

ETHICS QUARTERLY

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Introduction

This quarter, we saw a significant increase in authorities addressing various ethical obligations of lawyers. We have collected seven opinions, including two from the State Bar Review Department, and two ethics opinions that touch upon readmission to the Bar, the scope of sanctions that may be imposed for lawyer misconduct in federal courts, whether lawyers may waive the attorney-client privilege, disqualification of firms, the duty of candor, and whether a law firm or its former lawyer owns the work product privilege, and other ethics issues.

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.

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What are an attorney's ethical obligation regarding a profile of the attorney posted on a professional directory website maintained by a third party?

17.2.1 *In the Matter of Unger (2017) Case No. 16-R-13205* – State Bar Court of California, Review Department (March 17, 2017)

Issue:

Is an applicant for readmission to the State Bar time-barred from doing so if the application is made more than three years after taking the bar exam, but less than three years of learning after the results?

Analysis:

No. California Rules of Court, rule 9.10(f)(3) provides in pertinent part that “Applicants who resigned with charges pending or who were disbarred must establish present ability and learning in the general law by providing proof, at the time of filing the application for readmission or reinstatement, that they have taken and passed the Attorneys’ Examination by the Committee of Bar Examiners within three years prior to the filing of the application for readmission or reinstatement.”

In 2002, Unger had resigned with disciplinary charges pending. In February 2013, he took the bar exam. He later received a notification dated May 17, 2013 that he had passed the exam. And, on May 16, 2016, Unger filed for reinstatement. The Office of Chief Trial Counsel argued that the rule required that the exam be taken within three years of the filing of the application.

The Review Department disagreed. It concluded that such an interpretation created a trap for the unwary. And because passing the exam was a prerequisite, notice of which was usually not provided until approximately three months after taking the exam, it would effectively shorten the period to file an application to approximately 33 months.

17.2.2 *Goodyear Tire v. Haeger* (2017) 2017 U.S. LEXIS 2613; 137 S. Ct. 1178 – Supreme Court of the United States (April 18, 2017)

Issue:

Does a court abuse discretion in employing its inherent authority to impose over \$2.7 million in sanctions against counsel and client for delays in production of relevant information, making misleading and false in-court statements, and concealing relevant documents?

Analysis:

Yes. The Supreme Court reviewed the affirmance of a District Court order for sanctions that we addressed in the third quarter of 2015. It concluded 8-0 that the Ninth Circuit had erred. The Haegers sued Goodyear because a tire on their motor home failed. Goodyear repeatedly failed to produce testing information throughout the discovery process, but represented to the court that they had. The court imposed money sanctions equal to the fees and costs incurred after Goodyear served its supplemental responses to the Haegers' first request upon concluding that was when Goodyear first definitively showed it was not going to cooperate in the litigation process.

The Court concluded that, when a court exercises its inherent authority to sanction bad-faith conduct by ordering payment of the opposing party's fees, the amount must be limited by the additional fees the bad-faith conduct caused the other party to incur. Here, reasoning that this was a particularly "egregious" case, the District Court did not analyze whether the fees awarded had a causal link. The Ninth Circuit adopted a purely time-based approach to sanctions, concluding that they were appropriate without analyzing the cause of the fees. Instead, the Ninth Circuit believed they were justified so long as they were incurred during the time of the bad-faith conduct.

The Supreme Court corrected these analyses, indicating that the Haegers could recover only the portion of their fees that they would not have paid but for the misconduct. Such a but-for causation standard requires assessment and allocation of specific litigation expenses. But the ultimate goal is rough justice, rather than auditing perfection. Accordingly, assuming there had been no waiver of Goodyear's ability to challenge the award, the District Court needed to reassess the fees through a but-for analysis. On June 8, 2017, the Ninth Circuit remanded to the District Court for analysis of waiver and, if necessary, causation of fees.

17.2.3 *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal. App.5th 1083 – Fourth Appellate District, Division Three (April 18, 2017); review denied June 14, 2017

Issues:

Does a client waive the attorney-client privilege by inadvertently disclosing a privileged communication to third parties? Does the court properly disqualify a law firm representing one of the third parties because the lawyers failed to notify the client’s lawyer that the firm had the communication, reviewed and analyzed it, and used it in the lawsuit?

Analysis:

No, and yes. A former McDermott firm client brought an action against the firm and then moved for disqualification of its lawyers, Gibson Dunn. The trial court disqualified Gibson Dunn and a divided court of appeal confirmed.

The waiver question—with a somewhat convoluted set of facts—may be interesting, but it does not raise the key ethics issue. Briefly, the trial court found, and the court of appeal affirmed, that the eighty-year-old former McDermott firm client did not waive his attorney-client privilege by forwarding a confidential e-mail from his personal lawyer to his sister-in-law, because he inadvertently and unknowingly forwarded the e-mail from his iPhone and, thus, lacked the necessary intent to waive the privilege. Similarly, the sister-in-law did not waive the client’s privilege when forwarding the e-mail to her husband, who then shared it with four other individuals, because neither the sister-in-law nor the brother-in-law could waive the client’s privilege; the client did not consent to these disclosures because he did not know about them or additional disclosures—including into the McDermott firm’s file—until a year later.

The e-mail surfaced—in the hands of a lawyer for the opposing party—in a subsequent probate action; the client’s lawyer stated that the e-mail was privileged, had been inadvertently disclosed to the sister-in-law and demanded its return based on *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 and *Rico v. Mitsubishi Motors Corporation* (2007) 42 Cal.4th 807. The lawyer with the e-mail disagreed, but promised not to use it and destroy all copies.

But then, the McDermott firm produced a copy of the e-mail in response to a subpoena in the probate action. When the e-mail surfaced in a deposition, the client’s lawyer again objected that it was privileged and demanded its return. A Gibson Dunn lawyer, representing the deposition witness, refused, claiming that the ethical obligation to return inadvertently disclosed documents applied only to those inadvertently produced during discovery in litigation.

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Malpractice litigation against the McDermott firm followed. Gibson Dunn represented it, and attempted to use the e-mail at depositions in the malpractice litigation. Disqualification in the trial court and the writ proceeding followed.

Citing *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1188, the court of appeal reiterated that “the disclosure contemplated in Evidence Code section 912 involves some measure of choice and deliberation on the part of the privilege holder.” It upheld the trial court’s determination of both privilege and non-waiver.

When it came to Gibson Dunn’s disqualification, the appellate court reaffirmed that *State Fund* “is the seminal California decision defining a lawyer’s ethical obligations upon receiving another party’s attorney-client privileged materials,” a standard the Court adopted in *Rico*—while also extending the rule to materials protected by the attorney work product doctrine.

The court applied the language of *State Fund*—what it characterized as the “more stringent test”—that when materials received “obviously appear” to be privileged or “otherwise clearly appear to be confidential,” and where it is “reasonably apparent” that the materials were inadvertently made available, lawyers’ *State Fund* obligations arise. They must stop examining the materials any further, immediately notify the sender, and refrain from any use of the materials while the dispute about their privileged nature remains.

When Gibson Dunn found the e-mail in the McDermott firm’s files, it knew the sender was the client’s personal lawyer and that the McDermott firm lawyer who had gotten a copy was a potentially adverse party. The e-mail was, the appellate court held, presumptively privileged under Evidence Code section 917 and “therefore was an ‘obviously privileged’ document under the *State Fund* rule.” The inadvertence of its production to Gibson Dunn’s client was reinforced when the client’s lawyer claimed the privilege, said the production was inadvertent and demanded its return. Gibson Dunn’s use of the e-mail after that doomed it to disqualification.

The appellate court rejected both the law firm’s contention, and the dissent’s, that *State Fund* obligations are limited to privileged materials produced through the inadvertence of opposing counsel during litigation. Rather, citing post-*Rico* case law and a State Bar opinion, the court held that *State Fund* ethical obligations arise without regard to how the lawyer obtained the documents, “whenever a reasonably competent attorney would conclude the documents obviously or clearly appear to be privileged and it is reasonably apparent they were inadvertently disclosed.” Moreover, “the receiving attorney’s reasonable belief the privilege holder waived the privilege or an exception to the privilege applies does not vitiate the attorney’s *State Fund* duties. . . . The receiving attorney assumes the risk of disqualification when that attorney elects to use the documents before the parties or the trial court has resolved the dispute over their privileged nature and the documents ultimately are found to be privileged.”

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In short, absent agreement of the parties, the trial court, not the receiving lawyer, decides whether an apparently privileged and inadvertently produced document is, in fact, privileged. A receiving lawyer who makes that determination alone does so at the peril of later disqualification. “[T]he circumstances here did not permit Gibson Dunn to decide on its own whether the privilege was waived.”

17.2.4 *Broadway Victoria, LLC v. Norminton, Wiita & Fuster (2017)* 10 Cal.App.5th 1185 – Second Appellate District, Division Five (April 19, 2017)

Issue:

May a failure to meet a reasonable standard of professional care constitute a breach of fiduciary duty?

Analysis:

No. Client alleged that its lawyers failed to advise it of two significant things: a potential malpractice claim against predecessor counsel and the potential opportunity to obtain clarification from a bankruptcy court on an assignment that it had approved. This latter “failure to advise” was significant because standing was one of the primary points of contention in a state court lawsuit and one of the issues was whether ancillary claims had been transferred as part of the assignment. Further, resolving the issue before the bankruptcy court would likely have been less expensive and more expeditious than the state court option.

The Second District noted that such allegations could potentially be sufficient to show professional negligence, but would not support a claim for breach of fiduciary duty. “Beyond mere allegations of professional negligence, a cause of action for breach of fiduciary duty requires some further violation of the obligation of trust, confidence, and/or loyalty to the client.” So, a claim of breach of fiduciary duty arising from the same facts and damages as one for malpractice is duplicative and should be dismissed.

Similarly, standing alone, the mere fact that a lawyer pursued and was paid for a losing strategy does not support a breach of fiduciary duty claim. Here, the client theorized that, to generate greater fees by continuing to litigate a standing issue in state court, the lawyers did not inform the client of a potentially faster and cheaper option of seeking bankruptcy court clarification of whether an assignment the bankruptcy court had approved included the right to bring the action. The Second Appellate District concluded, “It would be entirely speculative” to infer that the lawyers intended their client harm from the nondisclosure of one option and the receipt of fees for pursuing another that proved unsuccessful.

17.2.5 *In the Matter of Moriarty (2017) Case No. 15-10406 – State Bar Court of California, Review Department (April 20, 2017)*

Issue:

Should a twice-suspended lawyer avoid disbarment for causing incorrect reports about his medical condition to be made to administrative law judges in order to obtain continuances of two hearings?

Analysis:

No. In 2000 and 2010, Moriarty was suspended from the practice of law for 30-day and 45-day periods. In September 2014, Moriarty or his fiancée twice instructed Moriarty’s assistant, Lazaro Machado, to represent to the Office of Administrative Hearings that Moriarty was experiencing health problems and could not attend hearings. In one instance, Machado embellished the facts. In both cases, continuances were granted and Moriarty was asked to furnish documentation supporting his medical excuse. Because Moriarty did not obtain medical attention on either occasion, he had none to provide. And, in one of the instances, Moriarty was ordered to pay sanctions to opposing counsel. He failed to do so, resulting in a small claims action to perfect a judgment against him. Moriarty did not report the sanctions to the State Bar.

Although Moriarty was found culpable of moral turpitude for failing to correct a misrepresentation made on his behalf and for intentionally making a misrepresentation to an administrative tribunal, charges regarding his failure to obey the order of sanctions or report them to the State Bar were dismissed since the order was not from a “court.” The hearing judge recommended 18 months actual suspension.

The Office of Chief Trial Counsel appealed, claiming that dismissal of the some of the charges was improper, and that disbarment appropriate. The Review Department agreed.

As a preliminary matter, the Office of Administrative Hearings constitutes a “court” for purposes of Business and Professions Code section 6103. Similarly, sanctions imposed by the Office should be reported pursuant to Business and Professions Code section 6068, subdivision (o)(3). The purpose for the subdivision is to advise the State Bar of facts that may warrant an investigation. Because the practice of law may include practice before administrative law judges, exempting sanctions they order from the reporting requirement would be inconsistent with that purpose.

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Disbarment was the proper level of discipline. Standard 1.8(b) provides, if a member has two or more prior records of discipline, and at least one involved suspension, disbarment is appropriate unless the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct. Although disbarment is not always mandatory as a third discipline, there were insufficient mitigating factors to justify a departure from the standard here.

17.2.6 *Weeden v. Johnson* (9th Cir. 2017) 854 F.3d 1063 (9th Cir. 2017) – United States Court of Appeals for the Ninth Circuit (April 21, 2017)

Issue:

Is a criminal defense lawyer’s failure to seek a psychological evaluation of his client a constitutional performance deficiency prejudicial to his client?

Analysis:

Yes. Weeden was convicted of felony murder and sentenced to twenty-nine years to life for a crime committed when she was fourteen. Her defense at trial consisted entirely of four character witnesses. Her lawyer did not seek an evaluation by a psychologist or present expert testimony about the effect of Weeden’s youth on her mental state. In post-trial proceedings, her lawyer claimed that he did not seek an evaluation because the result might not support his defense strategy.

In her habeas corpus petition, Weeden claimed that her trial lawyer provided constitutionally ineffective assistance of counsel. The state court rejected this claim, finding that the lawyer’s refusal to investigate psychological testimony was a reasonable strategic decision. The district court denied Weeden’s writ petition; the Ninth Circuit reversed.

The court applied the two-pronged framework of *Strickland v. Washington* (1984) 469 U.S. 668, 687-688, which provides that the Sixth Amendment guarantee of counsel in a criminal proceeding is violated if “counsel’s performance was deficient” and “the deficient performance prejudiced the defense.” The Ninth Circuit concluded that the California appellate court’s conclusion that Weeden’s trial lawyer provided effective representation was contrary to, or involved an unreasonable application of, clearly established Supreme Court law, because that Court has repeatedly made plain that counsel has the “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”

The California appellate court did not identify any “reasonable decision” that Weeden’s trial lawyer made rendering an investigation of psychological evidence “unnecessary.” Instead, it concluded that the choice not to investigate psychological evidence was a sound “tactical decision” because the lawyer feared the results of an expert evaluation might undermine his trial strategy. But that analysis, “puts the cart before the horse.” A lawyer cannot justify a failure to investigate simply by invoking strategy. The Supreme Court has squarely rejected an attempt to justify a limited investigation as tactical judgment.

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Weeden’s lawyer could not have reasonably concluded that obtaining a psychological examination would conflict with his trial strategy without first knowing what the examination would reveal. Equally unpersuasive was the lawyer’s conclusion that the prosecution could have used the results of an examination against Weeden. While a defendant must disclose expert reports she intends to rely on at trial, simply obtaining a report does not mean she had to produce it. Instead, the correct inquiry is not whether psychological evidence would have supported a preconceived trial strategy, but whether Weeden’s lawyer had a duty to investigate that evidence in order to form a trial strategy, considering all the circumstances. The Ninth Circuit concluded the answer is yes.

The prosecution’s felony murder theory required proof that Weeden had specific intent to commit the underlying felony, so Weeden’s mental condition was an essential factor in deciding whether she actually had the required mental states for the crime. The Supreme Court has repeatedly noted that the mind of a fourteen-year-old is markedly less developed than that of an adult, and her trial lawyer had described Weeden as “unusually immature.” Given the exculpatory potential of psychological evidence, her lawyer’s failure to investigate “ignored pertinent avenues for investigation of which he should have been aware.” “Counsel’s performance was deficient because he failed to investigate, a failure highlighted by his later unreasonable justification for it.” The Ninth Circuit did not address whether this constitutional performance deficiency also constituted a failure to fulfill his ethical obligations under Rules of Professional Conduct, rule 3-110 (Failing to Act Competently). But it reversed and instructed the district court to grant the petition unless Weeden was promptly retried.

17.2.7 *Tucker Ellis v. Superior Court* (2017) 2017 Cal. App. LEXIS 571 – First Appellate District, Division Three (June 21, 2017)

Issue:

May a law firm disclose documents potentially protected as work product without first obtaining consent of the lawyer who prepared them, but no longer works at the firm?

Analysis:

Yes. The First Appellate District determined that, between an employer law firm and a former attorney employee, the firm was the holder of the attorney work product privilege for documents created by an attorney during and in the scope of employment.

When first joining the firm, the attorney signed an agreement that all documents received, created, or modified by the lawyer were the property of the firm. While working there, the lawyer engaged consulting experts in his area of practice. The law firm received a subpoena for documents related to research or publication funded through payments the firm made to the consultants, and produced emails authored by the lawyer. The lawyer then wrote a “clawback” to both the subpoenaing firm and his former firm, demanding the documents be sequestered and returned.

The attorney then filed a lawsuit against his former firm. The trial court analyzed the case under Labor Code section 2860, and concluded that the firm owed a duty to ensure that the attorney’s work product was not disclosed to others without his consent.

The First Appellate District concluded that ownership of the documents pursuant to Labor Code section 2860 did not determine who could waive work product, who owned the work product privilege under Code of Civil Procedure section 2018.030 did. That is because lawyers, even though not still in possession of documents, may still assert work product of that which they create.

The primary purpose of the statute is to create an environment where lawyers may honestly and objectively evaluate cases by eliminating concerns that the documents are subject to later disclosure. Here, the work with the consultant was done to benefit a client of the firm. And a contrary holding could lead to unusual situations requiring multiple lawyers needing to provide consent because a given document reflects a collective analysis. The appellate court noted, multiple times, that its holding is narrow and applied to the particular set of facts in this case.

17.2.8 Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion No. 528 (April 2017)

Issue:

May an attorney engaged by an insurer to defend the interests of an insured who obtains information that could provide a basis to deny coverage disclose that information to the insurer?

Analysis:

No. An insurer assigned a lawyer to defend an insured. Through discovery in the course of the representation, the lawyer learns of a letter from his client to the plaintiff that may establish a statute of limitation defense by putting the plaintiff on notice, but it could also be used to establish that the insured knew of the claim, which it did not disclose before renewing the insurance policy.

Lawyers have a duty to communicate with their clients about significant developments in the matters they represent them in. (Bus. & Prof. Code, § 6068, subd. (m); Rules of Prof. Conduct, rule 3-500.) For lawyers representing multiple clients, such as insurance defense counsel, this means informing all clients. But this duty to communicate can sometimes conflict with the duty of confidentiality to maintain inviolate client secrets. (See Bus. & Prof. Code, § 6068, subd. (e); Rules of Prof. Conduct, rule 3-100.)

Here, the information could be damaging to the insured because the insurer could use it to argue the claim is uncovered. But it is also information that a lawyer for the insurer would be obligated to communicate. Because of this, Los Angeles County Bar Association concluded the lawyer had an irreconcilable conflict, mandating withdrawal, but without revealing the nature of the conflict.

Comment:

This opinion may be limited to the circumstance that it addresses, namely one where the same facts impacting coverage would also be material to the litigation. The opinion does not address whether withdrawal would be required in a situation where the lawyer learns of facts that would impact coverage during the representation, but those facts are not material to the defense.

17.2.9 American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 477R (May 11, 2017; revised May 22, 2017)

Issue:

May a lawyer transmit information relating to the representation of a client over the internet?

Analysis:

Generally, yes. But the lawyer should take precautions to protect against inadvertent or unauthorized disclosure. Special precautions may be mandated by agreement, law, or the nature of the information.

Although lawyers communicate in different ways, many use electronic means as their primary method. The duties of competency and confidentiality require that lawyers remain informed of the benefits and risks associated with that technology, especially in an age of evolving cybersecurity concerns. In determining how to protect information they transmit over the internet, lawyers should consider the sensitivity of the information, the likelihood of disclosure if not safeguarded, the cost and difficulty of employing safeguards, and the impact of protective measures on the lawyer's provision of services.

The opinion recommends that, when determining what reasonable steps to take, lawyers consider the nature of threats, how client information is transmitted and stored, what reasonable security measures may protect the information, how the information is labeled, and how to train those who handle the information (including lawyers, staff, and vendors).

17.2.10 COPRAC Formal Interim Opinion No. 12-0003

Issue:

What are an attorney's ethical obligations regarding a profile of the attorney posted on a professional directory website maintained by a third party?

Analysis:

This is a draft ethics opinion that has just been circulated for comment. It is available on the State Bar website:

<http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/2017-Public-Comment/2017-06>

This is an opportunity for all lawyers to comment and suggest changes if they wish.

Comments should go to: Andrew Tuft, Esq.

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If the State Bar formally adopts this opinion, as presented in this draft or as modified, *Ethics Quarterly* will then analyze it.