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Attorneys' Continuing Duties to Court after Termination of Attorney-Client Relationship

by Patrick A. Fraioli Jr.

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Attorneys' Continuing Duties to Court after Termination of Attorney-Client Relationship

By Patrick A. Fraioli Jr., member, LACBA Professional Responsibility and Ethics Committee. Fraioli is a partner in the firm of Rein Evans & Sestanovich LLP. The opinions expressed are his own.

Imagine the following scenario: You are an associate in a firm that is counsel of record in an appeal pending before the California Supreme Court. The appeal is by the firm's name partner in his malpractice suit against his former divorce lawyer. You are the lawyer handling the case, so your name appears on all of the pleadings, and you are scheduled to appear at oral argument in less than a week. A situation arises at your firm that causes you to abruptly resign, and you are asked to leave that same day. Before you do, you remind another associate that the firm has to replace you at the upcoming Supreme Court argument, and you offer to help someone prepare. You leave the firm as requested, believing you have discharged your duties.

No one from your former firm appears at the oral argument. Worse, because no one at your former firm notified the court in advance of what appears to be an intentional non-appearance, the court's operations are severely disrupted as it attempts to contact the firm to determine whether anyone will attend the oral argument. The court is not pleased.

A short time later, both you and the firm's name partner (who is also the appellant) become the subject of an order to show cause why each of you should not be held in contempt of court for willful neglect of the duty to appear for oral argument before the California Supreme Court. You respond, protesting that you were relieved from your duty to appear by your resignation (which you characterize as a "constructive discharge"), and that, in any event, it was the firm, not you personally, that was and remained counsel of record, and therefore had the duty to appear in the first place. You argue that the responsibility to appear always belonged to the firm as counsel of record and never to you individually. Thus, if anyone should be disciplined for not notifying the court of the firm's non-appearance, it should be the firm.

The court is not persuaded. You are held in contempt of court for willful neglect of the duty to appear for oral argument before it.

Sound impossible? It's not. This is the fact pattern of the recent decision, *In re Aguilar (Aguilar v. Lerner)*, 18 Cal. Rptr.3d 874, 2004 Daily Journal D.A.R. 11, 919 (September 23, 2004). The *Aguilar* court held both the firm's name partner, attorney Aguilar, and the associate in the above example, attorney Kent, in contempt for failure to either appear or at least notify the court of the non-

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appearance.

The *Aguilar* court provides several clear rulings on the issue of attorneys' duties to the courts. Those who would ignore these clear pronouncements do so at their own peril.

First, as long as the order directing counsel to appear before a court at a specified date and time is sufficiently clear, the attorney has a duty to appear that is personal to the attorney even if it is the firm, and not the individual attorney, that is counsel of record. Willful or intentional neglect of that duty is punishable by contempt. Moreover, the *Aguilar* decision makes clear that the intent required is simply the intent not to appear and no more. *Aguilar* at 876-878.

Second, the *Aguilar* court reminds us that duties owed by attorneys to the courts, like the duties owed by attorneys to clients, in some instances survive the termination of the attorney-client relationship. "Kent's decision to leave the firm did not automatically terminate his professional responsibilities either to his former client or to this court." *Aguilar* at 877. See also Cal. Bus. & Prof. Code Sec. 6068(e); Cal. Rules of Prof. Conduct, Rule 3-700(A)(2).

Finally, an individual attorney's willful failure to satisfy the duty to the court is punishable by contempt sanctions unless sufficient justification or excuse can be established. See *Aguilar* at 876-878. The *Aguilar* court's severest sanction was reserved for *Aguilar* himself, whom, the court found, failed to appear, failed to arrange for another attorney to appear, failed to notify the court, and then lied to the court about it. Nonetheless, the court also took pains to point out that while Kent's dereliction was not nearly as severe as *Aguilar*'s, Kent nonetheless deserved the contempt citation for neither appearing nor notifying the court that he would not be appearing. The court did not find "adequate justification to excuse Kent's failure to notify this court that he would not be appearing at oral argument" in the fact that Kent himself was not attorney of record. *Aguilar* at 878.

From a practical standpoint, the *Aguilar* court appears to have had four concerns foremost in its mind. First, it emphasized the importance of oral argument in its decision-making process. Second, it noted the severe disruption caused by the non-appearance, citing the attorneys' "responsibility for the interference with this Court's operations." Third, while not so stating, the court seems to believe that Kent should have been aware of the substantial likelihood that a significant disruption would occur in these circumstances, since his resignation came so close to the court date. Fourth, the court appears to feel that the burden on Kent of notifying the court of the changed circumstances would have been slight. *Aguilar* at 877-878.

Following *Aguilar*, the best course for attorneys is to keep the court advised of all changes in circumstances that may disrupt the court's calendar or operations. Regardless of whether you or another attorney or firm is counsel of record, if you are set to appear but do not intend to appear, notify the court well in advance of your non-appearance. Failure to do so may result in a contempt citation.

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