SAN DIEGO COUNTY BAR ASSOCIATION

ETHICS QUARTERLY

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Introduction

The first quarter brings two cases involving money—fee sharing among class action lawyers and advance fees for litigation related to loan modifications. We included a reciprocal discipline case—federal disbarment and subsequent State Bar discipline proceedings—as well as other discipline cases that, while unpublished, we thought instructive. The COPRAC opinion offers practical guidance for lawyers who change firms; the ABA opinion, advice to judges about financial ability of litigants to pay court-imposed charges. Finally, we include a synopsis of the ATILS Task Force report. Notable are suggested amendments to Rules of Professional Conduct, 1.1 (a comment about technological competence) and 5.4 (fee sharing with non-lawyers).

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:

20.1.1 *In the Matter of Rodriguez* (2020) Not Published Case Nos. 16-O-11648, 16-O-16181, 16-O-17636 – State Bar Court of California Review Department (January 13, 2020)

Issue:
May a lawyer require clients to pay advance fees for valid litigation services in matters concerning loan modification?

Analysis:
No. In 2009, two safeguards went into effect to protect borrowers who would potentially employ somebody to assist with loan modification: (1) a requirement for a separate notice advising borrowers that it is not necessary to employ a third party to negotiate a loan modification (Civ. Code, § 2944.6, subd. (a)); and (2) a proscription against charging pre-performance compensation, i.e., restricting the collection of fees until all contracted-for services are completed (Civ. Code, § 2944.7, subd. (a)). Until January 1, 2017, Business and Professions Code section 6106.3 provided, "It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct in violation of Section 2944.6 or 2944.7 of the Civil Code." Although the statute was amended effective January 1, 2017 to remove the reference to Civil Code section 2944.7, the conduct occurred before January 1, 2017. So, the former version of section 6106.3 applied.

Between 2014 and 2016, the respondent lawyer provided loan modification services in conjunction with foreclosure defense litigation in three client matters. She submitted loan modification applications in all three matters and collected a total of $48,750 in attorney fees. The record establishes that $14,750 of those fees were clearly pre-performance fees. Because such funds were proscribed by section 2944.7, they were illegal fees within the meaning of former Rule of Professional Conduct 4-200.

The lawyer argued that, because her agreement included litigation strategies, not all of which involved loan modification issues, sections 2944.6 and 2944.7 did not preclude her from collecting advance fees. But the Court concluded that the statute "plainly prohibits any person engaging in loan modifications from collecting any fees related to such modifications until each and every service contracted for has been completed."

Additionally, the lawyer's engagement agreement authorized her to engage in litigation that the clients deemed appropriate, but did not reference loan modification services or include the section 2944.6 disclaimer. Nonetheless, the lawyer acknowledged that she provided loan modification services to all three clients.

20.1.2 *Hance v. Super Store Industries* (2020) 44 Cal.App.5th 676 - Court of Appeal of California, Fifth Appellate District (January 23, 2020)

Issue:
Does a lawyer's failure to disclose the lack of professional liability insurance void a fee-sharing agreement among class action counsel?

Analysis:
Yes. A lawyer referred a client to an experienced labor lawyer for a potential wage and hour action. The labor lawyer recognized the potential of a class action. Because he was not experienced in class actions, he brought in experienced class action counsel. The lawyers eventually worked out a fee-sharing agreement among themselves, in part, in email among them.

The class action settled; the trial court awarded $4,300,000 in attorney fees. In spite of a dispute been the labor lawyer and class action lawyer about the enforceability of the fee-sharing agreement, the court ordered fees be apportioned to the referring lawyer and the labor lawyer fees in the percentage amounts stated in the agreement (respectively, 15% and 30%), 5% to another lawyer, and the balance (50%) to class action counsel. On appeal, the court reversed.

The court did not address whether the fee-sharing agreement complied with former Rules of Professional Conduct, rule 2-200 (requiring client approval of any such agreement); whether the agreement was final; or breached. Rather, as a case of first impression, the court of appeal focused on the admitted facts that the labor lawyer did not have professional liability insurance and never disclosed that fact to any of the class plaintiffs, as former rule 3-410 (current rule 1.4.2) mandated. Relying on, among other cases, *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, the court of appeal concluded that the ethical breach was such that it voided the fee-sharing agreement, because the purpose of the rule was to protect clients. Timely disclosure is necessary so that clients may decide whether to engage the lawyer or agree to a fee-sharing agreement.

The court rejected, however, the class action lawyer's argument that the labor lawyer was entitled to a quantum meruit award based only on his time records. Rather, the court held that the labor lawyer was entitled to quantum meruit compensation based on hours in his time records and also the reasonable value of the referral to the class action lawyers.

20.1.3 *People v. Johnson* (2020) 8 Cal.5th 1037a – Supreme Court of California (February 11, 2020 – amended opinion of November 25, 2019)

Issue:
Is a prosecutor's peremptory strike of three out of five African-American jurors coupled with launching a background check of another African-American juror sufficient to establish a prima facie case of discriminatory intent?

Analysis:
No. The defendant, an African-American male, was on trial for multiple criminal counts, including first degree murder, forcible rape, and assault to commit murder while he was engaged in a home invasion robbery.

Before individual voir dire, the trial court instructed all prospective jurors to complete an 11-page written questionnaire. Before preliminary voir dire of one prospective African-American juror, the prosecutor revealed that he had run a computer criminal history check on some, but not all, of the jurors and discovered that the prospective juror had two misdemeanor convictions despite responding on the jury questionnaire in response that he had never been accused of or arrested for a crime. The prosecutor declined to answer whether he had run a criminal record check on only African-American prospective jurors. But, after both sides questioned the prospective juror, the prosecutor withdrew his request to dismiss him from the jury for misconduct and both sides passed for cause.

Jury selection began the following afternoon. The jury pool consisted of 56 people, seven of whom identified themselves on the jury questionnaire as African-American or Black, the same race as defendant. The prosecution exercised three of 17 strikes on African-American jurors. And three of the 12 seated jurors were African-American. At the close of alternate jury selection, 54 of the 56 prospective jurors had appeared in the box. The prosecution had exercised a total of four of 19 strikes on African-American jurors. The seated jury consisted of three African-American jurors, seven Caucasian jurors, one Hispanic juror, and one mixed-race juror.

Considered in the context of the entire jury selection process, the prosecutor's strikes do not support an inference of discrimination. The prosecutor exercised 17 strikes during the selection of regular jurors, and two more while selecting alternates. Three of the prosecutor's 17 strikes during regular jury selection (18 percent)—and four of 19 overall (21 percent)—targeted African-American jurors. These figures "barely" exceed the 13 percent ratio of African-American jurors in the venire, and do not by themselves suggest an inference of discrimination. And African-American representation on the seated

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Moreover, the prosecutor repeatedly accepted the jury when two African-American jurors were on the panel, and ultimately accepted a panel with three African-American jurors. "While acceptance of one or more black jurors by the prosecution does not necessarily settle all questions about how the prosecution used its peremptory challenges, these facts nonetheless help lessen the strength of any inference of discrimination that the pattern of the prosecutor's strikes might otherwise imply."

20.1.4 *In the Matter of Haynes* (2020) Not Published Case No. 16-J-17208 State Bar Court of California Review Department (February 11, 2020)

Issue:
Does discipline in the United States District Court subject a lawyer to State Bar discipline?

Analysis:
Yes. Business and Professions Code section 6049.1, subdivision (a), provides that a final order determining that a California lawyer has committed professional misconduct in another jurisdiction is "conclusive evidence that the licensee is culpable of professional misconduct in this state . . ."

A judge in the United States District Court for the Northern District of California referred Haynes to the court's Standing Committee on Professional Conduct. The appointed committee found—and a three-judge panel and the Ninth Circuit upheld—on clear and undisputed evidence that Haynes failed to perform legal services with competence as former rule 3-110 required and violated his professional duties set forth in former rules 3-500 and 3-700. The relevant conduct include failing to file a timely opposition to a summary judgment motion, which was granted against his client; filing a notice of appeal in direct contravention of the client's written instructions; failing to inform the client he had filed the notice of appeal; filing to dismiss the appeal when asked, and failing to release the client's file.

Another case was dismissed because Haynes failed to comply with discovery orders and the appeal was dismissed because he failed to file the opening brief. He also had sent threatening and profane communications to opposing counsel and engaged in threating conduct in court—requiring intervention of marshals and FPS officers—and lied to a district judge about his conduct. Haynes's conduct in his district court discipline proceedings did not help his case. He refused to cooperate with the Standing Committee and blamed opposing counsel, district court judges, the Standing Committee, and his own clients for his conduct. The district court disbarred him; the Ninth Circuit upheld sanction.

The Review Department rejected Haynes's constitutional law challenges to the reciprocal discipline procedure and upheld the Hearing Department findings of violations of former Rules of Professional Conduct and provisions of the State Bar Act, including Business and Professions Code sections 6103 (violate a court order), 6104 (appear for a party without authority), and 6106n (moral turpitude).

The Review Department recommended an actual suspension for nine months and probation for three years, among other discipline.

20.1.5 *In the Matter of Paquin* (2020) Not Published Case No. 17-O-04162 State Bar Court of California Review Department (March 10, 2020)

Issue:
Is a lawyer-client relationship necessary for a lawyer to be disciplined for failure to perform legal services competently or for aiding and abetting the unauthorized practice of law?

Analysis:
Yes. The State Bar charged the lawyer misconduct when an individual's partner contacted an independent contractor for Paquin and other lawyers. The independent contractor was not Paquin's employee, nor did she share office space with him. Occasionally, the independent contractor presented blank engagement agreements to prospective clients, for them to review before meeting with Paquin. Paquin credibly testified that he never saw the agreement at issue in this case and it differed from his standard agreement. He never had any communication with the "client."

The issue before the Review Department was whether an attorney-client relationship existed so as to support the misconduct charges. The court found neither an express contract nor an implied contract based on conduct. Further, the State Bar did not allege any lawyer-client relationship with the "client's" partner who had all the communication with the independent contractor and Paquin's office manager.

Absent a lawyer-client relationship, the Review Department dismissed all charges with prejudice.

20.1.6 *In the Matter of Foster* (2020) Not Published Case No. 17-O-00414 - State Bar Court of California Review Department (March 16, 2020)

Issue:
Does the failure to disclose in writing relationships in the professional swimming world to a professional swimmer client subject a lawyer to discipline?

Analysis:
Yes. While representing a professional swimmer, Foster failed to give the client written disclosure of his long-standing and substantial relationships in the professional swimming community. His client was in a contract dispute with USA Swimming, an organization within which Foster maintained close professional relationships. He had also previously represented the USA Swimming coach who had made the contract offer to Foster's client. Foster also failed to disclose to his client that he had told a USA Swimming representative that, if the contract issue was not resolved, he would never sue the organization because he had "too many friends" in the organization. In addition, without his client's consent, Foster revealed information about his client's precarious financial situation to a lawyer at USA Swimming.

The Hearing Department judge found, and the Review Department agreed, that Foster violated former rule 3-310 (B)(1) when he agreed to represent the swimmer without giving her written disclosure of his personal and professional relationships with opposing parties—USA Swimming and one of its officials. Both courts also found a violation of rule 3-310(B)(3) in the failure to give written disclosure of a professional relationship with a person who could be substantially affected by resolution of the matter. They also found Foster violated Business and Professions Code section 6868, subdivision (e)(1)—duty to maintain the confidences and preserve the secrets of a client—when he revealed that she was "out of money" and "absolutely broke." The Review Department rejected Foster's argument that his client's agent's instruction permitted him to reveal her financial situation and that it was generally known. The Review Department also found a violation of section 6068, subdivision (e)(1), when Foster forwarded an email from his client with her evaluation of a pending settlement offer from USA Swimming. It rejected his argument that she wanted him to discuss settlement issues with USA Swimming. The State Bar Court also found a violation of former rule 3-310 (E) when Foster failed to obtain his former client's informed consent to his representation of her former agent, when he advised her to waive claims against that agent in her efforts to obtain a copy of her Athlete Representation Agreement.

Weighing aggravating and mitigating factors and applying the Standards for Attorney Sanctions, the Review Department recommended a 60-day actual suspension from practice, two years of probation with additional conditions.

20.1.7 American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 490

Issue:
What obligations do judges have in terms of inquiring into a litigant's ability to pay court fines, fees, bail, or other charges?

Analysis:
Under the Model Code of Judicial Conduct, Rules 1.1 (a judge shall comply with the law) and 2.6 (a judge shall "accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law"), judges must undertake a meaningful inquiry into a litigant's ability to pay court fines, fees, restitution, other charges, bail, or civil debt before using incarceration as punishment for failure to pay, as inducement to pay or appear, or as a method of purging a financial obligation whenever state or federal law so provides. Meaningful inquiry is also required by Rules 1.2 ("a judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary"), 2.2 ("a judge shall uphold the law and shall perform all duties of judicial office fairly and impartially"), and 2.5 ("a judge shall perform judicial and administrative duties, competently and diligently" and "shall cooperate with other judges and court officials in the administration of court business") as a fundamental element of procedural justice necessary to maintain the independence, integrity, impartiality, and fairness of the administration of justice and the public's faith in it.

According to the same Rules, a judge may not set, impose, or collect legal financial obligations under circumstances that give the judge an improper incentive either to multiply legal financial obligations or to fail to inquire into a litigant's ability to pay. As long as a defendant's failure to pay is due to genuine financial incapacity, alternatives to incarceration must be explored. Best practices for making ability to pay inquiries include using a "bench card" that provides judges and other staff relevant instructions on ability-to-pay inquiries, including a workable definition of indigence and alternatives to incarceration; providing advance notice to litigants of their ability-to-pay hearing and emphasizing that financial means will be "a critical issue" covered at the hearing; distributing a form "to elicit relevant financial information;" and providing a meaningful opportunity to address questions about the litigant's "financial status" at the hearing.

20.1.8 State Bar of California Standing Committee on Professional Responsibility and Conduct Opinion No. COPRAC 2020-201

Issue:
What ethical obligations arise when a lawyer departs from her law firm?

Analysis:
The guiding ethical principles governing any attorney departure are the protection of the client's best interests and the client's right to the counsel of its choice. Neither the departing lawyer nor the law firm may act in such a way that interferes with the client's right to choose counsel, including by seeking to enforce obligations owed between the departing lawyer and the law firm.

If the departing lawyer has been providing meaningful legal services to the client, is responsible for the services to the client, or is a lawyer the client may reasonably wish to transfer the matter to, the departure is a significant development that the lawyer and the law firm each have a duty to communicate to the client. The communication should be as soon as reasonably practical so that the client may make an informed choice regarding the client's representation going forward and should include the timing of the departure, where departing lawyer will be practicing, the ability of the departing lawyer and law firm to continue representation, the client's right to choose counsel, and the location of the client's file until the client makes such a selection.

The departing lawyer and the law firm must also be mindful of their continuing obligations to protect client confidences and to avoid conflicts of interests with clients. If the lawyer or law firm is unable to competently handle the client's representation as a result of the departure and cannot remedy that situation, or if the client chooses to make a change in representation, the lawyer or law firm must comply with rule 1.16, including taking "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." Finally, both the departing lawyer and the law firm have a duty to protect the client's interests by cooperating in the transition of any client matter.

20.1.9 Final Report of Task Force on Access Through Innovation of Legal Services (ATILS)

On March 12, 2020, the State Bar Board of Trustees reviewed the final report of the ATILS Task Force. Based on that review, the Board approved the following:

1. Circulating a proposed amendment to Rule of Professional Conduct 1.1 that inserts a new comment as 1. The proposed new comment to 1.1 slightly differs from ABA comment 8 in that the latter provides that to maintain requisite knowledge and skill, lawyers should keep abreast of changes in the law and its practice, including the benefits and risks of relevant technology. By comparison, the proposed draft for the California rule provides that the duties set forth in the rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

   http://www.calbar.ca.gov/Portals/0/documents/publicComment/ATILS-Proposed-Rule-1.1-Clean-Redline.pdf

2. Circulating a proposed amendment to Rule of Professional Conduct 5.4. The amendment would increase the ability of lawyers to share fees with nonprofit organizations that employ, retain, recommend, or facilitate their employment.

   http://www.calbar.ca.gov/Portals/0/documents/publicComment/ATILS-Proposed-Rule-5.4-Clean-Redline.pdf

3. Circulating a proposed amendment to Rules of the State Bar, rule 2.72. The amendment to the Continuing Legal Education requirements would, effective January 1, 2022, raise the minimum number of hours for elimination of bias education from one hour every two years to two hours every three years, with at least one hour focusing on implicit bias.

   http://www.calbar.ca.gov/Portals/0/documents/publicComment/2020/Changes-in-EOB-Requirement-in-MCLE.pdf

4. Approving a charter and membership appointment for a Paraprofessional Program Working Group. The goal of the group will be to study the concept of a licensing program that authorizes eligible nonlawyers to provide limited legal services in select practice areas.

5. Directing that the State Bar support public education about key problems not recognized as legal issues and support efforts to attract and retain lawyers in legal aid organizations.

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Comments on the circulated changes to the Rules of Professional Conduct are due by May 18, 2020. Comments on the circulated changes to the Rules of the State Bar are due by May 1, 2020.

Notably, the State Bar elected not to adopt the following recommendations of the Task Force:

1. A new Rule of Professional Conduct 5.7. The Model Rule identifies when law-related services are subject to the Rules of Professional Conduct and when they are not. California does not have a rule that directly addresses the issue.

2. Formation of a new working group to explore the development of a regulatory sandbox. Notably, less than a month earlier, the ABA's House of Delegates approved Resolution 15 which "encourages U.S. jurisdictions to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services." This issue is scheduled to be addressed by the Board again in May.

3. Consider recommendations for amendments to the Certified Lawyer Referral Service. This would include assessing whether existing laws impose unnecessary barriers to referrals that might otherwise be in the public interest.

4. Consider amendments to advertising and solicitation Rules of Professional Conduct. Specifically, the recommendation was to address whether the existing designation of real-time electronic contact should be prohibited.