

**RECENT DEVELOPMENTS AFFECTING
THE LAW OF LAWYERS**

John W. Amberg
Steven A. Lewis
Dennis Peter Maio
Suzanne M. Mellard

State Bar of California Annual Meeting
September 2007

80th Annual Meeting of the State Bar of California
September 27-30, 2007

NAME: John W. Amberg
FIRM OR ORGANIZATION: Bryan Cave LLP
ADDRESS: 120 Broadway, Suite 300
CITY/STATE/ZIP: San Monica, CA 90401
BUSINESS PHONE: (310) 576-2280 FAX NUMBER: (310) 576-2200
E-MAIL ADDRESS: jwamberg@bryancave.com

John W. Amberg is a litigation partner in the Santa Monica office of Bryan Cave LLP, and an Associate Risk Management Partner for the firm. He is the chair of the State Bar's Committee on Professional Responsibility and Conduct, and is also a member and former chair of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee. He frequently writes and lectures on legal ethics issues.

80th Annual Meeting of the State Bar of California
September 27-30, 2007

NAME: Steven A. Lewis

FIRM OR ORGANIZATION: Lewis & Bacon

ADDRESS: 1050 Fulton Avenue, Suite 125

CITY/STATE/ZIP: Sacramento, CA 95825

BUSINESS PHONE: (916) 485-5005 FAX NUMBER: (916) 485-5119

E-MAIL ADDRESS: slewis@lewisandbacon.com

Steven A. Lewis is a principal in the law firm of Lewis & Bacon, A Professional Corporation, in Sacramento. He has more than 30 years experience representing and advising hundreds of law firms and lawyers in a wide variety of matters including ethics consultations, disqualification motions, malpractice and malicious prosecution cases, fee disputes and disciplinary proceedings. Mr. Lewis has presented more than 160 continuing legal education programs on attorney risk management, with a focus on how to avoid malpractice claims, fee disputes and disciplinary actions, and has written numerous articles in those fields. Mr. Lewis also acts as an expert consultant and witness in cases where attorney conduct is in issue.

Since 2002, Mr. Lewis has served on the State Bar's Committee on Professional Responsibility and Conduct (COPRAC); he has served as Chair of COPRAC and currently acts as Special Advisor to the Committee. In Sacramento County, Mr. Lewis serves as a settlement judge pro tem, an arbitrator, and a member of the fee arbitration panel. Mr. Lewis has also been an adjunct professor of law at University of Pacific, McGeorge School of Law since 1999, where he teaches Civil Pre-Trial Litigation. Mr. Lewis is a graduate of the University of California, Santa Barbara (1971, with honors) and King Hall School of Law at the University of California, Davis (1974). Mr. Lewis and the firm have held an a.v. rating with Martindale-Hubbell since shortly after the firm was founded in 1982. Mr. Lewis has also served as President of the boards of two non-profits in the Sacramento area.

80th Annual Meeting of the State Bar of California
September 27-30, 2007

NAME: Dennis Peter Maio
FIRM OR ORGANIZATION: Reed Smith LLP
ADDRESS: Two Embarcadero Center, Suite 2000
CITY/STATE/ZIP: San Francisco, CA 94111
BUSINESS PHONE: (415) 659-5942 FAX NUMBER: (415) 391-8269
E-MAIL ADDRESS: dmaio@reedsmith.com

DENNIS PETER MAIO is a counsel in the Appellate Group of the Litigation Department of Reed Smith LLP, resident in its San Francisco office, and a member, and Vice Chair, of the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. For almost 20 years, Mr. Maio served on the staff of the Supreme Court of California, first for the Honorable Stanley Mosk, and then for the Honorable Ronald M. George, the Chief Justice of California. During his tenure at the Supreme Court, he drafted almost 300 published opinions, which cover a broad range of matters, including the ethical obligations of attorneys and issues of professional responsibility and conduct. Since joining Reed Smith LLP, Mr. Maio has appeared in numerous appellate and other matters on diverse questions, including legal ethics, in courts such as the United States Supreme Court and the Supreme Court of California.

80th Annual Meeting of the State Bar of California
September 27-30, 2007

NAME: Suzanne M. Mellard

FIRM OR ORGANIZATION: Rogers Joseph O'Donnell & Phillips

ADDRESS: 311 California St

CITY/STATE/ZIP: San Francisco, CA 94111

BUSINESS PHONE: (415) 365-5330 FAX NUMBER: (415) 956-6457

E-MAIL ADDRESS: smellard@rjop.com

Suzanne Mellard is a shareholder at Rogers Joseph O'Donnell in San Francisco where she chairs the Professional Liability Practice Group. Ms. Mellard has been a civil litigator for over 20 years. She specializes in the law governing lawyers, counseling lawyers and law firms regarding ethical obligations, risk management and partnership disputes and representing lawyers and law firms in malpractice, malicious prosecution and other types of lawsuits, disqualification motions, and state bar investigations. She lectures frequently on ethics and malpractice issues. Ms. Mellard is a current member and will be Vice-Chair 2007-2008 of the State Bar Committee on Professional Responsibility and Conduct. She is also a member of the Ethics Committee of the Bar Association of San Francisco. She received her law degree from Boalt Hall School of Law and her undergraduate degree from the University of California, Santa Barbara.

RECENT DEVELOPMENTS AFFECTING THE LAW OF LAWYERS

I. CONFLICTS OF INTERESTS

DINO V. PELAYO (2006) 145 CAL.APP.4TH 347

Motion to Disqualify by Non-client Mediation Privilege

Defendants sought to disqualify their adversaries' attorney on the grounds that confidential information disclosed during a confidential mediation created a conflict of interest between the defendants' adversaries who were jointly represented by counsel. Defendants claimed that, as a result of the mediation, opposing counsel owed defendants a duty of confidentiality regarding information provided at the mediation and that duty created a conflict between attorney's joint clients and violated the defendants' right to mediate confidentially with each party. Defendants claimed that they were entitled to have separate confidential caucuses with each of opposing counsel's clients and that joint representation precluded that. The Court of Appeal reversed the trial court's order disqualifying counsel, holding that defendants' opposing counsel had no attorney-client or other fiduciary relationship with defendants and there was no authority permitting one party to a mediation to disqualify the attorney representing the opposing parties based upon an agreement to participate in a confidential mediation. The Court of Appeal further held that a court may not interfere with a party's choice of counsel absent "ethical considerations that affect the fundamental principles of our judicial process."

OAKS MANAGEMENT CORPORATION V. SUPERIOR COURT (2006) 145 CAL.APP.4TH 453

Motion to Disqualify by Non-client

Defendant sought to disqualify plaintiffs' counsel in a construction defect/fraud case on the grounds that the attorneys had previously been limited partners in a limited partnership that had lent money to defendant and had thereby obtained confidential information regarding defendant's personal finances that could be used to defendant's disadvantage. The Court of Appeal reversed the trial court order disqualifying counsel, holding that even if plaintiffs' counsel received confidential financial information in making loans several years earlier, defendant had failed to meet burden of showing that information could give plaintiffs an unfair advantage or affect the outcome of the litigation. The Court of Appeal further held that, as former lenders, plaintiffs' counsel owed defendant no fiduciary duty; instead defendant had borrower-lender relationship with attorneys, which is generally considered at arm's length. The Court of Appeal further noted that, when no attorney-client relationship exists, the mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. A contrary rule would nullify a party's right to representation by counsel of choice any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox. Finally, the Court of Appeal noted that the key issue in disqualification motions is whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court. Thus, disqualification is proper where, as a result of prior

representation or improper means, there is a reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation. Where an attorney cannot use confidential information gleaned from a non-client to non-client's disadvantage, allowing the attorney to continue representing the opposing party does not compromise the adversarial system.

FAUGHN V. PEREZ (2006) 145 CAL.APP.4TH 592

Conflicts

Parents and their child brought medical malpractice action against hospital. Hospital moved to disqualify plaintiff's attorney on the ground that attorney had formerly represented hospital's parent corporation. Trial court granted motion to disqualify, but Court of Appeal reversed, holding that hospital failed to show that attorney's prior representation of parent corporation was substantially related to his representation of plaintiffs in this case. Nor did the hospital show that the attorney had actual knowledge of material confidential information. Instead, the Court of Appeal found the hospital's arguments relied too heavily on inferences; no direct evidence was submitted that pointed to specific confidential information that attorney could have had access to. Attorney had never represented the particular hospital in question, and though his former law firm had been retained by the hospital's parent corporation, the hospital failed to show that the attorney had a sufficient connection with the cases his law firm had handled to presume he acquired confidential information material to the present case.

OCHOA V. FORDEL (2007) 146 CAL.APP.4TH 898

**Disqualification
Law Firm Switching**

Defendant moves to disqualify plaintiff's law firm when a lawyer who previously worked for the defense law firm went to work for plaintiff's law firm. In law firm switching cases, the *modified substantial relationship test* applies. Under that test a *rebuttable* presumption that the firm-switching attorney has obtained material confidential information applies when the moving party makes an adequate showing the firm-switching attorney was positioned vis-à-vis the client likely to have acquired confidential information material to the current representation while at the former law firm. If so, the firm-switching attorney and the new law firm have the burden to prove, through an affirmative showing rather than a cursory denial, that the attorney had no exposure to confidential information relevant to the current action while a member of the former law firm. While an affirmative showing of no exposure to confidential information is required, neither access nor opportunity to acquire confidential information provides a sufficient basis to find that confidential information material to the current representation would normally have been imparted to the attorney during that attorney's tenure at the old law firm.

**Disqualification
Expert Witnesses**

Defense counsel retains confidential expert consultant in medical malpractice case. Plaintiff's attorney, unaware of the relationship between defense counsel and the confidential consultant calls consultant about serving as an expert witness. Consultant takes plaintiff's attorney's call at airport, does not recall the consultation with defense counsel, and tells plaintiff's attorney he is not aware of the parties. Plaintiff's attorney then sends consultant medical records and designates him as an expert witness before obtaining an opinion from him. Upon receiving the designation, defense counsel moves to disqualify plaintiff's attorney. The issue on appeal was what standard should be applied to the disqualification motion: (1) Does the party moving for disqualification (the defense) receive the benefit of a rebuttable presumption that confidential information it previously imparted to the expert was disclosed to other side's attorney? or (2) Does the moving party have the burden of persuasion to show that the attorney on the other side actually obtained confidential information from the consultant/expert? Determining which standard applies depends upon whether there is a "legal impediment" to the moving party's (defendant's) ability to obtain evidence from the consultant regarding the content of the consultant's conversation with the other side's (plaintiff's) attorney to enable the moving party to satisfy the burden of proof. If so, the burden rests with the moving party; if not, the rebuttable presumption applies. In this case, the Court of Appeal concluded the consultant was not "legally unavailable" to the moving party as a source of evidence of what confidential information, if any, the consultant conveyed to the other side's attorney. Thus, the burden of proof fell on the party moving for disqualification.

MACHADO v. SUPERIOR COURT (2007) 148 CAL.APP.4TH 875

**Standing of Non-party to File Disqualification Motion
Collateral Estoppel Effect of Disqualification Order in Related Case**

A former client (Client 1) moved to disqualify Attorney in two related actions. In the first lawsuit, the former client sought to disqualify Attorney from representing Client 2 in a lawsuit (in which Client 2 was claiming Client 1 had bribed Client 2's prior attorney) on the grounds that the Attorney had been privy to Client 1's "confidential business secrets, business practices, litigation preferences and personal tendencies" as a result of prior representation and the Attorney's prior participation with the former client in a land partnership. The trial court ordered disqualification and the Court of Appeal denied the current client's petition for a writ overturning the ruling. Current client did not appeal disqualification order. Attorney then filed a malpractice action on behalf of Client 2 against Client 2's prior attorney, alleging the prior attorney had conspired with Client 1 to deprive Client 2 of property, but not naming Client 1 as a defendant. Client 1 filed a motion to disqualify Attorney in the malpractice action based upon the same grounds asserted in the first action. The trial court granted the motion and the Court of Appeal affirmed, finding that Client 1 had standing to file motion even though not a party because malpractice lawsuit was filed to evade disqualification order in first matter and that Client 2 was collaterally estopped from challenging the disqualification order in the malpractice action by the order in the first case, which was a final order and precluded relitigation of issue of

whether Attorney' s prior legal and professional relationships with Client 1 warranted disqualification in dispute between current and former client.

KNIGHT V. FERGUSON (2007) 149 CAL.APP.4TH 1207

**Disqualification by Former Client in Absence of Material Confidential Information
Duty Not to Injuriouly Effect Former Client**

Plaintiff moved to disqualify defendants' lawyer in a dispute over a partnership and lease agreement on the grounds that, prior to the lawsuit, the lawyer had briefly represented plaintiff concerning the possible formation of a partnership and a lease agreement with another party involving the same business that was the subject matter of the lawsuit. Defendants' attorney opposed disqualification on the grounds that plaintiff knew when she consulted him that he represented defendants and that defendants had been privy to all of his communications with plaintiff. The Court of Appeal affirmed disqualification, holding that defendants' presence at the prior meetings between plaintiff and defendants' attorney did not sufficiently attenuate the attorney' s conflict. Because there was a substantial relationship between the two representations, it was presumed that confidential information had been disclosed. Further, disqualification was proper based upon the attorney' s duty not to do anything that would injuriouly affect his former client.

IN RE CHARLISSE C. (2007) 58 CAL.RPTR.3D 173 (REV. GRANTED & DE PUB.)

**Disqualification by Former Client of Public Law Office
Ethical screens for Public Attorneys
Vicarious Disqualification**

The mother of a child in a dependency proceeding filed a motion to disqualify the Children' s Law Center in Los Angeles (CLC), a publicly funded, nonprofit law office that represents children in Juvenile Dependency Court, from representing her child on the grounds that the CLC had previously represented her when she was in foster care and the ethical screens between the separate units of the CLC had been breached. The CLC has three separate units that are ethically screened from one another in accordance with established procedural safeguards so that lawyers in different units may provide services to parties with conflicting interests. There was evidence that certain procedures had been breached when new management took control, but no evidence that attorney representing child had obtained any confidential information concerning mother. The juvenile court disqualified the CLC. The Court of Appeal reversed, holding that "an appearance of impropriety" and the absence of strict adherence to structural screening safeguards were an insufficient basis for disqualifying a public law office. Noting that legal services lawyers do not have a financial incentive to breach client confidences and that disqualification of legal services attorneys can result in increased public expenditures, the Court of Appeal held that the proper standard for disqualification of public law offices in successive conflict cases is: (1) if an individual lawyer in a unit had a direct and personal relationship with former client on substantially related matter, the lawyer' s entire unit should be disqualified automatically; (2) if an individual lawyer had no direct, personal relationship with former client but there is evidence that ethical screens between units have been breached, the public law office should be

disqualified if moving party can establish reasonable probability that lawyer has actually obtained, or will inadvertently acquire, material confidential information relating to prior representation. The factors to be considered in making the latter determination include: (a) length of time elapsed since prior representation; (b) whether prior case was notorious or memorable; (c) whether current attorney was employed at time of prior representation; (d) whether attorney who represented former client is still employed; and (e) the nature and extent of any breaches in operating procedures established to ensure that confidential information acquired by one unit is protected from purposeful or inadvertent disclosure to lawyers in other units.

IN RE JASMINE S. (2007) ___ CAL.APP.4TH ___ [2007 WL 2122064]

**Disqualification of Public Law Firm in Concurrent Representation Case
Vicarious Disqualification
Ethical Screens for Public Attorneys**

This case involves a motion to disqualify the Children's Law Center in Los Angeles (CLC) from representing two siblings in child dependency proceedings, due to breaches in the CLC's structural provisions to prevent the sharing of confidential information between units. A CLC attorney in one unit who was representing one child in dependency proceedings sought to disqualify a CLC attorney in another unit from representing a sibling, based upon an alleged conflict of interest between the children. The juvenile court disqualified the attorney in Unit 2 from representing the sibling, finding that although there was no actual conflict in this case, the ethical screens between the units had been breached and there was therefore a systemic or structural conflict between the units. The Court of Appeal reversed, holding that disqualification of a public services lawyer who has no *actual or imputed* conflict of interest is improper and that the appearance of impropriety does not support disqualification. The Court of Appeal noted that a conflict arises when there is "a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interest or by the lawyer's duties to another current client, former client, or a third person." Under statute an attorney must *decline* representation of multiple siblings in dependency hearings if there is a reasonable likelihood that an actual conflict will develop, but the attorney is not required to *withdraw* based upon a reasonable likelihood that an actual conflict will develop. Instead the attorney must withdraw or be disqualified only if an actual conflict exists. Here, the juvenile court found there was no *actual* conflict. Further, even assuming there had been an actual conflict between the siblings, disqualification should be required only if there was evidence of (1) a material breach of CLC's ethical screens or material interference with an individual attorney's independent professional judgment related to the particular case or (2) persistent material violations of ethical screens, or persistent interference with attorneys' independent professional judgment, with respect to other cases sufficient to warrant disregarding the units' separate existence for all purposes.

**Disqualification of Government Attorney in Administrative Proceedings On Due
Process Grounds
Vicarious Disqualification**

The Water Board issued a notice of a proposed revocation of the water right license held by an Indian tribe. The tribe filed a petition to disqualify the entire enforcement team appointed to the matter on the grounds that one of the staff attorneys on the enforcement team was concurrently acting as advisory counsel to the Water Board in an unrelated proceeding involving the tribe. The Water Board denied the petition and the tribe filed a petition for writ of mandate in the trial court. The trial court issued a writ ordering disqualification of the staff attorney, holding that permitting an attorney to occupy the dual role of advocate in one proceeding and advisor to the decision maker in another creates an intolerable risk of bias and thus fails to comport with principles of due process. The Court of Appeal affirmed, holding that having an attorney acting in these two roles in concurrent but unrelated proceedings involving the same licensee deprives the licensee of due process. “The chance that the Board will show a preference toward [advisory counsel], even “perhaps unconsciously,” is “present and unacceptable.” The Court of Appeal rejected the Water Board’s argument that compliance with the APA satisfied due process requirements.

IN RE SONICBLUE INC. (2007) 2007 WL 1321746 (N.D. CAL. BANKR. CT.)

**Conflicts of Interest
Chapter 11 Trustees**

Law firm Pillsbury Winthrop has been longstanding counsel for electronics company SonicBlue. In 2002, Pillsbury wrote a letter to three creditors who were investing in a \$75 million bond issue by SonicBlue, opining that they would be repaid in full even if SonicBlue declared bankruptcy. The next year, SonicBlue went bankrupt, and Pillsbury began handling its bankruptcy case. Pillsbury should have disclosed the fact that it had issued the 2002 letter, but didn’t until January 2007, even though it was aware of the letter as least as early of August 2006. Citing a “complete breakdown of creditor confidence” due to the conflict raised by the letter that the firm had failed to disclose earlier, the United States Bankruptcy Court granted a motion by the United States Trustee to disqualify Pillsbury. The court reserved discussion of disgorging the fees Pillsbury has earned as debtor’s counsel “for a later hearing after review by the appointed trustee.” Essentially, Pillsbury’s continued work on the case was conflicted because its exposure (due to the 2002 letter) would be increased for every dollar the senior note holders’ claim was reduced. Said the court: “As of late August 2006, [Pillsbury] knew it had a disabling conflict of interest because it immediately sought the aid of [committee counsel] in an attempt to resolve the conflict. Yet, [Pillsbury] failed to apprise the court of these facts. [Pillsbury]’s attempt to characterize its failure as inadvertent oversight rings hollow in the face of its previous history of supplemental disclosures.” Pillsbury argued that “the partner in charge ‘assumed’ a supplemental disclosure had been made, but the firm has not offered any evidentiary foundation for that assumption.” Either way—intentional or inadvertent—the failure to disclose the conflict

“in any reasonable fashion mandates immediate disqualification of [Pillsbury] from its representation in this case.” At issue was a paragraph in Pillsbury’s letter that included a caveat about bankruptcy, but explicitly referred to only one of two paragraphs about repayment. The creditors argued that the other paragraph assured repayment even in the event SonicBlue became insolvent. The court noted that this failure to mention one of the two paragraphs about repayment “may have been a scrivener’s error” on Pillsbury’s part.

II. CONFIDENTIALITY/ATTORNEY-CLIENT PRIVILEGE/WORK PRODUCT

CAREHOUSE CONVALESCANT HOSPITAL V. SUPERIOR COURT (2006) 143 CAL.APP.4TH 1558

Work Product

Plaintiffs, a deceased patient’s children and successors in interest, sued defendant, a skilled nursing facility, for wrongful death and elder abuse. In response to plaintiffs’ motion to compel discovery regarding staff ratios, defendant’s counsel raised the attorney work product doctrine. She explained that because defendant did not maintain the requested log of the staffing ratios, she had compiled that information by applying the regulatory statutes to the staffing logs and sign-in sheets. The trial court granted plaintiffs’ motion to compel and directed that the response be provided, if necessary, by attorney deposition. The Court of Appeal granted defendant’s petition for a peremptory writ of mandate. Applying a three-prong test, the Court of Appeal found that plaintiffs had not rebutted the presumption against noticing the attorney’s deposition. As to the first prong, plaintiffs failed to show that they lacked other practicable means of obtaining the information, given that they had access to the same underlying documentation as defendant’s attorney. As to the second prong, plaintiffs failed to show that the information was crucial to their case; their arguments were based on ease, rather than necessity, and were not sufficient to establish the required extremely good cause. As to the third prong, defendant showed that the information sought was protected work product; defense counsel’s calculations reflected her industry and work effort during the litigation, and plaintiffs’ counsel had indicated his intent to probe her methodology and reasoning.

IN RE PRESCOTT (2007) 57 CAL.RPTR.3D 126 (CAL.CT.APP.; DE PUB. BY SUPREME CT.)

Conflicts

Duty of Loyalty

Attorney-Client Privilege

Ineffective Assistance of Counsel

Defendant who pleaded guilty to corporal injury to his wife moved to withdraw his plea, but his court-appointed attorney reported to the court that there was no basis for a motion to withdraw the plea. The attorney included attorney-client privileged information in the report that was submitted to the court and given to the prosecutor. The trial court denied defendant’s motion. After his conviction was affirmed, defendant filed petition for writ of habeas corpus on the grounds that he was denied his Sixth Amendment right to the assistance of counsel during a critical stage of his criminal proceedings. The People, among other things, countered that defendant should have objected to the privileged disclosures made in his attorney’s report to the court. The Court of Appeal vacated the trial court’s denial of defendant’s plea withdrawal motion and his conviction, and remanded. The Court of Appeal held that 1) defendant did not

waive attorney-client privilege by failing to object to his counsel' s disclosures; 2) counsel provided ineffective assistance of counsel by disclosing defendant' s confidential communications; and 3) counsel' s conduct warranted reversal. Not only had counsel failed to advocate on behalf of his client, he had actually argued against his case. Said the Court of Appeal: "There is no failure of representation more complete than an attorney advocating against his client."

THELEN REID & PRIEST LLP v. MARLAND (N.D. CAL. 2007) 2007 WL 578989

Attorney-Client Privilege for Communications With Law Firm In-House Counsel

The issue in this case is whether the attorney-client privilege applies to communications between a law firm' s attorneys and the law firm' s general counsel relating to the ongoing representation of a client. A law firm filed a lawsuit against a former client seeking to enforce a fee agreement that the former client claimed was unenforceable. The former client sought discovery of all communications regarding the prior representation and the law firm asserted the attorney-client privilege for communications between the attorneys representing the former client and the law firm' s general counsel, staff working at the direction of general counsel, and members of the executive committee. The district court rejected a rule requiring disclosure of all communications relating to an ongoing representation of a client, due to concerns that it would dissuade attorneys from referring ethical problems to other lawyers. The court held however that law firm must produce any communications that discussed (1) claims the client may have against law firm, (2) known errors in the firm' s representation of the client, (3) known conflicts in the representation of the client, or (4) other circumstances that triggered the law firm' s ethical duty to advise the client and obtain client consent. The court held that the law firm' s work product must be produced in accordance with the same guidelines.

III. LEGAL MALPRACTICE/BREACH OF FIDUCIARY DUTY

CHARNAY V. COBERT (2006) 145 CAL.APP.4TH 170

Billing Practices

The trial court sustained a demurrer filed by an attorney and his law firm to a client' s complaint alleging legal malpractice, breach of fiduciary duty, breach of contract, fraud, and negligent misrepresentation. The client and her husband had retained the attorney after being sued by neighbors who sought contribution for the cost of slope repair in a subdivision. The retainer agreement stated that the firm would assume its billing statements were accurate if the client did not question them within 10 days. The attorney advised the client to defend the action and to file a cross-complaint against the neighbors. After lengthy litigation, a judgment was entered against the client that required her to pay the neighbors' attorney fees pursuant to a fee-shifting provision in the subdivision' s conditions, covenants, and restrictions. The client alleged that the attorney failed to inform her of the potential liability for attorney fees far in excess of the original demand, billed her for tasks performed by others or never performed, and assured her that the opposing parties could not prevail. The Court of Appeal reversed, ruling that all of the causes of

action were pleaded adequately, and that the 10-day notice provision in the retainer agreement did not bar claims based on fraudulent billing.

AMBRIZ V. KELEGIAN (2007) 146 CAL.APP.4TH 1519

Litigation Malpractice and “Trial Within a Trial”

The trial court entered summary judgment in favor of a law firm and attorneys in a client’s legal malpractice action that alleged that the law firm and the attorneys failed to conduct a sufficient investigation, failed to propound necessary discovery, and failed to prosecute the client’s claims in a premises liability action the client had filed against the owners and managers of the client’s apartment complex, after she was raped by an intruder. The trial court in the premises liability case had granted a summary judgment motion filed by the owners and managers. The Court of Appeal reversed the judgment. The Court of Appeal found that the trial court improperly excluded a substantial portion of the client’s evidence. The client presented sufficient evidence to create a triable issue of fact as to the issues of duty and causation in her premises liability case, and thus, the trial court erred in determining as a matter of law that the client could not have survived summary judgment in that action. The transient who attacked the client had been seen inside her building on more than 10 occasions prior to the rape. In view of repeated security breaches and the known presence of unauthorized male intruders, a violent attack by an intruder was sufficiently foreseeable that management at the complex had a minimal duty to properly maintain the locks on the doors and gates to the complex and its buildings. Furthermore, because the complex was granted a density variance on the condition that it be maintained as a low-to-moderate income senior housing project, it thus knew that it was required to take certain security measures to protect its residents and that its residents were in need of special protection. In view of the evidence of repeated unauthorized entries to the premises by male intruders and police detectives’ determination that there was no evidence of forced entry at the time the client was attacked, it was reasonable to conclude that it was more likely than not that the client’s attacker used the same method of entry on the day of the rape that he and others had been using over an extended period of time to gain entry to the complex, i.e., entry through the malfunctioning doors at the complex.

ZENITH INSURANCE COMPANY V. O’CONNOR (2007) 148 CAL.APP.4TH 998

Non-client Claims Against Attorneys

Zenith entered into a reinsurance contract with Royal pursuant to which Zenith reinsured 100% of Royal’s exposure under certain liability policies. Under the reinsurance contract, Royal expressly retained exclusive power to investigate, defend and settle any claim on such terms as Royal, in its discretion, deemed expedient. Royal retained law firm to defend an insured in a clean-up action by the Environmental Protection Agency, which was covered by reinsurance contract. Royal ultimately paid \$3.8 million (including \$1 million in defense costs) to settle three related environmental claims against insured and demanded reimbursement from Zenith. Zenith determined there were 22 other insurers on the risk and demanded that law firm seek indemnity or contribution. Law firm refused to seek indemnification, due to conflicts and, at Zenith’s request, Royal hired other counsel to pursue indemnity claims. Zenith subsequently filed a

lawsuit against Royal for breach of contract and against law firm retained by Royal to defend insured for negligence in failing to timely pursue contribution and indemnification claims against third parties. The Court of Appeal affirmed an order sustaining a demurrer on the grounds that there were insufficient facts to demonstrate the creation or existence of an attorney-client relationship between law firm and Zenith and that law firm did not owe a duty of care to Zenith. The fact that Zenith was providing funds to pay law firm's fees, had communications with the law firm, or had a subjective belief that the law firm was also its attorneys was not sufficient as a matter of law to demonstrate an attorney-client relationship. The Court of Appeal also rejected the third party beneficiary theory, holding that an essential predicate for establishing a duty of care under an intended beneficiary theory was absent since there was no evidence that both the attorney and the client intended the third party to be the beneficiary of legal services provided by the attorney.

PCO INC. V. CHRISTENSEN, MILLER, FINK, ETC. (2007) 150 CAL.APP.4TH 384

**Vicarious Liability
Conversion
Fiduciary Duty**

Investment corporation PCO, through its receiver, brought action against attorney Robert Shapiro and his law firm (Christensen). Shapiro represented David W. Laing, who was convicted of engaging in fraudulent activities with PCO. The suit against the Christensen firm sought to obtain the legal fees Shapiro had received from Laing, alleging that Shapiro had improperly obtained monies from Laing's house that actually belonged to PCO's receivership. The trial court granted summary judgment for the firm, ruling that the firm could not be held vicariously liable for Shapiro's alleged acts. The Court of Appeals reversed, holding that plaintiffs raised triable issues of fact with respect to whether Shapiro committed his alleged acts within the scope of his authority as a partner of the Christensen firm. The Court of Appeal, however, affirmed the trial court's order granting summary judgment in favor of the firm on plaintiffs' causes of action for conversion and breach of fiduciary duty because plaintiffs had failed to "fulfill the requirement that if money is the subject of the conversion action, a specific sum [must] be identified." The court also found that the firm had no fiduciary duty to PCO with regards to Laing's money: "The undisputed evidence ... establishes that whatever monies Shapiro ultimately received [from Laing], it was for legal services. There is no evidence that ... Shapiro or the Christensen Firm otherwise stood in a fiduciary relationship with plaintiffs."

WIMSATT V. SUPERIOR COURT (2007) 152 CAL.APP.4TH 137

Mediation Privilege

In the underlying legal malpractice action, former client alleged that attorney breached his fiduciary duty to client by submitting an unauthorized reduced settlement offer, which plaintiff allegedly learned of when he read confidential mediation brief. Attorney sought a protective order preventing the discovery of (1) statements made in any mediation brief, (2) the content of e-mail communications between counsel on the eve of the mediation regarding the mediation

briefs and (3) earlier communications between counsel in which the attorney allegedly lowered the settlement demand. The Court of Appeal held that the mediation briefs and the e-mails sent on the eve of the mediation were protected from discovery by the statutory mediation privilege, which is not subject to any non-statutory exceptions. In doing so, the Court of Appeal recognized that the privilege could result in inequities, and suggested that the Legislature review the statutory privilege and that attorneys warn parties agreeing to mediate a dispute of the potential unintended consequences of such an agreement. The Court of Appeal allowed discovery of prior verbal communications between counsel regarding settlement, finding that defendant failed to meet his burden of showing that the conversation was linked to the mediation and thereby protected by the statutory privilege.

IV. ATTORNEY' S FEES

IN RE MARRIAGE OF GREEN (2006) 143 CAL.APP.4TH 1312

Attorney' s Right Under Family Code to Enforce Judgment

In a dissolution proceeding, the trial entered a judgment that included attorney fees for a law firm that represented the former wife. The wife opposed the payment of the fees by the husband' s estate, which did ultimately pay the fees. When the law firm sought to recover postjudgment interest, the trial court quashed the writ of execution, finding that the wife' s actions stopped the accrual of postjudgment interest. The Court of Appeal reversed. Under section 272 of the Family Code, entry of the judgment ordering payment of attorney fees gave the law firm an independent statutory right to enforce the judgment. That statute defined the wife' s rights regarding the attorney fee award in the judgment, and her rights did not include the power to prevent the trustee from paying her lawyers or to prohibit the trustee' s offer of funds. Neither action by the wife stopped postjudgment interest from accruing. Further, the trustee did not make a valid and effective tender of the judgment debt to the law firm because the trustee' s offers were not unambiguous. Rather, the trustee imposed conditions relating to the wife' s objections on his stated intention of honoring his obligations. It was the trustee' s burden either to pay the judgment amount or to deposit the funds into court. Because neither of those steps were taken, judgment interest continued to accrue.

BROOKS V. SHEMARIA (2006) 144 CAL.APP.4TH 434

Actual Innocence Rule in Criminal Malpractice

Client, a convicted criminal, sued attorney who represented him in criminal proceedings claiming attorney breached the retainer agreement by failing to refund the unused portion of the retainer, and was negligent in seeking the return of client' s property that had been seized by authorities. The trial court granted attorney' s motion for summary judgment, based on client' s undisputed inability to prove actual innocence. The Court of Appeal reversed, holding the actual innocence rule was not applicable to client' s claims since client was not challenging his conviction and his claims were unrelated to the defense of the criminal charges. The Court of Appeal found that the policy reasons that dictate application of the actual innocence rule in

criminal malpractice cases—including that guilty defendants should not profit from their crime, that allowing guilty defendants to shift the burden to their attorneys would undermine the criminal system, and that defendant’s criminal act is the ultimate cause of his predicament—did not support application of the rule to client’s claims seeking to enforce the right to be billed in accordance with the terms of the retainer agreement and to have property returned that the court ordered should be returned. In these claims, client was not seeking to profit from his wrong and was not challenging his conviction or seeking damages from it. Further, although client was the “but for” cause of the destruction of his property, since the court had ordered that some of his property be returned client was not the proximate cause of the destruction of his property.

SCHATZ V. ALLEN MATKINS LECK GAMBLE & MALLORY LLP (2007) 53 CAL.RPTR.3D 173 (REV.GRANTED; UNPUB.)

Enforceability of Contractual Arbitration Provision After Client Rejects Arbitration Award Under Mandatory Fee Arbitration Act (MFAA)

Client signed attorney fee agreement with binding arbitration provision. After attorney notified client of intent to invoke arbitration clause to resolve a fee dispute, client elected non-binding arbitration under the Mandatory Fee Arbitration Act (MFAA). Following the MFAA arbitration, client rejected the non-binding arbitration award in favor of attorney and filed a complaint seeking, among other things, trial *de novo* of the fee dispute. Attorney petitioned to compel binding arbitration pursuant to preexisting fee agreement. The Court of Appeal affirmed denial of the petition to compel arbitration, holding section 6204(a) of the Business & Professions Code, which provides that a party who participates in a MFAA arbitration but does not agree to be bound by the arbitration award “shall be entitled to a trial,” preempts a pre-existing arbitration agreement.

ERVIN, COHEN & JESSUP, LLP V. KASSEL (2007) 147 CAL.APP.4TH 821

Enforcement of Contractual Arbitration Provision After Client Waives Right to MFAA Arbitration

Law firm sent former client a “Notice of Clients Rights to Arbitrate” explaining that it intended to file suit against client to recover unpaid fees, and that client could invoke his right under the mandatory fee arbitration act (“MFAA”) by filing an application for arbitration with the local bar association. Client failed to invoke his right to nonbinding arbitration under the MFAA within 30 days and law firm filed lawsuit, then brought a motion to compel arbitration pursuant to provision in the fee agreement. The trial court denied the motion, finding the arbitration provision violated Business and Professions Code section 6204(a), which states that agreements for binding arbitration of fee disputes cannot be made before a dispute over fees arises. The Court of Appeal reversed, holding that law firm’s motion to compel arbitration should have been granted because client had waived his right to fee arbitration under the MFAA by failing to request arbitration within 30 days of receipt of notice.

**Attorney's Fees
Quantum Meruit
Legal Ethics
Fee Forfeiture**

A contingency fee attorney discharged by a client is ordinarily entitled to a *quantum meruit* recovery based on the reasonable value of services rendered. The discharged attorney's *quantum meruit* recovery is generally based upon hours reasonably expended times a reasonable hourly rate, and qualified by whether the total fees computed are reasonable given: (a) the nature of the litigation and its difficulty; (b) the amount involved; (c) the skill required; (d) the attention given; (e) the success or failure of the attorney's efforts; and (e) experience. Because contingency fee lawyers do not ordinarily keep time records, they may establish hours reasonably expended through testimony of total time worked during the relevant period, a fair estimate of the percentage of total work time spent on the case at hand, the work performed, the complexity of the issues, the obstacles faced, and trial preparation. A violation of the rules of professional conduct may result in a forfeiture of fees depending upon the egregiousness of the violation and issues of unjust enrichment. A court will not reward/unjustly enrich a client who hides a conflict of interest from the attorney and then claims the attorney's claim to fees is barred because of that conflict.

V. TRIAL MISCONDUCT

HALUCK V. RICOH ENTERPRISES (2007) 151 CAL.APP.4TH 994

Trial Judge Misconduct

Employees sued their employer and certain of its employees for damages for discriminatory employment practices. Judge James Brooks (Orange County Superior Court) entered judgment on jury verdict in favor of employer et al. Employees appealed on the grounds that "the trial judge's misconduct so infected the proceedings they were deprived of a fair trial." The Court of Appeal reversed and remanded to a different judge, holding that 1) trial judge should not have permitted counsel for only one party to participate in viewing a videotape with him; 2) trial judge's actions during trial constituted judicial misconduct; 3) deposition testimony from non-party former employee should not have been admitted by trial judge; 4) trial judge's curative instructions to the jury at the end of the trial were not enough to mitigate or cure his misconduct; and 5) trial judge's misconduct warranted reversal of judgment and remand for a new trial with a different judge. According to the Court of Appeal, "the trial judge's conduct was sufficiently egregious and pervasive that a reasonable person could doubt whether the trial was fair and impartial" and reversed on that ground. Among the matters cited, the trial judge oversaw a trial that lacked courtesy and decorum, made comments and jokes from the bench that could be construed as supporting the employer et al., and set up a "soccer game" system that involved the granting of "red cards" from the bench to punish attorneys for allegedly frivolous objections.

VI. ATTORNEY MISTAKE

TAMBURINA V. COMBINED INSURANCE CO. OF AMERICA (2007) 147 CAL.APP.4TH 323

Dismissal for Failure to Go to Trial Within Five Years Impracticability

An employee sued his employer for age discrimination and tortious interference with stock option contracts. The trial court dismissed the action for failure to bring it to trial within the five-year statutory period. The trial court found that the employee had not met the requirements to apply the impracticability exception to the five-year requirement. Specifically, the trial court found that stipulations to extend the trial date did not establish a circumstance of impracticability and that the employee had not shown a causal connection between the asserted circumstance and his failure to move the case to trial. The trial court did not make a finding as to whether the employee exercised reasonable diligence during all stages of the proceedings. The Court of Appeal reversed the judgment and remanded the matter to the trial court for it to consider the issue of diligence. The Court of Appeal found that five stipulations, in which the parties agreed to continue the trial setting conferences and/or the trial for a period of 424 days due to the illnesses of the employee or his counsel, were legally sufficient to show a 424-day period of impracticability. As stipulations, they embodied conceded facts and did not have to be signed under penalty of perjury. Further, they were not mere professional courtesies, given the circumstances, including the employee's serious, specified, and monitored illness. The Court of Appeal also found that the employee established a causal connection. The trial court's ruling on causal connection focused on the "but for" strand of causation and the length of time left to bring the case to trial after the illnesses resolved but did not fully recognize an alternative strand of causation: In the case at bar, unusually lengthy illnesses deprived the employee and his counsel of a substantial portion of the five-year period for prosecution of the lawsuit.

MANSOUR V. DEGAS (2007) 2007 WL 866706 (CAL.CT.APP.; DE PUB. BY CT.APP.)

Dismissal With Prejudice

Plaintiff filed a personal injury suit against several defendants. The trial court dismissed the case with prejudice. Plaintiff moved to vacate the order of dismissal, but the trial court denied the motion, as well as plaintiff's motion for reconsideration. Plaintiff's motion to vacate the dismissal order was based on an asserted clerical error by the trial court in sending the dismissal to plaintiff's attorney at his previous rather than his current office address. The Court of Appeal affirmed the order denying plaintiff's motion to set aside the dismissal. The Court of Appeal concluded that the trial court did not abuse its discretion in refusing to set aside the dismissal because the motion to vacate the dismissal was not filed until more than 10 months after plaintiff's counsel received written notice of the dismissal. The trial court had the discretion to determine whether the dismissal should be set aside. Under these circumstances, it was impossible to view the trial court's denial of relief as an abuse of discretion.

Dismissal With Prejudice

The trial court denied a creditor's motion to vacate the trial court's dismissal with prejudice of a debt collection action. The creditor's counsel failed to appear at a mandatory settlement conference. The trial court issued an order to show cause (OSC) and set a hearing date two weeks later. The day before the hearing, the creditor filed a voluntary dismissal without prejudice with the court clerk. When counsel did not show up at the hearing, the trial court ordered a dismissal with prejudice. The Court of Appeal reversed the trial court's order and remanded the case with directions to enter a new order vacating the trial court's dismissal and leaving the voluntary dismissal as the operative document. The Court of Appeal held that the trial court lost its authority to dismiss pursuant to the OSC when the creditor validly exercised its right to dismiss voluntarily. The pendency of an OSC is not equivalent to the commencement of trial because dismissal is not inevitable.

Determining Existence of Attorney-Client Relationship

Royal entered into a contract of reinsurance with Zenith. After claims were asserted against one of Royal's insured customers, Royal retained the Cozen law firm to provide legal services with respect to the defense of such claims. Ultimately, Zenith, which had reinsured 100% of Royal's policy liability in this case, filed this action for professional negligence against Cozen alleging that, under the circumstances, an attorney-client relationship existed between Cozen and Zenith based on 1) an implied in fact contract and 2) the theory that Zenith was an intended beneficiary of the legal services to be performed by Cozen pursuant to this retention agreement. The court rejected Zenith's claim, finding that Cozen's client was Royal, not Zenith, and thus it owed no duty of care to Zenith. There were no reasonable grounds for Zenith to expect that an attorney-client relationship existed between Zenith and Cozen. The facts that Zenith had reinsured 100% of Royal's potential policy liability, would thereby benefit or suffer from the performance of Cozen's legal services, and had multiple communications with Cozen (who was obligated as Royal's counsel to keep the reinsurer informed of the status of claim adjustment and defense) did not provide a basis for the establishment of an attorney-client relationship; moreover, Zenith made no claim that there was any express agreement with Cozen regarding such a relationship. An essential predicate for establishing an attorney's duty of care under an "intended beneficiary" theory is that *both* the attorney *and* the client must have intended Zenith to be the beneficiary of legal services Cozen was to render. That did not exist here.

VII. LITIGATION PRIVILEGE

JACOB B. V. COUNTY OF SHASTA (2007) 40 CAL.4TH 948

Litigation Privilege Constitutional Right to Privacy

The issue in this case is whether the litigation privilege bars a claim for invasion of a constitutional right of privacy. At the request of a parent, a county employee employed by a victim witness program wrote a letter to be presented to the family law judge providing information from the program's database regarding the child's molestation by an uncle. In writing the letter, the county employee did not realize that the alleged molester was also a minor. The letter was attached to an opposition to a request to modify visitation rights. The uncle then sued the county and the county employee who wrote the letter, alleging several claims including invasion of his constitutional right to privacy. The trial court held the litigation privilege barred all claims except invasion of privacy, which went to trial and resulted in an award to plaintiff. Defendants appealed and the Court of Appeal reversed, holding the litigation privilege barred all claims, including invasion of privacy. The Supreme Court granted review and affirmed, holding that the letter fit within the parameters of the litigation privilege and that the privilege barred all claims based upon the letter, even if the letter violated confidentiality laws protecting minors. The Supreme Court held that the litigation privilege bars an action based on the constitutional right to privacy, overruling two Court of Appeal decisions that had required a case-by-case balancing of competing interests to determine whether the litigation privilege barred such a claim.

VIII. ETHICS GENERALLY

IN RE REYNOSO (9TH CIR. 2007) 477 F.3D 1117

Unauthorized Practice of Law

United States Trustee filed complaint against Frankfort Digital Services, sellers of web-based software that prepared bankruptcy petitions, alleging violation of the section of the Bankruptcy Code governing bankruptcy petition preparers (BPPs) and seeking injunctive and other relief. Frankfort represented to potential customers that its software system offered expertise in bankruptcy law. It would ask for financial information, and then produce completed forms and claim exemptions for customers. Frankfort is not owned and operated by an attorney. The United States Bankruptcy Court entered an order requiring defendants to pay fines and disgorge fees and enjoined them from acting as BPPs. The Court of Appeals upheld the lower court ruling, finding that defendants indeed qualified as BPPs, and that the court did not err in imposing fines against them. It also found that defendants engaged in deceptive acts, and had engaged in the unauthorized practice of law. Frankfort had been found to be acting as a BPP in past litigation, but since its website had changed significantly between the time of the earlier litigation and the instant proceeding, issue preclusion did not bar defendants from challenging that determination.

Addressing the question *de novo*, the Court of Appeals examined the record in the instant case and found that defendants still qualified as BPPs.

IN RE MATTER OF WOLFF (2006) 5 ST. BAR CT. REP. 1

Attorney Abandonment of Clients

In a state bar disciplinary matter, respondent attorney abandoned over 300 indigent dependency clients and failed to appear in 39 matters. Respondent had been the attorney of record for these juvenile delinquency cases before the Sacramento Superior Court, and then abruptly filed with the court her intention to resign from her cases, a filing that the Court refused to consider. The hearing judge found that respondent failed to show up for hearings, and failed to inform her clients that she was resigning. On appeal, respondent challenged the hearing judge's imposition of a public reproof based on findings that respondent was culpable of the following: (1) failing to obey a court order (i.e., to continue working with clients); (2) withdrawing from employment without court permission; and (3) withdrawing from employment without taking reasonable steps to protect the interests of her clients. State bar appealed as well, on the grounds that the hearing judge's discipline recommendation was not sufficient in view of the seriousness of the misconduct. Review court found culpability on the part of respondent, not only on the grounds found by the hearing judge, but also additional culpability for charged misconduct arising from respondent's failure to inform clients of significant developments (i.e., her resignation). The review court recommended that respondent be suspended from the practice of law for three years, that the execution of the three-year suspension be stayed, and that respondent be placed on probation for three years on the condition that respondent be placed on actual suspension for 18 months and until she complies with standard 1.4(c)(ii) of the Standards of Attorney Sanctions for Professional Misconduct.

LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE, OPINION 519 (2007)

**Duty of Confidentiality
Attorney-Client Privilege**

The Committee addressed whether there is a "self-defense" exception to the duty of confidentiality that permits an attorney to utilize confidential client information to defend against a claim by a third party. The Committee concluded that there are two open questions: (1) May a court order limited disclosure of privileged communications? and (2) May a court dismiss a third party action against an attorney because of the attorney's inability to defend her/himself from the third party claim? The Committee then concluded that under California law, absent client consent, there is no basis for an attorney to breach the duty of confidentiality or to reveal privileged attorney-client communications to defend a claim by a third party. [Note: An attorney is excused from the duty of confidentiality not only where the client consents, but also where disclosure is required or authorized by the State Bar Act, the Rules of Professional Conduct or other law. Cal. Rule Prof. Conduct, rule 3-100, Discussion ¶2.]

SAN DIEGO COUNTY BAR ASSOCIATION FORMAL OPINION NO. 2007-1

Attorney Outsourcing Rules of Professional Conduct

Attorney outsourced supporting legal work to firm in India (Legalworks) which specializes in assisting with US intellectual property cases. None of the Indian attorneys hold US law licenses. With Legalworks' help, the attorney won dismissal of the case on a summary judgment motion. The opinion raised the following questions: Did the attorney violate Rules of Professional Conduct (RPC) by aiding the Indian firm in the unauthorized practice of law? Did he have a duty to inform his client that he was using the Indian firm? Were the RPC violated to the extent to which the Indian firm was relied upon to provide substantive expertise that Attorney lacked to defend the suit? The Bar Association Committee opines that outsourcing does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged. The attorney may satisfy his obligations to his client in using the Indian firm, but only if he has sufficient knowledge to supervise the outsourced work properly and he makes sure the outsourcing does not compromise his other duties to his clients. But he would not satisfy his obligations to his clients unless he informed them of Legalworks' anticipated involvement in the case at the time he decided to retain Legalworks. The fact that the outsourcing was done with a firm in another country adds a "heightened duty of supervision." Among other things, an attorney outsourcing to a foreign firm "should have an understanding of the legal training and business practices in the jurisdiction where the work will be performed."

AMERICAN BAR ASSOCIATION FORMAL ETHICS OPINION 06-444 (2007)

Restricting a Lawyer's Right to Practice Law

A lawyer may enter into an agreement with another lawyer or law firm restricting her/his right to practice after termination of the relationship only if the agreement concerns benefits upon retirement. Thus, a restrictive covenant will be upheld if it affects benefits available only to a lawyer who is in fact retiring. To constitute a retirement benefit, which supports a restrictive covenant, the benefit must be available only to those who retire and terminate or wind down their legal practices, and thus should include reference to a minimum age and/or minimum number of years of service.

THE STATE BAR OF CALIFORNIA

80TH ANNUAL MEETING

PROGRAM #99

RECENT DEVELOPMENTS AFFECTING THE LAW OF LAWYERS

FRIDAY, 9/28/2007
2:15 P.M. – 4:15 P.M.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2007-172**

- ISSUES:**
1. May an attorney ethically accept payment of earned fees from a client by credit card?
 2. May an attorney ethically accept payment of fees not yet earned from a client by credit card?
 3. May an attorney ethically accept payment of advances for costs and expenses from a client by credit card?

- DIGEST:**
1. An attorney may ethically accept payment of earned fees from a client by credit card. In doing so, however, the attorney must discharge his or her duty of confidentiality.
 2. Likewise, an attorney may ethically accept a deposit for fees not yet earned from a client by credit card, but must discharge his or her duty of confidentiality.
 3. By contrast, an attorney may not ethically accept a deposit for advances for costs and expenses from a client by credit card because the attorney must deposit such advances into a client trust account and cannot do so initially because they are paid through an account that is subject to invasion.

**AUTHORITIES
INTERPRETED:**

Rules 1-320, 3-100, 3-700, 4-100, and 4-200 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068.

STATEMENT OF FACTS

Attorney desires to accept payments and deposits from her clients by credit card for (1) earned fees, (2) fees not yet earned, and (3) advances for costs and expenses. Attorney intends to absorb the service charge debited by the credit card issuer, which would accordingly result in reducing the amount netted.

DISCUSSION

1. An Attorney May Ethically Accept Payment of Earned Fees by Credit Card.

The first question is whether an attorney may ethically accept payment of earned fees from a client by credit card.^{1/}

By way of background, a typical transaction involving a credit card issued by a bank operates as follows: "Issuing banks are members of [various] . . . not-for-profit associations of member banks that operate a worldwide communication system for financial transfers using credit cards. Issuing banks issue credit cards to consumers, enabling those consumers to make credit-card purchases at participating businesses. To accept credit cards, businesses must open an account with a merchant bank. Merchant banks, like issuing banks, are members of [the

^{1/} It should be noted that "earned fees" include fees paid pursuant to a "classic 'retainer fee' arrangement. A retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he [or she] actually performs any services for the client." (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4.)

same not-for-profit associations], but merchant banks have accounts with businesses, not consumers. Once a business is electronically connected with a merchant bank, it can accept a consumer's credit card by processing the credit card through a point-of-sale terminal provided to it by the merchant bank. If the merchant bank approves the sale, it immediately credits the business for the amount of the consumer's purchase. The merchant bank then transmits the information regarding the sale to [the not-for-profit association in question], who in turn forward[s] the information to the bank that issued the card to the consumer who made the purchase. If the issuing bank approves the sale, it notifies [the not-for-profit association] and then pays the merchant bank at the end of the business day. The issuing bank carries the debt until the cardholder pays the bill."^{2/} From all that appears, credit card issuers deposit funds on use of a credit card into the merchant account established for that purpose at the merchant bank; the merchant bank may invade the funds via chargebacks, that is, the imposition of debits, in the event that the credit card holder disputes the charge. Whether and, if so, under what conditions a merchant account might be rendered *not* subject to invasion is unknown to the Committee. But to the extent that a merchant account *is* subject to invasion, it is not, and cannot be deemed, a client trust account.^{3/}

More than 25 years ago, in California State Bar Formal Opn. No. 1980-53, the Committee opined that an attorney may ethically charge interest on past due receivables from a client, provided that the client gives his or her informed consent in advance. In the course of its analysis, the Committee stated: "The Committee [sic] on Ethics and Professional Responsibility of the American Bar Association initially concluded that use of credit cards for payment of legal fees was unprofessional because it was 'wrong' to put professional services in the same category as 'sales of merchandise and sales of nonprofessional services,' especially when all credit card publicity was directed to such sales. (ABA Committee on Ethics and Prof. Responsibility, informal opn. No. 1120 (1969).) The Committee reiterated that this conclusion applied even when the law firm agreed not to display promotional material and where collection of accounts by the banks was without recourse. (See ABA Committee on Ethics and Prof. Responsibility, informal opn. No. 1176 (1971).) [¶] However, upon adoption of the Code of Professional Responsibility by virtually all fifty states, the American Bar Association Committee on Ethics and Professional Responsibility overruled the latter two decisions and approved use of credit cards subject to [various] conditions for services actually rendered." (Cal. State Bar Formal Opn. No. 1980-53.)

In California State Bar Formal Opn. No. 1980-53, the Committee did not resolve the question whether an attorney may ethically accept payment of earned fees from a client by credit card.

The Committee is now of the opinion that the question should be answered in the affirmative. An attorney may ethically accept payment of earned fees by check or cash. By parity, an attorney may do the same by credit card. To be sure, a generation ago, the "use of credit cards for payment of legal fees" was deemed "unprofessional." (ABA Committee on Ethics and Prof. Responsibility, Informal Opn. No. 1120 (1969).) But for many years, that has not been the case.^{4/}

Although the Committee is of the opinion that an attorney may ethically accept payment of earned fees from a client by credit card, in doing so, the attorney must nevertheless be careful to comply with various ethical obligations.

^{2/} *United States v. Ismoila* (5th Cir. 1996) 100 F.3d 380, 385-386. The law governing credit card transactions is largely based on individual contracts between credit card issuers, credit card holders, and others, and not on general statutory provisions. (See Maggs, *Regulating Electronic Commerce* (2002) 50 Am. J. Comp. L. 665, 678 ["Private contracts rather than legislative enactments establish most of the rights and duties of cardholders, card issuers, and merchants."].) As a result, the specifics of credit card transactions vary greatly the one from the other.

^{3/} See *F.T.C. v. Overseas Unlimited Agency, Inc.* (9th Cir. 1989) 873 F.2d 1233, 1233-1234. By parity, to the extent that a merchant account is *not* subject to invasion, it may be a client trust account.

^{4/} See, e.g., State Bar Policy Statement on Use of Credit Cards for Payment of Legal Services and Expenses (Feb. 11, 1975); San Diego County Bar Association Formal Opn. Nos. 1972-10, 1972-13, & 1974-6; Bar Association of San Francisco Formal Opn. No. 1970-1; cf. ABA Formal Opn. No. 00-419 (2000) (withdrawing Informal Opn. Nos. 1120 and 1176); Colorado Bar Association Formal Ethics Opn. No. 99 (1997); Mass. Bar. Association Ethics Opn. 78-11 (1978); New Mexico State Bar Association Advisory Opn. 2000-1 (2000); North Carolina State Bar Formal Ethics Opn. 97-9 (1998).

For example, an attorney must discharge his or her duty of confidentiality to clients under Business and Professions Code section 6068, subdivision (e), and under rule 3-100 of the Rules of Professional Conduct of the State Bar of California.⁵⁷ Credit card issuers require a description on the credit card charge slip of the goods or services provided. In furnishing such a description, the attorney may not disclose confidential information without the client's informed consent.⁶⁷ To that end, the description should be general in nature, such as "for professional services rendered."

By contrast, an attorney does not implicate his or her duty not to charge the client an unconscionable fee in violation of rule 4-200 simply by accepting payment of earned fees from a client by credit card. To be sure, by accepting such payment, the attorney allows the client to subject him- or herself to interest and late charges imposed by the credit card issuer. There are many credit card issuers; each may set its own interest rates and late charges separately from the rest, and in addition, each may set interest rates and late charges separately for various classes of holders.⁷⁷ If the attorney were attempting to subject the client to interest and late charges, the attorney would be ethically obligated to obtain the client's informed consent and comply with applicable law broadly defined,⁸⁷ including the prohibition of rule 4-200 against unconscionability. But the attorney is subject to no such obligation if the client chooses to subject him- or herself to interest and late charges imposed by the credit card issuer. The attorney may choose to advise the client that the client's credit card issuer sets interest rates and late charges and that the client would do well to determine such rates and charges before using the credit card, but is not ethically obligated to do so.

Likewise, an attorney does not implicate his or her duty not to share fees with a non-attorney in violation of rule 1-320 simply by accepting payment of earned fees from a client by credit card and thereby making a payment to the credit card issuer through a debit of a service charge. The purpose of rule 1-320 is "to protect the integrity of the attorney-client relationship, to prevent control over the services rendered by attorneys from being shifted to lay persons, and to ensure that the best interests of the client remain paramount."⁹⁷ A service-charge debit, which amounts to the attorney's payment for a convenient method of receiving funds owed the attorney, does not frustrate the purpose of rule 1-320, and for that reason does not come within the rule's proscription.

It follows that Attorney in the Statement of Facts may ethically accept payment of earned fees from her clients by credit card. Attorney may also ethically absorb the service charge debited by the credit card issuer. But as noted above, Attorney would have to be careful to discharge her duty of confidentiality to her clients.

2. An Attorney May Ethically Accept a Deposit for Fees Not Yet Earned by Credit Card.

The second question is whether an attorney may ethically accept a deposit for fees not yet earned from a client by credit card.

At the outset, the Committee is of the opinion that just as the former hostility to the "unprofessional" use of credit cards for payment of legal fees does not justify a conclusion that an attorney may not ethically accept payment of earned fees from a client by credit card, neither does it justify such a conclusion with respect to accepting a deposit for fees not yet earned—so long as the deposit, as will be explained, does not include advances for costs and expenses.

⁵⁷ Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State of California.

⁶⁷ Cf. *Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1005 (stating that even the fact that an attorney is representing a client may fall within the protection of the attorney-client privilege).

⁷⁷ See footnote 1, *ante*.

⁸⁷ California State Bar Formal Opn. No. 1980-53; see Bar Association of San Francisco Formal Opn. No. 1970-1; Los Angeles County Bar Association Formal Opn. Nos. 370 (1978), 374 (1978) & 499 (1999); San Diego County Bar Association Formal Opn. No. 1983-1; cf. ABA Formal Opn. No. 388 (1974).

⁹⁷ Los Angeles County Bar Association Formal Opn. No. 510 (2003); accord, *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1418; see, e.g., *Gassman v. State Bar* (1976) 18 Cal.3d 125, 132.

Under rule 4-100, an attorney is subject to an ethical obligation to “deposit[]” “[a]ll funds received or held for the benefit of clients” into a client trust account. (Rule 4-100(A).) This ethical obligation is not qualified, conditional, or avoidable, and therefore does not allow the attorney, with or without the client’s consent, to take such actions as depositing client funds initially into an account other than a client trust account and subsequently transferring them into a client trust account if or when reasonable or practicable. The attorney is subject to a concomitant ethical obligation, which is “both personal and nondelegable,” to “take reasonable care to protect client funds” deposited into a client trust account.^{10/}

Under rule 4-100, as it has been construed by the courts, an attorney is ethically permitted, but not required, to deposit fees not yet earned into a client trust account.^{11/}

If an attorney were required to deposit fees not yet earned into a client trust account, the attorney would not be permitted to accept such a deposit from a client by credit card *to the extent that the credit card issuer deposits funds into a merchant account that is subject to invasion*. That is because to that extent: (1) the credit card issuer deposits the funds into a merchant account; (2) the attorney, however, must deposit the funds into a client trust account; (3) the attorney must take reasonable care to protect the funds deposited into a client trust account; and (4) before the attorney can assert control over the funds, the merchant bank may invade the funds in the merchant account, thereby putting the funds at risk beyond the attorney’s protection. As a consequence, the attorney could not immediately deposit such fees into a client trust account or take care to protect them, but would have to cede control to the merchant bank, at least initially.^{12/}

^{10/} California State Bar Formal Opn. No. 2005-169.

^{11/} *Securities and Exchange Commission v. Interlink Data Network of Los Angeles, Inc.* (9th Cir. 1996) 77 F.3d 1201, 1205-1207 (semble); see generally Vapnek et al., *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2006) §§ 9:107-9:108.

In *Baranowski v. State Bar*, *supra*, 24 Cal.3d at page 164, the Supreme Court left open the question whether the substantially identical predecessor of rule 4-100 required an attorney to deposit payment of fees not yet earned—so-called advance fees—into a client trust account. The Supreme Court has not given an answer in any subsequent decision. But it has nevertheless effectively articulated its views. “Although expressly not deciding the advance fee issue in *Baranowski*, . . . the Cal. Supreme Court did approve current [Rule] 4-100 as proposed by the State Bar. In recommending the current Rule, the State Bar specifically noted that it did not intend the Rule to require advance fees to be deposited in a client’s trust account: [¶] ‘The concept of including in paragraph (4-100)(A) a requirement that “advances for fees” be placed in the client trust account was considered but rejected because it is believed that such a provision is unworkable in light of the realities of the practice of law.’ [In the Matter of the Proposed Amendments to the Rules of Professional Conduct, California Supreme Court Case No. Bar Misc. 5626, at ‘Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation,’ at Memorandum, Dec. 1987, p. 42 (parentheses added)]” (Vapnek et al., *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2006) § 9:107.2.) In approving rule 4-100 as recommended, the Supreme Court allowed an attorney not to deposit advance fees into a client trust account. Since that time, it has “declined to approve a proposed rule amendment requiring advance fees to be paid into client trust accounts.” (*Ibid.*; see “Request for Approval of Amendments to Rules 3-700 and 4-100 of the Rules of Professional Conduct,” No. S029270 (May 11, 1995).)

It may be noted that, in *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, 7, the Appellate Department of the Superior Court construed rule 4-100 to require an attorney to deposit payment of fees not yet earned into a client trust account, but did so without consideration of the Supreme Court’s action, and inaction, with respect to rule 4-100 following *Baranowski*.

^{12/} Of course, even though funds deposited into a client trust account are not subject to invasion as are funds deposited into a merchant account, they may suffer a similar adverse effect in their amount or availability as a result of acts or omissions by the attorney—who might, for example, erroneously issue a check against insufficient funds in the client trust account—or by others—including the bank, which might, for instance, mispost a check intended for deposit into the client trust account. The possibility of such adverse effects, however, does not release the attorney from the ethical obligation to deposit funds into a client trust account. Neither does that possibility allow the attorney to deposit funds into an account other than a client trust account if he or she is ethically obligated to deposit them into a client trust account.

But because an attorney need not deposit fees not yet earned into a client trust account, the attorney may accept such a deposit by credit card, resulting in a deposit into a merchant account.

The fact that an attorney need not deposit fees not yet earned into a client trust account does not mean that, solely as a matter of prudence, the attorney should decline to do so. Upon termination of employment, an attorney is subject to an ethical obligation under rule 3-700(D)(2) to “[p]romptly refund any part of a fee paid in advance that has not been earned.” Failure to deposit such fees into a client trust account risks their unavailability at the time, if any, at which they must be refunded. After they are deposited in a merchant account by a credit card issuer, such fees may ethically be transferred into a client trust account. By means of such a transfer, an attorney would ensure their availability should he or she be required to refund any or all of them to the client. Although not ethically required to make a transfer of this sort, the attorney may consider doing so solely as a matter of prudence.

It follows that Attorney in the Statement of Facts may ethically accept a deposit for fees not yet earned from her clients by credit card. As stated above, she may also ethically absorb the service charge debited by the credit card issuer. But again, as stated above, she would have to be careful to discharge her duty of confidentiality to her clients.

3. An Attorney May Not Ethically Accept A Deposit for Advances for Costs and Expenses by Credit Card.

The third question is whether an attorney may ethically accept a deposit for advances for costs and expenses from a client by credit card.

Under rule 4-100, among the “funds received or held for the benefit of clients” that an attorney is ethically obligated to deposit into a client trust account are “advances for costs and expenses.” (Rule 4-100(A).)

Because an attorney must deposit advances for costs and expenses from a client into a client trust account, he or she may not ethically accept such a deposit by credit card, as explained above, *to the extent that the credit card issuer deposits funds into a merchant account that is subject to invasion*. It follows that the attorney may not ethically accept any payment or deposit from a client by credit card, whether for earned fees or fees not yet earned, if the payment or deposit includes advances for costs and expenses.¹³⁷ The attorney, however, *may* accept reimbursement by credit card for costs and expenses already paid. By definition, reimbursement of costs and expenses already paid does not constitute an “advance” of such costs and expenses, and consequently it need not—and indeed may not—be deposited into a client trust account.

It follows that Attorney in the Statement of Facts may not ethically accept a deposit for advances for costs and expenses from her clients by credit card. She may, however, accept reimbursement by credit card of costs and expenses already paid.

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 Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

¹³⁷ See footnote 12, *ante*.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2007-173**

- ISSUES:**
1. May an attorney, consistent with ethical obligations, deposit a client's will or other testamentary documents with a private will depository, without the client's consent?
 2. May an attorney, consistent with ethical obligations, register a client's will or other testamentary documents with a private will registry, without the client's consent?

DIGEST: An attorney who retains a client's will or other estate planning documents on deposit may terminate the deposit in accord with the client's instructions and/or consent. If the attorney cannot locate the client, the attorney may only terminate the deposit pursuant to Probate Code section 700, et seq. An attorney may register certain identifying information about a client's will or other estate planning documents with a private will registry if the attorney can determine, based upon knowledge of the client, the client's matter and investigation of the will registry, that registration will not violate the attorney's fiduciary duties of confidentiality and competence.

AUTHORITIES

INTERPRETED: Rule 3-100 and 3-110 of the Rules of Professional Conduct of the State Bar of California

Business and Professions Code section 6068, subdivision (a) and (e)

Evidence Code section 912(d)

Probate Code sections 700, et seq.

STATEMENT OF FACTS

In 1973, Attorney drafted a will for Client. At the time, Attorney and Client agreed that Attorney would retain possession of the executed original will. By 2003, Attorney is contemplating retirement and would like to terminate the deposit. However, Attorney has not heard from Client for 25 years, and recent efforts to locate the client have been unsuccessful. Attorney wants to ensure that Client can obtain access to his will at a future time or, in the event of his death, that the client's heirs can locate the will. Therefore, Attorney is considering either depositing the original will with a private will depository and/or registering certain information about the will with a private will registry. Attorney's file contains no notes regarding communications with Client, Attorney has limited recollection of Client, and has no independent recollection of any communications with Client.

BACKGROUND INFORMATION

Some lawyers who prepare wills or other estate planning documents retain the original executed documents on deposit for safe-keeping. Consequently, an attorney who is retiring or becomes unable to continue practicing law may have original wills and other estate planning documents in his or her possession. If the attorney can, with reasonable diligence, locate the former client, the attorney is ethically obligated to do so and to act in accordance with the client's lawful instructions regarding disposition of the documents. The more challenging issue is presented when the attorney cannot locate the former client.

There are two types of commercial enterprises that have recently started doing business nationally to address these issues: will depositories and will registries. A will depository is a private, online resource for locating, storing, and retrieving original wills. A will depository involves the actual delivery of a will to a central privately operated entity or person for safekeeping. For purposes of this opinion, a will registry is an online searchable database of vital information about a will, maintained by a private entity or person. The information stored in a registry would normally include the identity of the person making the will, the date the will was executed, the identity of the lawyer who drafted the will and the location of the will at the time of registration. Testamentary documents are not deposited with a will registry.

A California attorney with whom original estate planning documents have been deposited may terminate the deposit only as provided in Probate Code sections 700, et seq. Under Probate Code section 731, an attorney may terminate a deposit by: (a) personal delivery of the document to the depositor, (b) receiving a signed return receipt after mailing the document to the depositor, or (c) the method agreed on by the attorney and the depositor. Where the attorney mails notice to reclaim the document to the depositor's last known address and the depositor fails to reclaim the document within 90 days, the attorney may transfer all unclaimed documents to one other attorney. (Prob. Code § 732(b).) If, but only if, the attorney is deceased, lacks legal capacity, or is no longer an active member of the State Bar, the deposit may be terminated by transferring the document(s) to the clerk of the superior court of the county of the depositor's last known domicile. (Prob. Code § 732(c).)¹⁷ If the attorney uses the procedures outlined in sections 732(b) or (c), the attorney is required to provide notice to the State Bar. (Prob. Code § 733.)

If the attorney knows the depositor has died, the attorney may terminate the deposit by transferring the documents to the appointed personal representative or trustee; or, if no representative has been appointed, the attorney must file the will with the superior court and provide a copy to the named representative if that person can be located, or otherwise to a beneficiary. (Prob. Code §§ 734, 8200.) If the attorney is deceased or lacks legal capacity, a deposit may be terminated by another lawyer in the attorney's firm, or by a non-lawyer employee, or by a conservator or attorney in fact acting under a durable power of attorney, or by the attorney's personal representative. (Prob. Code § 735.)

In this opinion, the Committee addresses the ethical implications presented when, unable to locate the client after a reasonably diligent search, an attorney seeks to (a) deposit estate planning documents with a commercial will depository without the client's express consent or (b) register information about the client's will with a private registry without the client's express consent.

DISCUSSION

1. May an attorney ethically deposit a will with a commercial will depository without the client's express consent?

Because the Probate Code provides the exclusive legal means for disposition of wills and other estate planning documents held on deposit by an attorney, an attorney may not ethically deposit estate planning documents with a private will depository absent consent of the client pursuant to Probate Code section 731(c). To do so would, at the very least, constitute a violation of Business and Professions Code section 6068(a), which requires lawyers to support the laws of this state, and the prohibition against intentionally or recklessly failing to perform legal services with competence. (See Rule of Professional Conduct 3-110.)²¹

The attorney in the hypothetical has no record or recollection of obtaining the client's consent in 1973 to use a will depository and cannot now locate the client to obtain consent. Thus, the attorney in the hypothetical may not ethically deposit the former client's will with a will depository.

¹⁷ If the clerk receives a document under Probate Code § 732, the recorded document is confidential and available only to the maker (Government Code § 26810(c)). After the maker's death, as evidenced by a certified copy of the death certificate, it becomes available as a public record.

²¹ Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

2. May an attorney ethically register a will with a commercial will registry without the client's express consent?

The essential ethical question is whether the registration of information regarding a client's will with a will registry breaches the attorney's duty to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. (Bus. & Prof. Code § 6068(e)(1); rule 3-100.) While the ethical duty of confidentiality is broader than the evidentiary attorney-client privilege, a review of case authorities interpreting the attorney-client privilege may be instructive in evaluating the breadth and scope of the duty of confidentiality. We, therefore, begin with an analysis of the privilege issues.

The statute regarding waiver of privileges, Evidence Code section 912(d), provides: "A disclosure in confidence of a communication that is protected by a privilege provided by section 954 (lawyer-client privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege."

Pursuant to this exception and depending on the particular circumstances, a lawyer may disclose privileged client information when the lawyer reasonably believes doing so will advance the client's interests, or is appropriate in furtherance of the representation, unless the client instructs otherwise. (See, Evid. Code § 912(d); *McKesson HBOC, Inc v. Superior Court* (2004) 115 Cal.App.4th 1229 [9 Cal.Rptr.3d 812].)

Registering a client's will with a registry would typically require disclosure of the testator's name, the present location of the will, the name of the attorney who drafted the will, and often the date of execution of the will as well.

A client's identity and address is not typically considered privileged information.³⁷ There are, however, several important (but narrowly construed) exceptions to this rule. Specifically, if disclosure of a client's identity would itself reveal the nature of the client's legal problems for which the attorney was hired, the client's name may be privileged information.⁴¹

Disclosure to the will registry of the client's name as well as information about the documents being registered inescapably reveals the nature of the matter for which the lawyer was retained. However, unlike other cases that have held the identity of the client to be privileged (where criminal conduct or private medical issues are at stake), the mere execution of testamentary documents may or may not be considered "private information."

When an attorney cannot locate a client, or determine whether the client is alive or deceased, providing general information to a will registry could in some circumstances effectively advance the client's interests by making important information available to potential heirs, beneficiaries, and other interested persons. On the other hand, circumstances could exist such that providing even this general information would be detrimental to the client's interests (e.g., where the disclosure of the existence of a will could breed anxiety or concern among potential heirs). Thus, application of Business and Professions Code section 6068(e) is likely to depend upon the facts and circumstances of the particular situation.

Like the evidentiary attorney-client privilege, the attorney's ethical duty of confidentiality is considered fundamental to the attorney-client relationship, involving policies of paramount importance. However, as noted, while the attorney-client evidentiary privilege covers only confidential communications between the attorney and the client, the broader ethical duty of confidentiality requires the protection of all client secrets. In this regard, it is important to keep in mind that the decision whether to apply the privilege is made by judges or other arbiters in judicial or quasi-judicial proceedings. The duty of confidentiality is necessarily broader because it applies in non-litigation contexts where judicial protection may not be present. (Bus. & Prof. Code § 6068(e); rule 3-100; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621, n.5, [120 Cal.Rptr. 253]; Cal. State Bar Formal Opn. 1993-133.)

³⁷ See *People v. Chapman* (1984) 36 Cal.3d 98, 110 [201 Cal.Rptr. 628] ("[it] is well established that the attorney-client privilege, designed to protect communications between them, does not ordinarily protect the client's identity." [Citations.]")

⁴¹ See *Rosso, Johnson, Rosso & Ebersold v. Superior Court (Fitzpatrick-Potter)* (1987) 191 Cal.App.3d 1514 [237 Cal.Rptr 242] (disclosure of clients' identities under the circumstances would reveal private information regarding clients' medical condition).

State Bar ethics opinions have defined the ethical duty of confidentiality as encompassing not only privileged communications, but also any information related to the representation of a client, from any source, which a client does not want disclosed or the disclosure of which would be embarrassing or likely be detrimental to the client. (See Cal. State Bar Formal Opn. Nos. 1976-37, 1980-52, 1981-58, 1986-87; see also Los Angeles County Bar Association Formal Opn. Nos. 386 (1980), 436 (1985), and 456 (1990).)

The identity of a client who has executed a will, trust or other legal document may or may not be protected by the evidentiary attorney-client privilege. The client's identity may nevertheless be a client confidence or secret protected by Business and Professions Code section 6068, subdivision (e) and rule 3-100, or be deemed confidential information protected by the client's Constitutional right of privacy.⁵¹ In any event, if information about the will or its execution would be embarrassing to the client or likely be detrimental to the client's interests, the attorney (absent express consent of the client) should protect the confidentiality of that information.

Thus, before registering testamentary documents with a will registry without client consent, a lawyer must determine, from a review of the client's file and any independent recollection of communications with the client, whether registration would further the client's objectives as communicated to the attorney during the course of the attorney-client relationship or whether registration would breach the duty of confidentiality either because the client would want to keep the information private, or registration would embarrass the client or likely be detrimental to the client's interests. In the context of the hypothetical facts presented in this opinion, the attorney must also consider the effect of the substantial lapse of time on whether disclosure would be embarrassing or likely be detrimental to the client. As there can be no bright-line rule applicable in all circumstances, the attorney who registers a will without the client's express consent acts at his or her peril.

In addition, an attorney who seeks to register a will or other testamentary document, with or without client consent, has a duty to act competently. In that regard, an attorney registering information about a testamentary document has a duty to determine whether the registry adequately protects the interests of the client and otherwise complies with California law. (See, e.g., Civil Code § 1798.82, et seq., pertaining to system security breaches of businesses that own or maintain computerized personal information.)

Because the attorney in the hypothetical has no recollection of communications with Client, and no notes that refresh his recollection regarding Client's wishes, the Committee believes that the attorney does not have sufficient information to conclude that publication of information in a will registry would advance Client's interests. In the same vein, attorney appears to lack sufficient information to conclude that Client would consent to dissemination of information to a will registry, or that publication of the information in a will registry would not be embarrassing or likely be detrimental to Client. Thus, without some basis for making the relevant determinations, the attorney in the hypothetical could not ethically disseminate information about that client to the will registry.

CONCLUSION

In light of the statutory scheme set forth in Probate Code sections 700, et seq., a California attorney may not, in conformance with his or her duties to the client, deposit a will with a will depository without the client's express consent. A California attorney may not ethically use a will registry without the client's express consent unless the attorney concludes, based upon a review of the file, any recollection of communications with the client, and all of the relevant facts and circumstances, that disclosure would further the client's interest and would not be embarrassing or likely be detrimental to the client. An attorney who registers a will without a client's express consent acts at his or her peril.

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 Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

⁵¹ In *Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1006 [101 Cal.Rptr.2d 341], the court stated that "clients routinely exercise their right to consult with counsel, seeking to obtain advice on a host of matters that they reasonably expect to remain private." The court gave several examples, including: "a family member who desired to rewrite a will may also consult an attorney with the expectation that the consultation itself, as well as the matters discussed therein, will remain confidential until such time as the consultation is disclosed to third parties."

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2007-174**

ISSUE: Is an attorney ethically obligated, upon termination of employment, promptly to release to a client, at the client's request, (1) an electronic version of e-mail correspondence, (2) an electronic version of the pleadings, (3) an electronic version of discovery requests and responses, (4) an electronic deposition and exhibit database, and/or (5) an electronic version of transactional documents?

DIGEST: An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items too come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.

AUTHORITIES INTERPRETED: Rule 3-700(D) of the Rules of Professional Conduct of the State Bar of California.
Business and Professions Code section 6068, subdivision (e)(1).

STATEMENT OF FACTS

Attorney A was originally retained by Client to represent Client in negotiating and executing an agreement with BiotechCorp, under which Client entrusted a secret invention to BiotechCorp for development, patenting, and commercialization in exchange for payment of royalties. In the course of the representation, Attorney A prepared transactional documents, including the agreement itself, using a commonly available word-processing computer program to create manipulable files, and preserving such files in a readily searchable electronic document management system, in both final form and antecedent drafts. During the representation, Attorney A sent and received various e-mail correspondence.

Subsequently, Attorney A was retained by Client in a separate matter to file and prosecute an action on Client's behalf against Landlord relating to Landlord's breach of a lease to commercial premises occupied by Client. In the course of the representation, Attorney A prepared pleadings and discovery requests and responses, using the same commonly available word-processing computer program to create manipulable files, and preserving such files in the same readily-searchable electronic document management system, in both final form and antecedent drafts. Attorney A also created an electronic database, which is electronically searchable by word queries and other queries, containing deposition transcripts and exhibits. During this representation too, Attorney A sent and received various e-mail correspondence.

Client has now chosen to terminate Attorney A's employment and to employ Attorney B in Attorney A's place. Client has requested Attorney A to release to Client all of Client's papers and property. In particular, Client has requested an electronic version of the pleadings in the action against Landlord, expressing an intent to make them available to Attorney B for reuse, by electronic "cutting" and "pasting," in drafting new documents in the litigation as it progresses, and an electronic version of the discovery requests and responses, expressing the same intent. Client has also requested the electronic deposition and exhibit database, expressing an intent to make it available to Attorney B for use in discovery, trial preparation, and trial itself. Client has additionally requested an electronic version of the transactional documents in the BiotechCorp matter, expressing an intent to make them available to Attorney B to safeguard Client's interests as questions or disputes arise concerning the scope and purpose of the agreement, including specifically BiotechCorp's obligation to pay royalties under licensing agreements. As to each representation, Client has requested an electronic version of the e-mail correspondence, for ease of searching its contents. Attorney A has refused to release any of these items, claiming that each contains metadata reflecting confidential information belonging to other clients. Attorney A has made no assertion in support of his refusal based on the attorney work product doctrine of section 2018.010 et seq. of the Code of Civil Procedure.^{1/}

DISCUSSION

1. **Rule 3-700(D) of the Rules of Professional Conduct Obligates an Attorney Promptly to Release Client Papers and Property, at the Client's Request, Upon Termination of Employment**

Rule 3-700(D) of the Rules of Professional Conduct ("rule 3-700(D)") provides that, "[s]ubject to any protective order or non-disclosure agreement," an attorney "whose employment has terminated shall . . . promptly release to the client, at the request of the client, all the client papers and property. 'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not . . ." (Rule 3-700(D) & (D)(1).)^{2/} The attorney must make such release of client papers and property at no cost to the client.^{3/}

Rule 3-700(D)'s scope is evident. Among "[c]lient papers and property," the rule includes certain items coming within listed categories and also any other items that are "reasonably necessary to the client's representation." (Rule 3-700(D)(1).)

^{1/} In this opinion, we do not address ownership or entitlement issues that would arise if a person or entity other than Client had asserted a right to the papers and property.

^{2/} Accord, e.g., State Bar Formal Opn. No. 1994-134 (quoting rule 3-700(D)(1)); State Bar Formal Opn. No. 1992-127 (same; construing "client papers and property" within the meaning of rule 3-700(D)(1) to include the "entire contents of the file"); cf. Los Angeles County Bar Association Formal Opn. No. 362 (1976) (construing the predecessor to rule 3-700(D)(1), in accordance with an earlier opinion of the same local bar association, in line with rule 3-700(D)(1)); San Diego County Bar Association Formal Opn. No. 2001-1 (concluding that, under rule 3-700(D), an attorney may not withhold client papers and property for nonpayment of the attorney's bill).

^{3/} Although the attorney must release client papers and property to the client at no cost, the attorney may enter into an agreement providing that the client will pay for the cost of making a copy of such papers and property for the attorney to retain in his or her own files. See Rule 3-700, Discussion (stating that rule 3-700(D) is "not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, *nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding*"). (Rule 3-700(D), italics added.)

Rule 3-700(D)'s purposes include respecting the client's ownership interest in his or her papers and property and preventing "reasonably foreseeable prejudice" to the client's interests generally. (Rule 3-700(A)(2).)^{4f}

The obligation imposed on an attorney by rule 3-700(D) with respect to the prompt release of a client's papers and property, at the client's request, upon termination of employment, and the scope and purpose of that obligation, are consistent with the principles that a client may terminate an attorney's employment freely,^{5f} and that the attorney owes a duty of loyalty to the client, albeit limited, even after termination of employment.^{6f}

In imposing on an attorney an obligation promptly to release a client's papers and property, at the client's request, upon termination of employment, rule 3-700(D) expressly extends its coverage to "all the client papers and property." (Rule 3-700(D), italics added.) It does not draw any distinction based on the *form* of any item, whether electronic or non-electronic. Neither can it reasonably be read to do so. That is because "client papers and property" is not a "static" "concept," but rather one whose "content will change depending upon circumstances,"^{7f} covering items in electronic form as well as non-electronic form.

2. Rule 3-700(D) Obligates an Attorney, Upon Termination of Employment, Promptly to Release to a Client, at the Client's Request, (1) An Existing Electronic Version of E-mail Correspondence, (2) Existing Electronic Versions of the Pleadings, (3) Existing Electronic Versions of Discovery Requests and Responses, (4) Existing Electronic Deposition and Exhibit Databases, and (5) Existing Electronic Versions of Transactional Documents

The question before the Committee is whether, upon termination of employment, an attorney is obligated by rule 3-700(D)(1) promptly to release to a client, at the client's request, (1) an electronic version of e-mail correspondence, (2) electronic versions of the pleadings, (3) electronic versions of discovery requests and responses, (4) electronic deposition and exhibit databases, and (5) electronic versions of transactional documents.

As for the *nature* of the items in question: Among the "client papers and property" included in rule 3-700(D)(1), correspondence and pleadings, respectively, come within the listed category of "correspondence" and "pleadings" expressly. Likewise, deposition and exhibit databases come within the listed categories of "deposition transcripts" and "exhibits" by implication, inasmuch as deposition and exhibit databases, by definition, contain deposition transcripts and exhibits. The same, however, cannot be said of discovery requests and responses or transactional documents, which do not correspond to any listed category either expressly or by implication. Nevertheless, discovery requests and responses and transactional documents comprise items that are "reasonably necessary to the client's representation." (Rule 3-700(D)(1).) An item is "reasonably necessary to the client's representation" if it is "generated during the representation" for continuing use therein.^{8f} Discovery requests and responses satisfy this definition, since they may give rise to *further* discovery requests and responses and may also be included as exhibits to motions and as exhibits at trial. Transactional documents satisfy this definition as well, since they are used for

^{4f} See State Bar Formal Opn. No. 1994-134 (implying that "client papers and property" within the meaning of rule 3-700(D)(1) is not a "static" "concept," and stating that its "content will change depending upon circumstances"; "the attorney's ethical responsibilities do not turn on the physical contents of the client's 'case file,' but rather on the ethical obligation . . . to act reasonably to avoid reasonably foreseeable prejudice to his or her former client"); see also Bar Association of San Francisco Formal Opn. No. 1996-1 (reaffirming Bar Association of San Francisco Formal Opn. No. 1990-1, which implies that "client papers and property" within the meaning of rule 3-700(D)(1) includes any item whose release is necessary to avoid reasonably foreseeable prejudice to the client's interests).

^{5f} See, e.g., *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790 [100 Cal.Rptr. 385]; *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999, 1005 [124 Cal.Rptr. 668].

^{6f} See, e.g., *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 155-156 [172 Cal.Rptr. 478]; *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574 [15 P.2d 505].

^{7f} State Bar Formal Opn. No. 1994-134.

^{8f} State Bar Formal Opn. No. 1992-127.

purposes including monitoring performance under the original agreement underlying the transaction in question and any related agreement between the parties to that transaction and third parties who subsequently become involved.

As for the *form* of the items in question, that proves immaterial. As explained, rule 3-700(D)(1) expressly extends its coverage to “all the client papers and property,” without distinction based on the form of any item, whether electronic or non-electronic.

In light of the foregoing, the Committee answers the question before it in the affirmative, concluding that, upon termination of employment, an attorney is indeed obligated by rule 3-700(D)(1) promptly to release to a client, at the client’s request, (1) an electronic version of e-mail correspondence, (2) electronic versions of the pleadings, (3) electronic versions of discovery requests and responses, (4) electronic deposition and exhibit databases, and (5) electronic versions of transactional documents.^{9/}

In concluding as it does, the Committee believes that, at least as a general matter, an attorney’s obligation under rule 3-700(D)(1) to release items in electronic form is not subject to a “balancing test,” under which the client’s “need for the . . . electronic [versions]” must be weighed against the “expense (both money and time) to the attorney of having to copy and/or transfer . . . electronic [versions].”^{10/} The Committee discerns no support for the applicability of a “balancing test” either in the rule itself, which is silent about the issue, or in any extrinsic evidence bearing on the rule’s meaning.^{11/} In addition, the Committee notes that an attorney usually has it within his or her power to avoid incurring any substantial expense in releasing electronic versions of the client’s papers and property by putting in place any one of many commonly available electronic filing systems.^{12/}

The Committee also believes that whenever an attorney is obligated by rule 3-700(D)(1) to release items in electronic form, the attorney is not obligated to release them in *any application* (e.g., *Word (.doc)* or *WordPerfect (.wpd)*) other than the application in which the attorney possesses them. That is because the attorney’s obligation is to *release* items, not to *create* them or to *change* the application.^{13/}

^{9/} Cf. New Hampshire Bar Association Ethics Committee Opn. No. 2005-06/3 (2006) (concluding that, under the New Hampshire Rules of Professional Conduct, the “contents of a client’s file would necessarily include both paper and electronic forms of communications, documents and other records pertaining to the client”); Illinois State Bar Association Advisory Opn. No. 01-01 (2001) (concluding to similar effect under the Illinois Rules of Professional Conduct).

^{10/} Orange County Bar Association Formal Opn. No. 2005-01.

^{11/} Cf. New Hampshire Bar Association Ethics Committee Opn. No. 2005-06/3, *supra* (concluding that, under the New Hampshire Rules of Professional Conduct, an attorney has an “obligation to provide all files pertinent to representation of [a] client,” in “both paper and electronic forms,” “regardless of the burden that it might impose upon the [attorney] to do so”); but cf. Illinois State Bar Association Advisory Opn. No. 01-01, *supra* (concluding that, under the Illinois Rules of Professional Conduct, an attorney, upon termination of employment, may not refuse a request by a client for electronic versions of client file materials when, among other things, electronic versions can be retrieved easily).

^{12/} Cf. New Hampshire Bar Association Ethics Committee Opn. No. 2005-06/3, *supra* (stating that any “burden” that might be imposed upon an attorney to “provide all files pertinent to representation of [a] client . . . can be managed . . . through computer word search functions or other means that are routinely used for discovery or other purposes”).

^{13/} Cf. *Jicarilla Apache Nation v. United States* (Fed.Cl. 2004) 60 Fed.Cl. 413, 416 (approving and entering a confidentiality agreement and protective order providing for, among other things, the production of “electronic records” “in the format in which [the producing] party routinely uses or stores them”); Cal. Rules of Court 342(i) (providing that, “[u]pon request, a party must within 3 days provide to any other party or the court an electronic version of its separate statement” of undisputed material facts in support of its motion for summary judgment and/or summary adjudication, but is “not required to create an electronic version or any new version of any document for the purpose of transmission to the requesting party”).

3. Rule 3-700(D) Obligates Attorney A, Upon Termination of Employment, Promptly to Release to Client, at Client's Request, (1) the Existing Electronic Version of E-mail Correspondence, (2) the Existing Electronic Version of the Pleadings, (3) the Existing Electronic Version of Discovery Requests and Responses, (4) the Existing Electronic Deposition and Exhibit Database, and (5) the Existing Electronic Version of Transactional Documents, But Only After Attorney A Takes Reasonable Steps to Strip Such Items of Metadata Reflecting Confidential Information Belonging to Other Clients

It follows from the foregoing that, upon termination of employment, Attorney A is presumptively obligated by rule 3-700(D)(1) promptly to release to Client, at Client's request, an electronic version of e-mail correspondence, an electronic version of the pleadings, an electronic version of discovery requests and responses, and the electronic deposition and exhibit database, all in Client's action against Landlord, and also an electronic version of the transactional documents in the BiotechCorp matter.

Attorney A's presumptive obligation under rule 3-700(D), however, must be considered in light of Attorney A's claim that each of the electronic items in question contains metadata reflecting confidential information belonging to other clients. That is because an attorney is obligated under subdivision (e)(1) of section 6068 of the Business and Professions Code to protect *each* client's confidential information. Under the compulsion of that obligation, Attorney A would have to take reasonable steps to strip any metadata reflecting confidential information belonging to other clients from any of the electronic items prior to releasing them to Client.^{14/} Inasmuch as Attorney A has not invoked the attorney work product doctrine, that doctrine is not implicated on the facts presented.

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 Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

^{14/} Cf. Illinois State Bar Association Advisory Opn. No. 01-01, *supra* (concluding that, under the Illinois Rules of Professional Conduct, an attorney, upon termination of employment, may not refuse a request by a client for electronic versions of client file materials when, among other things, electronic versions can be retrieved without disclosing confidential information belonging to other clients).