

## Professional Responsibility

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# Establishing & Terminating an Attorney-Client Relationship

## 1 Establishing the Relationship

### Restatement of the Law Governing Lawyers

#### § 14

*A relationship of client and lawyer arises when:*

- (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either*
  - (a) the lawyer manifests to the person consent to do so; or*
  - (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or*
- (2) a tribunal with power to do so appoints the lawyer to provide the services.*

### 1.1 Client Retains lawyer

#### Contractual relationship

Some states require written retainer or fee agreements

- But may arise out of less formalized contact & communication
- Giving advice at a party?

Standard: Would a reasonable person, under the circumstances, conclude, from the lawyer's words and conduct, that the lawyer has agreed to represent the client

- Ambiguity generally goes against lawyer

### 1.2 Court Appointment

Not contractually created, but same duties apply

### 1.3 Episodic client:

Where attorney periodically does work for the same client, relationship may be ongoing, even when there is no active work or matter pending.

## 2 Declining or Terminating Representation

Lawyer must inform the client (preferably in writing) if the lawyer will not handle a matter or is no longer representing the client.

Any reasonable doubts will be resolved in favor of the client (e.g., a client may assume that his or her trial attorney will handle the appeal, unless the lawyer makes clear otherwise).

### Example

A visits L's office and asks L to represent him in an automobile accident case. L only handles tax cases, so L declines to represent A. L should:

- Advise A to visit other lawyers;
- Advise A of any impending deadlines (e.g., statute of limitations – if the deadline is about to expire, L may be required to do more, such as filing a complaint for A before declining representation);
- Protect A's confidences; and
- Notify A in writing that he is declining the representation.

### Rule 1.16

Representation may terminate

- By agreement of attorney & client
- When lawyer completes the task or matter for which she has been retained
- As specified in the retainer agreement

Reasonableness standard applies to termination as well as formation

### Restatement of the Law Governing Lawyers

#### §32: Termination of a Lawyer's Authority

- (1) *A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with an order of a tribunal requiring the representation to continue.*
- (2) *Subject to Subsection (1) and §33, a lawyer's actual authority to represent a client ends when:*
  - (a) *the client discharges the lawyer;*
  - (b) *the client dies or, in the case of a corporation or similar organization, loses its capacity to function as such;*
  - (c) *the lawyer withdraws;*
  - (d) *the lawyer dies or becomes physically or mentally incapable of providing representation, is disbarred or suspended from practicing law, or is ordered by a tribunal to cease representing a client; or*
  - (e) *the representation ends as provided by contract or because the lawyer has completed the contemplated services.*
- (3) *A lawyer's apparent authority to act for a client with respect to another person ends when the other person knows or should know of facts from which it can be reasonably inferred that the lawyer lacks actual authority, including knowledge of any event described in Subsection (2).*

#### §33: Duties When Representation Terminates:

- (1) *In terminating a representation, a lawyer must take steps to the extent reasonably practicable to protect the client's interests, such as giving notice to the client of the termination, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee the lawyer has not earned.*
- (2) *Following termination of a representation, a lawyer must:*
  - (a) *observe obligations to a former client such as those dealing with client confidences (see Chapter 5), conflicts of interest (see Chapter 8), client property and documents (see 44-46), and fee collection (see 41);*
  - (b) *take no action on behalf of a former client without new authorization and give reasonable notice, to those who might otherwise be misled, that the lawyer lacks authority to act for the client;*
  - (c) *take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation; and*
  - (d) *take no unfair advantage of a former client by abusing knowledge or trust acquired by means of the representation.*

## 2.1 Compulsory Withdrawal

### Rule 1.16(a)

#### Problems

Lawyer, a partner in the Smith Law Firm, represents A in litigation. When A receives a document production request, A instructs Lawyer to destroy some relevant documents. Lawyer explains to A that such destruction is illegal and unethical, but A insists that Lawyer destroy the documents.

- What are Lawyer's ethical obligations?
- May A fire Lawyer and, if so, does Lawyer have any recourse?

Lawyer represents A in a large business transaction. Over the past few years, Lawyer has become addicted to illegal drugs. The addiction has reached a point where Lawyer is unable to concentrate for more than a few minutes at a time. A's business transaction is very complicated and will take nearly one hundred hours to complete.

- What are Lawyer's ethical obligations?

## 2.2 Permissive Withdrawal

### Rule 1.16(b)

#### Problems

A hires Lawyer to represent A in a products liability suit. Within the first week, A and Lawyer realize that they are incompatible. Accordingly, they agree that it would be best for A to find a new lawyer. The litigation is in its early stages and thus A will not be prejudiced by a change of lawyers.

- May A withdraw?

Lawyer, a partner in the Smith Law Firm, represents A in litigation. When A receives a document production request, A decides to destroy some relevant documents. Lawyer learns of A's plans and explains to A that such destruction is illegal and unethical, but A insists on destroying the documents.

- Must Lawyer withdraw?
- May Lawyer withdraw?

An attorney experienced several instances when clients failed to pay their fees in a timely manner, but it was too late in the representation to withdraw without prejudicing the clients. To avoid a recurrence of this situation, the attorney has drafted a stipulation of consent to withdraw if fees are not paid according to the fee agreement. She proposes to have all clients sign the stipulation at the outset of the representation. Is it proper for the attorney to use the stipulation to withdraw from representation whenever a client fails to pay fees?

- A. Yes, because a lawyer may withdraw when the financial burden of continuing the representation would be substantially greater than the parties anticipated at the time of the fee agreement.
- B. Yes, because the clients consented to the withdrawal in the stipulation.
- C. No, because a client's failure to pay fees when due may be insufficient in itself to justify withdrawal.
- D. No, unless clients are provided an opportunity to seek independent legal advice before signing the stipulation.

Client has retained Attorney to represent Client in a contract suit. Attorney's retainer agreement provided that Attorney's fees would be based on a fixed hourly rate, payable at the end of each calendar month. Two months before trial, Client fell behind in the payment of Attorney's monthly billing for fees. Attorney included the following statement on Attorney's last bill to Client: "Your account is more than thirty days past due. If amounts due are not paid promptly in accordance with our agreement, I will terminate the representation. If you cannot pay the amount due, I will accept an assignment of your cause of action as security for your fee to me." Two weeks after the last billing, Attorney telephoned Client and told Client that Attorney would withdraw from representing Client if the bill was not paid within forty-eight hours or adequate security given for its payment. Forty-eight hours later, the client has neither paid the bill nor given security.

- May Attorney move the court for permission to withdraw?
- May Attorney turn Client's file over to another experienced lawyer in town and notify Client that Attorney no longer represents Client?
- May Attorney accept an assignment of Client's cause of action as security for Attorney's fees?

For many years, Attorney served as outside counsel for Corp. Shortly after a change in management, Attorney discovered what she reasonably believed to be a material misstatement in a document she had drafted that Attorney was about to file on Corp's behalf with a government agency. Attorney advised Corp's Board of Directors that filing the document was probably criminal. However, the Board disagreed that there was any material misstatement and directed Attorney to proceed with filing. When Attorney indicated her intention to resign, Corp argued that resignation at this time would send a signal that there was a problem with the filing. Corp urged Attorney to continue representation, but offered to use in-house counsel to complete the work on the filing. Although she does not know for certain that filing the document is illegal, Attorney reasonably believes that it is. In any event, Attorney is personally uncomfortable with the representation and wants to withdraw. May Attorney withdraw from her representation of Corp?

- Must Attorney withdraw?

When may an attorney who represents a plaintiff on a contingent fee basis withdraw because of an “unreasonable financial burden”?

## 2.3 Notice to/Permission of Tribunal & Protection of Client’s Interests

### Rule 1.16(c) & (d)

#### 2.3.1 Attorney’s Lien

An attorney’s lien is a security interest that a lawyer may assert against client’s property to ensure payment of fees. In most states, attorney’s liens are codified by statutes; in others, they are recognized under common law.

There are two varieties of attorney’s lien, distinguished by the type of client property to which they apply:

##### *Retaining Lien*

Applies to client property and money currently in the lawyer’s possession. This includes funds advanced by the client and funds that the lawyer has received from someone else for the client). It also includes the client’s file.

- e.g., Oregon Rev. Stat. § 87.430: “An attorney has a lien for compensation whether specially agreed upon or implied, upon all papers, personal property and money of the client in the possession of the attorney for services rendered to the client. The attorney may retain the papers, personal property and money until the lien created by this section, and the claim based thereon, is satisfied, and the attorney may apply the money retained to the satisfaction of the lien and claim.”
- North Carolina courts and the NC State Bar Ethics Committee have declined to recognize an attorney’s right to a retaining lien. See, 2006 Formal Ethics Op. 18 (Proviso in NC RPC 1.16(d) permitting “lawyer [to] retain papers relating to the client to the extent permitted by other law”, does not permit assertion of retention lien absent statutory or common law recognition of such a lien in NC).

##### *Charging Lien*

Applies to funds that the client will receive in the future as the result of a judgment or settlement.

- North Carolina courts have recognized an attorney’s right to assert a charging lien, but only if the attorney represents the client at the time of final judgment or a settlement. See *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992)

### Problems

Lawyer was retained by Client to defend Client in a pending criminal case. Client has failed to pay Lawyer’s monthly fees for six consecutive months. After numerous warnings, Lawyer would like to withdraw. Lawyer files a motion with the court seeking leave to withdraw, but the court denies the motion.

- What are Lawyer’s obligations to Client and the court?
- Assuming the court grants Lawyer leave to withdraw, what actions must Lawyer take to end her relationship with Client?

- If Client fails to pay the past-due fees to Lawyer, is there anything Lawyer may do to ensure payment?