THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 14-0003

ISSUE: May an attorney who is required to withdraw from representing a client under rule 3-700(B) because the client's claim or defense lacks merit, ethically settle the action before withdrawing from the representation?

DIGEST: An attorney who has concluded that a client's claim or defense lacks merit and cannot be pursued without violating the Rules of Professional Conduct or State Bar Act is required to withdraw from the representation. Before withdrawing, the attorney must take reasonable steps to avoid reasonably foreseeable prejudice to the client. Such reasonable steps may include settling the claim. However, the attorney may not make false statements to the opposing party about the merits of the client's case during the settlement process. Nor may the attorney settle if the attorney knows that information bearing on the merits, which had to be disclosed to the opposing party, was not disclosed.

AUTHORITIES INTERPRETED: Rules 3-200 and 3-700 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code sections 6068(c), 6068(d), 6106, and 6128(a).

STATEMENT OF FACTS

Attorney commences a legal action for Client based on alleged false statements made to Client by the Client's former business partner. During the course of protracted discovery in the case, Attorney learns that the uncontroverted evidence does not support the Client's claims. Attorney has therefore concluded that Client's case lacks merit and Attorney must withdraw under rule 3-700(B). Attorney advises Client of his conclusion and that he must withdraw from representing her. While Client does not agree with Attorney's assessment and still believes the case has merit, Client asks Attorney to attempt to settle the case before withdrawing because Client is concerned that finding replacement counsel will be difficult. Notwithstanding Attorney's ethical prohibition against proceeding to trial, may Attorney nonetheless attempt to settle the case with the defendant before withdrawing?

[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

DISCUSSION

I. This Issue Was Left Open By the Court in *Estate of Falco*

At issue in *Estate of Falco* (1987) 188 Cal.App.3d 100 [233 Cal.Rptr. 807], was whether a contingent fee attorney's withdrawal on ethical grounds is justified for purposes of determining whether the attorney may later seek a quantum meruit fee for the services provided. In its discussion, the Court of Appeal states: "Our Supreme Court has commented that "'[w]hen an attorney loses faith in his cause he should either retire from the case or dismiss the action.'" *Id.* at 1015 (quoting *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 309-310 [146 Cal.Rptr. 218] (quoting *Larimer v. Smith* (1933) 130 Cal.App. 98, 101 [19 P.2d 825])). In a footnote following that sentence, the court states: "We refrain from determining the corollary issue of whether an attorney who is ethically prohibited from proceeding to trial in a case the attorney believes lacks merit is similarly prohibited from settling the case." *Id.* at 1015, n 11. This is the issue, left undetermined by the *Estate of Falco* court, that this opinion will consider.

II. When is an Attorney "Ethically Prohibited From Proceeding to Trial"?

An attorney is ethically prohibited by rule 3-700(B) from proceeding to trial in certain limited circumstances.

Withdrawal is mandatory if (1) the attorney knows or should know that the action is being taken without probable cause and for the purpose of harassing or maliciously injuring any person; (2) the attorney knows or should know that continued employment will result in a violation of the Rules of Professional Conduct or State Bar Act; or (3) the attorney's mental or physical state renders it unreasonably difficult to effectively carry out the representation. Rule 3-700(B)(1)-(3).

Similar to the language in rule 3-700(B)(1), rule 3-200 (Prohibited Objectives of Employment) prohibits a lawyer from seeking, accepting or continuing employment if the lawyer "knows or should know" that the objective of the employment is to "bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause ***and*** for the purpose of harassing or maliciously injuring any person." Rule 3-200(A) (emphasis added).

Here, Attorney has concluded that the evidence does not support Client's claims, but there is no indication that Client has pursued the case for the purpose of harassing or maliciously injuring a person. In fact, Client may still believe the facts Client presented to Attorney even though Attorney has concluded that those facts are not true. Under these circumstances, rule 3-200(A) is not implicated and withdrawal is not mandated under rule 3-700(B)(1).

Rule 3-200(B) prohibits an attorney from seeking, accepting or continuing representation if the employment is "[t]o present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification or reversal of such existing law." The phrase "warranted under existing law" is not defined in the rule or the cases applying it. Statutes using the same language apply it only to "claims, defenses, and other legal contentions," not to "factual contentions," which are treated separately. (See Cal. Civ. Proc. Code § 128.7(b)(2) and (3); Fed. R. Civ. P. 11(b)(2)-(4).)

Under the State Bar Act, an attorney has a duty to "counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just." (Bus. & Prof. Code § 6068(c).) Thus, an attorney's continued employment in a case that the attorney knows is not "legal or just" will violate the State Bar Act. The terms "legal or just" are not defined in the statute, but subsection (c) has been interpreted as ensuring that attorneys only bring complaints and maintain arguments that "are supported by law or facts." *Canatella v. Stovitz* (N.D. Cal. 2005) 365 F.Supp.2d 1064, 1077.

Here, the facts Attorney has uncovered since the case was filed have caused Attorney to conclude that the case lacks merit because the evidence does not support the claims asserted. Thus, Attorney's continued employment is prohibited by Business and Professions Code section 6068(c) and, to the extent that the lack of evidentiary support means the claim is not "warranted under existing law," by rule 3-200(B). Attorney must therefore withdraw from the representation under rule 3-700(B)(2).[2/]

III. Although Grounds for Mandatory Withdrawal Exist, May Attorney Nevertheless Settle the Case?

A. Attorney Continues to Have Ethical Duties Even Though Attorney Has Concluded Client's Case Lacks Merit

Attorney's ethical duties to Client do not cease because Attorney has determined the case lacks merit and Attorney must withdraw.

Even where grounds for mandatory withdrawal under rule 3-700(B) exist, an attorney may not withdraw from representation until the attorney "has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." Rule 3-700(A); see also *In the Matter of Hickey* (1990) 50 Cal.3d 571 [788 P.2d 684]; *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 311 [146 Cal.Rptr. 218]. In a matter pending before a tribunal, even where mandatory grounds for withdrawal exist, the duty to take reasonable steps to protect against reasonably foreseeable prejudice lasts until the attorney is either formally substituted out of the case or has been relieved as counsel by order of the Court. See *In the Matter of Riley* (Rev. Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 115. If neither substitution nor permission to withdraw is granted, the attorney must continue to represent the client and continue to satisfy all ethical and other duties to the client.

In both *In the Matter of Hickey* and *Kirsch*, the lawyer concluded that he could no longer represent the client because the client's claims lacked merit. In *In the Matter of Hickey*, the lawyer called the client and told her he could no longer represent her, but did nothing to obtain a substitution of attorney or to be relieved as counsel by the Court. The lawyer instead let the claims languish, ultimately resulting in dismissal. The lawyer was disciplined for, among other things, failing to withdraw in accordance with the rules and failing to take steps to avoid reasonably foreseeable prejudice to the client. Thus, although the lawyer had determined the case lacked merit and mandatory grounds for withdrawal therefore existed under the predecessor to rule 3-700(B)(2), the lawyer could not simply let it be dismissed through inaction.

[2/] Attorney's continued prosecution of Client's claim may also be sanctionable under Code of Civil Procedure sections 128.5 or 128.7 or Federal Rules of Civil Procedure 11.

The attorney in *Kirsch* did take steps to be relieved as counsel, ultimately obtaining a court order relieving him as counsel, but with only two months remaining to bring the case to trial. The client thereafter sued the attorney, claiming that his determination that the case lacked merit was incorrect and that the withdrawal was too close to the prosecution deadline thereby prejudicing the client. The Court rejected the client's claims, holding "an attorney should not seek nonconsensual withdrawal immediately upon determination that the case lacks merit, but should delay to give his client an opportunity to obtain other counsel or to file a consensual withdrawal." *Kirsch*, 21 Cal.3d at 311. This is because when an attorney non-consensually withdraws, there is "an obvious inference" that the withdrawal "is not for the client's purpose but for the attorney's purpose, usually a lack of confidence in the merits of the case." *Id.* [3/]

Thus, between the time an attorney determines that because a client's case lacks merit withdrawal is mandatory, and the time actual withdrawal from the case occurs, the attorney's obligation to represent the client's interests remain.

Here, if Attorney must withdraw because he concludes he is ethically prohibited from proceeding to trial with the case, then any successor attorney may face the same ethical dilemma. Once Attorney withdraws, then, Client could be left without representation and exposed to potential default, entry of a judgment against Client for costs and possibly attorneys' fees, and a potential claim for malicious prosecution against Client. These risks to Client could potentially be avoided or mitigated through a settlement of the claims.

If an attorney may ethically advise a client to dismiss a case that lacks merit, as an attorney surely may, it stands to reason that the attorney could attempt to protect her client's interests by negotiating a settlement that would include a release, such that the case could be dismissed without exposing the client to further liability or expense. This is consistent with *Kirsch* and *In the Matter of Hickey*, which make clear that an attorney who concludes a client's case lacks merit may not simply abandon the client's cause without taking steps to protect the client. We have found no authority that would prohibit Attorney under the circumstances present here from attempting to negotiate a settlement of Client's claims and, indeed, such attempt may be appropriate to avoid reasonably foreseeable prejudice from Attorney's withdrawal.

Thus, under the facts present here, where the lack of merit of a claim mandates withdrawal, Attorney prior to withdrawal may ethically attempt to settle the case and extricate his client from the lawsuit. This conclusion is consistent with an attorney's duty of competence and the obligation under rule 3-700(A) to take reasonable steps before withdrawal to avoid reasonably foreseeable prejudice to her client.

[3/] Although not dealing directly with the issue of mandatory withdrawal, *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54], is instructive as to an attorney's duties when he or she concludes that a client's case lacks merit. In *Zamos*, the Court held an attorney who receives information after commencing an action indicating his client's claims are meritless, but continues to prosecute those claims, may be liable for malicious prosecution, but only if the claims are such that "any reasonable attorney would agree are totally and completely without merit." *Zamos*, 32 Cal.4th at 971. Under such circumstances, the attorney must either cause the dismissal of the lawsuit or withdraw. *Id*. at 969-70. The Court also suggests that the attorney may (and perhaps must) properly advise the client to dismiss the lawsuit: "[B]y advising a client to dismiss a meritless case, the attorney will serve the client's best interest in that the client will avoid the cost of fruitless litigation, and the client's exposure to liability for malicious prosecution will be limited." *Zamos*, 32 Cal.4th at 969-70.

B. The Steps Attorney May Take to Avoid Prejudice May Be Tempered Because Attorney Has Knowledge that the Case Lacks Merit

Although Attorney may have an obligation to take reasonable steps to avoid reasonably foreseeable prejudice, which may include seeking dismissal or settlement of the case, Attorney here cannot advocate the merit of Client's position knowing that it has none and must be truthful with respect to material matters in any negotiation.

In connection with efforts to settle, for example, Attorney may not falsely represent to the other side that Attorney has secured witnesses who will corroborate Client's story, that Client has suffered significant damages recoverable from defendants, or otherwise be dishonest about the merits of Client's claims. See Cal. State Bar Formal Opn. No. 2015-194 (Puffing in Negotiations); *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1123 [100 Cal.Rptr.2d 246] (duty of zealous advocacy is limited by "the bounds of the law"); Business and Professions Code sections 6068(d) (an attorney must use "for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth"), 6106 (prohibiting attorneys from engaging in any acts involving moral turpitude or dishonesty), and 6128(a) (attorney engaging in "any deceit or collusion" with the intention of deceiving any party is guilty of a misdemeanor). "[A] lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient [citation], and may be liable to a nonclient for fraudulent statements made during business negotiations." *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26].

If the attorney's conclusion that the case lacks merit was based on information wrongfully concealed from the opposing side during discovery, Attorney may be prohibited by the ethical obligations of honesty from settling the case before withdrawing, unless Attorney corrects the misapprehension of facts before participating in negotiating a settlement of the claim. (See, e.g., rule 5-220; Bus. & Prof. Code §§ 6068(d), 6106 and 6128(a).)

Acts of moral turpitude prohibited by Business and Professions Code section 6106 "include concealment as well as affirmative misrepresentations." *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 86. "'[N]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact.'" *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 808 (quoting *In the Matter of Chestnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174); see also Cal. State Bar Formal Opn. No. 2013-189. Under our facts, Attorney concluded that the Client's case lacks merit through the discovery process, suggesting that both sides had an equal opportunity to learn the information Attorney possesses. There is no suggestion that Client or Attorney, for example, falsified evidence or failed to disclose material information that they were under a duty to disclose.

Under our facts, while Attorney's advocacy of Client's position may be tempered by his duty of honesty, he may ethically attempt to settle the claim.

CONCLUSION

Even when an attorney determines withdrawal is required because the client's claim lack merit, reasonable steps must be taken to avoid reasonably foreseeable prejudice to the client before withdrawal. Those steps could include delaying withdrawal to allow the client to attempt to retain other counsel, continuing to take the steps necessary to preserve the claim, advising client to dismiss the case, and/or negotiating to settle the claim, provided a settlement could be negotiated consistent with the attorney's ethical obligations of honesty. The attorney may not make any false statements about the merits of the client's claim in the course of the settlement process and may not be able to negotiate terms of settlement at all if doing so would be based on the wrongful concealment of information material to determining the merits of the case and required to be disclosed.