The Grounds for, and Mechanics of, Withdrawal

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(First of two parts)

So will you please say hello
To the folks that I know
Tell them I won't be long
They'll be happy to know
That as you saw me go
I was singin' this song

We'll meet again
Don't know where
Don't know when
But I know we'll meet again some sunny day …

From the song "We'll Meet Again," written by Ross Parker and Hughie Charles, and sung by the legendary Vera Lynn — *https://www.youtube.com/watch?v=T5C4meGkNyc.*

It is often not easy for a lawyer to say goodbye to a client. Whether the withdrawal is a "may" or a "must," we are required to adhere to our professional conduct rules. If not, when the parties meet again it will likely not be a happy meeting on a sunny day (metaphorical or otherwise), but, instead, a decidedly unhappy meeting with the Office of Disciplinary Counsel or in defense of a malpractice claim.

The withdrawal rule, RPC 1.16, sits at an uneasy divide in the attorney-client relationship. Whether a lawyer chooses to withdraw from representation before completing the representation or the client has discharged the lawyer, or a court has told the lawyer to withdraw, the circumstances create appreciable risk management and ethical pitfalls for lawyers unless it is handled in accord with our rules.

This article covers the two central aspects of the withdrawal rule, the grounds for mandatory and permissive withdrawal, and the mechanics of withdrawal. Before we do, three preliminary comments are in order.

RPC 1.16 is entitled "Declining or Terminating Representation" (emphasis added). Although this article focuses on the second element of that disjunctive, the grounds addressed are often equally good reasons not to have accepted the representation.

Second, for our readers with a historical bent, the withdrawal rule was RPC 1.15 when the RPCs were adopted in 1985.1 Some of the cases we will address cite to RPC 1.15. The rule, however, was renumbered in 2006 to RPC 1.16 and it generally parallels its ABA Model Rule counterpart.2

Finally, although RPC 1.16 is a regulatory standard, courts often look to the rule in deciding whether motions to withdraw should be granted, and in guiding the way they handle the logistics of withdrawal along with their own procedural rules and associated case law. The Court of Appeals in Kingdom v. Jackson3 described all three sources as "pertinent factors" that a trial court should apply in exercising its discretion when reviewing a motion to withdraw.

Mandatory Withdrawal

RPC 1.16(a) outlines three situations when a lawyer must withdraw:

[A] lawyer shall … notwithstanding RCW 2.44.040, withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

Washington's version is framed so that the duty to withdraw under the rule supersedes RCW 2.44.040, which would otherwise require payment for services before changing counsel. As we'll discuss later, even mandatory withdrawal is subject to court approval under RPC 1.16(c) if the local rule of the forum requires it.

Each of the three mandatory grounds has its own nuances.

RPC 1.16(a)(1). Although RPC 1.16(a)(1) can be triggered in many ways, one of the most common is the requirement to withdraw when a nonwaivable conflict occurs in a joint representation.4 In re Carpenter,5 for example, involved a lawyer representing two defendants in a commercial dispute. A conflict developed between the jointly represented clients but the lawyer did not withdraw. He was disciplined both for the conflict and for failing to withdraw.

RPC 1.16(a)(2). Mandatory withdrawal under RPC 1.16(a)(2) is related directly to the duty of competent representation under RPC 1.1. If a lawyer has a condition that prevents the lawyer from representing the client, the lawyer must withdraw.

At the same time, the Supreme Court in In re Cohen6 cautioned that the condition involved must truly affect the representation rather than simply offer a convenient excuse to withdraw. A firm will not necessarily need to withdraw if others at the firm are capable of stepping in to assume responsibility for the lawyer who has become ill and the client approves.

Although ABA Formal Opinion 03-429 (2003) counsels that the privacy of the lawyer concerned can be protected, the opinion also concludes that the client must be told about the lawyer's inability to carry the representation forward.

RPC 1.16(a)(3). The Supreme Court in In re Kaegle,7 observed pungently: "Clients have an unfettered right to terminate an attorney's representation 'either for good or fancied cause, or out of whim or caprice, or wantonly and without cause.'" It follows under RPC 1.16(a)(3), therefore, that if a lawyer is fired, the lawyer must withdraw.8 Comment 4 to RPC 1.16 notes that even though a client has a broad right to discharge a lawyer, the client remains subject to any applicable contractual or statutory payment obligations.

Permissive Withdrawal

RPC 1.16(b) addresses seven situations when a lawyer is permitted to withdraw. Although we will briefly survey each, withdrawal for nonpayment is in our experience the most common for most lawyers. Even if permitted, withdrawal under RPC 1.16(b) is also subject to court approval under RPC 1.16(c) if the local rule of the forum requires it.

RPC 1.16(b)(1). Withdrawal under RPC 1.16(b)(1) is permitted when it "can be accomplished without material adverse effect on the interests of the client[.]" In Lockhart v. Greive,9 for example, a personal-injury lawyer withdrew after concluding the client's case had potentially significant flaws, but protected the client's interests on withdrawing by providing advance notice to the client and cooperating in transitioning the matter to new counsel.

RPCs 1.16(b)(2), (3). These two grounds involve situations where, respectively, a client is using or has used the lawyer's services to further a crime or fraud. State v. Berrysmith,10 for example, involved the withdrawal of a lawyer who had reasonably concluded that his client was planning to commit perjury. RPC 1.6(b)(1)-(3), in turn, address scenarios where the lawyer must or may reveal otherwise confidential information concerning a client's criminal or fraudulent activities.

RPC 1.16(b)(4). Withdrawal on this ground is permitted when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement[.]" State v. Marshall,11 for example, involved two criminal-defense lawyers who were allowed to withdraw on this ground based on their philosophical opposition to the death penalty that their client wanted to pursue. Less dramatically, this ground might also come into play in a dissolution case where a client is insistent on pursuing a "scorched earth" litigation strategy over the lawyer's considered judgment.

RPC 1.16(b)(5). Although phrased rather euphemistically as "fail[ing] to substantially fulfill an obligation to the lawyer regarding the lawyer's services[,]" this provision permits withdrawal for nonpayment.12 It requires "reasonable warning," but that is not a particularly high bar as both mounting bills and informal collection efforts usually precede this final remedy.

Most often, withdrawal for nonpayment arises in hourly fee matters. Robbins v. Legacy Health System, Inc.,13 however, involved a contingent-fee lawyer's withdrawal where the client had failed to pay agreed costs.

RPC 1.16(b)(6). This ground includes two distinct rationales: "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client[.]" Portman v. F.D.I.C.,14 illustrates the former: A firm was allowed to withdraw when a case initially involving a loan guarantee morphed into multifaceted litigation against a successor bank and the FDIC. WSBA Advisory Opinion 2225 (2012) offers an example of the latter: a client refuses to communicate and otherwise cooperate with the lawyer in handling the client's matter.

RPC 1.16(b)(7). This last ground is a "catch-all": "[O]ther good cause for withdrawal exists." The potential reasons are many and varied. Schibel v. Johnson15 illustrates a recurring example: what the trial court described as an irretrievable "breakdown in communication, trust and confidence in the attorney-client relationship."

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1 See Robert H. Aronson, An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed, 61 Wash. L. Rev. 823, 856–59 (1986) (discussing adoption of the withdrawal rule in Washington).

2 See WSBA, Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct 170–71 (2004) (discussing amendments to the rule).

3 78 Wn. App. 154, 158, 896 P.2d 101 (1995).

4 Comment 2 to RPC 1.16 counsels that a lawyer need not withdraw "simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation."

5 160 Wn.2d 16, 155 P.3d 937 (2007).

6 150 Wn.2d 744, 82 P.3d 224 (2004).

7 149 Wn.2d 793, 820, 72 P.3d 1067 (2003).

8 Comment 5 to RPC 1.16 notes that other law may restrict a client's ability to discharge appointed counsel.

9 66 Wn. App. 735, 742, 834 P.2d 64 (1992).

10 87 Wn. App. 268, 275–76, 944 P.2d 397 (1997).

11 83 Wn. App. 741, 745–46, 923 P.2d 709 (1996).

12 Comment 8 to RPC 1.16 notes that other client failures to abide by the agreed terms of an engagement may also provide a basis to withdraw under this provision.

13 177 Wn. App. 299, 304, 311 P.3d 96 (2013).

*14 2011 WL 1362692 at *3–4 (W.D. Wash., Apr. 11, 2011) (unpublished).*

*15 2012 WL 2326992 at *4 (Wn. App., June 19, 2012) (unpublished)*

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