

Vermont Rules of Professional Conduct
Rule 1.16 – Declining or Terminating Representation

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Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- Rule 1.16 has not been amended since 2009
- Relevant Blog Posts:
 - [Withdrawing? Stop making noise](#)
 - [Vermont Supreme Court addresses a lawyer's duty to deliver the file](#)

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:
- (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.
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] 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.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. See, e.g., V.R.C.P. 79.1(f), V.R.Cr.P. 44.2(c), V.R.F.P. 15(f), V.R.P.P. 79.1(e). Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request 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. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] 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.

[5] 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 self-representation by the client.

[6] If the client has severely diminished capacity, 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 may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] 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 taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] 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

[9] 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. The availability of such a retaining lien is limited where the fee is disputed or, by the overall effect of Rule 1.16, where harm to the client could result from the lawyer's retention of the file. See Rule 1.15.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.16 is amended to conform to changes in Model Rule 1.16, retaining a sentence in Comment [9] concerning availability of a retaining lien. See Reporter's Notes to V.R.P.C. 1.16 (1999).

The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph (b): Clarify significance of permission to withdraw "without material adverse effect on the interests of the client"

No change in substance is intended. This proposal is intended to clarify that the lawyer may withdraw for any reason if "withdrawal can be accomplished without material adverse effect on the interests of the client," or, even if there will be such material adverse effect, if the lawyer has good cause, as set forth in paragraphs (b)(2) through (6).

2. Paragraph (b)(4): Alter requirement for permissive withdrawal when client and lawyer disagree over course of representation

a. Substitute "taking action" for "pursuing an objective"

The Commission recommends that a lawyer be permitted to withdraw from representation whenever a client is insisting that the lawyer take action that the lawyer finds repugnant or, in some instances, when the lawyer has a fundamental disagreement with the action proposed by the client, regardless of whether the action concerns the client's objectives or the means of achieving those objectives.

b. Substitute "with which the lawyer has a fundamental disagreement" for "imprudent"

Allowing a lawyer to withdraw merely because the lawyer believes that the client's objectives or intended action is "imprudent" permits the lawyer to threaten to withdraw in order to prevail in almost any dispute with a client, thus detracting from the client's ability to direct the course of the representation. Nevertheless, the Commission believes that a lawyer ought to be permitted to withdraw when the disagreement over objectives or means is so fundamental that the lawyer's autonomy is seriously threatened.

c. Change first word from "a" to "the"

This is a stylistic change to conform with the other subparagraphs of (b).

3. Paragraph (c): Remind lawyers of court requirements of notice or permission to withdraw from pending litigation

Some courts require only that the lawyer notify the court of withdrawal, for example, where a substitution of counsel is being made with the consent of the client. The Commission recommends following the practice of several states that have added the proposed first sentence in order to remind lawyers of their obligations under court rules. [See, e.g., V.R.C.P. 79.1(f), V.R.Cr.P. 44.2(c), V.R.F.P. 15(f), V.R.P.P. 79.1(e).]

4. Paragraph (d): Add reference to return of unearned fees and unexpended advanced expenses

This change corresponds to the change in Rule 1.15, which requires lawyers to segregate advanced fees and expenses in a client trust account.

COMMENT:

[1] The additional material addresses the question of when a representation is completed and crossreferences other Rules, including those in which the services are limited in scope or intended to be short-term in nature. No change in substance is intended.

[3] Three changes are proposed. None of them is substantive. The first proposal is to add a sentence regarding the possibility that a court may require either approval or notice before a lawyer withdraws from pending litigation. The second is to substitute "request" for "wish" for reasons of style. The third is to add a cross-reference to Rules 1.6 and 3.3 regarding any colloquy with a court requesting an explanation for the lawyer's request to withdraw.

[6] These changes are proposed in light of the changes made in Rule 1.14.

[7] The proposed change tracks the proposed change to paragraph (b)(4).

[9] The Commission recommends adding a crossreference to Rule 1.15 on client property. It also recommends that the last sentence be deleted because its meaning is unclear.

Reporter's Notes

The third sentence of the final paragraph of the comment has been added to reflect the holding of *In re Bucknam*, 160 Vt. 355, 628 A.2d 922 (1993).

ANNOTATIONS

1. Sanctions. Two concurrent six-month suspensions were proper for an attorney who failed to cooperate with the disciplinary system, failed to communicate with her client and to return his papers, and practiced law where doing so violated the regulation of the legal profession. Furthermore, when respondent sought reinstatement, she would have to provide a detailed explanation for her lack of participation over the course of these proceedings. *In re Hongisto*, 2010 VT 51, 188 Vt. 553, 998 A.2d 1065 (mem.).