



Key Ethical Issues When Ending the Attorney-Client Relationship

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Withdrawing Prior to Natural Conclusion of Representation

Background

The client has the right to terminate the representation at any time, with or without cause, subject to terms of the engagement agreement. Model Rule 1.16, Comment [4].

An attorney may only withdraw for specially enumerated reasons, and if representation is before a tribunal, leave of the tribunal is required.

Mandatory Withdrawal

Model Rule 1.16(a)

"Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged."

Comment [2]: "A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation."

Permissive Withdrawal

Model Rule 1.16(b)

"Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;



(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists."

Comment [7]: "A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

Comment [8]: "A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation."

The "Hot Potato" Rule

Adopted by many jurisdictions, the so-called "hot potato" rule provides that a "firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client." *Picker Int'l, Inc. v. Varian Assocs., Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989).

As a result, even though withdrawal from a client representation may be permissive under Model Rule 1.16(b), if the reason for the withdrawal is to commence or continue representation of another client on a more profitable or favorable matter, the withdrawal may be precluded by the "hot potato" rule (where applicable).

Protecting Against Prejudice

Model Rule 1.16(d)

"Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."

Comment [9]: "Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law."



What Can / Must Be Disclosed in Withdrawal Motions

Model Rule 1.16(c)

"A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

Model Rule 1.6 Exceptions vs. Cal B&P §6068(e) "At Every Peril"

Model Rule 1.6

"(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

California Business & Professions Code §6068(e)

"It is the duty of an attorney to do all of the following

[...]

(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.



(e)(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."

Accord see Cal. Rules Prof. Conduct Rule 3-100

Court Orders of Disclosure of Confidential Information

Cal. Formal Opinion 2015-192 —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 irreconcilable 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. Although this 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.

Risk Management Concerns

Abandonment (Ethical / Legal Malpractice Issues)

Maples v. Thomas, 132 S. Ct. 912, 916, 181 L. Ed. 2d 807 (2012)

Cory R. Maples ("Maples") was convicted in Alabama of murdering two individuals and sentenced to death in 1997. Thereafter, in 2001, two New York attorneys serving *pro bono* filed a petition for post-conviction relief contending that Maples received ineffective assistance of counsel and citing other trial infirmities.

During the pendency of Maples' post-conviction relief petition, his New York attorneys left their law firm. They did not inform Maples of their departure or their inability to continue representing Maples in his petition, nor did they (or anyone else) move for substitution of counsel to handle Maples' case.

In May 2003, the trial court denied Maples' post-conviction relief petition. Notices of the denial were sent to the New York attorneys, but they were returned to the court unopened. With no attorney of record acting on Maples' behalf, the time to appeal the denial expired.

Thereafter, Maples petition for a writ of habeas corpus in federal court. The District Court, and the Eleventh Circuit, rejected the petition because of Maples' failure to timely file an appeal of the Alabama trial court's denial of his post-conviction relief petition.

On appeal to the United States Supreme Court, the Court held that the extraordinary facts of Maples' case — namely, the abandonment by his lawyers — presented caused to excuse his technical default in



failing to timely appeal the post-conviction relief denial. In so holding, the Court explained that: "Not only was Maples left without any functioning attorney of record, the very listing of [the abandoning attorneys] as his representatives meant that he had no right personally to receive notice. He in fact received none or any other warning that he had better fend for himself. Had counsel of record or the State's attorney informed Maples of his plight before the time to appeal ran out, he could have filed a notice of appeal himself or enlisted the aid of new volunteer attorneys. Given no reason to suspect that he lacked counsel able and willing to represent him, Maples surely was blocked from complying with the State's procedural rule."

Dissolution and the Client No One Wants

Cal. Formal Opinion 2014-190 — 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.

Duties and Obligations Where Acrimonious Breakup Appears Inevitable

Common Acrimonious Situations

- Legality, Propriety and Ethical Considerations of Stopping Work for Nonpayment
- Hostility or Threats from Client
- "Bad" Events/Circumstances

Duties and Obligations

Duty to Communicate

Model Rule 1.4

"(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and



(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Comment [5]: "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. [...] The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation...."

Scope of Disclosure Obligations

- Facts and Circumstances
- Obligation to Advise Rights and Remedies
- Model Rule 1.4, Comment [5] discussed above.
- Cal. Rule Professional Conduct Rule 3-310(A) defining disclosure as "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client."

In-Firm Attorney Client Privilege

Generally: Communications between a firm lawyer and the firm's in-house counsel are protected by the attorney client privilege

Traditional approach: a potential exception to the privilege exists where the client seeks discovery of that privileged communication when the subject of the communications relates to the client's matter under the fiduciary exception to the attorney client privilege.

Modern trend is to recognize the in firm privilege and protect it from discovery from a client, if formal attorney/client relationship exists between infirm counsel and the firm attorney.

- In 2014, California joined Massachusetts, Oregon and Georgia in recognizing an in firm attorney client privilege
 - *See, e.g., Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or. 476 (2014); *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, PC*, 293 Ga. 419 (2013); *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702 (2013).
 - *Edwards, Wildman, Palmer v. Superior Court of Los Angeles*, 231 Cal.App.4th 1214 (2014)
In *Palmer*, the law firm represented real party in an invasion of privacy lawsuit. The law firm and real party had a short and contentious relationship, with real party expressing dissatisfaction to relating to the bills and the quality of the representation. The firm's handling attorney communicated with two of law firm's in-house counsel regarding real party's assertions during the time firm continued to represent real party.



In a subsequent legal malpractice suit, the law firm asserted the attorney client privilege over handling attorney's communications with law firm's in-house counsel. Real party moved to compel, arguing that the privilege was inapplicable when a law firm acted as an attorney to both an outside client and to itself because the firm's fiduciary duty to the outside client trumped the privilege. In opposition, the law firm's two in house counsel submitted declarations that they shared responsibilities on claims handling and loss prevention issues for the law firm, and that they gave advice to Attorney in that capacity. They also argued they deputized a third attorney to supervise preparation of pleadings being prepared for real party. Law firm did not bill real party for the consultation time. The trial court granted the motion to compel.

On appeal, the *Palmer* court focused on the California Evidence Code, noting the attorney-client privilege has been a "hallmark of Anglo-American jurisprudence for almost 400 years" and fosters full communications between an attorney and client by protecting them. *Id.* at 1225 (internal citations omitted.) The Court further noted that the Evidence Code further sets forth eight recognized exceptions to the attorney client privilege, and where none of those privileges apply, the attorney client privilege will stand. Disclosure could not be ordered, without regard to relevance, necessity or any particular circumstances particular to the case.

The Court noted that a law firm's in-house counsel enjoys a standard attorney-client relationship with its client, the law firm, giving rise to a privilege. The question was whether the fact the law firm was a fiduciary to the outside client at the time of the handling attorney's consultation with law firm's in-house counsel worked to abrogate the privilege. After reviewing existing law, the court concluded "we are not at liberty to adopt the fiduciary or current client exceptions to the attorney-client privilege." *Id.* at 1230. The Court noted that it is well established in California that the privilege is a legislative creation and courts have no power to limit it by recognizing implied exceptions. The eight enumerated exceptions to the privilege in the California evidence code do not contain a "fiduciary" or "current client" exception.

The Court noted that while a law firm's representation of itself concurrently with representation of an outside client might raise "thorny ethical issues," "it does not follow that looming specter of ethical issues mandates the extinguishment of the attorney-client privilege." *Id.* at 1233. The Court noted that an attorney's duty to communicate under Business & Professions Code §6068(m) and California Rule of Professional Conduct 3-500 requires an attorney to keep a client informed of significant developments. This duty would require the firm to disclose to the client the underlying facts and circumstances which would form the acts of malpractice, circumstances that occurred independent of subsequent consultation with law firm in house counsel.

For the privilege to apply, an actual attorney-client relationship with a firm attorney and the law firm in house counsel must exist. Persuasive factors in that determination are whether the in house counsel is actually designated as the firm's formal in house counsel, in-house counsel cannot have performed work on either the outside client matter at issue or any substantially related matter, the in house consultation cannot have been billed to the outside client, and the communications must have been made in confidence and kept confidential.

Turning to the case at bar, the Court held in house counsel's communications with the handling attorney was protected, but that handling attorney's communications with the deputized counsel were not, as deputized counsel had no formal role as in house counsel,



and had also worked on real party's case. The matter was remanded to the trial court for further proceedings consistent with the opinion.

Representation Is Concluding. What Now?

Disengagement Letters

File Issues

Returning File to Client or Successor Counsel

Model Rule 1.16(d)

"Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law."

When?

Can you keep copy?

Entire File v. Endproduct Jurisdictional Divide

- **Majority Rule — Entire File Approach:** Upon termination, attorney must surrender all papers and property related to representation of client unless there is a specific exemption provided by state law.
 - See, e.g., *Iowa Sup. Ct. Attorney Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812 (2007); Alaska Bar Ass'n Ethics Comm. Op. 2003-3 (2003); Ariz. Formal Op. 04-01 (2004); Colo. Bar Ass'n. Formal Op. 104 (1999); D.C. Bar Op. 333 (2005); Or. Bar Ass'n Formal Op. 2005-125 (2005); Va. State Bar Op. 1399 (1990).
- **Minority Rule — End-Product Approach:** Upon termination, attorney must surrender only the end-product of an attorney's services, but need not turn over the materials that was used to create that endproduct
 - Ala. Ethics Comm. Advisory Op. 1986-02 (1986); Ill. State Bar Ass'n Advisory Op. 94-13 (1995); Kan. Bar Ass'n Op. 92-5 (1992); Miss. Bar Formal Op. 144 (1988); R.I. Sup. Ct. Ethics Advisory Panel Op. 92-88 (1993); Utah State Bar Ass'n Advisory Op. 06-02 (2006)
- **ABA Formal Op. 471 (July 1, 2015)**

A lawyer represented a municipality for ten (10) years under a contract for legal services. Following the expiration of the contact, the municipality opted to retain different counsel to provide future legal services, and requested that the former lawyer provide the new counsel with all file materials for both open and closed matters. The former lawyer requested an opinion as to what materials must be provided to the municipality as a former client.



The ABA opined that the end-product approach — wherein a lawyer must surrender the end-product of an attorney's services — is the minimum required by the ethical rules. Model Rule 1.16(d) requires the lawyer to surrender:

- Any materials provided to the lawyer by the municipality;
- Legal documents filed with a tribunal – or those completed, ready to be filed, but not yet filed;
- Executed instruments such as contracts;
- Orders or other records of a tribunal;
- Correspondences issued or received by the lawyer in connection with the representation, including email and other electronic correspondences that has been retained according to the firm's document retention policy;
- Discovery or evidentiary exhibits, including interrogatories and their answers, deposition transcripts, expert witness reports and witness statements, and exhibits;
- Legal opinions issued at the request of the municipality; and
- Third party assessments, evaluations, or records paid for by the municipality.

Importantly, however, "there may be circumstances in individual representations that require the lawyer to provide additional materials related to the representation," for instance "when the representation is terminated before the matter is concluded, protection of the client's interests may require the lawyer to provide the client with paper or property generated by the lawyer for the lawyer's own purposes." In these circumstances, the lawyer may be required to "release some of the materials the lawyer generated for internal law office use primarily for the lawyer's own purpose in working on a client's matter."

Thus, if the lawyer "has materials that are: (1) internal notes and memos that were generated primarily for the lawyer's own purpose in working on the municipality's matter, (2) for which no final product has emerged, and (3) the materials should be disclosed to avoid harming the municipality's interest, then the lawyer must also provide the municipality with these materials."

- **Model Rule 1.8(a)**

"A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."



- **Model Rule 1.8 (i)**

"A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case."

Comment [16]: "In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5."

Joint Client Issues

Anten v. Superior Court of Los Angeles, 233 Cal. App. 4th 1254 (2015)

Anten was a writ proceeding after denial of a motion to compel. Two joint clients (Clients A and B) retained Law Firm to represent them about tax advice given to clients by their former attorneys. Law Firm advised the joint clients that former attorneys' erroneous legal advice barred favorable tax treatment and that the error was not curable. On the basis of Law Firm's advice, the joint clients settled with the Internal Revenue Service, paying over \$1 million. Law Firm further advised the joint clients that their former attorneys had committed malpractice and recommended that joint clients sue their former attorneys. Client A declined, wanting to pursue settlement instead of litigation. Law Firm fired Client A, then represented Client B in filing suit against their former lawyers. Client A then filed the instant case against Law Firm and the former attorneys.

In the course of discovery, plaintiff Client A requested communications made between Law Firm and Client B in the underlying representation. Law Firm objected, stating that the communications were protected by the attorney-client privilege, and Client B had not waived the privilege. The trial court denied plaintiff's request for the documents.

The appellate court reversed. The Court first discussed Evidence Code §958, which states there is no privilege as to communications relevant to an issue of breach of a duty arising out of the attorney client relationship. The rationale for the exception is that it would be unjust to permit a client to accuse his attorney of a breach of duty then invoke the privilege to prevent the attorney from defending the charge. Section 958 is limited to communications between the lawyer charged with a breach of duty and the client charging the breach of duty only, and does not apply to attempts to obtain discovery of communications of a plaintiff and the plaintiff's attorney in a malpractice case, or to attempts to obtain discovery of communications between a defendant attorney and other clients not privy to the attorney client relationship at issue in the lawsuit.

As it pertains to joint clients, the Court the joint client exception applied, even though this was not a dispute between clients. Communications between joint clients in common interest and their attorneys are



not confidential as to those joint clients. The communications are privileged against strangers, but not among the joint clients and the attorneys. Here, the attorneys were trying to invoke the attorney-client privilege to protect communications with one joint client from being given to the other, when the communications were not confidential as to the joint clients. Thus, the privilege could not be invoked to bar plaintiff joint client from discovering them. The court also noted that permitting application of the privilege in these communications would create a risk of collusion by attorneys and non-suing joint clients, or between the joint clients themselves.

Attorney Obligations Upon Receipt of Request/Subpoena for File from Alleged "Client"

Protecting Client Files in Firm Custody

Duty of Confidentiality

- Confidential information defined: Information relating to the representation of a client, whatever its source. Model Rule 1.6, comment [3].
- Model Rule 1.6, discussed above.

Cybersecurity Concerns

Model Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [8]: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

Model Rule 1.6(c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Comment [18]: "Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3."

How Long Must Attorneys Retain a Closed Case File?

State specific rules. See recap by the ABA:

www.americanbar.org/groups/professional_responsibility/services/ethicsearch/materials_on_client_file_retention.html (last visited January 6, 2015), and as cited by the ABA, see "Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools," by Lee R. Nemchek, Law Library Journal Volume 93:1 at pg.7 et seq., www.aallnet.org/mm/Publications/llj/LLJ-Archives/Vol-93/pub_llj_v93n01/2001-01.pdf

How Long Should Attorneys Retain a Close Case File?



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You Think You're Going To Be or Have Been Sued - What Now

NAPABA SSF Boot Camp

San Diego, CA

November 3, 2016

The program

Statistically speaking, every lawyer will likely get at least one bar complaint or a legal malpractice suit in his or her career. But when you are a lawyer in Solo/Small Firm, you are not just a lawyer. You are the CEO, the rainmaker, and the CFO all at once – and you probably don't have a separate GC. This panel will educate and give you practical and useful advice on risk management and what to do when you think you are being or have been sued.

Sources of Ethics Guidance

- **Statutes**
- **Rules of Professional Conduct**
 - **Model rules**
 - **California rules**
 - **Update on proposed California rules**
- **Ethics Opinions**
 - **ABA, state ethics committees, local bar associations**
- **Case Law**

Consequences of Ethical Violation(s)

- **Discipline**
- **Civil liability**
- **Malpractice liability**
- **Disgorgement**
- **Sanctions (both monetary and non-monetary)**
- **Reputational damage**
- **Loss of clients**
- **Financial exposure**

Center for Professional Responsibility

Model Rules, Codes & Standards

- Legal and judicial ethics, professional regulation, professionalism, client protection, and specialization

Formal Ethics Opinions

- Interpreting and applying ethics standards

ETHICSearch

- Legal research service to find the right resources to resolve ethics issues
- Free to ABA members

Professional Responsibility Speakers Bureau

- Speaker Referrals for ethics- related topics

National, State & Regional Ethics Resources

- Expansive resources for the ever-changing landscape of legal ethics



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What is Legal Malpractice

- **Duty**
 - **Breach**
 - **Causation**
 - **Damages**
-
- **What is NOT legal malpractice?**

Other Common Causes of Action

- **Breach of Fiduciary Duty**
- **Breach of Contract**
- **Aiding and Abetting**
- **Unfair Competition**
- **Negligence Per Se**

How Do the Ethics Rules Fit In?

Model Rules Scope:

[19] ...the rules presuppose that whether or not discipline should be imposed for a violation ... depend on all the circumstances, such as the willfulness and seriousness of the violation....

Model Rules Scope cont.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. ...They are not designed to be a basis for civil liability....Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

So You Made a Mistake





**DON'T
PANIC**



"The 'E' in E-Mail Stands for Evidence"



Hotlines



Insurance?



Duty to Communicate - Model Rule 1.4

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

...

Model Rule 1.4 cont.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Conflicts of Interest - Model Rule 1.7

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

...

- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Model Rule 1.7 cont.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client

The "In Firm" Privilege

Duty to Withdraw - Model Rule 1.16

- (a)** Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in violation of the rules of professional conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.

Model Rule 1.16 cont.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

Keeping a Copy of Your File?



Claims Repair/Shadow Counseling

Tolling Agreements

You've Been Sued





Should You Represent Yourself?





Should You Invoke Arbitration

The Practical Considerations in Compelling Arbitration

- **The Benefits – A Defense Perspective**
 - **Privacy**
 - Greater control in choice of decision-maker
 - No exposure to "runaway" jury verdict
 - Less risk of punitive damages
 - "Faster"
 - "Cheaper"

The Practical Considerations in Compelling Arbitration

- **The Downsides – A Defense Perspective**
 - Evidence rules not applicable/relaxed/not applied
 - No assurance arbitrator will apply the law
 - Principles of "equity" and "justice" often guide decision
 - No or limited discovery
 - Dispositive motions less likely
 - Very limited right of appeal
 - No malicious prosecution

Is the Cost to the Opposing Side a Strategic Weapon?

- **Roldan v. Callahan & Blaine, (2013) 219 Cal.App.4th 87**
- **Tillman v. Tillman, No. 13-56624, 2016 BL 190432 (9th Cir. June 15, 2016)**

Is it Truly Neutral?



Common Defenses

- Standing
- Assignability
- Statute of Limitations
- No Breach
- Successor Counsel
- Causation
- Damages
- The Anti-SLAPP Motion
- Self Defense Privilege

Impact of the Triable Issue of Fact



Settlement v. Standing Your Ground

- **Consent clauses**
- **Hammer clauses**
- **The cost of defense
settlement**



It's the Principle, Right?





Reporting Requirements

Should You Sue for Your Fees?



The Parallel Discipline Complaint



Thank you for coming today.

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