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Maintaining Confidentiality when Withdrawing from Representation

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Although marketing seminars and other CLE programs for lawyers tend to focus on getting and keeping clients, the flip side of that issue often also presents problems. That is, when and how can a lawyer terminate an existing attorney-client relationship? The subject is a large one, too broad for one newspaper column but well-covered generally by M.R.Prof.C. 1.16. These rules describe the situations in which withdrawal is mandated, those in which it is permitted, and the steps required of a lawyer after withdrawal both to protect the former client's interests and to return the file, or portions of the file, to the client.

This article will discuss one narrow aspect of the issue of withdrawal from representation, namely, its interaction with rules on client confidentiality. Specifically, in situations in which the lawyer is required by the rules of a court or other tribunal (and therefore required by M.R.Prof.C. 1.16(c)) to obtain the tribunal's permission before withdrawing, what is the lawyer permitted to say in a motion to withdraw?
The problem, of course, is that the lawyer must proffer a reason that the judge will deem adequate without breaching client confidentiality under M.R.Prof.C. 1.6.

Judges are not unaware of this very common dilemma. The time-honored solution to the problem is for the lawyer to file a generic motion asking to withdraw citing, for example, irreconcilable differences between client and counsel as to strategy or tactics, or deterioration of the attorney-client relationship, or lack of communication. Assuming that trial or other deadlines are not imminent, and especially if the client does not oppose withdrawal, the court is unlikely to require that more be disclosed before allowing the motion.

If the motion is denied, the lawyer can consider at that point whether to request reconsideration and, if so, in what manner. For example, the lawyer might request that any additional information submitted be impounded, be considered *ex parte* and, especially in nonjury cases, be acted upon by a judge other than the trial judge. Compare M.R.Prof.C. 3.3(e) (former Supreme Judicial Court Rule 3:08 [Prosecution and Defense Functions], DF 13), *requiring* these steps of criminal defense counsel who seek to withdraw because the client intends to commit perjury.

Second, in requesting reconsideration, the lawyer must consider what more, if anything, is allowed to be said. In a recent decision voting in a pending matter to administer an admonition to an attorney for disclosing confidential information in his motion to withdraw, the Board adopted the report of its appeal panel holding that a lawyer can only reveal those facts necessary to support the motion to withdraw. *See also* Opinion no. 96-3 of the MBA Committee on Professional Ethics (lawyer in motion to withdraw "should reveal the minimum amount of confidential information to achieve his objective" and "should also take other steps...to prevent the spread of the confidential information.").

Although both the Board in the pending admonition and the MBA Committee in the ethics opinion considered it implicit that the lawyer can reveal some information that might otherwise be confidential, the rules do not so state and the issue has not been addressed by the Supreme Judicial Court. Bar Counsel's view is that there may be certain confidential information which cannot be revealed to support a motion to withdraw; in those cases, the lawyer may have to remain as counsel. In any event, it may not be *necessary* that *opposing counsel* receive the confidential information. There could accordingly be a disciplinary violation even if the information revealed is information that the trial court needs to make a decision. Compare Private Reprimand no. 94-2, 10 Mass. Att'y Disc. R. 309, 311 (1994) ("`the term `necessary' as used in DR 4-101(C)(4) refers not only to the content of the information revealed, but also to how and to whom the secret is revealed.'")

Finally, there are no special rules for problem clients. The Board in very certain terms emphasized in the pending admonition that rules protecting client confidences "apply equally to the `difficult' client and the `good' client." In that case, the lawyer, in support of an otherwise acceptable motion to withdraw, filed a supporting affidavit providing rich detail concerning his difficulties with the client: the client's procrastination, her lack of cooperation, and her penchant for argument among other problems. *See also*, Private Reprimand no. 92-34, 8 Mass. Att'y Disc. R. 327, 330 (1992) (attorney who "found himself harnessed to a hostile client who chose to criticize the [attorney] publicly and who widely disseminated his complaints against the [attorney] to the media" was privately reprimanded for sending the client's letters to the court.)

Lawyers who are seeking to withdraw from the representation of this type of difficult client should take a deep breath before filing the motion. Wait 24 hours after writing the motion and look at it again, or ask a partner or associate to review it to make sure that, at least when the motion is first filed, no confidences have been revealed. If the motion is denied and reconsideration is requested, make sure that adequate steps are taken to minimize both what is revealed and to whom it is revealed. Even where disclosure is permissible, it must be limited to what is reasonably necessary to effect withdrawal.

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