CALIFORNIA BAR JOURNAL
OFFICIAL PUBLICATION OF THE STATE BAR OF CALIFORNIA April 2015

MCLE SELF-STUDY

Having trouble reading this page?

APRIL 2015 | *Earn one hour of MCLE Credit in Legal Ethics*

The price of withdrawal: Contingency fee attorneys may forfeit certain fees

By SUZANNE BURKE SPENCER


Spencer

The decision to withdraw from representing a client is never an easy one, but for contingency fee attorneys, the decision can mean forfeiting fees. This is true even if the attorney believes the grounds for withdrawal are mandatory under the Rules of Professional Conduct (see Rule 3-700). Even if withdrawal is permitted by the rules or by the court, it may not be justifiable for purposes of recovering a *quantum meruit* fee. Justifiable cause is determined independently of whether the withdrawal was ethically permitted. This article explores the interplay between grounds for withdrawal under the Rules of Professional Conduct and justifiable cause for withdrawal allowing fee recovery.

The ability to collect a fee depends on circumstances

The rule has long been established that a contingent fee attorney discharged by the client with or without cause may collect in *quantum meruit* for the reasonable value of the attorney's services prior to discharge. (*Fracasse v. Brent*, 6 Cal.3d 784, 792 (1972).)

The rules are more complex when an attorney voluntarily withdraws. The attorney is entitled to a *quantum meruit* fee only if she has "justifiable cause" for withdrawal. This rule was first adopted in *Hensel v. Cohen*, 155 Cal.App.3d 563 (1984). In *Hensel*, a personal injury attorney decided, after spending 25.8 hours on it, that the case was a "dead-blank loser" and informed the client to either find new counsel, represent herself or dismiss the case. When the client retained new counsel, the attorney asserted a lien against any eventual recovery.

The court found the lien invalid: An attorney cannot "determine that it is not worth his time to pursue the matter, instruct his client to look elsewhere for legal assistance, but hedge his bet by claiming a part of the recovery if a settlement is made or a judgment obtained through the efforts of a subsequent attorney." (*Id.* at 564.) The court rejected dicta in an earlier case, *Pearlmutter v. Alexander,* 97 Cal.App.3d Supp. 16, 20 (1979), that an attorney who voluntarily withdraws should be treated the same as one discharged by the client when determining whether the attorney may assert a lien for fees against subsequent recovery.

The *Estate of Falco* court likewise rejected *Pearlmutter* dicta, holding an attorney who voluntarily withdraws may recover in *quantum meruit* only when the attorney has justifiable cause for withdrawing. (*Estate of Falco ["Falco"]*, 188 Cal.App.3d 1004, 1014 (1987); *accord Rus, Miliband & Smith v. Conkle & Olesten*, 113 Cal.App.4th 656, 672 (2003); *Matter of Lazarus*, 1 Cal. State Bar Ct. Rptr. 387, 399-400 (Rev. Dep't 1991).)

No reported decisions apply the *Hensel-Rus* line of cases to hourly fee contracts.

Hensel and *Falco* do not stand for the proposition that an attorney may *only* withdraw for justifiable cause. Rather, an attorney may withdraw for any of the reasons stated in Rule 3-700, even if the reason does not constitute "justifiable cause." If the attorney withdraws for reasons other than "justifiable cause," however, the attorney cannot recover *quantum meruit* fees. (See *Ramirez v. Sturdevant*, 21 Cal.App.4th 904, 916 (1994).)

Court permission does not constitute justifiable cause

An order granting a motion to withdraw does not constitute a finding of justifiable cause for withdrawal. There are many reasons withdrawal may be permitted, including a general breakdown in the relationship between lawyer and client. The relatively permissive attitude that governs withdrawals, however, does not govern determinations of justifiable cause for withdrawal, to which "the law takes a more rigorous approach." (*Rus, Miliband & Smith*, 113 Cal.App.4th at 673.) "The law governing an attorney's right or duty to merely withdraw from a case ... is a 'different question' than an attorney's right to withdraw and then *later* recover." *Id.* (emphasis in original); (see also *Falco*, 188 Cal.App.3d at 1014.) The particular reasons for a breakdown in the attorney-client relationship are not necessarily relevant to whether an attorney may withdraw, but would

MCLE SELF-ASSESSMENT TEST

April 2015

SAMPLE TEST QUESTIONS

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

1. Contingency fee lawyers who are discharged by their clients are generally entitled to recover a fee based on the reasonable value of their services.

○ True ○ False

2. A contingency fee attorney who voluntarily withdraws from representing her client will always be entitled to recover in *quantum meruit* for the reasonable value of the attorney's services.

○ True ○ False

3. A court order granting a motion to withdraw from representing a client constitutes a finding of justifiable cause for withdrawal for purposes of collecting a fee.

○ True ○ False

To complete the test, you must pay a $25 fee online. Click the button below and follow the onscreen instructions.

impact whether the attorney had justifiable cause for withdrawal. (*Falco,* 188 Cal.App.3d at 1014-15.)

The "dead-blank loser" rule

The "dead-blank loser" rule, so called after the description the lawyer in *Hensel* gave the case in which he withdrew and later sought to recover a fee, provides that an attorney who withdraws because of a good faith belief the case lacks merit will not be entitled to any fee. The converse, however, is not true. An attorney who withdraws while still believing in the merits does not, *ipso facto*, have justifiable cause for withdrawal. Under such circumstances, justifiability of withdrawal depends on the particular facts. (*Rus, Miliband & Smith*, 113 Cal.App.4th at 672-73.)

The "dead-blank loser" rule has been described as a "bright line rule" (*Rus, Miliband & Smith*, 113 Cal.App.4th at 672), but this may be an overstatement of the rule's application. If a lack of merit mandates withdrawal under the Rules of Professional Conduct, *Falco* suggests the attorney may still recover a fee; even if, presumably, he believed in good faith the case was a dead-blank loser.

Certain facts must be proven

The grounds for mandatory withdrawal are set forth in Rule 3-700(B) of the Rules of Professional Conduct and include where the attorney knows or should know that "the client is bringing an action [or] ... asserting a position in litigation ... without probable cause and for the purpose of harassing or maliciously injuring any person," or "continued employment will result in violation of [the Rules] or of the State Bar Act" or the attorney's "mental or physical condition renders it unreasonably difficult to carry out the employment effectively." Under the State Bar Act, an attorney may maintain those actions, proceedings or defenses only that appear to the attorney to be "legal or just." (Bus. & Prof. Code § 6068(c).)

The court in *Falco* found that withdrawal from representation when ethically mandated is justified, entitling the withdrawing attorney to recover in *quantum meruit*. (*Falco*, 188 Cal.App.3d at 1016.) However, because of the difficulty in discerning whether the attorney was motivated by ethical rather than financial considerations, the *Falco* Court imposed on the attorney the burden of proving 1) the withdrawal was mandatory under applicable ethical rules; 2) the "overwhelming and primary motivation" for the withdrawal was adherence to these ethical mandates; 3)the action was commenced in good faith; 4) the client obtained recovery subsequent to withdrawal; and 5) the attorney's work "contributed in some measurable degree" to the ultimate recovery. (*Id.*)

The attorneys in *Falco* failed to meet this burden of proof. The court found the case was not meritless and the attorneys failed to establish that they were motivated to withdraw by their ethical duties. The court was careful to point out, though, that the fact of subsequent recovery alone did not rebut the attorney's claim that the case was meritless. However, the amount of, and facts giving rise to, the recovery are "valid considerations" for the court in determining whether the withdrawal was justified. (*Id.* at 1017 n. 15.)

Heightened scrutiny applies

Read in isolation, the factors stated in *Falco* may suggest that grounds for withdrawal must be mandatory for an attorney to earn a *quantum meruit* fee. Not so. First, the *Falco* court left open the door for finding even permissive grounds for withdrawal allow fee recovery: "We do not rule out the possibility of awarding fees to an attorney who withdraws under permissive withdrawal provisions." (*Falco*, 188 Cal.App.3d at 1016 n. 12.) It is in the court's discretion in such cases, "with heightened scrutiny consistent with the standards articulated here, to determine whether counsel's withdrawal was justified for the purpose of awarding fees." (*Id.*) Second, several cases have walked through the door left open by *Falco*, applying the justified cause analysis to cases in which attorneys withdrew on permissive, not mandatory, grounds.

The grounds for permissive withdrawal are set forth in Rule 3-700(C), which include: "1)The client ... (d) [engages in] conduct [that] renders it unreasonably difficult for the member to carry out the employment effectively, or ... 2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or ... (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." (Rule 3-700(C).)

Applying the justifiable cause analysis to permissive withdrawal cases has yielded varying, sometimes contradictory results. In one case, an attorney's withdrawal was held justifiable where the attorney claimed it unreasonably difficult to carry out the employment because the client failed to consummate an agreed-upon settlement. (*Pearlmutter v. Alexander,* 97 Cal.App.3d Supp. 16, 20 (1979).) Conversely, finding the client's right to reject settlement absolute, the *Falco* court held the exercise of that right could not give rise to justifiable cause for withdrawal. (*Falco*, 188 Cal.App.3d at 1017; see also *Vann v. Shilleh*, 54 Cal.App.3d 192, 197 (1975) (withdrawal by attorney on eve of trial because client refused to consummate settlement was unethical).) Although *Falco* is probably the better reasoned of the two opinions, the Supreme Court has not yet weighed in.

Whether a lack of client cooperation justifies withdrawal and allows fee recovery depends on the facts. In *Falco*, the attorney contended his clients failed to cooperate not only by rejecting a settlement offer, but also by refusing to appear for deposition unless the attorney paid transportation costs, refusing to authorize attorneys to incur jury and expert fees and insisting that the fee agreement required attorneys to advance all costs of litigation. The court held such alleged lack of cooperation did not justify withdrawal. (*Falco,* 188 Cal.App.3d at 1019-20.) Where, however, a client's lack of cooperation included "failing to communicate directly with his attorney and making unilateral court filings," the attorney was justified in withdrawing and could recover a fee. (*Doherty v. City of Alameda*, No. 09-4961-EDL, 2011 WL 2429364, at *3 (N.D. Cal. June 13, 2011).)

Personality clashes between attorney and client that lead to a breakdown in the attorney-client relationship generally do not constitute justifiable cause for withdrawal allowing *quantum meruit* fee recovery. (*Rus, Miliband & Smith*, 113 Cal.App.4th 678 (alleged lack of cooperation and breakdown in communications did not establish justifiable withdrawal where only fact attorneys pointed to was letter from client which attorneys found insulting); *Schroeder v. San Diego Unified School District*, No. 07cv1266-IEG (RBB), 2010 WL 1948235, at *6 (S.D. Cal. May 12, 2010) (personality clash between attorney and client is not justifiable reason for withdrawal).)

Whether an alleged breach of the client's contractual obligation to advance costs justifies withdrawal was an issue in *Duchrow v. Forrest*, 215 Cal.App.4th 1359 (2013), but the case was remanded without deciding it.

In some limited circumstances, where the attorney is incapable of representing the client, justifiable cause for withdrawal can exist and the attorney may still recover a fee. (*Hinshaw v. Vessel M/V Aurora*, No. C 05-3927 CW, 2007 WL 4287567, at *3 (N.D. Cal. Dec. 6, 2007).) However, an attorney's claim he was incapable of representing the client without local co-counsel could not justify withdrawal. (*Id.*)

The *Hensel* and *Falco* rules do not apply where the agreed-upon services were rendered before the alleged breakdown in the attorney-client relationship that led to an alleged withdrawal or abandonment. (*Joseph E. DiLoreto, Inc. v. O'Neill*, 1 Cal.App.4th 149, 158 (1991).)

Ethical obligations in a fee dispute following withdrawal

Whether an attorney's withdrawal was justified, giving rise to the right to assert a lien and collect a fee, cannot be determined unilaterally by the attorney. (*Matter of Lazarus*, 1 Cal. State Bar. Ct. Rptr. 387, 400 (Rev. Dep't 1991).) If a dispute arises over the justifiability of the attorney's withdrawal, the attorney must hold in trust the disputed portion of any client funds she receives until the attorney's entitlement to a fee is agreed upon by the client or decided by the court.

Conclusion

Even though ethical grounds for withdrawal may exist, an attorney voluntarily withdrawing in a contingency case may forfeit the right to a fee. If the withdrawal is justified, the attorney may recover in *quantum meruit* in the same manner an attorney may recover if discharged by the client. Whether withdrawal is justified is a fact-intensive inquiry that should be carefully analyzed before deciding to withdraw.

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, attorney fee and lien disputes and legal ethics. She is also a member of the State Bar of California's Standing Committee on Professional Responsibility and Conduct. The views expressed herein are her own.

If you're having trouble taking the test, read the FAQ.