Court of Queen's Bench of Alberta

Citation: Re. A.L., 2003 ABQB 905

Date: 20031103
Docket: 021378062Q1
Registry: Edmonton

**In the matter of an application by A.L.
to withdraw as counsel of record in a criminal proceeding**

Restriction on Publication: By Court order found within, there is a provisional ban on publishing the identity of the person described in this judgment. Any person who wishes to have a ***Dagenais*** type review of this provisional ban is requested to so advise the Court in writing.

**Reasons for Judgment
of the
Honourable Madam Justice J.B. Veit**

Summary

[1] The termination of the lawyer/client relationship is subject to certain rules, including:

- a client can always fire a lawyer;
- (a client who has just fired a lawyer isn't always entitled to an adjournment to get a new lawyer);
- a lawyer cannot always fire a client;
- in Alberta, a lawyer who is on the record must obtain the leave of the court to get off the record. Leave will not be withheld if the client has fired the lawyer. Leave may be withheld where the reason the lawyer wants to fire the client relates to a disagreement about the financial retainer.

[2] Does a lawyer who wants to fire a client have to give that client notice of intent to terminate the relationship?

[3] On the date set for trial of a charge of trafficking in cocaine, in the absence of the accused, A.L. applied for leave to withdraw as the accused's lawyer on the grounds that he had not had any recent contact with the client.

[4] The application is denied.

[5] In Alberta, lawyers who are on the record in a criminal proceeding must apply to the court for leave to withdraw. The leave application allows the court the opportunity to assess the contractual, ethical and administrative implications of late withdrawal.

[6] Lawyers have certain contractual obligations to their clients. In this case, A.L. did not produce any evidence that the client's failure to remain in communication with his lawyer was a ground for immediate, unilateral termination of the contract by the lawyer. In such circumstances, for contractual reasons, notice must be given to the client of an intention to terminate the contract. A.L. had no contractual right to apply *ex parte* to terminate the lawyer/client relationship.

[7] Lawyers have certain ethical obligations to their clients. Even if the retainer between the client and the lawyer had included a term concerning the unilateral termination of the contract by the lawyer, the court should support the ethical responsibility of a lawyer not to withdraw services without express notification to the client. The risk of prejudice to clients in a criminal law setting of unilateral withdrawal of services by their lawyers is substantial; the potential prejudice includes incarceration or extended incarceration. In the circumstances here, A.L. may have had an ethical duty to maintain the contractual relationship of service to the client until notice of termination of the contract could be given to the client.

[8] Lawyers have obligations to the justice system. By analogy to the case law that holds that even where there has been a breach by a client of a financial term of the lawyer/client relationship that lawyer may have to continue to fully represent the client if withdrawal would cause prejudice either to the client or to the administration of justice, even where there is a contractual term entitling a lawyer to terminate the contract if the client does not remain in contact with the lawyer, the court may deny leave to withdraw where the withdrawal could cause prejudice either to the client or to the administration of justice. In the circumstances here, prejudice would be caused both to the client and to the administration of justice if A.L.'s application to withdraw were granted; leave is denied.

Cases and authorities cited

[9] **By the court:** ***Leask v Cronin Prov. J.*** [1985] 3 W.W.R. 152 (B.C.S.C.); ***Steele*** (1991) 56 C.C.C. (3d) 149 (Que. C.A.)***; Hardy*** [1990] A.J. No. 1127 (Q.B.), [1991] A.J. No. 1130 (C.A.); ***Brooks*** [2001] O.J. No. 1563, at para. 26, (2001) 153 C.C.C. (3d) 533 at 544 (Ont. S.C.J.); ***C. (D.D.)***

(1996) 187 A.R. 279, [1996] A.J. No. 829 (C.A.); ***Kong*** (2003) 23 Alta. L.R. (4th) 187 (Q.B.); ***Deschamps*** 2003 MBCA 116; ***Gillespie*** (2000) 146 Man. R. (2d) 279 (Q.B.);; M. Proulx and D. Layton, *Ethics and Canadian Criminal Law*, 2001, Irwin Law Inc. Toronto, c. 11, pp. 589 ff.; G.C. Hazard, Jr., W. W. Hodes, *The Law of Lawyering*, 3rd, ed. Aspen Law & Business, 2001, New York, N.Y.;Canadian Bar Association, *Code of Professional Conduct,* Ch. XII, Law Society of Alberta, *Code of Professional Conduct,* Ch. 14; Ch. 9, r.6; *Code of Conduct of the Bar of England and Wales*, London: The Council, 1990.

Appendices

[10] Appendix A: British Columbia withdrawal provisions in Code of Conduct

[11] Appendix B: Mississippi Rules of Professional Conduct - Terminating Representation

[12] Appendix C: Federation of Canadian Law Societies - Comments on Noisy Withdrawals

[13] Appendix D: Newfoundland Code of Professional Conduct - Withdrawal

[14] Appendix E: Illinois State Bar Association, Advisory opinion - Permissive Withdrawal

1. Background

[15] A.L. represents C, who is charged with one count of trafficking in cocaine. Some time ago, in co-operation with the prosecutor and the criminal trial co-ordinator, A.L. set October 2, 2003 as the trial date for that charge.

[16] On October 2, 2003, C did not appear for his trial. A.L. appeared, without the accused, to ask for leave to withdraw. The only ground advanced by A.L. in support of his application to withdraw was that he had not heard from his client for the preceding two weeks. According to A.L., after having had no contact with his lawyer since shortly after establishing the solicitor-client relationship, C resumed contact with him in the second week of September, 2003. At that time, a step requiring the personal attendance of C had been scheduled in Provincial Court for September 23; A.L. reviewed with C his obligation to appear in court on September 23, 2003. During the course of his application for leave to withdraw, A.L. informed the court that C did not attend in Provincial Court as required and a warrant from the presiding judge was issued on that date for C's arrest.

[17] A.L. did not provide, in support of his application, a copy of his written retainer agreement with C. Therefore, there is no evidence before the court that A.L.'s contract with his client included a term that the contract was unilaterally terminated if the accused failed to maintain regular, or specified, contact with the lawyer; indeed, it is my impression that such a term in a written retainer is not part of regular practice within the criminal defence bar in Edmonton..

[18] Co-incidentally, on October 3, 2003, I was asked by defence counsel in another case to adjourn until early 2004 a trial which had been set to commence on October 6, 2003. In that case, the accused was initially represented by A.L. who designated himself as the accused's lawyer in those proceedings in a document filed with the court on October 21, 2002. In advance of scheduled arraignments on April 9, 2003, a trial date of October 6-8, 2003 was pre-booked, that is the lawyers for the accused and for the Crown had agreed on trial dates with the criminal trial co-ordinator. A pre-trial conference date was scheduled for September 12, 2003. On August 26, 2003, A.L. made an *ex parte* application to withdraw in that case; there again the grounds were that he had had no contact with his client. He was granted leave to withdraw. At some point, new counsel appeared for the accused in this second case. The successor lawyer had undertaken to do his best to make himself available for trial on the dates that had been previously chosen; unfortunately, it developed that the successor lawyer could not free himself from obligations on October 6-8, and the successor lawyer therefore had to apply for an adjournment of the trial.

2. Publication ban

[19] A.L. advised the court that *ex parte* applications for leave to withdraw as counsel in criminal cases are routinely granted in this court and in the Provincial Court; I accept that submission. In the circumstances, therefore, it seemed to me inappropriate to name the individual lawyer who brought this application before me, since his practice is no different from that of many other similarly situated lawyers.

3. Obligation of lawyer to obtain leave of the court to withdraw/Late withdrawal by lawyer

[20] *In Alberta, when a lawyer is on the record in criminal proceedings, that lawyer may not withdraw legal services from the client except with leave of the court. The leave application gives the court the opportunity of determining whether there are contractual, ethical, or administrative implications to the late withdrawal of legal services.*

[21] There are two lines of authority in Canada on the issue of whether a lawyer requires the leave of the court to withdraw. The first is what might be referred to as the ***Leask*** or B.C. line of cases and the second is that which prevails in Alberta and in other Canadian provinces. A.L. did not challenge the Alberta practice of requiring leave. Therefore, I will say only a few words about what I understand to be the different perspectives within Canada on this issue.

[22] [I have not made explicit reference in this decision to the Alberta code of professional conduct for lawyers because I assume that all Alberta lawyers will have that resource readily available. I have referred to other professional conduct sources in an effort to demonstrate that, even where professional obligations are expressed differently, they are remarkably similar in content.]

[23] As I understand the position in British Columbia, lawyers are not required to obtain leave of the court to withdraw because a client always has the right to fire a lawyer, and the court cannot interfere with that right. The law concerning the untrammelled right of a client to fire a lawyer also applies in Alberta; an Alberta judge does not have the right to interfere with the client's termination of the contract for legal services. Indeed, it appears likely that an Alberta court would not require a lawyer fired during the course of trial to remain as the judge's assistant during the trial: ***Steele***.

[24] However, the Alberta requirement to obtain leave of the court to withdraw allows the court to explore whether the situation is, in fact, one of termination by the client as opposed to one of termination by the lawyer. The court may also have a responsibility, within the strictures imposed by solicitor-client privilege, to address the issue of whether a lawyer is entitled in the specific circumstances, to request permission to withdraw: see Appendix E. Moreover, even if the termination is clearly termination by the client, a court appearance allows the court to inform the client that the termination by the client of the legal services contract will not necessarily entitle the client to an adjournment of the proceedings, either to prepare for self-representation or to obtain the services of a new lawyer. Finally, even where it is clear that the client has fired the lawyer and an adjournment is required, the proceeding before the court gives the court the opportunity of giving what has become known as the "Hardy warning" that is of advising the client of the need to move quickly to obtain the services of a new lawyer, with information, if required, about how to contact Legal Aid or other providers of legal assistance: ***Hardy***.

4. The lawyer should not make an application to withdraw *ex parte*

[25] *When a lawyer applies for leave to withdraw from a criminal proceeding, for reasons grounded in contract and ethics, the lawyer should not appear ex-parte.*

[26] Although there will always be an ethical component to a lawyer's decision to apply *ex-parte* for leave to withdraw, there may be a contractual component to that decision as well.

a) Contractual considerations relating to the application to withdraw

[27] *There may be situations in which a lawyer has no contractual right to unilaterally, and on an ex-parte basis, withdraw legal services from a client.*

[28] A.L. did not satisfy the court that he had a unilateral right to withdraw legal services which termination could be confirmed *ex-parte*.

[29] A.L. suggested that his client had breached the contract for legal services by failing to remain in contact with his lawyer. However, A.L. did not provide a copy of the written contract with his client; it is unlikely that a term relating to the mode and frequency of client contact with the lawyer was a term of the written contract because such terms do not appear to be regular features of Edmonton contracts for the provisions of criminal legal services.

[30] In any event, before the court allowed a lawyer to terminate a contract unilaterally, it may be that a term of a written contract for legal services which imposed an obligation on the client to maintain some form of contract would have to be accompanied by a term which made it clear that a breach of the term requiring contact would result in instant, unilateral, termination of the contract. Even where failure to maintain contact was an explicit term of a contract and where the written contract contained an explicit warning about the contractual effect of a breach of that term, I assume that, before releasing a lawyer from obligations under that contract, a court may require evidence about any previous occasions on which the lawyer had chosen to waive the term requiring contact with a view to deciding whether a pattern had developed, and been acquiesced to, in which the formal terms of the contract were not enforced.

[31] Barring consideration of obligations imposed by the Law Society, a contract for the provision of legal services could be oral. When determining whether a lawyer can unilaterally terminate an oral contract to provide legal services on the basis of the client's failure to maintain contact, the court would have to consider whether it ought to recognize as an implied term of such oral contract that the client should remain in convenient touch with the lawyer, having in mind the disorganized lifestyle of some of the clients who require the services of a criminal law specialist.

[32] Even where there is a contractual basis for unilateral, uncommunicated termination of the contract to provide legal services, it may be that a lawyer has an ethical obligation to give notice to a client of the termination of legal services. That is the topic towards which I next turn.

b) Ethical considerations relating to the application to withdraw

[33] *Even where there is a clear contractual right to unilateral and ex-parte withdrawal of legal services, there may be an ethical obligation on a lawyer to give notice to the client of an intention to withdraw such services. A court's procedures should support, or at least not undermine, ethical obligations of lawyers.*

[34] There are many circumstances, of course, that require or entitle a lawyer to withdraw services from a client. It may be best for all of those circumstances to be outlined in the written retainer. However, even if they are not included in the retainer, the coming into existence of certain circumstances may require a lawyer to sever the solicitor-client relationship. A useful outline of the circumstances which either require or entitle a lawyer to terminate a relationship with a client are outlined in chapter 10 of the British Columbia code of professional conduct, which is reproduced as Appendix A. It will be noted that a failure by a client to maintain contact with a lawyer is presumably dealt with in the Optional Withdrawal section of chapter 10 under the heading "the client has refused to give adequate instructions to the lawyer". However, even that provision must presumably be interpreted within the context of the overall introduction to the Optional Withdrawal provision which reads as follows:

> 2. A lawyer may, but is not required to, sever the solicitor-client relationship or withdraw as counsel if there has been a serious loss of confidence between lawyer and client, such as where:
>
> (Emphasis added)

It goes without saying that the mere lack of contact by a client with their lawyer does not indicate a serious loss of confidence by the client in the lawyer. The lawyer who asserts that they have lost confidence in their client will presumably have to demonstrate the reasonableness of their position in light of the contractual provisions of the retainer.

[35] The Newfoundland Code of Professional Conduct, from which an extract is reproduced at Appendix D, requires appropriate notice to be given to a client of a lawyer's intention to withdraw.

[36] Although I recognize that it is dangerous to refer to practice standards outside Alberta without the assistance of an expert witness, and recognizing that there may be particular difficulties in attempting to draw useful analogies between practice in Alberta and practice in England which has a divided bar, but in an effort to demonstrate the widespread and generally consistent principles that apply to members of the legal profession, I have looked at some extracts from the English code of professional conduct. That code neatly encapsulates some of the reasons allowing a barrister to withdraw legal services in the following language:

> **609** Subject to paragraph 610 a barrister may withdraw from a case where he is satisfied that:
>
> (a) his instructions have been withdrawn;
>
> (b) his professional conduct is being impugned;
>
> (c) advice which he has given in accordance with paragraph 607 or 703 has not been heeded; or
>
> (d) there is some other substantial reason for so doing.
>
> **607** If at any time in any matter a barrister considers that it would be in the best interests of any client to have different representation, he must immediately so advise the client.
>
> **Conflicts between lay clients and intermediaries**
>
> **703** If a barrister in independent practice forms the view that there is a conflict of interest between his lay client and a professional client or other intermediary (for example because he considers that the intermediary may have been negligent) he

> must consider whether it would be in the lay client's interest to instruct another professional adviser or representative and, if he considers that it would be, the barrister must so advise and take such steps as he considers necessary to ensure that his advice is communicated to the lay client (if necessary by sending a copy of his advice in writing directly to the lay client as well as to the intermediary).

[37] With similar reservations to those expressed in relation to the English materials, and noting that American standards are also outside our area of expertise, but realizing that some Canadians appear to be of the view that American lawyers have broader autonomy in the matter of termination of services, I have consulted some American authorities. The authors of the *Law of Lawyering* make the following comments about the differences between the ABA's *Model Rules of Professional Conduct* and the *Restatement of the Law Governing Lawyers:*

> Other listed reasons for permissive withdrawal are more controversial and should be employed with correspondingly more caution precisely because the breakup of the client-lawyer relationship can less clearly be laid at the client's door. Indeed, for withdrawals based on these grounds, Restatement §32(4) specifically requires recalibration of the competing harms: if the harm to the client "significantly exceeds" the harm to the lawyer or others that prompted the impulse to withdraw, withdrawal is no longer permissible.
>
> A chief example is withdrawal in the face of client choices that the lawyer finds "repugnant or imprudent"; see Model Rule 1.16(b)(3) and Restatement of the Law Governing Lawyers §32(3)(f). Read too broadly, these provisions would permit lawyers to abandon clients at the first sign of disagreement or unpleasantness, which is antithetical to what a proper client-lawyer relationship should be. Clearly, lawyers ought to give clients the benefit of the doubt, and not withdraw unless the disagreement is fundamental, and the client's position so extreme as to be nearly impossible for most reasonable lawyers to countenance. See Restatement §32, Comment *j*.
>
> . . .
>
> Another possible ground for discretionary withdrawal arises when continuing the representation would impose an unreasonable financial burden on the lawyer, usually because of a miscalculation of the time or expenses involved; see Rule 1.16(b)(5). Restatement of the Law Governing Lawyers §32, Comment *m* notes, however, that this is usually a dubious ground, because lawyers are better able to forecast such matters and can provide for such contingencies (such as by requiring deposits for expenses, for example). Thus, under the Restatement there is no separate provision for withdrawal on this ground, but Comment *m* suggests that in rare cases it might trigger the more general "other good cause" provision set out in Restatement §32(3)(i).

[38] One type of American professional code of conduct provisions relating to the termination of the lawyer-client relationship is found in the Mississippi Rules of Professional Conduct, appended at B.

[39] In summary, therefore, it might be said that in each of Canada, England and the United States, lawyers are sometimes entitled to terminate their contract to provide legal services to clients. However, in every country, ethical standards may require a lawyer to notify the client that the contract has been terminated. That is not surprising, given the potential prejudice incurred by an unrepresented accused; such prejudice could even include incarceration, or a longer incarceration than would otherwise have occurred.

[40] The content of the ethical standard imposed in other jurisdictions is revealing of the nature of the ethical standard which applies to Alberta lawyers. In England, for example, we find the following:

> 610 A barrister must not:
>
> (a) cease to act or return instructions without having first explained to the client his reasons for doing so;
>
> (b) return instructions to another barrister without the consent of the client;
>
> (c) return a brief which he has accepted and for which a fixed date has been obtained or (except with the consent of the lay client and where appropriate the Court) break any other engagement to supply legal services in the course of his practice so as to enable him to attend or fulfil an engagement (including a social or non-professional engagement) of any other kind;
>
> (d) except as provided in paragraph 608 return any instructions or withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.
>
> (Emphasis added)

[41] Similar comments to those made in s. 610 (a) of the English code are made in the American text:

> . . . it would be improper to withdraw on this ground without first explaining the lawyer's proposed course of action, so that the client would have a chance to reconsider, thus influencing the future course of the representation; see Rule 1.4, discussed in § 7.4.

> Conscientious lawyers who are genuinely interested in assisting their clients, rather than imperiously dictating to them what is right and wrong, would also not withdraw without engaging the client in a serious moral dialog on the point of disagreement, see Rule 2.1,discussed in §§23.4-23.5 and accompanying Illustrations, as well as Illustration 20-5 in this chapter. Comments *j* and *n* to Restatement §32 present this view forcefully.

[42] The English and American comments relating to the need to advise a client of the intention to withdraw are, in fact, similar to the provisions established in R. 555 of the Rules of Court concerning withdrawal in civil cases; parenthetically, it will be noted that the solicitor who desires to remove herself as solicitor of record is dealt with in a different Rule than the Rule which governs the client who changes her lawyer: R. 554.

> 555.(1) Subject to subsection (6), a solicitor who desires to remove himself as solicitor of record for a party he has been representing may do so by
>
> (a) serving a written notice of his intention to withdraw from the record upon the party and upon all other parties who have provided an address for service, except those who have been noted in default or against whom a default judgment has been entered, and
>
> (b) filing proof of the required service.
>
> 2) The notice of withdrawal shall set out the last known address of the client.
>
> (3) The notice of withdrawal shall be endorsed with a notice to the party whom the solicitor is ceasing to represent to the following effect:
>
> "You are hereby notified that on the expiry of 10 days from the filing of the proof of service of this document the undersigned will no longer be your solicitor of record and you will not be entitled to be served with any pleadings or notice of other proceedings in the action unless a further address for service is filed and served in accordance with the Rules of Court."
>
> Name of Solicitor
>
> (4) On the expiry of 10 days from the filing of the proof of service of the notice of withdrawal upon all those parties required to be served, the solicitor shall be deemed to have withdrawn from the record and no documents relating to the action or matter shall be required to be served upon him or at the address for service provided by him.
>
> (5) On the expiry of 10 days, unless in the meantime the party has furnished a new address for service, the address set out in the notice of withdrawal shall be deemed to be that party's address for service and any other party may effect service of any document by mailing it to the party at that address by prepaid registered mail endorsed with a memorandum to the following effect:
>
> "This document is served by mail as no new address for service has been furnished by you."

> (6) Once a solicitor has executed a Certificate of Readiness in respect of an action, that solicitor shall not remove himself as solicitor of record for the party without leave of the Court.
> (7) The removal of a solicitor as a solicitor of record pursuant to the leave of the Court shall not be construed so as to affect any legal or ethical obligation of the solicitor to the solicitor's client.

[43] In summary on this point, the law recognizes a special obligation on lawyers to give notice to their clients of an intention to withdraw legal services. This unique type of obligation arises because of the unique relationship between lawyers and their clients and because of the unique vulnerability of those clients when deprived of legal services.

[44] However, even where the lawyer has the contractual right to withdraw services and no ethical obligation to the client, the lawyer may still fail to satisfy professional obligations to the criminal justice system. I will turn next to those issues.

c) Administrative considerations relating to the application to withdraw

[45] *Even where a lawyer has a contractual right to withdraw services and has given notice to the client of the intention to withdraw services, the court may deny the lawyer leave to withdraw where withdrawal would have a negative effect on the criminal justice system.*

[46] A lawyer's obligations are mainly to the client, but also the community and the justice system. We know that even where a lawyer has the contractual right to withdraw services, for example because the client has failed to pay for those services, the court may still require the lawyer to perform full professional services for the client if the lawyer's withdrawal will prejudice the criminal justice system, including, for example, the alleged victims of crimes or the witnesses who have been subpoenaed for the proceedings: ***C.(D.D.)***

[47] *A fortiori* then, or all the more reason then, for the court not to grant leave to a lawyer to withdraw when the application is made *ex parte*: where the application is made without the client, the court has neither the client's perspective of the potential prejudice to them of being fired by a lawyer nor full information about the effects on the trial process if the lawyer is allowed to fire the client. Even without full information about administrative effects of withdrawal, the court is entitled to assume that where leave to fire the client is granted, that will likely cause an adjournment of the process. The situation that I outlined in paragraph 18 above is, unfortunately, routine: where a lawyer has been given leave to withdraw, after the accused is arrested for non-appearance the accused will still require a lawyer and when a new lawyer is found it is unlikely that the successor lawyer will be available on the originally scheduled dates. New dates for the ongoing process will have to be found. Delay should not be encouraged in the criminal justice system. In the situation I referred to in paragraph 18, it may well be that the state's interest was not negatively affected: all of the Crown witnesses in the second case are

police officers who, unlike most ordinary witnesses, will presumably be in a position to rely on notes made at the time to refresh their memory at trial. However, in many situations, an adjournment of a trial will further weaken the memory of witnesses and make their evidence less reliable. Adjournments are a remedy of last resort. Accused would frequently, if not universally, continue the proceedings with their original lawyer if that remained an option.

[48] In summary on this point, when a lawyer wants to fire a client, the lawyer must apply to the court for permission to do so. The court will not always grant permission. In particular, the court will not give a lawyer permission to fire a client if such termination will create a prejudice either to the client or to the justice system.

d) Conclusion

[49] In summary, even where a lawyer has the contractual right to unilaterally, and without notice, terminate a contract for legal services, the lawyer will typically have an ethical obligation to inform the client of the intention to exercise that right.

[50] In recognition and support of those ethical obligations, a court should not grant a lawyer's application to withdraw until satisfied that the client has been notified of the lawyer's intention to terminate professional services.

[51] Even where a lawyer has a right to terminate a contract for service and has notified the client of the intention to withdraw, the court may not grant leave to withdraw. *A fortiori*, the court cannot give a lawyer leave to fire a client where the client has not been notified of the intention to terminate the contract because the court will not have a full understanding of the potential prejudice to the client and the administration if the lawyer fires the client.

5. Maintenance of solicitor-client privilege

[52] *In bringing an application to withdraw, either ex parte or on notice, counsel must be careful not to breach solicitor-client privilege.*

[53] In this case, A.L. thought that it was not a breach of that privilege to reveal that a warrant for his client's arrest had been issued by the Provincial Court. He based his conclusion on the fact that the proceedings in the Provincial Court were a matter of record.

[54] A.L. may be quite correct in concluding that what he told the court about the client's recent brush with the system was not a breach of his client's solicitor-client privilege. However, the fact that something is a "matter of record" may not release a lawyer from the obligation to maintain the client's privilege in relation to that "matter of record" if the lawyer acquired the knowledge of that fact through representation of the client. For example, defence counsel who hears a prosecutor tender to a sentencing court a criminal record which the defence counsel knows is incomplete may be unable to correct the prosecutor, for to do so may be to breach solicitor-client privilege: ***Brooks*** (2001) 153 C.C.C. (3d) 533 at 544 (Ont. S.C.J.)

> [para26] Unfortunately, Crown counsel failed to file the document which she asserted contained a statement of the applicant's prior criminal record. Ordinarily, a CPIC printout or equivalent should be made an exhibit. What resulted was a meandering and muddled discussion in which the Court and the prosecutor directed questions to the applicant through counsel as to his prior criminal record. This inquisitorial approach is to be deplored. An accused is free to acknowledge the tendered record or not or to make no statement at all through counsel. The accused's right to silence and right against self-incrimination must be respected. Defence counsel herself, for whatever reason, failed to object and indeed participated in the exercise.

[55] We also understand that lawyers may face diverging opinions about the amount of information which can properly be disclosed on an application for leave to withdraw. As a further example of a current problem, Appendix C set out some material distributed by the Federation of Canadian Law Societies in relation to certain American requirements for a "noisy" withdrawal which would presumably breach an Alberta lawyer's obligation to protect the client's privilege.

7. Determining whether Alberta criminal rules of practice required in this area

[56] Although rules of practice deal with practice, not substance, within its current comprehensive Rules Project, it would be helpful if the Alberta Law Reform Institute were able to add consideration of the potential need for rules of practice dealing with applications for leave to withdraw in criminal proceedings to its already heavy workload.

Heard on the 2nd day of October, 2003.
Dated at Edmonton, Alberta this 31st day of October, 2003.

J.B. Veit
J.C.Q.B.A.

Appendix A
British Columbia Withdrawal provisions in the Code of Conduct

CHAPTER 10

WITHDRAWAL

Obligatory withdrawal

1. A lawyer shall sever the solicitor-client relationship or withdraw as counsel if:

    (a) discharged by the client,

    (b) instructed by the client to do something inconsistent with the lawyer's duty to the court,

    (c) the client is taking a position solely to harass or maliciously injure another,

    (d) the lawyer's continued involvement will place the lawyer in a conflict of interest, or

    (e) the lawyer is not competent to handle the matter.

Optional withdrawal

2. A lawyer may, but is not required to, sever the solicitor-client relationship or withdraw as counsel if there has been a serious loss of confidence between the lawyer and client, such as where:

    (a) the client has deceived the lawyer,

    (b) the client has refused to give adequate instructions to the lawyer, or

    (c) the client has refused to accept and act upon the lawyer's advice on a significant point.

Residual right to withdraw

3. In situations not covered by Rules 1 and 2, a lawyer may sever the solicitor-client relationship or withdraw as counsel only if the severance or withdrawal:

    (a) will not be unfair to the client, and

    (b) is not done for an improper purpose.

4. Unfairness to the client will depend on the circumstances of each case, but will normally include consideration of whether the severance or withdrawal will:

   (a) occur at a stage in the proceedings where the client will have to retain another lawyer to do the same work, or part of it, again,

   (b) leave the client with insufficient time to retain another lawyer, and

   (c) give the newly retained replacement lawyer insufficient time to prepare to represent the client.

5. Impropriety will depend on the circumstances of each case, but will include severance or withdrawal in order to:

   (a) delay court proceedings, and

   (b) assist the client in effecting an improper purpose.

Withdrawal for non-payment of fee

6. Where a lawyer and client agree that the lawyer shall act only if the lawyer's fee is paid in advance, the lawyer shall confirm that agreement in writing to the client and shall specify a payment date.

7. A lawyer who decides to withdraw as counsel because the client has not paid the lawyer's fee when due shall withdraw in sufficient time to enable the client to obtain the services of another lawyer and to enable that other lawyer to prepare adequately for trial.

Procedure for withdrawal

8. Upon severance or withdrawal, the lawyer shall forthwith:

   (a) notify the client in writing, stating:

      (i) the fact that the lawyer has severed the solicitor-client relationship or has withdrawn as counsel,

      (ii) the reasons, if any, for the severance or withdrawal, and

      (iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly,

(b) notify in writing the court registry where the lawyer's name appears as counsel for the client that the lawyer has withdrawn and, where applicable, comply with any statutory requirements,[1]

(c) notify in writing all other parties, including the Crown where appropriate, of the severance or withdrawal,

(d) account to the client for:

(i) any money received for fees or disbursements, and

(ii) any valuable property held on behalf of the client,[2] and

(e) take all reasonable steps to assist in the transfer of the client's file.

Confidentiality

9. If the reason for severance or withdrawal results from confidential communications between the lawyer and the client the lawyer shall not, unless the client consents, disclose the reason for the severance or withdrawal.

Limited retainer

10. A lawyer who acts for a client in a limited capacity only shall disclose promptly to the court and to any other interested person in the proceeding the limited retainer, in any case where failure to make disclosure would mislead the court or that other person.

* * *

FOOTNOTES:

1. The relationship between a lawyer and client is contractual in nature, and the general rules respecting breach of contract and repudiation apply. If a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, and the decision to withdraw is not reviewable by the court, subject to its authority to cite a lawyer for contempt if there is evidence that the withdrawal was done for some improper purpose. Otherwise, the decision to withdraw is a matter of professional responsibility, and a lawyer who withdraws in contravention of this Chapter is subject to disciplinary action by the Benchers. See *Leask v. Cronin*, Prov. J. (1985) 66 BCLR 187 (BCSC). In civil proceedings the lawyer is not required to obtain the court's approval before withdrawing as counsel, but must comply with Supreme Court Rule 16(4) before being relieved of the responsibilities which attach as "solicitor acting for the party." See Luchka and *Luchka v. Zens et al* (1989) 37 BCLR (2d) 127 (BCCA).

2. When, upon severance or withdrawal, the question of a right to a lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce such a lien if the result would be to prejudice materially the client's position in any uncompleted matter.

Before accepting employment, the successor lawyer should be satisfied that the lawyer formerly acting for the client has withdrawn or has been discharged. It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps toward settling or securing any account owed to the lawyer formerly acting, especially if the latter withdrew for good cause or was capriciously discharged. However, if a trial or hearing is in progress or is imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.

Appendix B.

Mississippi Rules of Conduct

M.R.P.C. 1.16

MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

(As Amended)

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(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:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without materially adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal. A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation of the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge. A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal. A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.
A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal. Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

See MSB Ethics Opinions Nos. 49 and 105.

Appendix C

“Noisy withdrawal”

Federation of Canadian Law Societies

The Federation has applauded the U.S. Securities and Exchange Commission (SEC) for listening to its concerns and making changes to rules that would have extended to Canadian lawyers. The SEC announced modifications that exclude most foreign lawyers from the rules adopted on January 23, 2003. The SEC also announced its intention to allow more time for comment on a proposed "noisy withdrawal" provision in the rules governing the conduct of lawyers.

The Sarbanes-Oxley Act requires the SEC to establish rules governing the conduct of lawyers who practise before it. The Federation advised the SEC that its proposed definition of "appearing and practising before the Commission" should be restricted to lawyers who prepared submitted documentation substantially related to SEC filing. Under the SEC's final rules, foreign lawyers who are not admitted in the United States and who do not advise clients regarding US law, are not covered by the rules. The final rules cover lawyers providing legal services to an issuer who have an attorney-client relationship with the issuer, and who have notice that documents they are preparing or assisting in preparing will be filed or submitted to the SEC.

The SEC is also reconsidering a proposed requirement for lawyers to make a "noisy withdrawal" if they suspect clients are in violation of U.S. securities law and no action is taken to remedy the wrongdoing. Under this requirement, lawyers would have been required to withdraw from a matter and inform the SEC of the withdrawal. Such a requirement could have amounted to a breach of solicitor and client confidentiality.

The SEC has proposed an alternative to "noisy withdrawal". A lawyer would still be required to withdraw under certain circumstances, but the rule would require the issuer, rather than the lawyer, to publicly disclose the lawyer's withdrawal or provide written notice that the lawyer did not receive an appropriate response to a report of material violation. The SEC's proposed requirement for a "noisy withdrawal" by lawyers shall be sent for public review for 60 days before a final decision is made.

The Federation will continue to monitor the development of this issue closely while consulting with governments and legal organizations in Canada and abroad in order to address questions of jurisdiction or rules focusing on securities issues.

Appendix D

Rules in Newfoundland

Code of Professional Conduct

CHAPTER XII

WITHDRAWAL

RULE

The lawyer owes a duty to the client not to withdraw services except for good cause and upon notice appropriate in the circumstances.1

Commentary

Guiding Principles

1. Although the client has a right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having once accepted professional employment, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

2. The lawyer who withdraws from employment should act so as to minimize expense and avoid prejudice to the client, doing everything reasonably possible to facilitate the expeditious and orderly transfer of the matter to the successor lawyer.[3]

3. Where withdrawal is required or permitted by this Rule, the lawyer must comply with all applicable rules of court as well as local rules and practice.

Obligatory Withdrawal

4. In some circumstances, the lawyer will be under a duty to withdraw. The obvious example is following discharge by the client. Other examples are (a) if the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the court and, following explanation, the client persists in such instructions; (b) if the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another; (c) if it becomes clear that the lawyer's continued employment will lead to a breach of these Rules such as, for example, a breach of the Rules relating to conflict of interest; or (d) if it develops that the lawyer is not competent to handle the matter. In all these situations there is a duty to inform the client that the lawyer must withdraw.4

Optional Withdrawal

5. Situations where a lawyer would be entitled to withdraw, although not under a positive duty to do so, will as a rule arise only where there has been a serious loss of confidence between lawyer and client. Such a loss of confidence goes to the very basis of the relationship. Thus, the lawyer who is deceived by the client will have justifiable cause for withdrawal. Again, the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate such a loss of confidence. At the same time, the lawyer

should not use the threat of withdrawal as a device to force the client into making a hasty decision on a difficult question.[5] The lawyer may withdraw if unable to obtain instructions from the client.6

Non-payment of Fees

6. Failure on the part of the client after reasonable notice to provide funds on account of disbursements or fees will justify withdrawal by the lawyer unless serious prejudice to the client would result.[7]

Notice to Client

7. No hard and fast rules can be laid down as to what will constitute reasonable notice prior to withdrawal. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations the governing principle is that the lawyer should protect the client's interests so far as possible and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.8

Duty Following Withdrawal

8. Upon discharge or withdrawal the lawyer should:

   (a) deliver in an orderly and expeditious manner to or to the order of the client all papers or property to which the client is entitled;

   (b) give the client all information that may be required about the case or matter;

   (c) account for all funds of the client on hand or previously dealt with and refund any remuneration not earned during the employment;

   (d) promptly render an account for outstanding fees and disbursements;

   (e) co-operate with the successor lawyer for the purposes outlined in paragraph 2.

The obligation in clause (a) to deliver papers and property is subject to the lawyer's right of lien referred to in paragraph 11. In the event of conflicting claims to such papers and property, the lawyer should make every effort to have the claimants settle the dispute.9

9. Co-operation with the successor lawyer will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the express consent of the client.

10. The lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor lawyer or lawyers to the extent permitted by this Code, and should seek to avoid any unseemly rivalry, whether real or apparent.10

Lien for Unpaid Fees

11. Where upon the discharge or withdrawal of the lawyer the question of a right of lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce such a lien if the result would be to prejudice materially the client's position in any uncompleted matter.11

Duty of Successor Lawyer

12. Before accepting employment, the successor lawyer should be satisfied that the former lawyer approves, or has withdrawn or been discharged by the client. It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps toward settling or securing any account owed to the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.12

Dissolution of Law Firm

13. When a law firm is dissolved, this will usually result in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients will prefer to retain the services of the lawyer whom they regarded as being in charge of their business prior to the dissolution. However, the final decision rests in each case with the client, and the lawyers who are no longer retained by the client should act in accordance with the principles here set out, and in particular commentary 2.13

NOTES

1. Cf. CBA-COD 11; Que. 3.03.04, .05; B.C. G-5; IBA B-4; ABA-MR 1.16; ABA EC 2-32, DR 2-110(A), (C). For cases, see 4 Can. Abr. (2d) under "Barristers and Solicitors: Termination of Relationship", paras. 101-02 and supplements. See also *Orkin*, pp. 90-95.

2. In appeals to the Supreme Court of Canada see Rule 14(1) of that Court, whereunder the lawyer of record in the court below may be deemed to represent the client for purposes of the appeal.

3. Cf. ABA DR 2-110(A). Provincial Rules of Court provide for the giving of notice of change of solicitors and for the making of applications for leave to withdraw. For cases see 4 Can. Abr. (2d) under "Barristers and Solicitors: Change of Solicitors", paras. 342-58 and supplements. In legal aid cases provincial regulations may also require notice to the plan administrators; see, e.g., in Ontario O. Reg. 59/86 as amended, s. 62(1)(a). On an application under the Ontario rules for an order that the lawyer has ceased to act, the supporting material must show the particular facts warranting the lawyer's ceasing to act: *Ely v. Rosen* (1963), 1 O.R. 47 (Ont. H.C.)."I have no doubt that the learned trial Judge seriously erred in law when he purported to direct counsel for the accused that he could not withdraw from the case, notwithstanding the fact that the accused, his client, apparently wished to discharge him.", per Jessup, J.A. in *Regina v. Spataro* (1971), 3 O.R. 419 at 422 (Ont. C.A.).

4. Cf. CBA 3(2) and 5(5); IBA B-7; ABA DR 2-110(B)."... this case where [N.R.] is held to have sworn affidavits of discovery which were false and where the solicitor ... should not have allowed them to be sworn if he had done his duty which he owed to the Court.... The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case.", per Lord Wright in *Myers v. Elman* (1940), A.C. 282 at 322 (H.L.).
For a panel discussion chaired by Gale, C.J.O. on the rights and obligations of lawyers with respect to withdrawal in criminal cases, see Law Society of Upper Canada, *Special Lectures* (1969) at pp. 295-99.

5. Cf. ABA DR 2-119(C)."No solicitor ... need put up with abuse and accusations such as were alleged to have been made here and would be fully entitled, after them, to withdraw from the case. An accusation of fraud, in fact, would make it improper for the solicitor to continue to act for the client, since it showed that the client had lost confidence in him.", per Urquhart, J. in *Re Solicitors Act; Collision v. Hurst* (1946), O.W.N. 668 at 671 (Ont. H.C.).

6. Failure to instruct counsel constitutes repudiation which counsel could accept and terminate the employment.

7. "An attorney is ordinarily justified in withdrawing if the client fails or refuses to pay or secure the proper fees or expenses of the attorney after being reasonably requested to do so.", proposition in *Corpus Juris Secundum* approved and applied in *Johnson v. Toronto* (1963), 1 O.R. 626 (Ont. H.C.).

8. "If the case is scheduled to be tried on a date which will afford the accused ample time to retain another counsel, a lawyer who has not been paid the fee agreed upon may withdraw.... But if he waits until the eve of the trial so that there is no time for another counsel to prepare adequately ... it becomes too late for him to withdraw. He must

continue on ....", from panel discussion, note 4, *supra*, at pp. 295-96; and cf. Alta. 8: "If a member accepts a retainer to represent an accused at a preliminary hearing and not at the trial . . . [he] should have a clear and unambiguous understanding with his client to that effect and ... should advise the Court at the beginning of the inquiry ...".

9. "... [C]ounsel should be generous in accounting for any moneys which have been received but not yet earned, bearing in mind that a great deal of the time he has spent ... may be of little value to the other counsel who is required to take over.", *ibid*., at p. 296. As to the proper disposition of papers, which is frequently a perplexing problem, see *Cordery on Solicitors* (6th ed.) at pp. 118-20 for a discussion of law and principles and a table of categories with supporting authorities.

10. "It is quite apparent ... that the applicant dismissed the ... solicitor without just cause .... The common law right of a solicitor to exercise a lien on documents in his possession where he has been discharged without cause by his client is well recognized, subject, however, to certain exceptions ... where third parties are involved, the Court may interfere ... always upon the basis that whereas a solicitor may assert a lien . . . he should not be entitled to embarrass other parties interested.", per McGillivray, J.A. in *Re Gladstone* (1972), 2 O.R. 127 at 128 (Ont. C.A.).

11. See Morden, "A Succeeding Solic-itor's Duty to Protect the Accounts of the Former Solicitor" (1971) 5 Law Soc. U.C. Gaz. 257.

12. Cf. CBA 4(1).

13. "Subject to any question of lien, the client's papers in possession of the firm belong to the client and cannot be the subject of agreement as against him, but as *between themselves* solicitors can agree that on dissolution the clients of the old firm and their papers shall either be divided between the dissolving partners, or belong to those continuing the business of the firm ....", *Cordery on Solicitors* (6th ed.) at pp. 463-64 (emphasis added).

Appendix E

Illinois
Permission to withdraw in some cases, e.g. client with mental health difficulty

ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

THE FIRST DIGEST OF THIS OPINION WAS AFFIRMED BY THE BOARD OF GOVERNORS JANUARY 1991. PLEASE SEE THE 1990 ILLINOIS RULES OF PROFESSIONAL CONDUCT, RULE 1.14(b). THE SECOND DIGEST OF THIS OPINION WAS OVERRULED BY THE BOARD OF GOVERNORS. PLEASE SEE RULES 1.14(b), 1.16(b)(1)(D), AND 1.7(b) DIGEST.

Opinion No. 89-12

April 1990

Topic: Permissive Withdrawal; Confidences of Clients

Digest: It would not be professionally improper for a lawyer to request permission of the Court to withdraw if the client's actions or conduct is rendering the lawyer's fulfillment of employment difficult or is demanding action which in the lawyer's judgment is contrary contrary to the law.

Under the facts presented, it would be professionally improper for a lawyer to suggest the establishment of guardianship for a client when the information upon which the lawyer acts was learned by the lawyer through the confidential relationship.

Ref.: Rules 2-110(c)(1)(D), 7-101(a)(1) and 4-101(b)(1) and (b)(2)

EC 7-12

ISBA Advisory Opinion No. 84-2

Ill.Rev.Stat., Ch. 110 1/2, §11a-3

FACTS

The inquiring lawyer represents a client in a divorce proceeding. He has obtained what he feels to be a favorable settlement. The client has a history of psychiatric problems and is irrational in discussions with the lawyer. The client had consented to the proposed Judgment and Agreement and now refuses to sign. The lawyer does not believe the client is capable of making decisions in her own best interest.

The client has also begun to demand nearly impossible tasks of the lawyer. For example, though the client has no funds to pay for a future law suit, the client wants full custody of the 17-year old child who moved in with the spouse and who refuses to live with the client. (The Committee presumes that issues of custody are addressed in the proposed Judgment and Decree.)

The lawyer inquires whether he is able to withdraw from representation in the divorce proceeding. He also inquires whether he is able to suggest that the Court determine whether a guardian need be appointed without breaching the confidentiality between the lawyer and a client.

QUESTIONS

1. Whether the inquiring lawyer is permitted to withdraw from representation when a client acts irrationally, makes impossible demands, and refuses to follow the recommendations of the lawyer.

2. Whether it is proper for the lawyer to suggest to a Court that it determine whether or not guardianship of the client is appropriate.

OPINION

Generally, a lawyer shall not withdraw from a matter which is pending before a tribunal; however, Rule 2-110(c)(1)(D) allows withdrawal by a lawyer if a client "renders it unreasonably difficult for the lawyer to carry out his employment effectively." Among other facets of a lawyer's employment is the requirement to "seek the lawful objectives of his client" (7-101(a)(1)). If the client is creating obstacles to the lawyer's fulfillment of his employment, through irrational behavior and/or conduct, a request to withdraw would not be improper.

Lastly, the question arises as to whether or not the lawyer may request the Court, when he asks permission to withdraw, to determine if guardianship is proper. Rule 4-101(b)(1) and (2) state that the lawyer should not "reveal" a confidence or secret or "use" a confidence or secret of his client to the disadvantage of his client. If suggestions of a guardianship would require the use to the disadvantage of his client or the revelation of a confidence or secret, such use or revelation would be improper. If that which the lawyer learned would be the basis of adjudication, then to testify would be a breach of confidentiality.

It is recognized that the mental or physical condition of a client may place additional responsibilities on the lawyer as set forth in EC 7-12; however, the duty to preserve confidences of a client must still be of primary consideration. ISBA Advisory Opinion 84-2 acknowledged that a lawyer has a duty to both the court and his client. Though the matter in that opinion dealt with possible fraud upon the court, an even more serious matter than that being addressed by this opinion, the opinion recognizes the duty of preservation of confidences to be superior to that of the duty to the court.

[W]hile ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court, this duty does not transcend that to preserve the client's confidences.

In light of the fact that the Probate Act is very broad as to who may file a petition alleging incompetency, including the court on its own motion, to place that burden on the lawyer, thus causing the lawyer to breach the confidence of the client, is improper. Illinois Revised Statutes, Chapter 110 1/2, Section 11a-3.

This opinion is not directed at situations other than those presented in the facts herein.

* * *

Another Illinois situation
Lawyer wishing to withdraw if client is being difficult

In Colorado, there are cases which have decided the issue:

Rule 1.16.Declining or Terminating Representation

Rule 1.16.Declining or Terminating Representation

(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:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) A lawyer may not request permission to withdraw in matters pending before a tribunal and may not withdraw in other matters unless such request or such withdrawal is because:

(1) the client:

(A) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(B) personally seeks to pursue an illegal course of conduct.

(C) insists that the lawyer pursue a course of conduct that is illegal or that is prohibited by these rules.

(D) by other conduct renders it unreasonably difficult for the lawyer to carry out the lawyer's employment effectively.

(E) insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited by these rules; or

(F) deliberately disregards an agreement or obligation to the lawyer as to expenses or fees; or

(2) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal; or

(3) the lawyer's client knowingly and freely assents to termination of the lawyer's employment; or

(4) the lawyer believes in good faith in a proceeding pending before a tribunal that the tribunal will find the existence of other good cause for withdrawal.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

ANNOTATIONSCOMMENT

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Whether future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawal or being discharged by the organization's highest authority is beyond the scope of these Rules.

COMMITTEE COMMENT

Rule 1.16(a) is similar to Code provision DR 1-109. Rule 1.16(b) is generally similar to Code provision DR 2-110(C), and has been revised to restrict counsel's flexibility in permissive withdrawals. The revisions are patterned after DR 2-110. The concept of permitting withdrawal where "other good cause for withdrawal exists," found in the ABA Model Rules has been deleted. The Committee believes that the public is best served when a specific basis for withdrawal is required.

Rule 1.16(c) and (d) are substantially similar to Code provisions DR 2 110(A)(1), (2) and (3).

ANNOTATION

Annotator's note.

Rule 1.16 is similar to DR 2-103, DR 2-104, and DR 2-110 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 2-104 have been included in the annotations to this rule. Cases construing DR 2-103 have been included under Rule 1.5 and cases construing DR 2-110 have been included under Rule 1.2.

Attorney discharged without cause may not recover damages under a non-contingency contract for services not rendered before the discharge. It is important to balance the attorney-client relationship and the attorney's right to receive fair and adequate compensation. interests. Olsen and Brown v. City of Englewood, 889 P.2d 673 (Colo. 1995).

The decision as to whether defense counsel should be permitted to withdraw lies within the sound discretion of the court. If the trial court has a reasonable basis for concluding that the attorney-client relationship has not deteriorated to the point at which counsel is unable to give effective assistance in the presentation of a defense, then the court is justified in refusing to appoint new counsel. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Disagreement concerning the refusal of defense counsel to call certain witnesses is not sufficient per se to require the trial court to grant a motion to withdraw. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Among the factors a trial court must consider in determining whether withdrawal is warranted is the possibility that any new counsel will be confronted with the same irreconcilable conflict. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Public censure instead of private censure was appropriate where attorney failed to respond to discovery requests and motions for summary judgment and the findings of the board did not support the applicability of ABA Standard 9.32(i) as a mitigating factor since there was no medical evidence that attorney was affected by chemical dependency or that alcohol contributed to or caused the misconduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's restitution agreement was neither an aggravating nor mitigating factor since the attorney did not propose or attempt any form of restitution until after a request for investigation had been filed with the office of disciplinary counsel. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's argument that public discipline is not appropriate because it would stigmatize a recovering alcoholic was rejected since overriding concern in discipline proceedings is to protect the public through the enforcement of professional standards of conduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's professional misconduct involving the improper collection of attorney's fees in six instances, and the failure to withdraw upon client's request in one instance justified 45-day suspension. People v. Peters, 849 P.2d 51 (Colo. 1993).

An attorney is entitled only to compensation for the reasonable value of the services rendered if the attorney is employed under a fixed fee contract to render specific legal services and is discharged by the client without cause. The client was entitled to discharge the attorneys without cause and without incurring any further liability, other than payment for services rendered on a quantum meruit theory. Olsen and Brown v. City of Englewood, 867 P.2d 96 (Colo. App. 1993).

Any contractual provision that constrains a client from exercising the right freely to discharge his or her attorney is unenforceable. A client has an unfettered right to discharge freely its attorney without incurring liability under ordinary breach of contract principles. Olsen and Brown v. City of Englewood, 867 P.2d 96 (Colo. App. 1993).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo.1997).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Suspension for one year and one day appropriate where attorney violated paragraph (d) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Williams, 936 P.2d 1289 (Colo. 1997); People v. Barr, 957 P.2d 1379 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998);
In re Corbin, 973 P.2d 1273 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Damkar, 908 P.2d 1113 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998).

Cases Decided Under Former DR 2-104. Law reviews.

For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990).

For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).