

Firing or Withdrawal of Counsel During Litigation

Duties to the Client; Impact on Litigation; Collection of Fees; Effects on Malpractice Claims

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Overview

- Mandatory withdrawal
- Permissive withdrawal
- Risks and considerations

Break Ups Are Hard

- While no representation starts with an expectation that it will not work out, it helps to contemplate the possibility
- The engagement letter can outline the process by which attorney may withdraw
- Address withdrawal or termination based on conflict in case of multiple clients or payment
- Confirm notice provisions
- Confirm document retention policies upon withdrawal

Why Terminate the Relationship?

- Failure to pay bills
- Non-communication
- Difference over strategy
- Mistrust
- Policies of firm
- Statute of Limitations
- Fired by client

Withdrawal “Red Flags”

- Client stops paying or starts refusing to pay
- Client is dishonest
- Client is unrealistic
- Other changes in the relationship
- “I should have gotten out when I had the chance”

Withdrawal, Generally

- Rule 1.3, cmt [4]: “Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.”
- Written request for permission to withdraw, and the client’s response, can be the most effective protection an attorney can have
- Practical steps for withdrawal differ between litigation and non-litigation matters
- Identify the specific representation at issue, the reasons for seeking to terminate the representation, and provide notice that upon withdrawal the attorney will no longer represent the client

Withdrawal in Litigation Matters

- Specific procedures usually dictated by Court
- Sometimes requires leave of court or a court order
- Where simply substituting counsel, usually only need to file a substitution of counsel notice with address and other identifying information
- Risk of prejudice

Withdrawal in Litigation Matters

- If attorney is withdrawing without substituting new counsel, must comply with Court rules
 - Cal. Code of Civ. Proc. Section 284
 - Cal. Rules of Court 3.1362: where the client does not consent, the motion to be relieved as counsel must include a declaration stating “in general terms and without compromising the confidentiality of the attorney-client relationship” why client consent was not obtained to withdraw
- RPC 1.16(c): “A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”
 - Cmt. [3]: The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Mandatory Withdrawal

- Attorneys have no choice in mandatory withdrawal
- Often arises upon a violation of law or the Rules, firing, or an irreconcilable conflict

Rule 1.16(a) - Mandatory Withdrawal

- Shall withdraw if:
 - (1) the representation will result in violation of the rules of professional conduct or other law;
 - *Cmt. [2] - Must be more than just a suggestion*
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.

Mandatory Withdrawal

- *Medina v. Nike, Inc.*, No. 5:18-cv-01485, 2019 WL 1789882 (C.D. Cal. Apr. 23, 2019) (finding grounds for mandatory withdrawal where client misrepresented statements in her medical records)
- *Bartolini v. Mongelli*, No. 17-cv-6276, 2018 WL 2725417 (E.D.N.Y. June 5, 2018) (denying motion to disqualify on grounds that mandatory withdrawal was not necessitated)
- *In re Wiener*, No. 18-13042, 2019 WL 2575012 (S.D.N.Y. June 21, 2019) (finding withdrawal was mandatory in light of client's termination)

Rule 1.16(b) - Permissive Withdrawal

- A lawyer may withdraw if:
 - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.

Permissive Withdrawal

- *Griffin v. Wright Medical Technology, Inc.*, No. 18-1959, 2019 WL 5102677 (D. Md. Oct. 11, 2019) (local counsel lacked subject matter expertise; granted over client's objection)
- *Hunter v. Sokoloff*, No. 14-cv-05031, 2019 WL 5655013 (N.D. Cal. Oct. 31, 2019) (permitting withdrawal in pro bono matter upon breakdown of relationship)
- *Campbell v. Woodward*, No. 12-cv-02750, 2018 WL 3611059 (D.N.J. July 26, 2018) (denying leave to withdraw because attorneys had not been asked to do anything unethical, because relationship was not irretrievably broken, and in the interests of justice)

Rule 1.16(d) - avoid prejudice

- “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as 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. The lawyer may retain papers relating to the client to the extent permitted by other law.”

Post-Withdrawal: Close the File

- Statute of limitation and conflicts of interest
- Closing the file is specific to the matter, even if the client has other matters with the practice
- Closing the file consists of three things:
 - File-closing letter;
 - Accounting of funds;
 - Administrative closing of the matter

File-Closing Letter

- Effective Date
- Notice that the attorney or firm is no longer representing the attorney's interests
- File retention policies
- Depending on circumstances, there may be a marketing component
- Follow up with the procedures of the practice to actually close the file

Withdrawal by Client

What happens when you get fired?

Why do clients fire their lawyers?

- *Competence*: Client feels lawyer is not doing a good job.
- *Communication*: Client does not feel lawyer is responsive.
- *Diligence*: Matter or case is taking too long.
- *Fees*: Client is unhappy with bills.
- *Professionalism*: Client believes lawyer is unprofessional.
- *Strategy*: Client does not agree with lawyer's strategy.
- *Ethics*: Client believes lawyer is unethical.
- *Trust*: Client no longer trusts lawyer.
- *Just a Bad fit*: Client and attorney do not have good chemistry.

When can clients fire their lawyers?

- Short answer: Any time they want to (almost).
 - Courts will usually honor a client's wishes for the counsel of his/her choice.
- Exception: Eve of trial.
- Court must weigh the interests of the client in his/her counsel of choice with the prejudice to opposing party and burden on the courts of a delay in the proceedings.

What must a fired attorney do?

Comment [9] to Model Rule 1.16(d):

“Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.”

How to avoid prejudice after termination:

- Try to salvage relationship especially if close to trial
- Explain consequences of switching counsel
- File withdrawal and/or substitution of counsel
 - Even if client fires the attorney, attorney may still have to move to withdraw
 - Entity clients cannot represent themselves and must have substitute counsel
- Promptly return unused retainer
- Return client file pursuant to state law
- Maintain confidentiality

Impact on potential malpractice claims

- Does client have malpractice claim at the time of firing?
 - Do you need to put carrier on notice?
- Usually, the client's firing of his/her attorney will start the running of the statute of limitations on a malpractice claim.
- If client fires lawyer before trial or before lawyer has a chance to fix a problem, client may have harder time proving causation in subsequent legal malpractice claim.

Fees and Payment

- What happens to unpaid fees upon termination or withdrawal?
- What steps can attorneys take to collect fees?
- What are the ethical risks?

Rule 1.16(d)

- Upon termination, a lawyer shall “surrender[] papers and property to which the client is entitled and refund[] any advance payment of fee or expense that has not been earned or incurred”
- Cannot hold property hostage due to a client’s failure to pay fees (except as provided by Rule 1.15)

What if there is a dispute over the disbursement?

- Comment [3] to Model Rule 1.15: “Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.”

Why Hasn't the Client Paid?

- Unintentional oversight?
- Administrative issue (such as rate charged or agreed billing procedures)?
- Inability to pay?
- Dissatisfaction with work?
- The case is ongoing?

Filing a Lawsuit to Collect Fees

- Some firms have a policy of never suing clients; others will sue clients for unpaid fees once the representation ends
- Statistics indicate that as many as two of every five clients sued for nonpayment of fees file a counterclaim for legal malpractice
- Probably not covered by insurance, but may have to be reported
- Risks

Filing a Lawsuit to Collect Fees: Is the Amount of Unpaid Fees and Expenses Significant?

- Is it worth the risk of a counterclaim?
- Consider the costs of pursuing litigation
- For many firms, the ratio is 2:1

Filing a Lawsuit to Collect Fees: Is the Judgment Collectible?

- If the likelihood of collection is low, the risk of obtaining a judgment may outweigh the potential benefit
- Why did the relationship end? It may be a factor that impacts whether a collection action makes sense.

Filing a Lawsuit to Collect Fees: What is the Likelihood of Success?

- Model Rule of Professional Conduct 1.5(a): “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”
- Just because an amount was charged or incurred does not mean it is automatically recoverable in a subsequent suit - many factors
- Consider a peer review
- What is the statute of limitations?

Fee Arbitration

- Many firms include mandatory arbitration provisions in their engagement letters
- Can be limited to fee disputes -- many states have programs that require client consent
- May shift focus from *whether* the attorney will recover to *how much* the attorney will recover
- Advantages include timing and confidentiality
- May need to be specific in the engagement letter
- Public opinion is changing

Attorney's Lien

- Some states permit an attorney's lien
 - Charging Lien
 - Applies against amounts that the client will receive or obtain as a result of legal action
 - Retaining Lien
 - Retaining the client's property until client pays amounts due to the attorney
- Ethical restrictions

Issues Arising Post-Termination

Deadlines in Case

- Impending deadlines, especially trial, may affect ability to withdraw, even where the client fires the lawyer.
- If Court allows motion to withdraw, it may (a) give client time to find new counsel; and/or (b) give new counsel time to get up to speed. But Court will likely consider effect on opposing party and limit the length of any continuance.
 - “A request for a continuance properly may be denied when the denial will not be prejudicial to the movant.” *Matthews v. C.E.C. Indus. Corp.*, 202 F.3d 282 (1st Cir. 1999).
 - “The denial of a ... motion for a continuance amounts to a constitutional violation only if there is an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.” *Gerber v. Veltri*, 702 F. App'x 423, 428 (6th Cir. 2017)

Transitioning Files – State Specific*

Majority Rule → Entire File Approach:

“On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse. . . [A] client is entitled to retrieve documents in possession of a lawyer relating to representation of the client. That right extends to documents placed in the lawyer's possession as well as to documents produced by the lawyer.”

TCV VI, L.P. v. Tradingscreen Inc., 2018 WL 1907212 (Del. Ch. Apr. 23, 2018) (citing Restatement (Third) of the Law Governing Lawyers § 46(2) (Am. Law. Inst. 2000) & Comment c.)

Exceptions:

- (i) situations when compliance would violate the lawyer's duty to another;
- (ii) cases of extreme necessity, such as where the disclosure is likely to cause serious harm to the client;
- (iii) certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case.

Rationale:

- “Entire file” approach best comports with the duty owed by a lawyer to his or her client.
- “Entire file” approach is consistent with the client's property interest in his or her file.

*These rules apply when the client has paid in full. State attorney lien law may vary what the attorney is required to turn over.

Minority Rule → End-Product Approach

- “Distinguishes between lawyer’s external work product, which the client has a right to obtain, and the lawyer’s internal work product, which the client does not have any right to receive.” *Tradingscreen*, 2018 WL 1907212, at *5.
- External work product = documents that have been produced to further client’s interest
- Internal work product = documents containing lawyer’s mental impressions, conclusions, opinions, or legal theories

Rationale:

- Lawyers are paying for the “end result,” not necessarily the “tool used by the lawyer to reach the end result.”
- Lawyer’s interest in their thoughts and strategy outweighs the value of their disclosure.

**ABA Standing Committee on Ethics and Professional Responsibility:
Formal Opinion 471 (July 1, 2015)**

Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled

“Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client’s interest, and such steps include surrendering to the former client papers and property to which the former client is entitled. A client is not entitled to papers and property that the lawyer generated for the lawyer’s own purpose in working on the client’s matter. However, when the lawyer’s representation of the client in a matter is terminated before the matter is completed, protection of the former client’s interest may require that certain materials the lawyer generated for the lawyer’s own purpose be provided to the client.”

The ABA Committee opined that attorneys should be required to produce:

- any materials provided to the lawyer by the client;
- legal documents filed with a tribunal—or those completed, ready to be filed, but not yet filed;
- executed instruments like contracts;
- orders or other records of the tribunal;
- correspondence issued or received by the lawyer in connection with the representation of the client on relevant issues, including email and other electronic correspondence that has been retained according to the firm's document retention policy;
- discovery or evidentiary exhibits, including interrogatories and their answers, deposition transcripts, expert witness reports and witness statements, and exhibits;
- legal opinions issued at the request of the client; and
- third party assessments, evaluations, or records paid for by the client.

The ABA Committee opined that attorneys should not be required to produce:

- drafts or mark-ups of documents to be filed with a tribunal;
- drafts of legal instruments;
- internal legal memoranda and research materials;
- internal conflict checks;
- personal notes;
- hourly billing statements;
- firm assignments;
- notes regarding an ethics consultation;
- a general assessment of the client or the client's matter; and
- documents that might reveal the confidences of other clients.

Exception “when a lawyer has been representing a client on a matter that is not completed and the representation is terminated”:

The lawyer should produce materials that are: (1) internal notes and memos that were generated primarily for the lawyer’s own purpose in working on the client’s matter, (2) for which no final product has emerged, and (3) the materials should be disclosed to avoid harming the client’s interest.

Thank You

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