



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1270 (08/06/2024)

Topic: Engagement letters; Recording attorney-client communications; Withdrawing from employment; Advance consent to withdrawal.

Digest: A lawyer’s engagement letter or retainer agreement may prohibit the client from making audio or video recordings of communications between the lawyer and client provided the engagement letter or retainer agreement: (a) does not mislead the client regarding circumstances under which the lawyer may seek to withdraw from the representation; and (b) does not purport to serve as the client’s irrevocable advance consent to the lawyer’s withdrawal if the client violates the prohibition.

Rules: 1.16

FACTS:

1. The inquirer contemplates including in his retainer agreements and engagement letters a “No Recording Clause” prohibiting each client from recording any communication between the two of them via audio or video absent the other’s informed consent.
2. The inquirer seeks further to reserve the right to withdraw from a representation if a client violates the No Recording Clause.

QUESTIONS:

3. May a retainer agreement or engagement letter include a No Recording Clause?
4. If so, may the lawyer withdraw from the representation if the client violates the No Recording Clause (subject to permission of the tribunal in matters pending before a tribunal)?
5. May a retainer agreement or engagement letter provide that the client consents in advance to the lawyer’s withdrawal from representation if the client breaches the No Recording Clause?

OPINION:

6. Nothing in the New York Rules of Professional Conduct (the “Rules”) expressly prohibits (or expressly authorizes) the inclusion of a No Recording Clause in a retainer agreement or engagement letter. From that silence, we infer that a retainer agreement may include a No

Recording Clause, subject to other provisions of the Rules that may apply to attorney-client relationships and agreements, including several provisions of Rule 1.16.

7. Rule 1.16(b) prescribes the circumstances in which withdrawal is mandatory and Rule 1.16(c) explains when withdrawal is permissive. When a lawyer desires to withdraw from a matter pending before a tribunal, however, the lawyer must comply with Rule 1.16(d), which requires a lawyer to seek permission from the tribunal if the rules of the tribunal so require, and requires a lawyer to “continue representation notwithstanding good cause for terminating the representation” if the tribunal so orders. Moreover, whether a matter is pending before a tribunal or not, the withdrawing lawyer must comply with Rule 1.16(e), which requires the lawyer to “take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client,” including various steps specified in the rule.

8. Subject to the conditions set out in Rule 1.16, a lawyer’s withdrawal based on a client’s violation(s) of a No Recording Clause would be ethically permissible. *See, e.g.*, Rule 1.16(c)(1) (withdrawal is permissible when it “can be accomplished without material adverse effect on the interest of the client”); Rule 1.16(c)(7) (withdrawal is permissible when “the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively”); Rule 1.16(c)(10) (withdrawal is permissible when “the client knowingly and freely assents to termination of the employment”); Rule 1.16(c)(12) (withdrawal is permissible when “the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.”).

9. A client’s violation of a No Recording Clause will not always satisfy the conditions in Rule 1.16. For example, a client’s single, inadvertent, or immaterial violation of a No Recording Clause, standing alone, is not likely to render a “representation unreasonably difficult for the lawyer to carry out employment effectively” within the meaning of Rule 1.16(c)(7) or to constitute “other good cause for withdrawal” within the meaning of Rule 1.16(c)(12). But a client’s multiple minor violations of a No Recording Clause, or a client’s single deliberate or material violation, are more likely to satisfy the conditions permitting withdrawal.

10. In N.Y. State 719 (1999), in opining on the predecessor to Rule 1.16 in the Code of Professional Responsibility, we noted that our analysis of provisions in engagement letters and retainer agreements permitting a lawyer to withdraw is governed by two principles.

11. The first principle is that an engagement letter or retainer agreement may not purport to authorize an attorney to withdraw from a representation under circumstances in which withdrawal would be impermissible under the rule governing withdrawal (then DR 2-110, now Rule 1.16).

12. The second principle is that an engagement letter may not mislead the client with regard to the attorney’s obligations, including the attorney’s obligation to continue as counsel in the absence of a permissible ground for withdrawing from the representation (or in the face of a tribunal’s order that the attorney must continue the representation even if the attorney has a permissible ground for withdrawal).

13. In N.Y. State 719, we applied these principles to our analysis of DR 2-110, which was the predecessor of Rule 1.16. We said:

[The withdrawal rule] does not authorize a lawyer to enter into, or act in reliance on, a retainer agreement which purports to set forth conditions for terminating the representation that would not otherwise justify withdrawal It is axiomatic that a lawyer may not enter into an agreement with a client in which the client expressly authorizes or permits the lawyer to violate a Disciplinary Rule. ...

14. We believe that our analysis of the withdrawal rule in the former Code of Professional Responsibility (DR 2-110) fully applies today under Rule 1.16. Thus, a lawyer may not enter into, or act in reliance on, a letter of engagement or retainer agreement that sets forth conditions for terminating the representation that would not justify withdrawal under Rule 1.16.

15. Whether the client's breach rises to a level justifying the lawyer's withdrawal will be a case-by-case inquiry. In any case, if the client breaches the No Recording Clause, the lawyer must seek the permission of the tribunal pursuant to Rule 1.16 (d) before withdrawing, and the lawyer must inform the client that the tribunal's permission will be required even if the client breaches the No Recording Clause. In other words, the lawyer may not mislead the client into believing that the lawyer will have unfettered discretion to withdraw based on the No Recording Clause in the letter of engagement if the client breaches that clause. Rather, both the lawyer and the tribunal will need to assess all of the facts and circumstances at the time the lawyer seeks to withdraw.

CONCLUSION:

16. A lawyer's letter of engagement or retainer agreement may prohibit a client from making video recordings and audio recordings of communications between the lawyer and client, provided the letter of engagement or retainer agreement: (a) does not mislead the client regarding circumstances under which the lawyer may seek to withdraw from the representation; and (b) does not serve as irrevocable advance consent by the client to withdrawal by the lawyer if the client violates the prohibition.

(12-23)