

## Abandonment of Legal Practice

Although it may not happen often, abandonment of a law practice does occur. Divorce, alcoholism, stress, boredom, and heavy workloads have been factors in lawyers leaving a practice without any word to clients, colleagues, the Bar, or court officials. The interaction between these types of personal problems and abandonment of a practice is clearly visible upon an examination of court cases dealing with the abandonment of practice.

The following four cases elucidate the relationship between an attorney's personal problems and abandonment of his practice. In *Florida Bar v. Penrose*,<sup>1</sup> an attorney was before the state supreme court for disciplinary hearings on the abandonment of his practice. The attorney had a rather dire personal problem that quite possibly influenced his abandoning practice: he was involved in a conspiracy to purchase and distribute marijuana.<sup>2</sup>

In *In re Johnson*,<sup>3</sup> the fact situation is quite different; however, again the personal problem suffered by the attorney may reasonably explain his abandoning practice. Johnson had been involved in the practice of law in Minnesota for 26 years.<sup>4</sup> During these years, he never ran afoul of the state bar regulations;<sup>5</sup> yet, he moved to Florida leaving 12 outstanding cases in which he was the attorney of record.<sup>6</sup> To avoid disbarment, Johnson petitioned the state supreme court and requested that he be allowed to resign as an attorney from the Minnesota bar.<sup>7</sup> The conditions the court placed upon allowing Johnson to resign divulge a personal problem with alcoholism.<sup>8</sup> While the case does not establish that alcoholism was the sole cause of the attorney's abandonment of practice, it is entirely possible that this problem weighed heavily in his irresponsible action.

Another case of abandonment of practice involves the problem

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1. 413 So. 2d 15 (Fla. 1982).

2. *Id.* at 15.

3. 290 N.W.2d 604 (Minn. 1980), *modified*, 300 N.W.2d 793 (Minn. 1981).

4. *Id.* at 605.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 606.

of divorce, *In re Peters*.<sup>9</sup> The court in *Peters* lists seven cases that were pending when Peters abandoned practice.<sup>10</sup> Furthermore, the court states that such action justifies disbarment;<sup>11</sup> however, the court reduced the discipline in light of Peters' personal problem.<sup>12</sup> It is pointed out that during the time that the complaints against the attorney arose, Peters was involved in a divorce.<sup>13</sup> Peters claimed that the divorce affected him to the extent that he required psychiatric help.<sup>14</sup> Again, the interrelationship between personal problems and abandonment of practice is clearly evident.

*In re Cuddy*<sup>15</sup> involves an attorney from upstate New York who abandoned practice after 13 years. Cuddy attempted to explain his behavior on the basis that the new position he had recently taken as an executive for a surety company required more time and travel than he had expected.<sup>16</sup> Therefore, the new job interfered with his intention to orderly phase out his law practice.<sup>17</sup> Cuddy further contended that the new assignment caused the dissolution of his marriage and his hospitalization for alcoholism.<sup>18</sup>

There also exists a body of cases on the abandonment of practice in which there is no discussion as to the circumstances involved therein.<sup>19</sup> Quite possibly, the attorneys in these cases suffered from the same type personal problems as previously discussed. Another plausible explanation involves the concept of burnout. Burnout is the "marked loss of interest in something about which one was once highly enthusiastic."<sup>20</sup> In an article on burnout, one commentator relates the stories of once enthusiastic attorneys that have now abandoned the legal profession.<sup>21</sup> The

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9. 332 N.W.2d 10 (1983).

10. *Id.* at 13-15.

11. *Id.* at 17.

12. *Id.* at 18.

13. *Id.* at 17.

14. *Id.* at 17-18.

15. 79 A.D.2d 798, 433 N.Y.S.2d 881 (1980).

16. *Id.* at —, 433 N.Y.S.2d at 882.

17. *Id.*

18. *Id.*

19. See *Florida Bar v. Montgomery*, 412 So. 2d 346 (Fla. 1982); *Florida Bar v. Merritt*, 394 So. 2d 1018 (Fla. 1981); *Florida Bar v. Morrison*, 362 So. 2d 1356 (Fla. 1978); *In re Flinn*, 243 Ga. 342, 253 S.E.2d 692 (1979); *In re Merritt*, 266 Ind. 353, 363 N.E.2d 961 (1977).

20. Gillette, *Burnout*, 2 CAL. LAW. 48, 50 (1982).

21. *Id.*

causes of burnout are varied; however, central ingredients in the burnout process appear to be stress, the immense workload, and frustration from the loss of control over one's time and life.<sup>22</sup> The effects of burnout are "heightened emotionality, beginning with frustration and progressing to anger, anxiety and eventually depression."<sup>23</sup> Causing severe depression and anxiety, burnout easily rises to a position that could induce an attorney to abandon practice.

### *Effects of Abandonment on Clients*

Regardless of the reasons for attorneys abandoning their practices, the client invariably suffers. In the *Penrose* case, the attorney left all files unattended and in the possession of a nonlawyer.<sup>24</sup> This could result in hampering the client in obtaining another lawyer and possibly involve a breach of confidentiality. Yet, often when attorneys abandon practice, the client's files are not returned to the client or sent to replacement counsel. Such was the case in *Peters*. The attorney in that case was evicted from his office for nonpayment of rent.<sup>25</sup> Although Peters was given an opportunity to remove his clients' files from the office, he failed to do so.<sup>26</sup> This resulted in most of the files being removed by the county sheriff to a storage facility,<sup>27</sup> hardly a suitable location for active client files. Peters further damaged his clients by not informing them of the location of their files.<sup>28</sup> This resulted in delays in the disposition of clients' cases.<sup>29</sup>

A client in *In re Merritt* suffered a costly loss due to the attorney's failure to inform the client that he was abandoning his practice.<sup>30</sup> Merritt was retained to represent a defendant in a civil action.<sup>31</sup> The attorney failed to attend a hearing regarding his failure to answer interrogatories.<sup>32</sup> This resulted in a default judgment

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22. *Id.*

23. *Id.*

24. *Penrose*, 413 So. 2d at 15.

25. *Peters*, 332 N.W.2d at 12.

26. *Id.* at 13.

27. *Id.*

28. *Id.*

29. *Id.* at 15.

30. 266 Ind. 353, —, 363 N.E.2d 961, 966 (1977).

31. *Id.*

32. *Id.*

against the defendant for the amount of \$5,000.<sup>33</sup> The defendant was forced to obtain another attorney and file for bankruptcy.<sup>34</sup>

Another problem involved in many of the abandonment of practice cases is the failure of the attorney to return unearned fees. In *Florida Bar v. Morrison*,<sup>35</sup> the attorney failed to account to his clients and the courts for over \$100,000 in funds. In New York, the supreme court charged an attorney with "failure to account to three clients for the unearned portion of his fees."<sup>36</sup> The Florida Supreme Court stated in *Penrose* that the attorney failed "to conclude a dissolution after accepting a fee to do so."<sup>37</sup> Abandonment of practice is such a gross breach of responsibility that it is unlikely that an attorney who abandons his practice without notice to his client will return unearned fees. *In re Johnson*<sup>38</sup> stands as an exception. In that case, the court stated that there were no allegations of fund misuse or improper advancement of attorney fees.<sup>39</sup>

### *Applicable Standards of Professional Responsibility*

In reviewing these cases on abandonment, state supreme courts look to a number of provisions contained in the ABA Model Code of Professional Responsibility. The most applicable code sections are DR 6-101(A)(3), DR 7-101(A) (2), (3) and DR 2-110(A), (C). Disciplinary Rule 6-101(A)(3)<sup>40</sup> provides that a lawyer shall not neglect legal matters that he is entrusted with handling. Abandoning practice while cases are still open clearly violates this Model Code section. Disciplinary Rule 7-101(A) (2), (3)<sup>41</sup> provide

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33. *Id.*

34. *Id.* at \_\_\_\_, 363 N.E.2d at 967.

35. 362 So. 2d 1356 (Fla. 1978).

36. *Cuddy*, 79 A.D.2d at 289, 433 N.Y.S.2d at 881.

37. *Penrose*, 413 So. 2d at 15.

38. *Johnson*, 290 N.W.2d 604, 605.

39. *Id.* at 605.

40. Model Code of Professional Responsibility (hereinafter cited as Model Code) DR 6 101(A)(3) (1981): "A lawyer shall not: (3) Neglect a legal matter entrusted to him.

41. Model Code, *supra* note 40, DR 7-101(A)(2), (3):

(A) A lawyer shall not intentionally:

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw so permitted under DR 1-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship except as required under

sanctions against lawyers who breach employment contracts with clients, prejudice or damage clients. Clearly DR 7-101(A)(2) is violated when an attorney abandons a client while their employment relationship is still ongoing. Disciplinary Rule 7-101(A)(3) is also easily violated in the typical abandonment situation. Such is the case when a client loses his file or is delayed in an action, or even loses his case.

The most applicable Disciplinary Rule to the abandonment situation is DR 2-110(A), (C). DR 2-110(A), (C) provides in pertinent parts:

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(C) Permissive Withdrawal.

If DR 2-220(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because . . .

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.<sup>42</sup>

This Model Code section is universally violated in the abandonment cases discussed in this article. In no case was the client

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DR 7-102(B).

*Id.*

42. MODEL CODE, *supra* Note 40, DR 1-110(A)(C) (4), (5), (6); See EC 2-32.



informed of the attorney's withdrawal from practice. This is a violation of DR 2-110(A)(2). In several of the abandonment cases, the clients were not given the papers and property to which they were entitled.<sup>43</sup> This also violates DR 2-110 (A)(2). Many of the abandonment cases run afoul of DR 2-110(A)(3): the attorney fails to return unearned fees.<sup>44</sup>

Under the provisions of DR 2-110(C)(4), the attorney is allowed to withdraw due to mental or physical conditions that render it difficult for him to continue his practice.<sup>45</sup> The physical problems of alcohol and the mental trauma of divorce may bring attorneys under the provision of DR 2-110 (C)(4). However, this does not relieve the attorney from the requirements of DR 2-110(A)(2), (3). It may have been possible for Peters, Cuddy and Johnson to withdraw from practice without violating DR 2-110, but the total abandonment of practice without protecting the clients removed this possibility.<sup>46</sup>

Under the Model Rules of Professional Conduct, adopted in August 1983, the abandonment of practice is covered by Rule 1.16.<sup>47</sup> This rule closely parallels that of DR 2-110 under the Model

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43. See *Peters*, 332 N.W.2d at 13; *Penrose*, 413 So. 2d at 15; *Merritt*, 394 So. 2d 1019; *Flinn*, 243 Ga. at —, 253 S.E.2d at 692.

44. See *Penrose*, 413 So. 2d at 15; *Merritt*, 394 So. 2d at 1020; *Morrison*, 362 So. 2d at 1356; *Flinn*, 243 Ga. at —, 253 S.E.2d at 692; *Cuddy*, 79 A.D.2d at 789, 43 N.Y.S.2d at 881.

45. MODEL CODE, *supra* Note 40, DR 2-110(C)(4).

46. See *Peters* 332 N.W.2d at 17; *Johnson*, 290 N.W.2d at 606; *Cuddy*, 79 A.D.2d at —, 433 N.Y.S.2d at 882.

47. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.16 (1983):

(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:

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

(B) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client.

(6) other good cause for withdrawal exists.

(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 employ-

Code. However, there are a few differences between the two provisions. While DR 2-110(C)(4) *allows* an attorney to withdraw when a physical or mental condition interferes with his ability to work effectively, Rule 1.16 provides that an attorney *shall* withdraw if such a condition exists.<sup>48</sup> Another noticeable difference is found between DR 2-110(C)(6) and Rule 1.16(b)(6). The Disciplinary Rule only calls for the good faith belief on the part of the attorney that the tribunal will find good cause for withdrawal.<sup>49</sup> Rule 1.16(b)(6) simply requires that "other good cause for withdrawal exists."<sup>50</sup> It is possible to interpret Rule 1.16(b)(6) as actually requiring that good cause exists for withdrawal while DR 2-110(C)(6) only requires that the attorney believe in good faith that a good cause for withdrawal exists. This interpretation would result in Rule 1.16 being a more stringent provision. However, this is somewhat moot in the case of outright abandonment of practice, because under such circumstances, the attorney would fall under either Rule 1.16 or DR 2-110.

### *Bar Reaction to Abandonment*

In reviewing cases involving the abandonment of practice, the courts have strictly enforced the provisions of the Model Code. This is evident in that the most often prescribed punishment is disbarment. This far this paper has cited nine cases on abandonment of practice. The respective supreme courts have imposed the punishment of disbarment in seven of those nine cases.<sup>51</sup> In the remaining two cases, the courts imposed indefinite suspension from legal practice as the discipline.<sup>52</sup> In *Peters*, one of the two case or-

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ment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

48. MODEL CODE, *supra* Note 40, DR 2-110(C)(4); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(A)(2) (1983). (DR 2-110(B)(3) provides for mandatory withdrawal if a lawyer's mental or physical condition make it unreasonably difficult for him to carry out the employment effectively. This may be different from materially impairment under Rule 1.16).

49. MODEL CODE, *supra* Note 40, DR 2-110(C)(6) (1981).

50. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.16(B)(6) (1983).

51. See generally *Penrose*, 413 So. 2d 15; *Montgomery*, 412 So. 2d 346; *Merritt*, 394 So. 2d 1018; *Morrison*, 362 So. 2d 1356; *Flinn*, 243 Ga. 342, 253 S.E.2d 692; *In re Merritt*, 266 Ind. 353, 363 N.E.2d 961; *Johnson*, 290 N.W.2d 604.

52. See 332 N.W.2d 10; 79 A.D.2d 789, 433 N.Y.S.2d 881.

dering indefinite suspension, the court states, "we conclude that the admitted charges justify disbarment, but in lieu of outright disbarment we order an indefinite suspension."<sup>53</sup> This is an incredible ruling in light of the fact situation involved in *Peters*. Peters failed to file an answer to a petition regarding his professional misconduct;<sup>54</sup> Peters failed to remove his clients' files when he was evicted from his office;<sup>55</sup> furthermore, Peters failed to pay for debts connected with his law practice.<sup>56</sup> Evidently, the court considered the mitigating factors in imposing a sanction: the fact that Peters was going through a "protracted marital dissolution proceeding"<sup>57</sup> when most of the problems related to his practice arose.

The New York court also considered mitigating factors in *Cuddy* stating:

In determining the sanction to be imposed upon respondent for his misconduct, we have given due consideration to his plea in mitigation. Under all the circumstances we conclude that respondent should be suspended from the practice of law indefinitely with leave to apply for reinstatement upon a showing that he possesses the character and general fitness necessary to resume the practice of law, including a showing that he has discharged any outstanding obligations to his former clients.<sup>58</sup>

The mitigating factors in this case involved a new job assignment, divorce and alcoholism.<sup>59</sup>

Although the courts in some cases reduce the discipline in light of mitigating factors, the records reveal a fervent application of the Code provisions. Overall, the courts have determined that disbarment is the most appropriate sanction for abandonment of practice.

### *Conclusion*

While the abandonment of practice by attorneys has not reached epidemic proportions, there are enough instances of abandonment to concern the bar. In most cases, the bar has responded

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53. 332 N.W.2d at 11.

54. *Id.* at 13.

55. *Id.*

56. *Id.* at 12, *see* R.2 (C).

57. *Id.* at 17.

58. 79 A.D.2d at \_\_\_\_, 433 N.Y.S.2d at 882.

59. *Id.*



to abandonment with severe discipline: disbarment. This response is especially called for in abandonment cases since the client almost universally suffers great harm. Furthermore, such irresponsibility by attorneys generates distrust and dislike of the bar as a whole. The future of the bar rests on responsibility of its members. Since abandonment of practice is one of the most irresponsible acts an attorney can commit, it cannot be tolerated.

*Steve Perryman*