SAN DIEGO COUNTY BAR ASSOCIATION

# ETHICS QUARTERLY

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## Introduction

For the second quarter of 2018, we have seen new direction in a number of areas that concern California lawyers. These include involuntary removal of ineffective counsel over a criminal defendant's objections; whether the existence of racial bias alone may serve to establish ineffective assistance; lawyers' obligations to follow unchallenged, but voidable orders; lawyers' obligations to disclose errors discovered after a representation has concluded; and various advertising issues for lawyers, including the use of targeted marketing of mass tort victims and the use of a lawyer's name in the firm name when the lawyer ceases to be a limited partner or a shareholder, but remains with the firm.

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. If there is an issue impacting a significant portion of the legal community that you would like to see us address in a formal opinion, please let us know that as well. Just follow the instructions and a Committee member will get back to you with ethics authority you might consider.

## In This Issue:

## 18.2.1 *Magana v. Superior Court* (2018) 22 Cal. App. 5th 840 – First Appellate District, Division Four (April 27, 2018)

**Issue:**
May a trial court remove defense counsel over a criminal defendant's objections, to eliminate potential conflicts and ensure adequate representation?

**Analysis:**
Yes. Whereas the right to be represented by counsel of choice is an important one, the underlying goal of the Sixth Amendment is protect the right to an effective advocate. Although removing an attorney against the defendant's wishes may be viewed as a restriction on a defendant's right to select counsel, it may be justified where there is substantial lawyer misconduct or incompetence. While this should be a last step, courts must supervise counsel's performance to ensure that criminal defendants receive adequate representation.

Here, the defendant was charged with two counts of rape. After his trial date was continued four times, his counsel sought a fifth continuance, but failed to appear for the hearing on the motion, and the case was assigned out to trial. The defendant then filed a peremptory challenge against the trial judge to whom the case was first assigned, and then sought to challenge the second. When that failed, his counsel filed a motion for recusal, claiming the judge was biased because he declined to meet with counsel in chambers to discuss a settlement; though this motion was withdrawn before being addressed.

On the second day of trial, defense counsel filed a motion to appoint an expert to testify that the defendant's confession was involuntary. The trial judge ruled that counsel was not prepared to proceed to trial and was not providing adequate representation. Following a hearing, the trial court removed counsel and concluded that the defendant had been denied the right to a speedy trial, and that it had no faith that defense counsel would be prepared to take the case to trial on a timely basis moving forward.

Trial courts may relieve counsel whose lack of preparedness threatens to deprive other parties, including the public and the victims of a crime, of their right to a speedy trial. Accordingly, courts may properly remove defense counsel, whether retained or appointed, where the lawyers are unprepared on the assigned trial date or otherwise are providing inadequate representation. Here, the trial court found both that counsel was not prepared and was not adequately representing the defendant, including by retaining an expert before trial that would be crucial and central to the defense. And given the previous actions defense counsel had taken to cause the trial to be continued, it was unclear that the lawyer would ever be ready to proceed.

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**Comment:**
The First Appellate District also noted that the trial court properly reported the lawyer to the State Bar for potential discipline. A court "shall notify the State Bar" whenever "a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney." (Bus. & Prof. Code, § 6086.7, subd. (a)(2).) The court's findings established the lawyer had failed to act competently and at least a prima facie evidence of a misrepresentation to a judge of fact or law. But more than this, the appellate court was concerned with the repeated use of accusations of racial animus by the trial court for seeking to disqualify judges from hearing the case, without any apparent good faith basis for doing so.

## 18.2.2 *Ellis v. Harrison* (9th Cir. 2018) 2018 US. App. LEXIS 15368 – United States Court of Appeals for the Ninth Circuit – June 7, 2018

**Issue:**
Does a lawyer necessarily provide ineffective assistance to a criminal defendant when the lawyer has racist views?

**Analysis:**
No. For there to be prejudice to the client, the client must show that the client was aware of those views and that they led to a complete breakdown in communication or that the racism adversely impacted the lawyer's performance.

The Ninth Circuit previously concluded that a lawyer who uses racial epithets and threatened poor performance if the client exercised his right to trial provided ineffective assistance. (See *Frazer v. United Stated* (9th Cir. 1994) 18 F.3d 778, 783.) This conclusion can be based on the statement itself because it rendered the relationship so defective in and of itself.

Here, the client acknowledged that he was unaware of the racism until after the representation ended and could not identify any errors or omissions that feel below the standard of care. So, there is no evidence of a causal relationship between racism and a negative outcome of the representation.

**Comment:**
As a reminder, California lawyers and law firms may not discriminate or harass on the basis of race or other protected characteristics. (See current Rule of Professional Conduct 2-400; adopted Rule of Professional Conduct 8.4.1 [effective November 1, 2018].) So, lawyers who may have racist views may not simply decline to represent clients that have different racial backgrounds. Instead, they must not let any bias negatively impact the services they provide.

## 18.2.3 *In the Matter of Collins* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. ___, Case No. 16-O-10339 – State Bar Court of California, Review Department (March 28, 2018)

**Issue:**
Must a lawyer obey a court order that is void or voidable, but not challenged?

**Analysis:**
Yes. A lawyer was served with five sanctions motions based on discovery, where only the client was named, and corresponding sanctions orders, where he was held jointly and severally responsible for the amounts owed. Despite not being named in the moving papers, the lawyer did not challenge his inclusion in the orders, but failed to comply.

The trial judge dismissed the charges against the lawyer because, due to the lack of notice, the sanctions against the lawyer were either void or voidable. Nonetheless, a lawyer must obey court orders. Here the lawyer was aware of what the court had ordered, and did not challenge the sanctions against him. So, he could not ignore the court order, regardless of whether he would have prevailed had he elected to challenge the order. The orders became final and were binding on him. Based on these facts, the Review Department recommended a 30-day actual suspension.

## 18.2.4 American Bar Association Formal Opinion 481 – April 17, 2018

**Issue:**
Does a lawyer have an ongoing duty to advise a client of an error the attorney learns of after the representation has ended?

**Analysis:**
No. When lawyers learn during the course of a representation that they have made a material error, they have an obligation to disclose that fact to clients. The error is material if it is reasonably likely to harm or prejudice the client, or if it would reasonably cause a client to consider terminating the representation, regardless of whether the error caused harm. Notification to the client should be prompt, following the lawyer's discovery of the error, but may follow the lawyer's prompt consultation with counsel.

But once the client becomes a former client, the lawyer need not disclose the existence of newly discovered errors. That is because there is no duty to communicate with former clients. And lawyers' obligations to take steps to protect clients' interests extend only to actions that may be taken upon termination of the relationship.

**Comment:**
Although lawyers may not have an ethical obligation to disclose errors that they learn of after a representation ends, they may wish to do so to mitigate damages.

## 18.2.5 San Diego County Bar Association Ethics Opinion 2018-1 – May 18, 2018

**Issue:**
May a lawyer market legal services to mass disaster victims through targeted advertisements connected with the use of social media?

**Analysis:**
Yes. Rule 1-400(D)(5) precludes a communication or solicitation from being "transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct." In elucidation of this concept, Standard (3) provides that a communication which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel is presumed to violate the rule.

In Formal Opinion 2004-166, the State Bar of California Standing Committee on Professional Responsibility and Conduct concluded that a lawyer's communication with a prospective client in a mass disaster victims' chatroom was prohibited because it was too intrusive and likely to cause duress. The communication was with people the lawyer knew may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel because they were in an environment specifically designed to assist those trying to deal with a tragedy. Such a situation was and still is ethically impermissible.

The conclusion was reached for reasons that are not present with a regionally-targeted advertisement. First, COPRAC opined that victims chatrooms were more subject to abuse because they do not afford the same opportunity to "reflect, re-read, and analyze" as does, for example, an advertisement or an email. The absence of a live communication with an advertisement obviates such concerns. There is no real time messaging and, in fact, no communication at all from potential clients unless and until they affirmatively reach out to somebody who they know is offering to provide legal services. Second, in contrast to a victim support room, social media has many purposes outside of providing emotional support for victims and family members.

## 18.2.6 Los Angeles County Bar Association Opinion No. 530 – May 23, 2018

**Issue:**
May a law corporation or limited liability partnership use the name of a lawyer who is no longer a shareholder or partner, but who remains at the firm, in the firm name?

**Analysis:**
Yes. Firm names may not be false, deceptive, or misleading. One way that a firm name may potentially mislead is if it falsely states or implies a relationship between a lawyer and a law firm when no relationship exists. That is not a concern when the lawyer remains at the firm, even if the title and position of the lawyer may have changed. Likewise, the entity form precludes an assumption that the lawyer listed in the firm name would be personally liable for the obligations of the firm. Unlike the case of a general partnership, where the lawyers listed in the firm name would potentially be liable, shareholders and limited partners do not have the same personal exposure as do general partners.

## Editors' Note

On May 10, 2018, the Supreme Court of California, sitting *en banc,* issued Administrative Order 2018-05-09. This order approved 69 new Rules of Professional Conduct that will become effective November 1, 2018. Of note, the Supreme Court declined to adopt proposed rule 1.14, which would have addressed a lawyer's obligations in representing clients with diminished capacity.

The new rules may be found on the State Bar of California's website at http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/New-Rules-of-Professional-Conduct. Lawyers are highly encouraged to familiarize themselves with the new rules in advance of the November 1 effective date through reviewing the rules and comments, attending continuing legal education programs such as the series the San Diego County Bar Association is providing on the second Friday of each month through September, and/or as is otherwise necessary.