SAN DIEGO COUNTY BAR ASSOCIATION

ETHICS QUARTERLY

A Publication of the San Diego County Bar Association

October 2020, Vol. 20, No.3

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Introduction

This quarter brings an important opinion on a lawyer's entitlement, as opposed to a client's, to awarded attorney fees under California's Uniform Trade Secrets Act. We have also included two State Bar discipline cases. One, a reported case, underscores the importance the State Bar Court attaches to faithful compliance with conditions attached to State Bar probation; failure resulted in disbarment. We included the second, an unreported and thus non-precedential, case as a teachable moment. The lawyer had been admitted to practice barely a month when he began engaging in conduct that eventually led to a two-year actual suspension from practice, with the additional requirement that he prove to the State Bar Court his rehabilitation and fitness to practice.

The ABA opinion provides guidance on a new California Rule of Professional Conduct, Rule 8.4.1, while the two COPRAC opinions address important issues in contemporary practice: ethical obligations after a third-party gains access to client confidential information and the ethical obligations related to third-party litigation funding.

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 the ethics authority you might consider.

In This Issue:

20.3.1 *Aerotek, Inc. v. Johnson Group Staffing Co., Inc.* (2020) 2020 Cal. App. LEXIS 870 – Court of Appeal of California, Third Appellate District (September 15, 2020)

Issue:
Do fees awarded pursuant to California's Uniform Trade Secrets Acts (Civil Code section 3426.4) belong to the lawyer or the client?

Analysis:
To the extent that the client has not already paid the full amount of the awarded fees and absent an agreement to the contrary, they belong to the lawyer. California's Uniform Trade Secrets Act provides that courts may award reasonable attorney fees and costs to the "prevailing party" in certain cases involving bad faith claims. A law firm represented its client in an action where the plaintiff had alleged misappropriation of trade secrets; that lawsuit was settled. Then, the plaintiff sued again, raising claims similar to its original complaint.

The second suit lasted a long time and the defendant became unable to finance its defense. Counsel successfully withdrew, but then agreed to handle the remaining portions of the litigation on a modified pro bono basis. The case was finally resolved at trial with a defense verdict. And, in a post-trial motion, the court ordered the plaintiff to pay $735,781.27 in attorney fees. The client disputed that the fees should be paid to the law firm. Although the statute provides that fees are payable to the prevailing party, its wording is ambiguous enough to warrant consideration of legislative intent and public policy. The former being of little help to resolving the issue, the Third Appellate District found that the fees should properly belong to the lawyer, to the extent the lawyer had not already been paid the full amount awarded, to encourage representation of legitimate interests in the litigation, to avoid the client from being unjustly enriched, to avoid fee-sharing with a nonlawyer, and to avoid unfairness here that could otherwise be akin to an order of punitive damages—the client here had not incurred much of the fees and therefore would be recovering an amount that was never owed to another.

Comments:
The concept of who is entitled to the fees is an important concept. Among other things, it may determine whether a client is able to negotiate away the right to a portion or all of the fees as part of a settlement.

20.3.2 *In the Matter of Braun* (Review Dept. 2020) Case Nos. 18-N-16608; 18-O-17277 – State Bar Court of California, Review Department (September 18, 2020)

Issue:
Could failure to comply with State Bar probation conditions result in disbarment?

Analysis:
Yes. In an earlier discipline proceeding, resulting in suspension, the Supreme Court had ordered disciplinary probation conditions, including compliance with California Rules of Court, Rule 9.20. The Rule requires, among other things, that a suspended or disbarred lawyer notify courts, clients and opposing lawyers in writing of his or her ineligibility to practice law and timely file a compliance declaration. (Cal. Rules of Court, Rule 9.20(c).)

In 2003, Braun received a private reproval as an agreed discipline disposition. Then, in 2016, he received a one-year suspension, stayed, with two-year's probation. Braun did not comply with three conditions of his 2016 disciplinary probation and in 2018, after the State Bar initiated a discipline proceeding to revoke his probation, the Supreme Court suspended him for one year and imposed new probation conditions.

Braun was five months late in filing his compliance declaration and six months late submitting a quarterly probation report. He also failed to arrange a meeting with his assigned probation deputy and failed to meet with the deputy.

The State Bar Court Hearing Department judge weighed heavily evidence that Braun had suffered extreme emotional difficulties in late 2017 and 2018 but had recovered by May 2019. The hearing judge recommended actual suspension for 18 months and probation. The State Bar sought review, arguing for disbarment. The Review Department agreed.

Mitigation for extreme emotion difficulties requires: (1) the lawyer suffered from them at the time of the misconduct; (2) expert testimony established them as directly responsible for the lawyer's misconduct; and (3) "they no longer pose a risk that the attorney will commit future misconduct." (*In the Matter of Amponsah* (Review dept. 2019) 5 Cal. State Bar Ct. Rptr. 646, 654.)

The only mental health professional who testified at Braun's trial did not testify as an expert witness, but as a character witness; she had not treated him as a clinician because of a previous lawyer-client relationship. Another psychologist submitted a declaration, but also as a character witness. Both opined about his depressive symptoms, but not as experts, nor did he present clear and convincing evidence that his depressive condition was directly responsible for his misconduct. So, the Review Department found a failure to establish any of the three requirements for mitigation.

Although disbarment is the most consistently imposed sanction for failure to comply with Rule 9.20, the Review Department acknowledged that lesser discipline has been imposed. In this case, however, it gave heavy weight to the three prior impositions of discipline and the goal of public protection and maintenance of high professional standards and recommended disbarment. Because all the misconduct occurred before April 1, 2020, the effective date of Rules of Procedure of the State Bar, Rule 5.137, implementing Business and Professions Code section 6086.13, it did not also recommend monetary sanctions.

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20.3.3 *In the Matter of Roshan* (Review Dept. 2020) Unpublished Case Nos. 17-O-01202; 17-O-05799 – State Bar Court of California, Review Department (August 27, 2020)

Issue:
Can entering into a business deal and an attorney-client relationship lead to significant State Bar discipline?

Analysis:
Yes. In late May 2015, Roshan agreed to enter into a partnership with a prospective client to develop a device she had invented. Roshan was admitted to practice in California on June 2, 2015. About a month later, on July 9, 2015, Roshan entered into an attorney-client agreement with the inventor client in a contract dispute about the device that was the subject of the partnership. The 40% contingency fee engagement agreement did not mention their business partnership. On July 28, 2015, Roshan sent the client an email discussing the lawyer's legal responsibilities under Rules of Professional Conduct, former Rule 3-300—business transaction with a client—that included broad prospective waivers of the right to sue him, to assert any conflict, breach of fiduciary duty, other attorney-client duty, or violation of former Rule 3-300. The client signed.

Roshan filed lawsuits on the client's behalf, was sanctioned, attempted to get 51% of their partnership, and when the relationship soured, filed two provisional patent applications. The first listed himself as a co-inventor and the second listed only himself as inventor. Finally, Roshan resisted delivering the client file to her new lawyer.

The State Bar charged him with 21 counts of misconduct; the hearing judge found Roshan culpable on 12 counts and recommended a two-year actual suspension.

The Review Department found him culpable on seven counts of misconduct, including breach of fiduciary duty, failing to avoid interests adverse to a client and moral turpitude by misrepresentation, dismissing five counts for lack of evidence. At trial, evidence revealed that Roshan had also recorded a conversation with an unrepresented person without that person's consent, in violation of Penal Code section 632.

Although the Review Department found less culpability, it upheld the recommendation of a two-year actual suspension, including that the lawyer remains suspended until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and present learning and ability in the general law. In addition to the other conditions of his probation, he must attend State Bar ethics school and must retake and pass the Multistate Professional Responsibility Exam (MPRE).

The discipline was based on Roshan's multiple acts of misconduct. The most serious were his unfair business dealings and breach of fiduciary duties to his client in favor of his self-interest, including his overreaching in attempt to obtain control of his client's intellectual property. "His attempt to also have her pay him for the dubious value he brought to the partnership and his deceitful conduct toward an unrepresented defendant are particularly distasteful." The Review Department was unimpressed with his claims of violation of his constitutional rights in a denial of a continuance and the State Bar's Notice of Disciplinary Charges.

20.3.4 American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 493

Issue:
What is the purpose, scope, and application of Model Rule 8.4(g), which prohibits a lawyer from engaging in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of various categories, including race, sex, religion, national origin, and sexual orientation?

Analysis:
The conduct addressed by Rule 8.4(g) harms the legal system and the administration of justice. In addition to being advocates and counselors, lawyers serve a broader public role. They "should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." Discriminatory and harassing conduct, when engaged in by lawyers in connection with the practice of law, engenders skepticism and distrust of those charged with ensuring justice and fairness.

Rule 8.4(g) addresses conduct related to the practice of law that occurs both inside and outside the representation of a client or beyond the confines of a courtroom. For example, it would extend to conduct when representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business, or social activities in connection with the practice of law. In addition, it is not restricted to conduct that is severe or pervasive. So, whereas a single instance of a lawyer making a derogatory sexual comment directed towards another would violate Rule 8.4(g), the isolated nature of the act could be a mitigating factor regarding the level of discipline. A lawyer need only know or reasonably should know that the conduct in question constitutes discrimination or harassment. Though the scope of the Rule excludes utilizing peremptory challenges in a discriminatory manner, legitimate advice or advocacy, opinions and ideas on matters of public concern, and a lawyer's speech or conduct in settings unrelated to the practice of law.

The Model Rules are rules of reason, and whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective. Harassment is aggressively invasive, pressuring, or intimidating conduct targeted at a person based on the individual's race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. Discrimination within the Rule includes harmful verbal or physical conduct that manifests bias or prejudice towards others based on any of these same characteristics.

Comment:
California Rules of Professional Conduct, Rule 8.4.1, is an analogue to Model Rule 8.4(g).

20.3.5 State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2020-203

Issue:
What are a lawyer's ethical obligations in the event of a third person's unauthorized access to electronically stored confidential client information in the lawyer's possession?

Analysis:
Lawyers who use electronic devices which contain confidential client information must assess the risks of keeping such data on electronic devices and take reasonable steps to secure their electronic systems to minimize the risk of unauthorized access. Moreover, in the event of a breach, lawyers have an obligation to conduct a reasonable inquiry to determine the extent and consequences of the breach and to notify any client whose interests have a reasonable possibility of being negatively impacted by the breach.

The opinion recognizes that data breaches—from lost, stolen, or hacked electronic devices and systems—are a reality in today's world. Consequently, lawyers have important ethical obligations because data breaches may involve the potential loss of or unauthorized access to confidential client information—not only attorney-client privileged communications, but more broadly all information the Business and Profession Code section 6068, subdivision (e)(1) and Rule 1.6 protects from disclosure.

The opinion discusses the relationship between the duty of competence, Rule 1.1, and the duty to safeguard client confidences and secrets [Rule 1.6 and Bus. & Prof. Code, § 6068(e)], requiring lawyers to make reasonable efforts to protect such information from unauthorized disclosure or destruction and the threshold requirement that lawyers have a basic understanding of the "benefits and risks associated with relevant technology." [Cal. State Bar Formal. Opn. No. 2015-193; Comment [8], ABA Model Rule 1.1; proposed new Comment [1] to Rule 1.1.] Either a lawyer has a basic understanding of the risks associated with a given technology or obtains help from appropriate technology experts to assess those risks and takes reasonable steps to prevent data breaches which potentially harm clients. This applies with respect to each type of electronic device or system incorporated into the lawyer's practice—computer systems, vulnerable to "phishing;" portable electronic devices; laptop computers using public or inadequately secured networks; etc.

"Reasonable efforts" are those reasonably calculated in the circumstances to minimize particular identified risks. Some security precautions are so readily available and user-friendly that failure to implement them could be deemed unreasonable, others require deeper assessment. The opinion discusses examples.

In addition, lawyer with management or supervisory responsibility in law firms have obligations under Rules 5.1 and 5.3 to make reasonable efforts to ensure the firm has in effect policies and procedures to protect client confidential information from the risk of inadvertent disclosure and data breaches as a result of technology use and to supervise subordinate lawyer and non-lawyer personnel to comply with the procedures.

If a data breach occurs, Rule 1.4(a)(3) and Bus. & Prof. Code § 6068, subdivision (m) require lawyers to keep clients informed about "significant developments" relating to the representation. The opinion concludes misappropriation or compromise of a client's confidential information is such a "significant development." Disclosure to the affected clients has to be made as soon as reasonably possible so the clients can take steps to ameliorate the harm.

20.3.6 State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2020-204

Issue:
What ethical obligations does a lawyer have when representing a client whose case is funded by a third-party litigation funder?

Analysis:
The principal ethical issues are maintaining independent professional judgment. Rules of Professional Conduct, Rule 2.1 mandates lawyers to "exercise independent professional judgment and render candid advice." And lawyer's must comply with their duty of confidentiality pursuant to Rule 1.6 and Business and Professions Code section 6068, subdivision (e)(1), which require lawyers to "maintain inviolate the confidence ... and preserve the secrets, of his or her client."

The opinion addresses two types of third-party litigation funding: consumer litigation funding—typically providing living expenses, not legal fees, for personal injury plaintiffs; and commercial funding—typically advancing funds to pay a plaintiff's litigation expenses, either to the client or directly to the law firm. Both types are usually non-recourse. The third-party provides funds in return for a portion of any financial recovery.

If the litigation funder seeks information about the client or the client's case as a condition of funding, that raises a confidentiality risk and the need for the client's truly informed consent. Accordingly, the client should be informed that such an arrangement could risk the attorney-client privilege and work-product protections due to waiver.

Litigation funding introduces a third-party with its own interests into the lawyer-client relationship, posing risks to the lawyer's independent professional judgment and the relationship of confidence between the lawyer and client. The duty of loyalty and independent professional judgment require the lawyer to act in the client's interest at all times and particularly where the client's interest might depart from the funder's. Two Rules of Professional Conduct are implicated. Rule 1.7 prohibits a lawyer from representing a client if there is a significant risk that the lawyer's relationship with a third person or the lawyer's own interest will materially limit the representation. And Rule 1.8.6 prohibits a lawyer from entering into an agreement to accept compensation from someone other than a client unless the client gives informed written consent, the lawyer complies with the lawyer's duty of confidentiality, and the payment arrangement will not interfere with the lawyer's independent professional judgement or the lawyer-client relationship.

The lawyer's independent professional judgment may be impaired if the funding arrangement imposes limitations on how the case is litigated. There could be circumstances in which a funding agreement imposes limitations on the attorney's judgment such that the lawyer might not be able to competently represent the client. The opinion does not provide a conclusion that any particular degree of control is *per se* unethical. But where the funder has some degree of control of the litigation, the duty to communicate pursuant to Rules of Professional Conduct, Rule 1.4 requires the lawyer to advise the client about the impact of such limitations on the lawyer's representations.

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20.3.7 Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion No. 533

Issue:
May a lawyer continue to jointly represent multiple clients when their interests potentially or actually conflict so long as the lawyer has obtained the informed written consent of each client?

Analysis:
Generally, yes. Subject to three exceptions, a lawyer may represent multiple clients in the same or closely related matters if each affected client first provides informed written consent. Those exceptions are where the lawyer does not reasonably believe that the lawyer will be able to provide competent and diligent representation, where the representation is prohibited by law, and where the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

California case law has long acknowledged that, even in a litigation setting, clients might be permitted to elect to be represented by one lawyer, notwithstanding that certain types of conflicts potentially or actually exist between the clients. But, that could only occur if the lawyer were to fully disclose the risks and reasonably foreseeable adverse consequences of the joint representation and, after consideration of the risks and consequences, the clients provided consent in writing.