Every once in a while, we have to withdraw from a case in progress. We all have “dog” cases, and the sooner we get out of them, the better. We also know that this action can easily bring client retribution: a malpractice suit, State Bar complaint, and certainly a suit for fee refund. Thus, we have to take protective action while simultaneously protecting our client’s interests.

It is possible to do both. And there are ways to lessen the chances for retaliation while leaving your client — and your reputation — intact.

**STEP ONE: Decide to withdraw**

As recognized in the case law, the most typical reason we withdraw from a case is because we think it’s a loser. *Kirsch v. Durvea* (1978) 21 Cal.3d 303, 311, 146 C.R. 218. Another typical reason is because of a personality conflict with the client. Cases of the first sort waste everybody’s time. Both types of cases cause us grief. No matter how the latter type of case turns out, the client will bad mouth us and probably seek retribution anyhow.

A third type of case is the good case that is beyond our skill level to handle. In this age of specialization, it is nothing to be ashamed of. And it’s an ethical requirement to associate other counsel or withdraw. Rule 3-110(B), Rules of Professional Conduct (RPC). We do our clients a service when we tell them it is time to bring in a specialist. We encourage repeat business when we help find that specialist for them.

I believe that much client ill will stems from our breathing hot and cold in the last days or weeks before we finally withdraw. Our discontent with the case is felt by the client, even if not known consciously. The client will often prefer a clean break, rather than a false hope followed by a let down.

The decision can be personally awkward for us as attorneys. It may be that the initial unease we felt at accepting the case has now transformed into a real clear problem. Or the new facts we have turned up have just demolished an excellent case. If the client is not paying our attorney fees due to financial troubles, our withdrawal comes across as kicking a person who is down.

Then there’s our own greed. Lawyers stay in many cases too long because the case looks — or looked — good financially.

**STEP TWO: Determine that it is still possible to withdraw**

Rule 3-700(A)(2) of the State Bar Rules of Professional Conduct (RPC) states in part:

“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....”

In litigated cases, withdrawal is always subject to the discretion of the court. It is usually foreseeable prejudice to withdraw on the eve of trial. *Vann v. Shilek* (1975) 54 Cal.App.3d 192, 196, 126 C.R. 401. Even with client consent, a withdrawal can be overruled by the court if the withdrawal would cause undue hardship on the legal system. *In Re Jackson* (1985), 170 Cal.App. 3d 773, 216 C.R. 539.

Similarly it would be foreseeable prejudice to withdraw just before the statute of limitation expires, or just before a stock offering is made. The perspective must be from the client’s viewpoint.

**STEP THREE: Organize the file**

Attorneys who withdraw usually leave clients with messy files. It is better to straighten them out. The client benefits by having a clear file. You benefit by making the possibility of substitute counsel easier. As you organize the file, you will probably clarify and reinforce your own reasons for withdrawing. You may see clues in this case that will prevent a repeat problem in the next case.

Another excellent reason to organize the file is your own reputation. That file will be shopped around town to successor counsel and to plaintiff’s malpractice attorneys. One of the few occasions that other attorneys see the inner sanctums of our work is when they review our most troublesome case files. At least the dog should be groomed when it goes out.

Having re-organized the file, copy it and number the pages for self protection. The client is entitled to the client file on request. RPC 3-700(D)(1). The attorney may keep a copy at the attorney’s own expense. See the official comment to RPC 3-700. The file may not be held hostage for unpaid fees or costs. Academy of California Optometrists v. Superior Court (1975) 51 Cal.App.3d 940. The client may not be entitled to uncommunicated work product, but the issue is unsettled. See *Rose v. State Bar* (1989) 49 Cal.3d 646, 655, and *Weiss v. Marcus* (1975) 51 Cal.App.3d 590.

**STEP FOUR: Tell the client**

Having made the decision to withdraw, you must promptly notify the client. *Fineda v. State Bar* (1989) 49 Cal.3d 753.

Rule One: Call first.

It is the attorney’s obligation to tell the client before filing a motion. *Kirsch v. Durvea* (1978) 21 Cal.3d 303, 311, 146 C.R. 218. By starting with the phone call, you treat the client in a more humane way. An impersonal “Dear John” letter is more likely to anger the recipient than a more personal phone call. An angry client is a vindictive client, especially if the outcome
is as poor as you believe it will be.

Some clients will be surprised. Most of them see it coming, kind of like a divorce. The phone call is a lot more personal than a letter. It lets the client blow off steam. You can acknowledge and validate the client's anger and you will gain valuable insight on issues to address in the follow-up letter.

**Rule Two: Write the letter**

A phone call is not enough. You must actually write the client a letter. In Re Hickey (1990) 50 Cal.3d 571, 580. The letter must make it clear you are withdrawing. It is generally presumed that you must warn the client of statute of limitations or absolute deadlines such as five years to trial. See Hickey at page 580 and Kirsch at page 307.

Encourage the client to seek new counsel. One attorney's problem is another's solution. In one office of mine, we used to swap dog cases. The receiving attorney often rose to the challenge. Also, if you tell the client the case has no merit, the client may dismiss the case. Later, the client may sue you and locate an expert who testifies that the case had merit. Kirsch v. Dwyer (1978) 21 Cal.3d 303, 146 Cal.Rptr. 218. Who will the jury believe?

**Rule Three: Use neutral terms**

Few cases have no merit. Many are difficult to prove. Others have good likelihood with minimal damages. It is easy to acknowledge a personality conflict. There is no need to blam e it all on the client's ob­ tuse refusal to follow your sagacious advice.

Even if the client has quit paying fees, you don't have to be accusatory ("you have failed to live up to your side of the deal"). You can be more neutral ("your bill is now 90 days overdue").

The primary purpose of this neutrality is to defuse your client's anger. Another purpose is to look reasonable if you get sued. See Estate of Falco (1987) 188 Cal.App.3d 1004, 233 CR. 807. The fractured attorney-client dispute, regardless of fault, is now on record. Certainly the trier of fact was not disposed to rule for the attorney, even if he was right.


**STEP FIVE: Follow through**

In non-litigation cases, you can send several letters to the client reiterating your decision. In extreme cases, send it registered/return receipt, or even have it "served" on the client.

In litigated cases, any withdrawal must be signed by the client or approved by the Court. CCP 284; RPC 3-700(A)(1). In any event, it is the attorney's obligation to effect the withdrawal. In Re Hickey (1990) 50 Cal.3d 571, 580. Certainly the attorney can't remain silent and let the case die. Davis v. State Bar (1983) 33 Cal.3d 231, 238, 186 CR. 441.

The motion to withdraw should be couched in neutral terms if at all possible. I am amazed at the amount of damaging, anti-client information some attorneys place in public declarations. This practice would appear to violate RPC 3-700(A)(2) prejudicing the client. The practice would appear to constitute a release of client secrets in violation of Bus. & Prof. Code Section 6068(e), and Rule 376(b) of the California Rules of Court (CRC). Courts cannot coerce release of confidential client information; Levensen v. Superior Court (1983) 34 Cal.3d 530, 537, 194 CR. 446. See also Evidence Code section 917. However, judges sometimes need to be reminded forcefully; Mr. Levensen had to take up a writ to enforce the principle.

The mere making of the motion already telegraphs to the world that you lack faith in the merits of your client's case. Kirsch v. Dwyer (1978) 21 Cal.3d 303, 311, 146 CR. 218. If at all possible, I would base the motion to withdraw on RPC 3-700, (C)(1)(d), "...conduct (that) renders it unreasonably difficult for the member to carry out the employment effectively..." The declaration can assert that further detail would require release of client secrets and cite both Levensen and Kirsch. You can represent that as long as you and the client are not in adverse litigation, there is no need to release the information publicly.

Again, you have accomplished several goals. You have protected your client's interests, the paramount attorney duty under Bus. & Prof. Code Section 6068(e). You have maintained your own integrity in a difficult situation. You have warned the client that if there is retribution, your reasons for keeping those secrets are gone. We cannot prejudice our clients, but we can protect ourselves. See Evid. Code section 958.

**Concluding thoughts**

There may be 50 ways to leave your lover but there are far fewer ways to leave your client. There are a myriad of ethical risks. There is an immense civil exposure. Several local colleagues will pick over your dog of a case. So you might as well break decisively and break cleanly. It may be a painful experience, but we can learn from it.

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