Ingrid M. Evans
EVANS LAW FIRM, INC.

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Ethical considerations in withdrawing from representation

KNOWING HOW MUCH – RATHER, HOW LITTLE – YOU CAN SAY WHEN YOU SEEK COURT APPROVAL TO WITHDRAW

Every lawyer in private practice has been there at least once in her career – the moment at which she realizes she needs to withdraw from representation of a client. While your client can always fire you at any time for any reason[1], (see *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790) you as the lawyer do not have the same latitude in ending the client relationship. But when you know you need to end the relationship, it is best to do so promptly. While a rash or precipitous decision is never in your best interest, a considered, prompt decision surely is because a deteriorating relationship with your client is unlikely to improve and the passage of time may only make your withdrawal more problematic, especially if you're headed to trial.

In any case, when you find yourself at a crossroads in a client relationship remember that there are circumstances in which you *must* terminate the relationship and circumstances where you *may* terminate the relationship. I will review the California Rules of Professional Conduct for those separate circumstances and then consider what you need to do if your client consents to your withdrawal and – more problematically – what you need to do if you have to go to court to withdraw. The latter situation poses a number of ethical questions as to what you can *and cannot* tell the court (even *in camera*) about your situation and why you are seeking to withdraw.

Before discussing cases of mandatory and voluntary withdrawal it is important to remember that whenever you withdraw from representation, you may not withdraw until you have taken "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel." (Rules of Professional Conduct 1.16 (d). See *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 915 ["A lawyer violates his or her ethical mandate by abandoning a client (citation omitted), or by withdrawing at a critical point and thereby prejudicing the client's case." (citing rule 3-700(A)(2)]; *Moore v. United States*, 2008 WL 1901322 at *3 ["[I]n California, withdrawal is proper when the client's interest will not be unduly prejudiced or delayed"].) This obligation is another reason to act promptly if you believe you need to terminate a client relationship; waiting too long may prejudice your client and forestall or preclude your withdrawal.

When you must terminate legal representation

The Rules of Professional Conduct of the State Bar of California ("Rules of Conduct") specify three circumstances under which an attorney *must* terminate a client relationship: (1) where the attorney knows or reasonably should know that a client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; (2) where continued employment would result in violation of the Rules of Professional Conduct or the State Bar Act; or (3) where the attorney's mental or physical condition renders effective representation "unreasonably difficult." (Rules Prof. Conduct, rule 1.16 (Declining or Terminating Representation).) You also must seek to withdraw from an action where the client has discharged you. (See, e.g., Bus. & Prof. Code § 6104 [lawyer cannot appear as attorney for a party to an action "without authority"].) Indeed, appearing without authority for a party can be grounds for disbarment or suspension. (*Ibid.*)

When you may terminate a client relationship

The Rules of Conduct specify that an attorney *may* terminate a client relationship where the client (a) insists upon presenting a claim or defense not warranted under existing law and not supported by a good faith argument for extension, modification, or reversal of existing law; (b) seeks to pursue an illegal course of conduct; (c) insists that counsel pursue an illegal course of conduct or that violates an attorney's ethical obligations; (d) engages in conduct that renders it unreasonably difficult for the member to effectively represent the client; (e) insists, in a matter not pending before a tribunal, that the attorney engage in conduct contrary to the judgment and advice of the attorney; or (f) *fails to pay the attorney's agreed-upon fees and expenses.* (Rules Prof. Conduct, rule 1.16(b).)

Withdrawal also may be permitted where: continued employment is *likely (contrasted to the certainty under 3-700(B)(2)) to violate the attorney's ethical obligations, the client's best interests would be served by withdrawal due to an attorney's inability to work with co-counsel, the attorney's mental or physical condition renders it difficult for the employment to be carried out effectively, the client knowingly and freely assents to termination, or the member has a good faith belief that the tribunal will find other good cause for withdrawal.* (Rules Prof. Conduct, rule 3-700(C)(2)-(6).)

Common grounds for terminating a client relationship are a personality clash, inability to work together or an irreconcilable difference about the course of litigation. In short, a complete breakdown of any sort of workable relationship between you and your client. Courts recognize this sort of breakdown within an attorney-client working relationship as grounds for withdrawing. (*Estate of Falco v. Decker* (1987) 188 Cal.App.3d 1004, 1014 [motion to withdraw granted "on the basis that the relationship between (the attorney and client) had completely broken down"].) As the Court noted in *Estate of Falco*, "[i]t was not relevant who caused the breakdown," but rather that "the effects the rift would have on [the] legal representation." (*Id.* at 1015.)

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2023

"The guy just disappeared…"

Another recognized ground for withdrawal is when your client simply disappears on you and will not respond to letters or calls or emails. (See, e.g., California State Bar Formal Opinion No. 1989-111.) The facts behind that Opinion are a good example of what it's like when your client goes AWOL. There, the attorney represented a defendant in a personal injury case and when time came to prepare and file an answer, the client just disappeared.

The attorney wrote three letters to the client to his last known address but the letters were returned unclaimed. The attorney tried calling the client numerous times without success. The Opinion of course did not "rule" on the withdrawal but only advised that an attorney must make a "diligent effort" to locate a client and opined that the attorney could file an answer "to avoid reasonably foreseeable prejudice to the client." (If your client has disappeared on you or returns your mail unopened, be sure to keep a precise record of all returned correspondence, voice messages, emails, texts and any other means you have tried to communicate with them as you will need to preserve a record of your attempts when you make a motion to withdraw, as discussed more fully below.)

Consensual withdrawal

Where your client consents to your withdrawal, have them sign a Substitution of Attorney (in California it's Judicial Council Form MC-050). File and serve the signed Substitution on all parties to the action and you are out of the case. Once you've filed and served your Substitution you may want to monitor the Court's online profile of your case and communicate with the Clerk's office if you have not been removed as counsel from the case in the Court's online profile. I have had instances where I have been served a year after I withdrew from a case because the Court had not removed me from the service list even though my Substitution had been duly filed and served on all parties.

Moving to withdraw

While I have been able to obtain Substitutions in most cases where I have withdrawn, I have also had clients who, without refusing to sign a substitution, just disappear and ignore my attempts to reach them by phone or mail or email or text. Such unresponsiveness may of course be the reason you feel constrained to withdraw – you can't prepare for trial if your client does not cooperate and just ignores you. The unresponsiveness may be a pattern of behavior and may be an instance of a client getting cold feet midway through a litigation. In any event, this is one of those cases where you need to act promptly and go to court for the judge's approval of your withdrawal. In my experience, it is always best to cut ties with an unresponsive client sooner rather than later as the complications down the road may be troublesome and the client's own detachment from a case can pull her lawyer down with her.

Before getting into the nuts and bolts of withdrawal motions, one important practice tip here, which I alluded to above, is to record in detail each and every time you tried to reach your client and how (letter, email, call, text, etc.) by date and time and, if you left a voicemail, exactly what you said. It's rather like a meet and confer process where you want to assemble all your efforts at communicating in case the judge asks you what you did to try to reach your client about withdrawing. Once you start drafting the declaration for your withdrawal motion (discussed below) you will need to have a record of all the times you tried to communicate. Once you have the evidence of your attempts at communicating and getting a signed substitution then you can begin your motion to withdraw. In California your motion *must* be made on *three* fillable Judicial Council Forms:

MC-051 Notice of Motion and Motion to be Relieved as Counsel – Civil

MC-052 Declaration in Support of Attorney's Motion to be Relieved as Counsel – Civil

MC-053 Order Granting Attorney's Motion to be Relieved as Counsel – Civil

No memorandum of points and authorities ("MPA") accompanies your motion to withdraw in California, unlike the general requirement of an MPA for civil motions. Your declaration is the critical filing here. In it, you provide the "reasons" for your motion, and this is the most difficult document to craft. In California, you may not divulge any privileged communications in support of your motion and the gambit of what constitutes privileged communications is broad – even to the fact that you have not been paid.

Duty not to divulge privileged communications

When submitting and arguing a motion to be relieved as counsel – even in camera – counsel may not under any circumstances reveal confidential client information in seeking to withdraw. California Rules of Court, rule 3.1362(c) specifies that your declaration in support of motion "must state in general terms and without compromising the confidentiality of the attorney-client relationship" why you are bringing your motion. In California, the scope of what might "compromise" the confidentiality of the attorney-client relationship is broad and reaches even to non-public court proceeding.

In fact, if the court orders an in camera hearing to consider your motion, client confidences still may not be disclosed. (*Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 595; Cal. State Bar Form. Opn. 2015-192 [confidential information cannot be revealed in open court or in camera.] *See also* Mary A. Dannelley, *Ethically Speaking: Attorney Disclosure Upon Withdrawal*, Orange County Lawyer, November 2015, at 47.) This may even preclude an attorney from disclosing a client's failure to pay agreed-upon fees as the reason for withdrawal, as such information may be a client "secret," the disclosure of which would be embarrassing or detrimental to the client. (See Bus. & Prof. Code § 6068, subd. (e); *Dixon v. State Bar* (1982) 32 Cal.3d 728, 735 [attorney subject to

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2023

discipline for disclosing confidential client information likely to cause client public embarrassment]; Oregon State Bar Form. Opn. 2011-185 [attorney may not disclose in withdrawal motion that client is not paying attorney's bills].) However, a court may not deny withdrawal where counsel maintains that he must step down because of a disabling conflict that involves privileged communications. (*Aceves*, 51 Cal.App.4th at 584.)

In the leading case of *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, the court of appeal reversed (on a writ of mandate) the trial court's denial of a motion to withdraw filed by a public defender. In that case, the public defender advised the trial court on the morning of the scheduled trial that he had an actual conflict with his client, declaring that "the conflict caused a 'complete, utter and absolute' breakdown in the attorney-client relationship and precluded him from continuing the representation." (*Id*. at p. 588.) The public defender also told the trial court that "he could not reveal the nature of the conflict without divulging client confidences or breaching ethical duties." (*Ibid*.)

The trial court denied the motion after the public defender refused to reveal privileged communications to further explain the conflict. The court of appeal then denied the public defender's first writ of mandate "without prejudice to file a renewed application to be relieved as counsel founded upon a showing of the nature of the conflict, which showing may be made in camera." (*Ibid*. (citation omitted).) The public defender subsequently renewed his motion, but still refused to reveal privileged or confidential information. The court again denied the motion. Following the denial of its second motion, the public defender's office filed a second writ, which the court of appeal this time granted. The court ultimately held, "Whereas here the duty not to reveal confidences prevented counsel from further disclosure and the court accepted the good faith of counsel's representations, the court should find the conflict sufficiently established and permit withdrawal." That is, *Aceves* holds that the Court will take counsel's word for it that a conflict exists and may not probe further.

"And your reason for withdrawal?"

But any motion to withdraw still has to have a reason. So, given all the limitations, what *can* you say to support your motion? I recommend a very general statement such as:

> *In accordance with the Ethics Rules (California Rules of Professional Conduct) my withdrawal is mandatory but I have been unable to obtain a signed Substitution of Attorney.*

Because the statement is so general you may also want to describe what steps you took to determine what you could and could not say in providing the "reason" for your motion so your statement does not appear evasive or incomplete. You may wish to add a statement clarifying what steps you took before you drafted your stated "reason" for the motion:

> *I confirmed the application of the Rules independently and with the State Bar Ethics hotline.*

The ethical considerations are so important when you are drafting your supporting declaration for the withdrawal motion. Frankly, there is very little that a lawyer can divulge in support of a motion to withdraw. Even, for example, to tell the judge in chambers that your client is unresponsive would be to disclose confidential information about the client and cast an unfavorable light on your client in the Court's eyes. A judge or opposing counsel may try to elicit information about your client which you should not share (and are ethically prohibited), such as whether he or she has been paying the bill, whether they have moved away, whether they have essentially disappeared, and the like. The Court may ask in general terms for a description of the conflict. (*Manfredi & Levine v. Superior Court* (1998) 66 Cal.4th 1128, 1133-1136.)

The service rules

Once you have prepared your declaration and are ready to file and serve your motion, be sure to follow the service rules of California Rules of Court, rule 3.1362(d) which provides:

> ***(d) Service***
>
> *The notice of motion and motion, the declaration, and the proposed order must be served on the client and on all other parties who have appeared in the case. The notice may be by personal service, electronic service, or mail.*
>
> *(1) If the notice is served on the client by mail under Code of Civil Procedure section 1013, it must be accompanied by a declaration stating facts showing that either:*
> *(A) The service address is the current residence or business address of the client; or*
> *(B) The service address is the last known residence or business address of the client and the attorney has been unable to locate a more current address after making reasonable efforts to do so within 30 days before the filing of the motion to be relieved.*
>
> *(2) If the notice is served on the client by electronic service under Code of Civil Procedure section 1010.6 and rule 2.251, it must be accompanied by a declaration stating that the electronic service address is the client's current electronic service address.*
>
> *As used in this rule, "current" means that the address was confirmed within 30 days before the filing of the motion to be relieved. Merely demonstrating that the notice was sent to the client's last known address and was not returned or no electronic delivery failure message was received is not, by itself, sufficient to demonstrate that the address is current. If the service is by mail, Code of Civil Procedure section 1011(b) applies.*

The questions regarding mail service are included in the Judicial Council Declaration form (MC-052). Be sure you have answered all questions regarding service very accurately as the efforts made at notice to the client are critical to your motion being granted. I mail the notice, motion, declaration and proposed order

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2023

to any and all mailing addresses I have for a client and also email to any email addresses I have for the client.

After your motion to withdraw has been granted, you will need to serve the order on your client. The Order will include all upcoming hearings in the case. Under California Rules of Court, rule 3.1362(e) the Court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the Court. If that is the case, serve the Order and file your Proof of Service as quickly as you can because you are not relieved as counsel until those steps are taken. In other words, until you have served the order on your client and filed the POS, you remain the attorney of record, having the same duties to act competently to protect the client from prejudice. (Cal. State Bar Form. Opn. 1994-134.)

Obligations following withdrawal

The primary obligation for an attorney following withdrawal is to take all reasonable steps to avoid any prejudice to the client in the litigation. Thus, at a minimum, the attorney must advise the client of such things as any upcoming dates and deadlines in the client's matter. I recommend a very detailed letter with the precise dates, time and department for all upcoming hearings, discovery deadlines, and any pleadings deadlines in the case. If you have outstanding subpoenas, you should advise your former client of how she may obtain the records once produced by giving her the name of the deposition officer and the third parties to whom any subpoenas were issued. *Until the Substitution of Attorney form has been filed or until the court order granting withdrawal is effective, the attorney remains obligated to act competently to protect the client's interests.*

A former attorney does not need to provide additional services to the client once successor counsel has been employed and the attorney has released the client's files. You do have a duty to release the client's files. (Rule 1.16(e)(1).) This rule requires that all client materials and property be released and defines "client materials and property" as "correspondence, pleadings, deposition transcripts, expert's reports, and other writings, exhibits, and physical evidence, whether intangible, electronic, or other form, and other items reasonably necessary to the client's representation whether the client has paid for them or not."

The law is not clear on whether or not certain work product of the attorney is within the documents that need to be turned over to a client following termination. Surely work product that has previously been communicated to the client should be turned over to the client, but whether you need to turn over work product in progress (i.e., not previously communicated to the client) remains an open question. You may charge the client for copying everything (if he or she wants a hard copy) if your fee agreement so provides.

Unreasonable delay in releasing or refusal to turn over the client's file is grounds for discipline. Additionally, where failure to return the client's file results in damages to the client, the attorney may incur civil liability for malpractice. The bottom line is that the attorney cannot hold the files to extort a disputed fee or to create a lien that is contrary to public policy. (*Academy of Calif. Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999, 1006.)

Once notified of termination, the attorney must promptly return to the client any part of any fee paid in advance that has not been earned. (Rule 1.16(e)(2).

Conclusion

Withdrawal from any case is fraught with ethical considerations as to when you may withdraw, what reasons you may provide the Court for your withdrawal, your responsibility to avoid prejudice to the client, and your responsibilities following termination. If you believe you need to withdraw from a case and have questions about the particular ethical issues involved, I recommend you call the State Bar hotline. I also recommend you document each and every step you took to try to work things out with your client or to solicit a consensual substitution from them if you believe you really have to withdraw.

Ingrid M. Evans is the founder of Evans Law Firm, Inc. *in San Francisco www.evanslaw.com. You can reach Ms. Evans at ingrid@evansla.com, and follow the firm on Facebook (Evans law Firm, Inc. | Facebook), Twitter (@theevanslawfirm), LinkedIn (Evans Law Firm, Inc.: Overview | LinkedIn), Instagram (evanslawfirm) and Pinterest. Ms. Evans is licensed to practice in New York, Washington, D.C., and California; and has been admitted in all four United States District Courts in California and numerous U.S. District Courts throughout the country. Board Certified Civil Trial Advocate and Civil Practice Advocate by the National Board of Trial Advocacy. Selected as a finalist for the 2009, 2012 and 2015 California Consumer Attorney of the Year Award, and named as one of the 2009 Rising Stars by Northern California Super Lawyers® and 2010-2018 Northern California Super Lawyers® and Top Women Attorneys of Northern California 2012 Super Lawyers®, Top 50 Women Attorneys of Northern California 2018 Super Lawyers®, Top 100 Attorneys of Northern California 2018 Super Lawyers®, Women Leaders in the Law by the Recorder, Global Awards 2016 (Elder Law), 2019 Lawdragon 500 Leading Plaintiff Consumer Lawyer, 2014, 2015, 2016, 2017, 2018, 2019, 2019/2020 San Francisco Magazine Top Women Lawyers, 2020 Best Lawyers in America; 2020, 2021 U.S. News Best Law Firms; 2020, 2021 Lawdragon 500 Leading Plaintiff Consumer Lawyers; 2021 Best Lawyers in America.*

Endnotes

[1] *Fracasse v. Brent,* 6 Cal.3d 784, 790 (1972) ("a client should have both the power and the right at any time to discharge his attorney with or without cause"). A client's discharge of an attorney cannot constitute breach of contract under California law because "it is a basic term of the contract, implied by law into it by reason of the special relationship of the contracting parties, that the client may terminate that