THE Legal Ethics & Malpractice Reporter

A monthly commentary on current ethical issues in law practice for members of the Kansas and Missouri Bars

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Joseph Hollander & Craft LLC

Contents

About This Publication

The *Legal Ethics & Malpractice Reporter* (*LEMR*, for short) is a free, monthly publication covering current developments in ethics and malpractice law—generally from the perspective of the Kansas and Missouri *Rules of Professional Conduct*. Founded in 2020, this publication was envisioned by KU Law professor Dr. Mike Hoeflich, who serves as its editor in chief. In partnership with Professor Hoeflich, JHC's legal ethics and malpractice group is pleased to publish this monthly online periodical to help attorneys better understand the evolving landscape of legal ethics, professional responsibility, and malpractice.

In addition to the digital format you're presently reading, we publish *LEMR* as mobile-friendly blog articles on our website. We also share a digest newsletter to our *LEMR* email subscribers whenever a new issue is published. (You may subscribe here if you aren't already a subscriber.)

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FEATURE ARTICLE

Breaking Up is Hard to Do

Because of the fiduciary nature of the lawyer-client relationship, beginning and ending representation is a more complex matter than many lawyers expect. Generally, a client may hire a lawyer willing to represent him and may terminate the representation at any time. A lawyer is also free, in almost every instance, to engage in a representation, if she so chooses, subject to Rule 1.16(a). But termination of a representation by a lawyer is not so simple. It is regulated by Rule 1.16(b). Kansas Rule of Professional Conduct 1.16 states:

> (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;
> >
> > (3) the lawyer is discharged; or
> >
> > (4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.
>
> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
>
> > (1) the client has used the lawyer's services to perpetrate a crime or fraud;
> >
> > (2) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
> >
> > (3) 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;
>
> (4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (5) other good cause for withdrawal exists

Missouri Rule of Professional Conduct 4-1.16 reads:

> (a) Except as stated in Rule 4-1.16(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 Rule 4-1.16(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.

Perhaps the most problematic requirement under Rule 1.16(b) is that voluntary lawyer withdrawal may not have a "material adverse effect on the interests of the client." The ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 516 on April 2, 2025, to assist lawyers in determining when "material adverse effects" will prevent voluntary withdrawal. It states:Opinion 515 correctly notes that few of the Model Rule's exceptions will help in a situation in which a client has acted criminally against a lawyer. Model Rule 1.6(b)(1) might be useful in the case where the client's actions open the possibility of causing death or substantial bodily harm. Kansas, however, has a much different version, only permitting disclosure to prevent future crimes, a version that will most likely be even less useful in these situations.

> Under Rule 1.16(b)(1), a lawyer's withdrawal would have a "material adverse effect on the interests of the client" if the lawyer's withdrawal would significantly harm the client's interests in the matter in which the lawyer represents the client—e.g., if the lawyer's withdrawal would result in significant harm to the forward progress of the client's matter, significant increase in the cost of the matter, or significant harm to the client's ability to achieve the legal objectives that the lawyer previously agreed to pursue in the representation. This conclusion is consistent with ethics opinions which have determined that a lawyer's withdrawal will not have a "material adverse effect" where all projects for that client were completed, where no projects for the current client are imminently contemplated, where the case is at "an early stage," where the client has retained successor counsel, or where the lawyer has given the client "ample notice."

The Opinion points to a number of obvious situations in which a lawyer's withdrawal would almost certainly have no material adverse effect such as when representation has just begun or when a lawyer has co-counsel who can take over the representation. In addition, when a lawyer has been in a long-term representational relationship with a client, if there are no matters pending, the lawyer may well be

able to withdraw, although the client may be "disappointed" that the lawyer proposes to do so:

> As these scenarios illustrate, Rule 1.16(b)(1) does not: protect a client's interest simply in maintaining an ongoing client-lawyer relationship, protect against the client's disappointment in losing the lawyer's services, or prohibit withdrawal based on the client's perception that the lawyer is acting disloyally by ending the representation. Because it does not significantly harm the client's interests in the matter, the client's disappointment that this particular lawyer will not conduct or complete the representation is not a "material adverse effect" contemplated by the provision. If it were otherwise, the provision could never be used to permit a lawyer to unilaterally end the client-lawyer relationship.

While this approach is logical, it does appear to weaken the idea that as a fiduciary of a current client, a lawyer must demonstrate loyalty to the client even above her own interest in many cases. Were this type of withdrawal to be universally permitted, as the Opinion seems to suggest, this might weaken client perception of lawyers as trusted agents.

Indeed, this inclination to give lawyers greater latitude to withdraw voluntarily from representation under Rule 1.16(b) is carried further in the final section of the Opinion, wherein the Committee discusses the "hot potato" doctrine—the judicially developed rule that that a lawyer should not withdraw from representation of one client and then turn around and represent a new client adverse to the former client.

> For this reason, although Rule 1.16(b)(1) derives from judicial decisions, the provision parts company with the case law regarding whether a lawyer may withdraw from representing a client to avoid the conflict of interest that has resulted, or would result, from direct adversity to that client.
>
> In the context of litigation, some courts have held that without the client's consent, a lawyer may not withdraw from a representation to litigate against the now-former client. Lawyers who end a representation for this reason have sometimes been disqualified from representing the new client. The so-called "hot potato" rule or doctrine comes from *Picker International, Inc. v. Varian Associates, Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd,* 869 F.2d 578

(Fed. Cir.1989), where the court concluded, "a firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client." The implication of these decisions is that, even if the lawyer's withdrawal would otherwise be permissible, the lawyer may not withdraw to litigate against the client whose representation is terminated. But some courts recognize that the principle is not absolute and that it should not necessarily apply when the lawyer's withdrawal is not significantly prejudicial because, for example, "a lawyer's representation is sporadic, non-litigious and unrelated to the issues involved in the newer case."

The "hot potato" principle is derived from neither Rule 1.16 nor any other professional conduct rule. Rather, the principle is an extension of the common law duty of loyalty and the need to preserve public confidence in the bar. Even where a lawyer would otherwise be permitted to end a representation, such as where the lawyer is not currently engaged in a matter for the client or the client would not be significantly prejudiced if another lawyer completes the representation, courts might consider it disloyal for the lawyer to withdraw for the purpose of advocating against the now-former client even in an unrelated matter.

In general, although a lawyer may not advocate for a party that is directly adverse to another current client without both clients' informed consent, a lawyer may advocate against a former client if the matter is unrelated to the former representation and the lawyer does not use or reveal information relating to the representation to the disadvantage of the former client. *Compare* Rule 1.7(a)(1) (current client conflict rule) *with* Rule 1.9(a) (former client conflict rule). Courts applying the "hot potato" doctrine treat the lawyer's withdrawal as if it did not occur and apply the principle of Rule 1.7(a)(1), which prohibits a representation that is directly adverse to another current client without consent from both clients.

Rule 1.16(b)(1) and other Rules of Professional Conduct do not incorporate the "hot potato" concept for the reason discussed above, namely, that a lawyer's motivation for invoking Rule 1.16(b)(1) is irrelevant. Even if the lawyer's reason for invoking Rule 1.16(b)(1) may be perceived as disloyal, the lawyer's motivation is not relevant. The salient question under Rule 1.16(b)(1) is whether, by withdrawing

> from a representation, the lawyer will materially adversely affect the client's interests in the matter in which the lawyer represented the client, not whether the lawyer will be adverse to the client in an unrelated matter after the representation is over.

This part of the opinion seems to be rather extreme to some commentators and controversial. Indeed, the Opinion contains a formal dissent by two of the Committee members. They write:

> Ethics opinions should, at their core, be helpful to lawyers seeking to navigate their ethical responsibilities. This opinion provides very helpful guidance to lawyers on many of the situations it addresses. However, the portion seeking to argue why the ethics rules do not prohibit a lawyer from firing one client in order to sue another client is something that we fear will prove more harmful than helpful to lawyers.
>
> … the "hot potato" portion of the opinion is incomplete. The opinion fails to address the breadth of precedent on the "hot potato" doctrine, and we are concerned that by seeming to dismiss this judicial doctrine as involving a handful of outlier cases, the opinion may mislead lawyers about the law.1 The opinion is incomplete, and thus also incorrect, because it does not directly answer whether terminating a client for the purpose of turning around and filing suit against it for another client could itself qualify as an act inflicting a material adverse effect on the interests of the client being dropped under Rule 1.16(b)(1).

Formal Opinion 516 is quite helpful, but it also may lead some lawyers to ignore the "hot potato" doctrine to their and their clients' disadvantage if a judge disqualifies the lawyer in spite of the Opinion. To its credit, the Opinion recognizes that judges may well choose to do so:

> Courts are, of course, free to exercise their supervisory authority over trial lawyers by disqualifying those who drop a client "like a hot potato" to advocate against that client in another case. Courts may elect to do so as a sanction or remedy for the lawyer's perceived disloyalty or to remove the incentive for lawyers to end representations for what courts regard as inappropriate reasons. But it does not necessarily follow that the lawyer's withdrawal, for

> a purpose of which courts may disapprove, constitutes a violation of the Rules of Professional Conduct for which a lawyer could be professionally sanctioned.

It would be helpful if this latter issue were more fully clarified, as the dissent requests

PAST & PRESENT

Judicial Resistance

History often provides valuable perspective on current events. History may not repeat itself, but people and politics often do behave similarly over the decades, if not centuries. At the beginning of the nineteenth century, the United States was a young nation and many of its governmental institutions were untested and subject to political criticism and attack by the executive and legislative branches of government.

Joseph Story was one of the most remarkable men of his age. He served as a Massachusetts state legislator, successful lawyer, professor at Harvard, and as a U.S. Supreme Court Justice sitting on the Court beside the great Chief Justice John Marshall. He cherished the independence of the judiciary and helped to shape American law. In January 1822, he wrote a letter to Jeremiah Mason, a lawyer, United States Senator, and friend. In this letter Justice Story expressed his concerns and fears for the federal courts, which were under constant assault by others in the government and in the citizenry.

> The truth is and cannot be disguised, even from vulgar observation, that the Judiciary in our country is essentially feeble, and must always be open to attack from all quarters. It will perpetually thwart the wishes and views of demagogues, and it can have no places to give and no patronage to draw around it close defenders. Its only support is the wise and the good and the elevated in society; and these, as we all know, must ever remain in a discouraging minority in all Governments. If, indeed, the Judiciary is to be destroyed, I should be glad to have the decisive blow now struck, while I am young, and can return to the profession and earn an honest livelihood. If it comes in my old age, it may find me less able to bear the blow, though I hope not less firm to meet it. For the Judges of the Supreme Court there is but one course to pursue. That is, to do their duty firmly and honestly, according to their best judgements. We should poorly deserve our places, and should want common honesty, if we shrink at the threats or the injuries of public men. For one, though I have no wish to be a martyr, I trust in God I shall never be so base as to submit to intimidation, come when it may. I believe the Court

> will be resolute, and will be driven from its course, only when driven from the seat of Justice.

WW Story, LIFE AND LETTERS OF JOSEPH STORY (1851); vol. 1, pp. 411-412

This also will appear in the Topeka Capital-Journal on Sunday, May 4 2025.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *the Current Index to Legal Periodicals*

1. Chad Flanders, *When Should Clients Call the Shots? Examining the Attorney–Client Relationship after McCoy v. Louisiana*, 2023 Mich. St. L. Rev. 571 (2023).

   This article deals with a key issue of constitutional rights for criminal defendants and the allocation of decision-making between client and attorney.

2. Benjamin Pomerance, *A Code Too Easily Broken: Continuing Concerns Regarding the United States Supreme Court's New Code of Conduct*, 87 Alb. L. Rev. 229 (2023).

   The title of this article says it all!

A BLAST FROM THE PAST

Is Legal Ethics an Exact Science?

Q. Is Legal Ethics an Exact Science?

It is not, for it has its roots in the social conditions of each successive generation and of widely differing localities or communities, and the changing conceptions of what constitutes professional service or duty. Hence it is subject to the operations of evolutionary change. It is a living organism, subject to the laws of development, as well as of decay!

Its principle of life is always Honor. Its evolutionary body of formulated duty depends on the nature of the service each generation demands of the profession.

> *— Henry Wynans Jessup, THE PROFESSIONAL IDEALS OF THE LAWYER. A STUDY OF LEGAL ETHICS 6 (G.A. Jennings Co., New York 1926)*

josephhollander.com

KANSAS CITY
926 Cherry St
Kansas City, MO 64106
(816) 673-3900

LAWRENCE
5200 Bob Billings Pkwy
Lawrence, KS 66049
(785) 856-0143

OVERLAND PARK
10104 W 105th St
Overland Park, KS 66212
(913) 948-9490

TOPEKA
1508 SW Topeka Blvd
Topeka, KS 66612
(785) 234-3272

WICHITA
500 N Market St
Wichita, KS 67214
(316) 262-9393