

RESOLUTION 05-02-2017

DIGEST

Family Law: Client's Right to Discharge Attorney

Amends Code of Civil Procedure section 285.1 to allow a client to discharge his/her attorney of record unilaterally in a family law proceeding.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 285.1 to allow a client to discharge his/her attorney of record unilaterally in a family law proceeding. This resolution should be approved in principle because a client should be allowed to discharge his/her attorney in a family law proceeding without having to file a substitution of counsel signed by the attorney or proceed with a noticed motion, just like the attorney is permitted to withdraw unilaterally without the need for a signed substitution or noticed motion.

Under current law, the general rule is that a client can change his/her attorney or decide to proceed in *pro per* in any action or proceeding. This is accomplished in two ways. First, by the mutual consent of the attorney and the client, which is entered in the court's minutes or by the filing of a notice substitution of counsel. Second, by an order of the court based on the application by either the client or the attorney. (Code Civ. Proc., § 284.)

However, there is a broad and one-sided exception for attorneys representing clients in family law proceedings for the dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, or for the support, maintenance or custody of minor children. In such proceedings, the attorney can unilaterally withdraw from the representation after a judgment (other than an interlocutory judgment) becomes final, and before any other pleadings or motion papers still pending in that matter are served on him. (Code of Civ. Proc., § 285.1.) The attorney does so simply by filing and serving a notice of withdrawal. (Ibid.) The attorney does not need client consent because the judgment signals the end of the matter the attorney was retained for, e.g. to achieve a dissolution of marriage.

But the client is still bound by the general rule articulated in section 284 of the Code of Civil Procedure, and cannot unilaterally discharge his/her attorney in the same family law proceedings, even when the attorney does not respond to communications from the client. When this happens, the client often shows up to a hearing without his/her attorney expecting to be able to move the case forward in *pro per*, not knowing that he/she cannot speak for himself/herself while still represented by the attorney. But the court is powerless to help the client do so because the client is still represented by counsel until either a substitution of counsel is filed or a motion to discharge the non-responsive attorney is noticed and heard. Until then, the court can only continue the matter. Thus, the client is hamstrung by his/her attorney's non-responsiveness, and

cannot move his/her divorce forward without either obtaining a substitution of counsel (not possible, as the attorney is not responding), or filing an expensive motion to discharge his/her attorney.

This one-sided exception is harming clients and needlessly delaying family law proceedings. This resolution offers a practical solution. It makes the narrow exception to the general rule of how the attorney-client relationship is terminated in certain pending family law actions or proceedings reciprocal, allowing the client same rights as accorded his/her attorney. The solution is narrowly tailored so that it only applies in specified family law proceedings.

Resolutions Committee notes, however, that this resolution should be redrafted before it is enacted. There is no need to entirely delete the existing language of Code of Civil Procedure, section 285.1 because there is no substantive change to the exception for the attorney's unilateral withdrawal. Instead, it may be better to structure it as follows: not strike out the existing language but re-number the existing paragraph as subsection (a), change the existing subsections to (1), (2), and (3), and insert the new proposed language as subsection (b). Further, it may be better to enumerate the proceedings in which the new exception applies in the new paragraph, paralleling the enumeration in the current exception for attorneys, rather than relying on the statute numbers, because statutes get re-numbered requiring these references to be amended each time that happens.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsor to amend Code of Civil Procedure section 285.1 to read as follows:

- 1 § 285.1
2 Notwithstanding Section 284, in any civil action or proceeding pursuant to Family Code
3 Section 299, 2250, 2330, 6200, and 7600, either of the following may occur:
4 a) A party may at any time unilaterally relieve his or her attorney of record, including
5 when the attorney is providing limited scope representation, by filing a notice to relieve the
6 attorney. The party shall, no later than 10 days after the filing of the notice and at least 30 days
7 before the next scheduled hearing, serve the notice on the attorney at his or her address on record
8 with the State Bar of California and on all parties in the action or proceeding and their attorneys
9 of record. The Judicial Council shall revise current forms or develop new forms necessary to
10 implement this subdivision.
11 b) An attorney of record for a party in any civil action or proceeding for dissolution of
12 marriage, legal separation, or for a declaration of void or voidable marriage, or for the support,
13 maintenance or custody of minor children any party may withdraw at any time subsequent to the
14 time when any judgment in such the action or proceeding, other than an interlocutory judgment,
15 becomes final, and prior to service upon him or her of pleadings or motion papers in any
16 proceeding then that is pending in said cause the case, by filing a notice of withdrawal. Such The
17 notice shall state (a) the date of entry of final decree or judgment, (b) the last known address of
18 such party, (c) and that such the attorney withdraws as attorney for such the party. A The attorney
19 shall mail a copy of such the notice shall be mailed to such the party at his or her last known
20 address and shall be served upon serve the notice on the adverse party.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS

The Problem: The need for this proposal stems from the significant number of clients who decide to represent themselves but cannot get the cooperation of their respective attorneys to sign the substitution form. The same problem occurs in situations where a new attorney is coming into the case. The reasons for this lack of cooperation are various such as non-payment of fees, failure to update contact information with the State Bar, retirement, and general unresponsiveness. In Santa Clara County, for example, 70-80% of litigants in family law matters are self-represented and the numbers are similar statewide. Many of these litigants do not realize that once represented they cannot proceed in pro per or hire a new attorney until their attorney of record has been substituted out pursuant to California Code of Civil Procedure 284. They usually find out at the first hearing for a motion that either they filed in pro per or to which they are responding. Since the attorney is usually not present and the court cannot remove him/her on the record, the hearing is continued until the substitution form or a motion to relieve the attorney is filed. Scheduling multiple hearings creates hardship for attorneys and parties, wastes court resources and adds to existing calendar backlogs.

The Solution: California Code of Civil Procedure section 285.1 creates an exception to section 284 for family law matters, where an attorney can unilaterally remove himself or herself from a case, with notice, upon entry of a final judgment on all issues but before any further motions are filed. This proposal creates another exception under section 285.1 for family law cases to allow a client to unilaterally discharge his/her attorney of record by way of filing a declaration with notice to the attorneys and the other parties.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Fariba R. Soroosh, 191 North First St., San Jose, CA 95113, (408) 882-2922, fsoroosh@scscourt.org.

RESPONSIBLE FLOOR DELEGATE: Fariba R. Soroosh

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FLEXCOM - Disapprove

Rationale:

The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) disapproves this resolution. The disapproval is based on concerns that the proposed “shortcut” to a formal Motion to Withdraw would put attorneys in the position of perhaps not being served appropriately and thus not knowing that they had been relieved, resulting in acting as the party’s attorney after technically being relieved in this manner. It is currently possible for the consumer to get an Order from the court with a noticed hearing and this is viewed as the preferable manner for removal where the attorney, for whatever reason, refuses to be relieved by the party via a Substitution of Attorney.

Disclaimer:

This position is only that of the FAMILY LAW SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the FAMILY LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.