

AND NOW IT'S TIME FOR YOU TO GO

by Ellen M. Meagher

Bar Counsel often hears from clients who claim that their attorneys have improperly withdrawn from representation or, alternatively, have improperly refused to withdraw. Mass. R. Prof. C. 1.16 sets out the requirements for an attorney to decline or terminate representation of a client. The rule describes the situations in which an attorney is required to withdraw from representation and those circumstances in which withdrawal is permitted but not required. The rule also describes what an attorney must do to protect the client during and after withdrawal.

Rule 1.16 applies whenever an attorney-client relationship has been established. Attorney-client relationships can exist in the absence of an express agreement for representation and may arise even if the dealings never progress beyond an initial consultation. See *Devaux v. American Home Assur. Co.*, 387 Mass. 814 (1983). Sometimes a "client" will accuse the attorney of abandoning the case that the attorney had never intended to handle in the first place. This situation often arises in personal injury cases, after an attorney consults with a potential client and decides the claim is not worth pursuing. When the decision is made not to pursue a case, the lawyer must clearly communicate that decision to the client, preferably in writing, in order to avoid any misunderstanding. Discipline has been imposed for allowing a client to believe that the lawyer was working on a case when the lawyer had decided not to take the case but had failed to adequately communicate the decision to the client. See, e.g., AD 98-49, 14 Mass. Att'y Disc. R 898 (1998); AD 96-34, 12 Mass. Att'y Disc. R 654 (1996); AD 93-13, 9 Mass. Att'y Disc. R 450 (1993).

Confusion also arises when an attorney agrees to represent a party for a limited purpose, but the limits of representation have not been made clear to the client. The lawyer must reach a clear agreement with the client as to the scope of the representation, and the agreement should be reduced to writing to eliminate any ambiguity. Of course, the limits must not be so restricted that the lawyer cannot provide adequate representation to the client. See Mass. R. Prof. C. 1.5(b) and comment 5 to Mass. R. Prof. C. 1.2.

Once an appearance is filed in a court or other tribunal that requires permission to withdraw, the lawyer must see the case through to conclusion unless the court or tribunal allows the lawyer to withdraw, by motion or otherwise. Mass. R. Prof. C. 1.16(c). If the lawyer and client agree to discontinue prosecution of the client's case, the attorney should not just allow the case to die in the court, but should obtain the client's written consent to dismiss the claim.

A lawyer must decline representation, withdraw from a case not in litigation or seek permission to withdraw from a case before a tribunal, if permission is required, in the following circumstances:

- (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.

Mass. R. Prof. C. 1.16 (a)(1)-(3). Of these, the situation most frequently addressed by Bar Counsel is the lawyer's failure to withdraw from representation after being discharged by the client. Comment 4 to Rule 1.16 states that: "[a] client has a right to discharge a lawyer at any time, with or without cause..." The lawyer should advise the client of the consequences of such an action, especially where the lawyer is appointed counsel in a criminal defense case and there is the possibility that the client may be required to proceed pro se. If counseling the client is unsuccessful, the attorney cannot continue representation without bringing the matter before the court, taking care to protect client confidences. See *Maintaining Confidentiality When Withdrawing From Representation*, under "Bar Counsel Articles" at <http://www.state.ma.us/obcbbo/>

Rule 1.16(b) governs permissive or voluntary withdrawal. The rule allows a lawyer to withdraw from representation "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) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfil 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.

Perhaps the most common instances of permissive withdrawal result from fee disputes, as described in Rule 1.16(b)(4). Failure of a client to pay the entire agreed-upon fee does not necessarily mean that the client has failed "substantially to fulfil an obligation to the lawyer" under Rule 1.16(b)(4). A lawyer wishing to discontinue representation due to nonpayment must first comply with the rule and, where required, obtain permission from the tribunal. *Matter of Dembrowsky*, 8 Mass. Att'y Disc. R. 75 (1992). The court may consider many factors, including the terms of the fee agreement, the level of the client's compliance with the agreement, the sufficiency of notice to the client regarding consequences of non-payment, the length of time that the attorney has been involved in the case, the proximity of the trial date, and the availability of successor counsel.

If the case is not before a tribunal, the lawyer may withdraw if the client will not be significantly harmed. The same is true for cases that are before a tribunal, but there is a greater likelihood of material adverse effect and the court, in any event, has wide discretion in deciding whether or not to allow a motion to withdraw.

Upon termination of representation, whatever the circumstances, the attorney must mitigate the consequences to the client. Mass. R. Prof. C. 1.16(d). This is true even if the attorney has been unfairly discharged. See Comment 9 to Rule 1.16. The rule requires the attorney to give reasonable notice to the client in order to allow time for employment of successor counsel, promptly surrender all papers and property to which the client is entitled and refund any advance payment of unearned fees. Mass. R. Prof. C. 1.16(d) specifically governs the return of the client's file. Failure to promptly return files, as required by this rule, remains a major source of calls to Bar Counsel. See *The Ex-Files: Disputes Over the Return of Clients' Files* under "Bar Counsel Articles" at <http://www.state.ma.us/obcbbo/>

In conclusion, a lawyer must be careful about establishing a professional relationship with a

client and must guard against permitting an individual to believe incorrectly that the lawyer is pursuing his claim. If the lawyer decides to take on the representation, the lawyer must make clear the terms and conditions of the representation, preferably in writing, even in cases where a written fee agreement is not mandatory and particularly if the scope of the representation will be limited to specific goals. Once the attorney assumes representation, the presumption is that the lawyer will see the case through to conclusion. Withdrawal, whether permissive or mandatory, must be accomplished with due regard for the interests of the client.

Please direct all questions to webmaster@massbbo.org.

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