

Withdrawing: Must I? May I?

One of the advantages of posting on the Lawyers Board website¹ all of the articles written by me, by past directors, and by staff attorneys in this office is that attorneys, or the public, can read or reread them whenever an issue arises that one of the articles addresses. One of the disadvantages of posting on the Lawyers Board website all of the articles written by me, by past directors, and by staff attorneys in this office is that unless something dramatic changes in the wording or interpretation of a particular rule, then an older posted article that attorneys, or the public, can read or reread whenever an issue arises still may contain the best information there is on a topic. This makes coming up with new topics or new angles on an older topic on a monthly basis extremely challenging.

This month I won't even try. Instead, I will address the issue of withdrawal from representation, knowing full well that it has been well-addressed previously, albeit not for several years.² Nevertheless, withdrawing from representation remains a frequent source of questions posed to the attorneys in this office who handle advisory opinion requests and a not infrequent basis for issuing private admonitions. Perhaps withdrawal from representation is just not the kind of issue that lawyers think much about until a situation actually

arises in their practice—until then it is merely an abstract concept, something that happens to “other lawyers,” but not to you. But the best time to review the requirements of the rule is when it is not an urgent concern. And maybe learning about a few recent admonitions for violations in this area will be instructive.



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Must I?

There are more situations in which a lawyer may withdraw from representation than there are situations in which the lawyer must withdraw. As a result, it may be quite easy to overlook the mandatory withdrawal rules. Rule 1.16, Minnesota Rules of Professional Conduct (MRPC), governs declining or terminating representation. Rule 1.16(a) sets out only three situations in which a lawyer must decline representation at the outset or withdraw if representation has already commenced: where representation will result in a violation of the MRPC, if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, or if the lawyer is discharged. Examples of situations that could result in a violation of the MRPC that should preclude accepting representation at the outset or, if they arise during representation, would require a lawyer to withdraw from further representation, include a concurrent conflict of interest involving direct adversity with another client or a conflict of interest materially adverse to a former client in a same or substantially related matter, unless the conflict can be waived after informed consent confirmed in writing.³ Rectifying the consequences of an inadvertent offer of material false evidence by a client, who then refuses voluntarily to correct the error, also will require withdrawal, as might the insistence of a client that a lawyer file a frivolous motion.⁴

Recognizing your own physical or mental impairment is not easy for most lawyers; we are often wired to carry on in the face of adversity and rarely will admit our own frailties, even to ourselves. But the rule requires that an ongoing objective self-analysis of our health be conducted. It is one of our duties to our clients. And while ceasing representation when discharged intuitively seems obvious, as we shall discover below, it seems to frustrate some lawyers.

May I?

Rule 1.16(b) sets out a list of reasons why a lawyer may (discretionary) withdraw from a representation after its commencement, subject to court approval if needed. Some of the reasons are fairly specific while others are left more vague

and undefined. As often as not, the issue is not whether withdrawal is permitted, but rather one of timing.

Among the reasons a lawyer may withdraw are if the lawyer comes to realize that a client has used (past tense) the lawyer's services to perpetrate a crime or fraud, or persists in a course of action that the lawyer reasonably believes is criminal or fraudulent and is currently using the lawyer's services. A client's failure to substantially fulfill an obligation to pay for the lawyer's services (if the lawyer has provided a reasonable warning and opportunity to correct the situation) similarly establishes a basis for discretionary withdrawal, as does a representation that results in an unreasonable financial burden on the lawyer.

Ultimately, withdrawal can be accomplished prospectively for almost any reason if it can be accomplished without material adverse effect on the interests of the client. This is when the timing of the attempted withdrawal is particularly critical. If there is a significant step in the representation that is imminent, then withdrawal more likely will have a material adverse effect on the client. A more specific basis for withdrawal will be necessary in such an instance to permit withdrawal at that moment.

Even then, Rule 1.16(d) requires an attorney, upon termination of representation for any reason, to take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice, returning client papers and property (the file) to which the client is entitled, and refunding any unearned portions of an advance fee or advance for expenses. Returning client files and unearned fees easily could be a topic unto itself and remains the most common source of complaints from clients related to Rule 1.16.

Discipline

As indicated, several lawyers have received private admonitions in the past two years for violations of various sections of Rule 1.16, MRPC. Three lawyers were admonished for continuing to attempt to represent a client after being discharged. Why this is such a difficult requirement with which to comply is often baffling. For example, one lawyer in an eviction matter

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was discharged and the client came to the lawyer's office and obtained his file. The lawyer did not notify the court or opposing counsel of his discharge, and when opposing counsel then contacted the lawyer and requested a continuance of a pending motion the lawyer agreed, without consulting with or informing his [now former] client.⁵ Another lawyer in a social security disability matter, after being discharged, nevertheless filed an appeal on the client's behalf, apparently believing the client was making a poor decision to forgo the appeal process.⁶

Another lawyer was issued an admonition for the timing of her withdrawal. Opposing counsel in a litigation matter served upon the lawyer a motion for summary judgment. A hearing date was set for October 8 and the attorney's reply to the motion was due by September 30. Less than a week before the reply was due, the attorney had not begun to prepare a reply; the lawyer met with the client and, without warning, terminated the representation.⁷ A lawyer was disciplined for withdrawing without court permission in a situation in which permission is required (in federal court or state court criminal proceedings) in violation of Rule 1.16(c). Finally, as noted, several lawyers have been admonished for failing to promptly or fully return client files upon request following termination of representation, in violation of Rule 1.16(d).

Conclusion

Facing the issue of whether to withdraw from a difficult representation can be challenging for lawyers. Terminating representation upon discharge and taking appropriate steps to protect a client's interests, such as refunding unearned fees, should be "no brainers," but other, discretionary, situations can require thought and planning to fully avoid problems. ▲

Notes

¹ <http://lprb.mncourts.gov/articles/Pages/default.aspx>.

² Cole, "At Odds With Your Client," *Bench & Bar of Minnesota* (September 1997); Jorgensen, "Ethical and Procedural Withdrawal Requirements," *Minnesota Lawyer* (November 2002).

³ Rules 1.7 and 1.9, MRPC.

⁴ Rules 3.1 and 3.3(a)(3), MRPC.

⁵ The lawyer violated Rule 1.4(a) (communication) and Rule 1.16(a)(3), MRPC.

⁶ This violated Rule 1.2(a) (scope of representation and allocation of authority between lawyer and client) and Rule 1.16(a)(3), MRPC.

⁷ This violated Rule 1.16(b)(1) and (d), MRPC.

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