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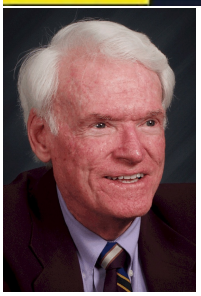

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❖ The following is a PowerLitigation™ article of Leonard Bucklin.

#TIP3031

Terminating Representation: Checklist

In the best of litigation practices, there comes a time when you realize that a client is not responding to your requests, is hiding evidence, is not paying your bills, or is simply a lying, rude, nasty person that you cannot tolerate. You might call that client an SOB, but let's use the term you would use in court: that client is a "difficult client."

The difficult client is going to get you into trouble sooner or later. Get rid of the difficult client, if you legally and ethically can do that.

Getting rid of a difficult client is the best form of risk management. It's also the best way to free up your time to work on more satisfactory cases in files.

When it becomes evident that you must terminate the representation of your litigation client, here is a checklist to use. Termination is not a legally easy process, so use a checklist and double-check everything you do.

Before you get to the actual termination (and using the checklist), you need to determine the answer to three questions.

1. When should you fire your client?

2. Can you fire your client?

3. What are the exact words – in one sentence – you will use to express your valid reason for withdrawal from representing your client?

When should you fire your difficult client?

There is only one answer to when you should fire a difficult client. Whether you call it "firing the client," "terminating representation," or "withdrawing as attorney, or simply "getting rid of that SOB" — do it

— and do it now!

Can you fire your client?

Each jurisdiction is different, but an attorney may withdraw from a case only a legally and ethically valid reason (and only if you can show that the client's interests won't be adversely effected.) Valid reasons include:

- Conflicts of interest;
- Client consent (Hopefully you have some good language in your fee contract that gives "client consent" to your withdrawal if the client does a specified item, e.g., fails to pay a fee bill in 30 days.);
- A client's insistence on taking a legally unjustified position;
- A client's failure to cooperate or communicate;
- Personality conflicts that rise to a level which prevents successful representation;
- A client's failure to pay attorneys fees;
- Further prosecution of the case by you will be an unreasonable financial burden; or
- A client's unethical, fraudulent, or criminal activity.

What are the exact words – in one or two simple sentences – you will use to express your valid reason for withdrawal from representing your client?

Sometimes, there is a legal and ethics problem — arising from the confidentiality of attorney-client communications, and from a duty of fidelity to the client — in telling the

court your reason for ;your request to withdraw from representing the client. Your client is your client – that means you cannot do anything that would be adverse to the client. For example, you cannot march up to the judge and say "my client lied in a deposition and he says he will do it again in court." You cannot put into the court record that your client never will be able to prove a claim of assault that he wants you to add to the pleadings.

You will need to do some legal research if your reason would put on the record something that would be adverse to your client. There is a wonderland of legal differences from state to state. E.g., if you client is preparing to lie in testimony, some states say you cannot do anything until after the client has lied in court, other states say that you should tell the court in camera, other states say you should simple say that "ethical reasons regarding my client's testimony require my withdrawal" and refuse to say anything more, and so on and on through sundry variations among the states.

Let's use Oregon as an example. The Oregon State Bar Legal Ethics Comm., at Op 2011, 8/11, opined that it would be unethical for a lawyer to make any of the following statements in court documents or open court (assuming that the contract of employment does not give informed consent to the attorney making such statements:

- My client won't listen to my advice
- My client won't cooperate with me.
- My client won't pay my bills.
- My client won't cooperate in making discovery responses.

According the Oregon ethics opinion, an attorney cannot make any of those statements (unless disclosure is implicitly authorized, or the client has given informed consent because they reveal information relating to the representation of a client.

In many states, all you can ethically do is what the Oregon ethics committee suggests. Say only:

> "The situation is such that professional considerations require me to terminate the representation. If the court orders me, I will submit additional information under seal to the court."

So, after you have decided to fire the client, to your legal research in your jurisdiction on exactly what you can say that is within the ethical rules of your jurisdiction.

Now that (1) you have decided to fire the client, and (2) you have decided on the reason you will express to the court, follow the *Checklist: The Ten Steps for Terminating Representation,* below.

Checklist: The Ten Steps for Terminating Representation

Step 1. Read the ABA ethics rule, and then your state ethics rule, on terminating representation.

Read the ABA *Model Rule of Professional Conduct*, Rule 1.16 (Declining or Terminating Representation), and all the official comments. The Rule and its comments are well worth the time of reading completely before you start to terminate the representation of a difficult client. I recommend first reading the ABA Rule 1.16, *and the official comments*, because they are well done and often give you an insight into different items that might not be mentioned in your state rule. Then read your own state's corresponding rule of professional conduct, which may be different, or may not mention a circumstance described in the ABA Rule and comments, or may give you help if the court's rules (see below) are silent on the circumstances of your case and client.

Step 2. Check the local procedural rules and law, and follow the procedures exactly.

Check the court rules of the local jurisdiction and the local statutory law on withdrawal. You need to do this for a simple reason:

> Each individual court can set its own procedure on when and how you can secure court authorization to withdraw. Even two different trial judges of the same jurisdiction, in the same city, may have a different set of rules about when you can withdraw and how you need to do it.

Follow the court's rules for withdrawal. Use the forms and make the statements required by the local court rules.

Step 3. Don't wait.

Courts have wide discretion on a motion to withdraw. Courts can, and do, deny a motion if a client might be adversely affected by the withdrawal. If the case has entered a crucial part of the litigation, you might be required to continue the representation despite valid reasons for withdrawing.

Step 4. Tell the client. Tell the client in a termination letter, by a method that proves the date the letter was received.

Send a termination letter. Leave no doubt in the client's mind that the lawyer-client relationship is ending. Tell the client the things set out below in step 5.

Send the letter by a mode that results in a signature that the client received it. (FedEx or UPS signature-required delivery seems to work better than postal mail. Postal mail seems to be rejected by a difficult client more often, resulting in no delivery. The court is going to require that you prove to the court that the client knows of your application to the court for permission to withdraw, so get the documentation of delivery of your letter. Include the documentation in your request to the court.

Step 5. Give the client ample time to get another lawyer. Give a good hand-off to the replacement attorney.

Lawyers cannot abandon clients. Read the dictionary definition of abandon:" A-ban-don: To withdraw one's support or help from, especially in spite of duty, allegiance, or responsibility; desert."

Your representation of the client in the litigation should end only after a reasonable period has passed after the client gets your termination letter. Set a date that will be after the client has had time to get another lawyer. Tell the client you will cooperate with any attorney he/she hires on the case. Tell the client that without charge you will have a conference with any replacement attorney, to confer on the status of the matter and give your insights and recommendations on the case. Why do these things?

First, those are the decent things to do.

Second, the court will require you to do those things, if the client wants it.

Third, giving a client time to secure the services of another attorney, and having a free hand-off conference between you and the new attorney reduces anxiety about not having adequate representation. An anxious client feels abandoned; and the actually abandoned client has grounds for a malpractice lawsuit.

Step 6. Give the client a status report.

With your letter of withdrawal, don't just document the reasons why you are withdrawing. Also, in the same letter, include a status report on the case and a list of upcoming deadlines.

Step 7. Protect the client.

Take appropriate action necessary to protect the client's interests. For example, you might need to secure physical evidence liable to change, seek extensions of discovery periods, or take depositions while waiting for permission to withdraw.

Step 8. Give the client the file.

Give the client all documents or property to which the client is entitled. Do it right away. Document the delivery.

The "entire contents of a client's file" needs to be turned over to a former client or substitute counsel. The "entire file" means, of course, all correspondence[1] and legal papers, evidence, and work product such as legal research. However, "the entire file" is much broader.[2] Probably every bar association's ethics committee has an opinion defining the "entire file" to which a client is entitled. If you have any doubt about turning over a particular item, read your local jurisdiction's ethics opinion. However, the Colorado Bar Association ethics committee has a good summary, including mentioning the two categories of items to which the client is not entitled.

Lawyers consistently have been disciplined for blanket refusals to surrender the file to the client upon demand. Interrelated with the obligation to protect the client's interests is the lawyer's duty to define the client's needs liberally. In this context, the client's entitlement is not completely defined by traditional concepts of property and ownership. Rather, the entitlement is based on the client's right to access the documents related to the representation to enable continued protection of the client's interests.

There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, e.g., another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client.

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[1] Remember, in today's world, the courts will include emails as correspondence to which the client is entitled.

[2] *See, e.g., D.C. Ethics Op.* 168 (1986), citing *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 34, 689 N.E.2d 879, 666 N.Y.S.2d 985 (N.Y. 1997

A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client.[3] This information is personal attorney-work product that is not needed to protect the client's interests.

Detailed definition of this second category is difficult. The distinction in this area is factually specific to each situation and must be determined by the lawyer, realizing that the lawyer has a duty to take those steps reasonably practicable to protect the client's interests by surrendering the necessary information. Generally, such duty favors production.[4]

Resist the urge to hold onto files and property until all fees have been paid. Even if you have state statutes or common law giving you a possessory lien on the client's file to secure payment, don't hold onto the file. Don't rely on the lien law. Almost always the courts find that your duty to your client trumps the state lien law, and—even if you are not paid for your work and costs advanced—you have to turn over the file when you voluntarily withdraw from the representation.

If you have withdrawn, and your bills for work and costs advanced are not paid, you can sue the client. However, think twice or thrice before doing so. A suit for legal fees is a common way to beget a counterclaim for malpractice.

Step 9. Bill and refund.

Give the client a final and complete bill of what is owed you. Refund all fees that have not been earned, any amounts held in trust, and any payment given to you for expenses that have not been incurred. If you do not wipe the financial slate clean, you will have a client that keeps hanging on and communicating with you. The court, listening to the client's version of what he or she asked, and what you said in response, may find that some of those communications make you an "implied" attorney giving advice to an "implied client."

Step 10. Save a copy of the file, and save it for a long time.

There may be many times in the future when you want to refer to the file before you say anything about your memory of facts of the case or anything else. It may be a couple of years later when the new attorney asks you a question. Or it may be 10 years later when the former client claims the benefit of the "discovery" rule in a malpractice claim.

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[3] This personal attorney-work product sometimes may have to be surrendered on a request based on the idea that it is reasonably needed to protect the client's interests in determining whether you, the withdrawing attorney, are guilty of malpractice!

[4] *Ethics Opinion 104: Surrender of Papers to the Client Upon Termination of the Representation,* 04/17/99, Ethics Committee of the Colorado Bar Association

Termination of a client always runs a risk that the client will claim malpractice. Malpractice claims can come years later than you will have a paper copy of your file. However long you normally keep a client's file, if you terminated your representation of the client — keep the file of a terminated client a longer period than you normally keep client files.

☞ **TIP.** I'm a big fan of the "one big PDF of a client's file."

If you later have to search the client file to answer a question or to document what you did, it's easier to search for your answer, and record where you found the answer or documentation, if the total client file is in a searchable PDF. With a searchable PDF, you can search by keyword or by quickly clicking through pages displaced on a monitor.

It's also easier to know later exactly which page of the file you referred to in answering a later question by court, the new attorney, or the former client if you put everything into one big PDF and used the Adobe Professional edition's Bates numbering function in creating that big backup copy of the client file. If you have Adobe 8 Professional or a later version and a PDF, it is easy to do. You can use the Adobe automated Bates numbering to apply, automatically, a sequential Bates number that uniquely identifies each page in the PDF.

Therefore, you may want to scan everything in the former client's case into one big PDF, and also — using Adobe Professional — add into the one big PDF all your electronically stored information (e.g., correspondence, drafts of court papers, email from the court, and your legal research notes stored on your computer).