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Feature

[Marc S. Stern¹](#)

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HOW TO WITHDRAW FROM A CASE

In any professional endeavor there comes a time to leave. Recognizing that moment is especially important in the attorney-client relationship. Knowing how to leave--and how to leave without creating ethical and financial problems for yourself--is even more important.

There are a variety of financial, personal, and professional reasons for withdrawing from a case. I believe that lack of payment is not automatically one of these; from time to time, attorneys should work for free to ensure that the system functions. Unless the client is willfully refusing to pay, an indication of a more deep-rooted problem, I believe that the attorney has an obligation, ethical or moral, to finish out the representation.

In the original retainer agreement you should have set forth the reasons for an eventual withdrawal and the bases for terminating the relationship. It is in the initial agreement that expectations are created and the basics of the attorney-client relationship set forth.

There are two types of withdrawals: the “normal” withdrawal and the “noisy” withdrawal. A noisy withdrawal is done when the client wants to commit or have the lawyer commit an ethical breach. In this case the lawyer cannot ethically continue to represent the client. At the same time, the withdrawal cannot disclose attorney-client privileged information. The manner and scope of such an action are well beyond the scope of this article. However, you need to know that it exists, and in order to protect your license, you may need to use it.

Having decided to leave, it is important to do so in such a manner that you don't have future problems with the client, the court, or the ethical authorities in your jurisdiction. First, you must determine what the court rules require you to do to withdraw from the case. Some courts will allow withdrawal after notice. Other courts require permission of the court (i.e., a court order authorizing withdrawal). Whatever the procedure, follow it.

If this is not a matter involving litigation, the court rules are not relevant but should be consulted in any event. Remember, the attorney-client relationship is a fiduciary one, and the client's interest comes ahead of yours. Make sure that you do not damage the client's case by the manner of the withdrawal.

You need to represent the client until the withdrawal is effective. If there is a motion pending before the withdrawal is effective, you need to respond to the motion. You need to appear at the motion and preserve your client's interest, even if you are not being paid, even if you can't stand the client. The exception is if the client intends to preserve perjured testimony or expects you to participate in a fraud on the court. (See the "noisy" withdrawal, above.) The matter may get continued by a call to opposing counsel, other lawyers involved, or the appropriate individuals.

Once you have decided to leave, you have a new client: you. Your purpose now is to get out of the case with the least exposure possible. It is to leave the client with good feelings, or at least with no vendetta against you. This means that you should not call the client a deadbeat or harass the client about fees, documents, etc. At this point, all communication should be in writing--letter or e-mail, preferably both. If there is an oral communication, confirm it in writing. Remember, everything that you do will be part of the record. You may hate the client. You may think that the client took advantage of you. It does not matter. If it will make you feel better, write a letter and explain it. Then burn or shred the letter. If you feel a need to vent, do so in private. Doing so in a public place will do you no good and can destroy relationships, not necessarily with the client.

Prior to terminating the relationship you need to go through the file and figure out what's there. Are there embarrassing notes, are there notations to missed deadlines, difficulties with or other issues involving the client that would best remain unclear? Be extremely careful before you remove anything. It is probably okay to remove your note that the client is a buffoon. Anything germane to the case is a different matter. If it memorializes something that happened or that will help the next counsel understand what happened, it needs to *42 stay in. Remember that the client owns the file, and you will be required to turn it over when the representation ends. (One option is to keep a client file and your own working file.) You also need to make sure that documents from other clients have not inadvertently made it into this client's file.

If there is even the possibility of future problems with the client, make a copy, electronic or paper, of everything that is in the file. You may rest assured that the client's new counsel will review everything in the file for the purpose of (1) deciding if there is a claim against you for malpractice, (2) determining whether your fees were reasonable, or (3) determining what you did and what needs to be done. Consequently, it is important to document all of these things.

If there are unpaid fees, many states give the lawyer a possessory lien on the documents in the attorney's possession. One would think that this would provide leverage in getting paid. However, many ethics opinions provide that withholding documents necessary for the client or his or her new lawyer to continue the representation will result in an ethical problem. Be very careful before holding onto files for the purpose of coercing payment. Is the fee really worth defending yourself against an ethics claim? On the other hand, if you have original documents, providing a copy should be sufficient to assist in the presentation of the case. Still, before taking this position, check with your jurisdiction's ethics authorities.

When you are preparing to leave the case, make sure that the client understands that there are deadlines he or she must meet. At the minimum, include all items that need to be completed. If you are firing the client before a statute of limitation runs, make sure that client knows when it will run and what that means. If there are other pending deadlines, make the client aware of them in

writing. Remember, at this stage you are demonstrating how professional you are, and more importantly, you are making a record.

Finally, remember that even after you and the client have parted company, the attorney-client relationship remains. You are required to maintain client confidences.

SAMPLE WITHDRAWAL LETTER

Dear Client:

Over the past several weeks I have been reevaluating our attorney-client relationship. It is apparent that we are not functioning as a team. It appears that my advice has been ignored, and you have not provided the information necessary to your proper representation. You have promised _____ and have not been able to devote the time/resources/etc. necessary to your proper representation.

We at _____ try to do the best possible job for our clients, and this is a two-way street. We expect our clients to fulfill their end of the bargain. When this is impossible, it is best that we terminate our attorney-client relationship. It is our intention to terminate our relationship effective on _____. Until that time we will continue to represent you. We will respond to motions and appear as your counsel in court. We will not, however, initiate any new actions except as we reasonably believe necessary to preserve the status quo.

Trial in this case is scheduled for _____. In addition, there are the following deadlines: _____.

The statute of limitations for your claims against _____ will toll on _____. The statute of limitation provides that actions need to be started before it runs. This means that you must file your lawsuit before that date.

Our decision to terminate the relationship is not negotiable and under no circumstances will we continue to represent you after _____. If you have not secured new counsel by that date, you will need to represent yourself. You will need to file a written appearance with the court, and you will need to respond to opposing counsel and appear for hearings.

We have (have not) given opposing counsel permission to contact you directly. As you know, the Rules of Professional Conduct preclude an attorney from contacting a represented client without permission.

Once again, thank you for this opportunity to be of service. We are sorry that it did not work out. In the event that we can be of further service, please consider us.

Sincerely yours,

[Withdrawing firm]

Footnotes

Marc S. Stern practices bankruptcy law in Seattle, Washington. He may be reached at marc@hutzbah.com.

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