

Rule 1.16 [3-700] 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 lawyer knows* or reasonably should know* that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;
 - (2) the lawyer knows* or reasonably should know* that the representation will result in violation of these Rules or of the State Bar Act;
 - (3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or
 - (4) the client discharges the lawyer.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
 - (2) the client either seeks to pursue a criminal or fraudulent* course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes* was a crime or fraud;*
 - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;*
 - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;
 - (5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
 - (6) the client knowingly* and freely assents to termination of the representation;
 - (7) the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;
 - (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
 - (9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or
 - (10) the lawyer believes* in good faith, in a proceeding pending before a tribunal,* that the tribunal* will find the existence of other good cause for withdrawal.

- (c) If permission for termination of a representation is required by the rules of a tribunal,* a lawyer shall not terminate a representation before that tribunal* without its permission.
- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (e) Upon the termination of a representation for any reason:
 - (1) subject to any applicable protective order, non-disclosure agreement, statutory limitation or administrative regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. “Client materials and property” includes correspondence, pleadings, deposition transcripts, experts’ reports and other writings,* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably* necessary to the client’s representation, whether the client has paid for them or not; and
 - (2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Comment

[1] This Rule applies, without limitation, to a sale of a law practice under Rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7, but that conflict might not arise in other representations of the client.

[2A] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. See Rule 3.1(b).

[3] Lawyers must comply with their obligations to their clients under Rule 1.6 and Business and Professions Code § 6068(e), and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal’s order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[4] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

[5] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

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¹ Change made per suggestion of L.A. Public Defender.

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Synopsis of Public Comments

TOTAL = 6	A = 2
	D = 0
	M = 3
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-25b	McCue, Martin (08-2-16)	N	NI	1.16	<p>Bar members need an affirmative statement that a lawyer can decline to undertake representation of a client.</p> <p>Perhaps there should be a duty to advise the person seeking representation of that decision so that they can seek representation elsewhere. That statement may need to be conditioned so that the lawyer is not otherwise acting in violation of law, such as engaging in prohibited discrimination.</p> <p>The freedom to decline representations is at the heart of professional practice.</p>	<p>Proposed rule 1.16 does not state that a lawyer is prohibited from declining to accept a client's representation. Therefore, the revision requested by the commenter could be viewed as practice guidance and not appropriate under the Commission's Charter requiring that comments be used sparingly and only for the purpose of explicating a rule.</p> <p>Regarding the commenter's suggestion for a duty to affirmatively communicate a lawyer's decision to decline representation, that obligation is arguably subsumed within a lawyer's general duty to communicate as interpreted by the California Supreme Court. (See <i>Butler v. State Bar</i> (1986) 42 Cal.3d 323, 329 "The attorney's duty to communicate with a client includes the duty to communicate to persons who reasonably believe they are clients to the attorney's knowledge at least to the extent of advising them that they are not clients.")</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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X-2016-43bn	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	M	(a)(2)	<p>1. Rule should follow model rule and require withdrawal or denial of representation when the representation will result in violation of law, not just the ethics rules.</p> <p>2. Rule should follow model rule by requiring withdrawal or denial of representation when the condition materially impairs ability to represent the client.</p>	<p>1. The Commission declines to make the requested change. A violation of law is subsumed under a violation of the Rules or the State Bar Act. See, e.g., proposed Rule 1.2.1 and 8.4(a), and Bus. & Prof. Code § 6068(a).</p> <p>2. The Commission declines to make the requested change. After discussion, the Commission concluded that the language in current rule 3-700 adequately described the situation under which withdrawal is mandated and carried forward that language. The Commission is not aware that the current rule's language has caused problems in applying the rule.</p>
X-2016-66m	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	A	Cmt. 1, 3	Supports adoption of proposed Rule 1.16. Comments 1 and 3 are particularly important guidance for lawyers	No response required.
X-2016-93f	Los Angeles County Public Defender (Brown) (9-23-16)	Y	M	(a)(1), (e)(1)	1. Paragraph (a)(1) should be clarified to permit criminal defense attorney to make all valid arguments on client's behalf.	1. Paragraph (a)(1) carries forward current rule 3-700(B)(1) verbatim. The Commission is not aware of any problems this provision has caused criminal defense lawyers. In fact, proposed rule 3.1(b) provides:

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						<p>(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless defend the proceeding by requiring that every element of the case be established.</p> <p>Although the Commission believes there is no need to revise the text of proposed Rule 1.16, it has added a clarifying comment referencing Rule 3.1(b).²</p> <p>2. The Commission agrees and has made the change.</p>
X-2016-104ae	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	A	1.16	Supports adoption of proposed Rule 1.16.	No response required.
X-2016-131c	Treat, Hon. Charles (10-06-16)	N	M	1.16	At various places this Rule refers to withdrawing because continued representation would or could result in a violation of the	The Commission declines to make the suggested change because it is not necessary. <i>First</i> , a judge has inherent

² KEM: I think it would be reasonable to add a comment to the rule that contains a cross-reference to Rule 3.1(b). See attached rule.

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					<p>RPC, such as a conflict arising. I propose to add language to the effect of “that the lawyer cannot reasonably avoid or prevent”, and an explanatory comment clarifying that this means a lawyer can’t drop a client due to a conflict that the lawyer has himself or herself created, or is proposing to create. This is what is colloquially called the “hot potato” rule, to the effect that you can’t cure a conflict on a new engagement by firing the client on an existing one. Absent such clarification, I fear that attorneys will read this rule to allow exactly such “hot potato” withdrawals.</p>	<p>power “[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.” (Code Civ. Proc., § 128, subd. (a)(5); <i>People ex rel. Clancy v. Superior Court</i> (1985) 39 Cal.3d 740, 745, 218 Cal.Rptr. 24.) A lawyer will not be able to withdraw from a representation unless the court permits it.</p> <p><i>Second</i>, if the conflict was not inadvertent but rather a designed or planned conflict created by the lawyer to permit the lawyer to withdraw from the representation, the judge could report the lawyer to the State Bar and OCTC could proceed under 6068(d).</p> <p>Third, if there is a concurrent conflict between two current clients, then the lawyer has violated 3-310(C) [proposed rule 1.7(a)] and could be disciplined under that rule.</p> <p>Fourth, if the commenter is concerned with the hot potato situation, there is case law on this. See <i>Truck Ins. Exchange v. Farmers Fund Ins. Co.</i></p>

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						(1992) 6 Cal.App.4th 1050 [8 Cal.Rptr.2d 228]. The Commission does not think a codification of that “rule” is necessary as it a straightforward application of basic conflicts principles.

