

## **FORMAL OPINION NO 2011-185**

### **Withdrawal from Litigation: Client Confidences**

#### **Facts:**

During litigation, Lawyer and Client have a dispute concerning the representation. Lawyer and Client cannot resolve the dispute and Lawyer files a motion to withdraw in which Lawyer wishes to state one of the following:

1. My client will not listen to my advice;
2. My client will not cooperate with me;
3. My client has not paid my bills in a timely fashion; or
4. My client has been untimely and uncooperative in making discovery responses during the course of this matter.

#### **Question:**

May Lawyer choose unilaterally to provide the court any of the client information noted above in the motion to withdraw?

#### **Conclusion:**

No, qualified.

#### **Discussion:**

Oregon RPC 1.0(f) provides:

“Information relating to the representation of a client” denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Oregon RPC 1.6(a) provides:

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).

Oregon RPC 1.6(b) provides, in part:

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

. . . .

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

(5) to comply with other law, court order, or as permitted by these Rules.

Lawyer's obligation not to reveal information relating to the representation of a client continues even when moving to withdraw from representing Client. *See* Oregon RPC 1.6(a). To the extent the withdrawal is based on "information relating to the representation of a client," the Lawyer may not reveal the basis for the withdrawal to the court unless disclosure is permitted by one of the narrow exceptions in Oregon RPC 1.6(b).<sup>1</sup>

Depending upon the specific factual circumstances involved, the four statements noted above seem likely to constitute information relating to the representation of a client because the information "would be embarrassing or would be likely to be detrimental to the client." *See also The Ethical Oregon Lawyer* § 4.2-1 (OSB Legal Pubs 2015) (providing that an event "such as nonpayment of fees, may have confidential aspects

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<sup>1</sup> This opinion does not address the situation that would occur when a client terminates a lawyer's services. Pursuant to Oregon RPC 1.16(a)(3), a lawyer is required to withdraw from the representation of a client if "the lawyer is discharged." Under those circumstances, it would be appropriate to inform the court that the lawyer's motion is being brought pursuant to Oregon RPC 1.16(a)(3).

to it, and therefore may constitute information protected by Oregon RPC 1.6”).<sup>2</sup>

For example, a client’s inability or refusal to pay may prejudice the client’s ability to resolve the dispute with an opposing party. Likewise, a party’s unwillingness to cooperate with discovery may lead the plaintiff to file additional pleadings or seek sanctions. Consequently, Lawyer cannot unilaterally and voluntarily decide to make this information public unless an exception to Oregon RPC 1.6 can be found.

Neither a disagreement between Lawyer and Client about how the client’s matter should be handled nor the client’s failure to pay fees when due constitute a “controversy between the lawyer and the client” within the meaning of Oregon RPC 1.6(b)(4). While there may be others, the two most obvious examples of such a controversy are fee disputes and legal-malpractice claims. A client’s dissatisfaction with the lawyer’s performance may ultimately ripen into a controversy, but at the point of withdrawal, such a controversy is inchoate at best. In a fee dispute or malpractice claim, fairness dictates that the lawyer be on equal footing with the client regarding the facts. Such is not the case under the facts presented here.

Suppose, however, that the court inquires regarding the basis for the withdrawal or orders disclosure of such information.<sup>3</sup> Comment 3 to ABA Model RPC 1.16 offers guidance and provides, in part:

The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would con-

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<sup>2</sup> This opinion assumes that the dispute between Lawyer and Client does not concern whether Lawyer should take action in violation of the Oregon Rules of Professional Conduct. For an analysis of such a situation, see OSB Formal Ethics Op No 2005-34, which notes that if a client will not rectify perjury, “the lawyer’s only option is to withdraw, or seek leave to withdraw, from the matter without disclosing the client’s wrongdoing.” *See also In re A.*, 276 Or 225, 554 P2d 479 (1976).

<sup>3</sup> See, for example, Oregon RPC 1.16(c), which provides that a lawyer wishing to withdraw must “comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.” *See also* UTCR 3.140 (discussing resignation of attorneys); LR 83-11 (discussing withdrawal from a case).

stitute such an explanation. The lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.<sup>4</sup>

If the court orders disclosure, 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. Lawyer should therefore take steps to limit unnecessary disclosure of confidential information by, for example, offering to submit such information under seal (or outside the presence of the opposing party) so as to avoid prejudice or injury to the client.

**Approved by Board of Governors, August 2011.**

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<sup>4</sup> Similarly, *The Ethical Oregon Lawyer* provides that

[i]n most instances, it should be sufficient to state on the record or in public pleadings that the situation is one in which withdrawal is appropriate and to offer to submit additional information under seal or in chambers (and outside the presence of the opposing party) if the court orders the lawyer to do so.”

*The Ethical Oregon Lawyer* § 4.2-1.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* chapter 4 (withdrawal), § 6.2-2 (information relating to the representation of a client), § 6.2-3 (difference between duty of confidentiality and lawyer-client privilege); and *Restatement (Third) of the Law Governing Lawyers* §§ 32, 59–60 (2000) (supplemented periodically).