

# HOW TO TERMINATE A CLIENT ENGAGEMENT

**JAMES M . MCCORMACK,**  
Attorney and Counselor at Law  
7004 Bee Caves Road, Building 1, Suite 205  
Austin, Texas 78746  
Office: 512-615-2408  
Fax: 512-615-2420  
Email: [jmccormack@austin.rr.com](mailto:jmccormack@austin.rr.com)

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**CHAPTER 5**



**JAMES M. McCORMACK**  
**Attorney and Counselor at Law**  
7004 Bee Caves Road, Building 1, Suite 205  
Austin, Texas 78746  
Office: 512-615-2408  
Fax: 512-615-2420  
*Email: [jmmccormack@austin.rr.com](mailto:jmmccormack@austin.rr.com)*

***EMPHASIZING LEGAL ETHICS  
AND LEGAL MALPRACTICE CONSULTATION***

Mr. McCormack is the former **General Counsel and Chief Disciplinary Counsel of the State Bar of Texas (1991-1996)** and a former **Managing Attorney** of the Civil Litigation Section of the Travis County Attorney's Office in Austin, Texas. As the **State Bar's Chief Disciplinary Counsel**, he served as the chief legal ethics enforcement officer for the attorney discipline system in Texas. He is a graduate of the **University of Texas at Austin: BBA with Honors, 1981; Doctor of Jurisprudence, 1984.**

Mr. McCormack also served as an **adjunct professor of law at the University of Texas School of Law** in Austin where he taught professional responsibility. He is a regular lecturer on legal ethics and malpractice issues. His article in the American Bar Association's *Law Practice Management* magazine entitled "Good Ethics, Smart Tactics" was named by the magazine as one of the top five articles of 1995.

From 1998 to 2004, Mr. McCormack served as a member of the State Bar's **Texas Disciplinary Rules of Professional Conduct Committee**, which is charged with recommending amendments to the Texas ethics rules.

He served as the **Chairman of the Board of Trustees of the Texas Center for Legal Ethics and Professionalism (Chair-Elect, 2006-2007; Chairman 2007-2008; Immediate Past Chairman 2008-2009).**

**Mr. McCormack's Austin-based practice emphasizes legal ethics and legal malpractice consultation as well as practice management services for law firms across Texas.** Past consultations include conflicts of interest analysis, mass tort settlements, disqualification motions, lawyer advertising and solicitation questions, organizational ethics reviews, expert testimony, representation before the Texas Board of Law Examiners, and other professional responsibility and malpractice-related counsel.

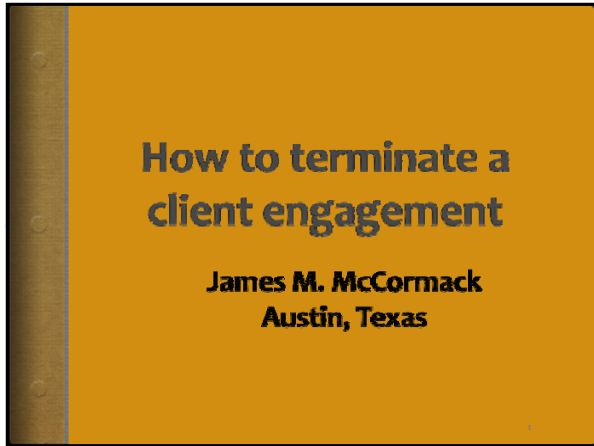
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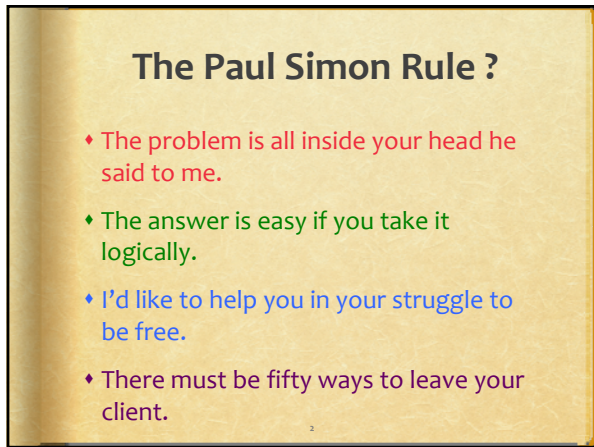
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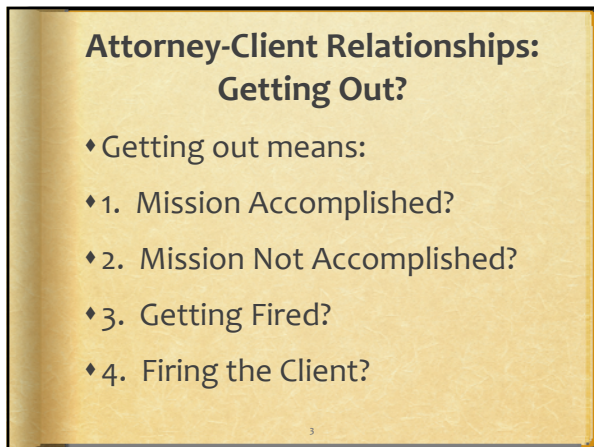
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**The Client Engagement: Getting Out**

- ♦ Whichever Way the Engagement Ends, It is Important to Be Clear That It is Over—**No need to be coy, Roy.**
- ♦ Written Termination and/or File Closing Letters to Clients.
- ♦ *Medrano v. Reyes*: summary judgment granted for attorney who proved termination letter sent.

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**Getting Out by Getting Fired?**

1. Clients have an absolute right to terminate the relationship.
2. **BUT:** A client may have contractual obligations that survive the termination.
3. Example: Client may still owe fees and expenses.

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**Getting Out by Getting Fired?**

1. *Mandell & Wright v. Thomas* (Tex. 1969): contingent fee lawyer who is discharged **without cause** before the representation is completed may seek quantum meruit fees or sue to enforce the contract from any damages the client subsequently recovers.
2. Texas Supreme Court reaffirmed this general rule in *Hoover Slovack LLP v. Walton* (Tex. 2006) while invalidating a termination fee clause the firm was enforcing.

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**Getting Out: Withdrawal Where You Must**

- Rule 1.15, TDRPC, provides the grounds:
  - **Mandatory withdrawal where:**
    - A. The representation violates Rule 3.08 or another disciplinary rule;
    - B. The lawyer’s physical, mental or psychological condition materially impairs the lawyer’s fitness to represent the client;
    - C. The lawyer is discharged, with or without cause.

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**Voluntary Withdrawal from Representation—Slipping Out the Back, Jack.**

- Except as required in the above, a lawyer **shall not withdraw unless:**
  1. Withdrawal can be accomplished **without material adverse effect** on the interests of the client;
  2. The client persists in a course of action involving the lawyer’s services that the lawyer **reasonably believes may be criminal or fraudulent;**

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**Withdrawing (cont.)**

- 3. The client has used the lawyer’s services to perpetrate a **crime or fraud;**
- 4. A client insists upon pursuing an objective that the lawyer considers **repugnant or imprudent or which the lawyer has fundamental disagreement;**
- Texas Professional Ethics Opinion 557 (2005): Client expresses “strong disagreement” with attorney’s settlement value of case and consults malpractice counsel. Committee approves withdrawal under “fundamental disagreement” ground or client has made representation “unreasonably difficult” ground.

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### Withdrawing (cont.)

- 5. The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services, including payment of fees, and **has been given reasonable warning that the lawyer will withdraw;**
- 6. The representation will result in an **unreasonable financial burden** on the lawyer or has been **rendered unreasonably difficult by the client;**
- 7. Other good cause for withdrawal exists.

• **Note:** A lawyer may withdraw for **reasons 2 to 7 even if** the withdrawal may have a material adverse effect upon the client’s interests. See Comment 8 and *Hovious v. Hovious* (Fort Worth, 2005, pet. denied).

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### Withdrawing

- **STEPS:**
- 1. Timely notice to client of intent to withdraw and reasons for withdrawal. **Again, no need to be coy, Roy.**
- 2. If in litigation, File Motion to Withdraw—with written notice to clients and other parties.
- 3. Set hearing on Motion to Withdraw unless client and other parties agree to your withdrawal.
- 4. If your withdrawal is contested, be prepared to offer evidence—and not just argument in support.

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### The Withdrawal Hearing

- **NOISY** versus **QUIET** Withdrawals
- Duty to Try to Protect the Client’s Interests in Withdrawing.
- **HOWEVER:** Attorneys have the ability to disclose Client Confidential Information (**Privileged and Unprivileged Client Information is Generally Protected by Rule 1.05, Texas Disciplinary Rules of Professional Conduct**) in limited circumstances.
- Attorneys do **not** have **carte blanche** to disclose whatever they wish about the client in withdrawing.

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**Withdrawal and Client Confidentiality**

- RULE 1.05, TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT
- **RELEVANT EXCEPTIONS TO THE BROAD CLIENT CONFIDENTIALITY PROTECTIONS IN THIS RULE:**
- 1. MAY DISCLOSE CONFIDENTIAL INFORMATION WHEN NECESSARY TO TO COMPLY WITH A COURT ORDER, A TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT, OR OTHER LAW;
- 2. MAY DISCLOSE TO PREVENT A CLIENT FROM COMMITTING A CRIMINAL OR FRAUDULENT ACT;

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**Select Confidentiality Exceptions (cont.)**

- 3. DISCLOSE TO THE EXTENT REVELATON REASONABLY APPEARS NECESSARY TO RECTIFY THE CONSEQUENCES OF A CLIENT’S CRIMINAL OR FRAUDULENT ACT IN THE COMMISSION OF WHICH THE LAWYER’S SERVICES HAD BEEN USED;
- 4. MAY DISCLOSE **UNPRIVILEGED** CLIENT INFORMATION WHEN NECESSARY TO RESPOND TO ALLEGATIONS IN ANY PROCEEDING CONCERNING THE LAWYER’S REPRESENTATION OF THE CLIENT;
- 5. SEE ALSO DISCLOSURE NEEDED TO COMPLY WITH RULES 3.03 AND 4.01.

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**Confidentiality Exceptions in Support of Motion**

- WHEN IN DOUBT ABOUT WHETHER YOU CAN DISCLOSE CERTAIN CLIENT INFORMATION, WHETHER PRIVILEGED OR UNPRIVILEGED—BUT ALL CONFIDENTIAL—**CONSULT RULE 1.05**
- **HOVIOUS V. HOVIOUS**, 2005 WL 555219 (Tex. App.—Fort Worth 2005, pet. denied): APPLYING TEX. R. CIV. P. 10 PERMITTING WITHDRAWAL FOR “GOOD CAUSE” BUT NOT DEFINING THE TERM. COURT NOTED THAT TEXAS DISCIPLINARY RULES ARE **“GUIDELINES ARTICULATING CONSIDERATIONS RELEVANT TO A ‘GOOD CAUSE’ DETERMINATION UNDER RULE 10.”**

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**THE NOISEST WITHDRAWAL?**

- **The HOVIOUS V. HOVIOUS Example:**
- ATTORNEY SOUGHT TO WITHDRAW AND CLIENT OPPOSED.
- COURT WARNED THE CLIENT THAT THE ATTORNEY-CLIENT PRIVILEGE BELONGED TO HER AND THAT, IF SHE WAIVED THE PRIVILEGE, HER ATTORNEY COULD OFFER EVIDENCE IN SUPPORT OF HIS MOTION THAT MIGHT BE PREJUDICIAL TO HER.
- IT WAS. ATTORNEY TOLD THE COURT THAT CLIENT HAD REPEATEDLY ASSURED ATTORNEY HER MEXICAN DIVORCE DECREE WAS VALID. IT WASN'T. MOTION GRANTED.

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**After Lee Got Free: Following Withdrawal**

- Upon termination of the relationship, take **reasonably practicable steps** to protect the client's interests:
- 1. **Reasonable notice** to the client that attorney has withdrawn—especially where client did not agree.
- 2. **Allowing time for employment** of other counsel (not necessary if fired and may not be reasonably practicable in some instances).
- 3. **Return of file and property** to which the client is entitled (fail not to return the file even if owed money)
- 4. **Return unearned fees**. Be careful about retaining fees that might be unconscionable.

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**Suing Your Client for Those Fees?**

- YOU ARE OWED LEGAL FEES BY YOUR CLIENT.
- YOU CAN SUE YOUR CLIENT FOR THOSE FEES.
- YOUR CLIENT CAN THEN **COUNTERCLAIM** AGAINST YOU FOR LEGAL MALPRACTICE (E.G., UNCONSCIONABLE FEES, ANYONE?)
- YOUR CLIENT CAN ALSO FILE A **GRIEVANCE** AGAINST YOU.
- IN THE END, YOU MAY PREFER TO SKIP COLLECTING UNPAID FEES.

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### About that Client File

- **Rule Number One:** Files belong to Clients, not Attorneys or Law Firms
- **Rule Number Two:** The Client File Includes Everything, including the Attorney's Work Product, and Electronic Data.
- **Rule Number Three:** If the Law Firm Wants to Retain a Copy of the File (And It Should), Then the Firm Copies the File at its Own Expense—i.e., Don't Charge the Client to Copy the Client's Own File.
- **Rule Number Four:** Document What Was Transferred to the Client and Don't Charge the Client for Reviewing the Client's File In Connection with the Transfer.

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### Finally: Anticipating Withdrawal from the Beginning?

- SHOULD YOU INCLUDE GROUNDS FOR WITHDRAWAL IN YOUR CLIENT CONTRACT?
- MAY NOT BE NECESSARY LEGALLY, BUT STILL....
- COULD BE USEFUL IF THERE IS A SUBSEQUENT LEGAL CLAIM AGAINST THE ATTORNEY TO HAVE CONTRACT LANGUAGE REGARDING NON-PAYMENT, NON-MERITORIOUS CLAIMS OR DEFENSES, ETC.
- IS YOUR CONTRACT "EXHIBIT WORTHY" ?

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### The End

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