Good Bye and Good Luck!
Ethical Issues on Terminating Representation

San Diego County Law Library
Presented by: David Cameron Carr

1. California Rule of Professional Conduct 3-700
    a. Primary source of law regarding attorney's responsibilities upon termination representation of a client.
    b. Termination of employment raises many ethical issues.
    c. Violation of Rule 3-700 can lead to substantial discipline
2. Rule 3-700 Termination of Employment
3. (A) In General.
4. (1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.
    a. Civil code § 284 Substitution–Consent or Order
    The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:
    1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes.
    2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.
    b. Cal. Rule of Court 3.1362: Withdrawal Procedure in Litigation Matters
        i. Noticed Motion Required
        ii. Supporting Declaration Required
        iii. Judicial Council forms mandatory (MC 0-51)
    c. Scope of disclosure allowed in motion to withdraw
        i. Bus. & Code section 6068(e)
        To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
        ii. Cal. State Bar formal opinion no. 2015-192
            1. ISSUE: What information may an attorney ethically disclose to the court to explain her need to withdraw from a representation – particularly in the face of an order to submit to the court, in camera or otherwise, the substance of the attorney-client communications leading to the need to withdraw?
            2. DIGEST: An attorney may disclose to the court only as much as is reasonably necessary to demonstrate her need to withdraw, and ordinarily it will be sufficient to say only words to the effect that ethical considerations require withdrawal or that there has been an reconcilable breakdown in the attorney-client relationship. In

attempting to demonstrate to the court her need to withdraw, an attorney may not disclose confidential communications with the client, either in open court or in camera. To the extent the court orders an attorney to disclose confidential information, the attorney faces a dilemma in that she may not be able to comply with both the duty to maintain client confidences and the duty to obey court orders. Once an attorney has exhausted reasonable avenues of appeal or other further review of such an order, the attorney must evaluate for herself the relevant legal authorities and the particular circumstances, including the potential prejudice to the client, and reach her own conclusion on how to proceed.

3. What if the Court orders you to reveal confidences? "Committee cannot categorically opine on whether or not it is acceptable to disclose client confidences even when faced with an order compelling disclosure, this Committee does opine that, whatever choice the attorney makes, she must take reasonable steps to minimize the impact of that choice on the client."
4. In Camera Review?
    a. Mandredi & Levine vs. Superior Court – yes (?)
    b. 2015-192—no!

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

d. Applies whether is attorney is fired or withdraws voluntarily.
e. Duty to sign substitution of counsel – must be done promptly (Kallen v. Delug (1984) 157 Cal.App. 3d 940
f. Cal. State Bar Form.Opn. 2014-190—applies when attorney withdraws upon dissolution of law firm
    i. ISSUES: Upon the dissolution of a law firm, what duties does an attorney affiliated with the firm owe to a client on whose behalf he or she provided legal services if the attorney no longer will be representing the client following the dissolution? How does the fulfillment of those duties differ if the attorney had no connection with or knowledge of the client prior to dissolution of the firm? Do the steps an attorney may be required to take depend on the nature of the attorney's position with the firm?
    ii. DIGEST: Rule 3-700(A)(2) of the California Rules of Professional Conduct, provides that a member may not withdraw from the

representation of a client until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. The requirements of rule 3-700(A)(2) apply when an attorney's withdrawal is prompted by the dissolution of the attorney's law firm. In the event of dissolution, all attorneys who are employed by or partners of a firm are required to comply with rule 3-700(A)(2) as to all clients of the firm, regardless of their connection to any specific client or the specific nature of their affiliation with the firm. What "reasonable steps" an attorney must take to protect a particular client's rights may vary considerably, however, depending on the circumstances, including the attorney's relationship to the client and its matter and the attorney's position within the firm.

5. (B) Mandatory Withdrawal.
    a. A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:
    b. (1) The member knows or should know that the 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;
        i. Rule Prof. Conduct 3-200 Prohibited Objectives of Employment
        A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:
            1. (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
            2. (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.
        ii. Parallel with standard on malicious prosecution tort – Zamos v. Stroud
    c. (2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or
    d. (3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.
6. (C) Permissive Withdrawal.
    a. If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

b. (1) The client
    i. (a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law,
    ii. (b) seeks to pursue an illegal course of conduct,
    iii. (c) insists that the member pursue a course of conduct that is illegal that is prohibited under these rules or the State Bar Act,
    iv. (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, (e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act,
    v. (f) breaches an agreement or obligation to the member as to expenses or fees.
c. Information substantiating these grounds often confidential.
d. (2) The continued employment is likely to result in a violation of these rules or of the State Bar Act;
e. (3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal
f. (4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively;
g. (5) The client knowingly and freely assents to termination of the employment; or
    i. Civil code § 284
    ii. Can you require client to sign substitution of attorney at start of employment?
h. (6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

7. (D) Papers, Property, and Fees.
8. A member whose employment has terminated shall:
9. (1) Subject to any protective order or nondisclosure agreement, promptly release to the client, at the request of the client, all the client papers and property.
    a. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not
        1. Disciplinary counsel believe this means the "original" file
        2. Does it include work product ? Modern trend is to say "yes"
        3. Cal. State Bar Form.Opn. 1994-134

a. ISSUES:1. What are an attorney's ethical obligations to prevent prejudice to the client after the attorney's employment in a litigation matter has been terminated, but before a substitution of counsel form has been filed? 2. Is it ethically permissible for an attorney whose employment has been terminated to withhold the file from the client or successor attorney until the client and the successor attorney have signed and filed or permitted the filing of a valid substitution of attorneys or the attorney has otherwise been permitted to withdraw by the tribunal before whom the matter is pending?

b. DIGEST: (1) An attorney remains the attorney of record until the substitution of counsel form is filed or the tribunal before whom the matter is pending has otherwise permitted counsel to withdraw, and therefore, has the same duties to act competently to protect the client from prejudice as the attorney did before discharge.2. When a matter is pending before a tribunal, the attorney may retain possession and control of the file only to the extent necessary to represent the client competently and fulfill any outstanding obligations to the court arising out of that representation. The attorney may not, however, hold the file in order to obtain payment or other consideration from the client in exchange for the delivery of the file to the client. With very limited exceptions, the attorney must make the file available to the client or successor counsel and provide a copy thereof upon demand.

4. Cal. State Bar Form.Opn. 2007-174: includes electronic files
    a. ISSUE: Is an attorney ethically obligated, upon termination of employment, promptly to release to a client, at the client's request, (1) an electronic version of e-mail correspondence, (2) an electronic version of the pleadings, (3) an electronic version of discovery requests and responses, (4) an electronic deposition and exhibit database, and/or (5) an electronic version of transactional documents?
    b. DIGEST: An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items too come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains

items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.

10. (2) Promptly refund any part of a fee paid in advance that has not been earned.
    a. Rule 4-100)(a): No current duty to place unearned advanced fees in client trust account.
    b. Proposed Rule of Professional Conduct 1.15: new duty deposit advanced fees in trust
       (a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, *including advances for fees,* costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import….
    c. Proposed Rule of Professional Conduct 1.15: Treatment of Flat Fees
       (b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided: (1) The lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed, and (2) If the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.

11. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.
    a. True retainer paid for availability only, not for services.
    b. "Non-refundable" fee for services a red flat (Matter of Brockway (Rev.Dept. 2006) 4 Cal. State Bar Ct.Rptr. 944, 950-951).

Your Presenter

David Cameron Carr is senior counsel at Klinedinst PC in the Legal Ethics and Law Practice Management Group in San Diego, California.

Since 2001 he has specialized in representing attorneys in matters involving legal ethics and the law of lawyering, including discipline defense, bar admissions, attorney fee disputes, legal malpractice, attorney professional responsibility and ethics advice.

Mr. Carr graduated from Loyola Law School in 1986 and was admitted to the California Bar that year. After practicing in business litigation and commercial law, Mr. Carr spent 12 years as staff attorney, discipline prosecutor and manager at the State Bar of California, before returning to private practice.

He is an active member of the San Diego County Bar Association, where he serves on the Legal Ethics Committee. Mr. Carr is a member and served as president of the Association of Discipline Defense Counsel from 2008 through 2010. He is also a member of the Association of Professional Responsibility Lawyers and the ABA Center for Professional Responsibility. Mr. Carr is adjunct professor of law at Thomas Jefferson Law School where he teaches professional responsibility.

More information is available at www.ethics-lawyer.com.