"But I don't want to settle"

When the client's determination to go forward conflicts with his best interests or your pocketbook

By Allison Fairchild

We have all encountered the client, especially in emotionally charged employment cases, who would not settle: damn the torpedoes, full speed ahead! That moment, sitting with one of *those* clients, heads bowed, our benefit-versus-cost presentation hanging limply in our hands or scrawled uselessly across a white board, can be a crossroads moment in the case. If you are prepared, the decision can be made without a lot of fanfare. If you are not prepared, there might be some landmines ahead.

No matter what type of client we are faced with, we are required by law to communicate, promptly, "All amounts, terms, and conditions of any written offer of settlement made to the client…" (CRPC 3-510; see also Cal. Bus. & Prof. Code, § 6103.5.) The discussion following Rule 3-510 states, "Any oral offers of settlement made to the client in a civil matter should also be communicated if they are "significant" for the purposes of rule 3-500." Rule 3-500 states

> A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

The question is, must you refuse or accept a settlement offer because your client says so? Ultimately, the answer is simple: yes. (*United States v. Beebe* (1901) 180 U.S. 343; *Linsk v. Linsk* (1969) 70 Cal.2d 272; see *Estate of Falco* (2nd Dist. 1987) 188 Cal.App.3d 1004 and *Sampson v. State Bar* (1974) 12 Cal.3d 70.) In fact, an attorney may be subject to disciplinary action if a settlement agreement is concluded without client authority. (*Ibid.*)

Even so, there is always the road that gets you from point A, i.e., the client's initial reaction to a settlement offer, to point B, i.e., whether the offer is accepted or rejected. It is best to map out that road before facing any client who is too emotionally invested in the process to make a decision that actually would be in his or her best interest.

On that note, let us all reflect on the words of Abraham Lincoln, "He who represents himself, has a fool for a client." One of the reasons for this may be that litigants can become very attached both to the process and the outcome of the conflict for which they seek legal representation. We might see the process as a means to achieve our desired outcome, but litigants might see the process as an end in itself.

For instance, I found some sociological research discussing the reactions of defendants in the traffic courts of Chicago. (E. Allan Lind & Tom R. Tyler, *Social Psychology of Procedural Justice* 2 (1988).) The judges there often dismissed traffic infractions just because the defendant showed up in court: if they showed up and lost a day's worth of pay, then that was considered sufficient punishment. (*Ibid.*) Even so, the defendants often left angry and dissatisfied because they were denied their day in court, i.e., they didn't get to present their evidence of innocence before the dismissal. (*Ibid.*)

Given our duty as a fiduciary to our clients, therefore, the first step must be to understand what is actually in the best interest of each client. Most of the time, recalcitrant clients will ultimately see the objective realities of their cases, and we are able to guide them through a reasonable settlement, or away from those that are unreasonable. Then again, there are those who will never see reason.

In addition, we may not always be happy with what is in the best interest of our clients. What if, for instance, it is in your client's best interest to settle prematurely – or drop the lawsuit because the process is *that* damaging to his or her physical or mental well-being? That could be a disaster, financially, for you and/or your firm. Or, what if it is in your client's best interest to continue the litigation and you and/or your firm do not have the financial means to go forward? (Have you read *A Civil Action* by Jonathan Harr?)

A position of fiduciary

The bottom line, as we all know, is that it does not matter. We stand in a position of fiduciary to our clients. "A fiduciary is a person who undertakes to act in the interest of another person." (Austin W. Scott, *The Fiduciary Principle,* 37 California Law Review 540 (1949).) Our duties as a fiduciary to our clients really cannot be overstated.

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties…Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd…

(*Id.* at 555 citing Chief Justice Cardozo (later Mr. Justice Cardozo) in *Meinhard v. Salmon* (1928) 249 N.Y. 458.)

We are, as attorneys, adept at persuasion. Persuading a client to make decisions in their best interest is, of course, part of our fiduciary duty to our clients. On the other hand, coercing or manipulating our clients into doing what is in *our* best interests is a violation of that same duty.

I am not speaking of malicious intent – I'm speaking of getting caught up in the tangibles and intangibles related to *our* business and financial interests, rather than the best interest of the one client in front of us. For instance, we may determine early in the case what the best settlement would be to maximize profit and minimize risk – for our financial position. We may pre-determine that this is a case we will not take to trial because we cannot afford to do so, or do not want to take the risk – and then balk when faced with a client who may reasonably insist that we do so.

We may want a certain outcome in order to impress other, potential clients, or to impress other attorneys who may refer us cases. Or, perhaps it is important to not press forward on this case in order to influence opposing counsel with whom we will have an ongoing relationship in other or future cases – or the reverse, that we need to make a statement to opposing counsel with this case even if it is not in our client's best interest to do so.

Granted, the line between our interests and the client's interests is not always so bright; and the line between persuasion and manipulation may not always be as clear as we might like. However, if you manage to cross these lines, you risk your license.

Your duty as a fiduciary precludes the use of undue influence. (See *Trafton v. Youngblood* (1968) 69 Cal.2d 17; *Clark v. State Bar* (1952) 39 Cal.2d 161.) In addition, the use of coercion may implicate the prohibition against moral turpitude, dishonesty or corruption.

> The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.
>
> If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

(Cal. Bus. & Prof. Code, § 6106.)

Refusing a settlement

Now, let us consider what is possible when a client refuses a settlement that, objectively, is in the client's best interests. Must you really refuse it and continue, despite the potential for a less than positive outcome? Again, the answer is apparently yes.

However, there are also rules prohibiting attorneys from pursuing litigation for improper purposes such as "…harassing or maliciously injuring any person…" or to pursue litigation "…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." (CRPC 3-200.)

Do you think your client's instructions are as a result of an improper purpose? If so, you may have grounds for mandatory withdrawal pursuant to California Rules of Professional Conduct 3-700(B):

> 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 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; or
>
> (2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; …

You may also have grounds for permissive withdrawal pursuant to California Rules of Court 3-700(C):

> 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:
>
> (1) The client
>
> (a) insists upon presenting a claim or defense 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
>
> …
>
> (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
>
> …

Withdrawal of representation is a drastic measure unless there are truly grounds for it. If you fail, the relationship with your client will probably suffer trust issues. In addition, even if you need to proceed with either mandatory or permissive withdrawal, you are still obligated by your duties of fiduciary and loyalty under Rule 3-700(A),

> 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.

You will need to document the reason for withdrawal within the parameters of your duty of confidentiality, and then file a motion to withdraw with the court. Again, keep track of your duties of confidentiality when preparing and filing such a motion to withdraw. I have filed such a motion,

under seal, even with the client's permission, in writing, that my firm withdraw representation: better safe than sorry.

If you have not yet filed the action, and even if your client's refusal does not appear to be for improper purposes, you may have an out if you are willing to go through the proper motion procedures and risk the fallout if your motion is denied. Rule 3-700(C)(1)(e) allows a member to request permissive withdrawal if,

> (1) The client
>
> (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

If you have not already filed the action, and your client's recalcitrance does not appear to be for improper purposes, you might take a stab at convincing the court it would be in the client's best interest to obtain other counsel pursuant to Rule 3-700(C)(6),

> (6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

Communicating to your client – carefully and diplomatically – about your intention to file a motion under Rule 3-700 could also result in a change of heart on the part of the client. It may not, of course, but you will have to give your client notice of the motion anyway, so why not take the opportunity and make the best of it?

What happens if the client's refusal to settle does not impact your other ethical obligations, but does result in costs and expenses that you may not be able to cover? This may also occur if you are faced with a client who wants to settle for what you consider to be an unreasonable amount, or whose best interests mean shutting down the case to avoid further physical or mental harm to the client.

This is probably not going to happen very often if you are careful about assessing your financial obligations, and your ability to move forward with any given case – *before* you take the case. However, sometimes costs explode for unforeseen reasons. Maybe you got blinded by dollar signs, and when the client is not interested in settling when *you* need them to settle, you get stuck between a rock and a hard place. Or, another case or two, or five, tank unexpectedly and you are left without sufficient resources for this case.

Withdrawing from a case

There are black-and-white rules about avoiding interests adverse to a client. (See e.g., CRPC 3-300, 3-310, 3-500, 3-700, 4-100.) These rules are based on the attorney's duty of undivided loyalty. (See Rule 3-300; and by analogy Rule 3-310 and related case law including *Jeffry v. L.J. Pounds, et al.* (1977) 67 Cal.App.3d 6; *Erskine & Tulley* (1988) 203 Cal.App.3d 884; *Anderson v. Eaton* (1930) 211 Cal. 113; *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070; *Flatt v. Superior Court* (1994) 9 Cal.4th 275.)

> By virtue of this rule, an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.

(*Anderson v. Eaton* (1930) 211 Cal. 113.)

When you cannot afford to continue

By analogy, if your own financial interests suddenly become precarious as a result of pursuing the client's interests, do you have a duty to disclose such a conflict of interest before discussing how to proceed with the settlement and/or case at issue?

Even if you decide that there is no duty to disclose such a conflict, do you have a duty to disclose under the communication requirements of California Rule of Professional Conduct 3-500? In other words, if you are required to continue litigating a client's case beyond the point of no return for you or your firm's financial stability, does that constitute a development relating to the representation significant enough to require communication to your client?

Regardless, there may come a time when you have no choice but to ask for permission to withdraw from a case before your own lack of resources ends up putting your client's interests at risk. Please note how I phrased that last sentence: if you cannot put your client's interests before your own, it may be time to ask the court permission – for the sake of the client – to withdraw from representation of the client.

Rule 3-700 does give you this *possibility*.

> 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:
>
> …
>
> (2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or
>
> …
>
> (6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

Again, your fiduciary duty to your client does not cease just because you are in the process of withdrawing – nor is there any level of guarantee that the court will grant your request. Your looming financial doom may not sway a judge if you still have a house to sell, or a car…

If there is ever a time to crunch the numbers, it is *before* you sign a contingent-fee agreement in a case that might just be over your head financially. Find a

co-counsel to help fund the case, apply for a line of credit – if you need to take the case, then find a way to do it *before* you take the case.

Finally, discussing the relative issues related to settlement with your new client at the onset of representation may facilitate future discussions with your client at the time of mediation and/or settlement. You may also want to consider including a term regarding settlement in your fee agreement, although according to the State Bar, it is "optional." Here is a sample term from State Bar of California's Sample Written Fee Agreement Forms:

(9) APPROVAL NECESSARY FOR SETTLEMENT. Attorney will not make any settlement or compromise of any nature of any of Client's claims without Client's prior approval. Client retains the absolute right to accept or reject any settlement. Client agrees to consider seriously any settlement offer Attorney recommends before making a decision to accept or reject such offer. Client agrees not to make any settlement or compromise of any nature of any of Client's claims without prior notice to Attorney.

(Prepared by the State Bar Committee on Mandatory Fee Arbitration. Approved by the Board of Governors June 20, 1987; amended effective November 22, 1996; May 15, 2001; June 23, 2005; March 8, 2010; November 19, 2010.)

If you discuss the issue of settlement before signing the agreement, you might get a good look at your client's predispositions. You may decide to take the case anyway, but you will, at the very least, know what the future might hold.


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