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## **What Can You Say? Seeking Court Permission to Withdraw**

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*Imagine this scenario:*

You have been doing a great job for a very “difficult” client. As the case has progressed, however, the client has been increasingly uncooperative, hasn’t gotten you important information in a timely fashion, and, to add insult to injury, hasn’t paid your bill. You’ve finally reached your limit (both personal and financial) and have decided to withdraw. Now seems like a good time because there are no imminent deadlines and trial is a ways away. The rules in the court where you are litigating the case require you to seek court permission to withdraw. You’d like to tell the judge that your client has been a total pain and has stiffed you to boot. Any problems?

However cathartic it might be, the confidentiality rule, RPC 1.6, constrains our ability—at least in open court (or open court filings)—to reveal confidential client information in support of a motion to withdraw. This past year the Oregon State Bar issued an ethics opinion that walks through the “do’s and don’ts” of what you can tell a court when seeking permission to withdraw. The opinion, Formal Ethics Opinion No. 2011-185, is available on the OSB’s web site at [www.osbar.org](http://www.osbar.org). In this column, we’ll look at what you can—and can’t—say in open court when withdrawing and the procedural options available if the court requires a more detailed explanation.

***What You Can and Can't Say***

Many state (see, e.g., UTCR 3.140(1) and ORS 9.380(1)(b)) and federal (see, e.g., Oregon federal district LR 83-11(a)) *procedural* rules require court-approval for a lawyer (or firm) to withdraw. When court rules require judicial approval, the *professional* rules—RPC 1.16(c) in particular—require compliance with those court-mandated procedures.

In our scenario, there are ample grounds to withdraw and timing is not an issue. RPC 1.16(b)(5) and (6), for example, allow a lawyer to withdraw when the client makes the representation “unreasonably difficult” and hasn’t paid the lawyer. At the same time, RPC 1.16(d) requires a lawyer to withdraw in a way that “to the extent reasonably practicable . . . protect[s] a client’s interests[.]” RPC 1.6(a), in turn, requires lawyers to protect client confidentiality and defines the scope of that duty broadly to include “information relating to the representation of a client[.]”

Formal Ethics Opinion 2011-185 counsels that that these twin duties significantly constrain what a lawyer can say—in either court filings or in open court—about the reasons motivating the lawyer’s withdrawal. The opinion (at 3) suggests following the guidance in Comment 3 to ABA Model Rule 1.16 by limiting the stated reasons to: “[P]rofessional considerations require termination of the representation[.]”

***What If the Court Wants More?***

Formal Ethics Opinion 2011-185 notes (at 4) that if the court requires more, a lawyer can respond to a judicial directive “to the extent ‘reasonably necessary’” (under RPC 1.6(b)(5)). The opinion also advises, however, that the lawyer must do so in a way that continues to protect the client.

A prudent approach that takes into account both of these objectives 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.

## **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.