Practice Tips

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RULE OF THE MONTH: RPC 1.16
(Declining or Terminating Representation)

Recently, and hopefully by coincidence, I reviewed several attorney complaints which all had the same underlying theme: the attorney stopped working on a client’s case and didn’t inform the client. In case you’re newly admitted and reading this column, just know that’s bad. As such, this month’s cautionary tale is that if you decide to stop working on your client’s case, don’t forget to let them know about it.

Now most attorneys, including those who fail to notify their clients that they are withdrawing from their matter, are aware of RPC 1.16(c) (Declining or Terminating Representation), which states that a “lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating representation.” In addition, subsection (d) of the rule states that “[u]pon 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....” Similar requirements are also enunciated under Supreme Court Rule 46 (Withdrawal or change of attorney).

In regard to subsection RPC 1.16(c), many of Nevada’s judicial districts have enacted local rules specifically requiring an attorney to obtain the court’s permission prior to withdrawing from a matter pending before the court. So, if the attorney knows the rules, how does he or she forget to inform the client? The problem often begins with a combination of sloppy law office management and the attorney-client relationship ending because of the client’s inability to pay or unhappiness with progression of his or her case.

In such an instance, the clients often tell the attorney to cease working on their matter while they obtain new counsel. Given that the practice of law often involves jumping from one emergency to the next, the soon-to-be-former client’s case is placed on the backburner. Sometimes, the new attorney is never found. If the firm doesn’t have great calendaring procedures, the client’s matter may very well become lost in the shuffle and forgotten.

A disappearing client is also problematic, especially when an attorney is retained to pursue a medical malpractice case or personal injury matter. Usually the problem is that the attorney needs further information from the client, who is slow to respond or is frequently out of town. In a busy firm, the mentality can become, “let’s wait until we hear from the client” before taking any further steps, and the matter is subsequently forgotten. Meanwhile, the statute of limitations is ticking away.

We’ve seen cases where the attorney “waited” well over a year to hear back from the client (who, it turns out, is often waiting to hear from the lawyer). In such instances, the way the attorney finally hears from the client is usually either via new counsel or a letter from the state bar. The attorney is then caught between defending against a RPC 1.3 (Diligence) charge and/or a RPC 1.16 charge.

These scenarios become particularly problematic if the underlying matter is being litigated in court and the discovery deadline is approaching or if opposing counsel files a motion for dismissal or summary judgment in the meantime. Further, while you are officially the attorney-of-record, opposing counsel cannot directly contact your client, given the constraints of RPC 4.2 (Communications With Parties Represented By Counsel). As such, you will receive the motion. Even if you subsequently permit
opposing counsel to communicate with the client, you’re still responsible for either filing an opposition or potentially becoming liable for the consequences.

When attorneys who find themselves in such a quandary call the state bar, we note that the attorney is probably stuck either preparing an opposition for which he or she is unlikely to be paid, or risking a potential malpractice case and/or disciplinary complaint. If the court allows, the attorney may seek an order shortening time to hear a withdrawal motion and seek to obtain an extension for the client. Still, if stuck between drafting a pleading free of charge or facing a possible discipline complaint and/or malpractice suit, we respectfully suggest working without pay until you can get released from the case. It may just save you headaches (and potentially money) in the long run.

Thankfully, most attorneys know better and, very often, complaints alleging client abandonment or neglect are quickly resolved when the respondent attorney provides copies of a court order permitting withdrawal, or of letters and/or e-mails to the clients informing them the firm was withdrawing from representation along with the applicable statute of limitations.

So, if you’re no longer representing a client, make sure to get it on paper and let the client know. Not only will you save the Office of Bar Counsel some work, you will save yourself time, stress and money, and not necessarily in that order.

“When the Office of Bar Counsel deals with non-responsive attorneys, we always send them correspondence via both regular and certified mail with return receipt requested.”

Withdrawal is easier in a pre-litigation scenario because, if the other requirements of RPC 1.16 are met (such as allowing the client adequate time to retain new counsel and there is no material adverse effect on the client’s interests), you are only required to give the client reasonable notice, e.g., sending the client a certified letter indicating that you are withdrawing from representation. When the Office of Bar Counsel deals with non-responsive attorneys, we always send them correspondence via both regular and certified mail with return receipt requested. That way, even if they ignore the certified mailings, they still receive the regular mailings. And if the regular mailing doesn’t bounce back to our office, there is a presumption they received it.

At my prior firm, the moment that the continued representation of a client became unfeasible, a termination letter or motion to withdraw was immediately prepared.

If a client wasn’t responding, we’d send letters and create a paper trail to establish our diligence. Just because the client may bear some culpability if his or her case is lost, it doesn’t automatically absolve the attorney’s conduct given our fiduciary duty and ethical obligations to the client.

1. See e.g., FJDCR 22 (Appearances; substitutions; withdrawal or change of attorneys) (Carson City and Storey County); WDCR 23 (Appearances; substitutions; withdrawal or change of attorneys) (Washoe County); 4JDCR 14 (Appearances; substitutions; withdrawal or dismissal of attorneys) (Elko County); EDCR 7.40 (Appearances; substitutions; withdrawal or change of attorneys) (Clark County); and NJDCR 21 (Withdrawal of counsel) (Douglas County).