



NEW JERSEY STATE BAR ASSOCIATION

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August 15, 2023

Hon. Glenn A. Grant
Administrative Director of the Courts
Hughes Justice Complex/P.O. Box 037
Trenton, NJ 08625-0037

RE: Withdrawal of Representation / Lawyer's Fees

Dear Judge Grant:

Lawyers, like everyone else who works, want to get paid for what they do. Of course there are legitimate situations where work is performed on a pro bono basis agreed upon in advance of undertaking the work. But in a situation where a client has agreed and is able to pay for a lawyer's services but does not, a lawyer should be able to end their representation. Yet, members of the New Jersey State Bar Association's Putting Lawyers First Task Force found that attorneys are often put in a difficult position where they must continue their representation after a client has stopped paying, even when the client agrees to end the representation. The New Jersey State Bar Association (NJSBA) asks the Judiciary to consider a number of changes to help alleviate this unbalanced situation, help lawyers get paid for services they provide, and allow clients to proceed with the representation they choose.

Currently, in many cases, lawyers are required to file a motion to be relieved of counsel, even if they have consent of their client. This results in additional, unnecessary costs for the client and use of unnecessary judicial resources. Litigants should have the right to be represented by the attorney of their own choosing or to represent themselves, if they wish. Forcing clients to continue with counsel despite their agreement to terminate representation results in client frustration, conflict within the attorney-client relationship and potential liability for the attorney for continued representation against the client's express wishes.

If a client does not consent to withdrawal from representation, a motion is and should be required. However, there can be ethical implications that make it even more complicated. For instance, if the reason for the withdrawal is protected by attorney/client privilege, then the confidentiality provisions of RPC 1.6 become an issue. An attorney does not have the ability to be candid with the court about the wrongdoings or difficulty of the client/attorney relationship without potentially violating confidentiality and prejudicing the client with the judge who will ultimately be making the decision on their case.

To address these situations and to streamline the process of allowing attorneys to withdraw from representation in appropriate matters, the NJSBA recommends consideration of the following proposals:

- (1) Amending the Court Rules to more readily allow an attorney to be relieved as counsel with the litigant's consent, regardless of the stage of the case. For family matters, where the withdrawal from representation is governed by a different rule, revisions should be made to allow attorneys to withdraw from representation without client consent at any time within the first 245 days after filing of a Complaint, and then at any time prior to 90 days of a preemptory trial date.
- (2) Allowing all motions to be relieved as counsel to be heard by the Presiding Judge of each Division or Part, unless the Presiding judge is assigned to the matter, to allow for the attorney to address the issue without prejudicing their client to the judge that will be hearing the case. If the Presiding Judge is assigned to the matter, then an alternate judge should be assigned. Service of motions to be relieved as counsel should be required to be served on an adversary, but if confidential information is needed to be disclosed to support the application, that information should be disclosed in camera to the court instead of directly in the motion papers.
- (3) Amending RPC 1.6 to clarify that the denial of withdrawal from representation as of right where good cause is present is only permitted when extraordinary circumstances exist to necessitate continued representation.

Proposed language for these amendments is attached for the Judiciary's consideration.

Attorneys also face hurdles when clients do not meet their payment obligations, but representation is ongoing. This can create conflicts within the attorney-client relationship and may affect the attorney's ability to continue the representation. The NJSBA recommends consideration of the following actions to provide avenues for attorneys to raise compensation issues in a reasonable manner that limits any impact on the advancement of the case:

- (1) Revising Case Management Orders to include a section to address counsel fees and funding the attorney's fees. Counsel should be permitted to raise the issue at the initial Case Management Conference without the necessity of filing a formal motion. By raising payment issues during the case management conference, the client is saved from incurring additional fees that would be incurred if a motion were to be required.
- (2) Requiring a judgment search for attorney's fees owed before client funds being held in escrow can be released, just as a judgment search is required to ensure there is no child support owed. If fees are owed, the attorney holding the funds should be required to either pay the amount owed out of the funds being held or continue to hold the funds until any payment dispute is resolved.
- (3) Reviewing the fee arbitration process with an aim of making it more efficient. For example, the Court can consider having forms available that can be easily filled in, similar to forms provided to self-represented litigants for clients so that attorneys can easily request fees. Consideration should also be given to including interest that is payable on the amount of any ultimate fee award.
- (4) Requiring judges to make a finding in cases that do not settle as to how the attorneys are being paid before the case proceeds to trial. If the attorneys are owed money, the attorney should be permitted to make an application for fees from their client at that time before more fees are accrued in preparing for and going to a trial.
- (5) Permitting attorneys who are not being paid to file a Notice of a Lien on the Docket Sheet setting forth the amount owed. The Notice should be required to be served on the client, existing lienholders and all adversaries. The lien should also be permitted to be filed in real property records and, where business assets are involved, as a UCC-filing with the Secretary of State.

The NJSBA appreciates the Judiciary's consideration of these proposals. We recognize the careful balance that must be struck among the myriad competing interests when considering issues of representation and payment of fees. We believe, though, that the above proposals strike the right balance to implement a client's choice of representation, to protect a client's interests when an attorney seeks to withdraw from representation without consent, and to ensure an attorney can be paid for the services rendered when a client has agreed and has the ability to pay. We view the proposals as a matter of fairness to all involved, and hope that the Judiciary will examine them through that lens.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim McGoughran". The signature is fluid and cursive, with a large, stylized "S" at the end.

Timothy F. McGoughran, Esq.
President

cc: William H. Mergner Jr., Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director

**COURT RULE AMENDMENTS
PROPOSED BY THE NEW JERSEY STATE BAR ASSOCIATION**

The following are proposed Court Rule amendments in connection with a lawyer's ability to withdraw from representation as described in the attached letter dated 8/15/2023:

R. 1:11-2(a) – addressing withdrawal generally:

(a) Generally. Except as otherwise provided by R. 5:3-5(e) (withdrawal in a civil family action) and R. 7:7-9 (withdrawal and substitution in a municipal court action),

~~(1) prior to the entry of a plea in a criminal action or prior to the fixing of a trial date in a civil action,~~ An attorney may withdraw without leave of court upon the client's consent provided a substitution of attorney is filed naming the substituted attorney or indicating that the client will appear pro se. If the client will appear pro se, the withdrawing attorney shall file a substitution. If a mediator has been appointed, the attorney shall serve a copy of the substitution of attorney on that mediator simultaneously with the filing of the substitution with the court, and

~~(2) after the entry of a plea in a criminal action or the fixing of a trial date in a civil action, an attorney may withdraw without leave of court only upon the filing of the client's written consent, a substitution of attorney executed by both the withdrawing attorney and the substituted attorney, a written waiver by all other parties of notice and the right to be heard and a certification by both the withdrawing attorney and the substituted attorney that the withdrawal and substitution will not cause or result in delay.~~

(32) In a criminal action, no substitution shall be permitted unless the withdrawing attorney has provided the court with a document certifying that he or she has provided the substituting attorney with the discovery that he or she has received from the prosecutor.

R. 5:3-5(e) – addressing withdrawal in civil family actions:

(1) An attorney may withdraw from representation ninety (90) days or more prior to the scheduled trial date at any time on the client's consent in accordance with R. 1:11-2(a)(1). If the client does not consent, the attorney may withdraw only on leave of court as provided in subparagraph (2) of this rule.

~~(2) Within~~ At any time within 245 days of the filing of a Complaint, or, any time after the 245th day after filing but prior to ninety (90) days of a preemptory trial date, an attorney may withdraw from a matter without consent of the client only by leave of court, on motion with notice to all parties if the attorney has an outstanding balance due and owing from the client which remains unpaid or other good cause as noted in RPC 1.16(b). The motion shall be granted as of right. The motion shall be supported by the attorney's affidavit or certification setting forth the reasons for the application and shall have annexed the written retainer agreement. In deciding the motion, the court shall consider, among other relevant factors, the terms of the written retainer agreement and whether either the attorney or the client has breached the terms of that agreement; the age of the action; the imminence of the scheduled trial; the complexity of the issues; the ability of the client to timely retain substituted counsel; the amount of fees already paid by the client to the attorney; the likelihood that the attorney will receive payment of any balance due under the retainer agreement if the matter is tried; the burden on the attorney if the withdrawal application is not granted; and the prejudice to the client or to any other party.

(3) Within ninety (90) days of a scheduled trial date, an attorney may withdraw from a matter without consent of the client only by leave of court, on motion with notice to all parties. The motion shall be supported by the attorney's affidavit or certification setting forth the reasons for the application and shall have annexed the written retainer agreement which documents need only be provided to the client and the court. In deciding the motion, the court shall consider, among other relevant factors, the terms of the written retainer agreement and whether either the attorney or the client has breached the terms of that agreement; the age of the action; the imminence of the scheduled trial; the complexity of the issues; the ability of the client to timely retain substituted counsel; the amount of fees already paid by the client to the attorney; the amount of fees due and owing to the attorney; the anticipated cost and time associated with the preparation of trial and trial; the likelihood that the attorney will receive payment of any balance due under the retainer agreement if the matter is tried; the burden on the attorney if the withdrawal application is not granted; and the prejudice to the client or to any other party.

(34) Upon the filing of a motion or cross-motion to be relieved as counsel, the court, absent good cause, shall sever all other relief sought by the motion or cross-motion from the motion to be relieved as counsel. The court shall first decide the motion to be relieved and, in the order either granting or denying the motion to be relieved, shall include a scheduling order for the filing of responsive pleadings and the return date for all other relief sought in the motion or cross-motion.

R. 7:7-9(b) through (e) -- withdrawal from municipal actions:

(b) Withdrawal, Substitution Prior to Receipt of Discovery. Prior to the receipt of any discovery, an attorney may withdraw as counsel without leave of court with the client's consent provided a substitution of attorney is filed naming the substituted attorney or indicating that the client will appear pro se.

(c) Withdrawal, Substitution After Receipt of Discovery With Consent of Client ~~Prior to Completion of Discovery and Prior to the Setting of a Trial Date. Prior to the completion of discovery and the setting of a trial date, At any time after the receipt of discovery~~ an attorney may withdraw as counsel without leave of court upon the filing of the client's written consent and a substitution of attorney executed by both the withdrawing attorney and the substituted attorney indicating that the withdrawal and substitution will not cause or result in delay. In the substitution of attorney, the withdrawing attorney shall certify that all discovery received from the State has been or will be provided to the substituting attorney within five business days after the filing of the fully executed substitution of attorney with the court.

~~**(d) Withdrawal, Substitution After Completion of Discovery and After the Setting of a Trial Date.** After completion of discovery and the setting of a trial date, an attorney may not withdraw or substitute as counsel without leave of court.~~

(ed) Motion at Any Stage of Proceedings. Nothing in this rule prohibits an attorney from filing a motion at any stage of the proceedings to be relieved from representing the defendant or be substituted as counsel regardless of whether the client consents.

RPC 1.16(c):

A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. Where good cause is present, a tribunal shall ordinarily permit withdrawal as of right, unless it can be shown that extraordinary circumstances exist to do otherwise. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.