

WSBA NWSidebar

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New WSBA Advisory Opinion on Withdrawal

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The WSBA Committee on Professional Ethics recently released an advisory opinion surveying withdrawal issues in the context of public court proceedings. The opinion, 201701, is available on the WSBA web site. The opinion primarily addresses what you can—and can't—say in public court papers and related public proceedings. In doing so, the opinion analyzes the sensitive intersection between the withdrawal rule—RPC 1.16—and the confidentiality rule—RPC 1.6.

Although CR 71(c) allows withdrawal by notice in a civil case if neither the client nor the opposing party objects, withdrawing counsel must obtain court permission under CR 71(c)(4) if there is an objection. Similarly, CrR 3.1(e) requires court permission in a criminal case if a trial has been set. RPC 1.16(c), in turn, requires compliance with applicable court rules—including, if necessary, court permission—when withdrawing.

At the same time, the duty of confidentiality remains even when a lawyer is withdrawing. Advisory Opinion 201701 echoes Comment 3 to RPC 1.16 that in public motion papers and related public proceedings, “[t]he lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.”

Comment 3 to RPC 1.16, however, recognizes the dilemma if the court involved wants a fuller explanation: “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.” RPC 1.6(b)(6) solves this dilemma in part by allowing a lawyer to disclose otherwise confidential information in response to a court order. Therefore, Advisory Opinion 201701 concludes that a lawyer may offer a fuller explanation if ordered to do so and available procedural tools are used to protect client confidentiality:

“Lawyer may offer to provide additional information to the trial court in camera and under seal if ordered to do so. Such a statement does nothing more than reflect the trial court’s authority to order such information and the Lawyer’s ability to reveal information pursuant to a court order under RPC 1.16(b)(6).”

Advisory Opinion 201701 also addresses the still rarer scenario where a court will not allow withdrawal unless the reasons are stated fully on the public record. In that situation, the opinion suggests that the lawyer delay disclosure and seek interlocutory appellate review unless the lawyer is threatened with immediate contempt.

Advisory Opinion 201701 further notes that if the client seeks appellate review, then the lawyer should also delay providing additional information until the appeal is resolved.

Advisory Opinion 201701 provides a very useful roadmap for lawyers in an always difficult situation. Additional helpful guidance in the form of a recent ABA opinion on withdrawal—Formal Opinion 476 (2016)—is available on the ABA’s web site.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar’s *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark’s telephone and email are 503.224.4895 and Mark@frllp.com.