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How to Safely Withdraw From a Case

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As with love, sometimes legal representation just doesn't turn out the way you thought it would. Unforeseen things happen along the way and there comes a time when you know in your heart that it is time to get out. Ah, but how to end the relationship?

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Rule of Professional Conduct 3-700 governs this area. The overarching concern is expressed in Rule 3-700, Rules of Profession Conduct: the withdrawal should not result in foreseeable prejudice to the interests of the client, if at all possible. Therefore, in determining if you can get out of a case, the predicate issue is

the absence of unreasonable prejudice to the client's rights. At a minimum, this requires giving notice to the client and an opportunity for the client to retain new counsel.

The easiest method to accomplish a withdrawal from representation is to request that the client and new counsel sign a substitution. In a civil case, when filing a substitution of attorney with client consent but without a court order (Judicial Council Form MC-050), it's a good idea to request a continuance of at least 30 days to give new counsel a chance to "get up to speed" if the case is active.

However, much to the dismay of lawyers, sometimes clients refuse. California Code of Civil Procedure Section 284 provides that counsel may be changed at any time before or after judgment or final determination by consent of both the client and the attorney or by order of the court upon application by the client or the attorney, and after notice from one to the other (Motion pursuant to 3.1362 of the California Rules of Court).

There are two types of withdrawal - mandatory and permissive. This article will address mandatory withdrawal.

**In determining if you can get out of a case,
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Mandatory withdrawal is required if the lawyer knows the client is up to "no good" or "asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person." Rule 3-700(B)(1) This will occur when you file a case and (during discovery) realize that the client may

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have "exaggerated," or in the course of pursuing the case, you realize the client is actually "truth challenged" and has misled you on an important issue like liability or damages. Get out of the case right away. Do not be lulled or bullied into continuing representation because there is potential malicious prosecution exposure for both you and your client.

Another source of fruitful justifications for withdrawal exists in Rule 3-700(B)(2), where the member "knows or should know that continued employment will result in violation of these rules or the State Bar Act."

"Conflicts [of interest] come in all shapes and sizes." (*Aceves v. Superior Court* (1996) 59 Cal Rptr. 2d 280, at 282; Rules of Professional Conduct, 3-300 and 3-310). The Court of Appeals in *Manfredi & Levine v. Superior Court*, (1998) 78 Cal. Rptr. 2d 494 set forth the following list of circumstances which, although occurring primarily in the context of criminal law and by no means exhaustive, illustrates circumstances giving rise to a conflict of interest that mandates withdrawal:

Counsel has divided loyalty between current client and former clients (*People v. Mroczko* (1983) 35 Cal.3d 86, 112; *Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951, 955 *prior representation of witness for the prosecution*).

Counsel has acquired a pecuniary interest that is adverse to the interests of the client (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 617, *literary rights*; *Brockway v. State Bar* (1991) 53 Cal.3d 51, 63-65 *attorney took control of client's property which was worth more than attorney's fee*).

Unpaid fees to counsel may result in the sacrifice of important client rights (*Cunningham v. Superior Court* (1986) 177 Cal. App.3d 336, 354-355; *People v. Ortiz* (1990) 51 Cal.3d 975, 985 ["The risk in compelling a defendant to go to trial with unpaid counsel against his wishes and those of his attorney, is that the defendant will get what he paid for."]).

There exists a romantic relationship between counsel and client (Business & Professions Code, Section 6106.8(b)) or an employee of the opposing law firm (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291; *People v. Singer* (1990) 226 Cal.App.3d 23 *relationship between defense counsel and criminal defendant's wife*).

There is a conflict between the interest of the insurer and the insured which in turn creates a conflict for counsel hired by the insurer to represent the insured (*San Diego Navy Federal Credit Union v. Cumis Insurance Society Inc.* (1984) 162 Cal.App.3d 358, 364).

Client tells counsel that he intends to give perjured testimony at trial (*People v. Johnson* (1998) 62 Cal.App.4th 608, 612).

There has been an irreparable breakdown of the working relationship between counsel and client (*People v. Marsden* (1970) 2 Cal.3d 118).

Counsel plans to take on the role as a witness (*Comden v. Superior Court*, *supra*, 20 Cal.3d 906, 912).

There have been settlement negotiations in which attorney fees are recoverable apart from the amount sought for damages (*Ramirez v. Sturdevant* (1994) 21 Cal. App.4th 904, 923-926). Generally, there will be more than one type of conflict, and your declaration should suggest the conflicts that exist, but ever so vaguely. Your declaration should be couched in very general terms and without compromising the confidentiality of the attorney-client relationship. Exercise caution, since improper withdrawal can lead to a variety of client claims, including love letters from the State Bar or even claims of legal malpractice.

In filing a formal motion to be relieved as counsel there are a few nuance issues that, properly handled, can serve you well. First, request that the motion be heard in camera, and out of the presence of opposing counsel. There is inherent tension, because the judge may be the fact finder in the client's case, so going into detail might create prejudice to the client's case. You must be very careful.

At the in camera proceeding, if the client opposes your withdrawal, it is advisable to allow the client to proceed with his or her position first. Since the client would not

sign a substitution, there probably is a breakdown in the attorney-client relationship; possibly you also are not being compensated for outstanding work, etc.

In allowing the client to present their side first, it's almost inevitable that they will attack the lawyer, thus giving rise to a "self defense" situation and a waiver of attorney-client privilege/confidentiality. Note, that waiver is limited to issues involving withdrawal, so you are prohibited from disclosing everything you know from the last 20 years of representation.

Generally, lawyers are allowed to defend themselves in fee arbitration, legal malpractice claims and at the State Bar. The operative principle is "accusatorial adversity."

Some clients will make made false promises or exaggerate the facts to induce you to undertake representation. After falling behind in payments, some clients will try to bully or guilt you into continuing to represent them beyond the time when you need to withdraw. This protocol might provide you with a solution. The breakdown of the attorney-client relationship will be apparent to the court when the client attacks the lawyer in camera. Therefore, although failure to compensate may not be enough, when coupled with an attack, such accusatorial adversity mandates withdrawal.

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