



# The State Bar of California

## **Rule 1.16 Declining or Terminating Representation (Rule Approved by the Supreme Court, Effective November 1, 2018)**

- (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 lawyer knows\* or reasonably 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;\*
  - (2) the lawyer knows\* or reasonably should know\* that the representation will result in violation of these rules or of the State Bar Act;
  - (3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or
  - (4) the client discharges the lawyer.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
  - (2) the client either seeks to pursue a criminal or fraudulent\* course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes\* was a crime or fraud;\*
  - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;\*
  - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;
  - (5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable\* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
  - (6) the client knowingly\* and freely assents to termination of the representation;
  - (7) the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;

- (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
  - (9) a continuation of the representation is likely to result in a violation of these rules or the State Bar Act; or
  - (10) the lawyer believes\* in good faith, in a proceeding pending before a tribunal,\* that the tribunal\* will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal,\* a lawyer shall not terminate a representation before that tribunal\* without its permission.
- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable\* steps to avoid reasonably\* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (e) Upon the termination of a representation for any reason:
- (1) subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,\* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably\* necessary to the client's representation, whether the client has paid for them or not; and
  - (2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

## Comment

[1] This rule applies, without limitation, to a sale of a law practice under rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. (See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.)

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under rule 1.7, but that conflict might not arise in other representations of the client.

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. (See rule 3.1(b).)

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code section 6068, subdivision (e) and rule 1.6, and to the courts under rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal\* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's\* order. (See Bus. & Prof. Code, §§ 6068, subd. (b) and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. (See, e.g., Pen. Code, §§ 1054.2 and 1054.10.)

[6] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

**NEW RULE OF PROFESSIONAL CONDUCT 1.16  
(Former Rule 3-700)  
Declining or Terminating Representation**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 3-700 (Termination of Employment) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.16 (Declining or Terminating Representation). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 1.16 (Declining or Terminating Representation).

**Rule As Issued For 90-day Public Comment**

Proposed rule 1.16 follows the substance and format of ABA Model Rule 1.16 while carrying forward certain concepts found in current rule 3-700. Similar to ABA Model Rule 1.16, proposed rule 1.16 applies to both the acceptance and termination of a representation. The proposed rule follows the format of ABA Model Rule 1.16 in that situations mandating withdrawal are set forth in paragraph (a) while permissive withdrawal situations are addressed in paragraph (b). The provisions in current rule 3-700(A)(1) and (A)(2) concerning seeking a tribunal’s permission to withdraw and the duty to not prejudice the client have been moved to paragraphs (c) and (d), respectively.

Paragraph (a)(1) carries forward the substance of current rule 3-700(B)(1), which prohibits a lawyer from representing a client where the action lacks probable cause and is brought to harass. In addition to formatting changes, the proposed rule substitutes the defined term, “reasonably should know” for the current rule’s “should know.”

Paragraph (a)(2) carries forward the substance of current rule 3-700(B)(2), which prohibits a lawyer from representing a client where doing so violates that lawyer’s ethical obligations. In addition to formatting changes, the proposed rule substitutes the defined term “reasonably should know” for the current rule’s “should know.”

Paragraph (a)(3) carries forward the substance of current rule 3-700(B)(3), which provides that a lawyer shall not represent a client if the lawyer’s mental or physical condition renders the lawyer ineffective.

Paragraph (a)(4) is a substantive change derived from ABA Model Rule 1.16(a)(3) requiring withdrawal and compliance with the rule when the client discharges the lawyer. Although case law provides that a client has the right to discharge his or her lawyer for any reason, see *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385], this concept is lacking in the current rule. Because lawyers will sometimes attempt to resist a client’s attempts to discharge them, making this a disciplinary offense protects the public

Paragraph (b)(1) carries forward the substance of current rule 3-700(C)(1)(a) but clarifies that a lawyer’s ability to withdraw based on a client’s pursuit of a meritless claim applies in both litigation and non-litigation matters.

Paragraphs (b)(2) and (b)(3) carry forward the substance of current rule 3-700(C)(1)(b) and (c), but add concepts derived from ABA Model Rule 1.16 which permit withdrawal based on fraudulent as well as unlawful conduct.

Paragraph (b)(4) carries forward current rule 3-700(C)(1)(d), which permit withdrawal when a client's conduct renders it unreasonably difficult for the lawyer to continue effectively.

Paragraph (b)(5) expands the breadth of current rule 3-700(C)(1)(f) by adopting the concepts in ABA Model Rule 1.16(b)(5). Paragraph (b)(5) permits withdrawal when a client breaches any agreement or obligation to the lawyer, including those not related to an agreement or obligation for fees or expenses. The lawyer must warn the client before withdrawing under the circumstances.

Paragraph (b)(6) permits a lawyer to withdraw with the consent of the client.

Paragraph (b)(7) carries forward current rule 3-700(C)(3), which permits withdrawal if a lawyer is unable to work with co-counsel.

Paragraph (b)(8) permits withdrawal for the reasons stated in paragraph (a)(3).

Paragraph (b)(9) permits withdrawal for the reasons stated in paragraph (a)(2).

Paragraph (b)(10) permits withdrawal from cases pending before a tribunal on the grounds that the lawyer has a good faith belief that the tribunal will find good cause for withdrawal.

Paragraph (c) carries forward the substance of current rule 3-700(A)(1), which provides that a lawyer shall seek the permission of the tribunal before terminating the representation if permission is required by the tribunal.

Paragraph (d) carries forward the substance of current rule 3-700(A)(2), which provides that a lawyer shall not terminate representation before taking reasonable steps to avoid foreseeable prejudice to the client.

Paragraphs (e)(1) and (e)(2) carry forward current rule 3-700(D)(1) and (D)(2), which provide that a lawyer must promptly return a client's file and property and promptly refund any unearned fees. Paragraph (e)(1) has been modified to provide that "client materials and property" includes those stored electronically. Paragraph (e)(2) has been modified to require the return of any unused advanced expenses.

Comment [1] clarifies that the rule applies to the sale of a law practice.

Comment [2] explains that withdrawal from one client matter does not necessarily require withdrawal from another in which the lawyer represents that same client. This concept is important in avoiding prejudice to the client.

Comment [3] emphasizes a lawyer's duty of confidentiality when seeking permission from the tribunal to withdraw.

Comment [4] provides citations to certain statutes that place limits on a lawyer's duty to provide the client with the file upon withdrawal.

Comment [5] carries forward current rule 3-700, discussion paragraph 3, regarding a lawyer's right to make a copy of the client's file and seek recovery of the lawyer's expense for doing so.

### **Revisions Following 90-Day Public Comment Period**

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised subparagraph (b)(4) to substitute the word "representation"

for “employment.” This subparagraph describes a basis for permissive withdrawal where the client’s conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively. The Commission substituted the term “representation” for “employment” because the latter might suggest the presence of an actual employer-employee relationship when the scope of this subparagraph is intended to encompass all lawyer-client relationships, including those that are independent contractor relationships and not an employment relationship.

The Commission also revised subparagraph (e)(1) to substitute the phrase “statute or regulation” for “statutory limitation.” This subparagraph refers to applicable non-disclosure considerations such as a protective order or a non-disclosure agreement. The Commission determined that the reference to non-disclosure obligations arising from a “statutory limitation” was too narrow. The phrase “statute or regulation” was considered to be a broader and a more appropriate reference.

In the rule Comments, the Commission added a new Comment [3] to clarify that the mandatory withdrawal provision in subparagraph (a)(1) does not mandate withdrawal where a lawyer for a defendant in a criminal or similar proceeding defends the proceeding by requiring that every element of the case be established.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

### **Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period**

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 1.16 at its March 9, 2017 meeting.

### **Supreme Court Action (May 10, 2018)**

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. A stylistic change was made in the title of the rule. Omitted asterisks for defined terms were added.

~~Rule 3-700 Termination of Employment~~ Rule 1.16 Declining or Terminating Representation

(Redline Comparison to the California Rule Operative Until October 31, 2018)

(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:

~~(A) In General.~~

~~(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.~~

~~(2) 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, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.~~

~~(B) Mandatory Withdrawal.~~

~~A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:~~

~~(1) The member~~the lawyer knows\* or reasonably 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;~~or\*~~

~~(2) The member~~the lawyer knows\* or reasonably should know\* that ~~continued employment~~the representation will result in violation of these rules or of the State Bar Act;~~or~~

~~(3) The member's~~the lawyer's mental or physical condition renders it unreasonably difficult to carry out the ~~employment~~representation effectively;~~or~~or

~~(C) Permissive Withdrawal.~~

~~If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:~~

~~(14) The~~the client discharges the lawyer.

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

- (a1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; ~~or;~~
- (b2) the client either seeks to pursue an illegal a criminal or fraudulent\* course of conduct; ~~or~~ has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes\* was a crime or fraud;\*
- (c3) the client insists that the ~~member~~lawyer pursue a course of conduct that is ~~illegal or that is prohibited under these rules or the State Bar Act,~~ or criminal or fraudulent;\*
- (d4) the client by other conduct renders it unreasonably difficult for the ~~member~~lawyer to carry out the ~~employment~~representation effectively; ~~or;~~
- (5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable\* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
  - (e) ~~insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or~~
- (f6) ~~breaches an agreement or obligation to the member as to expenses or fees.~~ the client knowingly\* and freely assents to termination of the representation;
- (2) ~~The continued employment is likely to result in a violation of these rules or of the State Bar Act; or~~
- (37) ~~The~~the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; ~~or~~
- (48) ~~The member's~~the lawyer's mental or physical condition renders it difficult for the ~~member~~lawyer to carry out the ~~employment~~representation effectively; ~~or~~
- (9) a continuation of the representation is likely to result in a violation of these rules or the State Bar Act; or
- (5) ~~The client knowingly and freely assents to termination of the employment; or~~



(610) ~~The member~~the lawyer believes\* in good faith, in a proceeding pending before a tribunal,\* that the tribunal\* will find the existence of other good cause for withdrawal.

(c) If permission for termination of a representation is required by the rules of a tribunal,\* a lawyer shall not terminate a representation before that tribunal\* without its permission.

(d) A lawyer shall not terminate a representation until the lawyer has taken reasonable\* steps to avoid reasonably\* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

~~(De) Papers, Property, and Fees.~~Upon the termination of a representation for any reason:

~~A member whose employment has terminated shall:~~

(1) ~~Subject~~subject to any applicable protective order~~—or,~~ non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all ~~the—client~~ papersmaterials and property. “Client ~~papersmaterials~~ and property” includes correspondence, pleadings, deposition transcripts, experts’ reports and other writings,\* exhibits, and physical evidence, ~~expert’s—reports~~whether in tangible, electronic or other form, and other items reasonably\* necessary to the client’s representation, whether the client has paid for them or not; and

(2) ~~Promptly~~the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not ~~been—earned~~ or incurred. This provision is not applicable to a true retainer fee ~~which is—paid~~ solely for the purpose of ensuring the availability of the ~~member~~lawyer for the matter.

### Comment~~Discussion~~

[1] This rule applies, without limitation, to a sale of a law practice under rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. (See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.)

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under rule 1.7, but that conflict might not arise in other representations of the client.

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in

incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. (See rule 3.1(b).)

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code section 6068, subdivision (e) and rule 1.6, and to the courts under rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal\* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's\* order. (See Bus. & Prof. Code, §§ 6068, subd. (b) and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. (See, e.g., Pen. Code, §§ 1054.2 and 1054.10.)

~~Subparagraph (A)(2) provides that “a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients.” What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.~~

~~Paragraph (D) makes clear the member’s duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).~~

[6] Paragraph (D) ~~ise~~(1) does not ~~intended to~~ prohibit a ~~member~~lawyer from making, at the ~~member’s~~lawyer’s own expense, and retaining copies of papers released to the client, ~~nor~~or to prohibit a claim for the recovery of the ~~member’s~~lawyer’s expense in any subsequent legal proceeding.