This Case is Killing Me

LAWYERS MUTUAL | LIABILITY INSURANCE COMPANY OF NORTH CAROLINA

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"This Case is Killing Me!"

Lawsuits can be stressful (and lawsuits against YOU can be even more stressful) - on clients, attorneys, carriers, and others. We address the stresses of representing difficult clients, and how to prevent those cases from evolving into a legal malpractice claim. When a legal malpractice claim does arise, there are mental health and stress concerns for all participants in the litigation process. The panel will discuss common pitfalls in representing challenging clients, tips on how to protect yourself and your law practice – including when and how to fire a problem client, as well as tips on how to assist clients and colleagues who may be suffering under the pressure and challenges of a difficult case, or in the face of a malpractice claim.

PART 1

"RULES OF ENGAGEMENT"

Rule 1 – Thou shalt vet thy client, and not take every case that walks in the door.

Rule 2 – Thou shalt prepare a proper engagement/retainer agreement.

Rule 3 – Thou shalt set a proper retainer/contingency.

Rule 4 – Thou shalt not dabble.

Importantly, …

THOU SHALT TRUST THY GUT INSTINCT!!

I. Red Flag Clients

- "The Guaranteed Rate Client" - Beware the client who insists they can only afford an inadequate retainer or is looking for a guarantee of success.

- "The Another Galaxy Client" - Beware the client who expresses unreasonable expectations.

- "The You Are My Very Expensive Therapist in Addition to My Lawyer Client" - Beware the client who demonstrates a pattern of boundary violations, everything is a crisis, frequent telephone calls, unreasonable requests or demands special favors.

- "The Cynic" - Beware the cynical client who constantly belittles lawyers and the legal system – What happens if you lose?

- "Three Strikes and *You Should be Out too"* - Beware the client who has fired or been fired by every other lawyer in town.

- "It's All About the Principle, Baby" - Beware the client who says "it's not the money, it's the principle."

- "The 'I did one year of Law School Client" - Beware the client who has done their own research and refuses to follow your advice.

- "Better Late Than Never – NOT!" Beware the client who arrives on your doorstep on the verge of an important deadline.

- "Over/In-Communicado" - Beware the client who over communicates or who never communicates.

- "The Unintended Contingency Fee Client" - Beware the client who is always late paying the bill.

II. Dangers of the "Good" Client

- So much work comes from this client that you feel obligated
- You make exceptions you would never make for other clients
- You do business deals on cocktail napkins because you are friends
- You do business deals on cocktail napkins because you are in business together
- You dabble in areas of practice that you otherwise would not

PART 2

"RULES OF DISENGAGEMENT"

- Regardless of all your efforts, a difficult client may become too impossible to continue the attorney-client relationship. If you are unable to satisfy the client with your work, you may need to allow the client to seek other counsel. If the case is being transferred to another lawyer, be sure the client is not disadvantaged in the process and that all material is duly forwarded. Even if the client has fired you, handle the issue courteously and professionally. Copy the client on all correspondence regarding the transfer of the file. Maintain a copy of the file for your records should a grievance or malpractice claim arise.

- If you find the attorney-client relationship has deteriorated to such a state that you are feel compelled to withdraw as counsel, take care to follow proper court procedures. An attorney cannot prematurely abandon a client. If you elect to withdraw, notify the client in writing and seek permission to file the appropriate paperwork with the court. Remind the client of the immediate need to seek substitute counsel and the time limitations associated with the case. Inform the client you will cooperate with substitute counsel.

- Regardless of whether you or the client terminated the attorney-client relationship, send the dis-engagement letter by certified mail and confirm receipt. This will provide written documentation that the letter was received by the client and that they were informed of the importance of pursuing the matter with substitute counsel timely. Maintain the return receipt card with the dis-engagement letter for your records.

PART 3

"Oops – I Made a Mistake – what now???"

- When a material mistake does occur, many attorneys make the situation worse by mishandling the matter with their client or their professional liability insurer. The potential consequences of mishandling a material mistake may subject an attorney to significant consequences such as:

  a) disciplinary proceedings at the State Bar;

  b) additional causes of action (beyond mere negligence) and damages in a legal malpractice claim;

  c) fee disgorgement; and

  d) potential loss of coverage under malpractice policy.

- Ethical Considerations To Client

a) A lawyer has an ethical obligation to keep the client apprised of information that is material to the representation.

b) A lawyer should not withhold information from a client to serve the lawyer's own interest.

c) If you know that you have made a material mistake that cannot be fixed, you should promptly inform the client of the mistake and tell them that due to a conflict of interest you may no longer advise him or her on the subject of your representation. Confirm the conversation in writing. This will not only substantiate and document the existence of the conversation and what was disclosed but also serve as a marker relative to the possible accrual of the statute of limitations for a malpractice claim.

d) If a mistake is correctable or has no real effect on the client's interests, there is no conflict of interest between the lawyer and the client. Additionally, a lawyer should be cautioned that when informing clients of such correctable mistakes, that the lawyer should do so in a way that does not unnecessarily cause alarm or otherwise negatively effect the attorney-client relationship.

e) Effective claims repair efforts may remedy the mistake.

f) In determining whether an attorney mistake creates a conflict of interest with his client, the attorney should ask herself whether there is a real likelihood that the mistake could result in a malpractice claim by the client against the attorney.

g) Before undertaking any repair effort, you must obtain the informed consent of the client to continue the representation. Informed consent requires: (1) disclosing the material facts surrounding the error; (2) informing the client that he has the right to terminate the representation; and (3) informing the client that he has the right to seek other counsel. Again, confirm this in writing!

h) If the mistake is one that requires you to withdraw as counsel due to the conflict of interest with your client, you should also provide your client with their file, keeping a copy for yourself. A separate file should be established for attorney-client privileged and work product documents.

- **Mishandling A Mistake May Result In Disciplinary Proceedings, Increased Damages, And Fee Disgorgement**

  a) Illustrations and examples of severe disciplinary consequences to an attorney who mishandles a mistake in violation of the ethics rule - Violations relative to trust accounts/client money seem to have the most severe penalties. Additionally, withholding attorney work-product and the client's file during disputes can result in severe penalties.

  b) Beyond the potential for discipline from State Bars, mishandling duties to the client after discovery of a mistake may also result in increased malpractice exposure for the attorney – intentional concealment of a mistake may expose an attorney to claims of fraud and punitive damages, or criminal penalties, which will not be covered by most errors and omissions policies.

  c) Increased damages and theories of liability may be opened up where an attorney mishandles his duties after making a mistake.

     1. Breach of fiduciary duty may also give rise to a claim for disgorgement or forfeiture of fees.

     2. Hiding a mistake from your client may also extend the statute of limitations applicable to a legal malpractice case against you.

- **Call Your E & O Carrier Promptly And Report A Potential Claim or Disciplinary Action**

  - Do not jeopardize coverage by failing to give prompt notice of a claim to your legal malpractice insurer.

    1. If something occurs which prompts you to make the disclosures to client discussed above, it should also prompt you to notify your carrier.

    2. Carrier needs to be notified not only of potential claims but also disciplinary action proceedings. Disciplinary action defense coverage/supplemental benefits might be available under the E&O policy. Typically such supplemental benefits are provided because a disciplinary proceeding is not an actual 'claim.' However, the benefits are a small amount but are also typically outside the limits of liability and exclusive of the deductible.

  - Opportunity for claims repair:

    1. Your E&O carrier would rather help you repair the claim before it turns into a lawsuit.

    2. Many policies contain claims repair coverage, and sometimes this does not even require that you pay a deductible (although often the amount of coverage is limited).

    3. Why claims repair?

PART 4:

"Don't be an Ostrich! – RULES OF DISENGAGEMENT – TAKE 2" -

Summary of Withdrawing/Reporting After a Material Mistake

- The potential consequences of mishandling a material mistake may subject an attorney to significant consequences such as: 1) disciplinary proceedings at the State Bar; 2) additional causes of action (beyond mere negligence) and damages in a legal malpractice claim; 3) fee disgorgement; and 4) potential loss of coverage under your malpractice policy

- After becoming aware of a mistake that may prejudice your client's interests, you should first remember your ethical obligation to keep the client apprised of information that is material to the representation. Rule 1.4 of the N.C. Rules of Professional Conduct

- Attorneys must always remember that their clients' interest is paramount to their own interest. A lawyer should not withhold information from a client to serve the lawyer's own interest (N.C. Rules of Prof'l Conduct R 1.4, Comment 7), and the lawyer must avoid impermissible conflicts of interest.

- If you know that you have made a material mistake that cannot be fixed, you should promptly inform the client of the mistake and tell them that due to a conflict of interest you may no longer advise him on the subject of your representation.

- When informing your client that you may have made a mistake, keep in mind that the ethics rules prohibit a lawyer from settling a legal malpractice claim "with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in connection therewith." N.C. Rules of Prof. Conduct R 1.8(h)(2).

- Promptly reporting mistakes to your professional liability insurer will avoid any uncertainty about timeliness of the claim under your policy. Prompt reporting to Lawyers Mutual may also result in a claims repair opportunity that remedies the situation before a malpractice claim by the client.

[redacted]

CRANFILL SUMNER & HARTZOG LLP

[redacted]

December 11, [redacted]

VIA CERTIFIED MAIL & REGULAR MAIL

[redacted]

Re: [redacted]

Dear [redacted]

As you know, no retainer payment has been made by you as required under the terms of our engagement for the above-referenced matter. [redacted] After you were served with the lawsuit filed by the [redacted] I advised that I would make a limited appearance on your behalf in order to obtain an extension of time for [redacted] to respond to the [redacted] complaint. An answer is due in that lawsuit on **December 10,** [redacted] and no payment has been made towards the retainer. [redacted] will be applied to that [redacted] particularly given the historical issues we have had with communication and payment.

In an effort to protect your interests and to allow you time to secure the funds to proceed with my representation of [redacted] or to retain new counsel, I was able to negotiate an additional informal extension with the [redacted] attorney, [redacted] Mr. [redacted] agreed to afford you through January 2, [redacted] to serve an answer to the complaint, contingent upon your providing him a [redacted] As a courtesy to you, I will provide him with those documents in order to facilitate quickly getting them into Mr. [redacted] hands to confirm the extension to answer. Mr. [redacted] aware that I do not represent [redacted] in connection with the [redacted] lawsuit. Accordingly, he may contact you directly [redacted] Please be responsive to his requests in order to protect your interests.

An answer to the lawsuit is due pursuant to the informal extension of time on January 2, [redacted] **This extension is only good if you provide him with the requested documents. I have provided the [redacted] but I do not have a copy of th[redacted]. You must get this to M[redacted], or to me to provide to him, before the end of this week.** Should [redacted] fail to serve and file an answer to the

[redacted]

lawsuit, th[redacted] will likely pursue a motion for entry of default, followed by a motion for default judgment. This is exactly what happened in th[redacted]case; when you retained me, although you either did not know or did not advise me of the same, default had already been entered by the Clerk of Court and a motion for default judgment was on the calendar for the following day. Had I not happened to check the civil calendar and appeared on your behalf at that hearing, default judgment would have been entered against both [redacted] n connection with the [redacted]'s counterclaims and third party claims, which means that all of the allegations asserted by the [redacted]s would have been deemed admitted, and they would only have to prove their damages to the Court. In other words, had I not stepped in to appear on your behalf in that matter, despite the fact that the retainer had not been paid in full, there would in all likelihood be a substantial money judgment against bot[redacted]

I point this out because the same thing will happen if you do not retain counsel and file an answer to th[redacted]lawsuit. It is imperative that you retain an attorney before the answer is due on January 2, [redacted] **Again, let me emphasize that if you do not provide a copy of the [redacted] before the end of this week, that informal extension will not be granted and default could be entered against you sooner.** [redacted]

remaining terms of our original engagement.

Again, it is imperative that you retain an attorney [redacted] to retain you in the defense of this matter. An answer is due pursuant to an informal extension of time on January 2[redacted] **so long as you provide a copy of [redacted] for opposing counsel by the end of this week**. Because the lawsuit is filed agains[redacted]n, please be advised that you cannot represent yourselves in the defense, as a company cannot represent itself *pro se*. If you retain new counsel, I will be glad to speak with him or her in an effort to bring your new attorney up to speed in this matter. I have returned with this correspondence all original file materials in our Firm's possession, [redacted] and kept copies for my records.

[redacted]

With best regards, I am

Very truly yours,

[redacted]

NORTH CAROLINA COUNTY OF [redacted]	)	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION [redacted]
[redacted]	)	**MOTION TO WITHDRAW AS COUNSEL FOR PLAINTIFF AND THIRD PARTY DEFENDANT**

NOW COMES [redacted] and the law firm of Cranfill Sumner & Hartzog LLP, ("Law Firm") pursuant to Rule 1.16 of the Revised Rules of Professional Conduct of the North Carolina State Bar, moves to withdraw as counsel of record for Plaintiff, [redacted] and Third Party Defendant [redacted]s. In support of this Motion, counsel states:

1. Plaintiff and Third Party Defendant have failed substantially to fulfill their obligations pursuant to the terms of their engagement agreement with Law Firm regarding Law Firm's services and have been given multiple warnings that the undersigned will withdraw unless the obligations are fulfilled.

2. The undersigned has also had extreme difficulty communicating with Third Party Defendant and this renders it unreasonably difficult for the undersigned to represent the Plaintiff and Third Party Defendant effectively. Undersigned has requested information

and documents from Third Party Defendant on multiple occasions and advised Third Party Defendant of undersigned's inability to properly represent [redacted] without cooperation.

3. In addition, the undersigned also mailed the email communications to [redacted] on behalf of [redacted]

4. Plaintiff and Third Party Defendant have been notified of undersigned's intention to withdraw as counsel.

5. Plaintiff and Third Party Defendant have been sent a copy of this Motion by regular mail and Certified Mail to their last known addresses and were given until August 24, [redacted] to cooperate with the undersigned as requested.

6. On August 24, [redacted] undersigned received a voice mail message from [redacted] indicating that [redacted] did not want undersigned to withdraw her appearance, that [redacted] was attempting to get [redacted] to contact us. [redacted] also indicated that he was in the process of securing funds to pay the outstanding legal fees.

7. On August 27, [redacted] undersigned counsel's office called and left a voicemail message for [redacted] in an attempt to schedule a meeting with the undersigned to discuss the matter and to obtain payment of the outstanding legal fees.

8. On August 29, 2018, undersigned counsel's paralegal sent an email to [redacted] setting forth available dates to schedule the meeting. The meeting was scheduled for September 7, 2018.

[redacted]

10. Due to [redacted], meeting had to be postponed.

11. On September 27, 2018, undersigned's paralegal provided dates to [redacted] to reschedule the canceled meeting. On October 1, [redacted] responded that [redacted] would be available to meet on October 11, [redacted]

[redacted]

13. On October 15, 2018 [redacted] responded and asked that the undersigned call [redacted] also stopped by the office and met with the undersigned's paralegal to discuss the matter. A meeting at that time was schedule for Monday, October 22, 2018 for undersigned, [redacted] to meet and discuss the case and have the [redacted] bring their account current.

14. On the morning of October 22, [redacted] undersigned's paralegal received an email from [redacted] stating that [redacted] could not make the 11:00 a.m. meeting and that he did not have any money to bring.

6. Plaintiff and Third Party Defendant have failed to substantially fulfill their obligations to the undersigned and Law Firm.

7. The undersigned has advised Plaintiff and Third Party Defendant of pending deadlines and the need for the corporate Plaintiff to retain new counsel.

8. The undersigned respectfully requests this verified motion be treated as an affidavit.

WHEREFORE, [redacted] and the law firm of Cranfill Sumner & Hartzog LLP respectfully requests this Court to allow them to withdraw as counsel of record for Plaintiff, [redacted] and Third Party Defendant [redacted]

NORTH CAROLINA

[redacted]

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[redacted]

ORDER

THIS CAUSE coming on before the undersigned upon motion of Melody J. Jolly and the law firm of Cranfill Sumner & Hartzog LLP to withdraw from representation of the Plaintiff and Third Party Defendant in this matter; and

IT APPEARING adequate reasons exist to permit Melody J. Jolly and the law firm of Cranfill Sumner & Hartzog LLP to withdraw; that the Plaintiff and Third Party Defendant and opposing counsel have notice of the same;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that Melody J. Jolly and the law firm of Cranfill Sumner & Hartzog LLP are permitted to withdraw as counsel for the Plaintiff and Third Party Defendant herein, and are hereby released as counsel of record for Plaintiff and Third Party Defendant effective as of the date of this Order.

This the ____ day of ____________________, 2018.

____
SUPERIOR COURT JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE [redacted]DISTRICT OF NORTH CAROLINA
[redacted]

[redacted]

MOTION TO WITHDRAW

NOW COM[redacted] and the law firm [redacted] and all respectfully move this Court for an order allowing [redacted] and the law firm of [redacted] to withdraw as counsel for all of the above-named Defendants in this Action, for the following reasons:

1. [redacted] the law firm of [redacted] are counsel of record ("Counsel") for the Defendants in this Action.

2. A non-waivable conflict of interest has arisen between Counsel and the Defendants with regard to this Action. Rule 1.7(a)(2) of the North Carolina Rules of Professional Conduct mandates that Counsel withdraw from the representation of the Defendants.

3. Counsel represent to the Court that Counsel have fully investigated the facts and circumstances surrounding the conflict of interest, and has determined that the Defendants interests' and defenses in this Action would be prejudiced by the continued representation by their law firm such that the conflict is non-waivable and cannot be consented to by the Defendants.

4. Pursuant to Rules 1.7 and 1.4 of the North Carolina Rules of Professional Conduct, Counsel have disclosed to the Defendants the facts and circumstances giving rise to the conflict of interest, and have informed Defendants that it may be advisable for them to consult with an independent lawyer regarding the Defendants' rights and claims.

5. Counsel have provided the Defendants with contact information for referral attorneys with whom the Defendants may choose to consult in order to obtain new representation for their defense in this Action.

[redacted]

7. Currently, Plaintiffs' Motion [redacted] is pending before this Court, with a [redacted]briefing deadline for the Defendan[redacted]

[redacted]

9. In order to adequately protect the interests and rights of the Defendants in this Action, Counsel respectfully request that in granting Counsel's Motion to Withdraw, (premised upon conflicts mandating withdrawal), the Court allow the Defendants twenty-one (21) days to

[redacted]

obtain new representation and to allow new representation to become familiar with this Action. Counsel respectfully request that the deadline for [redacted] briefing as requested by the Court [redacted] to a date fourteen (14) days from the Notice of Appearance filed by new counsel.

10. It is Counsel's firm belief after due inquiry that if Counsel were to advise the Defendants [redacted] Counsel would be acting in violation of the Rules of Professional Conduct by which Counsel are bound.

11. Justifiable and good cause exists for Counsel's withdrawal in this matter, specifically a conflict of interest which *mandates* the withdrawal [redacted] d their law firm.

12. Counsel have consulted with Plaintiffs' counsel regarding this Motion to Withdraw, and Plaintiffs' counsel does/does not consent to the Motion.

[redacted]

a. The Court enter an Order allowing them to withdraw from the representation of the Defendants in this Action;

b. The Court enter an Order allowing the Defendants twenty-one (21) days from the date of said Order to retain new counsel; and

c. The Court enter an Order enlarging the time for the Defendants' [redacted] briefing on the Motion [redacted] o a date fourteen (14) days from the Notice of Appearance filed by new counsel.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 476 **December 19, 2016**

Confidentiality Issues when Moving to Withdraw for Nonpayment of Fees in Civil Litigation

In moving to withdraw as counsel in a civil proceeding based on a client's failure to pay fees, a lawyer must consider the duty of confidentiality under Rule 1.6 and seek to reconcile that duty with the court's need for sufficient information upon which to rule on the motion. Similarly, in entertaining such a motion, a judge should consider the right of the movant's client to confidentiality. This requires cooperation between lawyers and judges. If required by the court to support the motion with facts relating to the representation, a lawyer may, pursuant to Rule 1.6(b)(5), disclose only such confidential information as is reasonably necessary for the court to make an informed decision on the motion.

Withdrawal from a Civil Matter Based on a Client's Failure to Pay Fees[1]

Model Rule 1.16 addresses a lawyer's duties and responsibilities when withdrawing from the representation of a client. Rule 1.16(a) sets forth the circumstances when a lawyer is required to withdraw, and Rule 1.16(b) describes the circumstances when a lawyer may be permitted to withdraw from a representation.[2] Among the permissive reasons, Rule 1.16(b)(5) provides that a lawyer may withdraw from representing a client when "the client substantially fails 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." Comment [8] to the Rule states:

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1. This opinion does not address the additional and unique issues raised when a lawyer seeks to withdraw from representation in a criminal matter. The opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2. Rule 1.16, paragraphs (a) and (b) read:

(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.

"A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs . . . ." In addition, Rule 1.16(b)(6) provides that a lawyer may withdraw where "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client." As the courts have decided in the cases cited below, if a client fails over time to pay a lawyer's fees, and that failure continues after a lawyer provides a reasonable warning to the client, the lawyer may be permitted to withdraw.[3] In effectuating a withdrawal, a lawyer should do so in a manner that minimizes any prejudice to the client.[4]

The Duty of Confidentiality in Moving to Withdraw, Generally

A permissive withdrawal under Rule 1.16(b) is subject to the requirements of Rule 1.16(c). Rule 1.16(c) provides that when representing a client in a matter before a tribunal,[5] a lawyer must comply with the applicable law of the tribunal in seeking to withdraw.[6] Under the rules of most courts, a motion to withdraw is required when a substitute lawyer does not simultaneously enter an appearance.[7]

In preparing a motion to withdraw a lawyer must consider how the duty of confidentiality under Rule 1.6 may limit the information that can be disclosed in the moving papers.[8] Under Rule

3. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32(g) cmt. k (2000). *Cf.* Brandon v. Belch, 560 F.3d 536, 538 (6th Cir. 2009).

4. MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (2016). *See also* RONALD E. MALLEN, LEGAL MALPRACTICE § 33.71 (2016).

5. "Tribunal" is defined in Rule 1.0(m), and "denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."

6. ABA Model Rule 1.16(c) states: "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."

7. *See, e.g.*, ARIZ. R. CIV. P. 5.1(b)(2); CAL. R. APP. P. 8.36; D.C. SUP. CT. R. CIV. P. 101(c); FLA. R. JUD. ADMIN. 2.060; ILL. R. CIV. P. 13; MASS. R. CIV. P. 11(c); N.D. CT. R. 11.2; VA. R. CIV. P. 1:5. Under ABA Model Rule 3.4(c), it is ethical misconduct for a lawyer to "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."

8. ABA Model Rule 1.6, titled "Confidentiality of Information," provides as follows:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond

1.6(a), the duty of confidentiality applies broadly to "information relating to the representation," unless the client provides "informed consent," disclosure is "impliedly authorized to carry out the representation," or one of the enumerated exceptions in Rule 1.6(b) applies. The exceptions in paragraph (b) permit disclosures only "to the extent the lawyer reasonably deems necessary" to address the purpose of a particular exception. *See* Rule 1.6 Comment [16].[9] For example, in *In re Gonzalez*, 773 A.2d 1026 (D.C. 2001), the respondent was given an informal admonition, not for informing the court that fees were owed by the client, but for also disclosing extraneous and embarrassing client information in connection with the motion. Accordingly, when in doubt, a lawyer should err on the side of non-disclosure.

The more difficult question is when is a lawyer permitted to disclose *any* confidential client information in filing a motion to withdraw, and if so, how much. The tension between a lawyer's obligation to provide the court with sufficient facts to rule on a motion and the lawyer's duty of confidentiality has been characterized in one treatise as "a procedural problem that has no fully satisfactory solution."[10] Ultimately, however, lawyers wishing to withdraw must choose some manner in which to phrase their request for relief.[11]

The Duty of Confidentiality in Motions to Withdraw For Unpaid Legal Fees

Neither Rule 1.6(b) nor the Comments expressly refer to motions to withdraw for unpaid fees. The Comments do, however, recognize that some disclosure of confidential client information otherwise protected by Rule 1.6(a) is permitted in fee-collection suits by lawyers,

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to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

9. ABA Model Rule 1.6, Comment [16] states: "Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes disclosure is necessary to accomplish one of the purposes specified…In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."

10. GEOFFREY C. HAZARD JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING § 21.16 (4th ed. 2015). *See also* Byrd v. Mahaffey, 78 P.3d 671, 676 (Wyo. 2003) ("[A]n artful balance between confidentiality and providing an adequate basis for withdrawal must be maintained by counsel requesting to withdraw.").

11. In ABA Formal Opinion 92-366, the Committee discussed the possibility of a "noisy withdrawal" to avoid assisting client misconduct. That Opinion was issued under a prior version of the Model Rules that did not include exceptions for disclosures to prevent or rectify client crime or fraud in furtherance of which the client used the lawyer's services. Currently, ABA Model Rule 1.6(b)(2) and (b)(3) expressly permit such disclosures.

based on the "claim or defense" exception in Rule 1.6(b)(5).[12] Similarly, motions to withdraw based on a client's failure to pay fees are generally grounded in the same basic right of a lawyer to be paid pursuant to the terms of a fee agreement with a client. Nonetheless, courts have differed widely as to whether any specific information regarding a lawyer's reasons for seeking withdrawal is required in a motion to withdraw, and if so, how much.

Comment [16] to Rule 1.6 provides that a lawyer may disclose information under 1.6(b) only "to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified." In support of the idea that specific information should not be required with respect to a motion to withdraw for nonpayment of legal fees, Comment [3] to Rule 1.16 states:

> 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 Rule 1.6 and 3.3.

See also N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 1057 (2015), 2015 WL 4592234, at *3 ("the Rules anticipate that the court will usually not demand the disclosure of confidential information if the lawyer advises the court that 'professional considerations' require withdrawal").

Notwithstanding this authority, however, many courts have issued decisions that recite details as to the money owed by the clients, the specific legal services performed and related facts, indicating that the court required more from the lawyer than just a statement that the motion to withdraw was motivated by "professional considerations." While the courts in the following cases did not address a lawyer's duty of confidentiality, the decisions demonstrate that these courts found such details pertinent to their assessment of the motions. *See, e.g.*, *In re Franke*, 55 A.3d 713, 724 (Md. Ct. Spec. App. 2012) (vacating trial court's denial of attorney's motion to withdraw based

12. ABA Model Rule 1.6(b)(5) permits disclosures "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and a client." Comment [11] states: "A lawyer entitled to a fee for services rendered is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." *See also* the RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 65, stating: "A lawyer may use or disclose confidential information relating to the representation when and to the extent that the lawyer reasonably believes necessary to permit the lawyer to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer."

on client's nonpayment of $120,000 in unpaid fees as an abuse of discretion and as wrongly causing attorney "to provide free legal services"); *Team Obsolete Ltd. v. A.H.R.M.A. LTD.*, 464 F. Supp. 2d 164 (E.D.N.Y. 2006) (granting motion to withdraw based on supporting affidavit filed under seal revealing that the moving law firm had a dispute with their client regarding unpaid legal fees); *King v. NAID Inflatables of Newport, Inc.*, 11 A.3d 64, 67 (R.I. 2010) (the Supreme Court of Rhode Island, with the benefit of an *amicus* brief from the Rhode Island Bar Association, reversed the trial court's denial of a motion to withdraw by a law firm filed before trial, stating that "the hearing justice did not accord adequate weight to the financial burden that would befall [the law firm] if [it] were required to continue to represent a nonpaying client."); *Brandon v. Blech*, 560 F.3d 536, 538-39 (6th Cir. 2009) (reversing trial court's denial of motion to withdraw for a client's nonpayment of fees, stating: "As other circuits recognize, compelling attorneys to continue representing clients who refuse to pay imposes a severe burden" (quoting then from *Rivera-Domenich v. Calvesbert Law Offices PSC*, 402 F.3d 246, 248 (1st Cir. 2005)); *Fid. Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 310 F.3d 537, 540 (7th Cir. 2002) (reversing the denial of a motion to withdraw by a law firm that was owed more than $470,000 in fees, stating that it was "difficult to see why [the law firm] should be obliged to provide them free legal services"); *Reed Yates Farms, Inc. v. Yates*, 526 N.E.2d 1115, 1121 (Ill. App. Ct. 1998) (upholding trial court's granting of a motion to withdraw, stating: "If during the course of litigation attorney fees are not paid when due, an attorney may demand payment of accrued fees and withdraw from the case if the fees are not paid in a reasonably time." [internal citation omitted]); *City of Joliet v. Mid-City Nat'l Bank of Chi.*, 998 F. Supp. 2d 689, 694 (N.D. Ill. 2014) (granting motion to withdraw by lawyers who were owed more than $5 million in fees, explaining that "to force unwilling attorneys to labor free of charge in a civil case where parties are not entitled to free representation is not in the interests of justice").

In *Team Obsolete Ltd. v. A.H.R.M.A. LTD.*, 464 F. Supp. 2d 164 (E.D.N.Y. 2006), the moving lawyer provided the reasons for the motion by submitting an affidavit *in camera*. Opposing counsel sought to unseal the affidavit. The court granted the motion to withdraw for nonpayment and denied the motion to unseal, but expressly ruled that the opposing party was entitled to know that the motion was based on an assertion that the client had failed to pay the agreed-upon fees, stating that it "hereby informs" [the opposing parties] "that the basis for

[movant's] motion to withdraw is a dispute regarding AHRMA's failure to pay its legal bills." *Id.* at 165.[13]

Thus, when filing a motion to withdraw a lawyer often will not know whether the court will accept the assertion that "professional considerations" warrant withdrawal, or whether the court will require more information. Under the narrow facts of this opinion, when a judge has sought additional information in support of a motion to withdraw for failure to pay fees, Rule 1.6(b)(5) authorizes the lawyer to disclose information regarding the representation of the client that is limited to the extent reasonably necessary to respond to the court's inquiry and in support of that motion to withdraw. We turn now to the issues facing judges who are called upon to rule on motions to withdraw based on unpaid fees.

The Judicial Inquiry With Respect to Such a Motion

In ruling on a motion to withdraw, judges seek to balance their need for information about the facts underlying the motion with the client's right to confidentiality.[14] In Formal Opinion 93-370, this Committee addressed the need for judicial sensitivity to lawyers' duty of confidentiality in the context of pretrial settlement discussions with judges, stating: "The judge should be sensitive to these ethical constraints on counsel and sensitive as well to the superior position of authority the judge enjoys with respect to the lawyer . . . ."[15] This need for judicial sensitivity applies as well when the judge is considering a motion to withdraw.

Trial courts have wide discretion when ruling on motions to withdraw. In addition to considering a lawyer's reasons for seeking to withdraw, trial courts also have a duty to consider such matters as the likely impact of a withdrawal on the parties and on the court's control over its calendar. *See generally Laster v. D.C.*, 460 F. Supp. 2d 111, 113 (D.C. 2006) ("[C]ourts may consider the disruptive impact that the withdrawal will have on the prosecution of the case."); *In re Kiley*, 947 N.E.2d 1, 7 (Mass. 2011) ("[T]he judge did not abuse his discretion in refusing to

13. As also indicated in *Team Obsolete*, the procedural rules in that court require that motions to withdraw be accompanied by facts showing a sufficient basis to grant the motion. Local Civil Rule 1.4 of the U.S. District Court for the Eastern District of New York, states that motions to withdraw "may be granted only upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal . . . ." Team Obsolete Ltd. v. A.H.R.M.A. LTD., 464 F. Supp. 2d 164, 166 (E.D.N.Y. 2006).

14. The Model Code of Judicial Conduct provides only broad based guidance on this matter. Model Code of Judicial Conduct R. 2.5(A) states: "A Judge shall perform judicial and administrative duties, competently and diligently." Comment [4] to Model Code of Judicial Conduct R. 2.5 states that "[i]n disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays and unnecessary costs."

15. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-370, at 4 (1993).

release the Kiley firm from the representation where the case was already three years old, discovery was delayed, and no successor counsel could be found."); *Brandon*, 560 F.3d at 538 (discussing topics of strategically timed or coercive behavior, prejudice); *McDonald v. Shore*, 953 N.Y.S.2d 650, 651 (App. Div. 2012) ("Generally, where the insurer of a defendant in a personal injury action issues a contested disclaimer of coverage in the midst of litigation, it is inappropriate to grant a motion to withdraw by the attorney the insurer has provided for that defendant.") In some jurisdictions the procedural rules provide criteria for the court to consider in ruling on motions to withdraw. *See In re Franke*, 55 A.3d at 722 (quoting Rule 2-132(b) of the Maryland Rules of Civil Procedure, permitting a court to deny a motion to withdraw "if withdrawal of the appearance would cause undue delay, prejudice, or injustice."). *See also Team Obsolete*, 464 F. Supp. 2d at 1662 (Local Civil Rule 1.4.).

In some instances, such as when a motion to withdraw is filed early in a case, a court's decision may be relatively straightforward. In other cases, such as when a matter is complex, extensive discovery has been conducted, and the trial date is approaching, a court's decision may be more difficult. To accommodate the individual facts of any particular case, the scope of information that may be deemed pertinent to a particular withdrawal motion is necessarily one that is left to the trial judge's discretion under applicable law.

As with settlement negotiations, judges should recognize the ethical constraints on lawyers who move to withdraw, and work with the lawyers to obtain the information needed to rule on the motion while cognizant of the lawyer's duties under Rule 1.6. In some instances, judges may conclude that the procedural history and status of the case is sufficient to decide the motion without further inquiry. Or a judge may consider asking the lawyer merely to assure the court that the motion is brought in good faith and without purpose of undue delay. A judge should not require the disclosure of confidential client information without considering whether such information is necessary to reach a sound decision on the motion. When a judge decides that confidential information is required, the judge should consider whether there are ways to reduce or mitigate harm to the client. For example, in *Gonzalez*, the court noted that two means of mitigation are to direct that the disclosures be made under seal and *in camera* [16] and for sensitive or unnecessary

16. By "*in camera*" we mean a submission only to the court under seal, to be reviewed in chambers, with a copy to the client. While opposing counsel or opposing parties do not receive copies of the *in camera* submission, they are nonetheless generally aware that it has been submitted. Opposing counsel and parties do not have the same unconditional or unrestricted right to all information relating to a motion to withdraw as they would with other motions. S*ee* MALLEN, *supra* note 4 (noting that "The adverse party's interest in the submission usually is unrelated to the litigation of the merits and not sufficient to warrant

information to be redacted.[17] Another option available to the court is to issue a protective order. As discussed below, these approaches, while sometimes useful, will not be appropriate in every case, nor are they "silver bullets" that resolve all issues.

Limiting Disclosures to Mitigate Harm to Clients

Comment [16] to Rule 1.6 provides that disclosures under Rule 1.6(b) are permitted only to the extent the lawyer reasonably believes necessary to accomplish the purpose specified. Of course, where practicable, a lawyer should first seek to persuade the client to take suitable action to remove the need for the lawyer's disclosure. When such persuasion is not practicable or successful, and disclosure of some confidential information is required, "If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it *and appropriate protective orders or other arrangements* should be sought by the lawyer to the fullest extent practicable."[18] Thus, Comment [16] anticipates the use of *in camera* submissions for disclosures where any of Rule 1.6(b)'s exceptions may apply. The situation is similar to discovery disputes over claims of privilege, whereby competing claims are often resolved by a court's review *in camera* of the documents at issue and such procedures can help reconcile the competing issues involved in ruling on motions to withdraw as well.

But while *in camera* submissions are a useful tool, a lawyer's disclosure of client information *in camera* is itself a form of "revealing" under Rule 1.6. It is therefore generally not sufficient under Rule 1.6 for a lawyer to proceed in the first instance by providing confidential information *in camera*, without first attempting to file a withdrawal motion with a formulaic reference to "professional considerations" or a similar term as the grounds for the motion, as suggested in Comment [3] to Rule 1.16. At that point the trial court might grant the motion without

disclosure."). While some may suggest that such submissions violate Model Code of Judicial Conduct Rule 2.9, prohibiting judges from engaging in substantive *ex parte* communications, the Committee does not believe that such *in camera* submissions, when made with full knowledge of the opposing party, are an *ex parte* communication and thus, they do not fall within that prohibition. "An *ex parte* communication is one that excludes any party who is legally entitled to be present or notified of the communication and given an opportunity to respond." ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 176 (2d ed. 2011). The prohibition on *ex parte* communications in MCJC Rule 2.9 is directed mainly to surreptitious contacts of which an adversary has no notice or awareness.

17. The *Gonzalez* court implied that the lawyer's disclosure of information relating to the fee claim, if done *in camera* and with certain redactions, would not have violated Rule 1.6, stating: "[W]e agree with the Board [on Professional Responsibility] that Gonzalez could have submitted his documentation in camera, and that he could also have made appropriate redactions of the material most damaging to his client . . . ." *In re Gonzalez*, 773 A.2d 1026, 1032 (D.C. 2001).

18. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16 (2016) (emphasis added).

further inquiry; it might state that a motion will be denied absent further information; it might request further information; or it may order the lawyer to provide further information.

Thus, in order to comply with Rule 1.6, a lawyer who has a good faith basis for withdrawal under Rule 1.16(b)(5) and/or 1.16(b)(6), and who complies with the applicable procedural prerequisites of the court for such motions, could: (1) initially submit a motion providing no confidential client information apart from a reference to "professional considerations" or the like;[19] (2) upon being informed by the court that further information is necessary, respond, when practicable, by seeking to persuade the court to rule on the motion without requiring the disclosure of confidential client information, asserting all non-frivolous claims of confidentiality and privilege; and if that fails; (3) thereupon under Rule 1.6(b)(5) submit only such information as is reasonably necessary to satisfy the needs of the court and preferably by whatever restricted means of submission, such as *in camera* review under seal, or such other procedures designated to minimize disclosure as the court determines is appropriate. If the court expressly orders the lawyer to make further disclosure, the exception in Rule 1.6(b)(6) for disclosures required to comply with a court order will apply, subject to the lawyer's compliance with the requirements of Comment [15].[20]

We consider here disclosures only in the context of a motion to withdraw in a civil case based on a client's failure to pay a lawyer's fees. Given the competing rights and responsibilities implicated in such motions, these steps should satisfy a lawyer's ethical duties under Rule 1.6. If a motion to withdraw is based on grounds other than a failure to meet financial obligations, other Rules and principles may apply.

As stated in the Scope section of the Model Rules, "The Rules of Professional Conduct are rules of reason."[21] The Scope section also states: "The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules, statutes relating to matters of

19. Of course a lawyer can recite her compliance with procedural steps, such as prior notice to the client, and can recite the procedural history and status of the case as reflected on the docket and the court's file.

20. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 473 (2016), relating to a lawyer's duties when responding to a subpoena or compulsory process to provide privileged information. *See also* Oregon Formal Op. 2011-185 (2011), 2011 WL 11741926, at *2 (Lawyer may reveal information relating to the representation of Client under Oregon RPC 1.6(b)(5), but may only do so to the extent "reasonably necessary" to comply with the court order.) The court's mere statement that the motion will not be granted absent more information is not "a court order" and does not trigger the exception under Rule 1.6(b)(6) until the lawyer has taken steps to prevent or limit disclosure of confidential information.

21. MODEL RULES OF PROF'L CONDUCT, Scope [14] (2016).

licensure, law defining specific obligations of lawyers and substantive and procedural law in general."[22]

Conclusion

In moving to withdraw as counsel in a civil proceeding based on a client's failure to pay fees, a lawyer must consider the duty of confidentiality under Rule 1.6 and seek to reconcile that duty with the court's need for sufficient information upon which to rule on the motion. Similarly, in entertaining such a motion, a judge should consider the right of the movant's client to confidentiality. This requires cooperation between lawyers and judges. If required by the court to support the motion with facts relating to the representation, a lawyer may, pursuant to Rule 1.6(b)(5), disclose only such confidential information as is reasonably necessary for the court to make an informed decision on the motion.

22. *Id.* at [15].