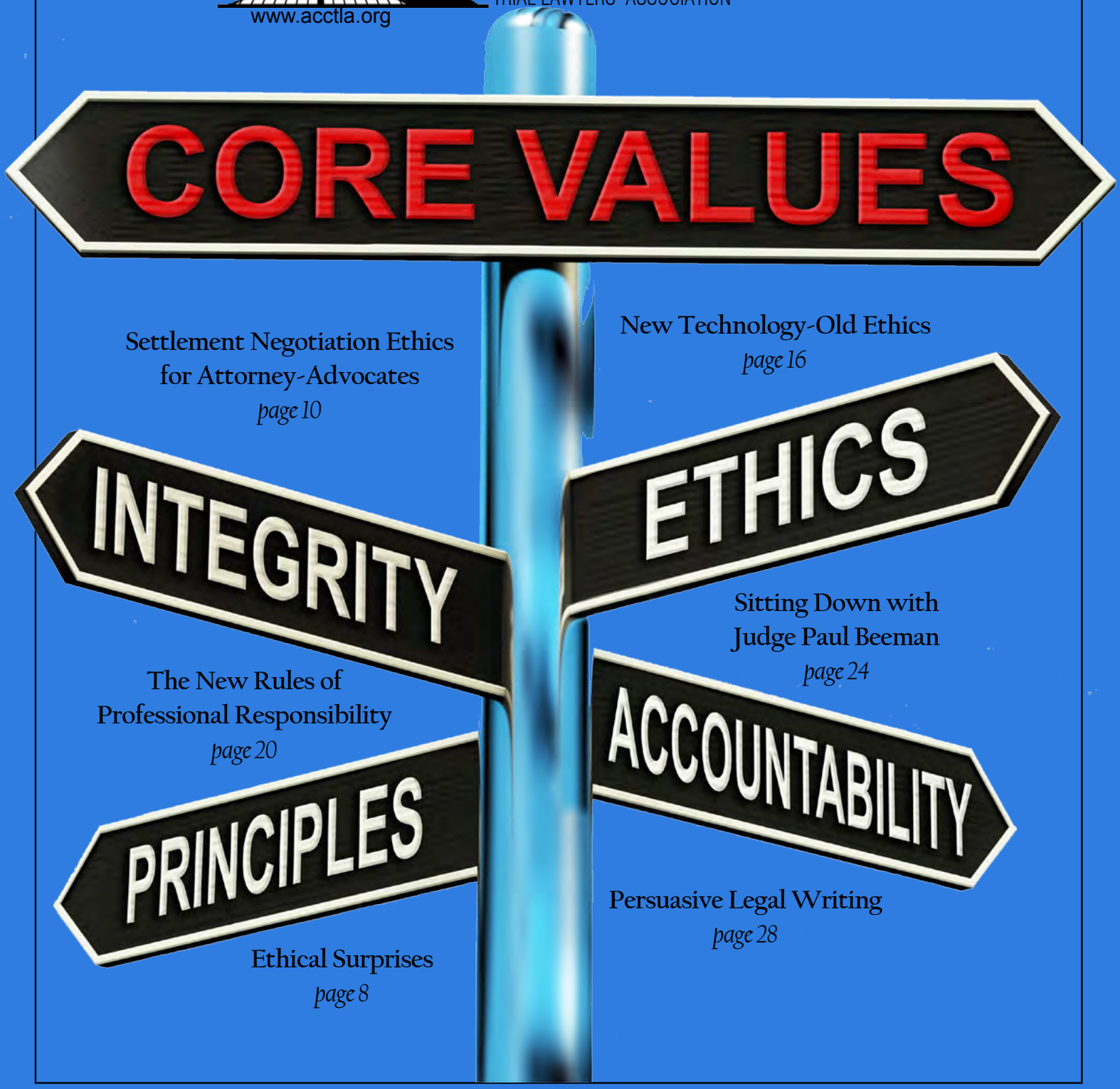
the Verdict

Summer 2018

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from the editors


Cat Cabalo


Carole Bosch

If there is any profession in our country that is charged with the task of "doing the right thing," it is the practice of law. However, in today's world, defining "right" and "wrong" appears to be more challenging, and in some instances, downright controversial. In this edition of The Verdict we have attempted to curate a discussion about the concept of ethics, what it means in our profession, and how the definition and practice of ethics is changing.

Michael Herman and Naseer Khan help us understand the updated California Rules of Professional Conduct that will become effective November 1.

As described by President Gatto, our own ethics "guru," Jerry Fishkin, provides us with a useful list of common ethics pitfalls to avoid.

Phillip Neiman from JAMS gives us an ADR view of negotiation ethics in the context of RPC 4.1. And Zachary Harmon helps us navigate ethics in the context of social media and other digital content on the internet.

This edition's "practical insights" article is a perspective on audience analysis in persuasive legal writing by Ted Pelletier. Gavin Barney sits down with Judge Paul Beeman. And as always, Valerie McGinty continues to keep us informed on the newest developments in appellate law. ◆

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from the president



Michael Gatto

— Ethics —

Not Just an MCLE Requirement

Every three years, the MCLE reports come due. People scramble to get the specialty credits, including ethics. While we encounter ethics issues frequently, the answer is often known and simple. For the first time in many years, several changes have been made to the California Rules of Professional Conduct. This issue focuses on ethical issues and these rule changes.

The Bar provides an Ethics hotline. Our own Jerry Fishkin is an ethics guru quick to offer sage advice. Numerous other members can provide insight. When faced with ethical dilemmas, use these resources.

Ethics guide our profession. As plaintiff trial attorneys, we are lost if we are not ethical. It is so easy to get jaded. Insurance companies, the Chamber of Commerce, large corporations and the political right have successfully poisoned our jury pools. We do not win cases by a preponderance of the evidence as Jury Instructions dictate. Our burden is now much greater. Jurors hold us to a higher burden of proof.

Scores of defense experts for hire and opinions like Howell and others have driven up our litigation costs while simultaneously reducing recoveries. We now need medical billing specialists to prove up 40% of the "billed amount" we used to recover without added expense. We endure defense attorneys who think they are ventriloquists and can testify for their clients, the withholding of insurance policy limits and excess coverage information, and many other real and perceived slights.

We must ensure that we are always honorable in what we do when representing and advocating for our clients. Retaliating in kind when facing unethical behavior just sullies the profession. Read this edition. Review the new rules. Rededicate yourself to always doing the right thing. Vent to a colleague when you feel wronged. ◆

— Michael Gatto specializes in prosecution of personal injury claims involving complicated medical issues and theories liability with the firm of Lew Van Blois & Associates. He can be reached at mgatto@vanbloislaw.com.

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ETHICAL SURPRISES

by Jerome Fishkin

There are professional responsibility issues that can take us by surprise. Sometimes the surprise is pleasant, but more often, we find out unpleasant truths the hard way. These are some of the issues that a steady stream of my clients has backed into over the past couple of decades.

You don't need good cause to withdraw from a case. *Ramirez v Sturdervant* (1994) 21 Cal. App. 4th 904. You do need to give the client proper notice. Rule 3-700, Rules of Professional Conduct, soon to be Rule 1.16. If the client does not consent, courts and many administrative agencies require you to file a motion. *See e.g.*, Code Civ. Proc. 284. In federal court, you need a court order, even to an agreed upon substitution.

I generally recommend that you begin with a phone call to the client, followed by a letter to the client that begins with an explanation that the attorney client relationship is not working out, and therefore the client must get a new attorney. Shame and blame letters don't help and sometimes come back to haunt you

If you are on a contingency, you do walk away from your fee unless you withdraw for "justifiable cause," something that generally means, failure to withdraw would result in your breaking the rules. Refusal to settle is not justifiable cause.

If somebody other than the client pays your fees, you must obtain written client consent to accept the third party payment. Rule 3-310(F), soon to be Rule 1.8.6. Yes, even if your client's parents or employer are paying the bill. Yes, even if a coparty is paying the bill.

When your client is a minor with a Guardian ad Litem, the minor is your client, not the Guardian Ad Litem. *De Los Santos v. Superior Court* (1980) 27 Cal. 3rd 677, 682. The GAL is not a party, but rather is a representative of a party. *Roe v Superior Court* (2015) 243 Cal. App. 4th 138.

If the attorney and the GAL disagree over a settlement, some courts will enforce a settlement over the GAL's objection, if the attorney shows that rejection of the settlement is not in the minor's best interests. *Scruton v Korean Air Lines* (1995) 39 Cal. App. 4th 638. The GAL can fire you, but only after finding a replacement attorney and obtaining a court order. Thus, the attorney's right to ask the court to intervene should be saved for the most serious of situations.

There is no automatic disciplinary offense to represent a client without a fee agreement. *Matter of Harney* (1995) 3 Cal State Bar Court Rptr 266, 279. The client can enforce or reject the oral agreement, if any. Otherwise, the attorney is entitled to a "reasonable fee, " aka, "quantum meruit," but not the contract fee.

Speaking of "Quantum Meruit, " any time that a reasonable fee is being calculated, it does not simply mean an hourly rate. Hourly rate is the starting point, not the only basis for quantum meruit. *Mardirossian v Ersoff* (2007) 153 Cal. App. 4th 257, 272. When the attorney does not keep time records, time can be estimated. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1096 and n.4.

The new Rules of Professional Conduct expressly recognize the validity of ethical screens to prevent vicarious disqualification. Rule 1.10(a)(2), as supplemented by Comments 5 & 6 to Rule 1.0.1. But they do have to be in writing, and should be in place before the new client comes on board.

There is no statute or rule of professional conduct that governs an attorney who believes that a client is lacking in legal mental capacity or has diminished capacity. A proposed rule was rejected by the Supreme Court. In the absence of such authority, attorneys may look to ethics opinion and the ABA Model Rules of Professional Conduct for guidance. *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal. App. 4th 644, 656. ABA Rule 1.14(b) permits an attorney in certain situations to take protective actions, ranging from consulting with family members to seeking a conservatorship. State Bar Ethics Opinion 1989-112 disagrees, stating that an attorney cannot institute a conservatorship proceeding, but could simply withdraw from a client whose mental condition makes it unreasonably difficult for the attorney to represent.

Federal principles of work product and attorney client privilege are not always the same as California state principles. California privileges are set by statute. Federal Rule of Evidence Rule 501 states that the common law as interpreted by US Courts governs a claim of privilege in federal courts on federal issues. Federal work product protection applies to documents prepared or in anticipation of litigation, Rule 26(b)(3) Federal Rules of Procedure. It also applies to unrecorded and intangible information, such as attorney recollections or opinions. *Hickman v Taylor* (1947) 329 U.S. 495. California work product applies in both litigation and transactional settings.

There is no rule, statute, or case that explains how to reconcile conflicting ethical duties. I suggest that you always begin with the question, what is in the client's best interests? After that, ask, what can be done to do the least harm to clients. Then get the clients into the hands of other attorneys and get out of the way. ◆



—Jerome Fishkin specializes in advising California attorneys about professional responsibility issues, and applicants to the State Bar about moral character issues. You can reach him at 925.944.5600 in his Walnut Creek office.

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Every few days, new court decisions affecting California attorney conduct are filed. We summarize these cases on the ***What's New*** page at **www.fishkinlaw.com**

Lindsay Slatter was on the team of attorneys that established the civil liability of a government entity whose police officer raped an arrestee, Mary M. v City of Los Angeles (1991) 54 Cal 3rd 202. Jerome Fishkin argued the successful quantum meruit case to the California Supreme Court, Huskinson v Wolf (2004)32 Cal 4th 453. Together they represented Sergio Garcia, the first undocumented immigrant to be admitted to practice law, in Re Garcia (2014) 58 Cal 4th 440.



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Settlement Negotiation Ethics for Attorney-Advocates in Litigated Cases

Rule 4.1 of the New California Rules of Professional Conduct

by Phillip Neiman

At some point after a civil dispute enters the legal system, opposing counsel will likely engage in some form of discussion to resolve the case. If attorneys don't initiate direct negotiations or early mediation, or if they do and the case doesn't resolve, they are likely to receive judicial encouragement at a case management conference to voluntarily explore settlement through a court's alternative dispute resolution program. Separately, courts use meet and confer requirements to promote settlement talks. If a case has not resolved and trial is approaching, attorneys are likely to find themselves at the negotiating table by judicial fiat. California Rules of Court, Rule 3.1380 authorizes a court to set one or more mandatory settlement conferences on its own motion.

Across the span of their careers, most civil litigators will spend more time engaged in settlement talks than they will in trial.[1] For this reason, it's important that they have a solid understanding of their professional duties while engaged in the settlement process, and specifically of new Rule 4.1 under the professional conduct rules that will go into effect on November 10, 2018 ("CRPC-2018.")

Rule 4.1, "Truthfulness in Statements to Others," figures prominently in the context of settlement negotiations. It is counterintuitive to many attorneys and it can be challenging to apply. By unpacking the rule and the comments and walking through some examples, attorneys will learn how to navigate the ethical dilemmas that often accompany this provision in practice.

RULE 4.1
TRUTHFULNESS IN STATEMENTS TO OTHERS

"In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by [Bus. & Prof. Code §6068(e)(1) or Rule 1.6]."

Three definitions are important to a discussion of this rule.

Fraudulent. The concept of client fraud figures prominently in Rule 4.1. Rule 1.0.1(d) states that "fraud" or "fraudulent" shall be defined under the law of the applicable jurisdiction and that the conduct must be with "a purpose to deceive." Rule 1.0.1, comment 3, makes an important qualification, stating: "When the terms 'fraud' or 'fraudulent' are used in these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation." Thus, to constitute "fraud" under Rule 4.1, one can look to CACI No. 1900, as modified by Rule 1.0.1, comment 3. The elements are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity; and (c) intent to induce reliance.[2]

Materiality. "Materiality" is not defined in Rule 4.1 or in Rule 1.0.1. Using the U.S. Supreme Court's definition, material facts are "all facts which a reasonable [person] might consider important."[3] This is essentially in line with the definition found in the Restatement (Second) of Contracts §162(2) (1979), which provides that a misrepresentation is "material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so."

Knowingly. "Knowingly" is defined as "Actual knowledge of the fact in question. Knowledge may be inferred from the circumstances." Rule 1.0.1(f).

The Problem of Silence: Rule 4.1(a), Comment 1

Rule 4.1(a) states: "In the course of representing a client a lawyer shall not knowingly… make a false statement of material fact or law to a third person."

In pertinent part, Rule 4.1, Comment 1 provides: "*A lawyer* is required to be truthful when dealing with others on a client's behalf, but *generally has no affirmative duty to inform an opposing party of relevant facts*." [Emphasis added.] Attorney A need not do Attorney B's work for her.

However, the comment continues: "A nondisclosure can be the equivalent of a false statement of material fact or law under [Rule 4.1(a)] where a lawyer makes a partially true but misleading material statement or material omission." Thus, *remaining silent is not always acceptable* and in fact constitutes a falsehood if a partially true but ambiguous (or a partially true and partially false) statement is made and then not corrected. The comment also states that a misrepresentation can occur if the lawyer incorporates or affirms the statement of another person [presumably a client] when the lawyer knows that the statement was false.

Comment 1 concludes by stating that lawyers remain bound by Business and Professions Code, Section 6106 and Rule 8.4 ("Misconduct"). Section 6106 provides: "The commission of any act involving moral turpitude, dishonesty or corruption… constitutes a cause for disbarment or suspension." Under Rule 8.4(a), "It is professional misconduct for a lawyer to… violate these rules or the State Bar Act, knowingly assist, solicit, or induce another to do so, or do so through the acts of another." And, under Rule 8.4(c), "It is professional misconduct for a lawyer to… engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation."[4]

Puffing and Bluffing are Allowed at the Negotiating Table: Rule 4.1, Comment 2

Rule 4.1, Comment 2 clarifies that not all dishonesty is treated equally. The comment carves out an exception to the Rule 4.1 duty of candor to third parties for certain kinds of misrepresentations.

The comment states: "[Rule 4.1] refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, *in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category,* and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud." [Emphasis added.]

Rule 4.1, Comment 2, which allows for bluffing and puffing in negotiations, isn't a novel concept, but CRPC-2018 *did* usher in a nuanced change. In 2015, the State Bar's Standing Committee on Professional Responsibility and Conduct issued Formal Opinion No. 2015-194 ("CA Ethics Opinion No. 2015-194").[5] The opinion addressed whether an attorney, when engaged in negotiations on behalf of a client, is subject to the ethical limitation on not lying to third parties.

> "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension.

The conclusion was that attorneys, when negotiating, are subject to the rules prohibiting dishonesty, deceit and collusion, but that puffery and posturing — including statements about a party's negotiating goals or willingness to compromise — are allowed *because they are not considered statements of fact*.

The fact pattern in CA Ethics Opinion No. 2015-194 involved a court-supervised settlement conference, which complicates matters. Under Evidence Code Section 1117(b)(2), a mandatory settlement conference ("MSC") held pursuant to California Rules of Court, Rule 3.1380 is not a mediation. Mediation confidentiality rules do not apply to MSCs. Of the scenarios presented in that opinion, three involved outright factual misrepresentations by one of the attorneys. If the case resolved, the party who was lied to would have grounds for a motion to set aside the settlement. The lying party would be unsuccessful in excluding evidence of the falsehoods based on Evidence Code Section 1119 because, as noted, an MSC is not a mediation.

CRPC-2018's Rule 4.1 appears to go further and impose a duty of candor in statements to others under all circumstances, including direct negotiations between attorneys and in mediation. It does not carve out private mediation in any case. As such, it makes a broader statement about the value of transparency than CA Ethics Opinion No. 2015-194.

At a minimum, the introduction of Rule 4.1 removes any doubt that the courthouse setting in CA Ethics Opinion 2015-194 rendered the entire opinion meaningless because the falsehoods were admissible in Court to prove fraud in the inducement. It is also important to emphasize that ethics opinions from the State Bar are advisory only.[6] *Now, formally and officially, lawyers may not knowingly misstate materials facts (of the non-puffing variety) when engaged in settlement talks.*

The Client Fraud Problem: Rule 4.1(b), Comment 3

Rule 4.1(b) requires some unpacking. It provides: "In the course of representing a client a lawyer shall not knowingly… fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by [Section 6068(e)(1) or Rule 1.6]."

In other words, *a lawyer has an affirmative disclosure obligation if disclosure is necessary to avoid assisting a client's fraud*. Assume a client makes a statement (or conceals something) that rises to the level of fraud. The attorney must correct the statement unless doing so would require the attorney to break a client confidence. The exception may have swallowed up the rule. ▶

Comment 3 to Rule 4.1 states: "Under Rule 1.2.1, a lawyer is prohibited from… assisting a client in conduct that the lawyer knows is… fraudulent. See rule 1.4(a)(4) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's… fraud by withdrawing from the representation in compliance with rule 1.16."

Rule 1.2.1 states: "A lawyer shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act." In turn, Rule 1.4(a)(4) states that a "lawyer shall . . . advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

Finally, Rule 1.16(a)(2) requires withdrawal if the lawyers knows (or should know) that continued representation will result in a violation of the professional conduct rules or the State Bar Act, while Rules 1.16(b)(3) and 1.16(b)(9) permit a lawyer to withdraw if the client insists that the lawyer do something fraudulent or if ongoing representation is likely to result in a violation of the professional conduct rules or the State Bar Act (withdrawal being subject to court approval, as applicable).

Putting these concepts together in the context of a settlement negotiation, if a client misrepresents or conceals a material fact to induce the other party's or opposing counsel's reliance (or arguably to induce reliance by the other party's support person or her expert witness or, for that matter, the mediator's reliance), the client's lawyer cannot participate in the misrepresentation or concealment (Rule 1.2.1) *and must correct it*, *unless* doing so would result in a breach of client confidentiality, in which case the lawyer should advise the client that she cannot partake in the fraud (Rule 1.4.(a)(4)) and, if the client doesn't relent, then the attorney may be required to move the court to withdraw under Rule 1.16(a)(2) (mandatory) or under Rule 1.16(b)(3) or Rule 1.16(b)(9) (permissive).

The Consequences of a Rule 4.1 Violation: Sanctions Guidelines

As noted, Comment 1 to Rule 4.1 concludes by stating that lawyers remain bound by Section 6106 and Rule 8.4. The former states that "dishonesty . . . constitutes a cause for disbarment or suspension." The latter states "it is professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation."

In this system of rules and discipline, an attorney who violates Rule 4.1 isn't labeled "unethical" and required to wear a scarlet "U." Rather, the attorney is subject to the State Bar's sanctions standards for professional misconduct.[7] The standards work like sentencing guidelines, in effect correlating specific punishments with specific types of misconduct. The Supreme Court is not bound to follow a disciplinary recommendation but does so "whenever possible" if consistent with the sanctions standards.[8] For that reason, sanctions are the "presumed" punishment when an attorney commits a particular type of misconduct.

Standard 2.11 appears to cover lying during settlement negotiations. It provides: "Disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact."[9]

Standard 2.12(a) also appears to apply: "(a) Disbarment or actual suspension is the presumed sanction for disobedience or violation of . . . the duties required of an attorney under Business and Professions Code Section 6068(a)(b)(d)(e)(f) or (h)."[10] In turn, Section 6068(d) states: "It is the duty of an attorney to… employ, for the purpose of maintaining the causes confided to him or her *those means only as are consistent with the truth*." Thus, again, the price of lying while negotiating appears to be disbarment or suspension.

Finally, Standard 1.5 lists aggravating circumstances that, if proven by the State Bar, can act as enhancements to the guideline sanctions. These include (d) intentional misconduct, bad faith or dishonesty; (e) misrepresentation; and (f) concealment.[11]

Lawyers may wish to review the sanctions standards prior to negotiating with opposing counsel.[12] As noted in Rule 4.1, Comment 3, if a client misrepresents a material fact, a lawyer who would otherwise be prevented from correcting the misrepresentation under the ethical duty of confidentiality follows a protocol of advising the client that she (the attorney) cannot partake in the fraud (Rule 1.4(a)(4)). Citing the sanctions to which an attorney would be subject may be the best way to illustrate to a client that there are limits to what an advocate can do.

Hypotheticals: Rule 4.1 at Work

We'll work with a hypothetical wrongful death case in which the plaintiff's late-husband, a 42-year old commercial roofer with three children, fell while he and his business partner were putting a new roof on a 12-story commercial building owned by the defendant, a performance artist and manicurist in her mid-30's who inherited the property (with significant deferred maintenance and a mortgage with a huge balloon payment due in three months) when her mother passed last year. The parties are in mediation.

Rule 4.1 - Scenario 1. Defendant's counsel tells the mediator that his client's aunt is paying his fees and he has every intention of leaving the building as soon as "the first outrageous demand is made, meaning anything over $40,000. Under Comment 2, *this is not the type of statement normally taken as fact, but rather, is suggestive of the attorney's subjective intentions. The statement is allowed.*

Rule 4.1 - Scenario 2. Plaintiff tells her lawyer that her late-husband was diagnosed with Stage IV pancreatic cancer two weeks before the fall and that his brother in Romania, who was also his doctor, gave him "at most six months to live." In prior discovery responses, Plaintiff disclosed no doctor visits by her husband and stated that he was in perfect health. She tells her attorney not to disclose the information "to anyone, ever." Plaintiff's counsel is in fact required to disclose the diagnosis, but he has a conflicting duty here as well. Rule 4.1(b) states that a lawyer "shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a . . . fraudulent act by a client, unless disclosure is prohibited by [Section 6068(e)(1) or Rule 1.6]." False statements on discovery responses fall under the definition of "fraud" set out in Rule 1.0.1, comment 3. Rule 4.1(b), comment 3 addresses this situation: "Under Rule 1.2.1, a lawyer is prohibited from . . . assisting a client in conduct that the lawyer knows is . . . fraudulent." The lawyer is instructed to consult with his client and make her aware that he cannot participate in the fraud. Rule 1.4(a)(4) states that a "lawyer shall . . . advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional ▶

Select Rules and Statutes Applicable to Settlement Negotiations

CRPC-2018

- Terminology - Rule 1.0.1
- Competence - Rule 1.1
- Scope of Representation and Allocation of Authority - Rule 1.2
- Assisting, Soliciting, or Inducing Violations - Rule 1.2.1
- Diligence - Rule 1.3
- Communication with Clients - Rule 1.4
- Communication of Settlement Offers - Rule 1.4.1
- Fees for Legal Services - Rule 1.5
- Confidential Information of Client - Rule 1.6
- Aggregate Settlements - Rule 1.8.7
- Declining or Terminating Representation - Rule 1.16
- Advisor - Rule 2.1
- Meritorious Claims and Contentions - Rule 3.1
- Delay of Litigation - Rule 3.2
- Threatening Criminal, Administrative, or Disciplinary Charges - Rule 3.10
- Truthfulness in Statements to Others - Rule 4.1
- Communication with a Represented Person - Rule 4.2
- Communicating with an Unrepresented Person - Rule 4.3
- Misconduct - Rule 8.4

State Bar Act

- Maintain only those actions/defenses as appear legal or just - B&P Code §6068(c)
- Employ means only as are consistent with the truth - B&P Code §6068(d)
- Maintain the confidences and preserve the secrets of the client - B&P Code §6068(e)(1)
- Keep clients informed of significant developments - B&P Code §6068(m)
- Violation of attorney oath (BPC §6107) or duties grounds to suspend/disbar - B&P Code §6103
- Communicate settlement offers - B&P Code §6103.5(a)
- Moral turpitude, dishonesty or corruption grounds to suspend/disbar - B&P Code §6106
- Deceit/collusion or consent to same with intent to deceive is misdemeanor - B&P Code §6128(a)

Conduct or other law." If the client will not permit disclosure of her late-husband's medical condition, the lawyer's option is to file a motion with the court to withdraw under Rule 1.16. That would require terminating the mediation, which could prejudice his client. If the court refuses to grant the withdrawal request (no noisy withdrawals are permitted), the lawyer is in an even bigger bind. Some of these issues have no workable solution.

Rule 4.1 - Scenario 3. Defendant's counsel tells the mediator that his client's girlfriend saw the decedent and his partner doing "lots and lots of tequila shots" at the bar on the corner before they started work on the roof the morning of the accident. The defendant has a girlfriend but she was in Tangiers on the day of the accident and was not a witness to any boozing activity. Therefore, the attorney is not permitted to make this statement. The very existence of the witness was manufactured and the facts about which she would allegedly testify, that the decedent was intoxicated before he began work on the roof of a 12-story building, are material to the case.

Rule 4.1 - Scenario 4. Plaintiff, who kept her husband's books, brought copies of the financials from the roofing company to mediation. They show average annual income for the last five years of $195,000. The attorney clearly recalls that when he first reviewed the books, average annual income was $325,000 for the last five years, and he brought those copies with him to mediation as well. He asks his client, who says the audit just came back and the new numbers were correct, the business wasn't doing as well as she thought. Defendant's counsel hadn't requested any financials to date. Plaintiff suggests telling the mediator that they have no books and records with them but that she "believes the business was doing very well, around $300,000 per year." Plaintiff's counsel overrules his client and decides to give the mediator the books showing $325,000 per year so he (Plaintiff's counsel) doesn't have to lie directly the other side and asks the mediator to share the books with opposing counsel right away. This is not permitted.

Comment 1 to Rule 4.1 states that a lawyer has *no affirmative duty to inform an opposing party of relevant facts. But here, the attorney is providing false information of a material nature to the other side. If he followed his client's suggestion, that too would have been a rule violation because the Comment provides that a misrepresentation can occur if the lawyer affirms the statement of his client when he knows the statement is false. The fact that the attorney used the mediator as a conduit for making the misrepresentation doesn't shield him from responsibility. The plain language of Rule 4.1 is that a lawyer shall not knowingly "make a false statement of a material fact or law to a third person." Thus, the lawyer cannot lie to the mediator either. Even if the rules allowed it, lying to the mediator is bad form and never helps one's client. Mediators need accurate information to help each party make informed decisions around settlement. If instructed not to disclose the information, the mediator would have honored that, but using the mediator to spew a lie to increase the value of one's settlement is a violation of the rules and counterproductive.*

Rule 4.1 - Scenario 5. Defendant's counsel states that the coverage limit on his client's policy is $250,000 when in fact he knows it to be $2.5 million, with a low deductible, and he also mentions that his client intends to file for bankruptcy if she has to spend any of her own money because "she doesn't have any." *The attorney is not permitted to make the statement about the policy limits, knowing it to be false.* Even though opposing counsel could obtain that information through discovery, *defendant's counsel is not allowed to misrepresent a material fact with the intention that it will be relied upon. The statement about his client's intention to file for bankruptcy is probably allowed, as this is the sort of statement made frequently in negotiations*. The lie about the policy limits and the statement about bankruptcy are treated as two separate issues.

Rule 4.1 - Scenario 6. Plaintiff's counsel states his client's walkway number is "in the neighborhood of $750,000" and mentions to the mediator that he plans to report the defendant to the Department of Consumer Affairs because her manicurist license lapsed several years ago, unless of course he gets his number "or close to it." Under Rule 4.1, Comment 2, *the lawyer's statement about his client's bottom line is posturing and permitted. The threat to report the defendant to DCA for a lapsed license is probably a violation of Rule 3.10 unless the attorney intends to go through with it. The two issues are separate, however.*

Does Rule 4.1 Matter If It Can't Be Proved?

Evidence Code Section 1119 provides that mediation-related communications are confidential: "No evidence of anything said . . . in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery…." Section 1119(c) states: "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." California courts have consistently upheld these provisions.[13] Even Section 1125(a), which states the conditions under which a mediation ends "for purposes of confidentiality," is swallowed up by Section 1126, which provides: "Anything said . . . that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends."

It is unclear how evidence of a material misstatement made by one attorney to another — directly or through the mediator — could be introduced into evidence at a subsequent proceeding to show misrepresentation or fraud. The confidential nature of mediation will probably[14] protect lawyers who make false statements in that setting.

During direct negotiations between attorneys, however, the cloak of secrecy for purposes of Rule 4.1 does not exist. This raises the rather disturbing question of why lying in one forum (mediation) is allowed while lying in another (outside of mediation) is prohibited, particularly when the mediator actually needs to have accurate information to bring about a Pareto optimal settlement.

The notion that a settlement agreement reached in mediation can be set aside if based on fraud in reliance on Section 1123(d) is false. That provision states that a settlement agreement is not made inadmissible if signed by the settling parties and the "agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute." Section 1123(d) allows the settlement agreement into evidence but it doesn't by corollary allow mediation communications into evidence.

Lastly, in this discussion it would be remiss not to mention Evidence Code Section 703.5, which provides that "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt . . . [or] (c) be the subject of investigation by the State Bar." In theory, an attorney might try to rely on this provision if she felt opposing counsel lied during a mediation in violation of Rule 4.1. I can't speak for other mediators, but I couldn't be of any help to the State Bar Court because of the sudden onset of amnesia that hits me every time a mediation ends. I'm unaware of any attempt to compel mediator testimony under Section 703.5(c), although there is precedent for it in other jurisdictions and in federal court.

CONCLUSION

Settlement discussions are generally conducted under the proverbial cone of silence, giving many attorneys the impression that "anything goes." There are, in fact, exceptions. While some degree of gamesmanship on certain topics is permitted, lawyers do not have complete freedom to say whatever they wish to the other side. Puffing and bluffing are allowed, but intentionally misrepresenting a material fact or failing to correct certain misstatements are against the rules. Crossing the line can lead to sanctions for the attorney, reputational damage and harm to one's client (e.g., if a settlement agreement is set aside based on fraud in the inducement). Banking on not getting caught is generally considered a risky approach. Over time, things have a way of revealing themselves. Given the strong confidentiality protection that mediation receives in California, if an attorney absolutely, positively *must* misrepresent the truth while negotiating the terms of a settlement, doing so in the presence of a mediator may be the only way to accomplish her goal, yet this is by no means foolproof. ◆



—Phillip Neiman, Esq. is a mediator with JAMS in San Francisco. A full-time neutral since 2004, he devotes much of his practice to securities and commercial cases, employment, real property, trust/estate, consumer and insurance matters, and disputes involving privacy torts and significant personal injuries.

[1]Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* (2004) 1 J. of Empir. Leg. Stud. 459.

[2]Because the comments are merely "guidance for interpretation" and "not a basis for discipline" (Rule 1.0 (c)), it may be that the two omitted elements of fraud should be added back in when considering discipline under Rule 4.1 and for that matter under all of CRPC-201.

[3]*TSC Industries, Inc. v. Northway, Inc.* (1976) 426 U.S. 438, 439.

[4]Two other provisions of the State Bar Act apply. Section 6128(a) states: "Every attorney is guilty of a misdemeanor who… consents to any deceit or collusion, with intent to deceive the court or any party." Section 6068(d) adds: "It is the duty of an attorney to employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with the truth."

[5]State Bar of CA Standing Comm. on Prof. Resp. & Conduct, Form. Opn. No. 2015-194 (September 10, 2014) (hereafter "CA *Ethics Opinion 2015-194*") (See: http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2015-194%20(12-0007)%20Puffing%20in%20Negotiations%20FINAL%2012-29-15.pdf).

[6]CRPC-2018, Rule 1.0, Comment 4.

[7]Bus. & Prof. Code §§6075-6117. The Rules of the State Bar, Title 5 ("Discipline") include Rules of Procedure and Rules of Practice of the State Bar Court. The *Standards for Attorney Sanctions for Professional Misconduct* are listed in the State Bar Rules of Procedure, Title IV, pages 146-157, accessed at http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2015-194%20(12-0007)%20Puffing%20in%20Negotiations%20FINAL%2012-29-15.pdf (hereafter, "*State Bar R. Proc.*").

[8]*In re Silverton* (2005) 36 Cal. 4th 81, 91. See also *In re Lamb* (1989) 49 Cal. 3d 239, 245.

[9]State Bar R. Proc., *supra* at 155.

[10]State Bar R. Proc., *supra* at 155.

[11]State Bar R. Proc., *supra* at 149. (The author is unclear how an enhancement works in the event of disbarment.)

[12]See State Bar R. Proc., *supra* (http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2015-194%20(12-0007)%20Puffing%20in%20Negotiations%20FINAL%2012-29-15.pdf).

[13]See, e.g., *Amis v. Greenberg Traurig* (2015) 235 Cal.App.4th 331 (hereafter, "*Amis*"); *Cassel v. Superior Court* (2011) 51 Cal.4th 113 (hereafter, "*Cassel*"); *Fair v. Bakhtiari* (2006) 40 Cal.4th 189 (hereafter, "*Bakhtiari*"); *Rojas v. Superior Court* (2004) 33 Cal.4th 407 (hereafter, "*Rojas*"); *Foxgate v. Bramalea* (2001) 26 Cal.4th 1 (hereafter, "*Foxgate*").

[14]California courts have not considered Rule 4.1 in the context of mediation (or in any forum), thus "probably" does not mean "definitely."

New Technology

Old Ethics

by Zachary Harmon

It is hard today to imagine an area of the legal practice that does not involve some facet of social media or blog posts. A digital referral service, filled with attorney reviews and bios, is often the genesis for client referrals. During the course of representation, attorneys frequently communicate with their client through e-mail, text messages, and instant messaging services available on almost every social media platform. At the end of a case, attorneys may ask the client to write a positive review on their website or social media site, or may write a blog post themselves or share a testimonial about the case on social media (anonymized, of course). Using social media is easy, fast, and far-reaching. So much so, that attorneys can violate an ethical duty in under a minute, and in less than 140 characters for all to see.

Two bodies of law apply to attorneys posting content on social media sites and blog posts: (1) the Rules of Professional Conduct of the State Bar of California and (2) the Business and Professions Code.[1] Rule 1-400 of the Rules of Professional Conduct states that any "communication" that contains "any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective clients" is subject to advertising regulations. Under the Business and Professions Code, an attorney cannot make any advertisement that is "false, misleading, or deceptive." Additionally, an attorney cannot make any "guarantee or warranty regarding the outcome of a legal matter." Bus. & Prof. Code, §6157.1-6157.2.

Both of these rules apply to social media communications, including posts on Facebook or Twitter. "Another great victory in court today! My client is delighted! Who wants to be next?" is subject to Rule 1-400.

> "Attorneys can violate an ethical duty in under a minute and in less than 140 characters for all to see.

How do attorneys ensure that they are not violating regulations on attorney advertisements when they post comments? Generally, the rules apply where there is a communication for employment, a guarantee of success, or misleading language. "My client is delighted" is a client testimonial (without a disclaimer). "Who wants to be next?" seeks professional employment. To be safe, the post should include a disclaimer such as, "this is an advertisement, all cases are unique, and no guaranty of any particular result is made or implied," and give further detail as to what qualifies as a victory. However, adding the disclaimer does not suffice. According to Rule 1-400(F), an attorney must keep a true and correct copy of any communication that falls within Rule 1-400. Depending on the amount of content contributed to social media each day, this may be a monumental task.

Blog posts are subject to the same rules. Blog posts tend to be longer and provide more information. However, even with greater context, it is easy for an attorney to violate an ethical obligation. For example, an attorney may boast about how "they almost always win" and detail their winning strategy or describe their string of successes. While this post is not an explicit invitation to retain the attorney's services, it is nonetheless a violation of ethical obligations. It is a communication seeking employment. And without language qualifying what a "win" is, this post is misleading and could be construed as a promise of success.

Attorneys are not prohibited from making any posts on social media or blogs related to their legal careers. "Attorney status postings that simply announce recent victories without an accompanying offer about the availability of professional employment generally will not qualify as a communication" and not be subject to regulations on advertising. The State bar of California Standing Committee on Professional Responsibility and Conduct Formal opinion No. 2012-186, p.4. Examples of acceptable social media posts are, "case finally over, unanimous verdict, celebrating tonight!" and "just published an article on wage and hour breaks. Let me know if you want a copy!"

> "Attorneys at coffee shops may violate an ethical obligation simply by logging onto the coffee shop's Wi-Fi.

Similarly, attorneys are free to make posts regarding various aspects of the legal profession so long as they do not make promises of success or invite employment. For example, attorneys may post a blog detailing collaborative divorce, visitation exchanges, and other legal topics. However, even a post that is otherwise informational can trigger ethical obligations with the simple inclusion of a sentence inviting the reader to contact the attorney for more information. Likewise, attorneys are free to make blog posts regarding personal interests, and even link their personal blogs to their professional page, so long as they adhere to the same ethical obligations detailed above.

Lastly, a tangential concern to the creation and publishing of any digital content is how an attorney connects to the internet. It is common to walk into a café and see attorneys sitting at a table, sipping a cappuccino, and responding to client e-mails, working on a motion, or even meeting a client in person. Besides the abundance of caffeine and trendy music, coffee shops also offer fast and reliable Wi-Fi. However, attorneys at coffee shops may violate an ethical obligation simply by logging onto the coffee shop's Wi-Fi.

Formal Opinion No. 2010-179 by The Standing Committee on Professional Responsibility and Conduct found that an attorney, "... risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop ..." to work on client matters unless appropriate actions are taken. The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2010-179, p.7. What exactly are appropriate precautions for connecting to a coffee shop's Wi-Fi? The Committee recommends that attorneys use a combination of file encryption, firewalls, and encryption of wireless signals. In short, attorneys need to be just as concerned with how they are connected to the internet as they are with what they are putting on the internet.

In sum, attorneys should take an extra moment before hitting "post" to re-read content for possible ethical violations and to make sure their internet connection is safe. ◆



— Zachary Harmon is an associate with Simon Law in Walnut Creek. He represents plaintiffs in family law, personal injury, and probate cases.

[1]More specifically, the Committee found that Rule 1-400 of the Rules of Professional Conduct of the State Bar of California, and §§6157-6159.2 of the Business and Professions Code applied to both social media and blog posts. Additionally, §§6106, 6151, and 6152 are applicable to social media posts. For more information, please see The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2016-196 (blog posts) and 2012-186 (social media).

— ACCTLA CALENDAR OF EVENTS —

Thursday, August 30, 2018
Happy Hour Mixer • 5:30pm
Somar Bar & Lounge, Oakland
(see page 21 for further information)

Wednesday, September 26, 2018
MCLE • 5:30pm
JAMS, Walnut Creek

Monday, October 15, 2018
Trojan Horse Seminar • TBA

Thursday, October 25, 2018
Fall Social • 5:30
Lafayette Park Hotel

Spring Cocktail Reception

May 10, 2018
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Judge Robert McGuinness and Michael Herman



Joseph Satterley, Judge Robert Freedman, Arcelia Hurtado, Andrea Houston, Jessica DeLeon



Nasser Khan, Judge Lambden (ret.), Lyle Cavin, Judge Robert Freedman (ret.), Rick Baskin



Erica Ploetz and Jessica DeLeon



Chris Viadro, Robert Schock, Judges S. Raj Chatterjee and Benjamin Reyes II



Judge Tara Desautels, Joe Satterley, Nasser Khan, Judge Brad Seligman, Henry Steinberg



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Sneak Preview

The New Rules of Professional Responsibility

by Michael Herman and Naseer Khan

The California Supreme Court recently issued an Order approving a new set of Rules of Professional Responsibility effective November 1 (CPRC). This is the first time the Supreme Court has approved substantially revised rules of professional conduct for California attorneys in almost thirty years. The majority of the rule changes track the American Bar Association (ABA) model rules, making California less of an outlier and establishing a uniform set of principles that all attorneys should be aware of, no matter their state of practice or bar admission. Some of the most salient changes are highlighted below.

LAWYER AS AN ADVISOR

Clients expect lawyers to be their guide in the field of law and other administrative areas. Yet, an attorney's work does not stop at mere objective legal analysis; rather, clients look to attorneys for general advice. Hence, Rule 2.1 was added to the CPRC, which encompasses this duty as an advisor. The rule states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." The comments provide that a lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest. The comments add that this rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

DILIGENCE

Diligence is now its own rule — Rule 1.3. Under the new rule, a lawyer "shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client." A reasonably diligent lawyer is "a lawyer who acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer."

SEXUAL RELATIONS WITH CLIENTS

The previous California rule regarding sexual relations with clients (Rule 3-120) prohibited sexual relations (including intercourse and touching of an intimate part of another) with clients where it was a requirement to or condition of professional representation of the client; where coercion, intimidation or undue influence were employed into entering sexual relations; and where it interfered with providing competent representation to the client. However, these restrictions did not apply to sexual relations with spouses or to ongoing sexual relationships that predate the attorney-client relationship.

New rule 1.8.10 does away with the above nuances: "A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced." The overall language is more prohibitive than the previous rule and now tracks the ABA rule. The take away—attorneys cannot have sex with clients unless the sexual relationship existed prior to the attorney-client relationship.

COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

Both the previous and new rules regarding lawyer advertising prohibit a lawyer ▶

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from claiming he or she is a "certified specialist" in a particular field unless the lawyer holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists. Nevertheless, new rule 7.4(b) states that a lawyer may communicate that his or her practice "specializes in," "is limited to," or "is concentrated in" a particular field of law. This rule allows certain lawyers to employ a very useful advertising tool — especially for those lawyers whose fields of practice do not have "certified specialist" designations (such as personal injury lawyers). Other restrictions regarding lawyer advertising remain.

CONFLICTS OF INTEREST

Rule 1.7 retains the California "informed written consent" standard but adopts the ABA Model Rules considering whether there is direct adversity to a current client or "a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests." Rule 1.7 applies broadly to "any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons, or a discrete and identifiable class of persons."

FEE SPLIT RULES

The new rules mandate that the clients consent to attorney agreements to split fees in writing "either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client of: (i) the fact that a division of fees will be made; (ii) the identity of the lawyers or law firms that are parties to the division; and (iii) the terms of the division."

ADVANCED PAYMENT ON FEES TO BE KEPT IN TRUST ACCOUNT

Rule 4-100 required advanced costs to be deposited in the client trust account. Rule 1.15 mandates that "all funds received or held by a lawyer or law firm for the benefit of a client, or other person to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled 'Trust Account'."

PROHIBITION ON DISCRIMINATION AND HARASSMENT — IN THE WORKPLACE AND IN THE PRACTICE OF LAW

Under Rule 8.4.1, lawyers may not "knowingly permit" harassment. "Knowingly permits" means "to fail to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited" under the rules. The comments clarify that "a law firm non-management and non-supervisorial lawyer who becomes aware that the law firm is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm management lawyer who would have responsibility under rule 5.1 or 5.3 to take reasonable remedial action upon becoming aware of a violation of this rule." In addition, a lawyer who is the subject of the State Bar investigation or proceeding is required to notify the State Bar of any "criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding."

NEW FINGERPRINTING FOR ALL LICENSED ATTORNEY

Most active California attorneys are required to be re-fingerprinted. For several years, the State Bar was out of compliance with a statutory mandate requiring notification of subsequent arrests and convictions of California Attorneys from the California Department of Justice. The only way for the State Bar to come fully into compliance is to re-fingerprint licensed attorneys, including attorneys who were previously fingerprinted at the time of admission to the State Bar. Email notifications with more detailed instructions began going out June 1, 2018 on a rolling basis until early August. The deadline to submit new fingerprints without penalty is April 30, 2019.

The new rules are available on the State Bar website. Add them to your summer reading list. ◆



— Michael Herman is the owner and managing partner of the Law Offices of Michael D. Herman in Walnut Creek. He has practiced exclusively plaintiff's personal injury and wrongful death since 2015. Mr. Herman has litigated hundreds of cases involving automobile injuries, premises liability, and other complex civil matters including wrongful death. He currently serves as a Board member of ACCTLA.



— Naseer Khan is an associate at the Law Offices of Michael D. Herman in Walnut Creek. He works on a variety of matters including automobile injuries and complex litigation involving premises liability and sexual abuse.

Alameda-Contra Costa
TRIAL LAWYERS' ASSOCIATION

Effective Advocacy in Personal Injury Mediations

What to Consider Before the Mediation - This program will address issues to be considered prior to mediation that may impact the offers of settlement at mediation. This includes not only the legal considerations impacting liability, but also the recoverable damages and potential set- offs, liens and credits; policy language and defendant's reporting requirements.



Guest Speaker Jeane Struck a neutral with more than 34 years of litigation experience handling personal injury, professional liability, construction defect, product and premises liability, commercial liability, private and public nuisance claims, ADA and habitability matters. As an insurance defense attorney Jeane was an advocate for her carrier and clients, while being respectful and fair to the plaintiff and opposing counsel. Jeane is a versatile neutral, adept at handling everything from simple, two party matters to complex, multi-party cases with unusual damage claims. Jeane understands unspoken dynamics and carrier/client relationships, and she has been praised for her ability as a neutral to quickly develop a rapport with counsel and their clients in order to reach resolution of the claims.

ACCTLA would like to thank our sponsor:

JAMS

Date and Time
Wednesday, September 26, 2018
5:30pm Presentation
6:30pm Networking Social Hour

Location
1255 Treat Blvd, Suite 700
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Appetizers and wine will be served.

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Sitting Down with

Judge Paul Beeman

by Gavin Barney



Judge Paul L. Beeman served 18 years as a Judge for the Solano County Superior Court. A Vallejo native, Judge Beeman came to the bench after years of working as a personal injury attorney in his home town. He retired in 2018.

Gavin Barney: Good afternoon Judge Beeman. Thank you for sitting down with me today. First things first, how have you been enjoying your retirement?
Judge Beeman: It's not a bowl of cherries, but it's fine. You get to sleep in a little longer, maybe get in one or two more workouts during the week. You might see one or two more movies a month. But what I've really been trying to do is get jump started on getting into mediation.

You know, as a judge, you're somewhat pampered — at least I always thought I was. I mean, the people I worked with, wonderful. I love the people I've worked with and if you needed something, they're more than happy to get it for you and you become rather dependent. Now they're gone. They don't want to come live in my house. So now, I have to do more things for myself.

What was it that initially attracted you to the law?
I was told, don't tell them that you became a lawyer because you couldn't think what else to do, but that's primarily it. I couldn't figure out what to do. I looked in the paper, and there weren't any job openings for political scientists. And earlier, I thought about maybe going into acting and, uh, I said, you're not good enough so forget that idea. My dad was an attorney and he suggested I go to law school. With his vote of confidence, I did.

And what drew you to become a judge?
Well, I practiced law for over 26 years, and if you go to court long enough and you work hard enough, you're watching people make decisions and it becomes apparent after 15 or 20 years that, hey I could do that. It's not that big a deal. In fact, I could do a better job than that guy. The other part of it is, being essentially a solo practitioner in a small community like Vallejo, it's hard. You're working seven days a week. I think one of the reasons I became a lawyer is because I didn't want to be a businessman. And after about 15 years it dawned on me, I was a businessman. In a plaintiff's personal injury practice, there's so many variables that you don't have control of. I always use the analogy that it was kind of like fishing — some days you could fill the boat up, other days you're going to be on a diet for a while.

Shifting to the topic of ethics, what are the kind of ethical issues that had the most impact on proceedings during your time on the bench?
Generally speaking, ethics didn't come up and, I guess, it didn't come up because the lawyers were good lawyers. They knew what the rules were. They knew what was acceptable conduct, what was permissible, and what wasn't. And the overwhelming majority of lawyers never presented me with ethical problems.

I wish I could be more helpful, but the lawyers behaved themselves. We had great lawyers. Sometimes they get angry, they get mad, you just take a recess, let them calm down. It wasn't much more exciting than that.

Did you see any kind of change over your tenure as judge?
I started at juvenile delinquency and dependency, and we didn't have any ethical issues. I mean, people just tried hard to get to do their job and properly resolve the issues before the court. And they got along, for the most part, quite well with one another. Then I went to adult felony, and it was like swimming in a rushing river. You have trial after trial, and you'd have lawyers who didn't properly prepare, whine and cry about wanting a continuance. But I do not recall a specific ethical issue with any given lawyer.

Lawyers are busy too. They want to get in and get out, represent their client, and move on. I mean, I'm sure some of them drank too much, but they came to court sober.

> "If you go to court long enough and you work hard enough, you're watching people make decisions and it becomes apparent after 15 or 20 years that, hey I could do that.

In your opinion, how does the rapid change of technology impact the ethical practice of law?
I recently looked back over the State Bar's Formal Opinion 2015-193 — on an attorney's duty of competence in handling clients' Electronically Stored Information. When I first read it, I thought this opinion cut both ways. I read it again yesterday and I noticed an important footnote down here: "This opinion does not address the scope of the attorney's duty of competency relating to obtaining an opposing party's ESI." Well guess what? It should. It really should. And I think a smart lawyer who would read this and realize their obligations to their own client would then also see the other side. I mean, in representing my client, how far do I have to go with the ESI to make sure that I properly prepared and that I've done all the discovery that needs to be done to resolve this case successfully. It should cut both ways.

I have seen large cases where, for example, a case had just started getting ready to start trial and the other side all of a sudden comes up with 30,000 pages of electronic discovery that they didn't realize they had before. Well, in this particular case, I think that happened two more times over the next three or four years and the case came right up on the five-year statute. There were allegations of people intentionally scrubbing laptops after a general counsel had issued a directive to everyone not to delete anything.

There's another recent ethics decision on puffery and posturing in negotiations. In your court, how would you generally deal with lawyers coming up to or crossing the line into falsehoods?
Well, you're always on guard for that. As the expression goes, I wasn't born yesterday. There are some lawyers who will misrepresent the truth to a court. As I look back on it, I can only think of one situation where a lawyer really misrepresented to me what a case said. I mean, I've read the case and I listened to him because I think we had oral argument in the case twice. I remember he came back the second time and he made the same pitch. I said, "You read this case? That's not what it says." And he was on the losing end of the motion or whatever it was. At that point, I don't have to get in an argument with a guy, I just have to rule against it. And then that's what you do.

Do those types of interactions color the way you view that attorney?
If you remember. Yes. But, number one, they don't come up that often, and number two, I'm not so sure I remember all that often. But if you remember, of course ▶

it does. You have somebody that comes to court in oral argument and they absolutely go berserk. To the point where they can't stand themselves. They get up and they run out of court. You're not going to forget that. And when they come back in, you watch them, and you see if they're going to go off. Yeah, I mean, we're human. You try not to let it affect your decision.

How did your requirements under the judicial code of ethics impact how you did your job?
We take judicial ethics course regularly to maintain our insurance. And the judicial council puts out regular publications on who's been disciplined and for what. You look at it and you wonder did I do something like that? Or did I come close to doing that?

I think demeanor is consistently in front of you. One of the things you've got to look out for is getting angry or getting mad or talking to people in a really demeaning manner. My clerk, she would make up a little note for me saying "the judge is always courteous, respectful, and dignified." Then I could find myself taking the note just throwing it in the garbage. This went on for a couple of weeks, and the clerk was not without her resources. She got thicker paper and then I'd try to sit up there and talk, and I'm trying to tear the damn thing and a half. So, she would laminate the thing and put it up there.

Finally, do you have any thoughts on the kinds of ethical issues newer attorneys should keep in mind as they begin practicing?
I think lawyers have to make sure that they keep the clients fully informed. So many times, you'd do a settlement conference and they'd come in and the plaintiff had never seen the defendant's settlement conference statement. Never seen it. It works to the attorneys' advantage to sit down and spend a couple of hours with the client and explaining the real down-to-earth meaning of what the defendants are saying, the significance of it. Why are they doing this? Because then rather than just the plaintiff thinking that they've got the best case in the world and are entitled to a million bucks, they would understand that there's two sides to this story.

Another thing that some young lawyers have — well they have two or three problems. Let's say you go to work for a firm, you've got a big class action case and you're supposed to go out and do some type of interviewing or sampling of members of the class. Let's say the allegations are discrimination against pregnant employees. You come back with all kinds of heartfelt stories that sound very compelling, you show it to the partner, and he goes batty at you because he doesn't like the answers given. Or perhaps he comes up with a way that the question should have been posed differently so you didn't get such a damaging answer. Okay, well, at what point am I misrepresenting the truth in that situation?

And that's a real hard thing for young lawyers. They have the obligation to report something unethical. So here you've been working there six months and now you're going to report your partner to the bar. I don't think so. You'd lose your job. Or the other thing that happens to young lawyers . . . I know of cases where a partner spent an extra week on vacation, so he needs some more hours on his side of the ledger. They just take some of the junior associate's hours, puts them in his column, and charges at the higher rate. Okay. Is that fraud? Yeah. And is it the obligation of the associates to report it? Yeah. But do they do it? I haven't seen it in the advance sheets that much.

I've always felt that it's extremely important where a lawyer goes their first two or three or four years of practice. I saw people that would go to work with an attorney who was obviously less than fully ethical — who frequently would misrepresent stuff. And they adopt that standard of conduct. And I've seen lawyers go to work for highly ethical attorneys, extremely ethical attorneys, and they adopt that standard of conduct and it sticks with them throughout their career. I mean, they might be able to modify it and tweak it a bit, but it's like a behavior that they find acceptable in the beginning, it's hard to modify it down the road. ◆



— Gavin Barney is an Associate with Hildebrand, McLeod & Nelson LLP, specializing in personal injury and ADA cases.

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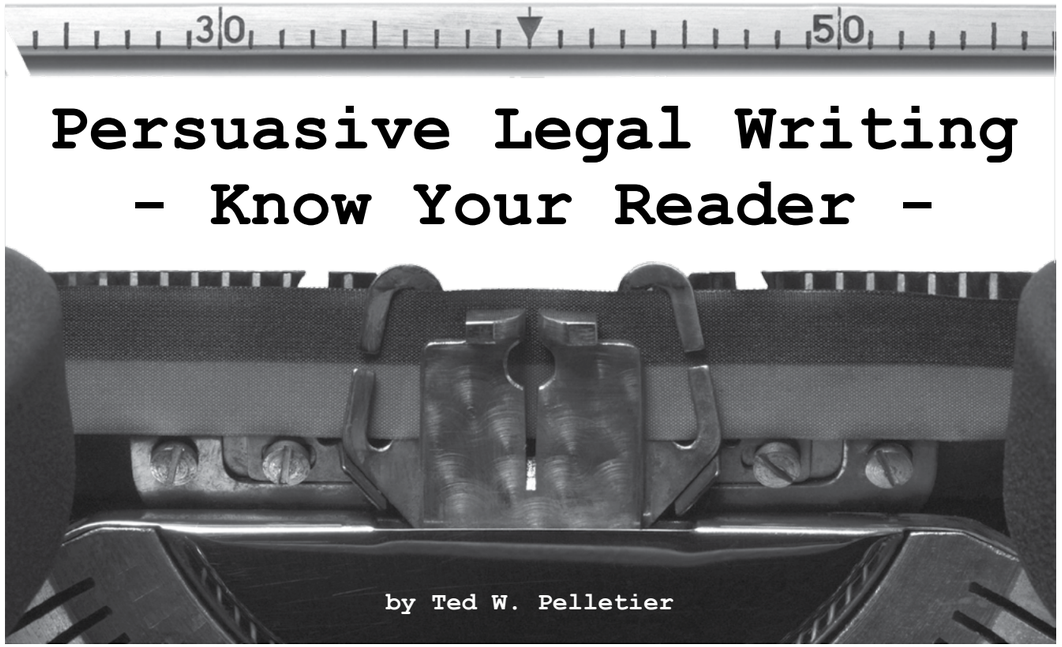
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- Settled over 90% of her cases as a trial judge.
- Honored on nine occasions for her judicial excellence, including for her work as a trial judge and for her work to increase access to justice.
- Previously a partner at McCutchen Doyle Brown & Enersen (formerly Van Voorhis & Skaggs).

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It's not just "legal writing." It's "persuasive legal writing." With every brief, motion, and opposition we file, we are trying to get the judge to do something for us: to reverse a judgment; to grant a motion; to exclude evidence. To persuade the judge to act in our favor. Successful persuasion with written briefs begins with understanding who your reader is. Yes, in the simplest terms, the reader is of course the judge – or perhaps, more accurately, the judge's clerk, staff attorney, or extern. But successful persuasive writing depends on understanding who *that person* is, including his or her pressures and limitations. Only then can you identify the problems this creates for you – and then how best to overcome those problems to help the reader help you. To persuade.

THE READER

The reader of your persuasive writing — your brief, motion, or opposition — is (for our purposes) two primary things: (1) intelligent but uninformed; and (2) incredibly busy.

First, your reader is no doubt very bright, but he or she knows *nothing* about your issue. Every judge, and every judge's staff personnel, is sure to be intelligent — it is a job prerequisite. But on your particular issue, they are uninformed. Even if your judge has some expertise in the subject matter — e.g., a law-and-motion judge on a procedural matter; or (in my line) an asbestos-department judge — he or she has not seen the issue presented in the precise frame in which it arises in your case. Indeed, your issue is likely in dispute *because* it raises a new twist. And if your subject matter is at all complex or esoteric, you can be sure that the reader will be learning about it, for the first time, from your papers.

This assumption *must* be your starting point: the judge knows nothing about your issue. Over the years, I have seen many briefs that suffer from the failure to realize this — and thus leave holes that, the writer apparently presumes, will be filled by the reader. They likely won't be. Second, your reader is incredibly busy — just like you and your colleagues are. Every day, judges and their staff are juggling multiple issues in numerous subject matters spread over many cases. You are battling for the reader's attention — for his or her time. If you want the reader to do something for you — which is of course the point of your writing — you must capture and keep that attention.

THE BATTLE

The battle to keep the reader's precious attention is an uphill one. The reader, pressed for time and with much else to do, will find any reason (consciously or otherwise) to put down your papers. I always tell writers to assume that your reader, upon picking up your papers, has on the desk a stack of other papers from other cases. This assumption is most often valid. Not to mention a myriad of other matters, large and small, that can infiltrate the consciousness: a child's grades; the upcoming holidays; the NBA Finals; you name it. The easiest thing for the reader to do is to become distracted from, or disinterested in, your papers. Accordingly, your papers simply *cannot* be confusing. Or ambiguous. Or aggravating. If your writing gives the reader any reason to divert his or her attention from your papers, it will happen.

The late writer C.S. Lewis warned that the "reader, we must remember, does not start by knowing what we mean. If our words are ambiguous, our meaning will escape him. I sometimes think that writing is like driving sheep down a road. If there is any gate open to the left or the right the reader will most certainly go into it." ["Cross-Examination," in *C.S. Lewis: Essay Collection and Other Short Pieces*, p. 555.)]

Thus, our job, as persuasive writers, is to chart our course carefully, to survey the road around and ahead, and to keep those gates closed — to keep our reader firmly on the road we want traveled.

THE SOLUTION

So how do we help the reader? How do we win the battle to keep the escape-gates closed?

We do so by honoring one simple rule: *every* decision about your writing should serve to make the reader's job easier. Don't make the reader do any of the work for you. The "secret ambition of every brief should be to spare the judge the necessity of engaging in any work, mental or physical." [Levitan, *Confidential Chat on the Craft of Briefing*, 4 J. APP. PRAC. & PROCESS 305, 310 (2002).] A perfectly crafted brief will lead the reader straight down the path to your desired result.

This rule can be honored in many ways:

1. Clarity – don't make the reader parse your meaning. As Lewis warned, if "our words are ambiguous, our meaning will escape" the reader. Or, at a minimum, grasping our meaning will take *effort* – the reader will have to stop, consider our words, identify alternative meanings, and then extract the correct one from the context.

> "The easiest thing for the reader to do is to become distracted from, or disinterested in, your papers.

This process is sometimes laborious, sometimes relatively quick. But even a small forced pause is a distraction. Those distractions add up. And each is an escape gate through which our reader's attention can easily slip.

Toward promoting clarity by eliminating ambiguity:

Remove unnecessary words. Nothing — *nothing* — makes writing clearer than stripping it of unnecessary words. I have the following posted on my office wall: "*Unnecessary words waste space and the reader's time, and they make strong writing weak*." [Gary Blake & Robert W. Bly, *The Elements of Technical Writing* 65 (1993).] Strunk and White were more succinct (in *The Elements of Style*): "Omit needless words." Strip your writing of all unnecessary detail, redundant language, and overblown wording.

We have all read a brief with a sentence like this: "It is the position of defendant ACME CONSTRUCTION AND SUPPLY, INC. that the three (3) published cases that govern the issue at hand require that this court rule in favor of defendant ACME CONSTRUCTION AND SUPPLY, INC. and against plaintiff HOWARD P. JOHNSON and grant the March 5, 2018, motion for summary judgment in the instant matter." What?!

So much unnecessary clutter can be excised here. "It is the position of" goes without saying — legal briefs advocate a position. The "cases that govern" are the law — just state it. The "issue at hand" adds nothing. Grant the motion "in the instant matter" — what else would you be talking about? *What this writer actually means*: "This Court should grant summary judgment." Say that.

Eliminate other clutter. Beyond unnecessary words, other clutter can be stripped away: *a. Shorten your references.* If a party's name has many words in it, you can use the full name in the case caption, and perhaps the first time you refer to it — but after that, shorten it. "Acme." "Johnson." The key here is clarity – if there is no other "Johnson" in the case, then "Johnson" will do fine. And please cut out the ALL CAPS with party names; *b. Use pronouns.* Larger names can also be replaced with pronouns. As long as the context is clear, once you are talking about "plaintiff Howard Johnson," your following sentences can refer to "he," and "him," and "his;" *c. Numbers.* We can also now drop the parenthetical numbers, i.e., "the three (3) published cases." A legal brief is a not a check or other legal instrument that could be forged. The number in parentheses does nothing; *d. Dates.* Lawyers love dates. Big, long, full dates: "The March 5, 2018, motion for summary judgment." But if your brief is addressing that motion, the date adds nothing; omit it. Sometimes a date is important — but what part? Is the exact day critical — or is sufficient context provided by "March 2016"? What about the year — if all the action in your case takes place in 2016, do you need to ▶

keep saying it? Or can you just say "January 10," and "February 6," and "March 3"? Cut what you can.

Many of these things sounds small, but they add up. Cut the clutter, and your point will shine through.

Choose the right word. Nothing slows the reader quite like contemplating the meaning of a word — let alone being forced to look it up. Make sure that the words you use are both correct and understandable.

Be sure that the word you use means what you think it does. If you are not certain, the reader won't be either. And if you have to look up a word, so likely will the reader — wasting time and risking distraction. Choose a more common word.

Also keep your words understandable. Does your esoteric word *help* the reader, or is it just flaunting your vocabulary? Your judge knows that you are smart. She will appreciate you keeping it simple — and not having to look up the meaning of your word. Justice Scalia could get away with using "panopticon" [*see Maryland v. King* (2013) 133 S.Ct. 1958, 1989 (Scalia, J. dissenting)] – we shouldn't try.

Beware of alternate meanings. If a word has different meanings, be careful. For example, many legal writers for some reason like to use the word "as" to mean "because": "*As the court has already ruled on this issue, the motion should be denied.*" But the word "as" also (and indeed much more often) means "at the same time." Thus, the reader's first impulse is that the sentence means "At the same time the court was ruling…." This creates a hiccup in the reader's comprehension. Avoid it.

Keep it parallel. Use the same words, phrasing, and structure to describe the same or similar things. Often there are multiple appropriate ways to say something — but once you choose one way, stick with it. Using parallel structure not only provides clarity but is actually pleasing to the reader's ear (or eye), not dissonant.

***2. Stay organized** — show the reader how your thoughts are related.* Help your reader by keeping your points organized. The best briefs contain a detailed, structured table of contents, which shows the brief's organized outline. Each major topic heading should discuss a different issue or make a different point. Under each major heading, each minor heading should support that major point — and likewise for every sub-heading under a minor heading.

Within each section, discuss and argue *only* the heading's point. Many briefs are cluttered by the writer's uncontrolled desire to make a point over and over again – in every section. If an objection was not timely, show the untimeliness in that section; in a subsequent section discussing the objection's merits, you needn't address timeliness again.

Use lists and numbers to show your organization. If there are three reasons why you should prevail, tell the reader: "*The motion should be denied for three reasons*." Then list them: "*(1) the limitations period was never triggered; (2) defendant fails to shift the summary-judgment burden; and (3) plaintiffs' evidence raises a triable issue of fact.*" After this list, discuss each reason, in turn, under a separate heading and/or in a separate paragraph. Make the organization of your presentation clear.

***3. Continuity** — make it flow.* The best writing flows from section to section, paragraph to paragraph, sentence to sentence. Many key points here echo back to law school . . . or even high school.

Paragraphs. Start most every paragraph with a topic sentence. Orient the reader. IRAC/CRAC: The law-school classic is still helpful. State the issue (or the conclusion, i.e., topic sentence); describe the governing rule; analyze (connect the rule to your facts); conclude.

One concept per paragraph. Each paragraph should make one point. When it's made, it's time for a new paragraph.

Sentences. Structure your sentences for maximum impact. Use the active voice — not "the motion was denied" (passive) but "the Court denied the motion" (active). This will usually put the sentence's subject at the beginning.

Put the emphasis of each sentence at the end: not "Defendant never raised this argument in his summary-judgment motion" but "Defendant's motion never raised this argument."

Use links to echo back to the prior sentence: "this, that, these, those": "Before trial, the court excluded the scientific evidence. *This ruling* prejudiced plaintiffs, depriving them of the ability to show a product defect. Lacking *that evidence*, plaintiffs could not prove their case."

Use these devices to make your sentences flow from one to the next.

***4. Accessibility** — don't make the reader dig through other documents.* In addition to choosing and organizing your words carefully, take great care to package them for the reader in a way that makes them accessible. The Golden Rule here: never make the reader dig to find something that you need her to see.

Cross-reference everything. Nothing annoys a reader more than having to strain to find something among various documents. For example, on summary judgment, include in your points and authorities citations to both your separate statement *and* the underlying evidence: "UMF 7; Jackson Depo. at 42:13-25." Don't make the reader go to the separate statement, find another citation there, then open a third document to find the evidence.

Give precise cites. When you cite anything as support for your position, your intent is to allow the reader to find that support. Don't send the reader to the vicinity of that support, then make her find its precise location. For testimony, give a precise citation to page *and line:* [*Smith Depo.* at 3:14-19] — not just a page number. For case law, give a precise citation to the page — and if needed, even more specific direction: "*Jones,* 123 Cal. App.3d at 54 (1st full par.)."

Internal references. Particularly in lengthy documents, if you want to refer the reader to something you have already said, or will say later, do it with precision. Don't just say "as shown above" – say "as shown in Part B above," or "on page 3 above." If the reader wants to see that other matter, she will know right where to go.

***5. Analysis** — don't make the reader think for you.* This is one of the most common, and costly, defects in persuasive writing: counting on the reader to provide something important. This usually occurs in one of two ways:

Assumed knowledge. Many writers mistakenly assume that the reader already knows something important — e.g., foundational law. These writers will jump directly to the specific nuance of their issue, without explaining the foundation on which that nuance rests. The reader, to comprehend your nuance, needs the underlying foundation. It need not be lengthy, but take a moment to orient the reader: e.g., *this issue is governed by a statute; the statute's key language is in subdivision (b); that language has been interpreted to mean X by several cases; but a recent case reached a different conclusion.* Now, on that foundation, you can make your argument about how the law applies to your case.

Omitted analysis. This deficiency also pervades legal writing: showing the reader the facts and the governing law, but failing to *analyze* how the law *applies* to your facts. Or, citing the applicable language of a governing case but then failing to *show* how that language applies to *your* case. No matter how clear it seems to you, don't leave the analysis to the reader. Show the reader; connect the dots.

ABSOLUTE CREDIBILITY — DON'T MAKE THE READER DISTRUST YOU

Even if you have done all you can to allow the reader to understand your argument — clarity, organization, continuity, accessibility, analysis — one hurdle to keeping the reader's attention remains. The reader must *want* to understand you.

One sure way to lose the reader's attention and interest is to provide a reason to distrust you. Your credibility is paramount. Never assert something that is not supported. Don't stretch your facts. Quote accurately. Acknowledge weaknesses in your case and deal with them — don't pretend they don't exist.

Remember, the reader has countless other things to do. And when you want the reader to do something for you, the last thing you want is to provide an impetus not to do it.

NOW, PRACTICE GOOD PERSUASIVE WRITING

Like any skill, clear writing that helps the reader is best accomplished through practice. Relentless practice.

The most important suggestion that I can make is this: *Edit your writing.* I know. We are all busy. Accordingly, our instinct is often to get something written and be done with it. But this — the first draft — is only the beginning. Your writing will improve immeasurably with careful, focused editing.

Not just on the computer screen — print out your draft and edit it on paper. Be ruthless. Cut away anything that doesn't need to be there. And generate a table of contents to assure that your headings are properly organized.

Try to approach your draft from the perspective of an objective reader — will he or she understand what you are saying? To this end, I often read my drafts to myself aloud. Often hearing your prose — as a reader might hear it for the first time – will reveal quickly ambiguities and omissions that you could not *see* on the paper.

And have your writing edited by *someone else*. If a colleague in your office cannot understand something, an objective reader surely will not be able to either.

Yes, these things take time. But they are worth it. Make it pleasurable, or at least different — take it to lunch, or work on it at home after dinner. Find what works for you, but make the time to do it.

In sum, always remember your reader: Your poor, tired reader, with a pile of briefs to get to. Imagine the delight when, from that pile, comes a brief that is clear, organized, user-friendly, and informative. That is the brief that will command the reader's attention. And capturing and holding that attention is a major, necessary step toward *persuasion.* ◆



— Ted W. Pelletier is a partner at Kazan, McClain, Satterley & Greenwood PLC in Oakland, where he runs the firm's law-and-motion and appellate departments. Prior to joining the Kazan firm in 2013, he handled appeals and motions for over a decade through the Law Office of Ted W. Pelletier, representing plaintiffs/consumers in cases involving many subject matters.

Portions of this article have appeared previously in articles by Mr. Pelletier in other publications.

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The Supreme Court has issued a new California Rule of Court effective June 1, 2018, that requires active attorneys to be re-fingerprinted at the attorney's own expense. We are partnering with an approved vendor, LPG Live Scan who will be attending our Fall Social. The cost will be $69 per person and you need to bring a valid ID. We will have more details closer to the event.

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Appellate Report

by Val McGinty

TORTS

• Universities have a special relationship with their students and a duty to protect them from foreseeable violence during class activities; Motion for Summary Judgment denied. *Regents of UC v. Superior Court*; Cal. Supreme Ct. S230568.

• Where defendant's failure to warn caused decedent's first accident but plaintiff sued for wrongful death caused in a second unrelated accident, plaintiff could not establish proximate cause; Motion for Summary Judgment affirmed. *Novak v. Continental*; 1st Dist. A149494.

• Plaintiff who neighbors electrical substation and sued on a nuisance claim suffers reversal based on improperly admitted evidence; nuisance claim must be retried. *Wilson v. So Cal Edison*; 2d Dist. B275845.

• Where hospital expert's opinion on standard of care was conclusory and devoid of any facts; Summary Judgment was error. *Doe v. Good Samaritan*; 5th Dist. F073934.

• Injured plaintiff who does not use available health insurance and instead goes outside his plan for medical treatment will be treated as "uninsured" and allowed to present bills as evidence of economic damages. *Pebley v. Santa Clara Organics*; 2d Dist. B277893.

IMMUNITIES

• Where plaintiff is injured on unpaved park trail, trail immunity applies; Motion for Summary Judgment affirmed. *Arvizu v. City of Pasadena*; 2d Dist. B277951.

• On design immunity, engineer's admission that the dangerous feature (here the lack of rumble strips) was not considered one way or the other when the design was approved does not defeat the approval element; Motion for Summary Judgment affirmed. *Rodriguez v. Dept. of Trans.*; 5th Dist. F074027.

EMPLOYMENT

• 90-day time period to sue begins to run when EEOC issues right to sue notice, not when plaintiff became eligible for the right to sue notice; Motion for Summary Judgment reversed. *Scott v. Gino*; 9th Cir. 16-56200.

• Where a community college district fired plaintiff while she was on an approved medical leave, it denied her a reasonable accommodation for her known physical disability, violating FEHA; plaintiff's judgment affirmed. *Hernandez v. Rancho Santiago*; 4th Dist. G054563.

• Where UC Regents failed to address employee's whistleblower retaliation complaint sufficiently, employee may file suit regardless of whether other judicial avenues have been exhausted. *Taswell v. The Regents*; 4th Dist. G053960.

CIVIL PROCEDURE

• Judgment denying leave to amend reversed where plaintiff proposes new facts on appeal and thus shows standing to bring cause of action. *Hacker v. Homeward Residential*; 2d Dist. B278537.

• Judgment sustaining demurrer on grounds that class action with identical class claims was similarly dismissed reversed where record fails to show that class action was dismissed on those grounds. *Fierro v. Landry's*; 4th Dist. D071904.

• Where trial court erred in evaluating the validity of a 998 offer, case was reversed and remanded. *Prince v. Invensure*; 4th Dist. G051996.

• Where prior action was settled and dismissed with prejudice, *res judicata* supported grant of demurrer on grounds of issue preclusion. *Shine v. Williams-Sonoma*; 2d Dist. B277513.

• Where mistrial is declared on "deadlocked" claim and plaintiff requests and obtains statement of decision, plaintiff waives claim of error on jury trial proceedings leading up to the mistrial. *Tierney v. Javaid*; 1st Dist. A147221.

ARBITRATION

• Only court (not arbitrator) may rule on whether nonsignatory party is compelled to arbitrate. *Benaroya v. Willis*; 2d Dist. B281761. ◆



—Valerie T. McGinty is a certified appellate specialist with a focus on affirming plaintiffs' verdicts on appeal. She serves on the boards of ACCTLA and CAOC and was CAOC's 2016 Marvin E. Lewis recipient and CAOC's 2014 Streetfighter of the Year; she is a Super Lawyer and is rated AV Preeminent on Martindale Hubbell.

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Jury Verdict: $526,649

Ethan Morse v. County of Merced, Charles Hale, Erick Macias, and Jose Sam Sanchez

Plaintiff was present at a party during which several individuals were killed in what appears to be a gang-related shooting. Plaintiff came forward to defend an individual implicated in the shootings that Plaintiff knew was innocent. Plaintiff contended that Defendants ignored physical evidence and badgered, threatened with arrest, and coerced several witnesses to pursue their investigation against the innocent individual. Plaintiff also contended that Defendants pursued Plaintiff in their investigation of the shootings after misrepresenting evidence to the state prosecutor who took over the case because Plaintiff's father was the District Attorney of Merced County. Plaintiff was arrested and incarcerated. A judge ultimately found that the innocent individual did not fire the weapon at issue and released Plaintiff from jail. Plaintiff claimed severe emotional distress and damages to his reputation from being wrongfully imprisoned.

***Plaintiff's Counsel**: Jayme L. Walker (lead) and J. Gary Gwilliam of Gwilliam, Ivary, Chiosso, Cavalli & Brewer*

***Defendants' Counsel**: Dana A. Fox and Matthew P. Harrison of Lewis Brisbois Bisgaard & Smith (Charles Hale, County of Merced) and Mark D. Rutter and Danielle C. Foster of Carpenter, Rothans & Dumont (Erick Macias, Jose Sam Sanchez, Merced County Sheriff's Department)*

Settlement: $500,000 Policy Limit

Benzon v. Valmoja

San Francisco Superior Court

A 66-year-old passenger was injured when his driver lost control of a 2006 Toyota Corolla and hit a fire hydrant and a garage door. Client broke his ribs and spine and has Post-Traumatic Stress Disorder. Client can no longer work as a maintenance worker for a non-profit hotel in San Francisco, a company he's been with for over 10 years.

***Plaintiff's Counsel**: Teresa Li of Law Offices of Teresa Li, PC*



ACCTLA Member Cassie Ayeni (third from the left) at the 2018 Bay Area Women Attorneys Mixer on May 23.

Settlement: $2,250,000 Policy Limit

Jiang v. Yang

Santa Clara Superior Court

A 63-year-old female pedestrian was hit by a Mercedes-Benz SUV at a crosswalk. She suffers from traumatic brain injury, complete loss of sense of smell, facial droop, memory loss, and back pain. She has to sell her business after being hit by the car. Her husband's *Dillon* claim is still open.

***Plaintiff's Counsel**: Teresa Li of Law Offices of Teresa Li, PC*

Settlement: $600,000.00

Bush, Lanett v. City and County of San Francisco

A 44-year-old ER nurse sustained an avulsion fracture, a ruptured ligament and a torn ligament in her right ankle when she stepped on the side of a tree basin on a sidewalk in San Francisco. Plaintiff's past medical care was valued at $50,000. She contended she would need a $40,000 ankle fusion; would have therapeutic injections to stave off replacement for 3 to 5 years at a cost of $4,500; and would suffer quality of life issues post fusion. Plaintiff incurred $70,000 in past wage loss and contended she would suffer $400,000 in loss of future earnings capacity. The matter resolved for $600,000.

***Plaintiff's Counsel**: Michael E. Gatto*

***Defendant's Counsel**: Mark Lipton*

Class Certification Order under the Americans with Disabilities Act of 1990 and the Unruh Civil Rights Act

Nevarez, et al. v. Forty Niners Football Co. LLC, et al., U.S. District Court, Northern District of California, Case No. 16-cv-07013 LHK

Cat Cabalo and her co-counsel recently prevailed on a Motion for Class Certification in a civil rights case involving Levi's Stadium in Santa Clara. Plaintiffs allege that several defendants, including the City of Santa Clara and the Forty Niners Football Company LLC, violated the Americans with Disabilities Act of 1990 ("ADA") and the Unruh Civil Rights Act ("Unruh") by failing to make Levi's Stadium and its related facilities readily accessible to persons with mobility disabilities and their nondisabled companions.

On July 12, 2018, U.S. District Judge Lucy H. Koh granted Plaintiffs' request to certify two injunctive relief classes (people with mobility disabilities and their companions) and a damages class. This case is one of the few cases to certify a damages class. It also confirms associational standing under the ADA and Unruh for nondisabled companions of people with disabilities.

***Plaintiffs' Counsel**: Cat Cabalo and Adam Wolf of Peiffer Wolf Carr & Kane; Guy Wallace, Sarah Colby, and Mark Johnson of Schneider Wallace Cottrell Konecky & Wotkyns; and Linda Dardarian, Andrew Lee, and Katharine Fisher of Goldstein Borgen Dardarian & Ho.* ◆

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Trial Attorney Seeks Work

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Please contact James Armstrong at (510) 501-7601 or armstron87@aol.com.

Thanks very much - I really appreciate it.

got news?

If you have member news that you'd like to share, please contact:
Mariana Harris, ACCTLA Executive Director
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