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How and When to Terminate Representation of a Difficult Client

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Special to the Legal

It happens to all of us: big firm, small firm, plaintiffs, defense, criminal and civil lawyers. There is a potential new client that we can and want to help, but somewhere in the back of our minds an alarm bell is ringing. Maybe we're worried about the client's ability to fund the case; maybe intuition tells us this client is going to be trouble. Sometimes we heed the bell and sometimes we ignore it, to our later regret. This month's column examines the ins and outs of withdrawing from the case you should never have taken.

In New Jersey and Pennsylvania, Rule of Professional Conduct 1.16 discusses both mandatory and permissive withdrawal from representation. The rule permits termination of representations for any reason so long as the lawyer can do so "without material adverse effect on the interests of your client." This permissive termination must, of course, comply with the applicable rules of the tribunal in which your case is being heard — which invariably involves a petition or other motion to withdraw.

You must terminate your representation when you are physically or mentally unable to continue, when you are fired or whenever the representation will result in a violation of the Rules of Professional Conduct or other law. As to the last circumstance, Comment 2 clarifies that withdrawal from representation is mandatory only when a client demands that the lawyer engage in illegal conduct or commit a violation of the rules. A mere suggestion on the part of the client is not sufficient to trigger mandatory withdrawal under Rule 1.16(a)(1).

In comparison, Rule 1.16(b)(2) provides that a lawyer may withdraw from an ongoing representation whenever "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." The lawyer arguably must first counsel the client to cease the offensive course of conduct before withdrawing from the representation. If the client agrees to stop, then the lawyer cannot rely upon Rule 1.16(b)(2) to support withdrawal from the representation. Similarly, Rule 1.16(b)(3) provides that withdrawal is permitted if the lawyer finds out that the client has used the lawyer's services to perpetrate a crime or fraud in the past. In this case, Comment 7 provides that the lawyer can withdraw even if doing so would materially prejudice the client.

A lawyer confronted with a client who has already used his professional services to commit a crime or fraud must also be cognizant of his ethical duties of candor to the tribunal (Rule 3.2), fairness to the opposing party and counsel (Rule 3.4), and truthfulness in statements to others (Rule 4.1). Rule 4.1(b), in particular, prohibits lawyers from "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Rule 1.6 does not prohibit disclosure of information relating to the representation of a client when the disclosure is necessary to: prevent reasonably certain death or substantial bodily harm; prevent the client from committing a criminal act likely to result in substantial injury to another's financial interests; prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services were involved. Rule 1.6(c)(1)-(3). While an exhaustive discussion of the interplay of these rules is beyond the scope of this month's column, a lawyer must consider not only his ethical obligations to the client, the court, opposing counsel and third parties, but also the potential for incurring personal criminal and/or civil liability if the lawyer continues to represent the misbehaving client.

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What about the more common case, for instance, when a client refuses to pay our fees? Under RPC 1.16(b)(5), an attorney may withdraw from representing a client if the client substantially fails to meet an obligation to the attorney regarding the attorney's services, and if the client has been given "reasonable warning" that the attorney will withdraw if the client does not meet the obligation. In subsection 6, the rule permits withdrawal when continued representation will result in an unreasonable financial burden upon the attorney, or if the client has made representation unreasonably difficult. In order to withdraw, court approval must be granted or substitute counsel must enter an appearance. See *Fulton Bank v. McKittrick & Briggs Sec.*

Inc., which discusses permitting withdrawal based on law firm's allegations that clients failed to timely respond to correspondence and phone calls, that representation constituted an unreasonable financial burden and the law firm's efforts to protect the clients' interests by seeking extensions to file answers.

As some of us know through painful experience, courts are not always in favor of permitting withdrawal, and may not do so if the case is ongoing. In *Buschmeier v. G&G Investments Inc*., a non-precedential opinion reversing a district court's denial of a motion to withdraw, the 3rd U.S. Circuit Court of Appeals found that the $100,000 in unpaid fees and expenses constituted an unreasonable financial burden on the law firm seeking withdrawal. The 3rd Circuit stated that a law firm "is entitled to withdraw once the firm demonstrates that the ordinary rules of withdrawal have been met and its appearance serves no meaningful purpose." *Id.* Dissenting from this view, Judge Robert Cowan offered this perspective: "Lamentably, however, for all too many the practice of law has become much less a profession carried on for service to others, and much more a craft carried on unabashedly for remuneration. Courts, however, are not in the business of protecting or collecting fees on behalf of attorneys. … Attorneys are to be officers of the court, representing parties of course, but not free to simply abandon their obligation to either or both, because they have not been paid as much as they think they deserve. … Although it is certainly desirable that attorneys be fully compensated, it does not follow that they always will be."

The lawyers who we practice and associate with are professionals trying to provide a service, but they also need to keep the lights on. So what steps may an attorney who withdraws, or is discharged from, a case take to protect their fees? Rule 1.16(d) of the Pennsylvania Rules of Professional Conduct states that upon termination of representation a lawyer shall take steps to protect a client's interests. This includes "surrendering papers and property to which the client is entitled." However, the rule allows the attorney to "retain papers relating to the client to the extent permitted by other law."

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Under Pennsylvania common law, attorneys may claim a retaining lien over the client's file and property when the client has not paid for legal services rendered. This is an equitable, passive lien, without the power of enforcement or sale, as in *Maleski v. Corporate Life Insurance Company*. Instead, the value of the lien lies in the client's need for the files.

But this lien is subject to an important exception — the attorney may only retain the file if such retention does not substantially prejudice the client. Substantial prejudice has been interpreted to mean "detriment to the client's interest in a material matter of clear and weighty importance," according to documents published by the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility. For example, retention of a unique document that is only in the possession of the discharged attorney or retention where trial or a real estate closing is so close in time that it would be impossible to obtain copies of pleadings, transcripts, and other necessary documents, would both result in substantial prejudice to the client. This exception has lead some to question the value of the retaining lien because the more important it is for the client to obtain the file, the more likely that the client will be substantially prejudiced by the attorney's retention of the file, and that retention will not be upheld by a court.

Painful experience, indeed. While many circumstances will permit or even mandate termination of your representation of a troublesome or non-paying client, as always the best medicine is preventive medicine. Assess the case and the client with care and be realistic about your ability to manage the case, your time and the possible financial burden. The alarm bells inside your head are no figment of your imagination; that's your judgment telling you to exercise caution. As a wise lawyer we know once said, "Say no and feel bad for an hour; say yes and feel bad for three years."

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