

Legal Profession

MF Chapter 13, 14, 15

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M&F4TH Chapter 13-14-15

Ending the Client-Lawyer Relationship

Model Rule 1.16

Declining or Terminating Representation

Rule 1.16 Declining or Terminating Representation.

- Rule 1.16(a) is mandatory. “A lawyer SHALL withdraw . . .”
- Rule 1.16(b) is discretionary. “A lawyer MAY withdraw . . .”

For example, if a lawyer *knows* that representing the client will violate the Model Rules or some other law, then she *must* withdraw under Model Rule 1.16(a)(1). If she merely suspects, or “reasonably believes” the client has used the lawyer’s services to perpetrate a crime or fraud, then she *may* withdraw under Model Rule 1.16(2) and (3).

Model Rule 1.16(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:

- the representation will result in violation of the rules of professional conduct or other law;
- the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or
- the lawyer is discharged.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Under Rule 1.16(c), if the lawyer has entered his appearance in court, then he must secure the court’s permission to withdraw.

If the client demands that the lawyer engage in unprofessional conduct, and the lawyer seeks to withdraw because of it, the lawyer must take care not to reveal any client confidences. The court may request an explanation for the withdrawal. The lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. A lawyer must be

mindful of their duty of confidentiality to the client, as well as their duty of candor to the court, under Model Rule 3.3.

Under Model Rule 1.16(a)(3), a client may fire her lawyer for any reason or no reason.

Breaking Up Is Hard To Do

Can the Lawyer Quit Over the Client's Objection?

Yes, under Rule 1.16(b)(1), but the lawyer may quit only if it "can be accomplished without material adverse effect on the interests of the client."

If the client objects to the lawyer withdrawing, then the client likely believes there will be material adverse effects.

Fundamental Disagreement with Client?

Rule 1.16(b)(4) says that if the "client insists upon taking action that lawyer considers repugnant" or with which lawyer has "fundamental disagreement," then the lawyer may withdraw from representation. If lawyer and client disagree so much, then probably someone else should be the lawyer?

What if the case has become a financial burden?

Rule 1.16(b)(5) entitles the lawyer to withdraw for nonpayment of fees if client has been given reasonable warning.

Rule 1.16(b)(6) says a lawyer may withdraw if case results in an "unreasonable financial burden on the lawyer"

Always A Fiduciary

No matter how ill-used the lawyer feels when breaking up with a client, the lawyer must continue to serve as a fiduciary. Model Rule 1.16(d):

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.

Model Rule 3.5

Impartiality & Decorum of the Tribunal

A lawyer shall not:

- seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- communicate with jurors in certain circumstances;
- engage in conduct intended to disrupt a tribunal.

Model Rule 3.7(a)

Lawyer As Witness

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- the testimony relates to an uncontested issue;
- the testimony relates to the nature and value of legal services rendered in the case; or
- disqualification of the lawyer would work substantial hardship on the client.

Model Rule 3.7(b)

Lawyer As Witness

A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Social Media

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Model Rule 8.2

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Model Rule 4.2

Communication With Person Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Anne Attorney represents Carl Client who is suing over a boundary dispute with his neighbor Daphne Defendant, who is represented by Larry Lawyer in the matter.

Anne Attorney may not speak to Daphne Defendant about the boundary dispute without Larry Lawyer's permission.

Rule 4.2 Comment 7 When clients and parties are individuals it's easy for the lawyer to determine who is "represented" and who isn't. In the corporate context, it's harder to know. Comment 7 describes the problem this way:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who:

- supervises, directs or regularly consults with the organization's lawyer concerning the matter
- or has authority to obligate the organization with respect to the matter
- or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Rule 4.2 applies only when the lawyer *knows* the party is represented by counsel. The lawyer is not obliged to ask, but also can't ignore evidence that the party is a represented person within the meaning of Rule. 4.2.

Applies in both criminal AND civil matters.

Uncertain during the INVESTIGATION phase of a criminal case prior to arrest or charge.

Applies to PERSONS, not just PARTIES.

Under Model Rule 4.2 Comment 7: “Consent of the organization’s lawyer is not required for communication with a former constituent.”

If former employees are represented by separate counsel, the lawyer must secure permission, even if the former employee is not a party.

If former employees are NOT represented, then Rule 4.3 (communication with Unrepresented Persons) comes into play.

If the rule were otherwise, opposing counsel could talk to former employees only by deposition, which would greatly increase the cost of litigation.

- Applies only when the lawyer SHOULD KNOW about the other lawyer (you need not ask);
- Applies, only to contacts related to the subject matter of the case;
- Applies even if the represented person initiates contact;
- Applies until the representation is in fact terminated;
- Applies to lawyers’ investigators, and not just the lawyer personally.

Don’t have to ask, but if person says the word “lawyer” stop

Subject matter of case. Lawyer meets client in grocery store and talks about how great the tomatoes are this time of year. Okay.

Applies EVEN IF the represented person contacts the lawyer.

Rule 4.2 (Communication with Represented Persons) Don’t forget the “or is authorized to do so by law or court order.” For example, a grand jury. The witness is questioned by prosecutors but the witness’s lawyer is not allowed in the room. Otherwise, Rule 4.2 Comment 3 says NO CONTACT “even though the represented person initiates or consents to the communication.”

It’s THE OTHER LAWYER who must consent to the interview.

Model Rule 4.3

Dealing With Unrepresented Persons

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

Comments [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.

In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between (1) situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and (2) those in which the person's interests are not in conflict with the client's.

In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel.

Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.

This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Model Rule 4.3 (continued)

Dealing With Unrepresented Persons

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

If the lawyer knows . . . that the interests of an Unrepresented Person are . . . in conflict with the interests of the client . . . The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel . . .

Witness Interviews

No misrepresentations. Duh! Model Rules 4.3 and 8.4(c). But the lawyer take care to make sure that unrepresented employees do not think that lawyer is on their side.

Model Rule 1.13

Organization As Client

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Model Rule 3.4(f)

Fairness To Opposing Counsel

Model Rule 3.4 calls for civility and cooperation between the lawyer and opposing counsel and parties. The lawyer shall not "obstruct another party's access to evidence" under Rule 3.4(a), and shall not "request a person other than a client to refrain from voluntarily giving relevant information to another party: unless:

1. The person is a relative or an employee or other agent of a client; and
2. The lawyer reasonably believes that the person's interests, will not be adversely affected by refraining from giving such information

Model Rule 7.1

Communications Concerning Services

A lawyer shall not make a false or misleading communication about a lawyer's services . . .

Ads may be funny and creative, but they must not be false or misleading.

Model Rule 7.2

- A lawyer may advertise through written, recorded or electronic communication, including public media;
- A lawyer shall not give anything of value to a person for recommending the lawyer's services.

Advertising under rule 7.2 is subject to Rules 7.1 and 7.3.

The difference between advertising under (a) and lawyer referral (paying someone to refer cases to you under (b)).

Some of the new marketing methods, including Google ad words, Legal Match, Total Attorneys, Groupon and Martindale Hubbel's Lawyers.com do not fit neatly into these categories.

Lawyers may pay to have leads generated. The clarification here is that these services SHOULD NOT STATE OR IMPLY or create the impression that they are recommending the lawyer, or her services.

Lead generators?

Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not:

- recommend the lawyer,
- any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer),
- and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services).

To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral.

Comment 8 Reciprocal Referrals?

A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services.

Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer

or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement.

Model Rule 7.3(a)

Solicitation of Clients

“Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

Model Rule 7.3(b)

A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a:

1. lawyer;
2. person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
3. person who routinely uses for business purposes the type of legal services offered by the lawyer.

Comment 2 “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard.

Model Rule 7.3(c)

A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

1. the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
2. the solicitation involves coercion, duress or harassment.

Model Rule 7.3(d)

This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

Comment 8 Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation

Model Rule 7.3(e)

Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment 9 Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan.

The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan.

For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise.

The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services.

Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

Model Rule 7.3

A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide . . . legal services.

Comment 1 In contrast, a lawyer's communication . . . does not constitute a solicitation if it is directed to the general public . . . such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.