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How to withdraw from representation ethically

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Your client has not paid you for several months, is extremely difficult to deal with, and takes the notion of zealous advocacy way too far. The client demands that you file motions that you consider wasteful and borderline frivolous, and that you reschedule depositions and other events for no good reason.

Every instinct is telling you to run, not walk, to the nearest exit. You desperately want to withdraw from representing your client but are not sure how to do so.

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. The right approach can vary depending on the status of the case, the basis for your withdrawal, and whether your client consents and locates new counsel.

In seeking to withdraw, you need to take care to ensure that you comply fully with all of your ethical obligations.

Governing rules

First, be sure to consult all 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 court rules.

Rule 1.5(a) of the Superior Court Rules of Practice provides that an attorney can withdraw from a case only with the consent of the court.

As the Rhode Island Supreme Court explains: "The grant or denial of a motion to withdraw rests within the sound discretion of the trial justice and depends upon such considerations as the reasons necessitating the withdrawal, the efficient and proper operation of the court, and the effect that granting or denying the motion will have on the parties to the litigation." *Carter v. Dworkin*, 561 A.2d 389, 390-91 (R.I. 1989).

Unless successor counsel enters an appearance, the motion to withdraw must be with reasonable notice to the party represented and must provide the court with the client's last known address. R.I. Super. Ct. R. of Practice 1.5(a).

Lawyers also must generally file a motion to withdraw in federal court. The local rules for the U.S. District of Rhode Island permit withdrawal by notice only if there is an entry of appearance by successor counsel, no motions pending, and no trial date set; otherwise, leave of court must be sought by motion. L.R. Gen 206. In most circumstances, you will have to file a motion with the court and articulate your basis for withdrawing.

Grounds for withdrawal

Rule 1.16 of the Rules of Professional Conduct provides for both mandatory and permissible withdrawal. A lawyer must withdraw from representing a client in three circumstances: if the representation will result in a violation of the Rules of Professional Conduct or the law; if the lawyer's physical or mental condition impairs his or her ability to represent the client; and if the lawyer is fired.

> Withdrawal is not guaranteed. Courts can and do refuse to permit withdrawal.

The latter two categories are relatively self-evident, but when does continued representation result in a violation of the rules? 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, the lawyer must withdraw. There is the risk that the lawyer will put his or her interests, in avoiding or ameliorating the claimed malpractice, before those of the client.

The rules also permit withdrawal in two basic circumstances: if the client has or intends to pursue a criminal, fraudulent or repugnant course of conduct, or if the client fails to pay the lawyer or continued representation will result in an unreasonable financial burden. R.I. R. Prof. C. 1.16(b)(1)-(5). There also is a catch-all "other good cause" provision. *Id.* 1.16(b)(6).

In the scenario described at the beginning of this article, the lawyer arguably has grounds to move to withdraw based on the non-payment for services and the client's insistence on overly aggressive tactics.

Even then, however, withdrawal is not guaranteed. Courts can and do refuse to permit withdrawal, particularly if, for example, it is shortly before trial or the client will be unable to find successor counsel.

Manner of withdrawal

In all events, continue to be cautious. When withdrawing, a lawyer must try to mitigate the harm to the client and protect the client's interests. In particular, the lawyer must be very careful to protect client confidences in any motion filed for withdrawal.

A lawyer may need to disclose certain otherwise confidential information to persuade a tribunal that good grounds exist for withdrawal, and Rule 1.6(b) of the Rules of Professional Conduct provides for certain exceptions to the 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 narrow and limited only to those with a need to know.

The best approach may be to seek the client's consent before disclosure or to file any such disclosure under seal or in camera. If disclosure will disadvantage or prejudice the client before the trial court, the lawyer should consider seeking leave to file the motion and make the disclosure to a different judge to avoid any prejudice. What the lawyer may and may not disclose is a minefield, however, and he or she may do well to obtain unbiased advice on the issue before moving to withdraw.

Finally, attorneys withdrawing from a case should be mindful of Rule 1.16(d) of the Rules of Professional Conduct, which provides that upon termination of representation, the lawyer must take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for hiring 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.

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