

***American Bar Association Formal Opinion 476—
The Duty to Protect Client Confidentiality in Motions
to Withdraw Based on Unpaid Legal Fees in Civil Matters***

By Gilda T. Russell¹

I. Introduction.

The American Bar Association (“ABA”) Standing Committee on Ethics and Professional Responsibility recently issued *ABA Formal Opinion 476* (December 19, 2016), in which it gave guidance under the ABA Model Rules of Professional Conduct (“Model Rules”) concerning motions to withdraw based on unpaid legal fees in civil matters. The ABA’s position may be surprising to many lawyers. *ABA Formal Opinion 476* sets forth a rather strict approach for a lawyer attempting to withdraw from a representation in a civil matter on account of unpaid fees. The Committee concluded that, under the Model Rules, a lawyer must protect client confidentiality in the motion, can only disclose “professional considerations” as the basis for the motion, cannot reveal more without inquiry and mandate from the court, and, if further disclosure is required, the disclosure must be limited to information necessary for the purpose and the lawyer must take additional steps such as requesting *in camera* review and sealed motions.

II. Permissive Withdrawal When a Client Fails to Pay Legal Fees.

In the *Opinion*, the Committee first discussed ABA Model Rule 1.16 (b), which permits a lawyer to withdraw from a client’s representation in certain situations. In particular, ABA Model Rule 1.16 (b)(5) provides that a lawyer may withdraw from a representation if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.” In addition, ABA Model Rule 1.16 (b)(6) provides that a lawyer may withdraw if “the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.” And Comment 8 to ABA Model Rule 1.16 states: “A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs....”

However, although these Rules permit withdrawal in such situations, the Committee pointed out that “permissive” withdrawal is also subject to the requirements of ABA Rule 1.16 (c). ABA Model Rule 1.16 (c) provides in part: “A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.” The Committee stated that, under the procedural rules in most jurisdictions, a lawyer must file a motion to withdraw from

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a client's representation when substitute counsel does not simultaneously enter an appearance for the client.

III. Content of the Motion to Withdraw — Client Confidentiality Protections Limit Disclosures.

The Committee next addressed the central point of its discussion — what grounds a lawyer can give for a motion to withdraw when brought on account of a client's failure to pay legal fees. The Committee began by noting that client confidentiality obligations under ABA Model Rule 1.6 are applicable to such analysis.

a. Client Confidentiality Protections Apply.

The Committee pointed out that, under ABA Model Rule 1.6 (a), the protections of client confidentiality apply to “information relating to the representation.” Such information is protected from disclosure unless the client consents to its revelation, the disclosure is “impliedly authorized to carry out the representation,” or certain other exceptions under ABA Model Rule 1.6 (b) are met. The Committee further commented that, even if disclosure is permitted, ABA Model Rule 1.6 (b) limits it to what the lawyer “reasonably deems necessary” to accomplish the permitted purpose.

The Committee noted that neither ABA Model Rule 1.6 (b) nor its Comments specifically cover motions to withdraw for unpaid fees although ABA Model Rule 1.6 (b)(5) provides that a lawyer may reveal information relating to the representation of a client “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.” In addition, the Committee stated that motions to withdraw on account of the failure to pay fees are “generally grounded in the same basic right of a lawyer to be paid pursuant to the terms of a fee agreement with a client.”

b. “Professional Considerations” as Grounds for the Motion Rather than Specific Information Unless Mandated by the Court.

The Committee stated that courts have differed on whether “specific information” can, should, or must be given in a motion to withdraw, and how much information should be disclosed. In support of *not* requiring any specific information, the Committee cited Comment 3 to ABA Model Rule 1.16, which provides:

“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. The lawyer’s statement that *professional considerations* require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rule 1.6 and 3.3.” (Italics added.)

The Committee also cited in support of a not requiring specific information *N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 1057* (2015), 2015 WL 4592234, at *3, which provided: "the Rules anticipate that the court will usually not demand the disclosure of confidential information if the lawyer advises the court that 'professional considerations' require withdrawal."

On the other hand, the Committee cited a number of cases concerning motions to withdraw based on failure to pay fees in which courts "required more from the lawyer than just a statement that the motion to withdraw was motivated by 'professional considerations.'" Based on the disparity in approaches in this area, the Committee stated that a lawyer filing a motion to withdraw "often will not know whether the court will accept the assertion that 'professional considerations' warrant withdrawal, or whether the court will require more information." If a court seeks additional information, the Committee concluded that ABA Model Rule 1.6(b)(5) "authorizes the lawyer to disclose information regarding the representation of the client that is limited to the extent reasonably necessary to respond to the court's inquiry and in support of that motion to withdraw."

c. Additional Judicial Inquiry: What Should Courts Do?

The Committee next addressed the question of what should courts do with regard to requiring additional information in support of a motion to withdraw. The Committee stated that "[J]udges seek to balance their need for information about the facts underlying the motion with the client's right to confidentiality." For example, the Committee pointed out that in *ABA Formal Opinion 93-370*, which addressed pretrial settlement discussions, the Committee found that courts were to be "sensitive to...ethical constraints on counsel and sensitive as well to the superior position of authority" the courts have over a lawyer. Likewise, the Committee concluded, such judicial sensitivity should also apply to motions to withdraw.

The Committee commented that courts should "work with the lawyers to obtain the information needed to rule on the motion while cognizant of the lawyer's duties under [ABA Model] Rule 1.6." In this regard, the Committee opined that a court may conclude that "the procedural history and status of the case" may be sufficient to render judgment on such motions, or a court may ask that a lawyer commit that the motion has been "brought in good faith and without purpose of undue delay." The Committee concluded that a court should not require a lawyer to reveal confidential client information unless "necessary to reach a sound decision," and should require that any disclosures be made under seal and *in camera* and redacted where necessary.

IV. Procedure to Follow to Protect Client Confidences and Mitigate Potential Harm to Client.

Finally, based on the above analysis, the Committee summarized the procedure a lawyer should follow in a motion to withdraw based on unpaid legal fees in a civil

matter in order to protect client confidences and mitigate potential harm to the client. The Committee stated that a lawyer should:

- Initially submit the motion without any client confidential information;
- Provide as grounds for the motion “professional considerations” or words to similar effect;
- If the court determines that further information is necessary, try to persuade the court to rule on the motion without requiring disclosure of confidential client information and assert all “non-frivolous claims of confidentiality and privilege;”
- If the court requires additional information, submit only information “reasonably necessary” to satisfy the court;
- Make any submission by “restrictive means,” such as requesting *in camera* review under seal or other procedures designed to minimize disclosure that the court deems appropriate;
- If the court orders further disclosure, the lawyer may comply pursuant to ABA Model Rule 1.6 (b)(6).

IV. Conclusion.

ABA Formal Opinion 476 gives guidance under the Model Rules on the appropriate approach to take in support of motions to withdraw in civil matters based on a client’s failure to pay legal fees. The approach, which consists of the several steps discussed above, is quite strict with the primary focus being on protecting client confidentiality. In essence, under the *Opinion*, a lawyer is to utilize every good faith method available to, at best, have a court adjudicate the motion without requiring the disclosure of any client confidential information, or, at worst, have a court require the disclosure of only limited confidential information accompanied by procedural protections such as *in camera* review under seal or other protective methods.²

Of course, *ABA Formal Opinion 476* serves only as guidance to lawyers and courts and does not have binding effect on how individual jurisdictions will handle motions to withdraw on account of unpaid legal fees. As such, lawyers should familiarize themselves with their own jurisdiction’s requirements in this area. Yet, to the extent that a specific jurisdiction’s position is not defined, it would be

² For further discussion of *ABA Formal Opinion 476*, see Davild L. Hudson, Jr., “Lawyers should tread carefully before quitting a troublesome client,” *ABA Journal, Ethics*, April 1, 2017, http://www.abajournal.com/magazine/article/ethics_leave_to_withdraw

reasonable and, indeed, prudent, for lawyers to follow the multi-step approach of *ABA Formal Opinion 476*.