Don't Go Away Mad (Just Go Away): Your Obligations After Representation is Terminated

By Shannon L. Briesacher

In the majority of cases, the attorney-client relationship is successful and results in the completion of the representation without incident. Of course, like any good relationship, this requires the willingness of both parties to make it work. But what happens when one party (or both) has had enough?

Rule 4-1.16(a) and (b) of the Missouri Rules of Professional Conduct set forth the circumstances in which an attorney may be required or permitted to withdraw from representation. For the sake of this article, we will assume that any time an attorney terminates the attorney-client relationship before completion of the representation, it is appropriate and pursuant to the Rules of Professional Conduct. And what about the rules that require or permit a client to terminate the attorney-client relationship? Well, in short, there aren't any. A client has the right to discharge a lawyer at any time, with or without cause.[1] In cases where an attorney feels that the client has terminated the representation without cause, it can be especially difficult to continue expending time and resources for the purpose of protecting the client. But even in cases where the attorney has been unfairly discharged, an attorney must take reasonable steps to mitigate any disruption or damage that the termination might cause the client.[2]

Rule 4-1.16(d) of the Rules of Professional Conduct provides that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests..." Obviously, this general requirement means that an attorney must avoid conduct that will purposefully damage the client. For instance, an attorney may not withdraw all pleadings in the client's case.[3] In Kansas, an attorney was disciplined for revealing a former client's confidences after their personal and professional relationship ended badly.[4] But Rule 4-1.16(d) also sets forth specific examples of duties owed after the termination of representation. Please note that the duties listed in Rule 4-1.16(d) do not constitute an exclusive list of all duties owed to a former client and the general requirement that an attorney take reasonable steps to avoid harm is the overarching mandate.

Giving Reasonable Notice

Rule 4-1.16(d) requires that an attorney withdrawing from representation provide the client reasonable notice of the withdrawal. The ABA/BNA Lawyers' Manual on Professional Conduct suggests that the notice provision is independent of any other provision in Rule 4-1.16, which means that you are required to give your client notice even when you are not required to seek court approval for your withdrawal.[5] The notice provision is designed to give the client an opportunity to employ new counsel, gather papers and property, and meet or extend any imminent deadlines.[6] In the case of *In re Coleman*, Mr. Coleman informed his client by letter that he would terminate the representation if he did not hear from his client in one week.[7] Having not heard from his client within the week, Mr. Coleman filed a motion to withdraw in all three of the client's pending matters, but failed to provide the client a copy of the motions to withdraw.[8] The Supreme Court of Missouri stated that the withdrawal was reasonable, but that Mr. Coleman was obligated to provide his client a copy of the motion to withdraw so as to notify her that the withdrawal had actually occurred.[9] Whether or not the notice of withdrawal is sufficient may be specific to the facts of the case. The Nevada courts have said that notice must clearly state that the lawyer will be withdrawing and should indicate the date and hour that the lawyer will petition the court for a withdrawal order.[10]

Allowing Time for Employment of Other Counsel

Clearly, if your client's jury trial is scheduled for Tuesday morning and you opt to withdraw from representation on Monday night, then there is probably not sufficient time for

your client to find substitute counsel (especially where the judge is unlikely to grant a continuance). Beyond this extreme example, an attorney's obligations are not quite as clear cut. Some authorities have suggested that, at a minimum, a withdrawing attorney must impress upon the client the importance of hiring substitute counsel.[11] The Restatement Third goes further in suggesting that the withdrawing attorney has an obligation to help in the search for a replacement.[12] The Supreme Court of Missouri has said that, at the very least, a withdrawing attorney is obligated to provide information that is relevant to the client's ability to hire new counsel and which is pertinent to the successor counsel's decision to take the case.[13] In *Coleman*, the client sent Mr. Coleman a letter at termination asking when her case would be set for trial, whether she needed another lawyer, what problems there would be in her case, what charges Mr. Coleman was asserting, and whether or not Mr. Coleman intended to assert a lien for fees.[14] The Supreme Court of Missouri found that Mr. Coleman's failure to provide the information requested hindered his former client's ability to obtain new counsel and Mr. Coleman was subsequently disciplined. The Supreme Court's ruling in *Coleman* would suggest that Missouri attorneys are obligated to cooperate with subsequent counsel and must promptly respond to inquiries regarding the status of the case.

Surrendering Papers and Property to Which the Client is Entitled

The original file, cover to cover, belongs to the client.[15] Rule 4-1.16(d) requires an attorney who has withdrawn or who has been discharged to surrender papers and property belonging to the client. There is an exception to the rule in that an attorney may retain items for which the attorney has paid out of pocket and has not yet been reimbursed (such as transcripts).[16] After the attorney has been reimbursed, however, the attorney must immediately deliver the property to the client.[17]

If the client has paid for the papers or property, it is not permissible for an attorney to retain the papers or file as a security for fees.[18] In the case of *Lim*, a Missouri attorney was hired by clients for immigration services, including obtaining a labor certification.[19] When the clients failed to pay their fees as requested, Mr. Lim terminated the representation and informed his clients that he would only release their labor certification once they had paid all fees due and owing.[20] The Supreme Court of Missouri issued a public reprimand and determined that it was improper for Mr. Lim to retain papers belonging to the client as a security for fees.

If an attorney sends a client a courtesy copy of all pleadings at the time of filing and a copy of all pleadings filed by opposing counsel (with a notation saying it's for the client's safekeeping), it is not necessary to copy the file and provide the documents to the client at termination as long as the attorney has provided an explanation of this process prior to sending the copies and if it's done with the understanding that the originals belong to the client.[21] If there is an original in the file, a copy does not fulfill the obligation to the client unless the attorney and client have agreed that it will.[22] Questions have arisen in many jurisdictions as to whether an attorney's "work product" can be removed prior to delivering the file to the client at termination. In Missouri, the Supreme Court Advisory Committee has opined that an attorney's "work product" actually belongs to the client because it is the result of services for which the client contracted.[23] Information in the file consisting of an attorney's impressions about the case, as well as comments made in telephone calls and meetings, are part of the file and must be provided to the client.[24]

Refunding Advanced Payment of Fees or Expenses Not Earned or Incurred

Presumably, money paid by the client as advanced payment for fees or expenses would be located in a client trust account at the time of termination. If the employment contract or agreement does not provide client consent for the attorney to remove earned fees from the trust account, an attorney cannot unilaterally withdraw funds as reimbursement for fees and expenses at the time of termination.[25] Generally, there is no ethics violation if a client has agreed in advance that the attorney may withdraw his or her fee from client funds.[26] Without going into a detailed discussion of fees, all attorneys' fees must be earned.[27] A client does not forfeit a fee paid in advance simply because he or she unfairly discharged an attorney or because the representation terminated unexpectedly. In the case of *Waldron*, an attorney was hired by the client following an automobile accident.[28] The client had medical insurance from State Farm in the amount of $5,000 and collection of this check was not part of the employment agreement, which provided for a 50 percent contingency in the injury case.[29] Mr. Waldron's client terminated the relationship at approximately the

same time the insurance company issued a $5,000 check in the name of Mr. Waldron and his client.[30] The Supreme Court found that Mr. Waldron inappropriately took the check and "held it hostage" for payment of attorneys' fees that were owed in other cases.[31]

In the end, it is the cause of the client that takes precedent. While it would be nice to wash our hands of a difficult client, there is an ongoing responsibility to make sure that the termination of representation is not detrimental to the client's interests. When you've done what you can to help aid in the client's future success, then you have the satisfaction of knowing that you did the right thing (and maybe avoided an ethics complaint at the same time).

Endnotes

1 Rule 4-1.16, Comment [4]; see also Comment [5] which provides for the exception of clients who were appointed counsel and states that the client's right to discharge the attorney may be determined by applicable law.

2 Rule 4-1.16, Comment [9].

3 ABA/BNA Lawyers' Manual on Professional Conduct, *Lawyer-Client Relationship* § 31:1201 (2005) (citations omitted).

4 *In re Bryan*, 61 P.3d 641 (Kan. 2003).

5 ABA/BNA Lawyers' Manual on Professional Conduct, *Lawyer-Client Relationship* § 31:1204 (2005) (citations omitted).

6 *Id*. (citing Wolfram, *Modern Legal Ethics* §9.5.1 (1986)).

7 295 S.W.3d 857 (Mo. 2009).

8 *Id*.

9 *Id*.

10 *In re Kaufman*, 567 P.2d 957 (Nev. 1977).

11 ABA/BNA Lawyers' Manual on Professional Conduct, *Lawyer-Client Relationship* §31:1205 (2005) (citing *In re Palmer*, 380 S.E.2d 813 (S.C. 1989)).

12 Restatement Third, §§33(1) cmt. B(2000).

13 *In re Coleman*, 295 S.W.3d 857 (Mo. 2009).

14 *Id*.

15 Missouri Formal Advisory Opinion #115.

16 Rule 4-1.16, Comment [9].

17 Missouri Formal Advisory Opinion #115.

18 Rule 4-1.16, Comment [9].

19 *In re Lim*, 210 S.W.3d 199 (2007).

20 *Id*.

21 Missouri Informal Advisory Opinion 20030047.

22 *Id*.

23 Missouri Formal Advisory Opinion #115.

24 Missouri Informal Advisory Opinion 980141.

25 ABA/BNA Lawyers' Manual on Professional Conduct, *Lawyer-Client Relationship* §31:1201 (2005).

26 *Id*.

27 See Missouri Rule of Professional Conduct 4-1.5.

28 790 SW2d 456 (Mo. 1990).

29 *Id*.

30 *Id*.

31 *Id*.

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