Introduction

We close out 2021 with opinions that address lawyer disqualification and attorney’s fees as well as authoritative guidance from both the ABA and the State Bar of California related to client communication and clients with diminished capacity.

We look forward to 2022 with the hope that courts and other authoritative sources will continue to provide legal ethics and professional responsibility guidance. As they do, we are pleased to bring that information to you.

We welcome your comments and suggestions about recent decisions, authority, or issues we might address in future editions. For immediate questions, the Legal Ethics Committee maintains a hotline that SDCBA members can call at any hour (619) 231-0781 x4145. Just follow the instructions and a committee member will get back to you with ethics authority you might consider.
In This Issue
Among the questions answered by rulings abstracted in this issue of Ethics Quarterly are:

May an employer’s workers’ compensation carrier properly move to disqualify a third party’s counsel on the ground that counsel created a conflict of interest by representing the injured employee in an underlying personal injury action against the third party?
21.4.1 Moreci v. Scaffold Solutions, Inc.

May a court deny attorney fees because the lawyers engaged in unnecessary and unreasonable litigation?
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21.4.4 State Bar of California Formal Opinion No. 2021-207
21.4.1 Moreci v. Scaffold Solutions, Inc. (2021) 70 Cal.App.5th 425 — Court of Appeal of California, First Appellate District, Division Two (September 27, 2021)

Issue:
May an employer's workers' compensation carrier properly move to disqualify a third party's counsel on the ground that counsel created a conflict of interest by representing the injured employee in an underlying personal injury action against the third party?

Analysis:
No, in such circumstances, a carrier lacks standing to seek disqualification, as it never has an attorney-client relationship with the third party's counsel. Absent any confidential or fiduciary relationship between it and counsel, the carrier has no legally cognizable expectation of confidentiality with counsel.

Because motions to disqualify inherently interfere with one party's right to choose counsel, a party moving to disqualify counsel must have a legally cognizable interest that would be harmed by the attorney's conflict of interest. So, courts have found an attorney-client relationship between the complaining party and the attorney sought to be disqualified or at least a duty of confidentiality owed to the nonclient is a prerequisite to disqualification. And, moving parties must also show that the counsel's continued participation would invade a legally protected interest which is both (1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical.

It is not enough for the moving party to have some interest in the outcome of the litigation. Here, for example, the carrier asserted that it had a stake based on its status as the worker's compensation carrier and its statutory right to seek reimbursement for benefits paid to the injured employee, to prevent the injured person from receiving a double recovery.

The Court of Appeal disagreed with the argument that the legal interests of an employee and employer cannot be adverse to each other in litigation involving workers' compensation and a third party. For example, although an employee may not directly sue an employer for on-the-job injuries, it does not necessarily follow that the legal interests of the employee and employer must be aligned, such that the employee is charged with a duty to safeguard the employer's right to sue a third party. Where, as here, the employer's negligence is asserted as a defense by a third party, the interests of the employee and employer become adverse.
21.4.2 Wertheim, LLC v. Currency Corporation (2021) 70 Cal.App.5th 327 — Court of Appeal of California, Second Appellate District, Division One (October 14, 2021)

Issue:
May a court deny attorney fees because the lawyers engaged in unnecessary and unreasonable litigation?

Analysis:
Yes. Two competitors fought extended litigation battles concerning the assignment of royalty rights from third parties, including more than 40 appeals on the appellate court’s docket over the last dozen years. A judgment creditor then sought more than $800,000 to enforce a 2009 judgment entered after a jury awarded it $39,000; the amended judgment, including interest and costs, was $190,718.48, which the appellate court affirmed in 2012.

The judgment creditor sought more than $210,000 in fees to prosecute a separate action on the appeal bond and, in a second motion, almost $400,000 for fees in connection with the original action and the bond action. The contract at issue in the original action provided for prevailing party fees in enforcing the contract.

Pursuant to the Enforcement of Judgments Law, post judgment fees and costs may be added to a judgment to the extent they are “reasonable and necessary.” A motion for such costs must be made before the judgment is satisfied in full, but not later than two years after the costs have been incurred. The Court of Appeal upheld the trial court’s denial of attorney fees in the bond action as unnecessary because the action itself was unnecessary. The creditor could have avoided a new lawsuit to enforce the bond if it had filed a timely motion within one year of a final determination on appeal, instead of filing a separate action. The delay “result[ed] in fees highly disproportionate to the result achieved.” Thus, although both procedures — motion or separate action — are available, they are not always equally necessary. “The trial court was within its discretion to find the bond action to be an ill-considered pursuit.”

The appellate court then sent a message: “We also remind the parties that fee awards are fundamentally governed by equitable principles. The trial and appellate courts in Los Angeles have been involved in dozens of litigations sorting out the rights and obligations of these business rivals in their long funning and sometimes personal competition to obtain royalties from third parties. . . Equity countenances against awarding attorney fees to parties who litigate unnecessarily or in expensive battles eclipsing the dispute that initially brought them into court.”
Comment:
The court did not mention any Rules of Professional Conduct, but it might have cited rule 3.2 that says “a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.” Failure to timely bring a motion to enforce the bond, instead of a separate and costly action ultimately resulting in denial of substantial attorney fees could potentially also implicate rules 1.1 (competence) and 1.3 (diligence).
21.4.3 American Bar Association Formal Opinion 500 (October 6, 2021)

Issue:
How should lawyers address the duty to communicate when common language is an issue?

Analysis:
Lawyers must communicate with clients in a manner that is reasonably understandable to those clients. Reasonably understandable client-lawyer communication is not only necessary to enable the client to make informed decisions; it is also an element of the lawyer’s obligation to provide the client with competent representation.

The duties of communication under Model Rule 1.4 and competence under Model Rule 1.1 do not change in nature, scope, or importance in situations where a client’s ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or because the client has a hearing, speech, or vision disability. In such situations, lawyers may be obligated to take measures appropriate to the circumstances to ensure that those duties are capably discharged.

If communications issues are such that the client cannot adequately comprehend the lawyer’s advice and other communications, and thus, cannot participate intelligently in the representation, or the lawyer is unable to ascertain the information needed to competently assist the client, the lawyer must take measures to establish a reasonably effective mode of communication. Ordinarily, this will require engagement of a qualified impartial interpreter or translator (or, in some situations, the use of an appropriate assistive or language-translation device) so that the lawyer and client can reasonably understand one another to a degree that is compatible with the lawyer’s professional obligations. Translators should be capable of comprehending and accurately explaining the legal concepts involved, and should agree to and abide by the lawyer’s duty of confidentiality. When using a lay person, such as a client’s friend or relative, lawyers should take care because of the risk that the closeness of the relationship may make the translator biased by a personal interest in the outcome of the representation. In appropriate circumstances, lawyers may also use other assistive or language-translation technologies.

Particularly when there are language considerations affecting the exchange of information, a lawyer must ensure that the client understands the legal significance of translated or interpreted communications and that the lawyer understands the client’s communications.
Comment:
The opinion touches upon a relate issue, when lawyers and clients may have other impediments to communication based on certain word choices and attributed meanings, such as may occur when there are generational, cultural, and/or dialectical differences. Again, lawyers should be sensitive to such situations in considering whether information has been accurately communicated and understood.
21.4.4 State Bar of California Formal Opinion No. 2021-207

**Issue:**
What are a lawyer’s ethical obligations to a client with diminished mental capacity?

**Analysis:**
Many jurisdictions have adopted a version of ABA Model Rule 1.14 to give guidance when lawyers must confront their obligations to a client with diminished decision-making capacity. The California Second Commission of the Revision of the Rules of Professional Conduct submitted a proposed version of rule 1.14 to the Supreme Court that attempted to reconcile the Model Rule’s approach with unique California obligations, including California’s more stringent obligations of confidentiality. The Supreme Court of California did not adopt proposed rule 1.14. The need for guidance, however, about ethical obligations to clients with diminished capacity remains.

The opinion notes that four issues are central to representing clients with diminished capacity: (1) a lawyer’s duty to maintain, to the extent possible, a normal lawyer-client relationship, as our competence, communication, confidentiality, loyalty and nondiscrimination rules require; (2) a lawyer’s obligation to make judgments relating to the client’s capacity; (3) a lawyer’s authority to take protective action on the client’s behalf; and (4) the ethical propriety of a competent client’s advanced consent to disclosure of confidential information if future diminished capacity exposes the client to harm that disclosure might prevent.

Nothing in the Rules or the State Bar Act defines “capacity.” The Probate Code, however, does. Thus, the concept of diminished capacity intersects with the rules whenever the rules involve a decision reserved to the client—e.g., formation and termination of the lawyer-client relationship; or rules requiring a client’s informed consent; or the representation’s objectives or “substantial rights.”

*Competence*
When a client shows signs of diminished capacity, the duty of competence (Rules of Prof. Conduct, rule 1.1) may require making judgments about the client’s capacity, including associating or consulting a lawyer with more experience, or even consulting experts in other professions, with client consent where required.

*Communication*
Lawyers have the obligation to keep a client “reasonably informed” about “significant developments relating to the representation.” (Rules of Prof. Conduct, rule 1.4.) A client with diminished capacity, however, may have greater difficulty understanding the client’s own interests or experience more difficulty communicating them to their lawyer.
Loyalty
The duty of loyalty requires that a lawyer act solely in the client’s interest, including exercising independent judgment uninfluenced by the lawyer’s own or a third party’s interests. When a client’s capacity is in doubt, the duty of loyalty continues to require that lawyers focus on their responsibility to ensure that a chosen course of conduct carries out the client’s wishes—and that the client understands available options and their legal and practical implications.

Taking Protective Action
A lawyer’s reasonable belief that a client is incapacitated does not necessarily terminate the lawyer’s authority to take protective action in the client’s best interest. But, the duties of confidentiality and loyalty may limit what a lawyer may do — information about the client’s diminished capacity will likely be confidential. Thus, a lawyer who wishes to disclose confidential information about a client’s capacity must first obtain the client’s informed consent. Furthermore, California lawyers’ duties of confidentiality and loyalty combine to bar them from initiating a conservatorship action without the client’s informed consent — even if facts establish the conservatorship standard and the action would be in the client’s best interest.

Advance Consent
Because of client confidentiality strictures, a competent client may wish to ensure, in the event of future diminished capacity, that the client’s lawyer will be able to disclose relevant confidential information if necessary to protect the client from substantial harm. An informed client may achieve this by giving advance written consent to that disclosure on specified conditions.

Comment:
Lawyers who represent individual clients in long-standing or ongoing engagements, where the client’s age or other circumstances may suggest the possibility of future diminished capacity, may wish to consider if they should discuss with the client whether such advance consent is in the client’s best interests. In that respect, the opinion’s guidance may be helpful.
Please note that, due to the break in continuity of publications, the volume number of *Ethics Quarterly* now matches the calendar year of publication and does not reflect the number of years that *Ethics Quarterly* has been published.