

Avoiding Problems When Terminating Representation

by

**Timothy M. Burke, Senior Assistant Director
Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (February 4, 2008)

An important component of practice is clarifying and documenting whether (1) a lawyer represents a particular person^{Ftn 1} and, (2) if so, the point at which representation terminates.

Failing to clarify the termination of representation can create professional problems. An example based on a matter recently before the Office of Lawyers Professional Responsibility illustrates the point.

The lawyer was the sole shareholder in a law firm. In or about August 2004, a person retained the lawyer's law firm to represent that person in requesting that a U.S. Supreme Court decision (*Blakely v. Washington*, 542 U.S. 296 (2004)) apply retroactively to the sentence the client had received previously upon conviction.

The lawyer delegated representation to an associate. The associate served and filed a motion on the client's behalf. While that motion was pending, the Minnesota Court of Appeals issued its decision in *State v. Houston*, which held that *Blakely* did not apply retroactively. The parties then agreed to have the ruling on the client's motion deferred until after the Minnesota Supreme Court issued its decision after further appeal in the *Houston* matter.

In October 2005, the Supreme Court affirmed the Court of Appeals decision in *Houston*. The associate advised the client of the decision. The associate's employment with the lawyer ended soon thereafter, but the lawyer continued to represent the client.

In November 2005, a District Court judge denied the client's pending motion. The lawyer did not inform the client of the court's ruling on the motion, did not send a copy of the order to the client and did not advise the client of the client's appeal rights. Although the lawyer considered his representation of the client concluded, the lawyer did not advise the client of this.

A few months later, the client wrote to the lawyer. The lawyer had his law clerk respond. The response did not indicate that the motion had been decided or that representation had ended.

Several months later, the client, still under the impression that the lawyer was representing him, sent two additional letters to the lawyer's office, inquiring about the status of the matter. The lawyer erroneously believed that he previously had addressed these issues and had informed the client that representation was concluded. Therefore, the lawyer did not reply.

The lawyer violated Rule 1.16 of the Minnesota Rules of Professional Conduct.^{Ftn 2} The rule requires a lawyer to take reasonable steps upon termination of representation to protect the client's interests. A fundamental step is to advise the client that representation had ended. This is even more true when the client reasonably can believe that the representation has not terminated.

In this matter, the lawyer did not advise the client that representation had terminated. Had the lawyer simply told his client that representation was over, he would not have violated MRPC Rule 1.16(d).

As with many things in the practice of law, a little bit of clarity and documentation can go a long way toward avoiding problems.

1 See, e.g., *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

2 The lawyer also violated Rule 1.4 of the MRPC, which requires a lawyer to communicate adequately with a client. The lawyer's failures to advise the client of the ruling on the client's motion, to send a copy of the order to the client and to advise the client of his appeal rights constituted clear violations of this rule.