The Ethical Considerations of Saying Goodbye

While parting ways might qualify as sweet sorrow to Romeo or Juliet, it is seldom a fair description of when a lawyer–client relationship is terminated before completion of a representation.

A recent case from the District of Columbia is representative of the difficulties encountered by lawyers who wish to withdraw from cases in litigation when the clients resist—especially when they claim that withdrawal would be fatal to their case.[1] In that *qui tam* proceeding under the federal False Claims Act, the relators (plaintiffs/whistleblowers) alleged that the defendants had overbilled the government for a supply contract pertaining to the Afghanistan conflict. The plaintiffs' lawyer stated in his motion to withdraw that he could not, as an officer of the court, file a second amended complaint that contained allegations being demanded by his clients. The clients' response was that the withdrawal would deal a fatal blow to their case, already four years old, because it would be impossible to find substitute counsel due to the hostility toward the plaintiffs demonstrated and expressed by the U.S. Attorney handling the matter.[2]

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The case is representative of the differences between a lawyer's ethical considerations when attempting to withdraw from a case in active litigation as opposed to a transactional matter, in both instances where the client resists the lawyer's wishes.[3]

We start with ER 1.16 (Declining or Terminating Representation) in Arizona's Rules of Professional Conduct.[4] ER 1.16(a) sets forth the events *requiring* a lawyer to withdraw from a representation, including where a lawyer is discharged by the client. This provision recognizes the well-established principle that the client has an almost absolute right to discharge a lawyer for any reason—including no reason. As further provisions in the Rule demonstrate, lawyers do not have the same latitude. Thus, ER 1.16(b) addresses when it's the lawyer who wants to end the relationship. The remaining parts of the Rule impose limitations on the manner of withdrawal and are meant to benefit and protect the client in the process. For purposes of this column, we deal primarily with ER 1.16(b).

ER 1.16(b) lists seven "safe harbors" that presumably allow a lawyer to withdraw from a representation in the absence of the client's consent. The list starts with the provision that withdrawal is permitted if it "can be accomplished without material adverse effect on the interests of the client." Outside the world of legal ethics, this safe harbor has raised questions as to how effective it would be when examined instead in the context of a case alleging that the lawyer, by resigning, had violated the lawyer–client contract or had breached the basic fiduciary duties between lawyer and client found in the common law.[5] (These questions are beyond the scope of this discussion.)

The Rule follows with other examples where withdrawal is permitted, such as when the client is demanding that the lawyer assist him in, or has used the lawyer's services in perpetrating, criminal or fraudulent acts; or is insisting on acts that the lawyer finds repugnant; or has not paid the lawyer's bill; or where continuing the representation would result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or when "other good cause for withdrawal exists." There are limits to this last catchall category, and there is authority to the effect that it does not apply when a lawyer simply changes his mind about the case.[6]

Note that the situations described are stated in the disconjunctive, which means that, read literally, if you fit into any one of them, at least in a transactional (non-litigation) setting, you can withdraw even if it may disadvantage your client.

Next, and just as important, is ER 1.16(c), which provides one more important consideration to be dealt with if withdrawal is sought when the representation is before a "tribunal."[7] This subparagraph says that if applicable law so provides, the lawyer wishing to withdraw must comply with it and may be required by the tribunal to continue the representation even if good cause for withdrawal might otherwise exist. In Arizona, we need only look to the

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procedural rules for civil[8] and criminal[9] cases that set forth the requirements for withdrawal, again pointing up the differences in attempts at withdrawal in transactional and litigation contexts.[10]

Finally, ER 1.16(d) provides for additional client protections after withdrawal, contested or not, including the surrendering of file documents[11] and the refunding of unearned fees.

Unplanned endings to lawyer–client relationships are not always accompanied by tearful farewells, and they may occasionally test a lawyer's ability to maintain a professional bearing in dealing with the parties involved. If ever confronted with a situation where you need a sense of direction in extracting yourself from a lawyer–client relationship, start by reading Arizona Ethics Opinion 09-02 (Termination of Representation; Withdrawal; Fees; Confidentiality) (September 2009). It's an excellent way to get off on the right foot in an area where the answers are not always easy.

endnotes

1. *U.S. ex rel. Hutchins et al. v. DynCorp. Int'l Inc.*, Case No. 15-cv-355 (D.D.C.), *reported in* ABA/BNA Lawyers' Manual of Professional Conduct, at ¶ 35:23 (1/23/19).
2. *Qui tam* cases are more lucrative for relator's counsel when the government is represented by a government lawyer who hopefully will do most of the heavy lifting.
3. The docket indicates the lawyer's motion to withdraw was granted.
4. Rule 42, Ariz.R.S.Ct.
5. *See* discussion in Restatement (Third) of The Law Governing Lawyers §32, at Comments h(i) and h(ii).
6. *Rusenow v. Kamara*, 920 F. Supp. 69 (D.N.J. 1996) (existence of evidence potentially harmful to client not good cause to withdraw; "A sudden disenchantment with a client or a cause is no basis for withdrawal. Those who cannot live with risk, doubt and ingratitude should not be trial lawyers").
7. This is a defined term. *See* ER 1.0 (Terminology) at subsection (m).
8. Rule 5.3 (Duties of Counsel and Parties) at subsection (2), Ariz.R.Civ.Proc.
9. Rule 6.3 (Duties of Counsel: Withdrawal) at subsection (c), Ariz.R.Crim.Proc.
10. There is an excellent treatment of the considerations Arizona courts have applied in their decisions under these procedural rules in State Bar of Arizona, Arizona Legal Ethics Handbook (4th ed. 2016) at ¶ 1.16:400 (Order by Tribunal to Continue Representation).
11. Who pays for any copying costs is covered in Comment [9] to ER 1.16.