UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN WINGO, Plaintiff, v. 3M COMPANY, Defendant.	Case No. 22-cv-00993-WMW-JFD **PLAINTIFF COUNSEL'S MEMORANDUM IN SUPPORT OF MOTION TO WITHDRAW WITHOUT SUBSTITUTION**
ROBERT RIEGER, Plaintiff, v. 3M COMPANY, Defendant.	Case No.: 22-cv-00994-WMW-JFD
TITUS KARGBO, Plaintiffs, v. 3M COMPANY, Defendant.	Case No.: 22-cv-00996-WMW-JFD

DESIREE HOLLER, Plaintiff, v. 3M COMPANY, Defendant.	Case No.: 22-cv-00998-WMW-JFD
VAUGHN WINGO, Plaintiff, v. 3M COMPANY, Defendant.	Case No.: 22-cv-01890-WMW-JFD
NEVELY RANDLE, Plaintiff, v. 3M COMPANY, Defendant.	Case No.: 22-cv-01904-WMW-JFD

Facts

These six cases commenced in April and July of last year.[1] Six plaintiffs—John Wingo, Robert Rieger, Titus Kargbo, Desiree Holler, Vaughn Wingo, and Nevely

[1] 22-cv-993 (J. Wingo) Doc. #1 (Complaint filed on 4-20-22); 22-cv-994 (Rieger) Doc. #1 (Complaint filed on 4-20-22); 22-cv-996 (Kargbo) Doc. #1 (Complaint filed on 4-20-22); 22-cv-998 (Holler) Doc. #1 (Complaint filed 4-20-22); 22-cv-1890 (V. Wingo)

Randle ("Plaintiffs")—have brought related cases against Defendant 3M Company.[2] Circumstances have arisen which require Plaintiffs' counsel ("Counsel") to move to withdraw without substitution due to professional considerations.[3] Additionally, there has been a breakdown of the attorney-client relationship with several Plaintiffs.[4]

There is currently no in-force scheduling order in these cases due to a request by the parties' counsel.[5] (At present, the parties are to submit a new proposed scheduling order by this Friday, Sept. 22, 2023.[6])

All Plaintiffs have been notified of this motion and have been notified that they may object or respond.[7] Plaintiffs have also been notified of the consequences of

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Doc #1 (Complaint filed 7-28-22); 22-cv-1904 (Randle) Doc. #1 (Complaint filed 7-29-22).

[2] *Id*.

[3] 9-21-23 Declaration of Brian J. Kluk ("Kluk Dec.") ¶ 3.

[4] *Id.* at ¶ 4.

[5] 22-cv-993 (J. Wingo) Doc. #57; 22-cv-994 (Rieger) Doc. #54; 22-cv-996 (Kargbo) Doc. #40; 22-cv-998 (Holler) Doc. #55; 22-cv-1890 (V. Wingo) Doc #28; 22-cv-1904 (Randle) Doc. #32.

[6] 22-cv-993 (J. Wingo) Doc. #58; 22-cv-994 (Rieger) Doc. #55; 22-cv-996 (Kargbo) Doc. #41; 22-cv-998 (Holler) Doc. #56; 22-cv-1890 (V. Wingo) Doc #29; 22-cv-1904 (Randle) Doc. #33 (Order that parties will submit proposed scheduling order by 9-15-23). 22-cv-00993 (J. Wingo) Doc. # 60; 22-cv-994 (Rieger) Doc # 57; 22-cv-996 (Kargbo) Doc. #43; 22-cv-998 (Holler) Doc. # 58; 22-cv-1890 (V. Wingo) Doc #31; 22-cv-1904 (Randle) Doc. #35 (text-only Order extending the deadline to submit a proposed scheduling order to 9-22-23).

[7] Kluk Dec. ¶ 2. *See, e.g.*, *Ivers v. CMFG Life Ins. Co.*, Civ. No. 15-1577, 2016 WL 11031189 at *1 (D. Minn. Apr. 5, 2016) (referencing the client's opportunity to respond to its counsel's motion to withdraw: the court required the withdrawing counsel to provide documentation it had informed its client of "the opportunity for Ivers to object to PDML's withdrawal"); *Cabo Holdings, LLC v. Engelhart*, Civ. No. 07-3524 (PJS/RLE), 2008 WL 4831757 at *3 (D. Minn. Nov. 3, 2008) (same: "Despite receiving notice of Briggs' intention to withdraw from its representation, So Cal did not submit any written response to Briggs' Motion").

Counsel's withdrawal,[8] and Counsel respectfully requests that any responses by Plaintiffs be allowed to be filed *ex parte* and in camera to protect client confidences.

Argument

1. Counsel is compelled to withdraw per the Minnesota Rules of Professional Conduct.

Withdrawal of counsel is governed by Local Rule 83.7. Attorneys seeking to withdraw without substitution must make a motion showing good cause, and the clients must be notified of the motion.[9]

Whether withdrawal without substitution is allowed is at the discretion of the Court.[10] Factors considered are: (1) the reasons for withdrawal; (2) the resulting prejudice, if any, to the parties; (3) the effect that withdrawal may have on the administration of justice; and (4) the delay in resolution of the case that would result from the withdrawal.[11]

Lawyers' conduct in Minnesota's federal courts is governed by the Minnesota Rules of Professional Conduct.[12] What constitutes "good cause" for withdrawal is considered in light of those rules.[13] The Professional Rules specify when a lawyer

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[8] Kluk Dec. ¶ 2.
[9] LR 83.7(c).
[10] *Fleming v. Harris*, 39 F.3d 905, 908 (8th Cir. 1994).
[11] *Jacobson v. County of Chisago*, No. 18-CV-2528 (SRN/HB), 2020 WL 13610598 at *1 (D. Minn. Oct. 14, 2020) (citing *Ivers v. CMFG Life Ins. Co.*, No. 15-CV-1577 (WMW/JJK), 2016 WL 11031189, at *1 (D. Minn. Apr. 5, 2016)).
[12] LR 83.6(a) (adopting the Minnesota Rules of Professional Conduct as the rules of the court).
[13] *Jacobson*, 2020 WL 13610598 at *2 ("As for good cause, courts in the District of Minnesota look to the Minnesota Rules of Professional Conduct in assessing the behavior of attorneys practicing in federal court.").

may or must withdraw.[14] When lawyers are associated in a firm, the firm may not represent a client if one of the lawyers practicing alone would be prohibited from doing so.[15]

If a lawyer satisfies the requirements of the Professional Rules, Local Rule 83.7, and any directives from the court associated with the motion to withdraw, withdrawal is presumptively appropriate.[16]

Here, while Counsel must be "intentionally vague"[17] to protect client confidences, professional considerations require that Counsel's representation of Plaintiffs be terminated.[18] Counsel is expressing the circumstances necessitating withdrawal here in the most general terms, but doing so is necessary to protect those confidences.[19] The Professional Rules state that a lawyer seeking withdrawal must balance client confidentiality and candor to the court.[20] In these circumstances, case

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[14] *See* Minnesota Rule of Professional Conduct 1.16(a), specifying when a lawyer "shall" withdraw; 1.16(b), specifying when a lawyer "may" withdraw.
[15] MRPC 1.10(a).
[16] *See Ivers v. CMFG Life Ins. Co.*, No. 15-CV-1577 (WMW/JJK), 2016 WL 11031189, at *1 (D. Minn. Apr. 5, 2016) (stating that "it is presumptively appropriate for PDML to withdraw from representing Ivers in this action" after noting the basis for withdrawal under the Professional Rules, compliance with LR 83.7, and compliance with the court's directives).
[17] *Jacobson*, 2020 WL 13610598 at *2.
[18] Kluk Dec. ¶ 3.
[19] *Id.* at ¶¶ 3-4.
[20] MRCP 1.16, comment [3]: "*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*

law indicates that "a lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."[21] This directive is based in MRPC 1.16.[22]

Analysis of factors:

1. The reason for withdrawal. Professional considerations require Counsel to withdraw.

2. The resulting prejudice, if any, to the parties. Here, no party is prejudiced, since there are no upcoming deadlines that would threaten to leave a party suddenly without counsel at a critical case juncture like dispositive motions or trial.[23] Also, 3M would not be prejudiced if any of the Plaintiffs were to represent himself or herself.[24]

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accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3."

[21] *Jacobson*, 2020 WL 13610598 at *2.

[22] *Id.* (stating: "[C]omment 3 to Rule 1.16 instructs that a 'lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.'"). MRCP 1.16, comment [3].

[23] *See, e.g.*, *Ivers*, 2016 WL 11031189, at *2 (finding no prejudice from withdrawal, in part, because the case's trial-ready date was more than five motions away). Here, there is no currently in-force scheduling order, *see* Footnotes 5 and 6 *supra*, and even under the old scheduling order trial was planned for June of next year.

[24] *Id.* ("[Counsel]'s withdrawal would leave Ivers without counsel unless, of course, he obtains substitute representation. However, there is no reason why [the opposing party] will be severely prejudiced if Ivers goes forward with this litigation pro se."); *Cf. Cabo Holdings*, 2008 WL 4831757 at *5 (stating that disruption to a suit could result when a lawyer withdraws from representation of a corporation, as corporations cannot appear *pro se*).

3. The effect that withdrawal may have on the administration of justice. Here, there is no negative effect, and Counsel believes that its withdrawal here furthers the proper administration of justice.[25]

4. The delay in resolution of the case that would result from the withdrawal. Here, any delay should be minimal. Counsel proposes that the Court order Plaintiffs to appoint new counsel within 14 days after issuing its order on this motion. The cases can then proceed on to dispositive motions and trial.

Analysis of the factors strongly favors withdrawal. There will be no prejudice, and a delay of a few weeks or a month does not outweigh the first factor, which necessarily predominates. Additionally, Counsel has met the requirements of the Professional Rules and Local Rule 83.7, making withdrawal presumptively appropriate.[26]

While Counsel does not believe that such submissions are necessary to support withdrawal,[27] if the Court so orders, Counsel will provide additional information supporting the circumstances requiring this motion, which Counsel requests permission to file *ex parte* and under seal.[28]

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[25] Kluk Dec. ¶ 5.
[26] *Ivers*, 2016 WL 11031189, at *1.
[27] *See Jacobson*, 2020 WL 13610598 at *2 (". . . a lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient," citing MRPC 1.16).
[28] *See, e.g.*, *Huntington Nat'l Bank v. Senergy Consulting Group*, No. 22-cv-1507 (NEB/TNL), 2023 WL 5276869, *1 (D. Minn. June 12, 2023) (ordering, in response to a motion to withdraw without substitution, counsel to "provide additional information in support of the motion to withdraw, including a memorandum of law and an affidavit, which could be filed ex parte and under seal, explaining the

2. Counsel also requests to withdraw due to a breakdown of the attorney-client relationship and fundamental disagreements.

Rule 1.16(b) sets forth when a lawyer "may" withdraw.[29] Permissive (i.e., non-mandatory) withdrawal is appropriate when it can be "accomplished without material adverse effect on the interests of the client."[30] Good cause for the withdrawal must be shown.[31]

"What constitutes 'good cause' for the withdrawal of counsel, without substitution, cannot be readily defined, or categorized, but must be evaluated on a case-by-case basis, and determined by examining the reasons proffered for the asserted need to withdraw."[32] Prior courts have found good cause "where a degree of fractiousness, between the client and counsel, has developed which inhibits the just, speedy, and inexpensive determination of the action."[33]

Here, good cause exists to grant permissive withdrawal. While Counsel must again be "intentionally vague"[34] to protect confidences, the breakdown of communication and lack of communication is producing delay in the resolution of issues.[35] The result is delay in the overall cases. For example, Counsel recently requested a week's extension of a deadline in order to keep working on resolving

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'professional considerations' that Defense Counsel asserts require her to withdraw in this matter").
[29] MRPC 1.16(b).
[30] *Id.* at (b)(1).
[31] LR 83.7(c).
[32] *Cabo Holdings*, 2008 WL 4831757 at *4.
[33] *Id.* (quotation marks and some punctuation omitted).
[34] *Jacobson v. County of Chisago*, 2020 WL 13610598 at *2.
[35] Kluk Dec. ¶ 4.

outstanding issues.[36] When the attorney-client relationship itself produces disruption or delay, withdrawal of counsel is warranted.[37] And while this motion may produce one short-term delay, proceeding with broken attorney-client relationships threatens to produce many delays in the future.

3. Counsel must withdraw from all of the related cases.

Counsel cannot withdraw from representing some of the Plaintiffs while continuing to represent others.

Under MRPC 1.9(a), "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same . . . matter in which that person's interests are materially adverse to the interests of the former client."[38] And a lawyer is prohibited from using information gained during a former representation "to the disadvantage of the former client."[39]

Under MRPC 1.7(a), a lawyer may not represent a client if there exists a concurrent conflict of interest, which includes "a significant risk that the

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[36] E.g., 22-cv-993 (J. Wingo) Doc.Doc. # 59, 60. (Similar docket entries appear in all the related cases.)

[37] *See Cabo Holdings*, 2008 WL 4831757 at *4 (noting a party's "demonstrated and intractable refusal to assist its counsel in a manner that would allow the timely resolution of this action").

[38] It is possible for the former client to waive these kinds of conflicts, *see* MRCP 1.9(a), (b), but Counsel believes that any such waiver would be extremely unlikely here.

[39] MRPC 1.9(c)(1).

representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a former client."[40]

Withdrawing from some related cases but not all is a recognized ethical minefield. Advisory opinions from the Director of the Minnesota Office of Lawyers Professional Responsibility state that, "[a]s a general rule, when joint or common representation fails because the interests of the clients become antagonistic, the lawyer must withdraw from representing all clients."[41]

If Counsel withdrew from some but not all, there would be a significant risk of precisely the conflicts described in Rules 1.7, 1.9, and the Office of Lawyers Professional Responsibility advisory opinions. There is a strong possibility that the interests of some of the Plaintiffs may be adverse, or may become adverse, to the others.[42] Many of the Plaintiffs are expected to be witnesses in each other's cases,[43] meaning that Counsel would have to conduct examination or cross-examination of former clients at trial with knowledge of confidential information gained from the prior representation.

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[40] It is possible for the current client to waive these kinds of conflicts, *see* MRCP 1.7(b)(4), but Counsel believes that any such waiver would be extremely unlikely here.
[41] Kluk Dec. Ex. A (Advisory Opinion Samplings from Kenneth L. Jorgensen, reprinted from *Bench & Bar of Minnesota*, Oct. 2004) (citing Paragraph 29 of the Comment to Rule 1.7, ABA Model Rules of Professional Conduct).
[42] *Id.* at ¶ 6.
[43] *Id.* at ¶ 7.

Conclusion

Counsel respectfully requests that it be granted permission to withdraw from the six related cases, and that the Court order that Plaintiffs appoint new representation within 14 days.

As noted, case law from this district indicates that this submission is sufficient to support withdrawal.[44] However, if the Court so orders, Counsel can provide additional information supporting its request *ex parte* and under seal, to protect client confidences.[45]

Respectfully submitted,

McCOLLUM CROWLEY P.A.

Dated: Sept. 21, 2023

/s/ Brian J. Kluk

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[44] *See Jacobson*, 2020 WL 13610598 at *2.
[45] *See Huntington Nat'l Bank*, 2023 WL 5276869, *1.