

Attorney Withdrawal: The Ins-and-Outs of Getting Out

In a perfect world, every matter a lawyer handles for a client would come to a timely, successful, and profitable conclusion. Sometimes, however, it becomes necessary to withdraw from an engagement before the work is done or the matter comes to an end. Withdrawing from an engagement that has become problematic can be an effective risk control measure, eliminating an impermissible conflict or neutralizing a dispute with a client before it takes on a life of its own.

Withdrawing from an engagement can be tricky, however. Since withdrawal can create significant burdens for clients and can infringe the fiduciary duties lawyers owe, ethics and disciplinary rules limit a lawyer's right to withdraw and govern the manner in which they may do so. Withdrawing without permission or failing to adequately protect the client's interests in the process can subject an attorney to professional discipline. A lawyer who does not follow the rules or comply with the conditions for withdrawal will be deemed to continue to represent the client. As a result, lawyers who fail to effectively withdraw can be subject to malpractice claims.

Accordingly, there are several issues lawyers need to consider with respect to withdrawal:

- What are appropriate grounds for withdrawal? Is it permissible under the circumstances?
- What are the hazards associated with withdrawal?
- What is the "right way" to withdraw?

Failing to consider these issues prior to withdrawing can lead to a bigger problem than the one that led to the lawyer's decision to withdraw in the first place.

Grounds for Withdrawal

While a client can fire a lawyer at any time, for any or no reason, the inverse is not true. Lawyers are generally expected to see each matter through to its conclusion, and in some situations, can be forced to stick it out even under the most difficult circumstances. Accordingly, the best opportunity to avoid a problematic representation is at the outset of the engagement, during the client/file screening process. Nevertheless, ethics rules contemplate a variety of circumstances in which withdrawal from an on-going engagement can occur.

Withdrawal can be either mandatory or permissible. Withdrawal is mandatory when it is ordered by a tribunal or required by a disciplinary or professional rule. Permissible withdrawal is based on other cause. Under ABA Model Rule 1.16(b), a lawyer can withdraw from an engagement without cause only if it will not result in a material adverse effect on the client's interests. Because withdrawal will usually produce some measure of harm to the client, in most instances it will be necessary for an attorney to demonstrate cause. However, the *Restatement of Law Governing Lawyers* indicates that even where cause exists, a lawyer may still not withdraw if he believes that the harm to the client caused by the withdrawal will be disproportionately greater than the harm to the client or others if the representation continues.

Of course, withdrawal by the lawyer is mandatory when the client terminates the engagement. Withdrawal is also required when a conflict arises that either cannot or has not been waived by the client, or when it appears that continued representation will require the lawyer to violate the law or ethics rules. Other instances where withdrawal is mandatory vary by jurisdiction.

The rules on permissive withdrawal also vary depending on the location and nature of the engagement. Generally, each state's ethics rules dictate the circumstances under which an attorney can withdraw based on cause. Grounds for cause include the client's persistent unlawful conduct or use of the lawyer's services to perpetrate a crime or fraud and other acts or intentions of the client which the lawyer considers repugnant. More common bases for cause include the client's failure to fulfill a substantial duty or obligation to the lawyer and client conduct that renders the representation unreasonably difficult or brings about an irreparable breakdown of the relationship.

Because it can create an unreasonable financial burden on the attorney, a client's failure to pay the lawyer for his services can be a failure to fulfill a substantial duty that may thus constitute sufficient cause to withdraw. But while not getting paid can be a sufficient cause, a claim by the lawyer that a representation requires too much time or effort ordinarily will not. Lawyers are expected to anticipate the needs of an engagement. While lawyers cannot anticipate everything that may be involved, it is important not only to consider these issues at the outset, but also to discuss them with the client and document these discussions and understandings in the engagement agreement and related correspondence. These materials will serve as evidence supporting withdrawal if the matter later develops into something well beyond the scope of the agreed engagement, or the expertise or resources available to the lawyer or firm.

According to most authorities, cause includes situations wherein the client has consented to the withdrawal. However, the client's consent must be informed, meaning the client has been advised and fully understands the consequences of the lawyer's withdrawal. Regardless of whether consent is given or the withdrawal is mandatory or voluntary, to withdraw from a matter that is pending before a court or other tribunal, the lawyer must first provide proper notice and seek approval from that authority pursuant to applicable law.

The Hazards of Withdrawal

Withdrawing from an engagement has the potential to be a cause of or a cure for professional liability or discipline for lawyers. On one hand, an attorney's withdrawal can be viewed as abandonment by the client or a court. However, withdrawing from a problem engagement can be an effective way to address a problem before it gets out of hand. For example, rather than continuing to represent a non-paying client and ending up in a costly fee dispute later on, it is usually better to withdraw before the fees get too high. Lawyers can get themselves into all types of trouble by failing to withdraw if and when the opportunity arises:

A lawyer was hired by his client to file a personal injury action shortly before the expiration of the applicable limitations period. Even though the attorney had no personal injury experience, he agreed to take the case merely for the purpose of getting the client's claim filed before it

was time-barred, and then refer the case to more experienced counsel, which he did a short time later in exchange for a small referral fee. No engagement letter or agreement was executed. Although the second lawyer filed another appearance on behalf of the client, the first lawyer neglected to formally withdraw his appearance, and eventually ceased to have any involvement with the case. When the second attorney failed to name several key parties as defendants causing the client's claim to be barred as to them, the client sued both lawyers for malpractice. Claims against the second lawyer were settled for \$250,000 (his available insurance policy limits). The claims against the first lawyer, who was with a larger firm and had substantial capital invested in the firm, proved more intractable. These claims were eventually settled for an amount in excess of \$1,000,000.

An attorney's withdrawal will almost always cause some degree of problems for a client, so attorneys must make efforts to minimize such harm. A terminated client will incur additional time and expense searching for new counsel. The client also likely will incur duplicate fees in enabling successor counsel to become familiar with the matter. Other consequences which must be considered are whether another qualified lawyer is available to the client, the prejudice that might result from delay caused by the change in lawyers, and whether the client might be reluctant to retain replacement counsel.

A withdrawing attorney must also be careful not to breach any continuing duties owed to the client. The most important of these is the continuing duty to preserve and protect the client's confidences, property, and records. An attorney who has withdrawn also may be obligated to keep the client informed of any post-engagement matters that come to the lawyer's attention. Finally, attorneys must not take advantage of any of the knowledge or trust acquired during the representation. After withdrawal, an attorney can take no action without the client's express authorization and must avoid any appearance that the lawyer is continuing to act as the client's agent or representative. Whether the departing lawyer continues to have authority to act on the client's behalf depends on whether the client regarded the lawyer to be in charge of the matter, whether the lawyer filed an appearance for the client with a tribunal, and whether other lawyers continued to represent the client in other matters.

Techniques for Withdrawing Safely and Effectively

A withdrawing attorney who fails to consider and make a reasonable effort to minimize the impact to the client risks creating a perception by the client or others that the client's interests have been abandoned. What efforts a departing lawyer must make to protect the client's interests will depend largely on the circumstances.

Even if client consent is not required for withdrawal, it is a good idea to seek consent anyway. Although this may or may not affect the decision to withdraw, the client should be afforded an opportunity to refuse permission. Requesting consent reduces the likelihood that the client will feel ambushed or offended, and may offer the lawyer an opportunity to salvage a damaged relationship. The lawyer should explain to the client that consenting to withdrawal will make the transition swifter and easier, which will likely be in the client's best interest. In any case, the client should be advised of his/her rights and the lawyer's duties and obligations with respect to withdrawal, as any consent a lawyer does obtain will be invalid unless it is sufficiently informed.

Prior to taking any action, a lawyer should explain his reasons for withdrawing. This explanation should be objective, concise and clearly understandable rather than confrontational. If the reason is based on client conduct, the client should be afforded a reasonable opportunity to take corrective action. For example, before withdrawing due to non-payment of fees, the lawyer must request payment and advise the client that the failure to pay could result in withdrawal.

An attorney must give the client adequate notice of his intention to withdraw and explain the implications for the client. Clients must be afforded a reasonable period of time to prepare for withdrawal, as lawyers may be ethically prohibited from completely halting the representation for some reasonable time period after receipt of notice. During this time frame, a withdrawing attorney should continue to represent the client and undertake efforts to ameliorate any harm caused by the withdrawal. These efforts include assisting the client in finding another lawyer and emphasizing to the client that this must be done without delay. If the client is facing an imminent deadline that may expire before successor counsel can act, a withdrawing attorney must take reasonable steps to extend the deadline or comply with it. In light of the additional expenses that may be incurred, lawyers should consider foregoing

or refunding certain fees, especially fees that will be re-incurred by the client for work that was not completed or was in-progress at the time of withdrawal.

When replacement counsel is engaged, the lawyer must make a reasonable effort to then transfer the matter to new counsel. The client's property and records must be turned over to the extent the attorney is not entitled to retain them. While it may be permissible to address the issue of paying outstanding balances, in most cases the lawyer is not allowed to withhold the client's property or documents in order to secure payment. Although attorneys are ethically required to reasonably cooperate with successor counsel, a terminating lawyer can receive payment in connection with the transfer of the matter to new counsel if the client is given adequate notice of such charges.

Lawyers should document the conversations and consultations they have with clients regarding withdrawal. If a client fails to respond to communications, a withdrawing lawyer should send correspondence relating to the termination by overnight mail or messenger providing proof of delivery, and keep copies and return receipts of all such correspondence in the firm's central files. Of course, if the client agrees to the lawyer's withdrawal, this consent should be obtained in writing. If withdrawal will require court approval, the lawyer should consider including a copy of a proposed motion to withdraw and advising the client that the motion will be filed by a specified date. A response from the client within a short period upon receipt of the letter should be sought.

Conclusion

Withdrawing from an on-going engagement will inevitably pose some problems for the client. These problems will become the lawyer's problems if termination is not handled sensitively and properly. Failure to obtain required permission and adequately protect the client's interests could give rise not only to potential liability to an abandoned client for malpractice, but also to disciplinary sanctions. By taking reasonable steps to minimize the harm and keeping the termination amicable, lawyers can effectively withdraw from a difficult representation and prevent a bad situation from turning into a larger problem.

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