Breaking Up Is Hard: How to Withdraw Ethically

It's not me, it's you, though it also may be me. Here are tips to ethically withdraw from an attorney-client relationship.

BY STACIE H. ROSENZWEIG

It's February. The holiday decorations have been taken down (right?), and cuffing season[1] is coming to an end. You might find that, like your New Year's resolution to go to the gym more, some of your client relationships are starting to outlive their welcome. It might be time for a breakup.

Breaking up is hard to do,[2] and that axiom applies with just as much force to a professional relationship as to a personal one. Still, termination of an attorney-client relationship is often prudent, sometimes necessary, and always must be handled ethically.

Should I or Shouldn't I?

At first blush, firing a client feels counterintuitive: clients are what make law firms go round, after all, and so much attention is rightfully paid to making sure they're well represented and happy. But sometimes, clients become problems. Perhaps they don't return your calls or refuse to pay your bills. Perhaps, despite your best efforts to explain that their case is the partition action they asked for, your client demands cupcakes and unicorns and maybe a million dollars.

In most situations, whether to continue the attorney-client relationship notwithstanding the difficulty is up to you (or, if you don't control your client roster and caseload, up to your supervisor). There are, however, a few situations that require lawyers to withdraw (or, at least, attempt to withdraw; more on that later).[3] One situation is relatively obvious, and that's when a client discharges you. It makes sense that a lawyer can't force a client to continue the relationship – clients get to make decisions regarding representation,[4] including whether to continue it.

Other circumstances requiring withdrawal may be less straightforward – lawyers must withdraw when representation will result in a violation of the Supreme Court Rules or other law. Examples include conflicts of interest that were not discovered or did not arise until representation commenced or a client insisting that you engage in illegal conduct.[5]

The third circumstance in which a lawyer must withdraw is when the lawyer's physical or mental condition materially affects the lawyer's ability to represent the client.[6] I know – it's often difficult for lawyers to take even a small step back for health reasons, and it's really, really difficult for us to recognize, much less admit, that we're too unwell to continue working, and we're not always capable of acknowledging it in the moment. But, working when we're not physically or mentally capable of doing so can lead to problems and can be a basis for discipline.

In almost any other circumstance, lawyers may withdraw even if they don't have to. These circumstances may include when the client fails to fulfill financial, communication, or other responsibilities to the lawyer; when the client wants to take action the lawyer finds "repugnant"[7] or with which the lawyer has a fundamental disagreement; or when the client has used the lawyer's services to perpetrate a crime or fraud.[8] Moreover, in 2020, the State Bar of Wisconsin's Professional Ethics Committee issued an opinion[9] stating that a client filing a grievance does not, by itself, create a conflict requiring

Stacie H. Rosenzweig, Marquette 2009, practices with Halling & Cayo SC, Milwaukee, and focuses on legal ethics, professional responsibility, licensing, and election and political law. She is a member of the State Bar of Wisconsin's Litigation Section and Professional Ethics Committee and is a Fellow of the Wisconsin Law Foundation. Access the digital article at www.wisbar.org/wl.

shr@hallingcayo.com

withdrawal, but the specific facts of the situation should guide a decision as to whether withdrawal is prudent.

Ask Permission, Not Forgiveness

If you need to withdraw from a case in litigation, you will likely need the court's permission, and one of the criteria the judge will review is whether withdrawal will have a materially adverse effect on the client's interests.[10] This means a judge may deny your motion made on the eve of trial or right before a deadline to file an appeal. While this scenario is not common, it could mean you would still need to continue to represent a client who has fired you, or who isn't paying, or is a jerk, or all of the above. It's not particularly fair, but unless you can secure a stay and an interlocutory appeal of the decision on your motion, you don't have much choice.

Moving to withdraw when confidential information forms the basis for withdrawal[11] always creates a weird tension between responsibilities. On one hand, lawyers need to give the court enough information to make a decision, but on the other hand, they can't reveal unnecessary information or unduly prejudice the client. A 2011 article by State Bar Ethics Counsel Tim Pierce[12] provides some good guidance on how to say enough, but not too much.

If a case is not in suit, then withdrawal is a bit easier – timing is mostly a business decision rather than an ethical one. However, if a statute of limitation is about to run or some other major deadline is imminent, it may be a better course of action to file the suit (or perform the required act before the deadline) and then move to withdraw or otherwise end the relationship without the deadline pressure.

How to Rip Off the Bandage

Regardless of timing, there are appropriate and inappropriate ways to let a client know you'll be moving on. I know conversations of this nature are hard and you might be tempted to "ghost" -- just disappear. But there is just no good way to ghost a client – unless the client knows that you're done, you're not done.

Withdrawal before a court generally requires that the client be provided notice and a copy of the motion, but when court involvement is not required, proper notice is still needed. A generic "Dear Client" letter may be tempting, but it's inadvisable unless you have no other choice. SCR 20:1.16(d) requires the lawyer to protect the soon-to-be-former client's interests, and unilaterally withdrawing without any follow up will do nothing to effectuate that. Also, it will more than likely create far more questions than answers for the client (and more of a hassle for the lawyer when the client invariably resurfaces and asks those questions).

Similarly, don't withdraw via text message. It's hard to maintain confidentiality with texting, and tone is hard to convey. That said, some clients don't answer their phones or emails but do answer text messages; in those cases, a text message asking to set up a phone call or meeting is fine. Avoid goofy emojis or text speak – a screen shot of a lawyer's "I need 2 talk 2 u [phone] [sad face]," while conveying tone, will take on a very different tenor with an exhibit sticker attached to it in a grievance proceeding.

In most circumstances, real-time communication (whether by phone, video, or in person) is best. That way, questions can be answered immediately.

There are, however, some circumstances in which an email or letter alone is appropriate. If the client has stopped taking your calls or returning your messages, that may be the only way to reach them. If the client has become abusive or harassing to you, a letter may be necessary for your own safety or well-being.

The Aftermath

After the call or meeting, or in lieu of a call or meeting if one cannot take place, follow up with a summary email or letter (depending on the client's communication preferences). Include any relevant deadlines, how to retrieve their file, the fact that you will cooperate with successor counsel if the client retains one, and what will happen with outstanding invoices or funds remaining in trust. If your fee agreement involved alternative protection for client funds under SCR 20:1.5(g), send a final accounting, a refund if any, and the required notice regarding disputes.[13]

After withdrawing, the lawyer still needs to take steps to protect the former client's interests. Some states allow so-called retention liens – lawyers in those states can condition release of a client's file upon payment of outstanding fees. Wisconsin does not allow this practice; the file belongs to the client and must be surrendered.[14] Collection needs to be handled through other means.

So, while breaking up may be hard to do, it can be done and must be done ethically. **WL**

ENDNOTES

[1]www.merriam-webster.com/wordplay/cuffing-season-meaning-origin.

[2]Neil Sedaka, *Breaking Up is Hard to Do*, on "Neil Sedaka Sings His Greatest Hits" (RCA Victor 1962).

[3]SCR 20:1.16(a).

[4]SCR 20:1.2.

[5]*See* SCR 20:1.16 ABA cmt. [2]. A client's mere suggestion that the lawyer break the law does not require the lawyer to withdraw, but if the client won't take no for an answer, the lawyer might not have a choice.

[6]SCR 20:1.16(a)(2).

[7]SCR 20:1.16(b)(4).

[8]SCR 20:1.16(b)(3). In 2023, the American Bar Association amended its Model Rule 1.16 to require withdrawal when a client "seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion … regarding the limitations on the lawyer assisting with the proposed conduct," but as of this publication date Wisconsin has not adopted this amendment.

[9]Wis. Formal Ethics Op. EF-20-01.

[10]SCR 20:1.16(b)(1).

[11]SCR 20:1.6.

[12]Timothy J. Pierce, *Leaving a Client: Confidentiality Upon Withdrawal,* 84 Wis. Law. __ (July 2011), www.wisbar.org/NewsPublications/WisconsinLawyer/pages/article.aspx?Volume=84&Issue=7&ArticleID=2222.

[13]SCR 20:1.5(g)(2).

[14]Wis. Formal Ethics Op. EF-16-03. **WL**