



## Withdrawing from a Case

by John Drath

Withdrawing from a case usually comes about because of some irreconcilable differences between attorney and client, differences which can be fertile ground for a malpractice claim. The manner and means of terminating that relationship can affect the likelihood that a malpractice claim will be presented. First and foremost, know and follow the procedures applicable in your jurisdiction. Many states, like

California, provide in their own Rules of Professional Conduct when withdrawal is mandatory and when it is permissive. Other states follow the ABA Model Code of Professional Responsibility (DR 2-110) or the Model Rules of Professional Conduct (Rule 1.16). When a matter is pending in a tribunal, your jurisdiction will likely have specific procedural requirements to be followed.

ABA Ethical Consideration 2-32 provides a good overview of the considerations to be kept in mind:

A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal.

A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

Second, do not procrastinate once a problem materializes or becomes inevitable. Very few problems serious enough to motivate withdrawal crop up overnight, and in most cases can be seen coming from a distance. When a serious problem is first recognized, it should be both discussed with the client and memorialized in writing. If that doesn't resolve the issue and withdrawal appears to be the only course, advise the client again in writing and stress the need for the client to obtain new counsel. See, e.g., ABA Model Code of Professional Conduct DR 4-101.

Make an effort to have the client sign a substitution of attorneys, and only make the motion to withdraw if further delay would jeopardize the client's case. When making the motion, take care to avoid disclosing attorney-client communications or setting forth any information which would either weaken the client's case or provide undue leverage to the opponent.

Finally, in addition to any formal procedures which must be followed, send a disengagement letter confirming the reason for the termination, addressing any remaining fee issue, and setting forth any upcoming deadlines or procedural requirements which will have to be addressed by the client or successor counsel. The disengagement letter serves the added purpose of establishing the outside date for the commencement of the applicable statute of

limitations period for malpractice claims. In drafting this letter, bear in mind that in the event a claim is brought against you, this letter will be an important exhibit; it should be professional, dispassionate, clear and accurate.

The extent to which the client is entitled to the attorney's file and work product will vary from jurisdiction to jurisdiction, and it will be important to determine the rules in your particular state. In California, as an example, an attorney is not entitled to withhold the client's file for non-payment of fees or costs, and the client is entitled to the original file without any charge for copying it, absent an express agreement in the engagement letter. Unless your jurisdiction permits you to withhold some or all of the file for non-payment of fees or costs, (see, e.g. §43, Restatement of Law Governing Lawyers [Third]), any request for the file should be responded to with dispatch and without imposition of conditions. Before doing so, however, you should make a paper or electronic copy of the entire file being turned over to the client or successor counsel. A letter describing the contents of the file should accompany the file, and the client or successor counsel should be asked to sign and date an acknowledgment of receipt of the material.

If not covered in your engagement letter, the disengagement letter should also advise the client how long you will retain the file before destruction, and this time period will differ among jurisdictions and the subject matter of the retention. In the event that there are remaining fee issues, avoid if possible the institution of any formal proceedings until after the applicable statute of limitations for a malpractice claim has expired. A cross-complaint for malpractice is frequently the response to an action for fees.

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