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Saying Goodbye: The Withdrawal Rule

**By Mark J. Fucile
Fucile & Reising LLP**

The withdrawal rule, RPC 1.16, has long played a key role in the relationship between lawyers and their clients. It sits directly on the fault line between the two when they part ways short of the conclusion of the case or transaction that brought them together. The recent tremors running through the economy have created significant financial tensions in many lawyer-client relationships that, in turn, have led to withdrawal in many instances. In this column, we'll examine the four basic component parts of the withdrawal rule with a special emphasis on its role in a down economy.

Mandatory Withdrawal

RPC 1.16(a) addresses three situations when a lawyer *must* withdraw. Although they are not related directly to the economy, financial pressures can sometimes lurk behind them in unpredictable ways.

RPC 1.16(a)(1) requires withdrawal if continuing a representation will result in violation of the RPCs. If, for example, a nonwaivable conflict develops between jointly represented clients, a lawyer must withdraw even if the lawyer has invested substantial time in the matter. This result is dictated by both the conflict rule (RPC 1.7) and the withdrawal rule. See, e.g., *In re Carpenter*, 160

Wn.2d 16, 155 P.3d 937 (2007) (lawyer disciplined for failure to withdraw when conflict developed between jointly represented clients).

RPC 1.16(a)(2) requires withdrawal if the lawyer develops a physical or mental impairment that prevents the lawyer from continuing to represent the client competently. *In re Cohen*, 150 Wn.2d 744, 82 P.3d 244 (2004), emphasizes that the medical condition must truly affect the representation rather than simply offer a convenient excuse for withdrawal.

RPC 1.16(a)(3) requires withdrawal if the lawyer is discharged—even if the client owes the lawyer for services provided to date. As the Supreme Court in *In re Kagele*, 149 Wn.2d 793, 820, 72 P.3d 1067 (2003), observed: “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.’” This aspect of the rule is specifically framed so that it supersedes RCW 2.44.040 (“notwithstanding RCW 2.44.040”) which would otherwise require the payment of the lawyer’s services prior to discharging the lawyer.

Permissive Withdrawal

RPC 1.16(b) addresses situations when a lawyer is *permitted* to withdraw. The circumstances range from common disagreements over case handling to less common instances where the lawyer discovers that the client has used the lawyer’s services to further a fraud. In times of economic stress like we are presently experiencing, RPC 1.16(b)(5) is often the central focus this facet of the

withdrawal rule because it permits a lawyer to withdraw for nonpayment. It is framed somewhat euphemistically, allowing withdrawal if “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[.]”

The ability to withdraw for nonpayment is subject to two caveats. First, in a litigation matter, RPC 1.16(c) requires the lawyer to obtain court permission if the rules of the forum require it. Second, RPC 1.16(b)(5) requires the lawyer to give the client “reasonable warning” of the lawyer’s intent to withdraw if the client does not make good on the amount owed.

Court Permission

In litigation matters, RPC 1.16(c) requires court permission to withdraw if, as noted, the rules of the forum require it:

“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)(4) requires court permission to withdraw in a state civil case if the client has objected. CrR 3.1(e), in turn, requires court permission in a state criminal case if the case has been set for trial. In Washington’s federal courts, Western District GR 2(g)(4) requires leave of the court to withdraw in all cases as does Eastern District LR 83.2(d)(5).

Court permission can often pose two issues: how do you tell the court without revealing confidential information and what if you are close to trial?

On the former, Comment 3 to RPC 1.16 acknowledges the concern and suggests the answer:

“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.”

If the court requires more, filing under seal and *in camera* proceedings should be considered. See, e.g., *State v. Berrysmith*, 87 Wn. App. 268, 944 P.2d 397 (1997) (*in camera* hearing on motion to withdraw).

On the latter, “timing is everything.” Ordinarily, most courts will permit a lawyer to withdraw for nonpayment. But, that can change if the lawyer waits until the eve of trial. *Kingdom v. Jackson*, 78 Wn. App. 154, 158, 896 P.2d 101 (1995), examines the interplay between CR 71 and the withdrawal rule at length and concludes that among the factors trial courts should consider is whether “withdrawal will delay trial or otherwise interfere with the functioning of the court[.]” A lawyer who waits too long may find that the court orders the lawyer to see the case through trial.

Assisting the Client

RPC 1.16(d) requires lawyers to “take steps to the extent reasonably practicable to protect a client’s interests” when withdrawing. The steps will vary

with the situation but RPC 1.16(d) mentions “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 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 Formal Ethics 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.

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.

Withdrawal can be—and very often is—a difficult time for both lawyers and clients. Natural emotions when a close relationship is unwound can easily combine in the present economic climate with difficult financial tensions on both sides of the lawyer-client relationship. Given those tensions and the potential “hard dollar consequences” of a withdrawal done poorly, lawyers need to handle their responsibilities under RPC 1.16(d) as professionally as possible.

Summing Up

It's no secret that many lawyers and clients are under severe economic pressure in today's economy. That, in turn, has caused lawyer-client relationships to fray in some cases and end in others. Given the economic times, understanding the practical contours of the withdrawal rule has become an increasingly important lesson for many lawyers.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.