

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2023-7
Issued September 14, 2023**

FACTS

The inquiring attorney created an irrevocable trust (the “Trust”) for two (2) clients, a husband and wife (the “Clients”), in 2016. The purpose of the Trust is to preserve its assets, which according to the inquiring attorney are protected from medical liens because the five (5) year lookback period has elapsed. The inquiring attorney is trustee of the Trust. The successor trustee is a family member of the Clients who is not one of their three (3) children.

The inquiring attorney reports that beginning in March 2023, one of the Clients’ children, a daughter, began contacting her regarding the Clients’ legal affairs. First, she asked the inquiring attorney to appoint her as the Clients’ power-of-attorney because she “does everything for them.” The inquiring attorney met with the Clients, deemed them competent, and appointed the daughter as the Clients’ power-of-attorney. The daughter accompanied the Clients to the meeting but was visibly upset that she could not participate.

Next, the inquiring attorney states, the daughter contacted her in June 2023 to schedule a meeting because the Clients wished to review their insurance policies. The daughter again accompanied the Clients to the meeting but participated this time. According to the inquiring attorney, the daughter did all the speaking for herself and the Clients, was aggressive and agitated, and directed ire at the inquiring attorney regarding her status as trustee of the Trust. The inquiring attorney found the daughter’s conduct at this meeting to be bullying, such that the inquiring attorney terminated the meeting because she concluded that the Clients were unable to act independently of the daughter.

Following her termination of the June 2023 meeting, the inquiring attorney sent the Clients a letter in which she asked them whether they wished her to resign as trustee or terminate the Trust. She sought to schedule a meeting with only the Clients (e.g. without the daughter present) to discuss the matter and determine if they were acting of their own free will. The inquiring attorney reports that the Clients have not responded to the letter. Since then, the inquiring attorney has been contacted by an attorney wishing to discuss the matter who refuses to disclose who she represents.

ISSUE PRESENTED

The inquiring attorney asks whether it is permissible for her to resign as trustee and withdraw from and terminate her representation of the Clients.

OPINION

The inquiring attorney may withdraw from and terminate her representation of the Clients because, based on the facts presented, her withdrawal will not have a material adverse effect on the Clients' interests; provided, that she must first satisfy her obligation to mitigate the consequences of termination before withdrawing.

REASONING

At the outset, the Panel makes clear that pursuant to Rule 9.1, its jurisdiction is limited to examining a lawyer's conduct as it applies to the Rules of Professional Conduct. Issues relating to an attorney's fiduciary duties with respect to his or her role as the trustee of a trust require resolution of questions concerning substantive law outside the area of legal ethics and discipline and, therefore, will not be considered or addressed herein.

With regard to the question of withdrawal from and termination of representation, Rule 1.16 sets forth the applicable standard:

(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.

(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;

(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.

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

(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.

Here, the inquiring attorney's withdrawal from and termination of her representation of the Clients will not have a material adverse effect on their interests. The Trust is established and, according to the inquiring attorney, its assets are protected and preserved. There are no outstanding legal matters on which the inquiring attorney is currently working for the Clients, nor is the inquiring attorney representing the Clients in any ongoing matters before any court. Finally, the inquiring attorney found the Clients to be competent when she designated the Clients' daughter as their power-of-attorney.

However, the Panel cautions that before withdrawing from and terminating her representation of the Clients, the inquiring attorney should take all reasonable steps pursuant to Rule 1.16(d) to mitigate the consequences to the Clients of her withdrawal, including, but not limited to, providing notice to the Clients of her intention to terminate representation, permitting the Clients time to select replacement counsel, returning the Clients' papers and property, and refunding any unearned fees or expenses. This is a non-exhaustive list of mitigation steps; the particular circumstances of the matter may require additional efforts. See Hazard, Hodes, Jarvis, and Thompson, The Law of Lawyering, § 21.18 n. 56, pg. 34 (2023).