

How To Withdraw From Representation Ethically In Mass.

By **Christopher Blazejewski and Jessica Kelly** (May 7, 2018, 3:36 PM EDT)

The saying goes, “Getting married is easy, getting divorced is complicated.” A similar sentiment applies once a lawyer has entered an appearance in court for a client — withdrawing from a case is not as easy as appearing in one. Whether a client is not paying, or is petulant, stubborn and unruly, or demands that you participate in borderline frivolous motion practice or bullying behavior, lawyers must still take care to comply with the rules and their ethical obligations in withdrawing from representation.

So how do you withdraw from the case? Can you simply file a notice of withdrawal? What rights does your client have? What about the court or opposing counsel? Can they object? The short answer is to be careful. In seeking to withdraw, you must still honor the legal and ethical duties owed to your client. More complete answers to these questions can vary depending on the status of the case, the basis for your withdrawal and whether your client consents and locates new counsel.

In this article we describe the specifics of the attorney withdrawal process in Massachusetts; similar principles apply in other jurisdictions, but details may vary.

Governing Rules

First, be sure to consult all of the governing rules. While the ethics of withdrawal are governed by Rule 1.16 of the Rules of Professional Conduct, the procedures for withdrawal are governed by the applicable Rules of Civil Procedure. Rule 11(c) of the Massachusetts Rules of Civil Procedure provides that an attorney can withdraw from a case by filing a notice only if: (i) there is successor counsel; (ii) no motions are pending before the court; and (iii) no trial date has been set. In “all other circumstances,” withdrawal must be sought by motion.

The local rules for the District of Massachusetts are much the same — prohibiting withdrawal by notice unless there is successor counsel, no pending motions and no trial date set, and adding the requirement that there be no scheduled evidentiary hearings set or reports due to the court.[1] Thus, in most circumstances, you will have to file a motion with the court and articulate your bases for withdrawing. Massachusetts federal district court requires that a request to withdraw, whether by notice or motion, be served on the party whom the attorney represents and all other parties to the case, and allows 14 days after service for objections to be filed unless the court shortens the period for good cause shown.[2]



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Grounds for Withdrawal

Massachusetts Rules of Professional Conduct 1.16 provides for both mandatory and permissive withdrawal from representing a client across three circumstances: first, if the representation will result in a violation of the Rules of Professional Conduct or other laws; second, if the lawyer's physical or mental condition impairs his or her ability to represent the client; and third, if the lawyer is fired.

The latter two categories — impairment and discharge — are relatively self-evident. But identifying if representation could become a violation of the Rules of Professional Conduct is more difficult. Most often, it occurs when a lawyer and client develop adverse positions and a conflict of interest arises.

For example, if the client believes the lawyer has made an error, accuses the lawyer of malpractice and refuses to consent to continued representation notwithstanding that conflict of interest, a lawyer must withdraw from continued representation. There is always the risk that the lawyer will put his or her interests — in avoiding or ameliorating the claimed malpractice — before the client's interests.

The rules also permit withdrawal under several circumstances, mainly if the client has or intends to pursue a criminal, fraudulent or repugnant course of conduct, if the client fails to pay the lawyer or if continued representation will result in an unreasonable financial burden.^[3] There is also a catchall "other good cause" provision, which may be used in a situation where there has been an irretrievable breakdown of the attorney-client relationship.^[4]

Thus, in the scenario described at the beginning of this article, the lawyer arguably has grounds to move to withdraw based on the nonpayment for services and the client's insistence on overly aggressive litigation tactics. Even then, however, withdrawal is not guaranteed. Courts can and do refuse to permit withdrawal — even when a lawyer is not getting paid — particularly where the administration of justice will suffer. It is not uncommon for courts to refuse the withdrawal, for example, if it is shortly before trial or if the client will be unable to find successor counsel.

Manner of Withdrawal

Under all circumstances, a lawyer must try to mitigate the harm to the client, and must take steps to protect the client's interests when withdrawing. In particular, the lawyer must be very careful to protect client confidences in any motion filed for withdrawal, as the lawyer may need to disclose certain otherwise confidential information to persuade a tribunal that good grounds exist for the withdrawal.

Rule 1.6(b) of the Rules of Professional Conduct provides for certain exceptions to this privilege, including "to respond to allegations in any proceeding concerning the lawyer's representation of the client." If that section applies to motions to withdraw, any disclosure must be very narrow and limited only to those with a need to know. Thus, the best approach may be to seek the client's consent before disclosure and/or to file any such disclosure under seal or in camera.

If disclosure will disadvantage or prejudice the client before the court, the lawyer should also consider seeking leave to file the motion and make the disclosure to a different judge to avoid any prejudice before the trial court. What the lawyer may or may not disclose is a minefield, however, and he or she should obtain unbiased advice on the issue before moving to withdraw.

Finally, attorneys withdrawing from a case should also be mindful of Massachusetts Rules of Professional

Conduct 1.16(d), which provides that upon termination of representation, the lawyer must take steps of a reasonable extent in order to protect a client's interests. This includes giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Lawyers are also required to provide clients with their file within a reasonable time upon request.[5]

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[1] L.R. 83.5.2(c).

[2] L.R. 83.5.2(d).

[3] Mass. R. Prof. C. 1.16(b)(1)-(5).

[4] Id. 1.16(b)(6).

[5] Mass. R. Prof. C. 1.16(e).