

New personal leave
continuance: *ethics considerations*

by

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Reprinted from *Bench & Bar of Minnesota* – July 2024

On September 1, 2024, the Minnesota General Rules of Practice will add a new Rule 18 that covers presumptive continuances in many civil cases based upon certain personal circumstances.* (The new rule, which will be subject to a two-year pilot period, also applies to the appellate courts through a new Rule 126.03 that mirrors the language of the district court rule.) This column will cover the rule generally with an emphasis on ethics considerations.

The rule

The Minnesota State Bar Association proposed the new rule after years of study and advocacy. The comment to the rule states that it arose from serious concerns about lawyer well-being and the need to destigmatize seeking leave for personal, health, or family reasons. Initially focused on parenting leave, the rule in its current form applies to four circumstances: (1) a health condition causing a temporary inability to represent a party; (2) the birth or adoption of a child regardless of the gender of the moving party; (3) family care responsibilities; or (4) the death of a family member. The rule excludes many cases, primarily those of a time-sensitive nature, as well as all criminal cases. The movant may seek a continuance of up to 90 days, with a potentially longer leave available upon good cause shown. The order describes the leave as presumptive, as the rule contemplates automatic approval absent a timely objection from the opposing party, who has the burden to show substantial prejudice or extraordinary circumstances to preclude or limit the leave.

Ethics issues to consider

The rule incorporates an express ethics consideration, but it is also important to note the rule in the larger context of ethics rules covering all representations. As part of the application for leave, the applicant must file a declaration affirming that “the client

has given informed consent (as defined in Minn. R. Prof. Conduct 1.0(f)) to the continuance.” Rule 1.0(f) of the Minnesota Rules of Professional Conduct defines informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of conduct.”

The comments to Rule 1.0 advise that “[o]rdinarily, [informed consent] will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client... of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s... alternatives.” Comment [6], Rule 1.0. The comments also note that “informed consent” usually requires “an affirmative response by the client[.]” and that lawyers may not assume silence is consent. Comment [7]. Thus, “informed consent” contains four parts: (1) disclosure of relevant facts and circumstances; (2) explanation of the material advantages and disadvantages of the action; (3) discussion of alternatives; and (4) affirmative agreement.

Because the circumstances of each situation will vary, so too will the parameters of informed consent. How much information to disclose about the personal circumstance giving rise to the request is likely the question most lawyers will fixate on, but that’s actually one of the easier parts of this requirement. The rule does not require the applying lawyer to provide specificity regarding the reason for the leave—just an affirmative declaration that the “personal leave is required for one of the reasons set forth in” the rule. Similarly, it’s likely sufficient to disclose to a client that you have a personal situation that is qualifying under the rule and will make you temporarily unavailable for a specified period of time. (Be specific about the timeline and how firm it is.) Any additional facts and circumstances that may need to be disclosed about the qualifying event will depend on how the leave will affect the client’s matter.

For example, clients do not need to know, nor does informed consent require, precise details of a personal nature, such as “I need to take approximately six weeks off to attend a 30-day residential substance use treatment program and to address related issues.” Instead, “I have a health condition that involves treatment and will cause me to be unavailable to clients for approximately six weeks” is sufficient. If you will only be able to return to work part-time after the leave, that is also something that might require disclosure. If you will not be reachable at all during the leave, that may need to be part of the disclosure. If you can do some things but not others for your client during this time, that may need to be part of the disclosure.

Next, explain the advantages and disadvantages of the proposed action. Clients cannot make informed decisions if they do not have good information about how their case will be impacted. The focus here is realistic, objectively identifiable impacts to the client's legal matter. Perhaps there are no advantages or disadvantages to the client from the continuance (except delay, which is not ideal but also not prejudicial). Or perhaps there are disadvantages. What you need to say will depend on the type of case, its status, the client's objectives, and the length of the requested leave.

Then discuss alternatives. As noted in the Court's order adopting the rule, "[c]lients are entitled to withhold their consent." (Order at 6.) Accordingly, one of the alternatives that must be disclosed to the client is that the client is under no obligation to provide consent. And you should be able to confirm that you will remain available and able to represent them diligently and competently without the leave. If this latter fact is not true, that too needs to be disclosed, and you may need to consider withdrawing, as discussed below. Stated differently, if the leave was not available or granted, is there a risk related to your representation that the client should know about and other possibilities for mitigating that risk?

Finally, obtain the client's affirmative agreement. Informed consent here does not need to be in writing, but discussing the above with your client and documenting that discussion and the client's agreement is the best practice.

Other ethics considerations

Do not forget that lawyers already have an ethical obligation to consider their physical and mental health when undertaking or continuing representation. Rule 1.16(a) mandates that a lawyer shall not represent a client (or must withdraw if representation has commenced) if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." Rule 1.16(d) provides that upon withdrawal, no matter the reason necessitating withdrawal, you are ethically obliged to "take steps to the extent reasonably practicable to protect a client's interest." Please keep this obligation in mind when accepting matters or continuing representation, and note these obligations exist regardless of the availability of the leave continuance.

As the Supreme Court's order also notes, there are numerous other ethics rules that require a lawyer to manage their workload such that they can represent their client without undue delay. Specifically, the Court noted Rule 1.3, which requires a lawyer to "act with reasonable diligence and promptness in representing a client." Rule 3.2 requires a lawyer to "make reasonable efforts to expedite litigation consistent with the interests of the client," and notes in a comment, "Although there will be

occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates.”

Further, Rule 1.4(b) requires a lawyer to “explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation.” And Rule 4.1 prohibits making knowingly false statements of fact (in support of a personal leave continuance or otherwise). These rules oblige us to evaluate our personal and professional obligations and limitations, and our continuing ability to meet our clients’ legal needs. If there is a material limitation, you need to take action.

Conclusion

The ethics rules are client-centered, and numerous ethics rules require lawyers to place their client’s interests before their own personal interests. Unexpected life events happen, however, and the personal leave continuance rule provides relief for litigators in certain civil cases and specific circumstances where they can be temporarily unavailable, and—most importantly from an ethics perspective—the client gives informed consent. Such a policy is complementary to, and consistent with, the lawyer’s ethics obligations generally. Lawyers do have a hard time seeking help or admitting limitations, and the adversarial system being what it is, it can be difficult to extend grace and understanding to others. In the end, as the Court stated in its order, the rule is premised on a belief that “allowing attorneys to attend to their well-being will inure to the benefit—not the detriment—of their clients.” As the rule goes into effect, please contact us on our ethics line at 651-296-3952 if you have questions.

* Order Promulgating Amendments to the Minnesota Rules of General Practice for the District Courts and the Minnesota Rules of Civil Appellate Procedure dated 4/30/2024 (ADM09-8009; ADM04-8001; ADM09-8006).