

Ethical Exits: ABA Formal Opinion 516, Permissive Withdrawal, and the Hot Potato Doctrine

Article By:

Christopher Blazejewski

Most attorneys have encountered, at one point or another, challenging client situations that prompt consideration of withdrawal. Unlike the relative freedom to decline new clients, terminating existing attorney-client relationships has long been governed by stricter ethical constraints. The rules governing withdrawal seek to strike a balance between an attorney's autonomy and protecting the client.

The American Bar Association's Standing Committee on Ethics and Professional Responsibility recently issued Formal Opinion 516, offering guidance on when attorneys may permissibly withdraw from client representations under Model R. Prof. Conduct 1.16(b)(1). The opinion examines the meaning of "material adverse effect on the interests of the client" – the key limitation on permissive withdrawal under Rule 1.16(b)(1). It explores the relationship between this ethical rule and judicial disqualification under the "hot potato" doctrine. It also includes a rare dissent by two members of the ABA standing committee. Below is a summary of the opinion and six practical takeaways for practicing attorneys navigating permissive client withdrawal decisions.

I. Permissive Withdrawal and "Material Adverse Effect"

The Model Rules establishes a framework for attorney withdrawal from representation. While clients possess the right to discharge a lawyer at any time, with or without cause, lawyers seeking to unilaterally terminate a representation are constrained by Rule 1.16.

First, under Rule 1.16(a), attorneys must withdraw in certain circumstances, such as when representation would result in ethical violations or when the attorney is discharged. Second, under Rule 1.16(b)(2)-(7), attorneys may withdraw for "good cause," including when clients use services for criminal purposes, fail to pay fees, or when the representation creates an unreasonable financial burden. Third, under Rule 1.16(b)(1), attorneys may withdraw for any reason, provided there is "no material adverse effect on the interests of the client."

For example, Rule 1.16(b)(1) allows attorneys to withdraw personal preference or business consideration as long as withdrawal doesn't significantly harm the client's legal interests. Whether the lawyer wishes to reduce workload, pursue other professional opportunities, or even avoid a potential conflict of interest by taking on a new client, the determining factor under Rule 1.16(b)(1) is

whether the withdrawal will cause material harm to the existing client's matter.

Formal Opinion 516 aims to provide greater clarity about what constitutes a “material adverse effect.” Withdrawal would have a material adverse effect if it resulted in (1) significant harm to the forward progress of the client's matter; significant increase in the cost of the matter; and/or (3) significant harm to the client's ability to achieve the legal objectives previously agreed upon. The opinion emphasizes that the adverse effect must relate to the client's interests in the specific matter, not merely the client's disappointment in losing the attorney's services or perception of disloyalty.

II. Potential for Material Adverse Effects in Various Scenarios

Formal Opinion 516 identifies several scenarios where withdrawal would likely cause material adverse effects:

- In transactional matters, where delay might jeopardize a deal's completion or value
- When no substitute lawyer is available or capable of completing the representation within necessary timeframes
- When timing is objectively critical to the client's matter
- When the withdrawing attorney possesses unique abilities or knowledge that cannot be readily transferred
- When successor counsel would need to duplicate substantial work, significantly increasing client costs

The opinion notes, however, that attorneys may be able to remediate these adverse effects through measures such as helping the client find substitute counsel, collaborating with successor counsel, or returning or foregoing fees for work that must be duplicated.

On the flip side, the opinion also identifies circumstances where withdrawal is unlikely to harm client interests and therefore would likely be permitted:

- Early in the representation, before substantial work has been performed
- When co-counsel can complete the remaining work without disruption
- When the representation is substantially complete, with only ministerial tasks remaining
- When there is no ongoing or imminent matter at the time of withdrawal

The opinion clarifies that Rule 1.16(b)(1) does not protect a client's interest in maintaining an ongoing attorney-client relationship or shield clients from disappointment – it only prevents attorneys from withdrawing when doing so would materially harm the client's legal interests in the specific matter.

III. The “Hot Potato” Doctrine and Rules of Ethics

Formal Opinion 516 concludes by addressing the relationship between Rule 1.16(b)(1) and the “hot potato” doctrine, which may disqualify attorneys who drop current clients to represent new clients with adverse interests to the then-current client.

Unlike other provisions of Rule 1.16(b), the attorney's motivation for withdrawal under 1.16(b)(1) is irrelevant. Under the Model Rules, therefore, an attorney may withdraw from representing one client to represent another client with adverse interests, provided the withdrawal does not cause material adverse effect to the original client's interests.

The opinion acknowledges that courts may still disqualify attorneys who drop clients to represent adverse parties pursuant to law of attorney disqualification. It distinguishes, however, between court disqualification decisions and violations of professional conduct rules, noting that the “hot potato” doctrine stems from common law duty of loyalty and the court’s efforts to maintain public confidence in the legal profession rather than the rules of professional conduct.

Whether and, if so, how courts apply the hot potato doctrine varies from jurisdiction to jurisdiction. See, e.g.:

- California – *of Trs. of Leland Stanford Junior Univ. v. Zhang*, 659 F. Supp. 3d 1061 (N.D. Cal. 2023)
- New York: *Merck Eprova AG v. ProThera, Inc.*, 670 F. Supp. 2d 201, 207 (S.D.N.Y. 2009)
- New Jersey: *Santacroce v. Nefl*, 134 F. Supp. 2d 366 (D.N.J. 2001)
- Pennsylvania: *Int’l Longshoremen’s Ass’n, Loc. Union 1332 v. Int’l Longshoremen’s Ass’n*, 909 F. Supp. 287, 293 (E.D. Pa. 1995)
- Texas – *Elec. Co. v. Mitsubishi Heavy Indus., Ltd.*, No. 3:10-CV-276-F, 2011 WL 13201855 (N.D. Tex. Sept. 12, 2011)
- Florida – *Lanard Toys Ltd. v. Dolgencorp LLC*, No. 3:15-CV-849-J-34PDB, 2016 WL 7326855 (M.D. Fla. Dec. 16, 2016)
- Illinois – *Life Ins. Co. v. Guardian Life Ins. Co. of Am.*, No. 06 C 5812, 2009 WL 1439717 (N.D. Ill. May 18, 2009)
- Massachusetts – *Bryan Corp. v. Abrano*, 474 Mass. 504, 509 (2016)
- Rhode Island – *Markham Concepts, Inc. v. Hasbro, Inc.*, 196 F. Supp. 3d 345 (D.R.I. 2016).

Attorneys should check their local rules and caselaw and consider consulting with local counsel before proceeding with a permissive withdrawal that may lead to disqualification.

IV. The Dissent

In a rare move, two ABA standing committee members wrote a dissent to Formal Opinion 516. They dissented from portions of the opinion, expressing concerns that the opinion (1) might discourage attorneys from properly closing files and transitioning dormant clients to former client status; (2) incompletely addresses the breadth of precedent on the hot potato doctrine; (3) fails to consider whether terminating a client to sue them could itself constitute a material adverse effect; (4) provides inadequate guidance for mandatory withdrawal situations; and (5) inadequately addresses transactional contexts. As noted above, these concerns, combined with the variable state-by-state caselaw concerning the hot potato doctrine, invite caution for any practitioner considering the use of permissive withdrawal to drop a first client to take on a second client in order to represent that second client in a matter adverse to the first client.

V. Six Practical Takeaways for Attorneys

1. Assess Material Adverse Effects Before Seeking to Withdraw

- Before withdrawing from any representation, conduct a thorough analysis of potential adverse effects on the client’s interests, focusing specifically on the three criteria identified in Opinion 516: harm to case progress, increased costs, and jeopardized objectives.

2. Implement Remediation Measures When Necessary

- When withdrawal might cause adverse effects, proactively seek to implement remediation measures. Try to assist the client in finding qualified successor counsel,

offer case transition assistance, and consider reducing or waiving fees for work that must be duplicated. The more significant the potential adverse effect, the more robust your remediation should be such the withdrawal would be permitted under Rule 1.16(b)(1).

3. Establish Adequate File Closure Procedures

- Develop systematic procedures for closing client matters when work is complete. Send a disengagement email or letter specifying when the representation has ended, return client materials when necessary, and provide final billing statements. This practice helps distinguish between current and former clients, potentially reducing conflict of interest complications that might necessitate withdrawal later.

4. Be Strategic About Timing

- When possible, time your withdrawal to minimize adverse effects. Withdrawal early in the representation or after substantial completion is generally less problematic than withdrawal during critical phases. Consider natural breaking points in the representation when the client can more easily transition to new counsel.

5. Understand That Court Disqualification Standards May Differ

- Recognize that courts may apply different standards when evaluating disqualification motions than those articulated in the ethical rules. Even if your withdrawal complies with Rule 1.16(b)(1), courts may still disqualify you from representing adverse parties under the “hot potato” doctrine. Consider both ethical compliance and potential court responses when planning withdrawal strategies.

6. Give Explanations to Clients When Appropriate

- When withdrawing, consider providing clients with an explanation of your reasons for withdrawal, consistent with confidentiality obligations to other clients. While client consent is not required for permissive withdrawal under Rule 1.16, thorough communication helps maintain professional relationships and reduces the likelihood of grievances or disputes.

VI. Conclusion

ABA Formal Opinion 516 provides improved clarity on the circumstances under which attorneys may withdraw from client representations under Model Rule 1.16(b)(1). By providing context for the meaning of “material adverse effect” and distinguishing ethical rules from judicial disqualification standards, the opinion offers a framework for attorneys to navigate withdrawal decisions. Attorneys should approach withdrawal decisions carefully, considering both ethical compliance and potential judicial responses.

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National Law Review, Volume XV, Number 98

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