



THE STATE BAR OF CALIFORNIA

85th Annual Meeting

Program 74

Staying Out of Hot Water: Current Legal Ethics Issues

Friday, October 12, 2012

4:15 p.m.-5:15 p.m.

Co-sponsored by the State Bar Court, the Office of the Chief Trial Counsel, and the Association of Discipline Defense Counsel

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85th Annual Meeting

Monterey | October 11-14, 2012

Program No. 74

Staying Out of Hot Water: Current Legal Ethics Issues

Joann Remke – Presiding Judge, State Bar Court

Joseph Carlucci – Deputy Chief Trial Counsel, State Bar of California

Jerome Fishkin – Fishkin & Slatter, LLP; President, Association of Discipline Defense Counsel

POTENTIAL PERILS OF MCLE NONCOMPLIANCE

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MINIMUM CONTINUING LEGAL EDUCATION RULES

Rules of the State Bar

Title 2 Rights and Responsibilities of Members

Div. 4 MCLE

Rules 2.50 through 2.93

MCLE REQUIREMENTS: THE BASICS

- Active member throughout the **36** month period must complete **25** approved credit hours. (Rule 2.72.)
- Course hours must be approved for MCLE credit.
∅ **Beware:** Not all are approved – verify. (Rule 2.72.)
- Active and suspended members (i.e., failure to pay fees or disciplinary reasons) are required to report compliance. (Rule 2.54.)
- If inactive for portion of **36** month period, a member must complete pro-rated number of hours. (Rule 2.54.)

MCLE REQUIREMENTS: REPORTING COMPLIANCE

- Reporting compliance does NOT require you to provide certificates of attendance or self-study. (Rule 2.73.)
- Must maintain proof of compliance for a period of one year after reporting date. (Rule 2.73.)
- **IF** audited, required to produce proof of compliance:
 - ∅ Vital to maintain certificates and records of MCLE credit.
- Most members report compliance on-line.
- **NEW:** Beginning with the next group, compliance will be reported under penalty of perjury.

MICLE NONCOMPLIANCE: WHAT IT IS AND IS NOT

- Noncompliance is **NOT** misconduct.
- Noncompliance **IS** an administrative term.
- Noncompliance does **NOT** subject you to the disciplinary process.
- You will **NOT** be disciplined for noncompliance, **BUT** you may be enrolled inactive and prohibited from practicing law.

MCLE NONCOMPLIANCE: DEFINED

The following are noncompliance:

1. Failure to complete the required education during the compliance period *or* extension, if granted;
2. Failure to report compliance or claim exemption from MCLE requirements;
3. Failure to keep a record of MCLE compliance; or
4. Failure to pay fees for noncompliance (\$75).
(Rules 2.90 – 2.93.)

CONSEQUENCES OF NONCOMPLIANCE

- **Notice of noncompliance:** Sets forth terms and deadline for compliance. (Rule 2.91.)
- Compliance reporting deadline is February 1st - but still an opportunity to complete the required hours without being suspended.
- \$75 late fee will extend deadline to June 30th without need to request a formal extension of time.

CONSEQUENCES OF NONCOMPLIANCE (cont.)

- Inactive enrollment for failing to timely comply with notice of compliance.
 - ∅ NOT disciplinary in nature.
 - ∅ Administrative and not entitled to a hearing. (Rule 2.92.)
- Remain inactive *until* proof of compliance and payment of noncompliance fees. (Rule 2.93.)
- Inactive member is *prohibited* from practicing law or holding himself/herself out as entitled to practice law.
- Practicing law while inactive can lead to discipline.

THE 2011 MCLE AUDIT: A CAUTIONARY TALE

- State Bar audited **635** members, or **1%** of the compliance group, requiring proof of required hours
- **98** members were out of compliance
- **5** members enrolled inactive for failing to respond to audit
- **27** investigated for **falsely** reporting compliance
 - ∅ Referred to the Office of Chief Trial Counsel for further investigation, possible prosecution and discipline

FUTURE AUDITS: CASTING A WIDER NET

- This year about **2,600** members, or **5%** of the last compliance group (last names H-M), are being audited.
 - ∅ Next year, **10%** will be audited (last names A through G).
- If audited, the member is required to fill out an online MCLE compliance log and submit actual certificates of attendance, either by mail or email.
- Compliance must be reported under penalty of perjury.

How MCLE Can Get You Into Trouble

- Falsely reporting compliance, either intentionally or with gross negligence, is misconduct and can lead to discipline.
 - ∅ An **intentional misrepresentation** is an act of moral turpitude in violation of Bus. & Prof. Code, § 6106. (*Olguin v. State Bar* (1980) 28 Cal.3d 195.)
 - ∅ **Gross negligence** may support a finding of moral turpitude. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025.)
- The commission of any act involving moral turpitude, dishonesty or corruption... constitutes a cause for disbarment or suspension. (Bus. & Prof. Code, § 6106.)
- An act of moral turpitude, fraud or intentional dishonesty...or of concealment of a material fact...shall result in ACTUAL suspension or disbarment... (Std. 2.3, Stds. for Attorney Sanctions for Prof. Misconduct.)

NEGLIGENT MISTAKE TO FRAUDULENT MISCONDUCT: WHAT IS DISCIPLINABLE?

WHAT IS DISCIPLINABLE?

NEGLIGENT MISTAKE TO FRAUDULENT MISCONDUCT:

SCOPE OF DISCIPLINABLE MISCONDUCT

- **Willful** - Standard for violations of the Rules of Professional Conduct
 - ∅ Simply a purpose or willingness to commit the act, or make the omission referred to.
 - ∅ Does NOT require any intent to violate law, or to injure another, or to acquire any advantage.
(*Durbin v. State Bar* (1979) 23 Cal.3d 461, 467.)
- **Negligent misrepresentation** - not subject to discipline
(*Matter of Respondent K* (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335.)
- **Gross negligence** - can lead to discipline
(*Grove v. State Bar of Cal.* (1967) 66 Cal.2d 680, 684.)

ATTORNEY'S INTENTIONAL MISCONDUCT

- An intentional misrepresentation violates Bus. & Prof. Code 6106 - requires an intent to mislead.
(*Wallis v. State Bar* (1943) 21 Cal.2d 322, 328.)
- Intentional misrepresentation to the State Bar is moral turpitude.
(*Olguin v. State Bar* (1980) 28 Cal.3d 195.)
- An attorney who intentionally deceives his client is culpable of an act of moral turpitude.
(*Gold v. State Bar* (1989) 49 Cal. 3d 908, 914.)
- Concealment is the same as misrepresentation.
(*Di Sabatino v. State Bar* (1980) 27 Cal.3d 159.)

"BUT I DIDN'T MEAN TO LIE..."

WHEN DOES GROSS NEGLIGENCE AMOUNT TO MORAL TURPITUDE?

- ∅ Attorney's policy on investigating and declaring conflicts breached "the most basic fiduciary obligation not to argue against a client's interest." (*Gendron v. State Bar* (1983) 35 Cal.3d 409, 425.)
- ∅ Attorney maintained office practices that: 1) allowed complaints to be signed by non-attorney employees, and 2) had no internal calendaring system sufficient to prevent prosecution time to run on filed complaints. (*Sanchez v. State Bar* (1976) 18 Cal.3d 280.)
- ∅ Delayed deadlines and mishandled money matters showed attorney's "habitual" inattention to client matters rather than an "isolated instance of carelessness followed by a firm determination to make amends." (*Waterman v. State Bar* (1936) 8 Cal.2d 17.)

CLIENT'S MISCONDUCT: ATTORNEY'S DUTY?

- Attorney does NOT have an ethical obligation to a client to perjure herself or to file a false declaration.
 - ∅ If the client demands that you do, persuade the client to the contrary or withdraw. (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 127-28.)
- Attorneys have been disciplined for:
 - ∅ Knowingly submitting to courts false information prepared by their clients. (*Pickering v. State Bar* (1944) 24 Cal 2d 141.)
 - ∅ Endorsing a client's false statement, which statement the lawyer knew at the time was false. (*In the Matter of Katz* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430.)
- Ignorance of the law in conducting the affairs of a client in good faith is not a cause for discipline. (*Call v. State Bar* (1955) 45 Cal.2d 104; *Friday v. State Bar* (1943) 23 Cal.2d 501.)

"None of the approaches to a client's stated intention to commit perjury is perfect. Of the various approaches, we believe the narrative approach represents the best accommodation of the competing interests of the defendant's right to testify and the attorney's obligation not to participate in the presentation of perjured testimony since it allows the defendant to tell the jury, in his own words, his version of what occurred, a right which has been described as fundamental, and allows the attorney to play a passive role."

(People v. Johnson (1998) 62 Cal.App.4th 608, 629.)

THE STATE BAR DEFENSE?

No employee of the State Bar can give an attorney permission to violate the State Bar Act or the Rules of Professional Conduct. (*Sheffield v. State Bar of Cal.* (1943) 22 Cal.2d 627, 632.)

THE KEY TO SUCCESS: COMMUNICATION

- Fee agreements
- Billing invoices
- Pros and cons of e-mail