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Terminating the attorney-client relationship

WHEN AND HOW TO TERMINATE THE RELATIONSHIP WITH YOUR CLIENT WITHOUT BREAKING ANY RULES AND WHILE PRESERVING YOUR RIGHTS TO FEES YOU HAVE EARNED

This article addresses the manner in which the attorney-client relationship can be terminated, either by the lawyer, the client, or by operation of law.

Establishing that the attorney-client relationship never existed

Talking with a client over the phone, informally at a party, or through email, text, or other social media, could potentially give rise to the existence of an attorney-client relationship. An attorney-client relationship can arise by inference from the conduct of the parties, even without a fee payment or a formal agreement. (*Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126.) There are multiple factors that go into establishing whether an attorney-client relationship existed. With this in mind, it is important to develop a custom and practice of rejecting a case. Although there is no formal approved method to be followed in every situation, here is the procedure practiced by our office:

Telephone or other informal contact

When rejecting a case, it is important to remind the client of the statute of limitations that seems most applicable to the case with giving the client the proviso that there may be a shorter statute of limitations and thus it is important to contact another attorney.

Written contact, including email

Whenever there is any written contact with a client, our practice is to send a rejection letter. Sometimes the statute of limitations is relatively obvious (for instance, a car accident) and sometimes it is not.

In-person meeting

With an in-person meeting, it is also imperative to send out a rejection email or letter.

The bottom line: the best way to not get into a situation where you have to terminate the attorney-client relationship is to make it clear that one never existed from the start.

Termination by client

The client has an absolute right to terminate the lawyer at any time.

See Glickman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2019 Issue

(*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790.) Generally, when a client discharges a lawyer, the lawyer is entitled to be paid for the lawyer's services.

An attorney may have a damage claim against a third party who induces the attorney's client to terminate the attorney-client relationship. (See *Abrams & Fox, Inc. v. Briney* (1974) 39 Cal.App.3d 604, 608; *Herron v. State Farm Mut. Ins. Co.* (1961) 56 Cal.2d 202, 206.)

Withdrawal by lawyer

An attorney may not withdraw from representation until the attorney has 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." (California Rules of Professional Conduct, ("Rule") 1.16(d).)

An attorney does not have an absolute right to withdraw; even where grounds for termination exist, the attorney must still comply with the procedures set forth in the Rules of Professional Conduct; the attorney is subject to discipline for failure to do so.

Fee agreements requiring a client to pre-sign a Substitution of Attorney form in pro per, which the attorney can file whenever he or she chooses, are improper. However, it is not improper for the fee agreement to provide that the lawyer, upon notice to the client, may withdraw as counsel at any time as long as the attorney does not abandon the client or withdraw at a critical point. (*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 915.)

An attorney must maintain and preserve client confidences even when seeking to be relieved as counsel. (Cal. Rules of Court (CRC), rule 3.1362(c).)

Withdrawal is mandatory under the following conditions:

(1) When litigation is for an improper purpose, or without probable cause;

(2) When representation will result in a violation of the Rules of Professional Conduct;

(3) When the lawyer's mental or physical conditions render it unreasonably difficult to carry out the representation effectively; or

(4) Where the client discharges the lawyer. (Rule 1.16(a).)

There are a number of grounds for permissive withdrawal including the following:

(1) The client insists on presenting an unwarranted claim or defense;

(2) The client seeks to pursue criminal or fraudulent course of conduct;

(3) The client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;

(4) The client, by other conduct, renders it unreasonably difficult for the lawyer to carry out the representation effectively;

(5) The client breaches a material term of an agreement and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the client fulfills the agreement;

(6) The client knowingly and freely assents to the termination of the representation;

(7) The inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(8) The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(9) A continuation of the representation is likely to result in a violation of the State Bar rules;

(10) The lawyer believes in good faith that the court will find the existence of other good cause for withdrawal.

The most common ground is probably the personality clash, where there is the breakdown in the attorney-client relationship. This ground is good cause for allowing the attorney to withdraw. (*Estate of Falco v. Decker* (1987) 188 Cal.App.3d 1004, 1014.)

Inability to locate the client is also good cause for withdrawal. (See *Bodisco v. State Bar* (1962) 58 Cal.2d 495, 497.)

The permissive withdrawal may affect the attorney's quantum meruit fee recovery in a contingency-fee case. Thus, while a personality clash with a client may provide good cause for withdrawal, it is not necessarily "justifiable cause" warranting the withdrawing attorney's recovery of attorney's fees. An attorney who withdraws without justifiable cause forfeits the attorney's right for quantum meruit recovery for services rendered prior to the withdrawal. (*Estate of Falco*, *supra,* 188 Cal.3d at p. 1014.)

Procedure for withdrawal

Whether the withdrawal is mandatory or permissive, the attorney must still obtain court approval for withdrawal. Most importantly, before withdrawing, the attorney must take reasonable steps to avoid foreseeable prejudice to the client's rights, including giving the client due notice, allowing for employment of other counsel, returning the client's files and papers, and complying with applicable laws and rules.

If there is no litigation pending, the basis requirement still remains that the lawyer may only withdraw after the lawyer has avoided foreseeable prejudice to the client.

Where litigation is pending, the request for withdrawal can only be accomplished by substitution with the client's consent, or by a motion to be relieved.

Substitution of counsel with the client's consent can be made at any time, even on the eve of trial; court permission is not required. (Code Civ. Proc., § 284(1); *Hock v. Superior Court* (1990) 221 Cal.App.3d 670, 674.)

The substitution by court order requires a motion to be relieved. The form is governed by CRC Rule 3.1362. In bringing the motion, the duty of confidentiality applies and cannot be revealed in the motion. (CRC, Rule 3.1362(c).) The Court, however, may require a demonstration of a good faith basis for the motion. This may require that counsel describe, in general terms, the nature of the conflict. (*Manfredi & Levine v. Superior Court* (1998) 66 Cal.4th 1128, 1133-1136.) The court may require

See Glickman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2019 Issue

an in-camera hearing to provide the court with further details.

The motion requires mandatory forms approved by Judicial Council that include the following forms: MC-051, MC052, and MC053.

The court will carefully scrutinize the supporting declaration to establish the service address for the client. Thus, be sure to take appropriate steps to prove the mailing address is the current address.

If there is no current address, a reasonable effort must be made to locate the client, including providing a declaration detailing the efforts that are made. If, despite diligent efforts, the client cannot be located, then the client may be served in compliance with Code of Civil Procedure § 1011(b) which authorizes delivery of the moving papers to the clerk on behalf of the client. If that basis for service is being made, the envelope should be addressed as follows:

> [CLIENT'S NAME]
> c/o Clerk of the Superior Court
>
> [INSERT COURT ADDRESS]

The back of the envelope should bear the following information:

> Service is being made under Code of Civil Procedure § 1011(b) on a party whose residence is unknown. [INSERT NAME OF CLIENT]
>
> [INSERT CASE NAME AND CASE NUMBER]

Once the motion to be relieved is granted, the order is not effective until it has been served on the client and a Proof of Service of the signed order has been filed.

Special rules for withdrawal upon completion of "limited scope representation"

In both general civil cases and in family law cases, the judicial council rules permit an attorney to limit the scope of representation to an appearance in a specified matter. (For instance, a hearing on a specific motion.) There is a Judicial Council form to be relieved upon completion of the limited scope representation (MC-955) as well as a form for an objection and also the Order (MC-956 and MC958).

The timing of the withdrawal of the attorney may impact the statute of limitations for legal-malpractice cases. The statute of limitations is tolled if the cause of action accrues while the attorney is representing the client until the representation is terminated. This is not necessarily the date that the order is entered granting the attorney's withdrawal. Rather, it is the date when the client has or reasonably should have no expectation the attorney will provide further legal services. (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1247-1248.)

If an attorney improperly withdraws, then the attorney is subject to discipline for failure to comply with the Rules of Professional Conduct, or any other law. An attorney may also be liable for malpractice if the withdrawal is made under the circumstances that breach the attorney's duty of care. For instance, withdrawing just before the statute of limitations runs, without opportunity to engage replacement counsel. Thus, if you intend to withdraw shortly before the statute of limitations is going to run, you should offer to prepare a pro per complaint for the client to avoid the statute of limitations running.

Termination by operation of law

The attorney's representation obviously terminates by death or incapacity of the attorney. However, even though one lawyer at the firm has handled all of the legal work, the client contract is really for services of all members of the firm. Thus, the firm is obligated to continue the representation unless and until the client discharges the firm, or the firm properly withdraws. (*Little v. Caldwell* (1894) 101 Cal.5th 53, 559-560.)

If you are the opposing party and know that the attorney has died or is suspended, then as an opposing party, you may, by written notice, require the client to engage new counsel or appear in pro per before any further proceedings. (Code Civ. Proc., § 286.) If you fail to give notice as an opposing party, no proceedings may be had against a lawyerless client. (*Aldrich v. San Fernando Valley Lumber* (1985) 170 Cal.App.3d 725, 742.)

Termination by completion of engagement

The attorney-client relationship comes to a natural conclusion when the attorney has completed the services for which the attorney was employed. In litigation cases, this is ordinarily the entry of judgment. (*Maxwell v. Cooltech, Inc.* (1997) 57 Cal.App.4th 629, 632.) However, the attorney's post-judgment work on the case establishes continuous representation for purposes of tolling attorney malpractice statute of limitations.

In our retainer agreement, we have the following clause relating to the scope of our work:

> ... before the LAW CORPORATION takes any action on any Appeal, both the CLIENT and the LAW CORPORATION must agree to proceed with the Appeal.

At the conclusion of a case, it is prudent practice to send a termination letter to the client.

The Rules of Professional Conduct do not specify how long an attorney should keep a client's files. However, there is a five-year retention rule for client accounting records. (Rule 1.15(c)(2).) There is an open question as to whether this five-year rule applies to all client files; the Los Angeles Bar Association Formal Opinion 475 recommends the five-year retention period "by analogy" to the Rules of Professional Conduct.

Most files can be destroyed but, generally, a client should be notified. Alternatively, the client can be notified that unless the client requests the return of the file, the file will be maintained for a certain time and/or then destroyed. With the advent of scanning files, it is easy to provide the client, at his or her request, with a complete copy of the file on a disc. We provide that opportunity to the client in our closing letter.

See Glickman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2019 Issue

Law firm break-ups

If the law firm breaks up, and if the lawyer is no longer able to represent the client due to the break-up, the departing lawyer must comply with the withdrawal provisions discussed above. Partners leaving a law firm are permitted to solicit any person with whom they have a prior professional relationship. However, lawyers leaving the firm may not send announcements to firm clients with whom they have no personal relationships. A departing firm lawyer who wrongfully persuades the firm's clients to leave the firm and switch to the departing lawyer's new firm is exposed to potential tort liability for intentional interference with contractual relations and interference with prospective economic advantage. (*Reeves v. Hanlon* (2004) 33 Cal.App.4th 1140, 1154-1155.) Additionally, a departing firm lawyer who takes firm clients may also be liable for negligent interference with prospective economic advantage. (*Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 9.)

Attorney's obligations upon termination of representation

The prime duty is to avoid prejudice to the client. Thus, at a minimum, the attorney should advise the client of such things as any upcoming dates and deadlines in the client's matter. 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.

The discharged attorney, absent special circumstances, 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. Upon termination for any reason, the attorney has 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."

An unresolved question is whether or not work product of the attorney is within the documents that need to be turned over. Work product that has previously been communicated to the client needs to be turned over, but work product not previously communicated to the client is an open question.

When turning over the files, the attorney has an obligation to release the items, not to create them or change the application. (California State Bar Formal Opinion 2007-174.) The lawyer may charge the client for copying the file if the fee agreement so provides. However, the lawyer cannot condition delivery of the client's file on the client's payment of copying expenses.

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).)

Enforcing and litigating the attorney fee lien

Separate action required

Where an attorney with a contractual lien on the client's recovery is discharged or withdraws prematurely from the action, the attorney must file an independent action against the former client to establish the existence of the lien, to determine the amount of the lien, and to enforce it. (*Carroll v. Interstate Brands Corp*. (2002) 99 Cal.App.4th 1168, 1173; *Valenta v. Regents of Univ. of Calif*. (1991) 231 Cal.App.3d 1465, 1467.)

This is true even where the fees are from settlement proceeds held by the successor attorney – a separate action still must be field for declaratory relief against the client to determine the amount of the lien. *(Mojtahedi v. Vargas* (2014) 228 Cal.App.4th 974, 977-979 [without first establishing lien rights in independent action, lawyer had no basis to claim successor attorney fraudulently withheld fees].)

A separate action is also required when competing liens exist, even where the client does not dispute the attorney's lien. (*Brown v. Sup.Ct.* (2004) 116 Cal.App.4th 320, 329.*)*

Filing notice of lien in the underlying action

Although an independent action may be necessary to enforce the lien, attorneys can prevent the former client from "settling around" their lien by filing a notice of lien in the pending action. (*Valenta,* 231 Cal.App.3d at pp. 1469-1470; see also *Carroll,* 99 Cal.App.4th at p. 1176.)

Here is the simple notice of lien language, to be sent to the insurance company pre-litigation or filed with the court in the pending action:

> NOTICE IS HEREBY GIVEN that the [name of law firm], hereby asserts a lien on any recovery of plaintiff [name of plaintiff] in this matter for costs and attorneys' fees. Any settlement draft in this matter must include the [name of law firm] as a payee.

Dealing with funds subject to a disputed attorneys' lien

(1) Attorney's possession of settlement funds subject to disputed attorney's lien: Where an attorney has possession of settlement proceeds subject to a disputed attorney's lien, the proceeds must be placed in a client trust account until the dispute is resolved. (Rule 4-100(A)(2).) By contrast, the attorney may not withhold the undisputed portion of the client's funds because of a fee dispute. The undisputed amount must be paid promptly to the client upon demand. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 240-241.)

(2) Settlement draft jointly payable to attorney and client trap: Settlement drafts are often made jointly payable to the client and the client's present and former attorneys. Where the former

See Glickman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2019 Issue

attorney has a lien on the settlement proceeds, endorsing the draft will result in waiver of the former attorney's lien rights. (*Matter of Feldsott* (Rev.Dept. 1997) 3 Cal. State Bar Ct.Rptr. 754, 758; Cal. State Bar Form.Opn. 2009-177.) Under such circumstances, refusing to endorse a settlement draft does not violate Rule 4-100(B)(4). (*Matter of Feldsott*, *supra*, 3 Cal. State Bar Ct.Rptr. at 758; Cal. State Bar Form.Opn. 2009-177.) However, refusing to endorse the draft without proper justification (i.e., without a valid lien) can result in discipline. (See *Matter of Kaplan* (Rev.Dept. 1993) 2 Cal. State Bar Ct.Rptr. 509, 521-522 [attorney disciplined for unreasonable refusal to endorse settlement draft (no lien asserted)].)

(3) Prompt action to resolve a lien must be taken: The current attorney faced with a former attorney with valid lien rights in settlement proceeds must (i) take prompt and reasonable action to resolve a dispute with his or her former client over the amount to which the attorney is entitled; (ii) promptly disburse any undisputed amount to which the client is entitled through a method upon which the attorney and client agree; and (iii) consult governing legal authorities and make a reasonable determination of the amount to which the lawyer is entitled under the circumstances. If the former client and lawyer cannot agree, the lawyer has an affirmative obligation to promptly seek resolution of the dispute through arbitration or judicial determination, as appropriate. (Cal. State Bar Form.Opn. 2009-177.)

Litigating the lien fee amount

A discharged attorney in a contingent fee case is entitled to quantum meruit fees based upon a pro rata share of the contract price.

In *Fracasse*, the Supreme Court held that an attorney discharged with or without cause may recover fees in quantum meruit for the reasonable value of services rendered up to the time of the discharge. *Fracasse* did not hold that quantum meruit fees must be calculated according to an hourly rate. Rather, it referred to *Los Angeles v. Los Angeles-Inyo Farms Co*. (1933) 134 Cal.App. 268, 276, for a list of factors which "should be taken into consideration in determining a reasonable fee."

Those factors are: "The nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure of the attorney's efforts, the attorney's skill and learning, including his age and experience in the particular type of work demanded."

Fracasse also stated that "To the extent that such discharge occurs 'on the courthouse steps,' where the client executes a settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services." (*Id*., 6 Cal.3d at 791.)

Cazares v. Saenz (1989) 208 Cal.App.3d 279, considered the methodology for calculating a discharged law firm's right to its share of a contingent fee. The *Cazares* court held that the quantum meruit recovery for the reasonable value of attorney services under a partially performed contingent fee contract is not determined by the prevailing hourly rate for attorneys but is the attorney's pro rata share of the contract price. (*Id*., at p. 288.)

Cazares held, "[T]he proper application of the *Fracasse* rule is to use an appropriate pro rata formula which distributes the contingent fee among all discharged and existing attorneys in proportion to the time spent on the case by each. Such a formula insures that each attorney is compensated in accordance with work performed, as contemplated by *Fracasse*..."

Mardirossian & Associates, Inc. v. Ersoff (2007) 153 Cal.App.4th 257, 272 held that: "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services."

Not that *Mardirossian* did not address the issue of how to determine quantum meruit fees owed to a discharged attorney under a contingent-fee agreement. In *Mardirossian*, the parties agreed to a 50 percent contingent fee, but also agreed that *if the attorney was discharged prior to any settlement offer, the attorney would be paid a specified hourly rate*.

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