

BAR BULLETIN

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The Grounds for, and Mechanics of, Withdrawal (Part Two)

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(Second of two parts)

We continue with our article from the December issue.

Statistics from the WSBA Office of Disciplinary Counsel's most recent annual report reflect that nearly nine percent of cases where discipline was imposed involved violations of the withdrawal rule, RPC 1.16.16 Statistics from the ABA also reflect that asserted improper withdrawal has also long formed a distinct class of legal malpractice cases.¹⁷ Last month, we surveyed the mandatory and persuasive grounds for withdrawal under, respectively, RPCs 1.16(a) and (b).

This month, we'll turn our attention to the "mechanics" of withdrawal — court permission under RPC 1.16(c) and file transition under RPC 1.16(d). The "mechanics" can be an especially dangerous inflection point with soon-to-be former clients and warrant a deft touch from the risk management perspective.

Court Permission

RPC 1.16(c) is simple on its face, but can be considerably more nuanced in its application:

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.

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 by simultaneous substitution of new counsel. But, if there is no immediate substitution and there is an objection to the lawyer's withdrawal, CR 71(c)(4) requires the lawyer seeking withdrawal to obtain court permission.

The corresponding criminal rule — CrR 3.1(e) — also requires court permission to withdraw once a trial has been set. LCR 83.2 and LGIVR 83.2 in, respectively, the federal district courts for the Western and Eastern Districts also generally require court permission if withdrawal will leave the client unrepresented.

The Washington Supreme Court in *In re Pfeffer*,¹⁸ disciplined a lawyer under RPC 1.16(c) for failing to comply with CR 71(c)(1). Conversely, the Washington Supreme Court in *Schibel v. Eymann*,¹⁹ held that if a lawyer is permitted to withdraw following a contested hearing, the client is precluded from re-litigating the merits of that issue in a subsequent legal malpractice claim. In short, obtaining court permission can lessen the risk of later "finger pointing" by the client involved.

Court permission presents two key questions: (1) what do you tell the court, and (2) when should you file your motion?

Content

As we'll discuss in this section, RPC 1.16(d) requires lawyers to protect their soon-to-be former clients in the process of withdrawing — including their confidential information. In public proceedings and public filings, Comment 3 to RPC 1.16 counsels that lawyers should be circumspect and simply indicate that "professional considerations" dictate the lawyer's withdrawal:

The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Most of the time, courts will recognize the words "professional considerations" as a signal that serious issues have arisen in the lawyer-client relationship that require withdrawal. In *Elf-Man, LLC v. Albright*,²⁰ for example, the court noted that the lawyer had used an equivalent shorthand and the court granted the motion. In other instances, however, the court may want a fuller explanation.

WSBA Advisory Opinion 201701 (2017) addresses this often uncomfortable position and should be required reading. Advisory Opinion 201701 counsels that lawyers are permitted to give a fuller explanation consistent with the duty of confidentiality if ordered to do so by a court as RPC 1.6(b) (6) generally allows lawyers to reveal otherwise confidential information in response to a court order.

At the same time, Advisory Opinion 201701 suggests that even if ordered, the lawyer should still use available procedural tools such as sealed filings and in camera proceedings to protect the client's confidential information from the other parties when seeking withdrawal. In *Rahim v. Providence Health and Services*,²¹ for example, the court in granting a motion to withdraw noted that the law firms seeking withdrawal had submitted their supplemental explanation under seal without objection from the opposing party.

Timing

The timing of a motion to withdraw can be critical. In *State v. Waters*²² and *State v. George*,²³ for example, the Court of Appeals affirmed the denial of motions made too close to trial. The Court of Appeals in *George* put it this way: "[W]e hold that the trial court did not abuse its discretion in denying counsel's motion to withdraw because appointing new counsel on the eve of trial would clearly have caused considerable delay and inconvenience to the jury, witnesses, prosecution, and the court."²⁴

Delaying a motion also increases the likelihood that the client or the opposing party may oppose it. In *Airbiquity Inc. v. AT&T Mobility LLC*,²⁵ for example, the U.S. District Court in Seattle denied a motion to withdraw where the client objected because the case was far along and the client had made a significant "investment" in its current lawyers.

Further, "eve of trial" can have different meanings in different courts. Western District LCR 83.2(b)(1), for instance, notes that "[t]he attorney will ordinarily be permitted to withdraw until sixty days before the discovery cut off in a civil case[.]" If the court denies a motion, then both the procedural rules and RPC 1.16(c) require a lawyer to stay on the case (absent a successful discretionary interlocutory appeal). Importantly, being ordered to remain on a case does not relieve the lawyer of either the duty of competence under RPC 1.1 or the standard of care.

File Transition

RPC 1.16(d) obliges lawyers to take the high road when withdrawing:

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 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. The lawyer may retain papers relating to the client to the extent permitted by other law.

The lawyer's file can be a particular flashpoint. RPC 1.16(d) recognizes that a lawyer may have possessory lien rights over a file for unpaid fees under RCW 60.40.010(1)(a). Nonetheless, WSBA Advisory Opinion 181 (rev. 2009) counsels that a 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.

Advisory Opinion 181 suggests that generally the lawyer's entire file — both paper and electronic — must be released to the client, subject to limited exceptions (principally the lawyer's notes relating to the business aspects of the relationship, such as conflict checks and collection notes that were not charged to the client, and general research memoranda that were prepared for another client and simply copied to the file involved for the lawyer's convenience and were not billed to the client transitioning).

*State v. Padgett*²⁶ and *State v. Miller*²⁷ address the interplay between RPC 1.16(d) and CrR 4.7(h)(3) on redacting certain discovery materials in criminal cases. Advisory Opinion 181 notes that the lawyer can maintain a copy of the file (at the lawyer's own expense) to document the work the lawyer did while handling the matter, and that is a prudent risk management practice.

Now that most lawyers' files are electronic, fights over copying costs are much less frequent than in the days when "the file" might have been a room full of "bankers boxes." Given the ease of copying electronic files, it is equally prudent to simply provide the client with an electronic copy via an inexpensive mobile storage device or a cloud-based link. Finally, RPC 1.16(d) specifically requires that unearned advance fee deposits be refunded.

The consequences of failing to meet the requirements of RPC 1.16(d) are very real. Lawyers have been disciplined for failing to promptly transfer client files (see, e.g., *In re Eugster*)²⁸ and to refund unearned fees (see, e.g., *In re Perez-Pena*).²⁹ If a client has been injured by a lawyer improperly withholding a file, it does not take much imagination to also envision potential civil damage claims for legal malpractice or breach of fiduciary duty.

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¹⁶ WSBA, *Washington Discipline System 2019 Annual Report 11* (2020).

¹⁷ ABA, *Profile of Legal Malpractice Claims 2016-2019 22* (2020).

¹⁸ 182 Wn.2d 716, 729, 344 P.3d 1200 (2015).

¹⁹ 189 Wn.2d 93, 104-05, 399 P.3d 1129 (2017).

²⁰ 2014 WL 12634929 (E.D. Wash. June 6, 2014) (unpublished).

²¹ 2014 WL 6886638 at *1 (W.D. Wash. Dec. 4, 2014) (unpublished).

²² 2002 WL 1608480 (Wn. App. July 22, 2002) (unpublished).

²³ 2016 WL 562730 (Wn. App. Feb. 9, 2016) (unpublished).

²⁴ *Id.* at *16.

²⁵ 2009 WL 10676495 (W.D. Wash. Aug. 14, 2009) (unpublished).

²⁶ 2018 WL 3455726 (Wn. App. July 17, 2018) (unpublished).

²⁷ 2020 WL 3270320 (Wn. App. June 15, 2020) (unpublished).

²⁸ 166 Wn.2d 293, 310, 209 P.3d 435 (2009).

²⁹ 161 Wn.2d 820, 828, 168 P.3d 408 (2007).

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