January 19, 2022

ADR Services, Inc.

2nd Annual Complimentary MCLE Day

7 hours MCLE CREDIT

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Your Partner in Resolution

MCLE Webinar Schedule:

Expanded Responsibilities Under The Amended Rules Of Professional Conduct

Description: In this presentation, we will discuss the Amended Rules Of Professional Conduct, and how they came to be. The new rules that we will be discussing and the recent opinions pertaining to those rules demonstrate the primacy of the three C's (confidentiality, competence and compliance) as well as the interplay and tension that exists between them. The care taken by the drafting committee (and the Supreme Court) before the issuance of the revised rules in November of 2018 reflects the seriousness of the topics we will discuss.

Time: 9:00 a.m. – 11:00 a.m. (2 hours Legal Ethics Credit)

Eliminating Bias: Next Steps Towards a Positive View

Description: Description: This course revisits the types of negative bias that affect us in the legal profession, and suggests ways to reduce the likelihood that such bias will adversely affect your practice of law. We also examine aspects of certain types of positive bias that enhance professional relationships at all levels, such as a bias for something that can bring understanding, healing, and hope.

Time: 11:15 a.m. – 12:15 p.m. (1 hour Recognition and Elimination of Bias Credit)

Winning While Saving On Costs With Arbitrations And Court References

Description: Description: Due to the impact of the Covid-19 pandemic, courts are backlogged at levels never seen before. Arbitrations and court references, often avoided in the past because of concerns about cost and fundamental fairness, present alternatives that should be reexamined. This presentation will examine the advantages and disadvantages of each alternative, including how to select an arbitrator or temporary judge (referee); preservation of appellate rights; and, perhaps most importantly, how to keep costs down.

Time: 12:30 p.m. – 1:30 p.m. (1 hour General Credit)

Competence: It's More Than Knowing the Law

Description: Description: In addition to learning and skill, the Rules of Professional Conduct require the application of "mental, emotional, and physical ability reasonably necessary for the performance" of legal services. Learn what those terms mean in the context of practicing law; their importance in providing legal services; and avenues for help when necessary mental, emotional, or physical ability are impaired.

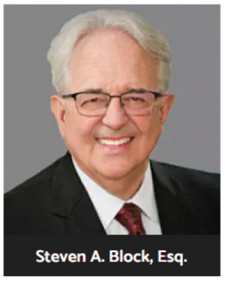
Time: 1:45 p.m. – 2:45 p.m. (1 hour Competence Issues Credit)

California's (not so) New Rules of Professional Conduct and Selected Cautionary Tales

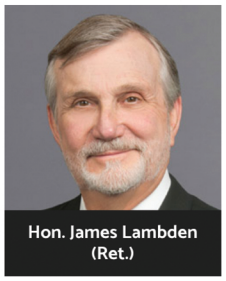
Description: Description: Effective November 2018, California adopted new Rules of Professional Conduct modeled on the American Bar Association's Model Rules. This was the first major overhaul of the California's Rules in 30 years. Although the new Rules are in many respects the same as the old Rules, there are significant changes. We will provide a general overview of the Rules and a more detailed look at what has changed. We will also look at significant new Ethics Opinions and explore common problems that may arise in your practice.

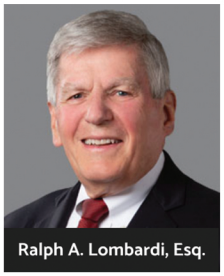
Time: 3:00 p.m. – 5:00 p.m. (2 hours Legal Ethics Credit))

Speakers:

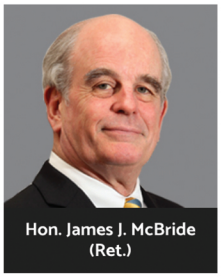

Steven A. Block, Esq.


Hon. Ming W. Chin (Ret.)

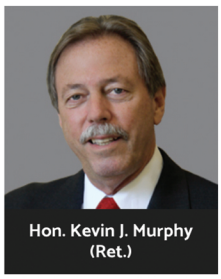

Hon. James Lambden (Ret.)

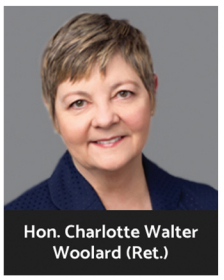

Ralph A. Lombardi, Esq.


Claudia Hagadus Long, Esq.


Hon. James J. McBride (Ret.)


Hon. Nathan D. Mihara (Ret.)


Hon. Kevin J. Murphy (Ret.)


Hon. Charlotte Walter Woolard (Ret.)

NEW RESPONSIBILITIES UNDER THE AMENDED CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Hon. Ming Chin (Ret.)
Hon. James Lambden (Ret.)
ADR SERVICES, INC.
January 19, 2022

IN 2019 CALIFORNIA JOINED THE REST OF THE STATES (FINALLY) BY ADOPTING NEW ETHICS RULES CLOSER TO THE ABA RULES; WHAT HAVE WE LEARNED SINCE THEN

The first comprehensive revision in 29 years of the California Rules Of Profession Conduct took effect on November 1, 2018.

- California joined the other 49 states by adopting ethics rules patterned after the Model Rules of Professional Conduct adopted by the American Bar Association in 1983.
- New Numbering: The former numbering such as 1-100 or 1-120 is now 1.0, 1.0.1, 1.2.1, etc., consistent with the ABA Model Rules numbering.
- Relief for attorneys engaged in multi-jurisdictional practice, who have been required to look at multiple sources to understand California's outlier ethics rules.
- Two blue-ribbon panels examined and proposed revisions to the Rules of Professional Conduct since 2001. The first Commission for the Revision of the Rules of Professional Conduct worked on revisions to the rules from 2001 to 2010, only to have its work rejected by the California Supreme Court in 2014.
- The Court appointed a second Commission, whose work was approved by the State Bar Board of Trustees and presented to the Supreme Court, and redrafted during an extensive 14-month review. The Court unanimously approved the new rulebook in 2018.

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THE SUPREME COURT ISSUED 69 NEW RULES, EFFECTIVE NOVEMBER 1, 2018 AND CPRC OPINIONS HAVE FOLLOWED

- The Court approved 27 amended rules just as they were drafted by the Commission.
- However, the Court authorized 42 other rules with extensive modifications.
- The Justices entirely rejected one proposed rule regarding an attorney's obligations to clients "with diminished capacity."
- **The State Bar Standing Committee on Professional Responsibility and Conduct has issued seven formal Opinions since the new rules became effective. Formal Opinions No. 2019-197 through 2020-204.** calbar.ca.gov/ethics/opinions
- The Rules do not expressly mention lawyers serving clients in the emerging cannabis industry, although the Commission sent the Supreme Court a proposed **Rule 1.2.1** that would allow a lawyer to "discuss the legal consequences of any proposed course of conduct with a client" so long as they do not counsel a client to break the law.
- **Opinion 2020-202 clarifies that attorneys "may provide advice and assistance to clients with respect to conduct permitted by California's cannabis laws, despite the fact that the clients conduct…might violate federal law."**
- **Rule 1.2.1** should also apply in other areas, such as immigration, where state and federal laws diverge.
- The new conflict of interest rules are broader and less case specific under provisions that define what constitutes a legal "matter."
- New Definition of "Person" In **Rule 1.0**, the definition of "Person" has the same meaning as set forth in Evidence Code §175, which "includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity."
- Comparison between the old and new ethics rules: https://www.calbar.ca.gov/Portals/0/documents/rules/New-Rules-of-Professional-Conduct-2018.pdf

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PROHIBITIONS ON HARASSMENT, DISCRIMINATION AND RETALIATION BY LAWYERS IN THE WORKPLACE AND IN PRACTICE ARE AS BROAD AS ANY RULE IN THE COUNTRY

- **Rule 8.4.1** was vigorously debated at all stages of the revision process and broadens the scope of discipline as well as requiring lawyers to give notice to the State Bar of civil, administrative and criminal proceedings involving such charges.
- The Rule also requires lawyers to notify workplace-fairness agencies of such disciplinary actions.
- The State Bar can now open an investigation into alleged harassment or discrimination without the trigger of a civil finding form another enforcement agency.
- And lawyers who suffer a related disciplinary action from the State Bar are required to notify the California Department of Fair Employment and Housing, the U.S. Department of Justice and the U.S. Equal Employment Opportunity Commission.
- The Rule imposes on "all law firm lawyers" the responsibility to "advocate corrective measures" to address "known" improper conduct by the firm, other lawyers and law firm personnel.
- Prohibited conduct extends to court proceedings, where lawyers must refrain from "manifesting by words or conduct, bias or prejudice…" subject to limited relevance exceptions (e.g., "Wheeler" motions are not *prima facie* evidence of actionable bias; and protected First Amendment conduct may be excluded).
- **Rule 5.2 clarifies the duties of subordinate attorneys to "speak up."**

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HYPOTHETICALS

- A lawyer discovers that her firm has an unspoken but obvious policy against hiring a particular minority.
- The from also has an obvious unspoken policy to never represent a certain minority.
- The lawyer also observes a senior lawyer has serial liaisons with staff members and behaves inappropriately with clients.

DUTIES OF A SUBORDINATE LAWYER

- California has adopted **Model Rule 5.2**, which addresses the obligations of a subordinate lawyer.
- It provides a subordinate lawyer does not violate the rules if he or she acts in accordance with a supervisory lawyer's "reasonable resolution of an arguable question of professional duty." The subordinate still must exercise independent judgment to determine if there is an "arguable question" and whether the supervisor's resolution is reasonable.
- **Rule 5.2** eliminates a subordinate lawyer's defense that he or she "was simply following orders …" when charged with an ethical violation.
- **Rule 5.1** requires a supervising lawyer to make reasonable efforts to ensure ethical compliance by subordinates; and all firm lawyers may be "reasonably" responsible to the extent they exercise authority and/or ratify conduct.

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NEW OPINIONS ON THORNY ISSUES ILLUSTRATE THE EMPHASIS OF THE NEW RULES REGARDING THE PRIMACY OF PROTECTION OF CLIENTS' INTERESTS

- Opinion 2020-204 deals with the ethical obligations of lawyers representing clients whose cases are funded by a third-party litigation funder (including independence of judgment, confidentiality, and the competence and conflict issues raised when the same attorney negotiates the funding contracts as well as trying the case.)
- 2020-203 discusses the ethical obligations of lawyers who suffer data breaches of electronically stored client information.
- 2020-201 deals withe the ethical challengeesthat arise when a lawyer departs from her firm, stressing that each client's interests must have priority over the interests of the lawyer and the law firm.
- 2019-200 discusses three issues: #1 what must the attorney do when the attorney suspects that a witness in a civil trial has testified falsely; #2 what are the attorneys's duties when the attorney *knows* the witness has committed perjury; and #3 what if the attorney first learns of the perjury *after* the witness has testified at trial and the client has instructed the attorney to continue to use the perjured testimony.
- An attorney has concluded she must withdraw under Rule 1.16 (a) because the client's car lacks merit. Can she go ahead and settle the case before withdrawing from representation? See Opinion 2019-198.
- What obligations arise when lawyers in a firm consult with outside counsel concerning matters related to the firms representation of a current client, such as ethical compliance or possible malpractice. And do those obligations change if the lawyer consults another lawyer in the same firm, perhaps the law firm's in-house counsel? See 2019-197

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IN MOST CIRCUMSTANCES LAWYERS SHOULD NOT HAVE SEX WITH THEIR CLIENTS

- **Rule 1.8.10** has received the most public attention *(because sex always receives the most attention).*
- The former rules prohibited a lawyer from having sex with a client if the act was coerced, or if it was considered a form of payment for services.
- **Over thirty years ago Formal Opinion 1987-92 pointed out that despite the many obvious ethical perils presented by intimate relations between attorneys and clients (e.g., confidentiality, the client's ability to consent, independence of judgment, undue influence, and the conflict of interests created by a sexual relationship between the attorney and the spouse of a criminal defendant represented by the attorney.) There was at that time no rule governing such matters.**
- **The 1987 opinion also pointed out the problems presented by a *per se* ban (e.g., privacy, the ability of an attorney to represent the attorney's own spouse, the emotional issues in family law cases, including child custody and the policy of encouraging reconciliation).**
- The new rule prohibits lawyer-client sexual relations unless there was a preexisting consensual relationship.
- If the client is an "organization" the rule applies where the lawyer has sex with a "constituent of the organization" who "supervises, directs or regularly consults with that lawyer."
- If a person other than the client alleges a violation of the rule, no Notice of Disciplinary Charges may be filed until the State Bar has attempted to a obtain a statement from the client and determined whether the client would be "unduly burdened by further investigation."

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HYPOTHETICALS

- A lawyer has a pre-existing sexual relationship with a lower level employee with no control over legal affairs at a large corporation and the firm takes over representation of the corporation as a client. There is no violation of the corporation's policies.
- The employee is promoted to be special assistant to the corporation's general counsel and will be involved in all legal matters for the client.
- What are the lawyer's obligations?

NOT JUST COMPETENCE, BUT ALSO DILIGENCE, IS NECESSARY

- California's Rulebook has always emphasized the requirement competence when representing a client (former Rule 3-110), and this duty is substantially unchanged in new **Rule 1.1.**
- **Rule 1.3** adds a duty of diligence when representing a client. It provides a "lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to act with reasonable … diligence in representing a client."
- Per **subsection 1.3(b)** "'reasonable diligence' shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or without just cause, unduly delay a legal matter entrusted to the lawyer."
- **Rule 1.3** has no equivalent under the former Rules of Professional Conduct and differs from ABA Model Rule 1.3, which provides a "lawyer shall act with reasonable diligence and promptness in representing a client...."

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NOT JUST COMPETENCE, BUT ALSO DILIGENCE, IS NECESSARY (CONTINUED)

- **Rule 1.3** raises questions such as whether, for example, requesting multiple extensions to respond to discovery or other similar conduct might constitute a "diligence" violation.
- Also **Rule 1.3** must be read with **Rule 3.2**, which provides that a "lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense."
- **Remember the interplay of competence and lack of diligence may involve such matters as declining competence because of illness or age.**
- If you are now thinking about your opponent's behavior in a pending discovery dispute, consider new **Rule 3.10** (formerly Rule 5-100) which states "a lawyer shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute."

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CONFLICTS OF INTEREST

- **Rule 1.7** moves away from the former “checklist” approach to current client conflicts taken by former Rule 3-310.
- **Rule 1.7** adopts the Model Rules test: whether a client’s interest is “directly adverse” to that of another client in the same or separate matter, or whether there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationship with another client, a former client or a third person, or by the lawyer's own interests.
- **Rule 1.7** keeps the “informed written consent” standard.
- The new “directly adverse” language is vexing when read along side **Rule 1.9** (conflicts with former clients) which refers to a lawyer’s interests being “materially adverse” to a former client.
- “Adverse,” “directly adverse,” and “materially adverse.” What’s the difference? Those distinctions suggest one reason it took 29 years to revise the rules. (Answer: the main difference revolves around determining whether there is “harm” to the client). **Again: the best interest of the client is the primary consideration**
- **Rules 1.10 and 1.8.11 and 1.18(c)** codify common-law imputation principles. **Rule 1.10** permits ethical screening for lateral attorneys in a new firm who did not substantially work on a former client conflict producing matter in their previous firm. **Rule 1.11** permits screening for government lawyers moving into private practice.

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SAFEKEEPING OF CLIENT FUNDS AND PROPERTY

- New **Rule 1.15** requires that advance fee deposits (often mislabeled as a "retainer") be deposited into a client trust account maintained in California (subject to a limited exception).
- This rule uses the word "funds received or held," which means it applies to all such fees, even those received prior to effective date of the Rule. By contrast, current rule 4-100 only required advance costs to be deposited into a client trust account.
- The requirement to deposit advance fees into a trust account does not apply to a "true retainer," which is earned upon receipt and ensures the lawyer's availability to the client during a specified period or on a specified matter.
- The new rule also permits a flat fee paid in advance for legal services to be deposited into an operating account, but only if the lawyer makes the required written disclosure as set forth in **Rule 1.15(b).**
- Confidential information: Study **Rule 1.6** thoroughly.
- **And remember Opinion 2020-203 regarding unauthorized access to client's electronically stored data (including trade secrets and HIPPA data under the Health Insurance Portability and Accountability Act).**
- New **Rule 1.18** codifies common law that a lawyer owes a duty of confidentiality as to confidential information received from prospective clients. The lawyer shall not represent a client with material adverse interests to a prospective client in the same or substantially related matter if the lawyer received confidential information from the prospective client – even if the lawyer was never actually hired.

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THE FAVORITE RULE AMONG JUDGES

- **Remember the 3 issues presented by Opinion 2019-200 in slide #6?**
- **Rule 3.3** describes the lawyer's duty of candor toward the "Tribunal" as follows: A lawyer shall not:
  - (1) knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal the language of a book, statute, decision or other authority; or
  - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by law….
    - **THESE ARE NOT NEW CONCEPTS-- JUST A REMINDER.**

ADR SERVICES, INC.

THANK YOU FOR ATTENDING

Hon. Ming Chin (Ret.)
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Case Manager: Joanna Barron
joanna@adrservices.com

Hon. James Lambden (Ret.)
justicelambden@adrservices.com
Case Manager: Katy Jones
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Eliminating Bias

Next steps towards a positive view

ADR Services, Inc. MCLE Day

January 19, 2022

Justice Nathan Mihara (Ret)

- Justice of the California Court of Appeal, 6th Appellate District
- Mediator/ Arbitrator ADR Services, Inc.

After serving over three decades as a judicial officer, including 27 years on the Court of Appeal and 8 years on the Santa Clara County Superior and Municipal Courts, Justice Mihara joined ADR Services, Inc. to resolve disputes as a neutral in 2020. In addition, Justice Mihara is a frequent lecturer and panelist for many judicial education programs, bar association seminars, and law schools, including Hastings College of the Law, UC Davis King Hall Law School, UC Berkeley Law, Stanford Law School, and Santa Clara Law School.

Claudia Hagadus Long

- Mediator, ADR Services, Inc.

Ms. Long has been a practicing attorney for over 35 years, both as an exceptionally skilled mediator who has mediated over 1500 cases, including employment matters with the Department of Fair Employment and housing, and as a civil litigator in both large and small law firms and in-house counsel at a large multinational bank. Fluent in Spanish and French, she can conduct mediations entirely in Spanish when necessary. She is trusted to resolve complex disputes with multifaceted and multidisciplinary legal, organizational, cultural and personal issues.

What are we covering?

- The objective of this course is to revisit the types of negative bias that affect us in the legal profession, and to suggest positive ways to reduce the likelihood that such bias will adversely affect your practice of law.

We are unique

- Uniquely analytical
- Uniquely thoughtful
- Integral, active human beings

Three Silent Exercises

- 1. Personally experienced negative bias.
- 2. Personal attempt to reduce your own bias against another group.
- 3. When you were a witness—what did you do? What could you have done?

Definitions

- What is bias?
- Bias towards what or whom?
- Racial, ethnic, cultural, religious, political, socio-economic, gender, orientation

Discrimination may be the act, and Prejudice may be the feeling.

- Legally: Pollock v. Tri-Modal Distribution Services, Inc. *11 Cal. 5th 918 (2021)*

"Our precedent explains that the primary difference between discrimination and harassment is that discrimination claims 'address only explicit changes in the terms, conditions, or privileges of employment [citations omitted]; that is, changes involving some official action taken [by the employer.}… Harassment claims, on the other hand, focus on situations in which the social environment [of the workplace] becomes intolerable because the harassment…communicated an offensive message…"

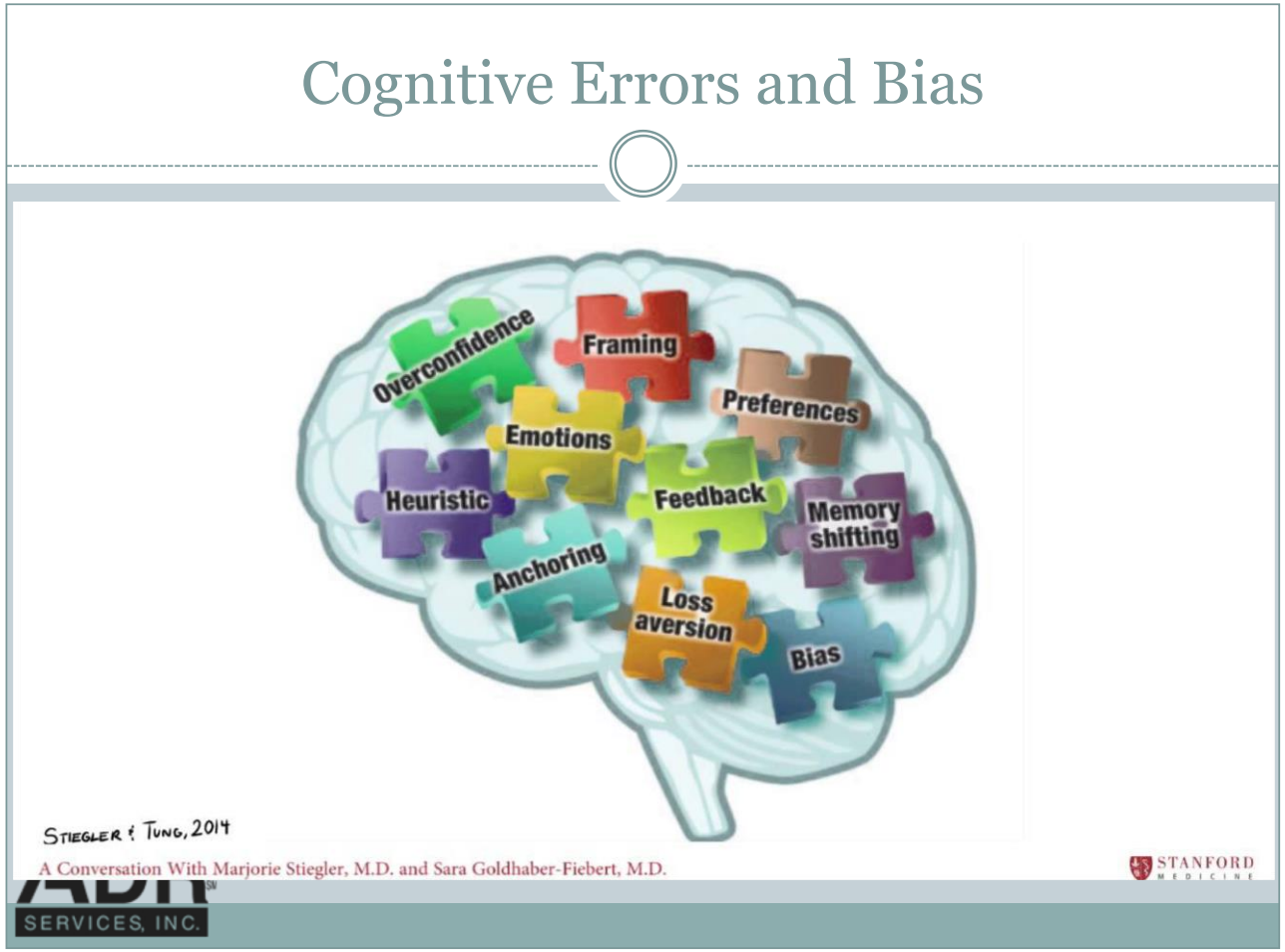
Negative vs. Positive Bias

- Bias towards helping others who are disadvantaged or marginalized because of race, religion, socio-economic position…

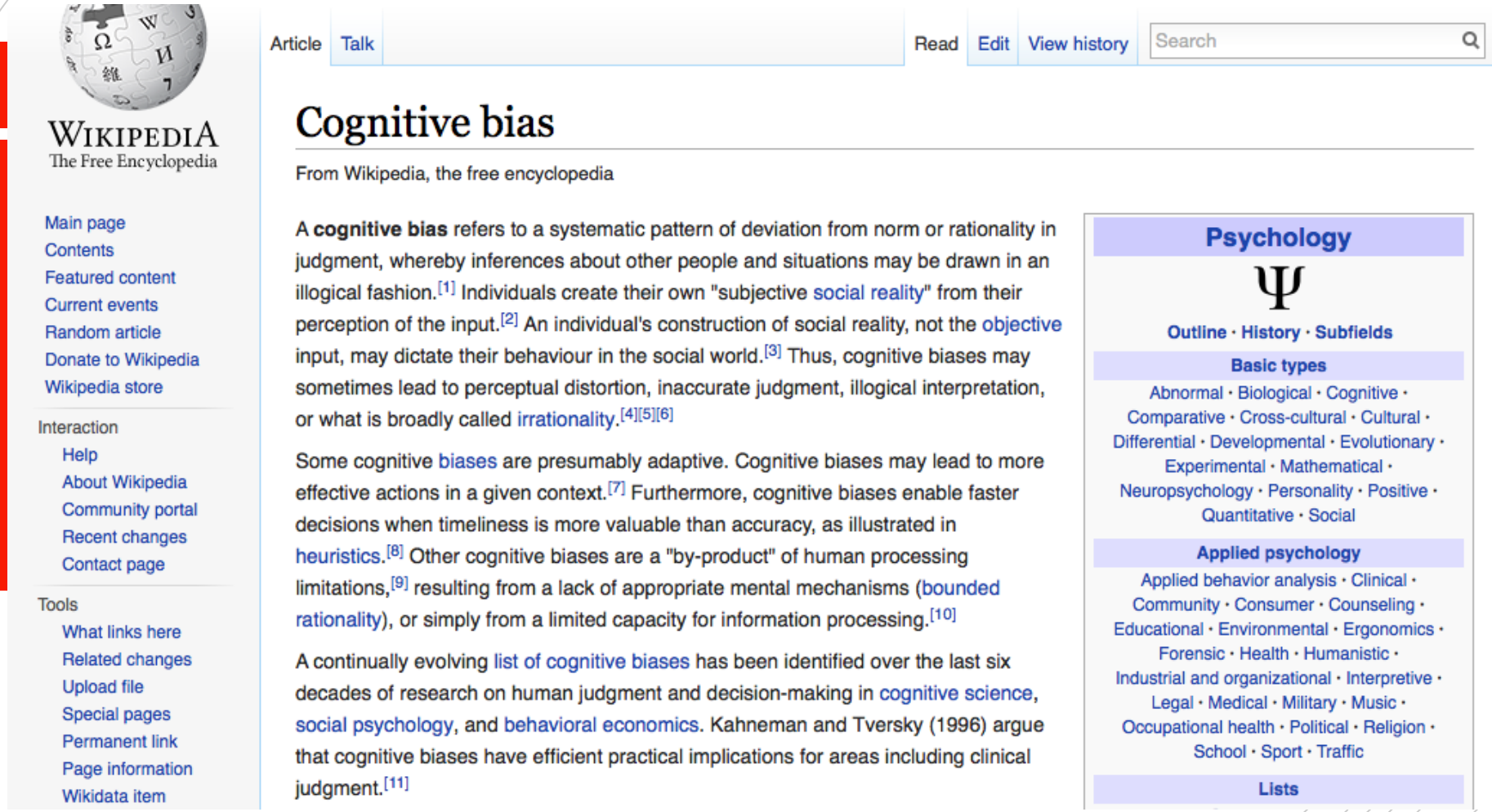
Cognitive Errors

- Different forms of cognitive errors
- “Adaptive”
- Social constructs
- Confirmation bias

We all know it's there



An unreadable definition



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Cognitive bias

From Wikipedia, the free encyclopedia

A **cognitive bias** refers to a systematic pattern of deviation from norm or rationality in judgment, whereby inferences about other people and situations may be drawn in an illogical fashion.[1] Individuals create their own "subjective social reality" from their perception of the input.[2] An individual's construction of social reality, not the objective input, may dictate their behaviour in the social world.[3] Thus, cognitive biases may sometimes lead to perceptual distortion, inaccurate judgment, illogical interpretation, or what is broadly called irrationality.[4][5][6]

Some cognitive biases are presumably adaptive. Cognitive biases may lead to more effective actions in a given context.[7] Furthermore, cognitive biases enable faster decisions when timeliness is more valuable than accuracy, as illustrated in heuristics.[8] Other cognitive biases are a "by-product" of human processing limitations,[9] resulting from a lack of appropriate mental mechanisms (bounded rationality), or simply from a limited capacity for information processing.[10]

A continually evolving list of cognitive biases has been identified over the last six decades of research on human judgment and decision-making in cognitive science, social psychology, and behavioral economics. Kahneman and Tversky (1996) argue that cognitive biases have efficient practical implications for areas including clinical judgment.[11]

Psychology

Ψ

Outline · History · Subfields

Basic types

Abnormal · Biological · Cognitive · Comparative · Cross-cultural · Cultural · Differential · Developmental · Evolutionary · Experimental · Mathematical · Neuropsychology · Personality · Positive · Quantitative · Social

Applied psychology

Applied behavior analysis · Clinical · Community · Consumer · Counseling · Educational · Environmental · Ergonomics · Forensic · Health · Humanistic · Industrial and organizational · Interpretive · Legal · Medical · Military · Music · Occupational health · Political · Religion · School · Sport · Traffic

Lists

The many faces of bias

- Overt bias
- Implied bias
- Implicit bias
- Fashionable bias

The many faces of bias

- Overt bias
  - Life Examples
  - Jim Crow Laws repealed
  - Equal Credit Opportunity Act of 1974 (!)
  - CCR's
- Fashionable bias

Personal experience defining behavior

- LET'S GET PRACITICAL!
- Going back to exercise 1, Real Life experiences and teachable moments.
- What can we teach ourselves from each one?

What we can do

- WHAT THEY'RE TEACHING JUDGES
- WHAT WE'RE LEARNING AS MEDIATORS
- HOW THE LAWS ARE CHANGING
  - California CCP 1002.5, effective January 1, 2020, prohibits "No Rehire" clauses in settlement agreements where an employee sues an employer and settles the case. (AB 749)
  - Civil Code 3361, effective January 1, 2020, prohibits the estimation, measure or calculation of past, present or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death from being reduced based on race, ethnicity or gender. (SB 41)

What can we do?

- It's more than a meme.
- Make sure you know what you're facing
- If you experience bias in the courtroom
- Turn your negative bias experience into positive impact

When you witness it

- What can you do when you see it in yourself?
  - Bias towards equality
  - Bias towards living an ethical life
  - Bias towards generosity and kindness
  - Bias towards open listening

And yet they say it doesn't work!

- Recent NYTimes opinion: "Such training would be worth fighting for if it had a record of success in changing discriminatory behavior, but it doesn't. …studies of anti-bias training show that even the best programs have short-lived effects on stereotypes and no discernable effect on discriminatory behavior." (The Absurd Side of the Social Justice Industry, Nov. 16, 2021)
- Taking the long view: Change is always too slow for the ones suffering. But each increment betters ALL of our lives. When we look back on what we now take for granted, and how long and hard the fight has been, can we really believe there's no "record of success"?

Thank you!

Hon. Nathan Mihara (Ret.)

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SB-41

SB-41 Civil actions: damages.(2019-2020)

Text Votes History Bill Analysis Today's Law As Amended Compare Versions Status Comments To Author

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Date Published: 07/30/2019 09:00 PM

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Bill Start

Senate Bill No. 41

CHAPTER 136

An act to add Section 3361 to the Civil Code, relating to damages.

SB-41

[Approved by Governor July 30, 2019. Filed with Secretary of State July 30, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

SB 41, Hertzberg. Civil actions: damages.

Existing law authorizes a person who suffers a loss or harm to that person or that person's property, from an unlawful act or omission of another to recover monetary compensation, known as damages, from the person in fault. Existing law specifies the measure of damages as the amount which will compensate for the loss or harm, whether anticipated or not, and requires the damages awarded to be reasonable.

This bill would prohibit the estimation, measure, or calculation of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death from being reduced based on race, ethnicity, or gender.

Digest Key

Vote: MAJORITY Appropriation: NO Fiscal Committee: NO Local Program: NO

Bill Text

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1.

The Legislature finds and declares the following:

(a) The principals of equal protection and due process are fundamental to our democracy and the concept of civil liberty.

(b) California has been a pioneer in civil rights, leading the way in prohibiting discrimination on the basis of race, ethnicity, gender, and other protected categories.

(c) However, in tort actions around the state and country, race, ethnicity, and gender are routinely used in calculating damage awards that are meant to provide restitution to victims. For example, since women in America earn lower wages, on average, than men, the damages awarded to women are substantially lower than those received by men.

(d) Nearly one-half of economists surveyed by the National Association of Forensic Economics said they consider race, and 92 percent consider gender, when projecting earning potential for an injured person, including children. Future lost earning potential is a significant component of the damages awarded in tort actions.

(e) To determine projected lost earning potential, court experts typically rely on the Bureau of Labor Statistics' Current Population Survey. The results are a reflection of gender pay gaps and workforce

SB-41

discrimination, and they fail to account for possible progress or individual achievement.

(f) The consequence of this bias—to use averages that represent generations of discriminatory practices—is to perpetuate systemic inequalities. These practices disproportionately injure women and minority individuals by depriving them of fair compensation.

(g) Using race and gender-based tables can, by some estimates, under-value women and minorities by hundreds of thousands of dollars, including children who have not yet had the opportunity to work or identify career options. Specifically, these practices greatly disadvantage children of color, who are more likely to be impacted by environmental hazards created by the industrial facilities and factories located in low-income communities.

(h) Any generalized reduction of civil damages using statistical tables alone, based on a plaintiff's membership in a protected class identified in Section 51 of the Civil Code, is counter to the public policy of the State of California.

(i) This act shall not be construed to explicitly permit the generalized reduction of damages for lost earnings or impaired earnings capacity based on protected classifications not identified in the Bureau of Labor Statistics' Current Population Survey unless otherwise permitted by existing law.

SEC. 2.

Section 3361 is added to the Civil Code, to read:

3361.

Estimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender.

AB 749

Assembly Bill 749 – Settlement agreements: restraints in trade.

Prohibits "No Rehire" clauses in settlement agreements. Employees who settle their claims against their employers are often required to agree that they will never again work for the same employer or its related entities. Such provisions are punitive and can have a devastating impact on an employee, forcing some to leave their field or severely limiting their future employment prospects. The use of "no rehire" provisions often leads to the perverse outcome where victimized employees are forced out of their jobs while harassers continue to be employed.[1]

AB 749 prohibits and invalidates all provisions in settlement agreements that prevent workers from obtaining future employment with the settling employer or its affiliated companies. Through newly created Code of Civil Procedure section 1002.5, it makes such provisions in agreements entered into on or after January 1, 2020 void as a matter of law and against public policy. Section 1002.5 provides as follows:

1002.5. (a) An agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer. A provision in an agreement entered into on or after January 1, 2020, that violates this section is void as a matter of law and against public policy.
(b) Nothing in subdivision (a) does any of the following:
(1) Preclude the employer and aggrieved person from making an agreement to do either of the following:
(A) End a current employment relationship.
(B) Prohibit or otherwise restrict the settling aggrieved person from obtaining future employment with the settling employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault.
(2) Require an employer to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.
(c) For purposes of this section:
(1) "Aggrieved person" means a person who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.
(2) "Sexual assault" means conduct that would constitute a crime under Section 243.3, 261, 262, 264.1, 286, 287, or 289 of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes.
(3) "Sexual harassment" has the same meaning as in subdivision (j) of Section 12940 of the Government Code. "An agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division,

AB 749

affiliate, or contractor of the employer. A provision in an agreement entered into on or after January 1, 2020, that violates this section is void as a matter of law and against public policy."

WINNING WHILE SAVING ON COSTS WITH ARBITRATIONS AND SPECIAL REFERENCES

Hon. Kevin Murphy (Ret.)

Mediator │ Arbitrator │Referee

ADR Services, Inc. MCLE Day 2022 – January 19, 2022

1. UNDERSTANDING THE IMPORTANCE OF ALTERNATIVES TO TRADITIONAL LITIGATION AND THE THREE MYTHS

2. TEMPORARY JUDGES

   A. SOURCE:

      California Constitution Article VI section 21 (see California Rules of Court 2.830-2.834): Allows for full trial

      California Probate Code sections 2405(a) and 9620- disputes relating to estate between guardian or conservator/personal representative and third person: Allows for summary procedure without pleading and discovery

   B. CONSENT OF PARTIES - YES

   C. SIGNIFICANCE OF DECISION: Operates as Decision of the Court

3. REFERENCES

   A. SOURCE:

      California Code of Civil Procedure ("CCP") sections 638-639 (see in general CCP 638-645.1)

   B. TYPES

      GENERAL: CCP 638(a):

      "To hear and determine any or all of the issues in an action or proceedings, whether of fact or of law, and to report a statement of decision"

      SPECIAL: CCP 638 (b) and 639

   C. CONSENT OF PARTIES

      CCP 638 - YES

      CCP 639 - NO

   D. SIGNIFICANCE OF DECISION

      638- "must stand as the decision of the court" (CCP 644(a))

      639- advisory (CCP 644(b))

4. THE DIFFERENCE BETWEEN REFERENCES AND ARBITRATIONS
   A. Appellate Rights

- References- Full Appellate Rights
- Arbitrations- Limited Appellate Rights: erroneous factual or legal conclusions, even if award causes substantial injustice, not reversible
- CCP 1286.2 procured by corruption fraud, or undue influence;

  Bad behavior by arbitrator: corruption, misconduct, failed to disclose ground for disqualification

  Exceeded powers and award cannot be corrected without effecting merits of decision

  Substantial prejudice by refusal to postpone upon sufficient cause or refusal to hear material evidence or other conduct contrary to title

- *__W__* BUT SEE Cable Connection Inc. V DIRECTTV Inc. where arbitration agreement read “The arbitrators shall not commit errors of law or legal reasoning and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.”

  California Supreme Court upheld BUT MUST BE EXPLICIT AND UNAMBIGIOUS

  HOWEVER, CAN’T CREATE EXPANDED APPELLATE RIGHTS UNDER FEDERAL ARBITRTATION ACT

   B. The Applicable Law

   Reference referees and temporary judges, absent agreement to the contrary, follow law that applies in courts

   Arbitrations-relaxed procedural law, especially when it relates to Discovery

   DISCOVERY: As a general rule limited discovery including, THE ABSENCE OF NONPARTY DISCOVERY

   __W__ The importance of reading CCP 1283.05 with CCP 1283.1

   1283.05 does not automatically apply in cases that don’t involve personal injury or wrongful death

   __W__ SOLUTIONS : write in application of 1283.05 or subpoena nonparty and records to arbitration hearing

   OTHER PROCEDURAL LAW

   DISPOSITIVE MOTIONS NOT ALWAYS ALLOWED

   American Arbitration Association (“AAA”) Commercial Rule 33: Arbitrator “may allow the filing of and make rulings upon

   a dispositive motion only if the arbitrator determines that the moving party has shown…likely to succeed…”

EVIDENCE ADMISSIBILITY RULES RELAXED

Private companies like ADR Services, Inc. AAA have relaxed evidence admissibility rules

CCP 1282.2 Rules of evidence and judicial procedure need not be observed; oath on request

ADR Services, Inc. Arbitration Rule 33: “strict conformity with the rules of evidence is not required”

5. SAVING ON COSTS

   THE COST MYTH

   WAYS TO SAVE

   1. Before your hire a temporary judge, referee, or arbitrator have a joint conference with the candidate
   2. Make good use of the Arbitration Management Conference
      - Ask about how to save and find out about billing
      - Discuss a discovery protocol that involves less formal ways of resolving discovery disputes
      - See if letter briefs are acceptable
   3. Avoid formal discovery motions
   4. Identify dispositive issues that can be litigated as soon as possible (ie evaluation; contract interpretation; damage calculation)
   5. Mediate as early as possible and with an evaluative mediator and, if appropriate, consider mediating with the arbitrator
   6. Remote Hearings including the trial or arbitration hearing

6. WINNING *__W__*
   1. Know the Law that applies to your case
   2. Don’t forget oral advocacy
   3. Understand the Impact of the Federal Arbitration Act 9 U.S.C. section 1 et seq.
      - If no mention in Arbitration Agreement of law that applies, the FAA applies if “involving commerce”
      - If FAA referenced it preempts State arbitration law
      - No Federal Preemption if the parties clearly provide in agreement or stipulation that State law applies
      - The parties to an arbitration agreement can specify under which arbitration rules the arbitration will be conducted
      - VOLT INFORMATION SCIENCES, INC. V BOARD OF TRUSTEES OF LEYLAND STANFORD JUNIOR UNIV. (1989)
   4. Understand the interrelationship between Code of Civil Procedure 1283.05 and 1283.1
      - 1283.05 grants full discovery rights to arbitration parties BUT
      - 1283.1 indicates 1283.05 applies only to cases involving wrongful death or personal injury or death (b) notes that parties by agreement may include 1283.05
   - In California to obtain Non-Party discovery you need to specifically incorporate CCP 1283.05 into arbitration agreement even then Non-Party discovery open to full judicial review

5. Read these FIVE STAR CASES
   - CABLE CONNECTION, INC. V DIRECTTV, INC. (2008) 44 CAL. 4TH 1334
   - TARRANT BELL PROPERTY, LLC. V SUPERIOR COURT (2011) 51 CAL. 4TH 538
   - AITRON, INC. V VEECO INSTRUMENTS, INC. (2020) 52 Cal. App. 5th 360
   - VOLT INFORMATION SCIENCES, INC. V BOARD OF TRUSTEES OF LEYLAND STANFORD JUNIOR UNIV. (1989) 489 U.S. 468

6. Choose Wisely and the Fear of Bias
   - Investigate
   - Avoid Out to Pasture Judges and Decision Makers
   - Interview
7. Cure Poorly Written Arbitration Agreement with Stipulations

Thank you

Hon. Kevin Murphy (Ret.)

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ADR SERVICES, INC.

COMPETENCE
It's More Than Knowing the Law

Steve Block, Esq.

Ralph Lombardi, Esq.

ADR Services, Inc. MCLE Day
January 19, 2022

Competence

IN ADDITION TO LEARNING AND SKILL, COMPETENCE REQUIRES:

"MENTAL, EMOTIONAL, AND PHYSICAL ABILITY REASONABLY NECESSARY FOR THE PERFORMANCE" OF LEGAL SERVICES.

ADR SERVICES, INC.

We Will Discuss

1

THE MEANING AND IMPORTANCE OF THOSE TERMS IN THE PRACTICE OF LAW

2

RESOURCES FOR HELP WHEN MENTAL, EMOTIONAL, OR PHYSICAL ABILITIES ARE IMPAIRED.

ADR SERVICES, INC.

RULES OF PROFESSIONAL CONDUCT

Rule 1.1 Competence

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

ADR SERVICES, INC.

RULES OF PROFESSIONAL CONDUCT

Rule 1.1 Competence

(b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service

ADR SERVICES, INC.

COMMON CAUSES OF LAWYER INCOMPETENCE

- Mental Health Issues
- Alcohol Abuse
- Drug Abuse

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MENTAL HEALTH, ALCOHOL AND DRUG ABUSE

Mental Issues

- Stress
- Anxiety/fear
- Depression
- Financial problems

Alcohol and Drug Abuse

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THE PRACTICE OF LAW IS STRESSFUL AND OFTEN CAUSES ANXIETY, DEPRESSION AND SUBSTANCE ABUSE

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COMMON STRESSORS IN THE PRACTICE OF LAW

- Level of Responsibility
- Rigid Deadlines
- Competitive Atmosphere - Inability to Process Losses
- Financial Stress and Risks
- Feelings of Inadequacy
- The Excessive Demands of Clients

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HOW EXTENSIVE ARE MENTAL HEALTH PROBLEMS, AND DRUG AND ALCOHOL ABUSE IN THE LEGAL PROFESSION?

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32%

OF ATTORNEYS AGE 30 AND UNDER ARE "PROBLEM DRINKERS"

28%

OF LAWYERS WITH 10 YEARS OF EXPERIENCE OR LESS HAD THE HIGHEST RATE OF PROBLEMS WITH ALCOHOL.

25%

OF MEN AND 15.5% OF WOMEN IN THE HAZELDEN BETTY FORD STUDY

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GOOD PHYSICAL HEALTH DOES NOT GUARANTEE ONE'S COMPETENCE

AS IT RELATES TO COMPETENCE, THE MOST REVEALING FACTOR IS THE STATE OF YOUR WELL-BEING

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WELL-BEING

Assessing your well-being may identify issues that increase the risks for incompetence

WHAT ARE THE PHYSICAL AND BEHAVIORAL WARNING SIGNS OF MENTAL HEALTH PROBLEMS, ALCOHOL AND SUBSTANCE ABUSE?

Physical signs and symptoms

Behavioral signs and symptoms

WHAT ARE THE DUTIES OF A LAWYER WHO IS INCOMPETENT OR HAS COLLEAGUES WHO BECOME INCOMPETENT IN THE PRACTICE OF LAW?

ADR SERVICES, INC.

DUTY TO WITHDRAW UPON BECOMING INCOMPETENT

RULE 1.16(A)(3) AN ATTORNEY SHALL WITHDRAW

"if the lawyer's mental or physical condition renders it unreasonably DIFFICULT to carry out the representation effectively“

COMPARE RULE 1.16(B)(8)

[An attorney MAY withdraw]

ADR SERVICES, INC.

THE LAWYER'S RESPONSIBILITIES WHEN AN INCOMPETENT PARTNER, SHAREHOLDER OR EMPLOYEE VIOLATE THE RULES OF PROFESSIONS FOR CONDUCT

IS THERE A DUTY TO TAKE ACTION?

No, unless...

The lawyer has managerial authority

Direct supervisorial authority

Or Directly supervises the offender (impaired lawyer)

LEGAL MALPRACTICE AND INCOMPETENCE

?

WILL THE STATE BAR CONSIDER PERSONAL AND EMOTIONAL PROBLEMS IN MITIGATION OF FINDINGS OF INCOMPETENCE?

DO I NEED HELP?

ADR SERVICES, INC.

ANSWER THE "TWENTY QUESTIONS" FROM THE LAWYER'S ASSISTANCE PROGRAM (LAP), STATE BAR OF CALIFORNIA

https://www.calbar.ca.gov/portals/0/documents/lap/LAP_20-Questions-Test.pdf

ADR SERVICES, INC.

The State Bar of California
Lawyer Assistance Program (LAP)

877-LAP 4 HELP (877-527-4435)
THE TWENTY QUESTIONS
Of Alcohol/Drug Abuse

ADR SERVICES, INC.

Other Resources

Other Bar

(800)-222-0767

Judicial Officers Assistance Program

(800)-327-0422

Hazelden Betty Ford Foundation

(855) 995-3642

ADR SERVICES, INC.

Thank You

Keep In Touch!

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More on the New Rules and Bar Discipline

Hon. Charlotte Walter Woolard (Ret.)

Hon. James J. McBride (Ret.)

ADR Services, Inc. MCLE Day 2022

January 19, 2022

The Constitution, the Bar, the Supreme Court and the Rules.

- The State Bar is the administrative arm of the Supreme Court and a judicial branch agency. Constitution Article VI Section 9.
- The Rules of Professional Conduct are approved by the Supreme Court.
  - 1. Regulate the professional conduct of attorneys
  - 2, **Establish the standards for attorney discipline.**
- Failure to comply with any Rule is a basis for discipline.
- Supreme Court is the final arbiter of formal attorney discipline imposes suspension from practice or disbarment upon an attorney. *See* Cal. Bus. & Prof. Code § 6078.
- Attorneys are also subject to discipline for violations of the State Bar Act. Business and Professions Code Sections 6000, et. seq .

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Supreme Court says the purpose of discipline is not to punish attorneys.

- From *In re Kreamer (1975)*, 14 Cal.3d 524,

- "We have said on a number of occasions that the purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity to the end that the public, the courts and the legal profession itself will be protected." *Id.* P. 532

The Discipline Process

- **Complaint:** No restriction on who can file a complaint; no standing requirement; no statute of limitations. Bar can initiate its own inquiry.
- **Investigation:** Reviewed by an attorney and, if a possible ethical violations is described, assigned to an investigator.
- Cooperation mandatory. B& P Code Section § 6068(i)
- **Charges:** If the complaint merits charges, attorney will be given a chance to settle. Settlement must be approved by the State Bar Court. If no settlement, formal charges are filed and the case becomes public.

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Trial and Appeal

- **State Bar Court Trial:** Burden of proof is clear and convincing evidence; proceedings are governed exclusively by the Rules of Procedure of the State Bar.
- **Discipline Recommendation:** If charges are proved, State Bar Court Judge recommends discipline to the Supreme Court.
- **Appeal**: Either party may seek review of the case and discipline recommendation by Review Department (three judge) acts as an appellate court. The Review Dpartment in turn makes recommendations to the Supreme Court.
- **Supreme Court**: Recommendation of suspension or disbarment discipline requires review and approval of Most of these cases are summarily affirmed.

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Discipline in 2020

- In 2020 The Bar took in 17,488 new complaints.
- 192,000 active members.
- Complaints against less than 1%.
- Filed Charges against 180 attorneys.
- An additional 63 cases settled by stipulation

Disbarment	97
Probation with actual suspension	83
Probation with stayed suspension,	31
Public reproval	26
Private reproval.	24

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For many years, the State Bar has been under pressure to do a better job on discipline.

- 2009 State Auditor's Report on the Bar: *State Bar of California: It Can Do More to Manage Its Disciplinary System and Probation Processes Effectively and to Control Costs*
- 2015 State Auditor report: *State Bar of California: It Has Not Consistently Protected the Public Through Its Attorney Discipline Process and Lacks Accountability*.
- 2021 the State Auditor report: *The State Bar of California: It Is Not Effectively Managing Its System for Investigating and Disciplining Attorneys Who Abuse the Public Trust.*

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DURING THE SAME PERIOD, THE BAR WAS UNDER PRESSURE TO REFORM THE RULES OF PROFESSIONAL CONDUCT

The first Commission spent 10 years working on the rules; requesting approval on piecemeal basis starting in 2012.

The Supreme Court did not take up the requests to approve any of the 17 rules submitted, preferring to deal with the entire set of new rules.

In 2014, the Bar asked for the chance to start over with a "a comprehensive reconsideration of the draft rules . . . ."

The Supreme Court agreed.

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Back to the Drawing Board

- The Supreme Court, apparently troubled by the unwieldy and lengthy process to that point, sent the bar a set of directives.
  - Establish a second Commission by November 26, 2014.
  - Complete work on all proposed rules and submit for final consideration no later than March 31, 2017.
  - Begin with the current rules and focus on revisions necessary to address new developments and eliminate unnecessary differences between California's rules and the rules of a preponderance of the states. That means the Model Rules or some version.

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The Supreme Court Called For Clear Enforceable ***Disciplinary*** Standards

- Commission should ensure that the proposed rules set forth clear and enforceable **disciplinary standards**, as opposed to purely aspirational objectives.
- "The Commission's work should facilitate compliance with and **enforcement** of the Rules by eliminating ambiguities and uncertainties."
- Substantive information about the conduct governed by the rule should be included in the rule itself.

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Sixteen Brand New Rules Without Former Counterpart.

- With foregoing standards in mind, let's grade sixteen brand new Rules :
- Rule 1.0.1 Terminology (Not new but much improved.)
- Rule 1.10 Imputation Of Conflicts Of Interest: General Rule
- Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees
- Rule 1.12 Former Judge, Arbitrator, Mediator, Or Other Third-Party Neutral
- Rule 1.18 Duties To Prospective Client

ADR SERVICES, INC.

- Rule 2.1 Advisor
- Rule 2.4 Lawyer as Third-Party Neutral
- Rule 3.2 Delay of Litigation
- Rule 3.9 Advocate in a Non-Adjudicative Proceeding
- Rule 4.1 Truthfulness in Statements to Others
- Rule 4.3 Communicating with an Unrepresented Person
- Rule 4.4 Duties Concerning Inadvertently Transmitted Writings
- Rule 5.1 Duties of Managerial and Supervisory Lawyers
- Rule 5.2 Responsibilities of Subordinate Lawyer
- Rule 5.3 Responsibilities Regarding Nonlawyer assistants

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Rule 1.0.1 Terminology
Grade A

- **Former Rules**: Words and phrases defined in separate rules where first used.
- **New Rules**: Some definitions are “rule specific” but Rule 1.0.1 provides definitions of terms used throughout the Rules and whose meaning is critical to understanding the Rules.
- Obviates the need to consult case law or ethics opinions to comprehend the ethical standard.
- Aimed at enhancing both compliance and enforcement.

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Rule 1.2 Scope of Representation and Allocation of Authority
Grade: B to B+

- Proposed rule 1.2 addresses the allocation of authority within the lawyer-client relationship and the ability of a lawyer to undertake representation on a limited scope basis. Carries forward former Rule 3-210.
- The primary objectives of proposed rule 1.2 were to clarify the relationship between lawyer and client, to contribute to access to justice, and to eliminate an unnecessary difference between California and other jurisdictions, all of which have substantially adopted some form of ABA Model Rule 1.2

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Rule 1.8.2 Use of Current Client's Information
Grade: A

- **Rule:** “A lawyer shall not use a client's information protected by Business and Professions Code section 6068, subdivision (e)(1) to the disadvantage of the client unless the client gives informed consent,* except as permitted by these rules or the State Bar Act.
- **Comment:**A lawyer violates the duty of loyalty by using information protected by Business and Professions Code section 6068, subdivision (e)(1) **to the disadvantage of a current client**.”
- We are not sure where the “disadvantage” part comes in.

Rule 1.18 Duties to Prospective Client Grade: tbd

- Rule A “prospective client”, one who consults with you before retaining has the protection of 6068 (e) and Rule 1.6 Confidential Information of a Client.
- This Rule is the subject to a recent Ethics Opinion, CAL 2021-205 and we will be talking about that.
- We will be delving into this Rule and the Ethics Opinion.

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
Grade: A

- **Rule:** "While lawyers are associated in a law firm,* a prohibition in rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them."
- **Comment**: Notably Rule 1.8.10 Sexual Relations with Current Client is not imputed
- Rules 1.8.1 through 1.8.9 are revisions or modifications of the Former Rules.. (1.8.2 is just B&P 6068(e) having to do with relationships with clients. Accepting gifts from clients, aggregate settlements, compensation from other thatn Client, etc. No big change.

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New Rules On Imputation of Conflict of Interest Rules 1.10, 1.11 and 1.12.

Grade: A

Any grading of these rules requires a look at Rules 1.7 Conflict of Interest: Current Clients, Rule 1.9 Duties to Former Clients and 1.18.

We grade each of those rules A

The Model Rules divide up conflict situations into existing client former client and prospective client.

These situation were dealt with together in Former Rules 3-310 Avoiding Representation of Adverse interests and 3-320 Relationship with Other Party's Lawyer.

This puts California in line with the many jurisdictions that have adopted that structure making the life of multi jurisdiction lawyers somewhat simpler.

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- **Rule 1.7 deals with the concept that loyalty and independent judgment are essential elements in the lawyer's relationship to a client.**
- **Avoid Direct Adversity of Interests.**
- **Avoid Material Limitations on Ability to Represent a client.**
  - Rule 1.7 carries forward the concepts of direct adversity of interests of two current clients and material limitations on a lawyer's representation of a client because of duties owed another current or former client, or because a relationship with a client or other person.
- New Rule keeps the California heightened standard of informed written consent.
- **Written Disclosure**
- **Written Consent**

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Rule 1.10 Imputation Of Conflicts Of Interest: General Rule.
Grade: B

- Rule 1.7 and 1.9 Conflicts are imputed to a lawyers firm.*
- Incorporates into a rule the imputation to a firm of conflicts of interest, a concept that is currently addressed only in California case law.
- Permits the erection of an ethical screen in narrowly defined circumstances to avoid the imposition of such imputations.
- Rule 1.10 tighter than Model Rule in the extent to which a private firm is permitted to erect an ethical screen around a lawyer who has moved laterally from another private firm.

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Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees Grade: B

- Rule incorporates well-settled case law on imputation of conflicts of interest and the screening of lawyers to avoid the imputation of their conflicts to other lawyers in the government agency or private firm to which they have laterally moved.
- Sets prohibitions on representation of a private client by a former government official or employee. subject to rule 1.9(c) (confidentiality duties owed to former clients) and may not represent a private client in a matter in which the lawyer substantially participated.
- provides that a former government lawyer can be screened to avoid the imputation of the conflict to other lawyers in the firm with which the former government employee is now associated.
- Prohibit use of confidential government information about a person.*

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Rule 1.12 Former Judge, Arbitrator, Mediator, Or Other Third-Party Neutral Grade: B

- **Rule:** "[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, judicial staff attorney or law clerk to such a person* or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give informed written consent.*
- Judge/arbitrator/mediator can't seek a job with a current party to a case but staff can with approval of the court.
- Lawyers who previously served as mediators or settlement judges cannot be screened.

ADR SERVICES, INC.

Rule 2.1 Advisor
Winner Special Category: Best Comments
Grade: B

- **Rule**: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”
- **Comment:**
- [1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.
- [2] This rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

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Rule 2.4 Lawyer as Third-Party Neutral Grade A (esp. because of Comment)

RULE: Inform unrepresented parties that you do not represent them. If they don't seem to get it, explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT: Warns that a lawyer serving as a neutral may be subject to separate codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration. rules Comment:

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Rule 3.2 Delay of Litigation
GRADE C

- **A strong contender as the Rule Most Likely to Open a Can of Worms.**
- **RULE:** Shall not use means that have no substantial* purpose other than to delay or prolong the proceeding or to cause needless expense.
- **Comment:** See Rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.
- **Our Comment**: Yes, but how about Rule 1.2. Client controls "**objectives** of the representation." Suppose client has a legitimate reason to delay?

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Rule 3.9 Advocate in Nonadjudicative Proceedings
Grade B-(Why this Rule?)

- **RULE:** If you represent a client in non-adjudicative matter* before a legislative body or administrative agency, you have to tell it you represent someone.
- Looks great, with the exception of "non-adjudicative".
- **COMMENT:** Clarifies you do not have to identify your client and Rule only applies if lawyer or client is presenting evidence or argument. Also, you don't have to tell if you are negotiating or applying for a license, etc.
- Comment goes on to say if the situation is a government investigation other rules about telling the truth (Rule 4.1-4.4) may apply.
- *whatever that may be

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Rule 4.1 Truthfulness in Statements to Others
Grade: C- (No former rule, aspirational)

- No former counterpart to this Rule.
- The Rule itself is straightforward: RULE: Shall not knowingly:* make a false statement of material fact or fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client.
- However the Comment to the Rule demonstrates the Rule's Vagueness.

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- COMMENT: “[I]n drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document.”
- Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.*

Rule 4.3 Communicating with an Unrepresented Person*
Grade: B- to C+

- **Rule:** shall not state or imply that the lawyer is disinterested and correct any misunderstanding about it.
- If interests of the unrepresented person* and client are in conflict with shall not give legal advice to that person*
- Shall not seek to obtain privileged or other confidential information.
- This part is unique to California.

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*
Grade: A

- A lawyer who receives privileged writing inadvertently shall: (a) refrain from examining the writing* any more than is necessary to determine that it is privileged and (b) promptly notify the sender
- The Commission decided wisely (in our opinion) against adopting Model Rule 4.4 (A)
- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

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Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers Grade: B

- **Training and Supervision**
- A lawyer who manages or supervises other lawyers in a firm* must make reasonable* efforts to ensure that the firm* takes measures giving reasonable* assurance that its lawyers comply with the Rules and the State Bar Act.
- A Lawyer supervises another lawyer, whether or not in the same firm,* shall make reasonable* efforts to ensure that the other lawyer complies with the Rules and the State Bar Act.
- A supervising lawyer is responsible for another lawyer's ethics violation if the supervisor ratifies the conduct or knows* of the conduct but fails to take reasonable* remedial action.

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Rule 5.2 Responsibilities of a Subordinate Lawyer Another Can of Worms Contender Grade A

- **Speak up.**
- **Rule:** "A subordinate lawyer does not violate these rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty."
- **Comment**: If the subordinate lawyer believes* that the supervisor's proposed resolution of the question of professional duty would result in a violation of these rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

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Rule 5.3 Responsibilities Regarding Nonlawyer Assistants Grade: B

- **Training and Supervision**
- Take measures giving reasonable* assurance that the nonlawyer's conduct is compatible with the professional ethics.
- Make reasonable* efforts to ensure that the person's* conduct is compatible with the professional ethics.
- Managing lawyer is responsible for a nonlawyer breach of ethics if manager ratifies the conduct or, knowing of it, fails to take remedial action.

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The Supreme Court did not approve Proposed Rule 1.14 Client with Diminished, but not for lack of interest.

Despite the failure to approve the Proposed Rule, the ethical issues raised by mental impairment of lawyers and clients are not being ignores

The issues were addressed in the State Bars two most recent Ethics Opinions.

2021-206 Colleague Impairment

2121-207 Client with Diminished Capacity

Formal Opinion No. 2021-205

- Prospective client provides confidential information to an interviewing lawyer.
- May the interviewing lawyer disclose that information or use it to the prospective client's disadvantage?

  Under what conditions is ethical screening available?

  To what extent can a prospective client give advance written consent to permit other lawyers in the interviewing lawyer's law firm to be adverse to a former prospective?

  https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/Formal-Opinion-No-2021-205-Duties-to-Prospective-Client.pdf

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Rule 1.18 Duties to a Prospective Client

- What is a “prospective client”? A person* who consults a lawyer for the purposes of retaining the lawyer or securing legal service or advice. Must have (1) a good faith intention to seek legal advice or representation, and (2) a reasonable expectation, based on the lawyer’s conduct, that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship or providing legal advice. (Rule 1.18 Comment [2]; CA State Bar Formal Opinion No. 2003-161, at p. 6.)
- The lawyer’s duty to a prospective client forbids use or disclosure of the confidential information disclosed except as would be permitted under Rule 1.9 (relating to former clients) and, if the information is material to the matter, bars the lawyer and the lawyer’s law firm from acting adversely to the person in the same or substantially related matter (Rule 1.18 [c]) except as may be permitted under Rule 1.18(d).

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Rule 1.18(d) When the individual and firm wide prohibitions on representation in Rule 1.18(c) will not apply:

If:

- Both the affected client and the prospective client have given their informed written consent to the representation (Rule 1.18 (d)(1))

Alternatively:

- (1) If the lawyer has taken reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client, and (2) the interviewing lawyer is timely ethically screened from participation in the matter and is apportioned no part of the fee, and, (3) written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the Rule's provisions, the firm wide prohibition of representation will not be triggered. (Rule 1.18(d)(2))

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Rule 1.18 Continued…

Burden on the lawyer who received the material confidential information to show the lawyer took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client. What information is "reasonably necessary"?

Rule 1.18 and its comment are silent.
Objective standard: what a reasonable lawyer would regard as necessary to make a decision to represent a client.

Check conflicts.

Enough information to permit a preliminary judgment that the client's case is not frivolous. The information gathered may include whether the matter is one that the lawyer is willing to undertake, and may exceed the information required to determine whether the representation is ethically proper. (Restatement (Third) of the Law Governing Lawyers, section 15)

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All Scenarios:

A Person (“PC”) consults with a lawyer (“Lawyer”) about retaining Lawyer and Lawyer’s firm (“Law Firm”) to prosecute a misappropriation of trade secrets claim against its competitor (“Competitor”). Lawyer conducts an interview to determine whether Lawyer can and should represent PC.

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Scenario 1

At the outset of the interview, Lawyer advises PC that Lawyer has not agreed to represent PC, but does not provide PC with guidance or caution about what PC should disclose to Lawyer. Instead, Lawyer asks PC open ended questions about PC's business and PC's claims against Competitor. PC provides confidential information about the merits. Lawyer declines PC's case. Competitor seeks to retain Law Firm. Law Firm is prepared to erect ethical screen. May Law Firm represent Competitor?

No.

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Scenario 2A

At the outset, Lawyer advises PC that Lawyer has not agreed to represent PC and that the interview is designed to determine only whether Law Firm would have a conflict of interest if it represented PC. Lawyer cautions PC against disclosure of information not reasonably necessary to to assist Lawyer in determining if there is a conflict of interest. Conflict search reveals the prospective defendant is Competitor, an existing client of Law Firm, which is advising Competitor in connection with an upcoming public offering. Law Firm declines PC's representation.

May Lawyer use or disclose to Competitor PC's threatened law suit?

No.

Flatt v. Superior Court (1994) 9 Cal. 4th 275

May Lawyer represent Competitor if PC later sues?

Yes.

Scenario 2b

Same facts as Scenario 2a, except that during preliminary discussion to determine whether there would be a conflict of interest in Law Firm's representation of PC, and despite Lawyer's admonitions, PC volunteers confidential information relating to PC's claim that if disclosed to, or used for Competitor's benefit, would be damaging to PC's case against Competitor. None of Lawyer's questions would have naturally elicited such information.

Would Law Firm be prohibited from representing Competitor?

No. With timely ethical screen and compliance with Rule 1.18(d)(2).

Scenario 3

PC clears Law Firm's conflict inquiry. PC would like Lawyer to proceed on an hourly fee basis. Lawyer cautions PC not to disclose any other information that is not reasonably necessary to assist Lawyer to determine whether PC is able to pay the hourly fees because they have not formed an attorney-client relationship. PC provides financial information and Lawyer determines PC cannot afford the hourly rate. PC asks Law Firm to take the case on contingency basis. Lawyer asks for factual information concerning the merits of the case and possible damage award. Lawyer again cautions PC to not disclose information not reasonably necessary for the assessment. Lawyer decides against recommending that the Law Firm take the case, but does not share any of PC's information, the related analysis or conclusions that the Lawyer reached with anyone at the Law Firm. Lawyer informs PC that Law Firm will not take the case, explains the reasons, and that Lawyer did not share any of PC's information with any other person at the Law Firm. Competitor seeks to hire Lawyer to represent Competitor against PC.

May Lawyer represent Competitor?

No

May Law Firm represent Competitor?

Yes. With timely ethical screen and compliance with Rule 1.18(d)(2)

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Scenario 4

PC has cleared conflicts. PC is interviewing other law firms and wants to evaluate Lawyer and Law Firm by giving Lawyer material, confidential information about the case so Lawyer can provide memorandum analyzing the case and setting up a proposed strategy and budget. PC does not retain Law Firm. Competitor subsequently seeks to hire Law Firm.

What circumstances would enable Law Firm to represent Competitor?

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Formal Opinion No. 2021-206

Lawyer's ethical obligations when the lawyer or a lawyer in that lawyer's law firm has violated, is violating, or will violate California's Rules of Professional Conduct or the State Bar Act in the course of representing a client as a result of the lawyer's possible mental impairment.

https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/Formal-Opinion-No-2021-206-Colleague-Impairment.pdf

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The Unfortunate Tale of the Impaired Lawyer and the Subordinate Lawyer

- Impaired Lawyer ("IL") is a senior partner and lead counsel for a longtime client on a litigation matter set to begin trial. Subordinate Lawyer ("SL") is a fifth-year associate assigned to assist with Client's matter and a member of the litigation team since the case's inception. IL has recently exhibited signs of mental impairment. SL unsuccessfully raised ethical concerns about IL's conduct directly with IL.

What should SL do?

Scenario #1: Both employed at Big Firm, an 850-lawyer international law firm with both an executive committee and a risk management committee.

Scenario #2: Both work in IL's small firm where SL is IL's only employee.

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Responsibility of the Impaired Lawyer

- Mental impairment does not lessen a lawyer's obligation to provide competent and ethical representation. ABA Formal Opn. No.03-429.
- A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence and diligence. Rule 1.1(a).
- Competent representation includes the lawyer's obligation to communicate with a client. *Calvert v. State Bar* (1991) 54 Cal.3d 765.
- A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d) represent a client if there is a significant risk that the lawyer's representation of the client will be materially limited by …the lawyer's own interests. Rule 1.7(b).
- Termination of representation. The lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively. Rule 1.16.

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Responsibility of Other Lawyers

- When an impaired lawyer is unable or unwilling to deal with the consequences of impairment, firm lawyers and the impaired lawyer's supervisors who know of the impaired lawyer's conduct have an obligation to take steps to protect the client and ensure that the impaired lawyer complies with the rules and the State Bar Act. ABA Formal Ethics Opn. No. 03-429.
- Reasonable remedial action should be determined on a case-by-case basis, considering the nature and seriousness of the misconduct and the nature and immediacy of its harm. Rule 5.1 Comment [6].
- A lawyer's failure to to supervise other lawyers can result in attorney discipline. *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. RPTR.354; In the *Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315.

Responsibilities of Subordinate Lawyer

- Rule 5.2(a) requires a lawyer to comply with the rules and the State Bar Act "notwithstanding that the lawyer acts at the direction of another lawyer or other person."

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Scenario #1 (Big Firm)

Subordinate Lawyer may not follow Impaired Lawyer's instruction to take no further action and must instead act in accordance with SL's independent duties to Client.

If reasonable to do so, SL may seek to fulfil obligation by communicating with one or more unimpaired supervisory lawyers triggering their duty under Rule 5.1.

This internal reporting does not fully discharge SL's duties. SL continues to owe Client an independent set of ethical obligations which requires SL to ensure the ethical concerns have been addressed. Rule 5.2 [Comment].

If SL concludes Big Firm's resolution is not reasonable, SL may be obligated to pursue further measures, including contacting Client directly.

Scenario #2 (Small Two-Lawyer Firm)

Subordinate Lawyer will need to communicate to Client and advise how matter should be handled. Rule 1.4(a)(2)-(3) and (b). Client's decision controls.

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Formal Opinion No. 2021-207

What are the ethical obligations of a lawyer for a client with diminished capacity?

https://www.calbar.ca.gov/Portals/0/documents/publicComment/2021/COPRAC-Formal-Opinion-No.2021-207.pdf

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Capacity, in general:

The ability to communicate a decision and to understand and appreciate (a) the rights duties and responsibilities created by or affected by the decision; (b) the probable consequences and persons affected; and (c) the significant risks, benefits and reasonable alternatives involved. (Cal. Prob. Code section 812.) Capacity is presumed; the presumption goes to the burden of proof. (Prob. Code section 811(b)) The question is decided on an issue-by-issue basis and is situational.

Diminished Capacity Also not defined in the Rules of Professional Conduct. The client may be wholly incapacitated and unable to make or communicate a decision. The client may be incapable of making a particular decision but can make other decisions associated with the representation. Alternatively, the client may only lack the capacity to make some decisions without some assistance or accommodation.

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The Impact of Diminished Capacity on the Professional Relationship

1. The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship. The client makes those decisions normally reserved to the client. (Cal Practice Guide: Professional Responsibility (The Rutter Group 2019) Ch. 7-24, §7:73,5.)
2. Representing a client with diminished capacity may require a lawyer to make difficult decisions relating to capacity in situations of factual and legal uncertainty. A disinterested lawyer who exercises "an informed professional judgment in choosing among…imperfect alternatives" should not be viewed as acting unethically simply because in hindsight the judgment is later determined to have been mistaken. (Restatement (Third) of the Law Governing Lawyers, section 24, comments (b) and (d); see also American Bar Association, Formal Opinion 491 at 9 and note 26 (2020) "courts and regulators have warned against hindsight bias".)

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Duty of:

Competence

When a client shows signs of diminished capacity, the lawyer's duty of competence may require the lawyer to inquire into or make judgments concerning the client's capacity. Lawyer may consider associating with or consulting a lawyer with greater experience. With client's consent:

- Consult medical or other professionals
- Involve family, friends, or professionals to support the client's understanding and considering and communicating decisions relating to the representation.

Communication

Lawyer must keep the client reasonably informed about significant developments and provide explanation to permit the client to make informed decisions. (Rule 1.4.)

Suggestions similar to duty of competence.

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Duty of Loyalty

- Requires that the lawyer act solely in the client's interest, and "protect [the] client in every possible way" while avoiding any "relation that would prevent the lawyer from devoting [the lawyer's] entire energies to the client's interest." (*Moore v. Anderson, Zeigler, et al.* (2003) 109 Cal.App.4th 1287.)
- When the client's capacity is in doubt, the duty of loyalty continues to require the lawyer to focus on the lawyer's primary responsibility to ensure that the course of conduct chosen effectuates the client's wishes and that the client understands the available options and the legal and practical implications of the ultimately chosen course of action. (*Moore, supra*, 109 Cal.App.4th at 1298.)

Duty of Nondiscrimination

- In representing a client, or terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully discriminate against persons on the basis of any protected characteristic. (Rule 8.4.1(a).) The protected characteristics covered by the rule include both "physical disability" and "mental disability." (Rule 8.4.1(c)(1).)

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Taking Proactive Action:

Authority, Confidentiality, and Loyalty

- Absent a final judicial determination of incapacity, a lawyer's reasonable belief that a client is incapacitated should not by itself terminate a lawyer's authority to take protective action in the client's best interest if such action is in the scope of representation.

- Information about the client's diminished capacity will often be kept confidential and protected from disclosure under Business and Professions Code section 6068(e)(1) and Rule 1.6 because it is information gained in a professional relationship that the clients requested be kept secret or disclosure of which would likely be harmful or embarrassing to the client. Unless an exception to the duty of confidentiality applies, a lawyer who wishes to disclose information concerning the client's diminished capacity must obtain the client's informed consent to do so.

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Advance Consents to Disclose Confidential Information

Rule 1.2 permits a client to give advance authorization “to take specific action on the client’s behalf without further consultation” provided there is no material change in circumstances, the lawyer has complied with the duty of communication under Rule 1.4, and subject to the client’s right to revoke the authorization at any time, so long as the client has the legal capacity to revke, and the right to revoke should be highlighted in the informed consent.

Scenario #1

Due to an accident Client suffered brain injury in that resulted in a change of personality, episodes of mania, and increase in highly risky behavior. Client's relatives plan to institute conservatorship proceedings. Client consults Lawyer about opposing conservatorship application. Lawyer reasonably believes that the evidence supports establishing a conservatorship and that doing so would protect Client from substantial risks of harm. Lawyer also concludes that Client could improve his own decision-making and reduce the likelihood of conservatorship, if Client were to establish a supportive decision-making structure involving both Client's close friend and a diagnostician. Client has rejected Lawyer's advise and wishes to oppose the conservatorship. Lawyer believes the decision is imprudent, but also reasonably believes Client has the capacity to make the decision, and that the decision reflects Client's commitment to maintaining personal liberty. May Lawyer ethically represent Client in opposing the establishment of a conservatorship?

Yes.

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Scenario #2

Lawyer has known and represented Client for may years and prepared Client's initial estate plan. In recent years, Lawyer has frequently seen Client socially and noticed signs of diminished capacity. Client has now asked Lawyer to prepare a revised estate plan, largely disinheriting Client's children in favor of Client's younger companion, who has recently moved in with Client. Based upon information available to Lawyer and further reasonable inquiries, Lawyer reasonably believes that Client lacks testamentary capacity, that, but for Client's diminished capacity, Client would not make the new testamentary dispositions, and that Client is at substantial risk of being subjected to undue influence by Client's younger companion. May Lawyer ethically prepare the new estate plan?

No.

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Scenario #3

Lawyer represented Client in a recently settled personal injury matter, involving a large recovery, and has now been asked by Client to assist in making a loan to Client's nephew. When Client meets with Lawyer to discuss the loan Lawyer notices a deterioration in Client's apparent capacity. The proposed loan has terms that are highly favorable to the nephew, a convicted felon. Client agrees to the retention of a physician consultant to assess Client's capacity. Consultant concludes Client is now incapacitated. Lawyer reasonably concludes that Client lacks legal capacity to enter into the loan transaction. Lawyer seeks to contact Client to advise him against the transaction, but the phone is answered by the nephew who tells Lawyer that Client has given nephew a power of attorney. Lawyer reasonably believes nephew lacks authority to act for Client, and his diminished capacity exposes Client to a substantial threat of financial harm at the nephew's hands and will likely prevent Client from recognizing or acting to protect against that harm. Lawyer knows the Client has other relatives who, if aware of the situation, would take steps to protect Client's interests. What, if any, measures may Lawyer ethically take to protect Client from harm?

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Scenario #4

Lawyer is preparing an estate plan for a competent client with substantial experience and resources and a difficult and contentious family situation. In the course of their discussions, Client discloses that a family member suffered from dementia related to Alzheimer's disease, and as a consequence was financially exploited by other family members. Assuming that it is consistent with the duty of care to do so, under what conditions, if any, may Lawyer ethically recommend that Client consider or execute an advance consent to Lawyer's disclosure of client confidential information at a future time where Lawyer reasonably believes that Client is incapacitated?

ADR℠ SERVICES, INC.

Thank you for Attending!

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