ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday December 19, 2019

No. 2 Update and possible action regarding Former State Bar Ethics Opinions

o Op. 09-02

Committee member Charles Thomson will present information at the meeting.

Ethics Opinion 09-02 Revisited

My charge from the November 21, 2019 meeting was to draft proposed supplemental language for Op. 09-02, in effect, emphasizing that 09-02 means what it says, to wit, there is very limited confidential information that can be shared by withdrawing/terminated counsel with successor counsel in the absence of the client's informed consent, and then encouraging withdrawing counsel to seek the client's consent in order to effectively transfer the representation. I remain of the mind that 09-02 addresses the first topic clearly. Therefore, my proposed supplemental language addressing both of these topics—attached--is rather modest in length.

A second charge to me was to flesh out what disclosures are impliedly authorized by ER 1.6(a) "to carry out the representation," not necessarily as a supplement to 09-02 that deals with this issue only in the context of a transfer of the representation, but for general consideration by the committee. To this end, I offer the following as an aid for discussing the boundaries of 1.6 impliedly authorized disclosures.

Comment [5] to ER 1.6 provides the following limited insight on impliedly authorized disclosures: "Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation some situations [sic], for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers."

In "Impliedly Authorized Disclosures," **Arizona Attorney** (January 2015), David W. Dodge stated that an "obvious" example of an impliedly authorized disclosure "would be discussing your client's case with one of your more experienced partners." He then noted other situations, not quite as obvious, that have generated varying degrees of concern for lawyers, including consulting with lawyers outside the firm; using contract lawyers and other outside professionals; clients with diminished capacity (ER 1.14); and deceased clients. The common

thread in all these examples is the lawyer's reasonable belief that the client's interests are being furthered by the disclosure.

In ABA Formal Opinion 98-411, it is said that a lawyer who is consulting about a client matter with another lawyer associated in the matter is impliedly authorized to disclose certain information relating to the representation without client consent, but may not disclose information that is protected by the attorney-client privilege or that would otherwise prejudice the client. It is also cautioned, "Bright line rules are difficult to draw in this area . . . ."

In an article by Helen W. Gunnarrson, "When is a Lawyer 'Impliedly Authorized' to Reveal Client Information?" **Bloomberg Law News** (May 17, 2016), the author suggests disclosure is impliedly authorized in the following situations:

- A lawyer may reveal client confidences to advance the client's interests. Citing **Restatement (Third) of the Law Governing Lawyers** § 61 (2000).
- A lawyer is impliedly authorized to deliver a former client's file to successor counsel to protect the former client's interests. N.C. Ethics Op. 2015-5.
- A lawyer retained by an insurance company to defend its insured is implicitly authorized to give the insurer certain information about the representation as long as it does not adversely affect a material interest of the insured. *See* ABA Formal Ethics Op. 01-421.
- A lawyer hired by an insurance company to represent the insured may reveal to the insurer information about the case only if disclosure advances the interests of both the insured and the insurer and does not compromise the lawyer's independent judgment. Or. Ethics Op. 2005-166.
- A lawyer may disclose information relating to the representation of a deceased client only if disclosure would further the client's interests, and only if the lawyer believes the client would have consented. Gunnarsson at 2.
- In general, lawyers are free to discuss a client's matter with other lawyers in their firm without first asking the client's permission unless special circumstances exist. Gunnarsson at 4.
- A lawyer is impliedly authorized to disclose client information to lawyers outside the firm only to the extent it will further the representation, that is, the disclosure must be in the client's interest. Gunnarsson at 4.
- Where a relationship between a firm and a contract lawyer performing services for the client is attenuated, no information protected by 1.6 may be

disclosed without the client's informed consent. *See* ABA Formal Ethics Op. 08-451.

- Unless circumstances suggest otherwise, a lawyer generally need not obtain a client's express consent to disclose client information to non-lawyer employees performing routine support services, but must take measures to ensure the non-lawyer protects the client's information. Gunnarsson at 8.

Section 61 of the **Restatement (Third) of the Law Governing Lawyers** further emphasizes the idea that disclosures are impliedly authorized *only* if they advance the client's interests: "A lawyer may use or disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation." In addition, that Section advises

- A lawyer has general authority to take steps reasonably necessary to further the client's objectives in the representation. No explicit request or grant of permission is required. Cmt. b.
- This Section (§61) requires that a lawyer have a reasonable belief that the use or disclosure will further the objectives of the client in the representation. Cmt. b.
- A lawyer may use or disclose confidential client information when presenting evidence or argument or engaging in other proceedings before a court, government agency, or other forum on behalf of the client. Cmt. d.
- A lawyer has the same authority in matters other than litigation. A lawyer may, for example, exchange confidential client information reasonably calculated to further settlement of a lawsuit or negotiation of a business transaction. Cmt. d.

In "Ethics: 'Impliedly Authorized' Disclosure of Client Information," **Wisconsin Lawyer** (October 2010) by Dean R. Dietrich, the author adopts the reasoning of § 61 of the **Restatement**: "Lawyers are allowed to make disclosures when doing so is appropriate to accomplish the objectives of the representation agreed to between the lawyer and client." [This article also contains a list of ethics opinions and case law that have discussed impliedly authorized disclosures in various circumstances.]

Returning to the context of withdrawing and succeeding counsel, in "Ethics in Dangerous Situations: Responding to Suicidal Clients, Menacing Parties and Threatening Behavior," **Oregon State Bar Bulletin** (October 2015), by Amber Hollister, the following statement is made: "When referring the client to new counsel, the [withdrawing] lawyer may not disclose confidential information about

the nature of the breakdown of the lawyer-client relationship without the client's consent," citing ER 1.6(a) as the authority.

The clear teaching, I suggest, is that disclosures of client information in the context of a transfer of the representation are impliedly authorized under ER 1.6(a) *only* when they advance the client's objectives or interests, or the disclosing lawyer reasonably believes that they do.

Other ER's recognize situations not necessarily related to transfer of the representation in which a lawyer may be impliedly authorized disclose confidential client information: ER 1.13—Organization as Client; ER 1.14—Client with Diminished Capacity; ER 2.3—Evaluation for Use by Third Persons.

One final observation. Ethics Opinion 09-02 also addresses whether fees may be charged by the withdrawing lawyer for the work necessary to accomplish the withdrawal. The conclusion drawn in the opinion, contrary to at least one other state that has ruled such fees may not be charged to the client, is this: "The work a lawyer reasonably undertakes in support of a smooth transition to new counsel or *pro per* representation is usually work that may be charged to the client if otherwise appropriate under the fee agreement and if withdrawal is not clearly solely due to the lawyer's circumstances (such as a lawyer closing the lawyer's law office in favor of public employment)." I have not undertaken to analyze this portion of the opinion. If 09-02 is going to be supplemented and "reissued" so that it has binding effect, and if there are concerns about the fee portion of the opinion, additional work remains to be done.

Proposed Supplement to Ethics Opinion 09-02:

When a lawyer withdraws from a representation or is terminated by the client, any disclosure of confidential information relating to the representation of the client to successor counsel or prospective successor counsel not specifically allowed by ER 1.6(a) is prohibited regardless of the reason for the withdrawal or termination. It frequently happens that when a representation is being transferred from one lawyer to another, the withdrawing or terminated lawyer has little or no direct communication with the client and, therefore, limited opportunity to obtain the client's informed consent to disclose confidential information to successor counsel. As noted in Ethics Opinion 09-02, a withdrawing lawyer must advise the new counsel (as well as the client) of pending court dates, status of the case, issues, and anything else necessary and appropriate for the smooth transfer of the representation; however, confidential disclosures of this nature to new counsel are impliedly authorized by ER 1.6(a) *only* when the withdrawing lawyer reasonably believes that the disclosures will advance the interests and objectives of the client in the representation. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 61 (2000). As emphasized in Op. 09-02, the withdrawing lawyer must also remain mindful of reasons that may make further briefing of successor counsel imprudent or not in accordance with the client's interests and objectives, and thus exercise discretion accordingly on a case-by-case basis. It is the recommendation of the Committee that a withdrawing lawyer actively seek the client's informed consent to disclose confidential information to successor counsel in order to facilitate a fully informed transfer of the representation.

State Bar of Arizona Ethics Opinions

09-02: Termination of Representation; Withdrawal; Fees; Confidentiality 9/2009

Lawyer-client relationships sometimes end earlier than the lawyer and client anticipated at the start of the representation. A lawyer's withdrawal from representation is not always agreed upon by the client and may also be under touchy circumstances, such as dishonesty of the client or non-payment of fees owed to the lawyer. Further, a client may fire a lawyer at any time, for good or bad reasons. A lawyer faced with such situations must uphold the lawyer's ethical responsibilities to the client despite that the representation is at, near, or has reached an end. Client confidentiality must be protected unless the ethical rules specifically allow disclosure, and any disclosures must be made as narrowly as possible. If, in a court setting, the tribunal does not allow the withdrawal, the lawyer can seek relief from a higher court, but must protect the client's interests and competently represent the client until and unless an order for withdrawal is granted. A withdrawing lawyer must advise the client and new counsel of pending court dates, status of the case, and anything else necessary and appropriate for the smooth transfer of the representation. Any fees charged to the client for withdrawal-related work must be reasonable. Of course, the client is entitled to the client file regardless of the circumstances for the withdrawal.

FACTS

Lawyers have raised many questions about ethical obligations when a decision for withdrawal from representation has been made. These questions most often involve the intersection of ER 1.l6 (withdrawal) and ER 1.6 (confidentiality obligations). Questions also frequently arise regarding whether fees may be charged for withdrawal-related work. In light of these frequent requests for informal ethics advice, the Committee on the Rules of Professional Conduct has chosen to issue this formal opinion *sua sponte*.

QUESTIONS PRESENTED

1. What are a lawyer's ethical responsibilities when withdrawing from representation of a client?
2. May a lawyer charge a client for withdrawal-related work?
3. What obligations does the withdrawn lawyer have to the former client?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER __")

ER 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee….

. . . .

ER 1.6 Confidentiality of Information

(a) 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 or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

. . . .

Comment

[18] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in ER 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in ER 1.6. Neither this Rule nor ER 1.8(b) nor ER 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

ER 1.9 Duties to Former Clients

. . .

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ER 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

> (1) the representation will result in violation of the Rules of Professional Conduct or other law;
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
> (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
> (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
> (5) 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;
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
> (7) other good cause for withdrawal exists.

(c) A lawyer shall comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned. Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights.

Comment

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also ER 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. 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 ERs 1.6 and 3.3.

ER 3.3 Candor Toward the Tribunal

Comment

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by ER 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client lawyer relationship that the lawyer can no longer competently represent the client. Also see ER 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6.

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ethics Ops. 93-02, 94-02, 00-11, 04-01, 05-05, 08-02

OTHER RELEVANT ETHICS OPINIONS

2007 N.C. Ethics Op. 8; Mich. Ethics Op. RI-296

OPINION

1. What are a lawyer's ethical responsibilities when withdrawing from representation of a client?

ER 1.16 sets forth the circumstances under which a lawyer may and shall withdraw from further representation of a client. *See* ER 1.16(a) and (b). The lawyer's responsibility to follow the law and procedures of the tribunal in attempting withdrawal is set forth in ER 1.16(c). Further, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." ER 1.16(c). The lawyer is not prohibited from seeking withdrawal relief from a higher tribunal. While the lawyer is seeking relief, and if relief is not sought or granted, at all times the lawyer must continue to represent the client competently and diligently. ERs 1.1 and 1.3.

ER 1.16 does not relieve the withdrawing lawyer from the duties of confidentiality set forth in ER 1.6. This Committee cautions the withdrawing lawyer to carefully review and follow ER 1.6 during the withdrawal process. Comment [3] to ER 1.16 addresses the practical problem that a lawyer seeking to withdraw may face questions from the tribunal about the reasons for withdrawal: "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."

ER 1.6(d)(4) allows disclosure of confidential information "to respond to allegations in any proceeding concerning the lawyer's representation of the client." Yet, that disclosure must be made only "to the extent the lawyer reasonably believes necessary." ER 1.6(d). The withdrawing lawyer ordinarily should resist any disclosure during the withdrawal process in favor of citing and following the directions in Comment [3] to ER 1.16 to state that professional considerations require withdrawal of the lawyer. *See Lawyer Disciplinary Bd. v. Farber*, 488 S.E.2d 460 (W. Va. 1997) (lawyer moving to withdraw from representation violated Rule 1.6 by adding affidavit reporting on his plea discussions with defendant).

"Reasonably necessary" has been construed quite narrowly in connection with ER 1.6(d)(4) disclosures. Ariz. Ethics Op. 93-02 (March 1993) addressed whether the inquiring lawyer could speak to an author and refute the former client's accusations to the author that the lawyer had represented the client incompetently and had engaged in a conspiracy with the prosecution. In holding that the Ethical Rules allow the lawyer to do so, the narrowness of "reasonably necessary" component of ER 1.6(d) was stressed:

> We emphasize that our conclusion should not imply that an attorney may simply open his or her file in response to any such derogatory allegations. ER 1.6(d) permits disclosure only to the extent the lawyer reasonably believes necessary to establish a claim or defense. Therefore, an attorney must determine whether he or she can adequately establish a claim or defense against accusations of misconduct without disclosing information protected by ER 1.6(a). Whether disclosure is "reasonably necessary" for the purposes of ER 1.6(d) is ultimately within the independent judgment of the attorney involved, after a careful assessment of the facts and the nature of the controversy.

Ariz. Ethics Op. 93-02.

Even when a lawyer has learned that his or her client has submitted fraudulent evidence warranting the lawyer to withdraw the evidence, the lawyer must first try to withdraw the evidence without revealing that the client submitted fraudulent evidence:

> If an attorney can refuse to offer evidence the attorney reasonably believes to be false, see ER 3.3(a)(3), there seems to be no good reason why the attorney could not move to withdraw evidence from a tribunal's consideration that he or she knows to be false. This measure, too, should be done without revealing any client misconduct. The attorney should cite client confidentiality, attorney-client privilege, and the client's Fifth Amendment privilege, if appropriate, should the tribunal insist upon an explanation why the attorney is seeking withdrawal of the evidence.

Ariz. Ethics Op. 05-05 (July 2005) (footnotes omitted). *See* also ER 3.3, Comment [15] ("In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6.")

Given the narrowness of exceptions to the confidentiality requirements of ER 1.6 even in light of a lawyer's obligation of candor towards the tribunal as set forth in ER 3.3, if the lawyer believes it is reasonably necessary to disclose a client confidence as part of withdrawal proceedings, the withdrawing lawyer should consider whether an ex parte submission may be warranted and permitted under the rules of the tribunal.

Comment [15] to ER 3.3 supports a lawyer revealing the least possible confidential information in support of the lawyer's withdrawal: "In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6."

Withdrawing and withdrawn lawyers also should be mindful that what constitutes confidential information about the client is construed quite broadly. In addressing what a lawyer should do when subpoenaed for client information, this Committee, in Ariz. Ethics Op. 00-11 (November 2000), wrote: "Under ER 1.6, a lawyer is required to maintain the confidentiality of all information relating to representation, regardless of the fact that the information can be discovered elsewhere…. Indeed, the lawyer is required to maintain the confidentiality of

information relating to representation even if the information is a matter of public record." (Internal citations omitted.)

Despite the lawyer's obligation to keep a client's confidences, Comment [3] to ER 1.16 is clear that, once withdrawn, the lawyer may give notice of the fact of withdrawal, "and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like." *See* Ariz. Ethics Op. 05-05.

2. May a lawyer charge a client for withdrawal-related work?

A lawyer's charged fees must be reasonable. *See* ER 1.5. Neither ER 1.5 nor its comment addresses the particular circumstances of whether a lawyer may charge for withdrawal-related work such as preparation, filing, and arguing a motion to withdraw. Other jurisdictions have addressed this question, however, in 2007 N.C. Ethics Op. 8 (http://www.ncbar.gov/ethics) (July 13, 2007), the North Carolina State Bar opined that the act of the withdrawal with the Court is the professional obligation of the lawyer, and therefore the lawyer may not shift the cost of the withdrawal to the client. "Whether the client or the lawyer is the first to conclude that the relationship must end, determining who is at fault or the motivation of the client or the lawyer when ending the relationship is often impossible and, ultimately, beside[s] the point. Regardless of who may be at fault, the cost of the work necessary to file and argue a motion to withdraw must be incurred because the lawyer is required by the Rules of Professional Conduct and the court rules to obtain the permission of the court to withdraw." Further, in North Carolina, a fee agreement provision requiring the client to pay for the cost of preparing, filing, and arguing a motion to withdraw if the client terminates the lawyer's services is improper because "[s]uch a provision would have an improper chilling effect on a client's right to terminate a lawyer's services at will." *Id*.

North Carolina poses two exceptions to the general rule of not charging for withdrawal-related work. One exception is when "a lawyer must file a motion to withdraw, with the consent of the client, to advance the client's objectives for the representation and not because the client is dissatisfied with the lawyer's services or the lawyer wishes to terminate the representation." *Id*. An example:

> [A]n insurance carrier hires a lawyer to defend its insured in a personal injury lawsuit. Before trial, the carrier offers the full policy limits to the plaintiff. The carrier hires another lawyer to file the appropriate motion seeking to have the carrier relieved of its duty to defend the insured. The lawsuit must go forward, however, to determine whether there is liability entitling the plaintiff to recover the proceeds from an underinsured or other excess liability insurance policy. If the motion to be relieved of the duty to defend is allowed, the lawyer originally hired to defend the insured must make a motion to withdraw to further the insurance carrier's objective of being relieved of the duty to defend. The insurance carrier typically anticipates and assumes that it will pay the legal fees associated with the preparation and presentation of the motion to withdraw.

Id.

The second exception identified by North Carolina is where a court-appointed lawyer's withdrawal is necessary because of a conflict of interest, a breakdown of the relationship, or other similar circumstance, and the cause of such is not the lawyer's conduct. "Judicial review provides oversight to insure that the fee charges are warranted and, unlike in private representation, seeking compensation for filing the motion will not have a chilling effect on the client's right to terminate the relationship." *Id*.

The State Bar of Michigan's Standing Committee on Professional and Judicial Ethics takes somewhat of a different view, allowing the lawyer to charge a client for withdrawal-related services if the withdrawal is the client's choice and the lawyer has explained the consequences of withdrawal to the client, including the cost:

> When a client seeks to discharge a lawyer, the lawyer has an obligation under MRPC 1.4(b) to explain to the client the effect of the withdrawal, including the likelihood of the judge granting the withdrawal under MRPC 1.16(c), that the lawyer continues as counsel until the judge grants the motion to withdraw, and that the motion to withdraw may not terminate the lawyer's ethical obligations to refrain from assisting illegal or fraudulent conduct of the client [MRPC 1.2(c), 1.2(d), 3.3(a)]. Presuming that the lawyer has fulfilled all obligations at the time of the contract and at the time withdrawal is requested, and as in this case, the contract is hourly [not contingent or fixed fee], the lawyer may charge to fulfill the client's wishes.
>
> On the other hand, when it is the lawyer who has decided to withdraw, whether with cause or otherwise, the lawyer is not serving the interest of the client and therefore may not charge the client for expenses incurred in seeking the withdrawal.

Mich. Ethics Op. RI-296 (July 15, 1997) (http://www.michbar.org/opinions)

While the North Carolina opinion better serves the client's right to have counsel of his or her own choice , we do not believe the circumstances a lawyer may charge for withdrawal-related work are as narrow as adopted in North Carolina. Because a breakdown in a lawyer-client relationship is often difficult to distill down to client choice or lawyer choice (and in the same case, the client and the lawyer may perceive the decision-maker and the reasons therefor differently), we do not adopt the Michigan decision. Rather, we refer withdrawing lawyers to the reasonableness requirement of ER 1.5. The work a lawyer reasonably undertakes in support of a smooth transition to new counsel or *pro per* representation is usually work that may be charged to the client if otherwise appropriate under the fee agreement and if the withdrawal is not clearly solely due to the lawyer's circumstances (such as a lawyer closing the lawyer's law office in favor of public employment). Nevertheless, clients will likely scrutinize closely withdrawal-related charges, and a lawyer must be able to justify all such charges as reasonable under the circumstances.

3. What obligations does the withdrawn lawyer have to the former client?

"Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned." ER 1.16(d). Even if money is owed by the client to the withdrawn lawyer, the client is entitled to the client's property, including the file. *See* ER 1.16(d); Ariz. Ethics Ops. 04-01 (January 2004) and 08-02 (December 2008).

A withdrawn lawyer can find duties to former clients generally set forth in ER 1.9. For example, ER 1.9(c) makes clear that duties of confidentiality continue for former clients:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Many courts require that the withdrawing lawyer notify the client and new counsel of upcoming court dates, settings, and deadlines. This is consistent with a withdrawing lawyer's ethical obligations. Importantly, the lawyer's ethical obligations to the client do not stop there. The lawyer must be mindful to protect the client's interests during and for an orderly transition to new counsel or *pro per* representation. Exactly what steps are entailed in the withdrawing or withdrawn lawyer participating in an orderly transition will be a case-by-case analysis. In most cases, the withdrawing or withdrawn lawyer is ethically obliged to brief new counsel as to the issues and status in a case with more detail than simply conveying court dates, settings, and deadlines. Yet, a lawyer must be mindful of reasons that may make briefing successor counselor imprudent. "Indeed, if the withdrawal is occasioned by a conflict, briefing successor counsel may taint the successor." Mich. Ethics Op. RI-296. In short, a withdrawing or withdrawn lawyer should participate in the transition due to the withdrawal such that the lawyer has reasonably tried to minimize (or alleviate, if possible) prejudice to the client from the withdrawal.

CONCLUSION

A client remains so until the lawyer's withdrawal is complete regardless of the reasons for and timing of the cessation of the lawyer-client relationship. The withdrawing lawyer must protect the client's interests despite any dispute between the lawyer and the client and despite any wrongdoing of the client. Any disclosures of confidential information must be strictly limited to those circumstances authorized by the Rules of Professional Conduct. Fees must always be reasonable and appropriate. A withdrawing or withdrawn lawyer should participate in an orderly transition to new counsel or *pro per* representation to minimize prejudice to the client from the withdrawal. Once a lawyer is withdrawn, ethical obligations continue as for any former client.

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[1] *See* Ariz. Ethics Op. 94-02 (March 1994) (In opining that a fee agreement provision preventing the client from discharging the lawyer without "good cause" was unethical, this Committee stated: "Such a provision would likely discourage or deter a client, who no longer had confidence in or even distrusted counsel, from discharging the lawyer and hiring a new lawyer.")