The “Hot Potato” Doctrine and the Model Rules of Professional Conduct: the Limits of a Lawyer’s Duty of Loyalty

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ABSTRACT

Model Rule 1.3 requires a lawyer to carry a matter through to completion unless withdrawal is permitted or required by Model Rule 1.16. Model Rule 1.16(b)(1) permits withdrawal if “withdrawal can be accomplished without material adverse effect on the interests of the client.” Withdrawal from an active matter would not be permissible under that provision if replacing the lawyer would result in a material adverse effect on the representation, for example, by delay of the matter, extra expense to the client, or difficulty in completing the matter. Where court approval is required, a lawyer may not withdraw until that has been obtained. Even if a client has no active matters, a lawyer cannot withdraw from representing that client if the lawyer is bound by an agreement to remain available to the client for future representations. If a lawyer-client relationship continues without any active matters, and without any express or

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implied agreement to remain available for future representations, Model Rule 1.16(b)(1) permits the lawyer to withdraw, even if the purpose is to undertake a representation adverse to that client.

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Model Rule 1.7(a)(1) forbids a lawyer to undertake a representation that is “directly adverse to another client,” in the absence of informed consent. In contrast, without consent, Model Rule 1.9(a) forbids undertaking a representation materially adverse to a former client only if the new matter is the same as or “substantially related” to the former client’s prior representation. This difference gives rise to the question of whether a lawyer may withdraw from a representation of a
current client (thereby rendering the client a former client) in order to undertake a new representation directly adverse to the now-former client but not the same as or substantially related to any prior matter handled for that client\(^1\) and, if so, under what circumstances.\(^2\)

In disqualification cases, this question is sometimes described as whether a law firm can “drop a client like a hot potato.”\(^3\) Such cases often state a flat rule against doing so.\(^4\) Such a rule would treat withdrawal to undertake a representation adverse to the client as a form of disloyalty to that client.\(^5\)

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2. In many litigated cases, one issue has been whether the party objecting to the new representation was already a former client when the lawyer undertook the new representation. This opinion does not address when a particular client-lawyer relationship has been effectively terminated. For guidance, however, see, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Opinion 481 (2018) (on duties regarding lawyer mistakes), which includes a brief discussion of when a lawyer-client relationship has been effectively terminated. In one case, there was an issue whether the involvement of the law firm with the new client prior to the unrelated termination of its representation of the now adverse party constituted a representation of at a time when it still represented the former client. Biomatrix Spec. Pharm. v. Horizon Healthcare Servs., No. 18-61680-CIC-MORENO/SELTZER, 2018 U.S. Dist. 216660 (S.D. Dist. Fla. Dec. 27, 2018) (at the request of Biomatrix, its relationship partner had the relationship partner for Horizon call Horizon’s counsel to identify someone with whom to discuss an unpaid account; unbeknownst to law firm Horizon had denied the claim in question, which was later the subject of the action the law firm filed for Biomatrix against Horizon). Because the law firm did not terminate its representation of Horizon to be able to undertake representation of Biomatrix adverse to Horizon, that case did not present the issue addressed in this article.


4. See, e.g., Picker, 670 F. Supp. at 1365 (“A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.”); State Farm Mut. Auto. Ins. Co. v. Fed. Ins. Co., 86 Cal. Rptr. 2d 20, 26 (Cal. Ct. App. 1999) (stating, “so inviolate is the duty of loyalty to an existing client that the attorney cannot evade it by withdrawing from the relationship”; not, then, a Model Rules state); ROTUNDA & DZENKOWSKI, supra note 3, § 1.7 – 5 (“[T]he general rule is that, if the firm withdraws from further representation of Client A, it still may not ethically represent Client B [adversely to Client A].”).

5. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 261 (11th ed. 2018) (“In a footnote in Unified Sewerage Agency of Washington County v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981), Judge Goodwin wrote that law firms could not escape the stricter current client conflict rules simply by withdrawing from a representation and converting a current client into a former one. Why not? If the second matter is truly unrelated, who is hurt? Certainly the ‘former’ client may encounter some additional expense, but assume the former firm is prepared to pay it. The Jelco footnote honours a client’s interest in uninterrupted representation to the conclusion of a matter. Think of it as an attribute of loyalty. ‘I won’t drop you to sue you.’ Judge Goodwin’s footnote acquired a simile in Picker International, Inc. v. Varian Associates, Inc., 670 F. Supp. 1363 (N.D. Ohio 1987), aff’d, 869 F.2d 578 (Fed. Cir. 1989). There, the district judge determined that Jones Day had dropped one client ‘like a hot potato’ in order to be free to continue to represent another client. Today the ‘hot potato’ rule is broadly recognized.”).
None of the “hot potato” cases attempt to analyze the question under the Model Rules of Professional Conduct. This article undertakes to provide such an analysis. It concludes that in most circumstances, the Model Rules support the same result as the flat “hot potato” rule. But it also concludes that the Model Rules would support a different result if the representation from which the lawyer wishes to withdraw is “dormant” (in the sense that there is no active matter for that client but the client has a reasonable belief that a past representation continues) and if the lawyer has no obligation to the client to remain available for future matters.

The analysis will begin by examining a lawyer’s duty to complete matters the lawyer undertakes unless withdrawal is required or permitted by Model Rule 1.16. It will then examine Model Rule 1.16(b)(1), which permits a lawyer to withdraw from a representation if “withdrawal can be accomplished without material adverse effect on the interests of the client.”6 Finally, it will consider whether withdrawal from a dormant representation to undertake an adverse representation inherently causes a “material adverse effect on the interests of the client.”

I. A LAWYER MUST CONTINUE A MATTER TO COMPLETION UNLESS RULE 1.16 PERMITS WITHDRAWAL

A. MODEL RULE 1.3

A lawyer’s obligations of competence and loyalty require a lawyer to complete a representation unless it is properly terminated under Rule 1.16. Rule 1.3 says “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” Comment [4] to Rule 1.3 says “[u]nless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.”7

Comment [4] addresses related matters. So, “[i]f a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved.”8 On the other hand, “[i]f a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.”9

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7. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32 (2000) (similarly describing the ways in which a lawyer may terminate a representation); id. § 32 cmt. c (“[A] lawyer who undertakes a representation ordinarily should see it through to the contemplated end of the lawyer’s services when failure to do so would inflict burdens on the client. Accordingly, the general rule is that a lawyer must persist despite unforeseen difficulties and carry through the representation to its intended conclusion, with the limited exceptions stated in Subsection [32](3) [parallel to Model Rule 1.6(b)];’’); Laster v. Dist. of Columbia, 460 F. Supp. 2d 111, 113 (D.D.C. 2006) (stating that “counsel is under an obligation to see the work through to completion when he agrees to undertake the representation of the client”; motion to withdraw granted where no prejudice to court or client).
8. MODEL RULES R. 1.3 cmt. 4.
9. Id.; accord Parallel Iron, LLC v. Adobe Sys., No. 12-874-RGA, 2013 U.S. Dist. LEXIS 29382, at *7–8 (D. Del. Mar. 4, 2013) (reasoning that while firm had no active matters for Adobe, “the six year history between Adobe and [firm] was sufficient to instill in Adobe a reasonable belief that it would not be sued by [firm], at
Comment [4] places the burden on the lawyer to clarify if there is uncertainty: “[d]oubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so.”

For example:

[I]f a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter.

B. WITHDRAWAL UNDER MODEL RULE 1.16(B)(1)

Model Rule 1.16 governs a lawyer’s withdrawal from a representation. Rule 1.16(a) mandates withdrawal in three circumstances. Rule 1.16(b) permits withdrawal in seven circumstances. Court approval is required in some circumstances. And certain steps must be taken upon withdrawal. This article focuses on Rule 1.16(b)(1), which provides “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 . . . .

There is little authority addressing under what circumstances “withdrawal can be accomplished without material adverse effect on the interests of the client.” Cases construing Model Rule 1.16 generally concern motions to withdraw from representation in pending litigation. In that context, some reason beyond lack of material adverse effect (e.g., lack of payment or breakdown of the relationship) is almost always offered. Leave to withdraw is normally denied if withdrawal will delay proceedings on a pending hearing, motion, or trial. Leave is frequently

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10. MODEL RULES R. 1.3 cmt. 4; Parallel Iron, LLC, 2013 U.S. Dist. LEXIS 29382, at *7–8 (if all pending matters are complete but client reasonably expects the representation to continue, lawyer must notify client if lawyer wishes to terminate the representation).
11. MODEL RULES R. 1.3 cmt. 4.
12. MODEL RULES R. 1.16(a)(1).
13. MODEL RULES R. 1.16(a)(1)–(3).
14. MODEL RULES R. 1.16(b)(1)–(7).
15. MODEL RULES R. 1.16(c) (compliance with court rules).
16. MODEL RULES R. 1.16(d) (steps the withdrawing lawyer must take to protect the client).
17. MODEL RULES R. 1.16(b)(1); see also MODEL RULES R. 1.16 cmt. 7 (stating that a lawyer “has the option to withdraw if it can be accomplished without material adverse effect on the client’s interests”). MODEL RULES R. 1.16(c) contains the provision requiring compliance with court rules.
granted, and no material adverse effect found, where the case is at a stage where there will be little need for successor counsel to duplicate work done by withdrawing counsel and there is ample time to substitute counsel. But, in most such cases, the lack of adverse effect is likely to have been considered as a factor in the analysis rather than as forming the sole basis for withdrawal. Additionally, where the lawyer has agreed to litigate a case on a contingent fee, the loss of that agreement may itself be considered a form of material adverse effect.

C. WITHDRAWAL FROM AN ACTIVE MATTER WOULD NOT BE PERMISSIBLE UNDER MODEL RULE 1.16(B)(1) IF REPLACING THE LAWYER WOULD RESULT IN A MATERIAL ADVERSE EFFECT ON THE REPRESENTATION, FOR EXAMPLE, BY DELAY OF THE MATTER, EXTRA EXPENSE TO THE CLIENT, OR DIFFICULTY IN COMPLETING THE MATTER

One common form of adverse effect on a client’s withdrawal is extra expense resulting from the need to bring a new lawyer up to speed on the matter, typically requiring the new lawyer to duplicate some of the withdrawing lawyer’s work. The need to find a new lawyer and bring that lawyer up to speed could result in material delay in completion of the matter, and significant additional cost for the client. In addition, replacing the withdrawing lawyer might be difficult or impossible. On the other hand, the lawyer may be able to mitigate


21. See Kiley, 947 N.E.2d at 8–9 (“A law firm, after agreeing to represent a client for a contingent fee . . . may not withdraw from a case simply because it recognizes belatedly that the case will not be profitable for the law firm.”).

22. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32 cmt. h(ii) (2000) (possible “material adverse effects” include the possibility that “[t]he client might have to expend time and expense searching for another lawyer” or “[t]he successor lawyer might have to be paid what in effect are duplicated fees for becoming familiar with the matter,” though “[a] lawyer wishing to withdraw can ameliorate those effects by assisting the client to obtain successor counsel and forgoing or refunding fees”).

23. Id. (“An equally qualified lawyer might be unavailable or available only at material inconvenience to the client. In some circumstances, the nature of confidential information relevant to the representation might make the client reasonably reluctant to retain another lawyer.”).
any adverse effects of withdrawal (e.g., by waiving or refunding fees for work that successor counsel will or may need to duplicate). It would be a question of fact whether (after taking account of any mitigation) an adverse effect of this sort on completion of the pending matter would be material. Moreover, in considering a possible withdrawal from such a representation, the lawyer would need to conclude that there would be no material adverse effect. It will often be difficult to predict with confidence that such effects would not be material. As a practical matter, this difficulty further limits the ability of a lawyer to use Model Rule 1.16(b)(1) as a basis for withdrawing from an active representation to undertake a representation adverse to the client from whose representation the lawyer withdrew.

D. WHERE COURT APPROVAL IS REQUIRED, A LAWYER MAY NOT WITHDRAW UNTIL THAT HAS BEEN OBTAINED

If termination were otherwise permissible, the lawyer would violate Model Rule 1.7 if she commenced the new representation before terminating the representation of the client against whom the lawyer would proceed.\textsuperscript{24} Thus, if notice to or permission by a tribunal is necessary before the lawyer could withdraw from representing the old client, that requirement would need to be satisfied before the lawyer could begin representing the new client.\textsuperscript{25}

Obtaining the necessary approval would usually impose a significant delay on undertaking the adverse representation. As a practical matter, the prospect of such delay might cause the prospective client to seek representation elsewhere, even if the prospective client were confident that leave to withdraw would eventually be granted. Thus, withdrawal from an active litigation matter to undertake a representation adverse to the client in that litigation is less likely to be practical than withdrawal from an active nonlitigation matter.

\textsuperscript{24} See TQP Dev., LLC v. Adobe Sys., No. 2:12-CV-570-JRG-RSP, 2013 U.S. Dist. LEXIS 97896, at *2–5 (E.D. Tex. July 13, 2013) (finding conflict where firm had no active matters pending for client, but relationship continued by implication and was not terminated before lawyer undertook representation adverse to client); Parallel Iron, LLC v. Adobe Sys., No. 12-874-RGA, 2013 U.S. Dist LEXIS 29382, at *7–8 (D. Del. Mar. 4, 2013) (while firm had no active matters for Adobe, “the six year history between [firm] and Adobe, was sufficient to instill in Adobe a reasonable belief that it would not be sued by [firm], at least absent some sort of prior notice that [firm] would no longer be available to serve as Adobe’s opinion counsel”); Oxford Sys., Inc. v. CellPro, Inc., 45 F. Supp. 2d 1055, 1060 (W.D. Wash. 1999) (firm’s relationship with client was of sufficient scope and duration that, despite lack of active matter, client reasonably believed that it was still a client at time firm undertook representation adverse to it).

\textsuperscript{25} Stratagem Dev. Corp. v. Heron Int’l N.V., 756 F. Supp. 789, 792–93 (S.D.N.Y. 1991) (while firm sought to withdraw from representing client to whom it wished to become adverse, withdrawal was not effective until substitution was complete, and, because the firm acted adversely before that, it was disqualified from the new representation).
E. EVEN IF A CLIENT HAS NO ACTIVE MATTERS, A LAWYER CANNOT WITHDRAW FROM REPRESENTING THAT CLIENT IF THE LAWYER IS BOUND BY AN AGREEMENT TO REMAIN AVAILABLE TO THE CLIENT FOR FUTURE REPRESENTATIONS

Lawyers sometimes promise to remain available to represent a client in return for payment of a retainer.26 The retainer makes such a promise an enforceable contract.27 Even without any retainer, such a promise of continued availability would be enforceable if the client relied on that promise to its detriment.28 A promise may be implied from conduct, but the mere fact of long continued representation does not alone constitute a promise to remain available. If, however, a lawyer is aware that the client is taking some action in reliance on the lawyer’s future availability, failure to advise the client that such availability is not assured might be found to constitute a promise.

Such a promise requires the lawyer to refrain from undertaking matters adverse to the client because such matters could prevent the lawyer from being available to represent the client should it wish to call upon the lawyer. Where the lawyer has no active matters for such a client, the only effect of withdrawal from the representation would be to free the lawyer to undertake matters adverse to that client. If the lawyer is bound by agreement to remain available to represent that client, withdrawal—especially withdrawal for the specific purpose of undertaking a matter adverse to that client—would necessarily have a material adverse effect on the client. So, withdrawal would not be permitted by Model Rule 1.16(b)(1).

F. IF A LAWYER-CLIENT RELATIONSHIP CONTINUES WITHOUT ANY ACTIVE MATTERS, AND WITHOUT ANY EXPRESS OR IMPLIED AGREEMENT TO REMAIN AVAILABLE FOR FUTURE REPRESENTATIONS, MODEL RULE 1.16(B)(1) PERMITS THE LAWYER TO WITHDRAW, EVEN IF THE PURPOSE IS TO UNDERTAKE A REPRESENTATION ADVERSE TO THAT CLIENT

As already noted, a lawyer-client relationship may continue to exist even when the lawyer is not engaged in any active matter for the client.29 Notably, courts recognize what might be called “episodic clients.” “For example, a firm may have done work for a client two or three times a year for the past five years, creating a reasonable client expectation that the professional relationship continues during the intervals and that the lawyer will be available the next time the client needs

27. Retainer obligations are commonly time limited, e.g., a payment of $X to remain available for a year or a payment of $Y per month to provide all necessary services of a particular type. Unless the lawyer has undertaken an obligation to continue the obligation to remain available, the lawyer is free, so far as the Model Rules are concerned, to decline to extend the period of required availability by providing reasonable notice and complying with any contractual requirements for doing so. Of course, the lawyer must complete any matters the lawyer has undertaken unless withdrawal is required or permitted by Model Rule 1.16.
29. MODEL RULES, R. 1.3 cmt. 4.
her.” So long as such a relationship continues, the lawyer is not free to undertake a representation adverse to that client, even if there are no active matters for that client.

The lawyer can negate such a continuing relationship by sending a disengagement letter on closing a client’s last active matter. Even in the absence of a disengagement letter, however, where the client has no active matters, withdrawal would cause no premature termination of the representation on any matter. If there is no pending matter and no express or implied agreement to remain available for future matters, there would be no client interests at stake, and thus there could not be any “material adverse effect” on the client’s interests unless withdrawal to undertake an adverse representation inherently creates such an effect.

Disqualification cases often state a broad rule against “drop[ping] a client like a hot potato” without regard to whether the lawyer has any active matters for the client or whether withdrawal would have any “material adverse effect” on the client’s interests. Hot potato rule cases all seem to say this in a context where the prohibition simply means that once a lawyer had created a concurrent conflict by representing one client adversely to another, the lawyer could not cure that conflict simply by dropping the client to whom the lawyer had become adverse.

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30. See GILLERS, supra note 5, at 79 (“Obviously, this is a question of fact that looks at the frequency with which the client has called on the firm and over what period of time.”); see also Parallel Iron, LLC v. Adobe Sys. Inc., No. 12–874–RGA, 2013 WL 789207 (D. Del. Mar. 4, 2013).

31. Altova GmbH v. Syncro Soft SRL, No. 17-11642-PBS, 2018 WL 3589076, at *3–5 (D. Mass. July 26, 2018) (court need not consider hot potato rule, because firm undertook adverse representation while still representing client to which it became adverse); Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., 425 P.3d 1, 27–29 (Cal. 2018) (Chin., J., concurring) (continued existence of attorney-client relationship, even with no active matters, precluded undertaking adverse representation; firm relied on advance waiver that was not adequately informed); see also id. at 14–15 (referencing “a substantial body of case law from both within and without California” concluding that “[u]nder comparable circumstances, where a law firm and a client have had a long-term course of business calling for occasional work on discrete assignments, courts have generally held the fact that the firm is not performing any assignment on a particular date and may not have done so for some months—or even years—does not necessarily mean that the attorney-client relationship has been terminated” (citations omitted)).

32. Sending such disengagement letters is a good practice if the lawyer wishes to maintain maximum ability to undertake new representations for others, regardless of whether those representations are adverse to the client whose matter(s) have been completed.


34. See, e.g., McLain v. Allstate Ins. Co., NO. 3:16CV843-TSL-RHW, 2017 U.S. Dist. LEXIS 62636, at *4 (S.D. Miss. April 25, 2017) (when lawyer sought to withdraw from representation of Allstate, it was already representing McLain regarding a claim against Allstate and, while lawyer had not received any new matters from Allstate in over a year, lawyer was still finishing some existing matters); Markham Concepts, Inc. v. Hasbro, Inc. 196 F. Supp. 3d 345, 347 (D.R.I. 2016) (prior to undertaking to sue Hasbro, law firm represented it in a number of patent applications and was seeking to expand its representation; “the hot potato doctrine is consistent with, and furthers the purpose of, the RIRPC [Rhode Island Rules of Professional Conduct] and that “lawyers should, as a general rule, remain loyal to their current clients and decline to take on the new, conflicting representation”); W. Sugar Coop. v. Archer-Daniel-Midland Co., 98 F. Supp. 3d 1074, 1078 (C.D. Cal. 2015) (merging law firms missed conflict created by merger, where one firm had been suing a longstanding client of the other, so that merged firm was representing one client against another); Bd.
That reasoning should not apply where the lawyer has no active matters for the client, has no commitment to remain available for future matters, and then withdraws from the dormant representation in accordance with the Model Rules before commencing the new adverse representation.

The prohibition against concurrent conflicts is based on the proposition that loyalty is an essential element of an attorney-client relationship. If applied in the context of a dormant representation without a retainer obligation or any express or implied agreement of continued representation, the “hot potato” rule would treat withdrawal to undertake a representation adverse to the client as a form of disloyalty. Commentators have disagreed about whether a loyalty obligation is protected by the hot potato rule and whether the lawyer’s motivation in seeking to withdraw matters. However, by the terms of Model Rule 1.16(b)(1), a lawyer’s motivation is irrelevant, because the inquiry looks only to whether there is a material adverse effect on the client’s interests that would result from the withdrawal. For a dormant client, there could be no such effect unless withdrawal to undertake an adverse representation inherently creates such an effect.

Those suggesting that a material adverse effect is inherent rely on the lawyer’s duty of loyalty to the client from whose representation the lawyer would...
withdraw. And Model Rule 1.7 definitely does codify a duty of loyalty to every current client. 38 But does the scope of that duty extend to forbidding a termination of representation for the purpose of undertaking an adverse representation?

One way to a negative answer to that question is simply to observe that the duty of loyalty extends only to a current client. That duty is necessarily limited by Model Rule 1.16, which expressly authorizes the termination of current client relationships, after which the duty of loyalty ceases to apply. But deeper analysis leads to the same conclusion.

A lawyer actually has two duties of loyalty. All lawyers are agents, and agents have duties of loyalty to their principals. But the agency duty is limited to matters connected with the agency relationship. 39 This duty is absolutely essential to an agency relationship: the principal could not safely entrust the agent with powers and duties to act on the principal’s behalf without assurance that the agent would do so solely on the principal’s behalf. But this duty does not limit the agent’s ability to act adversely to the principal on matters not connected to the agency relationship. Accordingly, it cannot be violated when (as in the case of a dormant client relationship) there are no matters connected to the agency relationship on which the agent could act.

But the Model Rules impose a broader duty of loyalty, extending beyond the particular matters entrusted to the lawyer:

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily

38. MODEL RULES, R. 1.7 cmt. 6.
39. RESTATEMENT (THIRD) OF AGENCY, § 8.01 (AM. LAW INST. 2006) (“An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”) (emphasis added)); id. § 8.03 (“An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship.”) (emphasis added)).
constitute a conflict of interest and thus may not require consent of the respective clients.\textsuperscript{40}

Insofar as the issue is the client’s “fear that the lawyer will pursue that client’s case less effectively out of deference to the other client,” that issue does not arise where the lawyer has no active matters which might be pursued less effectively and is terminating the lawyer-client representation. That also eliminates the possibility that such fear could exist for any future matters.

What remains is the likelihood that the client will “feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively.”\textsuperscript{41} We may assume that the client from whose representation a lawyer withdraws to accept an adverse representation would feel betrayed and would no longer be able to trust that lawyer. But that client would no longer need to trust that lawyer, as the lawyer-client representation would have been terminated. Because none of the reasons why a duty of loyalty is imposed require denying a lawyer the right to withdraw from a dormant representation in order to take on an adverse representation, there is no reason to construe that duty to forbid such action. Model Rule 1.16(b)(1) protects the interests of the client but not the client’s feelings about the lawyer who is withdrawing.

Further support for the conclusion that such conduct does not create any “material adverse effect on the client’s interests” may be found in ABA Formal Opinion 05-434, wherein the committee opined that (with exceptions not material here) “[t]here ordinarily is no conflict of interest when a lawyer is engaged by a testator to disinherit a beneficiary whom the lawyer represents on unrelated matters.”\textsuperscript{42} A key premise of this conclusion was that “[d]irect adverseness requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests.”\textsuperscript{43}

\textsuperscript{40} \textit{Model Rules}, R. 1.7 cmt. 6.

\textsuperscript{41} This concern is expressed in many of the cases on which Model Rule 1.7 was based. See, e.g., IBM v. Levin, 579 F.2d 271, 280 (3d Cir. 1978) (“A serious effect on the attorney-client relationship may follow if the client discovers from a source other than the attorney that he is being sued in a different matter by the attorney.”); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976) (“When Cinerama retained Mr. Fleischmann as its attorney in the Western District litigation, it was entitled to feel that at least until that limitation was at an end, it had its undivided loyalty as its advocate and champion.”); Jeffry v. Pounds, 136 Cal. Rptr. 373, 376–77 (Cal. Ct. App. 1977) (“A lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter. . . . [T]he basis of the conflict is the client’s loss of confidence, not the attorney’s inner conflicts.” (footnote omitted)); Grievance Comm. v. Rottner, 203 A.2d 82, 84 (Conn. 1964) (“When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home attached by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed. . . .”); see also Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1297 (1981) (“[P]roscription of simultaneous representation in unrelated matters . . . should . . . be viewed as reflecting . . . the need to protect certain client expectations and thereby to promote a trusting and harmonious attorney-client relationship.”).

\textsuperscript{42} ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 05-434 (2004).

\textsuperscript{43} Id.
This led to the conclusion that:

[A] testator is, unless limited by contractual or quasi-contractual obligations or by state law, free to dispose of his estate as he chooses, or to consume his entire estate during his lifetime or give it all away, leaving nothing to pass under his will. A potential beneficiary, even one who has been informed by the testator that he has been named in a testamentary instrument, has no legal right to that bequest but has, instead, merely an expectancy. Thus, except where the testator has a legal duty to make the bequest that is to be revoked or altered, there is no conflict of legal rights and duties as between the testator and the beneficiary and there is no direct adverseness.44

Similarly, where a lawyer has no active matters for a client and no obligation to be available for future matters, the client has no legal right to the lawyer’s continued services or continued unavailability of the lawyer to adversaries of the client, so the lawyer is free to terminate a dormant client relationship at any time and for any reason not otherwise forbidden by law.45

Thus, withdrawal would be permissible under Model Rule 1.16(b)(1). As indicated by Comment [4] to Model Rule 1.3, termination by withdrawal under Model Rule 1.16(b)(1) requires notice to the client, preferably in writing. Upon delivery of such notice, the representation would be terminated and, insofar as the Model Rules are concerned, the lawyer would be free to undertake a representation adverse to the now-former client.

The same conclusion has been reached by a leading treatise:

Some authorities purport to extend the reach of the “hot potato” rule . . . and apply it whenever a lawyer drops a client for the purpose of suing that client on behalf of someone else. This is inconsistent with the permissive withdrawal scheme of Model Rule 1.16(b) and Restatement of the Law Governing Lawyers § 32(3) . . . .46

II. CONCLUSION

Model Rule 1.16(b)(1) does not permit a lawyer to terminate an active matter if doing so will result in a material adverse effect on the client regarding completion of that matter. But, insofar as the Model Rules are concerned, so long as the lawyer has no contractual commitment to remain available for future

44. Id.
45. Artromick, Int’l v. Drustar, Inc., 134 F.R.D. 226, 230 (S.D. Ohio 1991) (“[B]ecause mutual subjective intent is sufficient to create the relationship, and its continuation is dependent upon both parties’ continuing to have that intent, a declaration—by word or deed—by either party that the relationship has ended is sufficient to cause it to end.”); id. at 231 (where firm’s relationship with Schottenstein may have continued without any pending matter, “disqualification proceedings could have been avoided if Schottenstein had simply told plaintiffs that they were no longer clients before accepting Drustar as a client. I am aware of no reason why a unilateral termination by the attorneys would not have been legally sufficient to end the relationship.”).
representations, a lawyer may terminate a dormant representation of an existing client to undertake a representation adverse to that client, so long as that representation is not in the same matter as the lawyer had formerly represented that client or a substantially related matter.