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Bailing Out: The Mechanics of Withdrawal

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RPC 1.16(a) and (b) tell us, respectively, when we must or may withdraw. The reasons range from unwaivable conflicts to irreconcilable differences between lawyer and client on case strategy. The question then becomes: how do we withdraw? That question is easier stated than answered because when withdrawing we are charged with the duty to proceed in a way that, as RPC 1.16(d) puts it, protects the client's interests "to the extent reasonably practicable[.]"

In this column, we'll examine the mechanics of withdrawal in civil matters in Oregon's state and federal courts. We'll first briefly survey the law governing withdrawal. Next we'll look at the content and timing of notice to the client. We'll then walk through the motion and hearing seeking leave to withdraw. We'll conclude with a discussion on the disposition of unearned funds and client files.

Governing Law

There are two primary sources of law regulating withdrawal: RPC 1.16, the "withdrawal rule"; and applicable court rules. With RPC 1.16, there are two key provisions. RPC 1.16(c) requires compliance with any applicable court rules. RPC 1.16(d), in turn, states the general principle noted above on protecting client interests and also governs the return of unearned funds and client files. RPC

1.16 is also applicable to federal court practice under LR 83-7. With the court rules, both the state rule—UTCRC 3.140 (which incorporates ORS 9.380 by reference)—and the federal rule—LR 83-11—generally require court permission to withdraw (absent substitution or, with the federal rule, when there is co-counsel).

Notice

RPC 1.16(d) requires “giving reasonable notice to the client[.]” “Notice” can be oral, but it is usually wise to confirm the discussion in a contemporaneous written (paper or electronic) document in the event that there are any issues later. Notice to the client not only informs the client of the decision, but also gives the client time to find replacement counsel and advises the client of any significant pending deadlines or case issues. Prudence also suggests using the confirming letter or email to memorialize the reasons triggering withdrawal. It is important to remember that a court can order a lawyer to remain on a case notwithstanding grounds to withdraw and, in that event, the lawyer must do so under RPC 1.16(c) (see, e.g., *Ryan v. Miller*, No. 08-6250-HO, 2008 WL 4775108 (D Or Oct 31, 2008) (unpublished) (citing rule)). Therefore, it is usually best to seek leave to withdraw well in advance of trial.

Motion & Hearing

Under RPC 1.16(c) and the respective court rules, both the client and opposing counsel should be served with the motion seeking leave to withdraw.

Because we have a continuing duty to protect the client in the process of withdrawing, the motion itself should generally take a “minimalist” approach and avoid revealing client confidential information. If the court requires a fuller explanation, a prudent approach is to seek an *ex parte, in camera* hearing in chambers with the judge—with the record of the chambers conference then sealed afterward. Most reasonable opposing counsel will stipulate to this procedure and both state (see, e.g., Multnomah County SLR 1.165, 5.036) and federal (see, e.g., LR 3-8, 3-9) court rules permit this approach. If there is concern about revealing information to the trial judge, it is also possible to ask that another judge conduct the chambers conference and decide the motion. Both Oregon (see, e.g., *Frease v. Glazer*, 330 Or 364, 4 P3d 56 (2000)) and federal (see, e.g., *United States v. Zolin*, 491 US 554, 109 SCt 2619, 105 LEd2d 469 (1989)) law generally hold that disclosure of otherwise confidential information to a court *in camera* does not waive privilege.

Unearned Fees & Client Files

RPC 1.16(d) requires that a withdrawing lawyer provide the client with “papers and property to which the client is entitled and . . . [refund] any advance payment of fee or expense that has not been earned or incurred.” Although there is a nominal exception for possessory file liens “to the extent permitted by law,” OSB Formal Ethics Opinion 2005-90 counsels that a client’s need for the file trumps a lawyer’s possessory lien. In short, it is usually prudent to give the client

the file so that the client can't claim (a) that the lawyer shouldn't be allowed to withdraw because the lawyer won't give up the file or (b) the client's case was prejudiced by the lack of the file. It is usually equally prudent to retain a copy of the file (or at least key parts, such as correspondence) at the lawyer's own expense so that, if necessary later, the lawyer can document the status of the case at the time the lawyer withdrew. OSB Formal Ethics Opinion 2005-125 provides detailed advice on file transfers.

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