TIME TO SAY GOODBYE: Ethical Considerations When Ending Client Relationships

PRESENTED BY
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About David Graulich, Esq

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OVERVIEW

• Types of Termination
• Ethical Framework
• Mandatory Withdrawal
• Optional Withdrawal
• Case Cites/Examples
• Personal Examples
• Best Practices
• Other Situations
Types of Termination

Relationship lifecycle and two ways that relationships end
Types of Termination

- Every representation has a lifecycle
  - All matters have a lifecycle. Just as you formally start an attorney-client relationship, you must formally end it.
  - Formal phrase is “Terminating the Relationship.” I prefer to say “ending the relationship.”
Types of Termination

- Two Ways that the Attorney-Client Relationship Ends
  - Normal, routine, non-adversarial. The assignment or matter in dispute resolves. We’ll talk about these later in the class.
  - Unexpected, contentious, disputed and adversarial. These present the ethical challenges for lawyers and put them at the greatest risk of disciplinary action or malpractice.
Ethical Framework

ABA rules and legal precedent
Ethical Framework

- Traditional Bonds that Commit Attorney to the Client

  Ingrained in the traditions of the law is the principle that Attorney bears the greater burden than the Client. A case from 1932 put this into epic words:

  "The office of a lawyer is one of great importance. He is schooled in the substantive law, has studied the intricate rules of practice and is familiar with the pitfalls made in this complex world for the uninitiated. He has the power of expression and is skilled in argument. The road he travels is technical, but he knows the turns where others get lost ... The profession demands of him that he stand by under the most trying conditions-lest, unprotected, his client fall down harder than justice requires. He should not desert in the midst of the battle. The relation of attorney and client is a sacred one and it binds the lawyer, although not the client, to continue to represent him until he is properly relieved."

  Eisenberg v. Brand, 259 NYS 57, 58 [Sup Ct Kings County, 1932].
Rule 1.16: Declining or Terminating Representation

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;
- the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- the client has used the lawyer's services to perpetrate a crime or fraud;
Rule 1.16: Declining or Terminating Representation

Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- 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;
Rule 1.16: Declining or Terminating Representation

Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- other good cause for withdrawal exists.
Rule 1.16: Declining or Terminating Representation

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.
Ethical Framework

- 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.
The Importance of Timing of Withdrawal

- “withdrawal can be accomplished without material adverse effect on the interests of the client;”
- The primary variable here is the timing of the withdrawal
- If the separation happens at the beginning of the relationship before anything is filed, there is much less adverse effect
Second thoughts Regarding Competence

- Other ABA sections stress attorney competence
- Can and attorney withdrawal if they begin having second thoughts regarding their competence regarding the legal matter?
- Generally, a state bar or judge will expect an attorney to grow and learn with each case.
- If you felt comfortable taking the case the general expectation is that you follow through in this context.
Mandatory/Optional Withdrawal
Mandatory Withdrawal

- A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.
Mandatory Withdrawal

- Concreate (and not uncommon) Example:
  - Clients will frequently ask, during the discovery process, if “we have to produce” some document that is damaging to our case. I tell them yes, we do, and insist that they provide me with everything they have. Sometimes they keep a diary or journal and I don’t find out until later.
  - If they refuse to comply, there is no other choice but to initiate a mandatory withdrawal.
When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct.
Mandatory Withdrawal

- 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. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.
Mandatory Withdrawal

- “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;”

- “Persists” is the keyword here.

- One-off events are unlikely to ethically warrant separation.

- There must be a pattern of behavior
Mandatory Withdrawal

- “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;”
- The keyword with this rule is “actions”
- The client may engage in idle speculation, but without concrete behavior a separation is unlikely to merit ethical separation.
Optional Withdrawal

- A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it.
Optional Withdrawal

- Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.
A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.
Optional Withdrawal

- “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;”

- Is largely about payment for legal services
  - The attorney should show a patience and good faith effort to obtain the payment
  - Document all correspondence diligently.

- Could also relate to situation where client is uncooperative (such as not turning over discovery)
Optional Withdrawal

- “other good cause for withdrawal exists”
- Communication breakdown is a primary example of what could be categorized here.
- Good, honest and timely communication is paramount for a successful attorney/client relationship. If this does not exist, the attorney cannot offer the best representation possible.
  - Micromanaging on the part of the client could also fall here. More on this later in the courses.
Optional Withdrawal

- “the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;”
- The scope of work could considerably change as case progresses
- The client may refuse to settle which could greatly change the costs of the case
- If separating for this reason it is always prudent to refund retainer
- The earlier this determination is made, the better
Case Cites and Examples
Law firm asked Court for permission to withdraw as plaintiff’s legal counsel. Law firm claimed there had been a breakdown in attorney-client relationship; that client, a 74-year-old woman, was abusive, repeatedly threatened to fire the firm, accused counsel of colluding with opposing side, and that she had accused counsel of discrimination.
The client, Verda Day, denied being abusive, said she was no threat to anybody, and that she merely complained about the law firm moving too slowly. The Court sided with the client, Day, and denied permission for the firm to drop the case. The Court said there was insufficient evidence that the law firm had good cause to withdraw from representation.

[REMEMBER TO DOCUMENT!]
Lawyer was appointed to position as Administrative Law Judge and instructed to leave private practice and assign clients to other attorneys. Moore, the defendant, failed to notify a client, Convington, that he was no longer representing her. Even worse, Moore had a long prior record of failing to respond to Covington inquiries, emails, and phone messages. The Court punished Moore with an indefinite suspension after considering, but rejecting, disbarment.
Bailey v. Commonwealth

- Criminal defendant was convicted for possession of cocaine with intent to distribute. Defendant, Bailey, retained and fired two previous defense attorneys. Third attorney sought to be released after Bailey told him that “If I didn’t do what he told me to do it wasn’t going to work.”
Bailey v. Commonwealth

- Attorney said he had an ethical dilemma and that the situation was impossible due to Bailey’s attitude. Court granted attorney’s request to withdraw;
- However, a dissenting opinion in the verdict argues that the attorney should have tried harder to reason with Bailey.
Kentucky Bar Association v. Johnson

- 475 S.W. 3d 720 (2015)
- Attorney took retainer and fees and absconded, leaving Kentucky and showing up in Texas. He made no attempt to complete the work for client nor even tell client where he was. He was suspended from practice of law in Kentucky for five years and to make full restitution of the client’s money.
Personal Examples
Micro-manager

- Employment law case where client was very senior in organization he was suing
- I wanted to call opposing council to touch base but client refuses
- I reluctantly agree (in order to win trust of client) and decide to email instead yet d now client wants to see all emails before they are sent.
Micro-manager

- This descends into constant second guessing and micro-managing and the relationship deteriorates.
- It becomes untenable and referencing a clause in our contract that the attorney manages the day to day control of the case and withdrawal representation.
- Client is extremely angry and sends me an aggressive email but I choose not to respond.
Untruthful in providing information

- Another client repeatedly lies to me during discovery.
- After many incidents and warnings, it becomes impossible to continue with case and I withdraw representation.
- In some situations, it becomes impossible to continue ethical representation and this was one of them.
Engagement Letter

- Be careful with defining scope in initial engagement letter, then strictly enforce it.
- It is critical to clearly define scope of representation to properly set client expectations and head off scope creep in the case.
- Clearly define expected communication parameters
- Clearly define who controls day to day management of the case.
End of Representation letter

- It is critical to send an “end of representation” letter when representation has completed.
- It is important to state explicitly “I am no longer your attorney.”
- This is routine with larger firms (especially dealing with large clients) but this is often forgotten in smaller firms or private practice.
- You don’t want any gray area. For example, I have had clients contact me months later for tax advice on a settlement.
- Clearly document and record communications with clients.
- Clearly document and record requests for payments and failures of payment.
- Document key decision points during cases.
- Document any non-cooperation or deception by client.
Many situations require a formal “End of Representation”
Other Situations to End Representation

- When a case is decided or withdrawn an “End of Representation” letter should be produced and sent.
- “End of Representation” letters should also be sent in other common scenarios:
  - Conclusion of estate planning — will or trust is created
  - Conclusion of transaction (e.g., real estate deal)
  - Conclusion of evaluation or risk assessment (e.g., client asks, is it legal for me to do X?)
  - Conclusion of probate
Getting In Touch

- I love hearing from attorneys who have taken my courses.
- I can be reached at:
  - david@wrongedatwork.com