

THE PHILADELPHIA BAR ASSOCIATION  
PROFESSIONAL GUIDANCE COMMITTEE  
Opinion 2018-2  
(July 2018)

The Professional Guidance Committee of the Philadelphia Bar Association has received numerous inquiries as to steps to be taken when clients refuse to cooperate with advice of counsel. The purpose of this Opinion is to determine how and to what extent the Pennsylvania Rules of Professional Conduct (“the Rules”) may govern this question and to provide advice concerning the ethical obligation under the Rules in uncooperative client situations. This opinion is meant as a follow-up to Opinion 2018-1 issued in June, 2018 with respect to missing clients.

## **INTRODUCTION**

As provided for under the Rules, “a lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.” Rule 1.2(a). However, what do the Rules require when there is disagreement between an attorney and his/her client?

The Rules anticipate this, providing that “[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, [Rule 1.2] does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. *See* Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. *See* Rule 1.16(a)(3).” Rule 1.2, cmt. 2.

This Opinion is intended to address some of the Rules implicated when a disagreement arises between attorney and client, and which bear on how those disagreements may be resolved.

## **DISCUSSION**

Disagreements may arise between an attorney and client for any number of reasons. Per the Rules, the preferred way to handle a client that refuses to follow the advice of counsel can differ depending on the nature and subject of the disagreement, as well as the procedural posture of the matter at issue.

## Terminating Representation

When a disagreement arises in the middle of an engagement, withdrawal from the representation is something that can – or must – be pursued, depending on the circumstances.

Rule 1.16 presents the conditions under which an attorney *must* withdraw from a representation. Of course, this must occur if “the lawyer is discharged” by the client. Rule 1.16(a)(3). More significantly, an attorney *must* withdraw if “the representation will result in violation of the Rules of Professional Conduct or other law.” Rule 1.16(a)(1). Thus, if a client gives a directive to pursue a course of conduct that will violate the law or Rules, an attorney must refuse and withdraw from the representation.

In addition, Rule 1.16 provides that an attorney *may* withdraw from a representation when:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer’s services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) 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;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

Rule 1.16(b).

Withdrawal is thus permissible, if not mandatory, when a client acts and/or directs an attorney to act, or uses an attorney’s services to act, in a way that is unethical and/or illegal, or even when the client has done so and the attorney finds out after the fact. An attorney *must* withdraw if continued representation will result in his own conduct violating the Rules or other law, although the mere suggestion of such conduct is insufficient. Rule 1.16, cmt. 2. Indeed, the Rules independently state that an attorney “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” Rule 1.2(d). An attorney *may* withdraw “if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent.” Rule 1.16, cmt. 7.

More subject to interpretation is the portion of the Rule permitting an attorney to withdraw “where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” Rule 1.16(b)(4); *see also* Rule 1.16, cmt. 7.

#### Disclosure of Client Directives Requiring/Permitted Withdrawal

When pursuing withdrawal, best practices dictate that an attorney should document the reason for the withdrawal via written correspondence to the client. However, whether an attorney can (or must) breach client confidentiality and reveal the client’s desired course of conduct when he/she disagrees with that conduct is governed by Rule 1.6.

An attorney *must* reveal this information “if necessary to comply with the duties stated in Rule 3.3 [related to candor toward the tribunal].” Rule 1.6(b). An attorney *may* reveal this information to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;
- (3) to prevent, mitigate or rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services are being or had been used; or
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
- (5) to secure legal advice about the lawyer’s compliance with these Rules.

Rule 1.6(c).

#### Rules Implicated Regarding Withdrawal

Other Rules provide more concrete guidance with respect to when attorney withdrawal is permitted or required, including:

- Rule 3.1, requiring that an attorney only bring claims and make arguments that are not frivolous;
- Rule 3.2, requiring that attorneys pursue litigation expeditiously where possible;
- Rule 3.3, requiring candor to the tribunal;
- Rule 3.4, requiring fairness to opposing parties and their counsel;
- Rule 4.1, requiring truthfulness in statements to others; and
- Rule 4.4, requiring attorneys to respect the rights of third persons.

A client's directive for an attorney to engage in conduct that would violate one of these Rules (or any other Rule) would constitute grounds for mandatory withdrawal under Rule 1.16(a)(1). When faced with such a situation, it is prudent for an attorney to communicate his/her obligations under the Rules to the client in writing so as to avoid any ambiguity and provide the client with an opportunity to change course.

### Disagreements Regarding Strategic Decisions

If a client's directives do not rise to a level of conduct set forth in Rule 1.16, but instead constitute a disagreement as to strategy, an attorney's options are more limited. Lawyers are required to "exercise independent professional judgment and render candid advice," considering not just the law but "other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Rule 2.1. An attorney must be thorough, to the point where he/she must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(b). Moreover, an attorney must "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Rule 1.4(a)(2). Attorneys should be sure to keep clients informed and otherwise comply with all requirements of communication set forth in Rule 1.4

If, after providing candid, thorough advice, a client still wishes to pursue a different course of action than that recommended by his attorney, the attorney must carry out the client's wishes (including, notably, with respect to settlement). Rule 1.2(a). It is best practice for an attorney to document this, both via a memorandum to the file and written correspondence to the client, detailing both the advice given and the client's disagreement.

The comments to Rule 1.4 do provide for some flexibility, stating that "[i]n some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication." Rule 1.4, cmt. 7. However, the example provided – that a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client – makes clear that an attorney must be careful when relying on this exception.

### CONCLUSION

When facing a material disagreement with a client, or a client who refuses to cooperate with sound legal advice/counsel, an attorney should first determine if withdrawal is required. If it is not required, it is prudent to make a determination as to whether withdrawal is permissible. If so, a decision should be made as to whether to continue on with the engagement.

If an attorney wishes to carry on with the representation notwithstanding the disagreement, or if withdrawal is not possible, it is advisable for the attorney to document correspondence and legal advice as much as possible. Particular attention should be paid to documenting instances where a client chooses to go against his/her attorney's advice, as well as any negative outcomes and controversial recommendations. Settlement demands, offers and responses should be conveyed to both clients and opposing counsel in writing to avoid any ambiguity.

**CAVEAT:** The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.