

More on the New Rules and Bar Discipline



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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 .

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 violation 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.

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 Department 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.

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
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- ▶ Disbarment 97
 - ▶ Probation with actual suspension 83
 - ▶ Probation with stayed suspension, 31
 - ▶ Public reproof 26
 - ▶ Private reproof. 24

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.*

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.

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.

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.

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

- ▶ 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

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.

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

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 than Client, etc. No big change.

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.

- ▶ **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**

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.

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.*

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.

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.

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:

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?

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

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.

- ▶ 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.

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.

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.

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.

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-Pro prospective-Client.pdf>

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).

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))

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)

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.

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.

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 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)

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?

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>

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.

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.

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 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.”

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.

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>

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.

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”.)

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.

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).)

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.

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 revoke, 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.

Scenario #2

Lawyer has known and represented Client for many 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.

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?

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?

Thank you for Attending!



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