Can a Lawyer Who Has Formerly Withdrawn His Appearance Incur Liability for Subsequent Events in the Case?

Avoiding Liability

By Jeffrey P. Lewis

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A lawyer on occasion may formally withdraw his or her appearance but continue to offer advice to the lawyer who is remaining in the case or replacing him or her representing the same client. The attorney/client relationship has been formally terminated. Notwithstanding, can the withdrawing lawyer be liable for legal malpractice committed by the non-withdrawing or replacement lawyer after the withdrawing lawyer has withdrawn? The short answer is that it depends on the circumstances. A recent case considered a set of circumstances in which this issue was addressed.

In *Cesso v. Todd*, 82 N.E.3d 1074 (MA. App. 2017), defendant lawyer filed his withdrawal of appearance for a client husband in a divorce action when his co-counsel was departing the law firm to start his own law firm and the client would follow him. The withdrawal was technically incorrect under Massachusetts' procedure. Client denies that he was served with a copy of the withdrawal of appearance. To the contrary, he contends that he did not learn of counsel's withdrawal of appearance and of co-counsel's departure from the firm until he received a letter from the counsel who had withdrawn his appearance informing him of both developments.

That letter, however, provides the key to the analysis as to whether the lawyer who had withdrawn his appearance could be exposed to liability for conduct by the lawyer who continued to represent the client in his own practice. That letter states in part:

> "As you may know, [the departing attorney] has decided to leave [the law firm of the attorney who had withdrawn his appearance] to open his own practice, effective July 28, 2008. **Although [the departing attorney] and I will continue to work together and consult on your case**, your hard files will need to be transferred to [departing attorney's new] office. **It is our usual practice to have clients agree to this in writing**, and as such, I would ask that you please execute this correspondence where indicated and return to my attention as soon as possible so that we may forward your file to [departing attorney's new] office." (bold added).

Client did not sign the letter until 12 days later when it was hand-delivered to him because it was originally mailed to the wrong address, nor did he object to the withdrawal of appearance. Thereafter, the law firm for the lawyer who had withdrawn his appearance did not further bill client after the date this letter was first mailed to the client. Moreover, client admitted that he had no further in-person communication with the lawyer who had withdrawn his appearance after this letter was first mailed to the client.

Before receiving the hand-delivery of this letter, client emailed both attorneys "to discuss team strategy,' evincing [client's] belief that [the lawyer who had withdrawn his appearance] was still part of the team. "Yet the same email demonstrates that no later than [the date of that e-mail] [client] knew that [the lawyer who had withdrawn his appearance] was withdrawing." Moreover, client, apparently in an email, asked the lawyer who had withdrawn, "What are the roles between [client] and [him]?" To which the withdrawn lawyer did not respond and client never objected to his failure to respond.

What happened next is subject to a factual dispute. Client contends that the withdrawn attorney continued to consult on the case, although that attorney denied this. There were time entries for this time period by the withdrawn lawyer, but client was never billed and the withdrawn lawyer contends that the time entries concerned the file transfer and not the substance of the case. Client noted that the cover letter for the last bill sent "states that retainer balance will be applied to future legal services," suggesting that the representation had not come to an end. Yet later, client requested that the balance of the retainer be sent to departing counsel, suggesting that he viewed withdrawn counsel's involvement at an end.

> The formal withdrawal of counsel does not avoid a finding of implied representation when the withdrawing counsel says to the client that he will remain involved in the case until it becomes reasonably apparent to the client that the lawyer is no longer involved.

The withdrawn attorney was not present in court for the first two days of trial. Nor did client object. Moreover, the two counsel conversed between two of the trial days about how the trial was proceeding, and trial counsel even offered that withdrawn counsel "could 'sit in and take an easy witness,' adding that [client] 'would love to see [him] there.'"

Upon conclusion of the divorce action, client eventually asserted legal malpractice claims against both counsel. The withdrawn counsel defended on the basis that an attorney-client relationship no longer existed after he filed his withdrawal of appearance, and, therefore he was not responsible for any legal malpractice that occurred after he withdrew his appearance. Accordingly, he sought and was granted summary judgment.

Massachusetts's intermediate appellate court, however, reversed the trial court. Noting that an attorney-client relationship can rest upon either an express contract or implied as a matter of law, it recognizes the existence of a genuine issue of fact here as to the existence of an attorney-client relationship following withdrawal. Under Massachusetts's case law, such a relationship may be implied when "1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." The court recognized that "the third element may be established by proof of detrimental reliance when the person seeking legal services reasonably relies on the attorney to provide the advice

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Value, Rarity of Oral Arguments

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Employment Opportunity Commission or in mediation, and oral arguments are available. In Philadelphia County, during mediation with judges, we present oral arguments. In appellate work, I have had the opportunity to argue the case," Wilkinson said.

While there may be fewer opportunities for a jury trial, oral argument is not a lost art in her practice. She said it is more beneficial to have oral argument, and if given the choice, she elects to have it. "You can help guide the judge to what the critical issues are. You will know by what the judge asks if you need to go further or not," Wilkinson said.

Wilkinson has more than 30 years of practice and has honed her oral argument skills. "I usually write down notes, but depending on the venue, I don't always look at them. You have to know what you are going to say. Prepare to be flexible, know your case, know what your theme and argument are. It isn't about memorizing a script. It does take experience, and you have to be well prepared."

Without courtroom experience, young attorneys are at a disadvantage. Advocacy requires practice. "There is a whole generation of lawyers functioning as litigators who never go before a judge to argue a case," Stepanian said. "Young lawyers may be able to acquire courtroom skills in other ways, he said. "We have to change our mind set. Mediation and arbitration are increasing parts of our practices. We can be effective advocates at mediation."

Wilkinson said young lawyers have to find other opportunities in the life of a case. "There are opportunities for oral arguments at the summary judgment level, or discovery disputes. It's not only at trial that you can have oral argument. In depositions, there are opportunities to conduct direct or cross examination. Cases can be won or lost at the deposition phase of a case."

Where possible, she delegates an opportunity for argument to other attorneys in her firm. She asks associates to present the oral argument at discovery motions and to observe mediation and accompany her. In Philadelphia County and federal cases, experienced lawyers can be designated to serve as judge pro tempore. When Wilkinson handles settlement conferences or discovery disputes as a judge pro tem, she invites associates to observe. "It gives them a chance to see what more experienced lawyers do and learn from them. It all helps," Wilkinson said.

Stepanian

Wilkinson

The Civil Litigation Section has begun offering a valuable resource for lawyers to learn courtroom skills. Trial minicamps, specifically targeted to young lawyers, help lawyers know how to prepare and conduct arguments.

The trial minicamps have already been held in western and central Pennsylvania with more planned for south central and eastern regions. "This was the brainchild of Sharon López (PBA president), and it's a great idea. They are abridged mock trial programs. They are great opportunities to network with judges and are very practical CLEs," Stepanian said.

"We want to provide young lawyers an opportunity to exercise skills and hone courtroom skills. Anyone who wants to develop courtroom skills should attend," he said.

The Civil Litigation Section's annual retreat is April 13-15 at Skytop Lodge, Skytop. CLE sessions cover a wide range of topics, including tips for jury selection in federal and state court, electronic discovery, keeping civility at depositions, planning for successful outcomes through mediation and learning winning strategies for bench trials. For more information or to register, go to www.pabar.org.

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and the attorney, aware of such reliance, does nothing to negate it."

The court rejected client's argument that the withdrawn counsel's improper procedural means of withdrawal should render his withdrawal invalid, thus precluding him from contending that he had ceased representing client. It found that the trial court has "discretion to forgive noncompliance with a rule," which it exercised here and that client knew more than a month before trial that the withdrawn counsel had in fact withdrawn, without any objection by client, and therefore was "effective to end his formal appearance." But, although that settled the issue of withdrawn counsel's formal withdrawal, in the appellate court's view that did not settle the issue of whether an implied attorney-client relationship continued forward from there. In the appellate court's view, "[o]n this record, reasonable persons could differ as to the existence of an attorney-client relationship' so 'this issue must be resolved by the trier of fact.'" Although the court notes that client makes no argument based upon reliance on withdrawn lawyer's silence, "this misapprehends [client's] argument that he believed the more experienced [withdrawn lawyer] was the architect of the case strategy and was continuing to work in an advisory role."

Under the circumstances of this case, in this court's view, a jury could conclude that withdrawn counsel was remaining on the case, but not later than when he did not appear at trial and client knew (as an admittedly sophisticated consumer) that withdrawn counsel "was not responding to any direction or communication from [client], when he asked withdrawn counsel's firm to forward the balance of the retainer to departing counsel."

The appellate court reversed the grant of summary judgment, but only for claims of malpractice that occurred until trial when it became apparent as a matter of law that withdrawn counsel no longer represented client. The point of this story is that the formal withdrawal of counsel does not avoid a finding of implied representation when the withdrawing counsel says to the client that he will remain involved in the case until it becomes reasonably apparent to the client that the lawyer is no longer involved.