

The Dilemma Posed by an Opposing Party with Diminished Capacity

MOST LITIGATORS have dealt with situations in which the opposing attorney is—there’s no other way to put it—a jerk, who seems to be acting solely to promote his or her own interests rather than those of the client. These situations often require the parties themselves to find a way to deal with each other directly. Such cases come with the territory, and experienced litigators have learned how to address the often-competing interests that diverse personalities and difficult opposing counsel bring to legal disputes.

But what can you do when the client of the unprofessional litigator appears to lack the capacity to understand the nature of the proceedings in which he or she is involved, and the litigator seems to be taking advantage of the situation? What happens, for example, if during a deposition, the plaintiff testifies that he or she is unaware that a lawsuit was filed on his or her behalf? Put another way, what obligations, if any, do you have if the opposing party seems obviously confused? How can you raise an opposing party’s lack of mental capacity with the court? Will raising the issue be improper, since it could adversely affect your own client’s interests? Is it appropriate to bring the information to the attention of the State Bar for the purpose of requesting discipline against the opposing party’s attorney?

Unfortunately, there are no rules and regulations that provide any guidance in such situations. As an initial matter, one may be tempted to look only at the duty that we owe to promote and advance zealously our own client’s interests and thereby take advantage of the opposing party’s inability to understand the proceedings. As tempting as this “solution” might appear, we also have a competing mandate, specified by statute, to “maintain the respect due to the courts of justice and judicial officers.”¹ There can simply be no judicious outcome if one of the parties lacks the capacity to understand the proceedings, and his or her attorney refuses to provide the required clarity—for personal gain or otherwise.

When a party clearly lacks an understanding of the proceedings in which he or she is involved, it is ultimately the party’s attorney’s responsibility to rectify the situation. However, if the attorney is furthering interests that are not necessarily those of the client, the court needs to be involved, and the opposing attorney may be the only person able to bring the issue to the court’s attention.

While there are no guidelines for how to raise this issue, perhaps the most expeditious procedure is a formal motion for an order appointing a guardian or conservator for the opposing party.² This motion will certainly not earn you the gratitude of opposing counsel, so it should not be made lightly. Indeed, until there is legislative guidance on how to handle this delicate situation, you should approach this motion with the same import and burden as a motion for summary judgment, that is, supported by evidence akin to “undisputed material facts” that demonstrate the opposing party’s incapacity. Deposition transcripts are a bare minimum, with videotaped testimony

that shows a party’s confusion and incapacity more convincing. It is unlikely that in this situation opposing counsel would voluntarily present the client to the court, so the motion should include a request that the party be present for examination by the court.

Depending on the stage of a case, it may be appropriate to raise the issue of competence in a case management conference statement to gauge the court’s interest in hearing the issue. The court may take the initiative to determine if a guardian or conservator is needed, thus freeing you from the task of preparing a detailed motion, but is unlikely to do so until evidence of incompetence exists.³ Again, the sup-

There can simply be no judicious outcome if one of the parties lacks the capacity to understand the proceedings.

porting evidence should be readily available and presented to the court. Otherwise, you may do a grave disservice to the interests of your client by antagonizing your opponent and the judge. For those occasions in which a cordial relationship exists between you and the opposing attorney (not likely in this scenario), you may try to raise the issue with opposing counsel to inquire how the attorney plans to deal with the client’s obvious lack of competence. You may learn that a petition to appoint a guardian or conservator is already being prepared.

In the absence of legislative direction, you may want to report the situation to the State Bar, since an attorney who blatantly puts his or her interests ahead of those of the client, especially a client who lacks the capacity to direct the litigation, is subject to discipline. However, be aware that the State Bar is accustomed to attorneys reporting each other in the midst of contentious litigation, so you will have the burden of convincing the skeptical agency that the dispute is not merely a personal matter but involves the integrity of the adversarial process. Be prepared to offer credible, convincing evidence of improper conduct by the attorney.

While we hope that situations of client incompetence are rare, California needs to put formal procedures into place that guide how attorneys, opposing counsel, and the court deal with these issues. Without regulatory guidance, attorneys will be left with limited options—and no direction—for how to raise such matters with the court to ensure justice. ■

¹ BUS. & PROF. CODE §6068(b).

² CODE CIV. PROC. §372.

³ CODE CIV. PROC. §373(c).

Jerrold Abeles is a partner in the Los Angeles office of Arent Fox LLP, specializing in complex business litigation.