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Do I have to? Determining whether withdrawal is mandatory

By SUZANNE BURKE SPENCER



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The lines between ethically mandated and permissive withdrawal from a client's representation are often unclear, making it difficult for attorneys to determine their ethical obligations and how to satisfy them. This article will explore where the lines are drawn, how they are applied, and what an attorney's duties are when withdrawing from representation.

The close lines between mandatory and permissive withdrawal

Rule 3-700 of the California Rules of Professional Conduct provides three grounds upon which an attorney must withdraw from representing a client, and several grounds upon which an attorney may, but is not required to, withdraw. Each of the three mandatory grounds for withdrawal under the rule has a similar corresponding permissive ground for withdrawal, often making it difficult to discern whether withdrawal is required or merely permissive.

Withdrawal is mandatory, for example, where the attorney "knows or should know the client is ... asserting a position in litigation ... without probable cause and for the purpose of harassing or maliciously injuring any person." Rule 3-700(B)(1) (emphasis added). However, an attorney may – but is not required to – withdraw if the client insists on presenting a claim that is not warranted under existing law or cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. Rule 3-700(C)(1)(a). Withdrawal for presenting a claim that lacks probable cause, then, is mandatory only if it is also brought for the purpose of harassment or malicious injury.

Rule 3-700(B)(2) mandates withdrawal when the attorney "knows or should know that continued employment will result in violation of [the Rules of Professional Conduct] or the State Bar Act." (Emphasis added). Where continued representation is only likely to result in a violation of the Rules or State Bar Act, however, withdrawal is permitted, but not mandatory. Rule 3-700(C)(2).

Finally, withdrawal is mandatory where the attorney's "mental or physical condition renders it unreasonably difficult to carry out the employment effectively." Rule 3-700(B)(3). If the attorney's condition renders it only "difficult" to carry out the representation, but not "unreasonably" so, withdrawal is permitted, but not mandatory. Rule 3-700(C)(4).

There is little authority specifying the differences between when, for example, continued representation "will result," as opposed to "is likely to result," in a violation of the rules or when incapacity renders it "unreasonably" difficult, as opposed to just "difficult," to continue representation. However, authorities describing various circumstances in which an attorney must – or may not – withdraw provide guidance to counsel in these situations.

Mandatory withdrawal for a lack of probable cause or legal merit

A decision to withdraw on the grounds that a client is asserting a position in litigation, without probable cause and for an improper purpose under Rule 3-700(B)(1), involves a balancing of the attorney's duties to protect her client's interests and the attorney's obligation to "respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." *Kirsch v. Duryea* (1978) 21 Cal.3d 303. This same balancing is required where an attorney seeks to withdraw under Rule 3-700(B)(2) because continued representation will violate the rules which prohibit attorneys from presenting any position not warranted under existing law or that is not "legal or just." Bus. & Prof. Code § 6068(c); Rule 3-200(B).

However, some cases have held that an attorney's conclusion that a client's case lacks merit does not necessarily give rise to grounds for mandatory



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June 2016

SAMPLE TEST QUESTIONS

BELOW ARE SAMPLE QUESTIONS FROM THIS MONTH'S MCLE SELF-ASSESSMENT TEST.

1. The Rules of Professional Conduct provide only mandatory, not permissive, grounds upon which an attorney must withdraw from representation.

True False

2. Withdrawal is mandatory where the attorney knows or should know the client is asserting a position in litigation without probable cause and for the purpose of harassing or maliciously injuring any person.

True False

3. Where continued representation will result in a violation of the Rules of Professional Conduct or State Bar Act, an attorney must withdraw from the representation.

withdrawal, in part because the attorney's conclusion could be wrong. In *Estate of Falco* (1987) 188 Cal.App.3d 1004, for example, the attorneys asserted they were required to withdraw because they determined the client's case was meritless. The clients later recovered on their claims. The court found that the attorneys' conclusion the claims were meritless was wrong and that withdrawal was therefore not ethically mandated. *Id.* at 1017-18.

Other cases indicate that when an attorney no longer believes in the merit of a client's claims because, for example, the attorney does not believe the client's version of the facts, withdrawal is mandated under Rule 3-700(B)(2); however, even in those circumstances, the attorney is obligated to protect the client's claims until promptly obtaining a substitution of attorney or formally withdrawing from the case. The attorney may not simply inform the client that he no longer wants to represent the client because he does not believe in her claim and then let the case languish. *Matter of Hickey* (1990) 50 Cal.3d 571.

Mandatory withdrawal where 'will violate' ethical obligations

An attorney's obligation to withdraw where the representation "will result" in a violation of the Rules applies to prospective violations only. Although not interpreted in any California reported cases to date, a leading treatise interprets the phrase "will result in" a violation of the rules as meaning it must be "reasonably clear" that the rules will be violated. Vapnek, et al., *California Practice Guide: Professional Responsibility*, 10:29 (The Rutter Group 2015).

A host of different circumstances – from inability to obtain necessary client consent to client perjury – may mandate withdrawal under the "will result" standard in Rule 3-700(B)(2).

In *Matter of Davis*, for example, an attorney who had a conflict under Rule 3-310 that was not cured by informed consent was required to withdraw. *Matter of Davis* (Rev. Dep't 2003) 4 Cal. State Bar Ct. Rptr. 576 ("[G]iven that there was an actual conflict, as opposed to a potential conflict, respondent was obliged to withdraw from his representation of the corporation if he was unsuccessful in obtaining the informed consent of the board.") Similarly, an attorney who is hired by an insurer to represent the insured would be required to withdraw should the attorney uncover information which would allow the insurer to deny coverage. [COPRAC Form Opn. 1995-139](#).

Withdrawal is also required if the client insists the attorney act unethically. For example, where an attorney makes a material change to a contract but inadvertently fails to reline the change, the attorney has an obligation to disclose the error to the opposing party. If the client insists that the attorney conceal the change, the attorney is required to withdraw from the representation. [COPRAC Form Opn. 2013-189](#); see also L.A. County Bar Ass'n Form. Opn. No. 520 (failure to disclose overpayment under a settlement agreement). Client instructions to conceal information that must be disclosed in an action will also typically obligate the attorney to withdraw under Rule 3-700(A)(2). See Bar Ass'n of San Francisco, [Opinion No. 1977-2](#) (instruction to conceal community assets).

However, courts have rejected attorneys' claims that a client's mere failure to cooperate mandates withdrawal under 3-700(B). See *Rus, Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal.App.4th 656.

Attorneys may also be required to withdraw when their client commits perjury, although the ability to withdraw without prejudicing the client in these circumstances must be considered carefully and alternatives to correct the perjury should be pursued before seeking to withdraw. [COPRAC Form Opn. 1983-74](#).

Where a client intends to commit perjury, but has not already done so, an attorney's duties will turn on a number of factors, including whether the lawyer actually knows, as opposed to merely suspects, that false testimony will be provided. Some authority supports the conclusion that actual knowledge of the client's intent to commit perjury is required before an attorney has any ethical duty to attempt to prevent or limit the use of potentially false testimony. See Orange County Bar Ass'n, [Form Opn. 2003-01](#) (collecting cases). In a criminal matter, even with actual knowledge that the defendant-client intends to commit perjury, the defendant's constitutional right to testify on his own behalf, *Rock v. Arkansas*, (1987) 483 U.S. 44, generally means the best balance between the attorney's competing ethical duties may not be to withdraw, but rather to permit the client to testify in the narrative. *People v. Bolton* (2008) 166 Cal.App.4th 343, 357.

Mandatory withdrawal on the basis of attorney incapacity

An attorney's mental or physical condition may require withdrawal if the lawyer finds the condition renders it unreasonably difficult to carry out the employment. Even under such circumstances, however, the attorney is required to take the formal steps necessary to withdraw from representation – either through substitution of attorney or motion to be relieved as counsel. Failure to do so may subject the attorney to discipline. See *Nehad v. Mukasey*, 535 F.3d 962, 970 (9th Cir. 2008) (attorney clearly violated the California Rules where the attorney informed the client that he had to withdraw from the representation because of a "personal issue" (spouse's illness) the day before a significant hearing and that the client had to settle that day or lose the benefit of attorney's services).

In *Slavkin v. State Bar* (1989) 49 Cal.3d 894, withdrawal was mandated because alcohol and drug abuse caused the attorney to miss deadlines and fail to attend to client matters. The attorney had taken no steps to seek to be substituted out or to be relieved as counsel. However, because the Supreme Court found it inconsistent to be charged both with violating the mandatory duty to withdraw for incapacity and with de facto withdrawal without taking the reasonable steps necessary to avoid prejudice to her clients, it upheld the attorney's conviction only on the latter charge. *Id.* at 903.

Circumstances under which attorneys may not withdraw

An attorney may generally not withdraw on permissive or mandatory grounds because a client refuses to settle, even if that refusal is against the advice of counsel. *Estate of Falco*, 188 Cal.App.3d at 1019; but see *Pearlmutter v. Alexander* (1979) 97 Cal.App.3d Supp. 16, 20 (withdrawal permitted where the client's refusal to consummate an agreed-upon settlement rendered it unreasonably difficult for the attorney to carry out his employment effectively). Nor may an attorney attempt to create by contract a right to withdraw for failure to settle by "structuring the representation agreement so as to allow the lawyer to withdraw, or to ratchet up the cost of representation, if the client refuses an offer of settlement." *Nehad*, 535 F.3d at 970-71.

Attorneys are also prohibited from withdrawing from representation on the basis of a client's race, national origin, sex, sexual orientation, religion, age or disability. [Rule 2-400\(B\)\(2\)](#).

True False

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Even when withdrawal is required, attorneys must protect client confidentiality and the client's best interests

Regardless of the grounds on which he or she does so, the withdrawing attorney must take the reasonable steps necessary to avoid foreseeable prejudice to the client. [Rule 3-700\(A\)\(2\)](#). This duty continues up to the time the attorney is either formally substituted out of the case or a motion to be relieved as counsel is granted. *Matter of Riley* (1994) 3 Cal. State Bar Ct. Rptr. 91, 115-16; COPRAC [Form. Opn. 1994-134](#).

The reasonable steps required by [3-700\(A\)\(2\)](#) include, but are not limited to, giving notice to the client and allowing time for employment of other counsel. [Rule 3-700\(A\)\(2\)](#).

An attorney who fails to withdraw when withdrawal is mandatory, or who stops performing services for any reason without formally withdrawing and avoiding foreseeable prejudice to a client, may be disciplined. See Bar Ass'n of San Francisco, [Opinion No. 1977-2](#) (where withdrawal is mandatory, failure to do so "is proper subject for disciplinary proceedings"); *Matter of Davis* (Rev. Dep't 2003) 4 Cal. State Bar Ct. Rptr. 576; *Matter of Miller* (Rev. Dep't 1990) 1 Cal. State Bar Ct. Rptr. 131, 135 (improper de facto withdrawal).

Where a motion to be relieved as counsel is necessary, an attorney may not disclose confidential information in support of the motion. [Rule 3-100](#); [Bus. & Prof. Code § 6068\(e\)](#). Even if the court orders the attorney to reveal privileged or confidential information to support the application to be relieved as counsel, the attorney is ethically obliged to resist such an order, at least at first, through lawful means, such as seeking appellate review. COPRAC [Form. Opn. 2015-192](#).

Conclusion

When determining whether withdrawal is mandatory under the rules, attorneys must carefully weigh the best interests of the client and sometimes make difficult choices. Where withdrawal is required, however, attorneys must take reasonable steps to avoid prejudice to the client and to preserve the client's claims, even if the attorney has concluded that the claims lack merit.

Suzanne Burke Spencer is the managing shareholder of Sall Spencer Callas & Krueger in Laguna Beach, where she focuses her practice on business litigation, legal malpractice and professional ethics. She is also the vice-chair of the State Bar of California's Committee on Professional Responsibility and Conduct. The views expressed in this column are her own.

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