

Declining or Withdrawing from Representation

IDAHO RULE OF PROFESSIONAL CONDUCT
1.16

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Overview

- Dealing with a difficult client: Steps to take, up to and including withdrawing from the representation.
- Declining representation: Model Rule 1.16(a) amendment.
- Dealing with difficult circumstances: Knowing your own obligations.



Identifying the difficult client

- Has unrealistic expectations about outcome, investment, time
- Is unreliable (e.g., untruthful, not responsive)

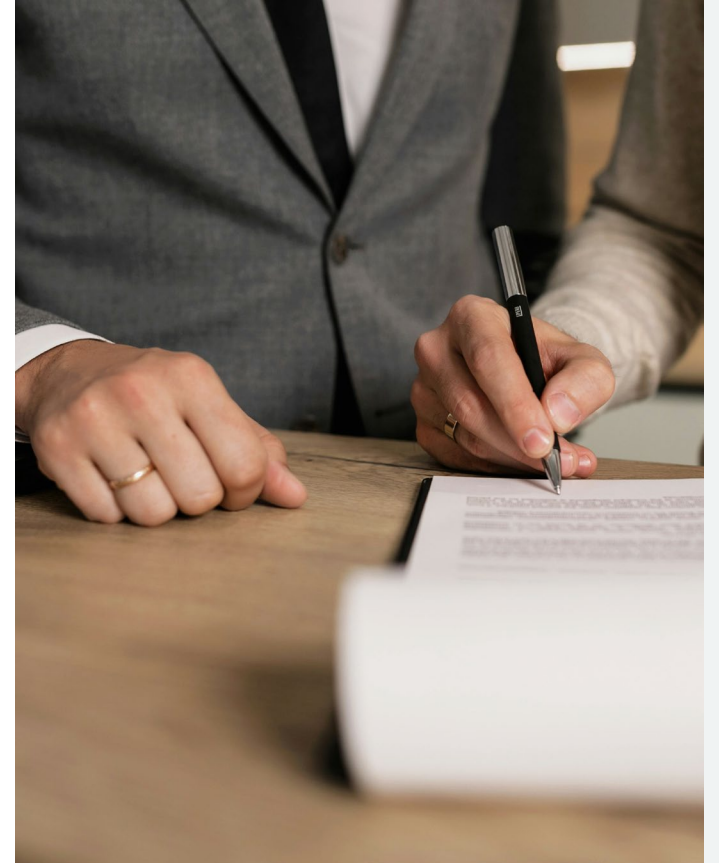
Dealing with unrealistic expectations

- Identify the objectives up front. Client sets the objectives.
- Educate on the legal strategy, often and with candor. Lawyer primarily determines the means by which the client's objectives are pursued.
- Set boundaries.
- I.R.P.C. 1.2, I.R.P.C. 1.4, I.R.P.C. 3.1



Dealing with an unreliable client

- Screen up front
- Require documentation
- Send confirming emails
- Set expectations



**If these strategies do not
work . . .**

I.R.P.C. 1.16: Declining or Terminating Representation

- (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;

I.R.P.C. 1.16: Declining or Terminating Representation - cont'd

- (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.

I.R.P.C. 1.16: Declining or Terminating Representation - cont'd

(c) A lawyer must comply with applicable law requiring notice 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.

I.R.P.C. 1.16, Comment 3

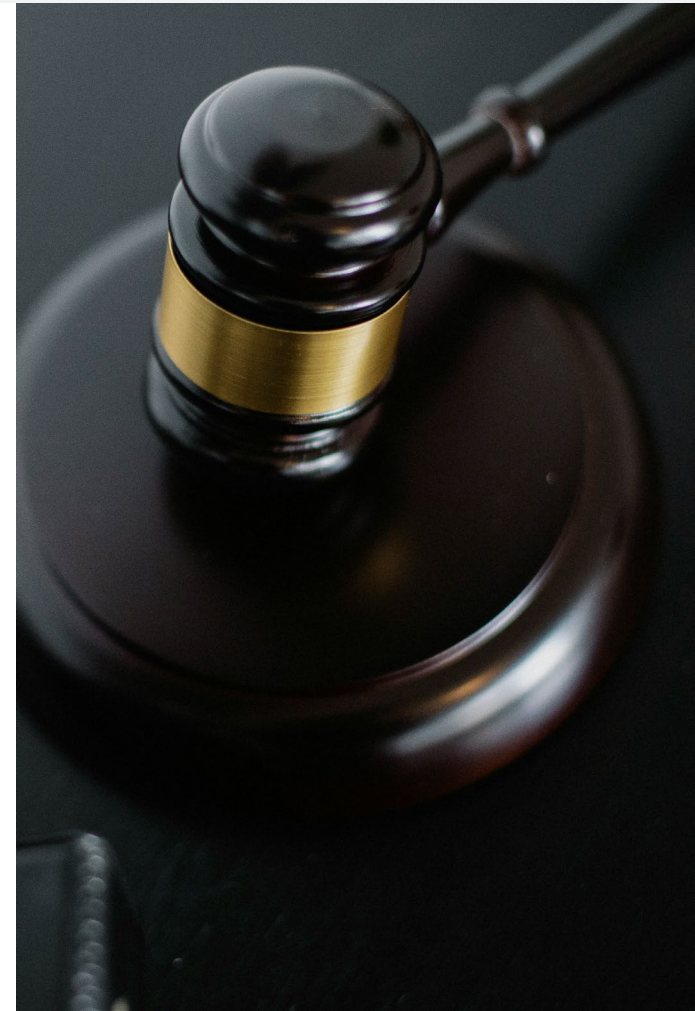
[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be 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.

I.R.C.P. 11.3

- (b) Withdrawal of Attorney.

(1) Leave of Court Required. To withdraw from an action, except by substitution, an attorney must first obtain leave of the court. The attorney seeking to withdraw must file a motion with the court and set the matter for hearing, and must provide notice to all parties, including the party the withdrawing attorney represents in the proceeding. The attorney must provide the last known address of the client in any notice of or motion for withdrawal.

(2) When Granted. By written order the court may grant leave to withdraw for good cause and upon such conditions or sanctions as will prevent delay or prejudice to the parties.



I.R.P.C. 1.16: Declining or Terminating Representation - cont'd

(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.

**A proposed addition (ABA
Resolution 100)**

5 **Rule 1.16: Declining or Terminating Representation**

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7 (a) A lawyer shall inquire into and assess the facts and circumstances of
8 each representation to determine whether the lawyer may accept or continue the
9 representation. Except as stated in paragraph (c), a lawyer shall not represent a
10 client or, where representation has commenced, shall withdraw from the
11 representation of a client if:

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13 (1) the representation will result in violation of the Rules of
14 Professional Conduct or other law;

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16 (2) the lawyer's physical or mental condition materially impairs the
17 lawyer's ability to represent the client; or

18
19 (3) the lawyer is discharged; or

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21 (4) the client or prospective client seeks to use or persists in using
22 the lawyer's services to commit or further a crime or fraud, despite the
23 lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the
24 limitations on the lawyer assisting with the proposed conduct.
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67 **Comment**

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69 [1] Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the
70 facts and circumstances of the representation before accepting it. The obligation
71 imposed by Paragraph (a) continues throughout the representation. A change in
72 the facts and circumstances relating to the representation may trigger a lawyer's
73 need to make further inquiry and assessment. For example, a client traditionally
74 uses a lawyer to acquire local real estate through the use of domestic limited
75 liability companies, with financing from a local bank. The same client then asks
76 the lawyer to create a multi-tier corporate structure, formed in another state to
77 acquire property in a third jurisdiction, and requests to route the transaction's

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78 funding through the lawyer's trust account. Another example is when, during the
79 course of a representation, a new party is named or a new entity becomes
80 involved. A lawyer should not accept representation in a matter unless it can be
81 performed competently, promptly, without improper conflict of interest and to
82 completion. Ordinarily, a representation in a matter is completed when the
83 agreed-upon assistance has been concluded. See Rules 1.1, 1.2(c) and 6.5. See
84 also Rule 1.3, Comment [4].

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78 **Mandatory Withdrawal**

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80 [2] A lawyer ordinarily must decline or withdraw from representation if the client
81 demands that the lawyer engage in conduct that is illegal or violates the Rules of
82 Professional Conduct or other law. The lawyer is not obliged to decline or
83 withdraw simply because the client suggests such a course of conduct; a client
84 may make such a suggestion in the hope that a lawyer will not be constrained by
85 a professional obligation. Under paragraph (a)(4), the lawyer's inquiry into and
86 assessment of the facts and circumstances will be informed by the risk that the
87 client or prospective client seeks to use or persists in using the lawyer's services
88 to commit or further a crime or fraud. This analysis means that the required level
89 of a lawyer's inquiry and assessment will vary for each client or prospective
90 client, depending on the nature of the risk posed by each situation. Factors to be
91 considered in determining the level of risk may include: (i) the identity of the
92 client, such as whether the client is a natural person or an entity and, if an entity,
93 the beneficial owners of that entity, (ii) the lawyer's experience and familiarity
94 with the client, (iii) the nature of the requested legal services, (iv) the relevant
95 jurisdictions involved in the representation (for example, whether a jurisdiction is
96 considered at high risk for money laundering or terrorist financing), and (v) the
97 identities of those depositing into or receiving funds from the lawyer's client trust
98 account, or any other accounts in which client funds are held. For further
99 guidance assessing risk, see, e.g., as amended or updated, Financial Action
100 Task Force Guidance for a Risk-Based Approach for Legal Professionals, the
101 ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat
102 Money Laundering and Terrorist Financing, A Lawyer's Guide to Detecting and
103 Preventing Money Laundering (a collaborative publication of the International Bar
104 Association, the American Bar Association and the Council of Bars and Law
105 Societies of Europe), the Organization for Economic Cooperation and
106 Development (OECD) Due Diligence Guidance for Responsible Business
107 Conduct, and the U.S. Department of Treasury Specially Designated Nationals
108 and Blocked Persons List.

143 **Optional Withdrawal**

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145 [7] A lawyer may withdraw from representation in some circumstances. The
146 lawyer has the option to withdraw if it can be accomplished without material
147 adverse effect on the client's interests. ~~Withdrawal is also justified if the client~~
148 ~~persists in a course of action that the lawyer reasonably believes is criminal or~~
149 ~~fraudulent, for a lawyer is not required to be associated with such conduct even if~~
150 ~~the lawyer does not further it.~~ Withdrawal is also permitted if the lawyer's services
151 were misused in the past even if that would materially prejudice the client. The
152 lawyer may also withdraw where the client insists on taking action that the lawyer
153 considers repugnant or with which the lawyer has a fundamental disagreement.

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155 [8] A lawyer may withdraw if the client refuses to abide by the terms of an
156 agreement relating to the representation, such as an agreement concerning fees
157 or court costs or an agreement limiting the objectives of the representation.

Dealing with potential impairment



I.R.P.C. 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.

I.R.P.C. 1.16: Declining or Terminating Representation

What is “material impair[ment]” under I.R.P.C. 1.16(a)(2)?

- Serious medical condition
- Substance abuse
- Grief
- Burnout

Dealing with potential impairment

- Pursue treatment or other strategies to avoid impairment if possible.
- Substitute or include another colleague.
- Communicate, balancing client's need to be consulted with lawyer's privacy concerns. (ABA Formal Opinion 03-429 (2003)).