

Ethics Opinion

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FACTS: In 1991, a client hired a shareholder-lawyer in a law firm to represent him in a medical malpractice case. The lawyer accepted the case on behalf of the firm, and the law firm underwrote the costs. No other firm lawyer worked on the case.

The written contingent fee agreement was signed by the lawyer for the law firm and the client, its terms providing that "The law firm, in its absolute discretion, may withdraw at any time from this case."

The case went to trial in 1996, where the judge dismissed it during the client's case in chief. It did not go to the jury. The lawyer trying the case left the firm, giving the firm two weeks notice, and advised the client he would no longer represent him.

After reviewing the file of the departing lawyer, the law firm met with the client and advised him that they would handle the appeal from the dismissal but that they would not assume the handling of the case beyond appeal. The firm advised the client that in the event the appeal was successful and the case was remanded for new trial, the client would have to seek new counsel. The firm also advised the client that the firm would waive any claim for costs or expenses relative to the case. The departing lawyer was contacted, but he refused to handle the case, stating that he would not work on it even if the Court would not allow him to withdraw as counsel.

QUESTION PRESENTED: What are the ethical obligations of the law firm towards the client under the facts of this case?

SHORT ANSWER: The firm's responsibilities are set out under Rule 1.16 of the Montana Rules of Professional Conduct.

DISCUSSION: When a lawyer agrees to represent a client, there is an implied obligation to continue such representation through completion. See Geoffrey C. Hazard, Jr., and W. William Hodes, *The Law of Lawyering* 466-67 (2d ed. 1990) ("Lawful client objectives must be pursued diligently and effectively (Rules 1.1 and 1.3), and the client's 'investment' in the lawyer may be repudiated only for compelling reasons (Rule 1.16). Furthermore, until withdrawal is accomplished, the client is still a client and has a corresponding claim to the unstinting loyalty of his lawyer"). This obligation holds true for the firm. The facts are clear that the departing lawyer accepted the case on "behalf of the firm," that the contingent fee agreement was signed by the shareholder "for the firm," and that the firm underwrote the costs of the litigation. As the departing lawyer has apparently abdicated all responsibilities, it is the firm's obligation to stand in its former partner's stead to continue representation through completion, using the mechanisms of Rule 1.16 of the Montana Rules of Professional Conduct to terminate the representation as is apparently desired.

The scheme of Rule 1.16 is as follows: subsection (a) deals with mandatory withdrawal, subsection (b) deals with permissible or discretionary withdrawal, and the two remaining subsections impose limitations upon the time and manner of withdrawal, stressing client protection. As the facts indicate mandatory withdrawal is not an issue, the applicable portions of the rule follow:

(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) a 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. A lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer except as required by the limitations on the retaining lien in Rule 1.8(j). Except for those client papers which a lawyer may properly retain under the preceding sentence, a lawyer shall deliver either the originals or copies of papers or materials requested or required by a client or former client and bear the copying costs involved.

While there is an implied obligation to continue representation through completion, lawyers and their firms are not in most cases permanently wed to their clients. Rule 1.16(b) states the circumstances under which a lawyer may withdraw from representation before its completion, in effect "firing" the client. Close reading of the rule is required, for while a client still has far more leeway to fire a lawyer than vice versa, lawyers retain considerable discretion of their own.

Rule 1.16(b) permits a lawyer to withdraw in two types of situations. First, a lawyer may withdraw for any or no reason, even without client consent, so long as withdrawal can be accomplished without "material adverse effect" on the client. Second, in the six situations catalogued in the rule, a lawyer may withdraw even if there is harm to the client. (This follows because the rule speaks first to situations where withdrawal will not cause harm to the client and then introduces the catalogue of other withdrawal scenarios with the words "or if.")

Note, however, that Rule 1.16(b) is subject to the power of a court to order continued representation. Rule 1.16(c) states that the right of a lawyer to withdraw from representation is subject to a court's authority to order representation continued. If the court denies a lawyer's request to withdraw, the

lawyer and his firm continue to owe to the client the duties of loyalty and competence. In general, a court has wide discretion on a motion to withdraw, and permission may be denied if withdrawal would adversely affect opposing parties or impede the administration of justice. See, e.g., *United States v. Pointer*, 17 F.3d 1070 (7th Cir. 1994) (court did not abuse discretion in denying withdrawal request made four days before trial).

Upon withdrawal, Rule 1.16(d) mandates that the lawyer take steps to protect the client's interest "to the extent reasonably practicable." This includes giving reasonable notice to the client, allowing time for employment of other counsel, surrendering the client's papers and property, and returning unearned fees.

The firm here may move to withdraw if they feel the client will not suffer material adverse effect. The firm has eliminated some adverse effect by agreeing to continue with the appeal and that it would waive any claim for costs or expenses relative to the case. It also seems that the firm is giving appropriate notice to the client of their intent. It remains with the firm to do additional assessment of the effect of their withdrawal and to act accordingly. The parameters as to what the firm's motion will assert is provided in Rule 1.16, recognizing the duty owed to the client of confidentiality described in Rule 1.6.

Significantly absent in this discussion are two issues that are outside our purview and that we may not discuss: the departing lawyer's duty to the client and the legal malpractice implications to the firm and departing attorney. The first is a matter within the purview initially of the Commission on Practice, the second matter is for the Courts.

CONCLUSION: While it is clear that clients have an easier path than attorneys and their firms towards termination of the attorney-client relationship, attorneys, and in this case the firm, is not without options and may move to withdraw. The terms under which they may move to withdraw are set out under Rule 1.16 and are restricted only by the duty owed to the client of confidentiality under Rule 1.6.

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