

## Ethics Opinion 2004-6

- **Rule: 1.16**
- **Subject: Declining or terminating representation; client with diminished capacity.**
- **Summary: A lawyer may withdraw from representing a client with Court approval. If the client suffers from diminished capacity, the lawyer may take certain steps to protect client's interests.**

### FACTS

Lawyer was retained to represent an individual who was injured in a fight. Lawyer filed a personal injury lawsuit. Trial in said matter was scheduled to begin within five days at the time the request for this Ethics Opinion was made. Lawyer's client is of foreign descent and does not speak nor understand English. Further, lawyer does not speak nor understand the language of his client. Recently, client has moved from South Dakota to the west coast. It is lawyer's understanding that client does not work at this time and will not be available for trial because he has no money to travel, nor does he have any money to pay witness fees to subpoena witnesses for trial. Lawyer does not know if his client has any idea what the status of the case is. Lawyer has sought a continuance of the trial for the purpose of trying to resolve these problems. However, a continuance has been denied.

Lawyer requests an opinion of this Committee as to whether or not he can withdraw as counsel of record under the Rules of Professional Conduct.

### DISCUSSION

Rule 1.16 provides:

Rule 1.16. Declining or Terminating Representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (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.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) 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;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) 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.

(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 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 Committee guidelines prohibit the Committee from opining on how lawyers should resolve those issues identified in the factual statement which pertain to preparing for trial without any communication or contact with the client. However, resolution of those issues may be found in Rule 1.16. The applicable paragraphs are as follows:

1. Rule 1.16(b)(1) permits withdrawal if you determine it can be done without material adverse effects on your client's interest.
2. Rule 1.16(b)(5) permits withdrawal if the client has failed to substantially fulfill an obligation to you regarding your services. However, the Rule mandates that before you withdraw under these circumstances, that you must have given your client reasonable warning that you will withdraw if he fails to fulfill this obligation.
3. Rule 1.16(b)(6) is self-explanatory and can only be answered by lawyer.
4. Rule 1.16(b)(7) permits withdrawal for good cause.

Withdrawal under Rule 1.16 is subject to Court approval and to the provisions of 1.16(d). Rule 1.16(d) may resolve the issues which you identify concerning trial preparation and may also prohibit you from withdrawing at this late date.

Finally, Rule 1.14, Client with Diminished Capacity should be reviewed prior to making a final decision to withdraw. Rule 1.14(a) provides:

When a client's diminished capacity to make adequately considered decisions in connection with a representation is diminished whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. Although the Rule does not describe what constitutes diminished capacity, COMMENT 6 identifies several factors which should be considered and balanced in determining the extent of the client's diminished capacity. If you conclude that your client's diminished capacity is the result of a language barrier, Rule 1.14(b) and (c) dictate what you need to do and consider to protect your client's interests.

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