

PROFESSIONAL LIABILITY UPDATE

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CONTINGENT ATTORNEYS' FEES

California Law

By Jennifer A. Becker

*The Fourth District holds that a contingency fee attorney who voluntarily withdraws from a case is not entitled to a quantum meruit fee from the recovery.*

**Rus, Miliband & Smith v. Conkle & Olesten** (2003) 114 Cal.App.4<sup>th</sup> 656

When the Hill Williams real estate empire collapsed Charles W. Daff was appointed Chapter 7 Trustee and Rus, Miliband & Smith (Rus) served as his counsel. The Rus firm sued numerous potentially liable parties, including their future client, the accounting firm of Goodrich, Goodyear & Hinds (Goodrich). Goodrich tendered the claim to their carrier who took the position that there was only one policy that covered the acts with a one million dollar diminishing limit. Except for Daff's action all other claims against Goodrich related to Hill Williams were resolved within policy limits.

Daff's case was settled when Goodrich stipulated to a judgment of \$40,000,000.00, with an agreement not to execute, and payment of the remaining policy limits. Goodrich retained its rights against its carrier and agreed to be represented in the bad faith action by Rus on a contingency fee basis. Daff was to receive a percentage of any recovery against the carrier.

At the demurrer stage of the bad faith case Goodrich wrote to Rus asking questions about the factual basis of the lawsuit. A partner wrote back responding to the inquiries but this was quickly followed up by another letter from another partner claiming an irreconcilable conflict of interest necessitating withdrawal. Goodrich asked that the Rus firm not withdraw and agreed to cooperate but Rus moved to withdraw on the basis that there was a breakdown in communications. Goodrich opposed the motion arguing that there had not been a breakdown in communication; Rus disagreed. Rus maintained that it was entitled to unilaterally terminate the representation based on its dissatisfaction with the relationship. The trial court granted the motion for unspecified "good cause."

Goodrich's personal counsel, Conkle, took over the representation. Conkle opposed a summary judgment motion by the carrier and moved for summary adjudication. Goodrich was successful in both motions and subsequently

obtained a settlement, generating a substantial contingent fee.

Conkle filed a declaratory relief action against Rus to establish that it did not have an enforceable claim on the attorney fees. Rus then filed a cross-complaint for quantum meruit. Conkle and Goodrich separately moved for summary judgment. Rus argued in opposition that Goodrich's letter inferred that Rus was forcing Goodrich to testify falsely and therefore Rus had justifiable cause to withdraw entitling it to quantum meruit. Rus also argued that there were questions of fact as to whether the withdrawal was permissive or mandatory. The trial court decided the withdrawal was not justified and granted the motions for summary judgment.

The Court of Appeal observed that the fee recovery after termination of a contingent fee attorney depends on who terminates the relationship and the reason for termination. When the client unilaterally discharges the attorney the law is clear that the attorney is entitled to a quantum meruit claim against any recovery. Even an attorney discharged with cause is entitled to recover the reasonable value of services rendered to the time of discharge. Without such a rule a client's absolute right to discharge an attorney in a contingency fee case allows the client, in effect, to confiscate the attorney's work.

When an attorney withdraws over a client's objection recovery of fees depends on whether there was justifiable cause. If the attorney withdraws because of a good faith belief that the case is meritless, he or she has no claim on any eventual recovery. Other than the "meritless case" scenario, each case is dependent on its particular facts.

The Court disagreed with Rus's argument that withdrawal from a case the attorney believes to have merit automatically entitles the attorney to quantum meruit. The test is whether the cause for withdrawal is sufficiently justifiable so as to permit recovery by the withdrawn attorney.

The Court concluded that Rus's withdrawal was not mandated for ethical reasons. To establish a withdrawal for ethical reasons the attorney must demonstrate that the withdrawal be truly mandatory under the professional rules and that primary motivation to withdraw was to adhere to the professional ethical rules. Withdrawal due to breakdowns in communications is permissive under the State Bar Rules, but not required. Furthermore, a client's insulting letter does not move the withdrawal into the mandatory withdrawal column.

Prior cases denying recovery have characterized attorney withdrawal from a case for primarily economic reasons as "bet hedging." Allowing an attorney under a contingency fee agreement to permissively withdraw, yet still recover fees, shifts the time, effort, and risk from the attorney, who originally agreed to take the risk, to the client. For a permissively withdrawing attorney to obtain a fee recovery the rationale for withdrawal must pass heightened scrutiny.

The Rus firm never gave any factual reason to justify its withdrawal, and thus was unable to withstand regular scrutiny, much less heightened scrutiny. Even if Rus had believed that the Goodrich letter was a "set up" based on the prior adverse relationship between Goodrich and Rus, the Rus firm should have expected Goodrich to ask for assurances to protect

them from malicious prosecution claims should the litigation being recommended by the Rus firm fail. In any event, Rus failed to make the claim that it was being “set up” in opposition to the motion for summary judgment.

Based solely on the text of Goodrich’s letter, the withdrawal was not justified. Goodrich expressed no reluctance to cooperate and Goodrich had the right to ask questions about the basis of the litigation. The letter merely demonstrated that Goodrich expected Rus to do the legwork in the face of upcoming discovery requests. The court observed that clients should not have to refrain from asking questions on the chance that their attorneys will feel insulted over a perceived lack of trust. The first Rus attorney’s response was reasonable; the second letter was overkill and indicated a new agenda: to get out of the case. This conclusion was reinforced by Rus’s steadfast refusal to reconsider even after Goodrich expressed its willingness to proceed and cooperate. Thus, Rus was not entitled to any fee.

*Comment:* Attorneys generally may withdraw for any reason. However, this case reminds attorneys that fee entitlement is not automatic. Courts expect attorneys who agree to take a risk to follow through and will not treat every difficulty between attorney and client as a right to sidestep responsibility to see the litigation to its conclusion.

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