Minnesota Supreme Court has acknowledged that a basic "breakdown of the working relationship between lawyer and client is ample justification" for withdrawal, depending on the timing of the act.^{Ftn 4} In most instances where lawyers have been disciplined for conduct related to withdrawal from representation, the cause has been their failure to return a client file after the withdrawal.^{Ftn 5}

MECHANICS OF WITHDRAWAL

Once it is determined that withdrawal is permitted, the mechanics of how to withdraw are governed by local court rules, not by the Rules of Professional Conduct. Rule 1.16(c) states that if court permission is required, then you must of course obtain it. In Minnesota, that is true for matters in federal district court. Local Rule 83.7 requires court permission for any withdrawal, and most often a signed "substitution of attorney" form.^{Ftn 6} In state court litigation, permission is required in criminal cases.^{Ftn 7} In civil matters, however, Rule 105 of the General Rules of Practice has effectively eliminated the requirement of court permission, as long as written notice is given to opposing parties and the court.^{Ftn 8}

NOTES

¹ The Lawyers Professional Responsibility Board has dealt with several of these retainer agreement issues in formal opinions, which should be consulted: for example, LPRB Opinion 13 deals with copying costs and what constitutes the client's file; Opinion 14 deals with liens on a client's homestead; Opinion 15 deals with nonrefundable retainer agreements.

² Rule 1.16(a) provides that if the conflict or the client's intention to commit fraud are known before the representation would begin, then the lawyer must decline the representation. *See also* Rule 1.2(c), which prohibits a lawyer from assisting a client in conduct which the lawyer knows is criminal or fraudulent.

³ ABA Model Rule 1.16(b) states that "a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client"

⁴ *In re Admonition in Panel File No. 94-24*, 533 N.W.2d 852, 853 (Minn. 1995).

⁵ Discipline would be imposed for violating Rule 1.16(d) and/or LPRB Opinion No. 13.

⁶ Local Rule 83.7 (LR83.7), Local Rules of the United States District Court for the District of Minnesota.

⁷ Rule 703, General Rules of Practice for the District Courts.

⁸ Rule 105, General Rules of Practice for the District Courts.

