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November 2017 WSBA *NWLawyer Ethics & the Law* Column

Parting Ways:
The Mechanics of Withdrawal

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According to statistics compiled by the WSBA, each year around five percent of all grievances against Washington lawyers stem from their withdrawal from on-going representations. Withdrawal also figured prominently in a significant Washington Supreme Court legal malpractice decision within the past year. RPCs 1.16(a) and 1.16(b) govern the grounds for, respectively, mandatory and permissive withdrawal. From the perspective of law firm risk management, however, the mechanics of withdrawal can be as sensitive as the basis for withdrawal. The reason is simple: in many cases, the attorney-client relationship has unraveled and emotions on both sides are often raw. This dynamic can create a particularly fraught situation that may spawn bar grievances or claims over the withdrawal if not handled professionally.

In this column, we'll look at two primary elements of the mechanics of withdrawal. First, we'll examine the steps a lawyer should take if the withdrawal occurs in the context of public court proceedings. Second, we'll survey issues that often arise when transitioning the withdrawing lawyer's file. These two areas largely mirror RPCs 1.16(c) and 1.16(d). At the same time, court rules—such as CR 71—play an equally important role in any litigation-related withdrawal.

Public Proceedings

RPC 1.16(c) requires that a lawyer seeking to withdraw "comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." CR 71(c)(3) allows withdrawal by notice alone if the client (or the opposing party) does not object within the 10-day period provided. Similarly, CR 71(d) allows withdrawal simply by simultaneous substitution of new counsel. But, if there is no immediate substitution of new counsel and there is an objection to the lawyer's withdrawal, CR 71(c)(4) requires the lawyer seeking withdrawal to obtain the court's permission. The state court criminal rule—CrR 3.1(e)—also requires court permission to withdraw once a trial has been set. LCR 83.2 and LR 83.2 in, respectively, the federal district courts for the Western and Eastern Districts also generally require court permission if the withdrawal will leave the client unrepresented.

When a lawyer is in a situation where court approval is required, that creates a corresponding issue under the "confidentiality rule"—RPC 1.6: what can the lawyer reveal in public court papers and related public proceedings? Both the WSBA and the ABA recently issued very useful ethics opinions on this sensitive point that are available on their web sites: WSBA Advisory Opinion 201701 and ABA Formal Opinion 476.

Assuming the client has not consented to having otherwise confidential information aired in public or the public record already makes plain the reason for the withdrawal, the WSBA and ABA ethics opinions counsel a two-step process.

First, in public motion papers or public proceedings, the opinions suggest that the lawyer simply state that "professional considerations" provide the basis for withdrawal without including further detail that would reveal confidential information. This approach is patterned on Comment 3 to both Washington RPC 1.16 and its ABA Model Rule counterpart. Both formulations of the comment note that this or an analogous phrase "ordinarily should be accepted as sufficient."

Second, if the court concerned nonetheless wants more, the opinions counsel that the lawyer can generally comply if ordered to do so by the court because Washington RPC 1.6(b)(6) and the parallel ABA Model Rule permit lawyers to reveal otherwise confidential information in response to a court order. In that circumstance, however, the opinions suggest that the lawyer should use available procedural protections such as sealed filings and *in camera* review to protect the client's confidential information from the opposing party.

If the court denies withdrawal or rejects the lawyer's efforts to protect the client's confidential information in the process, the only practical avenue for

appeal is discretionary review in state court (*see, e.g., Robbins v. Legacy Health System, Inc.*, 177 Wn. App. 299, 311 P.3d 96 (2013)) or *mandamus* in federal court (*see, e.g., Mallard v. U.S. District Court for Southern Dist. of Iowa*, 490 U.S. 296, 109 S. Ct. 1814, 104 L. Ed.2d 318 (1989)).

Two practical considerations also enter the mix in the litigation setting.

First, if you conclude you need to withdraw, don't delay. The Washington Court of Appeals in *Kingdom v. Jackson*, 78 Wn. App. 154, 158, 896 P.2d 101 (1995), and *Robbins v. Legacy Health System, Inc.*, *supra*, 177 Wn. App. at 310, both noted that courts may deny motions where "withdrawal will delay trial or otherwise interfere with the functioning of the court[.]" RPC 1.16(c) concludes that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Particularly when the reason for withdrawal is nonpayment, a lawyer who delays until the eve of trial may find him or herself performing "involuntary *pro bono*" if the court denies a late motion to withdraw.

Second, in situations that are especially fractious, a lawyer may wish to consider affirmatively seeking court permission even if it is not technically required by the applicable court rule. In *Schibel v. Eymann*, ___ Wn.2d ___, 399 P.3d 1129 (2017), the Washington Supreme Court held that a court order

permitting withdrawal precludes a subsequent legal malpractice claim over the withdrawal. The Supreme Court in *Schibel* reasoned that the former client—having had the opportunity to litigate issues surrounding the withdrawal in the underlying case—was collaterally estopped from revisiting them in a subsequent legal malpractice case.

Transitioning the File

RPC 1.16(d) addresses transitioning the matter concerned on withdrawal. It takes the high road: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of another legal practitioner, 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." Comment 9 to RPC 1.16 underscores that lawyers must take these steps regardless of the particular circumstances that led to the withdrawal: "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."

One particular flashpoint can be the lawyer's file. RPC 1.16(d) recognizes that a lawyer may have possessory lien rights over a file for unpaid fees: "The lawyer may retain papers relating to the client to the extent permitted by other

law." At the same time, WSBA Advisory Opinion 181 concludes that the lawyer's continuing fiduciary duty to the client during a transition "trumps" the lawyer's possessory lien rights and requires the lawyer to provide the client with the file if the client needs it. Generally, Advisory Opinion 181 suggests that a lawyer's entire file—whether paper or electronic—must be turned over to the client (or the client's new lawyer at the client's direction), subject to limited exceptions. The principal exceptions include a lawyer's notes relating to the business relationship with the client, such as conflict checks and collection notes, that were not charged to the client and general research memoranda, such as a memo prepared in another matter dealing with the same legal issue but not billed to the client concerned. Copy costs are a less frequent source of dispute today now that many files are solely in electronic form. Nonetheless, Advisory Opinion 181 counsels that a lawyer may retain a copy of the file (at the lawyer's expense) to document the state of the matter on the lawyer's watch. As noted earlier, RPC 1.16(d) specifically requires that unearned advance fee deposits be refunded. At the same time, withdrawal does not waive a lawyer's lien for fees under RCW 60.40.010.

The consequences of failing to meet the obligations imposed by RPC 1.16(d) can be severe. Lawyers have been disciplined for failing to promptly

deliver client papers (*see, e.g., In re Eugster*, 166 Wn.2d 293, 209 P.3d 435 (2009)) and client funds (*see, e.g., In re Perez-Pena*, 161 Wn.2d 820, 168 P.3d 408 (2007)). Further, our responsibilities to clients under the RPCs reflect our underlying fiduciary duties. Although the former may not directly provide a basis for a civil claim, the latter clearly do under *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992). A client who was injured by a lawyer's failure to transfer a file might well raise a breach of fiduciary claim. Similarly, the Consumer Protection Act applies to the business aspects of law practice under *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984). Again, a client harmed by a lawyer's failure to transfer a file might also contend that the CPA was triggered because fee issues go directly to the business elements of law practice. These possible civil remedies can also become legal and practical impediments to a subsequent collection action by the lawyer.

ABOUT THE AUTHOR

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