Hon. David A. Rosen, Ret.
ADR SERVICES, INC.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2024

Legal ethics: Client Trust Account requirements, the new "snitch" rule, and conflicts of interest

WHILE LEGAL ETHICS OFTEN EVOLVE, SEVERAL SPECIFIC AREAS ARE OF PARTICULAR INTEREST AS 2024 BEGINS

Client trust accounts and attorney obligations

(CRPC 1.15; California Rules of Court, rule 9.8.5; California Business and Professions code section 6068; and *Edwards v. State Bar* (1990) 52 Cal.3d 28.) The Client Trust Account Protection Program ("CTAPP") rules, effective 12/1/22, further clarify and sharpen the Bar's focus on client trust account procedures.

As a result of an increasing number of ethics violations by some very well-known lawyers, client trust account requirements have especially been in the news and therefore in the sights of the State Bar. In 2021, the Bar created a Committee on Special Discipline Case Audits, and within one year of that committee's formation, the Bar board of trustees implemented CTAPP. CTAPP is intended to aggressively monitor and regulate client trust accounts and promote the quick recognition of attorneys with trust account problems, whether willful, negligent, or inadvertent. Of course, there is considerable public and legislative pressure on the State Bar in this regard.

Most lawyers are aware that they have statutory and ethical obligations to safeguard funds they hold in trust for their clients. However, many lawyers may not be aware of how strict and specific the rules relating to client trust accounts are. All client funds must be kept completely separate and clearly segregated from an attorney's personal and business accounts. Attorneys have the obligation to maintain accurate, up-to-date accounting records, and to provide regular, timely, complete, and accurate reports to their clients, as well as the State Bar. There is absolute liability for being even a penny out of balance, and good faith is not a defense. (See, e.g., *Guzetta v. State Bar* (1987) 43 Cal.3d 962, 976-980.)

Withdrawing money from a CTA and promptly redepositing all of it is still a violation. (*Kelly v. State Bar* (1991) 53 Cal.3d 509, 518-519.) As with curfew laws, CTA violations are low-hanging fruit, which are aggressively pursued by the bar.

The new CTAPP requirements modify and expand the existing client trust account rules. All California attorneys must, to remain in good standing with the Bar, comply with these

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2024

new requirements, including registering all client trust accounts, including IOLTA accounts, annually with the State Bar. Every attorney must complete an annual self-assessment of their client trust account administration practices, and attorneys must certify with the Bar that they understand and follow all requirements and prohibitions relating to client trust accounts pursuant to rule 1.15 of the California Rules of Professional Conduct.

In order to register a client trust account, including an IOLTA account, with the State Bar, the attorney must report the year-end balance to the Bar. All of these reporting requirements may be satisfied electronically through the My State Bar Profile. The deadline for reporting annually is the same as the deadline for paying annual bar license fees, February 1. Penalties for non-compliance will not be imposed until April 1, and can include being placed on inactive status.

A subordinate lawyer, such as an associate or junior partner, may confirm through consultation with a supervisory lawyer that the CTA duties required are being performed by others in the law firm. The subordinate lawyer is entitled to rely on the supervisor's responses.

The Bar intends to further enhance its monitoring and enforcement of client trust account rules, including expanding public outreach and education of the public, as well as providing and requiring enhanced education for attorneys. The Bar also plans to schedule compliance reviews of selected lawyers and law firms to be conducted by CPAs.

Note that it appears that a long-term deposit of a significant amount of client money may be placed in a separate interest-bearing trust account for the benefit of the client, avoiding IOLTA requirements. (*Brown v. Legal Foundation of Washington* (2003) 538 U.S. 216, 240, fn. 6 to dissent; *Washington Legal Foundation v. Legal Foundation of Washington* (2001) 271 F.3d 835, 843-844.) For example**,** in some tort cases, partial settlements may be achieved early in the litigation, sometimes in substantial amounts. However, there may be liens on the total recovery in the tort case from health care providers or workers' compensation payors, among others. Those liens may not be perfected, or their amounts determined, until the conclusion of the tort case. Thus, the substantial amount of earlier settlement recoveries may, it appears, be placed in a separate interest-bearing trust account established for the benefit of the plaintiff client, with counsel as trustee, so that that money may earn interest for the benefit of the client for the months or years between the collection of that money from some of the tort defendants and the complete resolution of the case. Where applicable, attorneys must detail specific efforts to find "lost clients" for whom the lawyer or firm is holding funds in a CTA, IOLTA or otherwise, before the money held escheats to the State.

California's new "snitch rule"

(CRPC 8.3; ABA MRPC 8.3; California Business and Professions Code Sections 6068(b), (d), (e)(2) (i) and (o).)

California is the last of the 50 states to adopt model rule 8.3, effective 8/1/23, but note how CRPC 8.3 differs from the model rule.

A California lawyer must "inform the State Bar, or a tribunal with jurisdiction to investigate or act upon [the] misconduct" whenever the lawyer knows of "credible evidence" that another lawyer has either "committed a criminal act" or has engaged in "conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property," *and* the conduct or act "raises a substantial question as to the layers of honesty, trustworthiness, or fitness as a lawyer in other respects." (Emphasis added.) Comment One to CRPC 8.3 notes that, of course, "[t]his rule does not abrogate a lawyer's obligations to report the lawyer's own misconduct as required by these rules or the State Bar Act. [citations]"

The ABA's Model Rule of Professional Responsibility, rule 8.3, on the other hand, requires far more broadly that "[a] lawyer who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." (Emphasis added.)

A judge is required under Business & Professions code section 6086.7, upon initially issuing an order, such as sanctions above a certain amount, that triggers notification requirements, to notify the State Bar of the order. (CRPC 10.609.) Query whether CRPC 8.3 affects such judicial reporting to the State Bar.

There are a number of exceptions or carve-outs to the requirements of California's rule 8.3; for mediation confidentiality, attorney-client privilege or any other applicable privileges, as well as for statutory specific protections such as Business & Professions code section 6068, subdivision (b), CRPC 1.6 and 1.8.2; information "gained by a lawyer while participating in a substance abuse or mental health program;" and information "protected by [any] other rules or laws, including information that is confidential under Business & Professions code section 6234" (which protects "information provided to or obtained by the Attorney Diversion and Assistance Program"). (CRPC 8.3(d).) MRPC 8.3(c) is significantly less stringent in its carve-out language.

According to Comment number 10 to CRPC rule 8.3, "Communications to the State Bar relating to lawyer misconduct are 'privileged and no lawsuit predicated thereon may be instituted against any person.' (Business & Professions Code, sec. 6094.)" However, it is not expressly clear that reports of illegality per 8.3 are confidential, especially if the report is made to a tribunal or court and not to the State Bar or solely to the State Bar. The new rule itself does not specifically comment about confidentiality of reports per 8.3.

There are penalties for filing false reports under CRPC 8.3. The second sentence of Comment number 10 to the Rule states that: "[L]awyers may be

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2024

subject to criminal penalties for false *and* malicious reports or complaints filed with the State Bar or be subject to discipline or other penalties by offering false statements or false evidence to the tribunal…." (emphasis added), citing, CRPC 3.3a, and Business & Professions code sections 6043.5 (a); 6068 (b).

Do other jurisdictions deal with abuse of this rule by "over-reporting" in bad faith? (See Williams, Reputation and the Rules: An Argument for a balancing approach under rule 8.3 of the Model Rules of Professional Conduct, 68 La. L. Rev. 931 (2008).) In view of the dearth of cases based upon "over-reporting," the main concern continues to be lawyers' reluctance to "tattle."

It is debatable whether rule 8.3 applies retroactively. The rule itself is silent on this issue and the State Bar has not yet provided any guidance on the issue.

Note duality with civility and professionalism requirements, including without limitation those in the California Attorney oath since 2014 (See italicized portion below):

Per the State Bar website, "Taking the attorney's oath is not just a ritual. It is required for admission to practice law in California pursuant to California Business and Professions Code section 6067.

"OATH (to be taken before a Notary or other authorized administering officer): I, (licensee name) solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor of law to the best of my knowledge and ability. *As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity*."

Conflicts of interest for attorneys, judges, neutrals, and prospective jurors

Attorneys

"A wall is not enough." (*People ex. Rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135; *Hitachi, Ltd. v. Tatura* (2006) 419 F. Supp. 2d 1158.) In *SpeeDee*, a lawyer was of counsel to a firm representing parties adverse to an oil company. That of counsel attorney, without knowledge that the firm to which he was of counsel was handling that case, briefly but substantively consulted with lawyers at the law firm representing the oil company. There was no evidence that the of counsel lawyer ever shared any information with his firm about his conversation with the oil company lawyers, and no evidence that anyone in the of counsel lawyer's firm had any knowledge at any time of the of counsel's discussion with the oil company lawyers. Nevertheless, the Supreme Court held that the of counsel lawyer to the firm representing parties suing an oil company was subject to automatic disqualification by virtue of the fact that the firm to which he was of counsel represented the defendant oil company, although without the of counsel attorney's knowledge, and the of counsel lawyer consulted with the oil company lawyers. The Court held that these initial consultations, though innocent and without any exchange of information between the two firms, involved sufficient communication of confidential case theory and strategy that the of counsel attorney was held to have represented the oil company defendant for conflicts-of-interest purposes. The Court further held that the continuing significant relationship between the firm representing a party adverse to the oil company and an attorney who is of counsel to that firm, with its regular exchanges of information, advice, and opinions, properly makes the of counsel lawyer subject to the rule that imputes a conflict of interest to members of that same firm, with the consequences of automatic disqualification. (20 Cal.4th at 1154.)

Although there was language in the *SpeeDee* case seeming to imply that evidence of an ethical wall between otherwise conflicted attorneys or personnel within a law firm could rebut the presumption of shared confidences within the firm, any such implication in *SpeeDee* was dicta at best, and the United States District Court for the Northern Cistrict of California in *Hitachi, Ltd.* found that California law does not allow the use of ethical walls to prevent vicarious disqualification for conflict of interest. (*Hitachi, supra*, 419 F.Supp.2d at 1162-1164, citing, *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.)

"Consent and waiver," *Antelope Valley Groundwater Cases* (2018) as 30 Cal.App.5th 602, in which the court declined to extend the *SpeeDee* ruling where the affected parties clearly and expressly waive the conflict of interest and consent to continued representation by the otherwise conflicted lawyer.

"Disqualification for an alleged conflict is not automatic." (*Adams v. Aerojet General Corp.* (2001) 86 Cal.App.3d 1324.)

Further, there is the possibility of disgorgement of all or part of fees earned in the matter upon disqualification for conflict of interest. (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 88-96. *N.B.* Justice Chin's dissent, joined by then – Chief Justice Cantil-Sakauye, in this 5 – 2 ruling.)

Apparent vs. actual conflicts of interest

In *criminal* cases, an appearance of a conflict is subject to inquiry, in seeking reversal of the conviction or to disqualify defense counsel, but only an actual conflict disqualifies counsel or mandates reversal, and an apparent conflict only becomes actual if the conflict is shown to have adversely affected counsel's performance. (*People v. Bonin* (1989) 47 Cal.3d 808; *Mickens v. Taylor* (2002) 535 U.S. 162, 168-169.)

As to disqualification of a *prosecutor*, *People v. Eubanks* (1996) is 14 Cal.4th 580; *People v. AWI Builders, Inc.* (2022) 80 Cal.App.5th 248, 255, 268-269.

In *civil* cases, including family law, an apparent conflict can result in disqualification of counsel, even without the showing of any adverse effect on

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2024

counsel's performance. (*SpeeDee Oil*, *supra*, 20 Cal.4th at 1147; *Spindle v. Chubb/Pacific Indemnity Corp.* (1979) 89 Cal.App.3d 706; *IRMO. Abernathy* (1992) 5 Cal.App.4th 1193; but see, citation to California Penal code, section 1424.)

CRPC 1.7 requires no showing of adverse effects on conflicted counsel's representation. The focus instead is on loyalty and confidentiality.

Conflicts for judicial officers

The United States Supreme Court issued its Code of Conduct on November 13, 2023, but the specific wording, pervasive throughout the document (a Justice "should," not "must" or "shall") and the lack of any enforcement procedure or authority, renders this code rather hollow when compared to, inter alia, the CRPC and the California Judicial Canons of Ethics. (See also, Rothman, California Judicial Conduct Handbook, 4th ed., 2017, Ch. 7.)

There are practical problems, however, unique to disqualification or recusal at the United States Supreme Court level. There's no procedure in place as to who will replace the recused justice, regardless of how or at whose instance the recusal was effectuated. Professor Erwin Chemerinsky suggests the appointment by the remaining eight justices of a Circuit Court of Appeals judge and or having the other eight justices rule on the alleged conflict of interest.

Despite the express statutory scheme in California relating to disqualification or recusal of bench officers, practitioners are often uncertain as to exactly what requires a judge or justice to disclose potentially disqualifying information or to actually recuse themselves. Moreover, practitioners are often uncertain as to what constitutes a sufficient basis for recusal of the bench officer at counsel's instance. (Code Civ. Proc., §§ 170.1, 170.5, subd. (b); but *not* 170.6.)

Section 170.1, when read in the context of the definitions of terms provided in section 170.5, subdivision (b), delineates specifically the factual circumstances under which the bench officer must recuse themselves. Section 170.1 also provides the basis for a motion for recusal of the bench officer. The default, however, is that a bench officer must hear and decide all matters assigned to them unless they are disqualified as a matter of law. (Code Civ. Proc., § 170.)

Whether a judge should disclose information about potential conflicts without recusing themselves, or even the basis for self-recusal, is not a hard and fast question. Counsel are often uncertain as to whether they should respond to a judicial disclosure of this type by seeking recusal, or even whether they should seek recusal based upon information counsel has obtained, whether it was disclosed by the bench officer or not.

For example, a judge announces at the outset of the hearing in a medical malpractice case, "I've had several surgeries at (name of defendant hospital) without incident, but I don't think anything about those experiences will affect my impartiality or objectivity in this case." Whether this information had to be disclosed at all is, frankly, a gray area of the law. Some judges would make this disclosure of these facts and some would not. However, a close reading of section 170.1, et seq. makes clear that neither self-recusal nor recusal at the instance of counsel is indicated. Nevertheless, counsel could move to disqualify the judge, thereby risking leaving a bad taste in the bench officer's mouth, a result which the bench officer is ethically bound to avoid and ignore.

However, a judicial disclosure without recusal in another case is more troubling. In mid-trial of an employment case, after plaintiff testified about their work history including that they'd had a management position in the office of the district attorney, the trial was recessed for the weekend. Before plaintiff resumed testifying on direct on Monday morning, the trial judge disclosed that over the weekend he'd had dinner with the district attorney himself over the weekend. Conversation at that dinner table came around to "what interesting cases are you hearing these days?" The judge disclosed that he had responded that he was in the middle of a trial involving one of the D.A.'s former staff members, who'd apparently occupied a position of some authority. The D.A. responded, per the judge's disclosure, that the D.A. had never heard of this person.

The judge noted to counsel and parties that he felt obligated to disclose this conversation, but he then stated that he did not feel it would affect his impartiality or objectivity in the case. The judge did not self-recuse, nor did any party move to recuse the judge, perhaps because they were uncertain as to whether they had grounds to do so.

The judge should not only have recused himself, but should have self-reported to the Commission on Judicial Performance. (California Code of Judicial Ethics, canon 3B(9).) It was inappropriate for the judge to discuss with anyone, a social friend who happened to be the D.A., or anyone else, anything specific about the pending trial, certainly including plaintiff's name or employment history. While this was a jury trial, and the D.A.'s professed ignorance as to this person was never disclosed to the jury, plaintiff's counsel was necessarily concerned that based upon his conversation with the D.A. at dinner, the judge might think plaintiff was embellishing in his sworn testimony at least one part of his work history. Defense counsel might think the same thing, but might want to imply the same, or even be concerned that the trial court would bend over backwards in favor of the plaintiff in a subconscious attempt to render the apparent conflict immaterial. All of this and more is why the judge should have kept his mouth shut to begin with, but then should have recused himself once the dinner conversation had occurred. Talking about the facts of the case before it is resolved to those not involved in the case was itself a violation of ethics. Then, disclosing the conversation without self-recusal was also inappropriate. Yet, the trial proceeded, and the trial judge made no rulings which seemed to either counsel to have resulted from the inappropriate dinner talk.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2024

Code of Civil Procedure section 170.6, by the way, does not actually provide the basis for a truly peremptory challenge to the bench officer. Despite common misconceptions about section 170.6, in order to "paper" a judge without specific cause, counsel must execute, file, and serve a declaration under penalty of perjury that the bench officer is prejudiced against the party, the attorney, or the interests of the party or attorney. Attorneys commonly execute the Judicial Council form declaration in support of the section 170.6 challenge without really considering whether they are actually making that claim. Instead, section 170.6, unique to California, is often used strategically; to buy more time, or to avoid a particular courthouse or district within the county.

Conflicts for venire members (potential jurors)

Code of Civil Procedure sections 225(b)(1)(B), (c), 229(b), (d), such as *ownership* of an interest in a party, may be sufficient to support a successful for cause challenge.

Conflicts for neutrals

(Code Civ. Proc., § 1281.9; California Judicial Council Ethics Standards 7, 12(b); CRPC 2.4, et seq.*; Honeycutt v. J.P. Morgan Chase Bank* (2018) 25 Cal.App.5th 909; *Ovitz* v. *Schulman* (2005) 133 Cal.App.4th 830.)

In *Honeycutt*, the Court of Appeal for our Second District reversed a trial court judgment confirming an arbitration award after the unsatisfied employee appealed on the basis that the award in favor of the employer was made by an arbitrator who failed to fully disclose possible conflicts of interest. The Court of Appeal held that the arbitrator violated California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration by failing to disclose that the arbitrator had or would accept offers to serve as a neutral in other cases involving the same parties or attorneys, had sent inadequate disclosure letters to the parties which failed to fully satisfy the arbitrator's disclosure obligations, and the arbitrator failed to disclose their service in other pending arbitration matters involving counsel for the employer in this case. The Court further held that the arbitrator had violated ethics standards requiring disclosure of any matters that could cause a person to reasonably doubt the arbitrator's ability to remain impartial. Thus, the Court ruled that the arbitration award in favor of the employer must be vacated. This ruling has resulted in the fine-tuning and expansion of disclosures routinely made by neutrals throughout the state.

The purpose of the focus, then, on apparent conflicts is to preserve and maintain the public's confidence in the legal system; but note politics and appointments. (See, CRPC 8.4; *In re Jasmine S*. (2007) 153 Cal.App.4th 835, 840.) But, to paraphrase the vernacular, "How's that going for us?"

Hon. David A. Rosen, Ret. was appointed to the Los Angeles Superior Court in 2015, serving into 2023. As a judge, he had assignments in criminal law, family law, and a civil I.C. court. Prior to this, he was a plaintiffs' lawyer with Rose, Klein & Marias LLP *in Los Angeles for over 30 years, focusing on trial preparation, trials, and appeals of toxic exposure matters and employment disputes, inter alia. Judge Rosen was on the boards of AAJ, CAOC, and CAALA, as well as the Litigation Section of LACBA, and he sat on the California Commission on Access to Justice. Judge Rosen now mediates and arbitrates various disputes through* ADR Services, Inc. *in Los Angeles.*