How To Fire A Client

The Client From Hell, Dog Cases, and Escape Clauses

Firing a client is counter-intuitive to lawyers. After all, since clients are so hard to come by why would a lawyer ever want to fire one? As it turns out lawyers need to know when and how to withdraw from representing a client for a host of reasons. Sometimes it's necessary because professional conduct rules require it. Other times to avoid a malpractice claim, bar complaint, or disqualification motion. There are practical reasons for withdrawal as well. Examples are when a lawyer is not paid, has an unmanageable caseload, becomes ill, leaves a firm, or retires from practice. Even when a client fires the lawyer there are duties the lawyer must observe in terminating the relationship.

This article provides an overview of Kentucky Rule of Professional Conduct 1.16 Declining or Terminating Representation. It covers several withdrawal situations plus "escape clauses" that some lawyers now use in employment contracts to facilitate firing clients. It concludes with an evaluation of withdrawal malpractice risks and risk management techniques to counter these risks.

Rule 1.16 Withdrawal Essentials

Rule 1.16[i] has three cardinal principles and provides two categories of withdrawal that every lawyer must know.

Principles

1. If the matter is before a tribunal, a lawyer may withdraw only with the permission of the tribunal even though good cause for withdrawal exists. Compliance with this requirement typically involves following court rules for filing a motion for withdrawal or substitution of counsel. The court has the discretion to deny a request to withdraw for reasons of judicial economy or in the best interest of the client. If withdrawal is denied, the lawyer must continue the representation with no reduction in responsibilities to the client or diminishment of the client's interest.

2. A client may discharge a lawyer at will and the lawyer must withdraw. If the matter is before a tribunal, however, withdrawal still requires approval by the tribunal. In all other situations the client's right to discharge a lawyer is absolute and the lawyer must take immediate steps to withdraw.

3. The withdrawing or discharged lawyer must take action to protect the client's interest. These steps include giving reasonable notice of withdrawal, allowing time for retention of another lawyer, and promptly returning papers and property to which the client is entitled.

Withdrawal Categories

1. <u>Mandatory Withdrawal:</u> The rule requires withdrawal if:

a. The representation results in a violation of the Rules of Professional Conduct or law;
b. The lawyer's physical or mental condition impairs the representation; or
c. The lawyer is discharged.

2. Permissive Withdrawal: Paragraph (b) of Rule 1.16 awkwardly provides for two permissive withdrawal scenarios --

a. Withdrawal is permissible at the lawyer's option if there is no material adverse affect on the client.

b. Withdrawal is permissible for cause in the following situations even if there is prejudice to the client:

(1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client has used the lawyer's services to perpetrate a crime or fraud;

(3) The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) 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;

(5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) Other good cause for withdrawal exists.

Applying The Rule

Is it OK to withdraw for no reason? Personal reasons? Caseload management problems?

The rule allows permissive withdrawal at the lawyer's option if there is no material adverse affect on the client. Thus, it appears that in such circumstances a lawyer may withdraw for no reason, frivolous reasons, or to reduce workload. It is not quite that simple.

First, withdrawal usually has some adverse affect on the client even if the lawyer does not consider it material. A lawyer accused of an unjustified withdrawal has a heavy burden to prove there was no material adverse affect on the client. Failure to meet this burden could be expensive.

Second, and more important, as a comment to Rule 1.16 stresses: "A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion." This invokes the lawyer's obligation of client loyalty. It holds that the lawyer-client relationship is more than contractual. It requires exceptional commitment and dedication to the clients a lawyer agrees to represent. Accordingly, lawyers should withdraw only for compelling reasons. A casual or convenient withdrawal from representation may not be a *per se* violation of the rule, but it falls short of the minimal loyalty a client has a right to expect.

Is it OK to drop the "client from hell" because you are fed up?

Lawyers typically withdraw for cause from representing difficult clients citing the permissive grounds of "the representation … has been rendered unreasonably difficult by the client" or "other good cause for withdrawal exists." Examples of withdrawal for these reasons include a client that withheld material information and repeatedly contacted the opponent's lawyers, a client that would not respond to calls and letters, and a client that sent vituperative letters to the lawyer. Generally they concern instances in which there is an antagonistic breakdown in relations between the lawyer and client.[ii] A key point is that withdrawal on these grounds may be with prejudice to the client. Of course, if there is no material adverse affect on the difficult client's interests, withdrawal is permissible at the lawyer's option as covered in the previous paragraph.

Is it OK to drop a current client like a hot potato to avoid a conflict of interest that precludes accepting a new better paying client?

The prevailing view is that you cannot cure a conflict of interest or avoid disqualification by dropping a less favored client like a hot potato to accept a new client with a more lucrative matter.[iii] One ethics expert explains why not as follows:

> The most obvious problem is a moral one: the lawyer's motivation is patently base and disloyal to the abandoned client. Courts, obviously motivated by concern over the lawyer's disloyalty, have spoken with one voice. The now widely accepted rule is that a lawyer who withdraws – whether otherwise in conformity with the lawyer code or rules or not – from representing a current client for the purpose of proceeding adversely to the client on behalf of another client does not thereby convert the representation into that of a former client.[iv]

Is it OK to withdraw from a dog of a case?

Dog cases are those litigation cases lawyers take knowing they are weak, but hoping they will develop into a worthwhile undertaking. As so often happens they do not improve with investigation and linger on as an active case going nowhere. Timely realization that a dog case is too weak to pursue usually allows permissive withdrawal at the lawyer's option because promptly resigning the case should have no material adverse affect on the client. Unfortunately, lawyers often procrastinate in dog cases and do not consider withdrawing until the case is utterly hopeless, suit has been filed, or the statute of limitations is an issue. At this point withdrawal is likely to produce a material adverse affect on the client precluding a lawyer's option to resign. Under the old adage that when things go bad they stay bad there is usually no permissive withdrawal for cause ground available for the dog case, and the lawyer is committed to the representation to the bitter end. One seasoned Kentucky lawyer advises: "The best approach is often to take your medicine. Quit procrastinating, do the discovery, set the case for trial, try the case, lose the case; *i.e.*, clean up your own mess. After all, you took the case."

If a lawyer believes the dog case lacks a good faith basis for proceeding, Rule 1.16 mandates withdrawal because pursuing the case is a violation of the Rules of Professional Conduct (Rule 3.1 Meritorious Claims and Contentions) and procedural rules forbidding baseless and frivolous actions. The risk in withdrawing for this reason is that few matters can be valued as totally lacking in merit. For this reason, while it is often appropriate to advise a client that a weak case should not be pursued and that the lawyer must withdraw, it is seldom prudent to advise that a case has no merit. One of the classic malpractice cases concerns a lawyer who asserted this to a client only to learn at great expense that another more experienced lawyer later discovered a viable cause of action after the statute of limitations expired.[v]

Is it OK to use an escape clause in a letter of engagement or employment contract?

There is a growing practice, especially by personal injury lawyers, of including withdrawal and termination clauses in employment contracts. One loss prevention guide recommends this[vi] and two recent New York bar ethics opinions evaluate the propriety of escape clauses.[vii] There is no known Kentucky legal authority on this practice.

Some escape clauses simply provide that the lawyer has the discretion to terminate the employment agreement at any time by mailing written notice to the client. Other examples are:

> If we cannot resolve a problem, you or we may end this relationship at any time, subject to your obligation to pay us according to the terms of the agreement, by giving reasonable notice to the other. We will endeavor sufficiently before any such termination to assist you in retaining alternate counsel without a lapse in representation.[viii]

> This Retainer Agreement is subject to the Firm's receipt and review of medical records; in the event, after review of those records, whether by an attorney or the Firm or an expert witness, the Firm believes the case is not viable, the Firm reserves the right to unilaterally discharge itself from representing the Client.[ix]

Clauses similar to these examples often include the stipulation that the client consents to the specified withdrawal rights of the lawyer. Others provide for unilateral withdrawal with ten days notice if the client fails to cooperate, rejects a recommended offer of settlement, or fails to follow instructions and advice on ethical, strategic, or tactical matters.

The problem with these escape clauses is that they take advantage of the unequal position of the client in the attorney-client relationship. They are manipulative and can mislead clients on their authority and rights in the relationship. Furthermore, they abridge the ethical standards for withdrawal established in Rule 1.16 and the lawyer's obligation to continue a representation to completion, withdrawing only under compelling circumstances.

Neither New York ethics opinion concluded that escape clauses were *per se* unethical. They, however, stressed the following ethical considerations as guidance for drafting escape clauses:

- Escape clauses may not purport to authorize lawyer withdrawal under circumstances that the Rules of Professional Conduct do not permit.

- Escape clauses may not mislead the client as to the lawyer's duty to continue the representation.

- Escape clauses may not use a client consent stipulation authorizing withdrawal under specified circumstances if it implies that the client has no right to object to withdrawal because of material adverse affect.

- Escape clauses may not predicate withdrawal on failure to follow advice relating to ethics, strategic, and tactical matters if the effect is to require the client to accept the lawyer's advice on issues that the ethics rules reserve for the client to decide (*e.g.*, settlement).

- Lawyers should explain the implications of the escape clause to a client at the time the agreement is made. This disclosure should cover the possibility of default of the client's action, the client's continued responsibility for disbursements, and potential liability to the opposing party for costs or sanctions if the lawyer withdraws.

- Nothing in an escape clause relieves a withdrawing lawyer from the duty to protect the client's interest; *e.g.*, giving reasonable notice of withdrawal, allowing time for retention of another lawyer, and promptly returning papers and property to which the client is entitled.

Withdrawal Malpractice Claims And Bar Discipline Exposure

Malpractice and ethics violations can result from either the act of withdrawal or from the manner in which the withdrawal is done:

Act of Withdrawal: The risk of an unjustified act of withdrawal is that the client will be considered abandoned by the lawyer. The lawyer is then exposed to liability for a claim for all damages proximately caused by the unjustified withdrawal as well as bar discipline. A Kentucky lawyer was disciplined for an unjustified withdrawal when he abruptly closed an Eastern Kentucky office without even notifying a client.[x]

Manner of Withdrawal: There is a risk even when a lawyer has justifiable grounds for withdrawal, if the withdrawal is done in a manner that does not adequately protect the interests of the client. An Ohio lawyer was disciplined for failing to arrange for another lawyer to represent one of her clients. The lawyer received court permission to withdraw, citing deterioration of the attorney-client relationship, the client's failure to communicate with her, and the client's failure to pay her fees as grounds for termination. She, however, never specifically told her client she was withdrawing. The unrepresented client then received an unfavorable judgment based on a divorce decree that contained an error. [xi]

As in all malpractice claims, to have merit the lawyer's withdrawal must be the proximate cause of damage to the client. If the underlying matter had no merit, the lawyer will not be liable to the client no matter how unjustified the withdrawal was. Unfortunately, if the matter had merit, the lawyer becomes a virtual guarantor of a successful outcome for the client. Either the client will successfully recover from being abandoned by prevailing in the underlying matter or achieve the same result by suing the lawyer for malpractice. While a meritless underlying matter will save the withdrawing lawyer from malpractice liability, it will not serve as a defense to a disciplinary complaint for unjustifiable withdrawal.[xii]

Conclusion – Managing The Risk

Risk managing client firings is critical because the potential liability is so great when accused of an unjustified withdrawal. Before you decide to withdraw from representation for whatever reason consider these loss prevention concepts. One of them could help you avoid an unpleasant experience.

✔ The essentials of Rule 1.16 must be clearly understood. Any withdrawal must comply with the rule's professional responsibility standards. Any effort to abbreviate them with a termination or escape clause is not effective and may lead to a false sense of security if a withdrawing lawyer fails to appreciate the binding authority of Rule 1.16.

✔ If you choose to use a termination or escape clause in employment contracts, carefully consider the points made in the section of this article that show the ethical traps in poorly drafted escape clauses.

✔ If you discover a conflict of interest during a representation, withdrawal is mandatory unless it is resolved. Lawyers loath to give up a case will often fail to see a conflict or ignore it. This can result in a malpractice claim because the client upon discovering the conflict will attribute motive to the lawyer for any unsatisfactory aspect of the representation. In fact the representation may have been optimal, but the client will not see it that way and a jury can be expected to be hard on what looks like a treacherous lawyer. Other risks assumed for failing to withdraw are disqualification motions by opposing counsel and bar disciplinary actions. In many conflict cases withdrawal from representing one or more clients is the best risk management -- and remember that Rule 1.16 mandates withdrawal in unresolved conflicts cases.

✔ If a client accuses a lawyer of malpractice, the lawyer has an instant personal interest conflict. The question then becomes whether to immediately withdraw or obtain client consent to continue representation in an effort to repair the mistake. If there is no question that malpractice occurred (*e.g.*, a missed mortgage in a title search or a missed statute of limitations) the lawyer has little choice but to notify the client of the malpractice, withdraw, and advise the client to seek counsel. If there is a reasonable possibility of repairing the error, it is often advisable to continue the representation if client consent can be obtained. You should consult your malpractice liability insurer before either withdrawing or continuing representation. For example, Lawyers Mutual has an aggressive program of claims repair and is invaluable in helping policyholders decide whether to withdraw or seek to continue representation.

✔ Always do a complete file review just before filing an action. This is often a last clear chance to terminate the client from hell, the dog case, or the non-paying client without material adverse affect. Once a matter is before a court withdrawal becomes much more problematic.

✔ Whenever a lawyer retires or leaves the firm do a complete file review of all matters under the supervision of that lawyer to assure that no client is inadvertently abandoned or that a client thinks his representation includes lawyers no longer on the matter.

✔ Whenever possible withdrawal should be a clean break – a clear-cut decision with the client's agreement in writing. Use a disengagement letter that:

- Confirms that the relationship is ending with a brief description of the reasons for withdrawal.
- Provides reasonable notice before withdrawal is final.
- Avoids imprudent comment on the merits of the case.
- Indicates whether payment is due for fees or expenses.
- Recommends seeking other counsel.
- Explains under what conditions the lawyer will consult with a successor counsel.
- Identifies important deadlines.
- Includes arrangements to transfer client files.
- If appropriate, includes a closing status report.

✔ After sending the disengagement letter you must carefully follow through on the duty to take necessary actions to protect the client's interest and comply with the representations in the disengagement letter. This avoids a malpractice claim over the manner of withdrawal.

✔ Finally, a complete copy of the file should be retained. A fired client or one that fired you has a high potential to be a malpractice claimant. The first line of defense is a complete file with a comprehensive disengagement letter. This is the best evidence for showing competent and ethical practice in terminating a client.

---

[i] Rule 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall 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.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if-

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) 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;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
(d) 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 other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

[ii] *See generally*, ABA/BNA Lawyers' Manual on Professional Conduct, Permissive Withdrawal, Chpt. 31:1111-1112.

[iii] Mallen & Smith, Legal Malpractice 5th Ed. (2000), § 16.15, p.758.

[iv] Wolfram, Former Client Conflicts, 10 Geo. J. Legal Ethics 677, 708 (1997).

[v] Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).

[vi] Mallen & Smith, Legal Malpractice 5th Ed. (2000), § 2.10, p. 112.

[vii] New York State Bar Ass'n Opinion 719 (7/28/99), ABA/BNA Lawyers' Manual on Professional Conduct, Ethics Opinions, Chpt. 1101:6108; Nassau Cty (N.Y.) Bar Ass'n Comm. on Professional Ethics, Op. 01-2, ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports Vol. 17 No. 3, p.66 (1/31/01).

[viii] Mallen & Smith, Legal Malpractice 5th Ed. (2000), § 2.10, p. 149.

[ix] Nassau Cty (N.Y.) Bar Ass'n Comm. on Professional Ethics, Op. 01-2, ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports Vol. 17 No. 3, p.66 (1/31/01).

[x] Kentucky Bar Ass'n v. Rankin, 999 S.W.2d 710 (Ky. 1999).

[xi] Office of Disciplinary Counsel v. Butler, 706 N.E.2d 757 (Ohio 1999).

[xii] *See generally*, Mallen & Smith, Legal Malpractice 5th Ed. (2000), § 30.36, p. 551.