



The State Bar *of California*

OPEN SESSION

AGENDA ITEM

JULY 2019

REGULATION AND DISCIPLINE COMMITTEE II.A

DATE: July 11, 2019

TO: Members, Regulation and Discipline Committee

FROM: Andrew Tuft, Supervising Attorney, Office of Professional Competence

SUBJECT: Formal Advisory Ethics Opinion 2019-198: Request for Approval for Publication

EXECUTIVE SUMMARY

This agenda item seeks Board Committee on Regulation and Discipline (RAD) approval for the publication of proposed Formal Ethics Advisory Opinion 2019-198 developed by the Committee on Professional Responsibility and Conduct (COPRAC or Committee).

BACKGROUND

COPRAC is charged with developing the State Bar's non-binding, advisory ethics opinions.¹ Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar policy and procedure,² which provides that once the Committee has approved a formal opinion following consideration of public comment, the formal opinion and the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of RAD for decision.

¹ Each published opinion includes the following statement: "This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar." Although non-binding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility. (See, e.g., *Huskinson & Brown v. Wolf* (2004), 32 Cal.4th 453, 459.)

² See Board Resolutions, July 1979, December 2004, and November 2016.

DISCUSSION

This agenda item requests approval for the publication of Proposed Formal Advisory Ethics Opinion 2019-198. Prior to being finalized for publication, while the opinion was still in development and out for public comment, it was styled as Proposed Formal Opinion Interim No. 14-0003.

Proposed Formal Opinion Interim No. 14-0003 was drafted by COPRAC and at its January 12, 2018 meeting, in accordance with COPRAC's Rules of Procedure, the Committee approved the opinion for an initial 90-day public comment distribution. Subsequently, at its September 7, 2018 meeting, COPRAC revised the opinion in response to public comments received, and in particular updated the opinion to conform to the new Rules of Professional Conduct that took effect on November 1, 2018, and approved a further 60-day public comment period. At its December 7, 2018 meeting, following consideration of the public comments received, COPRAC approved the opinion for submission to RAD for formal publication.

As the opinion was being prepared for consideration at RAD's March, 2019 meeting, Board member Sean SeLegue provided staff with two observations regarding the opinion. First, he noted the opinion's reference to a "duty of honesty" and commented that substituting a reference to a "duty of truthfulness" would more closely track the language of new California Rule of Professional Conduct 4.1 (entitled "Truthfulness in Statements to Others"). Second, he suggested the addition of a paragraph to clarify one of the points asserted in the opinion related to the determination that an attorney may negotiate the settlement of a client's claim if certain circumstances are satisfied.

At the Committee's April 11, 2019 meeting they considered these observations, agreed with the recommendation, and approved an additional 45-day public comment period. No public comments having been received, at its June 7, 2019 meeting, COPRAC approved the opinion for submission to RAD for formal publication.

The full text of the proposed opinion is provided as Attachment A. The question addressed in the proposed opinion is: "May an attorney who is required to withdraw from representing a client under rule 1.16(a), because the client's claim lacks merit, ethically settle the action before withdrawing from the representation?" The opinion digest states:

An attorney who has concluded that a client's claim lacks merit and cannot be pursued without violating the Rules of Professional Conduct or the State Bar Act is required to withdraw from the representation. Before withdrawing, the attorney must take reasonable steps to avoid reasonably foreseeable prejudice to the client. Such reasonable steps may include settling the claim if the attorney can do so consistent with the attorney's duty of truthfulness.

The State Bar Standing Committee on Professional Responsibility and Conduct requests that RAD approve the publication of Formal Ethics Advisory Opinion No. 2019-198.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

It is recommended that the Regulation and Discipline Committee approve the following resolution:

RESOLVED, following the publication for public comment and consideration of the comments received, and upon the recommendation of the Standing Committee on Professional Responsibility and Conduct, the Board Committee on Regulation and Discipline approves the publication of Formal Ethics Advisory Opinion 2019-198, attached hereto as Attachment A.

ATTACHMENT(S) LIST

- A.** Formal Ethics Advisory Opinion 2019-198

**ATTACHMENT A –
Formal Ethics Advisory Opinion 2019-198**

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2019-198**

ISSUE: May an attorney who is required to withdraw from representing a client under rule 1.16(a), because the client’s claim lacks merit, ethically settle the action before withdrawing from the representation?

DIGEST: An attorney who has concluded that a client’s claim lacks merit and cannot be pursued without violating the Rules of Professional Conduct or the State Bar Act is required to withdraw from the representation. Before withdrawing, the attorney must take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. Such reasonable steps may include settling the claim if the attorney can do so consistent with the attorney’s duty of truthfulness.

AUTHORITIES

INTERPRETED: Rules 1.16, 3.1, 3.4, and 4.1 of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code sections 6068(c), 6068(d), 6106, and 6128(a).

STATEMENT OF FACTS

Attorney commences a legal action for Client based on alleged false statements made to Client by the Client’s former business partner. During the course of protracted discovery in the case, Attorney learns that the uncontroverted evidence refutes the Client’s claims. Attorney has therefore concluded that Client’s case lacks merit and Attorney must withdraw under rule 1.16(a).^{2/} Attorney advises Client of his conclusion and that he is ethically obligated to withdraw from representing her. Attorney requests from Client consent to dismiss the case or, alternatively, offers to delay his withdrawal to allow Client time to attempt to retain other

^{1/} Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

^{2/} This opinion addresses the ethical obligations applicable when an attorney concludes that he or she is in a mandatory withdrawal situation under rule 1.16(a) on the basis that a claim lacks merit. For purposes of this opinion, the Committee assumes the attorney has correctly concluded that he or she is in such a mandatory withdrawal situation, and does not address all of the ways that a mandatory withdrawal situation may arise.

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counsel. Client does not consent to outright dismissal of the case, but instead asks Attorney to attempt to settle the case before withdrawing because Client is concerned that finding replacement counsel will be difficult and that dismissing the case outright may expose her to liability to the defendant. Notwithstanding Attorney's ethical prohibition against proceeding to trial, may Attorney nonetheless attempt to settle the case with the defendant before withdrawing?^{3/}

DISCUSSION

1. When is an Attorney Ethically Prohibited from Proceeding to Trial on a Claim?

An attorney is ethically prohibited by rule 1.16(a) from proceeding to trial in certain limited circumstances.

Withdrawal is mandatory if (1) the lawyer knows or reasonably should know that the action is being taken without probable cause and for the purpose of harassing or maliciously injuring any person; (2) the lawyer knows or reasonably should know that continued employment will result in a violation of the Rules of Professional Conduct or the State Bar Act; (3) the lawyer's mental or physical state renders it unreasonably difficult to effectively carry out the representation; or (4) the lawyer is discharged by the client. Rule 1.16(a)(1)-(4).

Similar to the language in rule 1.16(a)(1), rule 3.1 (Meritorious Claims and Contentions) prohibits a lawyer from bringing or continuing an action "without probable cause *and* for the purpose of harassing or maliciously injuring any person." Rule 3.1(a)(1) (emphasis added). Here, Attorney has concluded that the evidence refutes Client's claims, but there is no indication that Client has pursued the case for the purpose of harassing or maliciously injuring a person. In fact, Client may still believe the facts Client presented to Attorney even though Attorney has concluded that those facts are not true. Under these circumstances, rule 3.1(a)(1) is not implicated and withdrawal is not mandated under rule 1.16(a)(1).^{4/}

Rule 3.1(a)(2) prohibits an attorney from presenting a claim in litigation "that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law." The phrase "warranted under existing law" is not defined in the rule or the cases applying the predecessor to rule 3.1, former rule 3-200. Statutes

^{3/} This question was left unanswered in the case *Estate of Falco* (1987) 188 Cal.App.3d 1004, 1015 n. 11 [223 Cal.Rptr. 807] ("We refrain from determining the corollary issue of whether an attorney who is ethically prohibited from proceeding to trial in a case the attorney believes lacks merit is similarly prohibited from settling the case.").

^{4/} While not the situation addressed directly here, the analysis in this opinion would seem to also apply where an attorney knows a claim lacks probable cause and is being pursued to harass or maliciously injure another person and therefore must withdraw under rule 1.16(a)(1).

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using the same language apply only to “claims, defenses, and other legal contentions,” not to “factual contentions,” which are treated separately. (See Cal. Civ. Proc. Code § 128.7(b)(2) and (3); Fed. R. Civ. P. 11(b)(2)-(4).)

Under the State Bar Act, an attorney has a duty to “counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just.” (Bus. & Prof. Code § 6068(c).) Thus, an attorney’s continued employment in a case that the attorney knows is not “legal or just” will violate the State Bar Act. The terms “legal or just” are not defined in the statute, but subsection (c) has been interpreted as ensuring that attorneys only bring complaints and maintain arguments that “are supported by law or facts.” *Canatella v. Stovitz* (N.D. Cal. 2005) 365 F.Supp.2d 1064, 1077.

Here, the facts Attorney has uncovered since the case was filed have caused Attorney to conclude that the case lacks merit because the evidence refutes the claims asserted. Thus, Attorney’s continued employment is prohibited by Business and Professions Code section 6068(c) and, to the extent that the lack of evidentiary support means the claim is not “warranted under existing law,” by rule 3.1(a)(2). Attorney must therefore withdraw from the representation under rule 1.16(a)(2).^{5/}

2. Although Grounds for Mandatory Withdrawal Exist, May Attorney Nevertheless Settle the Case?

A. Attorney Continues to Have Ethical Duties Even Though Attorney Has Concluded Client’s Case Lacks Merit

Attorney’s ethical duties to Client do not cease because Attorney has determined the case lacks merit and Attorney must withdraw.

Even where grounds for mandatory withdrawal under rule 1.16(a) exist, an attorney may not withdraw from representation until the lawyer “has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client.” Rule 1.16(d); see also *In re Hickey* (1990) 50 Cal.3d 571 [788 P.2d 684]; *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 311 [146 Cal.Rptr. 218]. In a matter pending before a tribunal, even where mandatory grounds for withdrawal exist, the duty to take reasonable steps to protect against reasonably foreseeable prejudice lasts until the attorney is either formally substituted out of the case or has been relieved as counsel by order of the Court. See *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 115. If neither substitution nor permission to withdraw is granted, the attorney must continue to represent the client and continue to satisfy all ethical and other duties to the client.

^{5/} Attorney’s continued prosecution of Client’s claim may also be sanctionable under Code of Civil Procedure sections 128.5 or 128.7 or Federal Rules of Civil Procedure 11.

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In both *In re Hickey* and *Kirsch*, the lawyer concluded that he could no longer represent the client because the client's claims lacked merit. In *In re Hickey*, the lawyer called the client and told her he could no longer represent her, but did nothing to obtain a substitution of attorney or to be relieved as counsel by the Court. The lawyer instead let the claims languish, ultimately resulting in dismissal. The lawyer was disciplined for, among other things, failing to withdraw in accordance with the rules and failing to take steps to avoid reasonably foreseeable prejudice to the client. Thus, although the lawyer had determined the case lacked merit and mandatory grounds for withdrawal therefore existed, the lawyer could not simply let it be dismissed through inaction.

The attorney in *Kirsch* did take steps to be relieved as counsel, ultimately obtaining a court order relieving him as counsel, but with only two months remaining to bring the case to trial. The client thereafter sued the attorney, claiming that his determination that the case lacked merit was incorrect and that the withdrawal was too close to the prosecution deadline thereby prejudicing the client. The Court rejected the client's claims, holding "an attorney should not seek nonconsensual withdrawal immediately upon determination that the case lacks merit, but should delay to give his client an opportunity to obtain other counsel or to file a consensual withdrawal." *Kirsch*, 21 Cal.3d at 311. This is because when an attorney non-consensually withdraws, there is "an obvious inference" that the withdrawal "is not for the client's purpose but for the attorney's purpose, usually a lack of confidence in the merits of the case." *Id.*^{6/}

Thus, between the time an attorney determines that because a client's case lacks merit withdrawal is mandatory, and the time actual withdrawal from the case occurs, the attorney's obligation to represent the client's interests remain.

Here, if Attorney must withdraw because he concludes he is ethically prohibited from proceeding to trial with the case, then any successor attorney may face the same ethical dilemma. Once Attorney withdraws, then, Client could be left without representation and exposed to potential default, entry of a judgment against Client for costs and possibly attorneys' fees, and a potential claim for malicious prosecution against Client. These risks to Client could potentially be avoided or mitigated through a settlement of the claims.

^{6/} Although not dealing directly with the issue of mandatory withdrawal, *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54], is instructive as to an attorney's duties when he or she concludes that a client's case lacks merit. In *Zamos*, the Court held an attorney who receives information after commencing an action indicating his client's claims are meritless, but continues to prosecute those claims, may be liable for malicious prosecution, but only if the claims are such that "any reasonable attorney would agree are totally and completely without merit." *amos*, 32 Cal.4th at 971. Under such circumstances, the attorney must either cause the dismissal of the lawsuit or withdraw. *Id.* at 969-70. The Court also suggests that the attorney may (and perhaps must) properly advise the client to dismiss the lawsuit: "[B]y advising a client to dismiss a meritless case, the attorney will serve the client's best interest in that the client will avoid the cost of fruitless litigation, and the client's exposure to liability for malicious prosecution will be limited." *Zamos*, 32 Cal.4th at 969-70.

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If an attorney may ethically advise a client to dismiss a case that lacks merit, as an attorney surely may and in some circumstances must,^{7/} it stands to reason that the attorney could attempt to protect her client's interests by effectuating a dismissal through a negotiated settlement on whatever terms the opposing side is willing to accept. Such terms generally would include a release so that the case could be dismissed without exposing the client to further liability or expense. This is consistent with *Kirsch* and *In re Hickey*, which make clear that an attorney who concludes a client's case lacks merit may not simply abandon the client's cause without taking steps to protect the client. We have found no authority that would prohibit Attorney under the circumstances present here from attempting to negotiate a settlement of Client's claims.^{8/}

B. The Steps Attorney May Take to Avoid Prejudice May Be Tempered Because Attorney Has Knowledge that the Case Lacks Merit

Although Attorney may seek to settle the case, his ability to advocate for settlement may be significantly limited by his duty of truthfulness, in multiple respects.

First, in seeking to negotiate a settlement, an attorney may not make affirmative material misstatements of fact concerning the merits of the claim, by, for example, falsely stating that certain evidence will support liability or damages recoverable against the defendant, when the Attorney now knows that in fact it will not do so. See Cal. State Bar Formal Opn. No. 2015-194 (Puffing in Negotiations); *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1123 [100 Cal.Rptr.2d 246] (duty of zealous advocacy is limited by "the bounds of the law"); Business and Professions Code sections 6068(d) (an attorney must use "for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth"), 6106 (prohibiting attorneys from engaging in any acts involving moral turpitude or dishonesty), and 6128(a) (attorney engaging in "any deceit or collusion" with the intention of deceiving any party is guilty of a misdemeanor). "[A] lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient [citation], and may be liable to a nonclient for fraudulent statements made during business negotiations." *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26]. Rule 4.1

^{7/} See *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54].

^{8/} While the court in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54] held that, to avoid liability for malicious prosecution, an attorney who concludes that a case is "totally and completely without merit" must either cause the dismissal of the case or withdraw (*id.* at 970), the court does not address the issue of whether dismissal of the case can be achieved through settlement. It seems however that the factors articulated by the *Zamos* court in support of its holding, such as the efficient administration of justice and reduction of burden on the courts and defendants resulting from the dismissal of meritless claims (*id.* at 969-70), would apply to any dismissal, whether achieved as part of a settlement or filed independent of settlement. We see nothing in the *Zamos* decision that would prohibit an attorney from negotiating a dismissal of a case through settlement. Consistent with the *Zamos* decision, if not able to negotiate a dismissal or obtain client consent to dismiss, however, the attorney must withdraw.

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likewise prohibits lawyers from knowingly making “a false statement of material fact or law to a third person.”

Second, in negotiating any settlement, an attorney may not conceal information material to the negotiations in violation of a duty to disclose. Acts of moral turpitude prohibited by Business and Professions Code section 6106 “include concealment as well as affirmative misrepresentations.” *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 86. “[N]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact.” *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 808 (quoting *In the Matter of Chestnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174. Similarly, it is unethical for an attorney to make implicit misrepresentations in settlement negotiations. See Cal. State Bar Formal Opn. No. 2015-194 (discussing examples of implicit misrepresentations) and ABA Formal Opn. No. 06-439.

Third, lawyers may not knowingly assist the client in negotiating a settlement based upon prior material misrepresentations or wrongful concealment of material facts concerning the merits of the claim. Rule 4.1 prohibits lawyers from knowingly failing to disclose material facts to third parties “when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client,” unless disclosure is prohibited by the lawyer’s duty of confidentiality under rule 1.6 and Business and Professions Code section 6068(e). Moreover, in Cal. State Bar Formal Opn. No. 2013-189, we opined that, although attorneys generally do not have a duty to correct material errors of opposing counsel, when the error is induced by the attorney’s conduct constituting “deceit, active concealment or fraud,” the failure to alert opposing counsel of the error is unethical. Lawyers are further prohibited by rule 3.4 from suppressing “any evidence the lawyer or the lawyer’s client has a legal obligation to reveal or produce.”^{9/} Rule 3.4(b). Thus, here, for example, if Attorney’s conclusion that the case lacks merit was based on information wrongfully concealed from the opposing side during discovery, Attorney may be ethically prohibited from settling the case before withdrawing, unless the misrepresentation or concealment is corrected before negotiating a settlement of the claim.^{10/}

^{9/} A legal obligation to reveal or produce may arise under applicable discovery rules and statutes, or may arise outside of the discovery context in certain circumstances. In the family law context, for example, parties owe each other fiduciary duties, including duties to immediately, fully, and accurately update and augment financial disclosures to the extent there are material changes so that at the time an agreement is entered, each party will have full and complete knowledge of the relevant underlying facts. See, e.g., Cal. Fam. Code §§ 721, 1100, 1101, 2100. Similar duties exist for criminal prosecutors. An attorney may not ethically negotiate a settlement where the attorney knows an affirmative obligation to disclose accurate and complete information material to the settlement negotiation has not been fulfilled.

^{10/} Similarly, if information material to a decision to settle the case is required to be disclosed under rule 4.1(b) but has not or cannot be disclosed without violating rule 1.6, the attorney cannot ethically settle the case, unless the client consents to the disclosure of the confidential information.

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On the other hand, if the evidence that has caused Attorney to conclude the claim is meritless is not known to the other side but neither Attorney nor his client was or is under a duty to provide it to the other side, then Attorney may be able to negotiate a settlement so long as his statements are truthful and do not violate a duty to disclose. In this scenario, Attorney would need to consider whether prior statements made to the adverse party could be considered false or misleading in light of the new information Attorney has gained.

Attorney's compliance with these obligations may often limit the ability to make a persuasive demand going beyond an exchange of releases or to accept a prior offer from defendant that does not reflect an awareness of the evidence refuting liability. Assuming, however, that the Attorney fully complies with the foregoing obligations of truthfulness, the Attorney may properly seek to settle the claim on whatever terms can be obtained, even if the resulting settlement involves some payment to the Client in exchange for releasing the claim.

Under our facts, Attorney concluded that the Client's case lacks merit through the discovery process, suggesting that both sides had a fair opportunity to learn the information Attorney possesses. There is no suggestion that Client or Attorney, for example, falsified evidence or failed to disclose material information that they were under a duty to disclose, or that any conduct or activity by Attorney or Client constitutes fraud, deceit or concealment. Thus, while Attorney's advocacy of Client's position may be tempered by his duty of truthfulness, he may ethically attempt to settle the claim on whatever terms that can be negotiated.

CONCLUSION

Even when an attorney determines withdrawal is required because the client's claim lack merit, reasonable steps must be taken to avoid reasonably foreseeable prejudice to the client before withdrawal. Those steps could include delaying withdrawal to allow the client to attempt to retain other counsel, continuing to take the steps necessary to preserve the claim, advising client to dismiss the case, and/or negotiating to settle the claim, provided a settlement could be negotiated consistent with the attorney's ethical obligations of truthfulness. The attorney may not make any false statements about the merits of the client's claim in the course of the settlement process and may not be able to negotiate terms of settlement at all if doing so would be based on the wrongful concealment of information material to determining the merits of the case and required to be disclosed.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.