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PROFESSIONAL RESPONSIBILITY

Wrestling with withdrawal, confidentiality

By Diana DiGennaro

What information may an attorney ethically disclose to the court to explain her need to withdraw from representation? Is the answer the same where the court has ordered the attorney to disclose to the court, in camera or otherwise, the substance of the attorney-client communications resulting in the need to withdraw?

These are the questions addressed in a recent ethics opinion issued by the California State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC). Formal Opinion 2015-192 supplies additional guidance, but also leaves questions unanswered.

The factual scenario presented in the opinion is treacherous. Near the close of discovery, about six weeks before trial, Attorney learns information that causes her to conclude that Client's claim lacks probable cause. She meets with Client's CEO to discuss this new information. Attorney advises CEO that Client should dismiss the claim and that she may not ethically continue to prosecute the claim. CEO then reveals that the primary purpose of the lawsuit is to harass or maliciously injure the defendant, a competitor company, and refuses to dismiss the case. Attorney advises CEO that, for ethical reasons, she will need to withdraw from the representation, but CEO refuses to consent, on the grounds that he would not be able to find another lawyer so close to trial.

Attorney moves to withdraw and the court agrees to hear the motion on shortened time. In the moving papers, Attorney states, "Ethical considerations require my withdrawal as counsel for Client." At the hearing, the judge asks Attorney to explain her need to withdraw and expresses concern about potential prejudice to Client. When pressed, Attorney explains that she has an irreconcilable conflict of interest with Client that precludes her continued representation, and that her duty of confidentiality to Client precludes her from saying any more. The court then orders Attorney to provide a detailed declaration, filed under seal, about the substance of the attorney-client communications that led Attorney to believe she must withdraw and schedules an in camera hearing to discuss the declaration.

In this hypothetical, deciding whether to withdraw is the easy part. Under Rule 3-700(B)(1), withdrawal is mandatory where "[t]he member knows or should know that the client is bringing an action,

conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person." Under Rule 3-700(B)(2), withdrawal also is mandatory where "[t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act." Thus, Attorney correctly concluded that she had a mandatory duty to withdraw.

The hard part is balancing the potentially conflicting ethical obligations that arise when an attorney must withdraw. Those obligations are three-fold. First, because the attorney is representing the client in a court proceeding and the client will not consent to her withdrawal, permission from the court is required. Second, the attorney must take reasonable steps in compliance with Rule 3-700(A)(2) to avoid reasonably foreseeable prejudice to the client's rights, including giving due notice to the client and allowing time for employment of other counsel. Third, the attorney must continue to uphold her duty of confidentiality under Rule 3-100 and Business and Professions Code Section 6068(e)(1).

With trial only six weeks away, Attorney's need to withdraw appears to conflict with her simultaneous duty to avoid prejudice to the client. In addition, even where withdrawal is mandatory, absent client consent, the attorney may not withdraw without a court order. Ultimately, the court will weigh the duty to withdraw against any prejudice to the client, but this may be cold comfort to Attorney, who must convince the court of her need to withdraw without violating the duty of confidentiality. As Formal Opinion 2015-192 explains, "[a]n attorney moving to withdraw from representation faces a difficult dilemma — how to present sufficient facts to enable the court to consider the motion, while still maintaining the client's confidences."

California Rule of Court 3.1362 sets forth the basic procedural requirements for a motion to be relieved as counsel. It specifically provides that an attorney's declaration must set forth the grounds for withdrawal "in general terms" and "without compromising the confidentiality of the attorney-client relationship." Formal Opinion 2015-192 further specifies that Attorney may disclose to the court "only as much as is reasonably necessary to demonstrate her need to withdraw." The opinion concludes that ordinarily it will

suffice for Attorney to state simply that ethical considerations require withdrawal or there has been an irreconcilable breakdown in the attorney-client relationship.

To demonstrate the need to withdraw, an attorney may not disclose confidential information, either in open court or in camera. This prohibition goes beyond attorney-client privileged communications; information may be confidential even if it is not "privileged." Accordingly, the duty of confidentiality may prevent or limit an attorney from disclosing any confidential information learned in the course of the representation, including even the circumstances of a confidential communication where doing so would reveal client confidences or secrets. Such confidences or secrets may include information the client has requested to be kept confidential or the disclosure of which might be embarrassing or detrimental to the client.

Formal Opinion 2015-192 grapples with, but ultimately does not answer, the most difficult question presented by the hypothetical: the court's order requiring Attorney to disclose privileged information. The opinion acknowledges that "[t]o 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 [under Business and Professions Code Section 6103] to obey court orders."

Under these circumstances, the opinion concludes, an attorney has a duty to take "all reasonable steps" to avoid the dilemma — either by obtaining the client's permission to consent to the in camera disclosure (with full disclosure to the client of the risks of such disclosure) or some other compromise measure, or by filing a writ petition with the Court of Appeal challenging the court's order. Attorney must "exhaust all reasonable measures short of disclosing confidential client information against Client's wishes before making the ultimate decision of whether to disclose confidential information or disobey the court's order."

If an attorney is unsuccessful and cannot satisfy both the client and the court, the attorney must choose between her obligations to the client and her obligation to the court. Formal Opinion 2015-192 recognizes this Catch-22, but declines to provide a categorical solution, finding that, absent any controlling authority, "there is no one rule that should apply in every situation." 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 conclusions about how to proceed."

As the opinion explains, an attorney may face significant legal and disciplinary consequences for refusing to obey a court order, but she also could be subject to discipline if she obeys the court and violates the duty of confidentiality. That duty is considered to be one of the most important and rigorously enforced ethical obligations, and California law explicitly requires an attorney to preserve the secrets of his or her client "at every peril to himself or herself." The proper course of action under these difficult circumstances remains an open question. One thing is clear, however: Whatever Attorney's decision, she must take reasonable steps to minimize the impact of the decision on Client.

What does that mean as practical matter? If Attorney obeys the court order and discloses confidential information, she must consider ways to minimize the harm to Client resulting from the disclosure.

Where, as in the hypothetical, the disclosure would compromise the client's case, one option might be to ask the court to appoint a judge pro tem or transfer the withdrawal motion to another judge, so the disclosure is not made to the trial judge. If, on the other hand, Attorney refuses to disclose the confidential information, she has the same obligation to minimize harm to Client. Formal Opinion 2015-192 does not address what steps Attorney should take if the court denies the request to withdraw, but notes she must continue to competently represent Client and advise of the potential adverse consequences should Client continue to pursue the lawsuit for improper purposes. It is an open question whether, after deciding that withdrawal is mandatory, Attorney still could attempt to settle the case.

Where an attorney's ethical obligations are in conflict, there are no easy answers.



Diana DiGennaro is an associate in Arnold & Porter LLP's litigation department and a member of the attorney liability practice group. You can reach her at Diana.DiGennaro@aporter.com.