

**RECENT DEVELOPMENTS AFFECTING  
THE LAW OF LAWYERS**

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State Bar of California Annual Meeting  
September 2008

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## **I. CONFLICTS OF INTEREST/DISQUALIFICATION/WAIVER**

**STYLES v. MUMBERT (2008) 164 CAL.APP. 4TH 1163**

### **Fiduciary duties to former clients**

Styles sued Mumbert and Mumbert retained Attorney Pagkas to represent him in the lawsuit. The superior court later entered a default judgment against Mumbert for \$730,456, due to, among other things, Mumbert's failure to respond to written discovery requests. After Pagkas admitted on the record that he did not have time to devote to Mumbert's case, Mumbert obtained a new attorney who appealed the default judgment. Mumbert also filed a malpractice lawsuit against Pagkas. In a novel attempt to reduce his liability in the malpractice action, Pagkas purchased an assignment of the default judgment from Styles, his former client's adversary. Pagkas then filed a motion to substitute himself into the appeal as the respondent in place of Styles, asserting that he and Mumbert were already adverse parties because of the pending malpractice suit.

The Court of Appeal denied Pagkas' substitution motion and awarded sanctions against him. Finding that Pagkas' conduct made a mockery of the Rules of Professional Conduct, the court held that the substitution would violate Pagkas' ongoing fiduciary duty of confidentiality owed to Mumbert, his former client, as well as his duty as former counsel not to act in any way that would injure Mumbert in matters involving such former representation.

## **SHARP v. NEXT ENTERTAINMENT, INC. (2008) 163 CAL.APP.4TH 410**

### **Current client conflict**

### **Third-party payor conflict**

### **Waiver of conflict**

The Rothner firm represented the Writer's Guild of America (Guild). To support its unionizing efforts, the Guild met with employees of reality television shows, several of whom eventually agreed to be named as plaintiffs in two class actions against reality television production companies and television networks, alleging violation of wage and hour laws. The Rothner firm also represented the plaintiffs in the class actions, and the Guild paid the firm's fees. The Rothner firm continued representing the Guild and Rothner partner Segall served as the Guild's general counsel. The Guild saw its participation as supporting unionization of reality television writers. The plaintiffs acting as class representatives in the class actions signed written conflict of interest waivers acknowledging that the Rothner firm represented the Guild in other matters, and received written disclosures regarding the third-party payor conflict of interest, acknowledging that the Guild was paying all litigation fees and costs. The Guild further stipulated that it would not make any decisions regarding litigation strategy, nor did the Guild control the litigation.

The Rothner firm expended over 1,000 hours on the class actions. During discovery, several plaintiffs asserted the common interest privilege, asserting a common interest with the Guild that precluded discovery of the plaintiffs' otherwise privileged communications with the Guild. Defendants moved to disqualify the Rothner firm from representation of the plaintiffs, and also moved to disqualify the individual plaintiffs from serving as class representatives. Defendants alleged that the Rothner firm had conflicts of interest because of a divergence in the goals of the Guild, which sought to further its unionizing activities, and the plaintiffs in the class actions, who sought to compel compliance with wage and hour law. Defendants asserted the Rothner firm violated Rule of Professional Conduct 3-310. Defendants further asserted that each individual class member was required to consent to the firm's representation.

The superior court rejected the defendants' motions to disqualify the firm, but did disqualify those plaintiff class representatives who had testified that they were motivated in part by a desire to promote unionization.

The Court of Appeal affirmed. Noting that motions to disqualify were subject to great tactical abuse, the court found that Rule of Professional Conduct 3-310 did not require the disqualification of the Rothner firm. It further found effective the plaintiffs' waivers of the third-party payor conflict of interest. It found no evidence of any interference with the objectives of the lawsuits by the Guild. In the absence of any California rule or statute on point, it relied upon Comment 25 to ABA Model Rule 1.7, and deemed it impractical to require that each plaintiff class member sign a conflict waiver.

## UMG RECORDINGS v. MYSPACE (C.D. CAL. 2007) 526 F.SUPP.2D 1046

### Future conflict waivers

### Conflict of interest

### Screening

O'Melveny & Myers (OMM) represented UMG Recordings in the *In Re Napster* litigation and a related Department of Justice (DOJ) inquiry. Napster filed bankruptcy, but the case continued as to Hummer Winblad and Bertelsman (major investors in Napster). In that case, Hummer asserted in an affirmative defense that UMG misused copyrights and deceived the DOJ. A judge ordered the production of documents, which UMG argued were protected by the attorney-client privilege, pursuant to the crime-fraud exception. After an appeal and settlement, the documents were not produced and DOJ dropped its inquiry. In connection with OMM's representation of UMG, OMM obtained a waiver of future conflicts of interest, and UMG consented to permit OMM to represent others against UMG if the matters were not substantially related to the Hummer matter. UMG further agreed that OMM could represent another client against UMG in litigation involving infringement of IP rights, but OMM agreed to institute an ethical wall or screen, involving segregation of paper and computer access, notice and postings.

Later OMM represented MySpace in a case against UMG. OMM gave notice that an ethical wall was put into place. In that case, MySpace asserted a defense of misuse of copyrights by UMG. MySpace issued an interrogatory regarding UMG's alleged misuse of copyright, then a document request. A second document request, drafted by associated counsel Susman, but signed by OMM lawyers, sought discovery of documents OMM possessed from the prior representation of UMG. At this point, UMG demanded that OMM withdraw from the representation of MySpace. OMM contended that it had screened the matters as agreed with UMG. MySpace then withdrew the document request, dropped the defense, and promised that as long as OMM remained counsel, MySpace would not assert that particular defense.

The court determined that the relationship between the first and second representations was substantial, under all the factors set out in *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445. As for the ethical wall, the court observed that the California Supreme Court had hinted it might approve screening in *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, but when it had the opportunity to do so in *City and County of San Francisco v. Cobra Solutions Inc.* (2006) 38 Cal.4th 839, it rejected screening, disqualifying the entire City Attorney's Office. Accordingly, the court determined that the screen put into place by OMM did not cure the conflict of interest. MySpace's withdrawal of its misuse of copyright defense, however, did remove the conflict of interest. The court further found no indication of breach in the ethical wall. The court found the assertion that Susman drafted the critical defense suspicious. The court further found that the advance waiver of future conflicts of interest effective, and put UMG on notice of the risk that OMM might sue UMG in the future. The court ordered OMM to pay UMG's fees in connection with the dispute in part because of the marginal positions OMM maintained, including taking positions about the waiver that were inconsistent with the duty of loyalty

and entirely unreasonable, and persisting in those positions all the way through the hearing. The court also criticized MySpace's/OMM's withdrawal of the document request and later assertion that it would re-propound the same request through Susman. The court affirmed MySpace's right to choice of counsel as well and allowed OMM to remain MySpace's counsel under condition that the defense not be asserted.

**MED-TRANS CORPORATION, INC. v. CITY OF CALIFORNIA CITY  
(2007) 156 CAL.APP.4TH 655**

**Duty of confidentiality**

**Conflict of interest**

**Motion to disqualify**

Defendant City moved to disqualify the lawyer for plaintiff Med-Trans, an air ambulance service, which had sued for fraud and breach of contract. City sought disqualification after plaintiff pleaded that City had failed to disclose it would be difficult to obtain an ambulance service license in Kern County, a fact that City contended the lawyer had learned during a meeting with a City official, prior to his engagement by Med-Trans. City argued that the meeting constituted an initial consultation between the lawyer and a prospective client, City, giving rise to a duty of confidentiality and a conflict of interest. Finding that a substantial relationship existed between the subject matter of the meeting and the present lawsuit, the superior court granted the motion to disqualify. The Court of Appeal reversed. The court cited Rule of Professional Conduct 3-310(E) which states that an attorney may not "without informed written consent of the client or former client" accept adverse employment "where, by reason of the representation of the client or former client, the [attorney] has obtained confidential information material to the employment." The court noted that no attorney-client relationship had resulted from the meeting and, therefore, held the burden was on the moving party to prove that the lawyer had acquired confidential information during the meeting. Because City failed to meet this burden, the lawyer should not have been disqualified.

**AMERICAN BAR ASSOCIATION FORMAL OPINION 08-450**

**Duty of confidentiality for multiple clients in same or related matters**

When an attorney represents multiple clients, either in the same or related matters, the attorney is required by ABA Model Rule 1.6 to protect the confidentiality of "information related to the representation" belonging to each client. On the other hand, the attorney is required by ABA Model Rule 1.4(b) to provide information to a client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." (The opinion is set in the context of a hypothetical in which an attorney is retained by an insurer to defend both an insured employer and an employee whose conduct is in question and for which the employer may vicariously be liable.)

A conflict of interest arises when the attorney recognizes the necessity of revealing confidential information relating to one client in order to provide another client with reasonably necessary information at the same time that the attorney recognizes the necessity of *not* revealing such information.

The first point in time at which the attorney must address the potential problem of confidential information involving multiple clients is when the attorney undertakes the joint representation, when the attorney can best clarify both the scope of the representation and the clients' intentions concerning the duty of confidentiality.

The second point is when the attorney realizes that disclosure of one client's confidential information is reasonably necessary for another client. Absent the existence of an express agreement among the attorney and the clients capable of satisfying the "informed consent" standard of Model Rule 1.6(a)—the existence of which is highly doubtful—the attorney is prohibited by Rule 1.6 from disclosing one client's confidential information to another client, even when reasonably necessary, unless such disclosure is permitted under an exception to Rule 1.6. In the event the attorney is prohibited from disclosing the confidential information of one client that is reasonably necessary for another client, the attorney is required to withdraw from representing the latter client. Depending on the circumstances, the attorney may be required to withdraw from representing the former client as well.

## **II. DUTY OF CONFIDENTIALITY**

### **RICO v. MITSUBISHI (2007) 42 CAL.4TH 807**

#### **Inadvertent disclosure of privileged material**

Mitsubishi filed a motion to disqualify plaintiff Rico's counsel and experts based upon plaintiff's counsel "inadvertent" receipt and subsequent review, dissemination, and use of a privileged 12-page annotated document summarizing defense attorneys' communications with defense experts. Mitsubishi claimed that plaintiff's counsel had taken the document from defense counsel's files during a deposition at the office of plaintiff's counsel but plaintiff's counsel claimed that the court reporter had given him the document. Upon review of the document, which was dated but not otherwise labeled, plaintiff's counsel knew that it related to defendants' case, that defense counsel did not intend to produce it, and that it would be a powerful impeachment document. Without notifying defense counsel that he had the document, plaintiff's counsel copied and studied the document, gave copies to cocounsel and his experts, and discussed the document with each of plaintiff's experts. He then used the document to cross-examine one of the defense experts at his deposition. When defense counsel realized plaintiff's counsel had the document, they demanded the return of all duplicates and moved to disqualify plaintiff's legal team and experts. The superior court granted the motion.

The California Supreme Court affirmed. The court adopted the standard of *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, holding that plaintiff's counsel should have examined the document only enough to ascertain that it was privileged and should then should have immediately notified defense counsel that he possessed the document. The court further held that, while mere exposure to an adversary's confidences is insufficient to warrant disqualification, disqualification was appropriate in this case because of the unmitigable damage caused by plaintiff's counsel dissemination and use of the document.

### **III. ATTORNEY-CLIENT PRIVILEGE**

#### **ZURICH AMERICAN INSURANCE CO. v. SUPERIOR COURT (WATT INDUSTRIES, INC.) (2007) 155 CAL.APP.4TH 1485**

##### **Attorney-client privilege**

##### **Disclosure within corporation**

Plaintiff Watt Industries sued defendant Zurich American Ins. Co. for bad faith refusal to defend and to provide coverage in underlying litigation. Watt sought production of documents from Zurich's claims file, and Zurich objected on the ground of the attorney-client privilege. A discovery referee conducted an in camera review of the documents and confirmed that many of them referred to litigation plans and strategy, but nevertheless recommended that they be produced because he believed the attorney-client privilege in California was limited to communications by counsel to the client, or by the client to counsel, and did not protect internal documents that transmitted the legal advice received by the company to others within the organization. The superior court adopted the recommendation and directed Zurich to produce the documents. Zurich petitioned for relief and the court of appeal issued a writ of mandate, vacating the lower court's order. The appellate court ruled that the trial court and referee had taken too narrow a view of the privilege. It reasoned that Evidence Code § 952, which defines "confidential communication" for purposes of the privilege, contemplates that such communications may be shared with persons "to whom disclosure is reasonably necessary for the transmission of the information" for "the accomplishment of the purpose for which the lawyer is consulted." Thus, the court concluded, it was "neither practical nor efficient to require that each corporate employee charged with implementing legal advice" must meet directly with counsel to the corporation. Dissemination of the lawyer's advice to others within the corporation would not automatically waive the privilege. It remanded the case and directed the trial court to determine if the privilege had been waived by disclosure to unnecessary third persons within the corporation.

**COSTCO WHOLESALE CORPORATION v. SUPERIOR COURT (RANDALL)  
(2008) 161 CAL.APP.4TH 488**

**Attorney-client privilege**

**Factual information not protected**

Costco retained the Sheppard Mullin law firm to undertake a factual investigation and legal analysis regarding the classification of managers in its warehouse stores. A lawyer conducted confidential interviews with managers, gathered information from the company, performed legal research, and produced a 22-page letter to Costco's in-house counsel. In a subsequent class action alleging that Costco had misclassified employees and unlawfully failed to pay overtime, plaintiffs sought production of the letter which Costco had listed on a privilege log. They argued Costco had waived the attorney-client privilege and work-product doctrine for the advice given by Sheppard Mullin when the company asserted that it "reasonably expected" that managers regularly exercised their independent judgment and discretion, based on interviews with managers. This, plaintiffs contended, placed Costco's knowledge and expectations at issue.

The superior court ordered Costco to produce the letter to a referee for in camera review. Costco did not object to the disclosure of the name and address of the sender and the recipient or the descriptive titles of the jobs discussed, but it objected to disclosure of any other information in the letter. The referee recommended production of a redacted version of the letter, stating that factual information was not protected because it came from non-privileged documents and interviews of corporate employees which "are generally not protected." The referee concluded that the factual information was obtained by the outside lawyer "in her role as fact-finder rather than attorney, a role that could have been performed by a non-attorney." Costco sought a writ but the Court of Appeal denied the requested relief on the ground that Costco had not met its burden to show that release of the redacted document would cause irreparable harm. Costco had the burden of showing not only that the letter was privileged but also that extraordinary relief was warranted, which required it to prove that the trial court's ruling was both clearly erroneous as a matter of law and substantially prejudiced it. As redacted, however, the letter did not communicate any legal opinion or advice, did not reveal the lawyer's mental processes or impressions, and did not infringe upon the attorney-client relationship. The unredacted portions of the letter contained no information that could "irreparably harm" Costco.

#### **IV. DISCIPLINE/SANCTIONS**

##### **QUALCOMM, INC. v. BROADCOM CORP. (2007) 2007 U.S. DIST. LEXIS 82965**

###### **Duty of candor**

###### **Suppression of evidence**

Qualcomm sued Broadcom, alleging patent infringement by Broadcom. Broadcom contended that Qualcomm participated as a member of the Joint Video Team (JVT).

In January 2007, a jury returned a verdict of non-infringement in favor of Broadcom. In August, 2007, the court determined that Qualcomm had committed misconduct during the litigation by failing to produce 46,000 emails and digital documents reflecting Qualcomm's involvement in the JVT until after the January trial. District Court Judge Brewster referred the sanctions motion to Magistrate Judge Major who directed Qualcomm to pay Broadcom over \$8 million in sanctions. In her ruling, Magistrate Judge Major found that Qualcomm lawyers chose not to look in the correct locations for the email and documents, accepted unsubstantiated assurances from the client that its search was sufficient, ignored warning signs that the document search and production were inadequate, and failed to press Qualcomm employees for the truth. Qualcomm lawyers then made numerous false statements and arguments to the court and jury. Magistrate Judge Major issued a ruling referring six Qualcomm attorneys to the State Bar to determine whether they had violated Rule of Professional Conduct 5-200, which prohibits misleading a judge or jury with false statements, and Rule 5-220, which prohibits the suppression of evidence that an attorney or client had a legal obligation to reveal to the court.

##### **CHANDLER v. STATE BAR OF CALIFORNIA (2008) 2008 WL 901865**

###### **Enforcement of Mandatory Fee Arbitration Act awards**

An arbitration award was entered against an attorney, and in favor of his former client, under the Mandatory Fee Arbitration Act (MFAA), Business and Professions Code § 6200 et seq. The arbitration award became binding against the attorney because he failed to seek trial de novo within 30 days of the mailing of the notice of the award. When the attorney failed to satisfy the arbitration award after it became final, the State Bar commenced proceedings to enforce the award, as it was required by the MFAA, and eventually declared the attorney involuntarily inactive.

After the State Bar commenced proceedings to enforce the arbitration award against the attorney, but before it declared him involuntarily inactive, the attorney sued the Bar in federal district court, seeking relief including unspecified damages and an injunction appointing a monitor to oversee the Bar. On the Bar's motion, the court dismissed the action. The court concluded that damages against the Bar were precluded by the Eleventh Amendment to the United States Constitution without the Bar's consent under *Hirsh v. Justices of the Supreme Court of California* (9th Cir. 1995) 67 F.3d 708. The court likewise concluded that an injunction was precluded by the abstention doctrine of *Younger v. Harris*

(1971) 401 U.S. 37: Absent extraordinary circumstances, a federal district court must abstain and dismiss an action where (1) state judicial proceedings are ongoing, (2) important state interests are involved, and (3) the plaintiff has an adequate opportunity to litigate federal claims in the state proceedings; in this case, no extraordinary circumstances were present and all three conditions were satisfied: (1) the Bar proceedings are judicial proceedings and were ongoing at the time the attorney filed the action; (2) the proceedings implicate important state interests in enforcing an arbitration award against an attorney; and (3) the attorney has the opportunity to litigate his federal claims before the California Supreme Court.

**SHELLER v. SUPERIOR COURT (2008) 158 CAL.APP.4TH 1697**

**Attorney's fees**

**Formal reprimand**

**Revocation of *pro hac vice* status and disqualification**

The superior court granted an application by an out-of-state attorney to appear *pro hac vice* for plaintiffs in a class action. The attorney sent a communication to prospective class members that contained at least one misrepresentation. The superior court formally reprimanded the attorney for his misrepresentation and, on the defendant's motion, ordered the attorney to pay the attorney's fees the defendant incurred relating to the misrepresentation as a condition of retaining his *pro hac vice* status.

Following the out-of-state attorney's appeal and what it deemed to be his petition for writ of mandate, the Court of Appeal concluded that the superior court lacked authority to formally reprimand the attorney: the superior court had no jurisdiction to impose a similar sanction on a California attorney. The Court of Appeal also concluded that the superior court lacked authority to order the attorney to pay the defendant's attorney's fees: the superior court had no statutory basis for such an order, and could not have imposed a similar order on a California attorney. But, by contrast, the Court of Appeal concluded that the superior court possessed authority to revoke an attorney's *pro hac vice* status: since the superior court had inherent power to disqualify a California attorney, and since revocation of an out-of-state attorney's *pro hac vice* status is effectively a disqualification of the attorney, the superior court has inherent power to revoke an attorney's *pro hac vice* status when that attorney engages in conduct that would be sufficient to disqualify a California attorney. The Court of Appeal reversed the attorney's fees order and caused issuance of a writ of mandate vacating the formal reprimand and remanding the case to the superior court to determine whether to revoke the attorney's *pro hac vice* status.

**GADDA v. STATE BAR OF CALIFORNIA (2007) 511 F.3D 933**

**Collection of disbarment costs**

A disbarred attorney sued the State Bar in federal district court. The disbarred attorney challenged, among other things, the constitutional validity of the Bar's authority to collect

disbarment costs from him under Business and Professions Code § 6086.10. On the Bar's motion, the court dismissed the disbarred attorney's complaint with prejudice.

On the disbarred attorney's appeal, the Court of Appeals affirmed. The disbarred attorney claimed that, in seeking to collect disbarment costs, the State Bar was unconstitutionally applying an amendment to § 6086.10 retroactively. At the time the underlying order for disbarment costs was entered, § 6086.10 did not provide a method for enforcement, but provided only that such costs were to be collected from a disbarred attorney upon application for readmission. Subsequently, § 6086.10 was amended to permit enforcement of a disbarment costs order in a money judgment. The Bar argued that the amendment merely provided a means to collect a debt that the disbarred attorney already owed and that, in seeking to collect such debt, it was not applying the amendment retroactively. The court disagreed, concluding that, in attempting to collect the owed disbarment costs, the Bar was applying the amendment retroactively. But the court also concluded that the amendment was clearly intended to be apply retroactively to disbarred attorneys. The court went on to conclude that the purpose of the amendment was to recover disbarment costs owed by disbarred attorneys who did not seek readmission. Thereupon, the court concluded that, in light of the amendment's purpose, the amendment's retroactive application did violate either the Ex Post Facto Clause of Art. I, § 10, Cl. 1 of the United States Constitution or the Due Process Clause of the Fourteenth Amendment: The amendment's retroactive application did not violate the Ex Post Facto Clause because the amendment's purpose was not punitive; and it did not violate the Due Process Clause because it was rationally related to that purpose and that purpose was legitimate.

**IN THE MATTER OF DONALD J. LOFTUS (STATE BAR CT. REVIEW DEPT. 2007)  
[WWW.CALBAR.CA.GOV/CALBAR/PDFS/SBC/OPINIONS/LOFTUSOPINION.DOC]**

### **Moral turpitude in secretly recording conversation**

#### **Harassing a former juror**

Tamara Lukeman suffered severe brain damage following treatment by Thomas Marcisz, M.D., a neurologist, and subsequent treatment by Gabrielle Morris, M.D., another neurologist. Lukeman retained Donald J. Loftus to bring a medical malpractice action. Loftus contacted Dr. Morris and led her to believe that he was seeking information from her as a potential witness—failing to inquire whether she was represented by counsel and failing to inform her that she would be a defendant in any medical malpractice action he might bring. Following the initial contact, Loftus secretly recorded a telephone conversation with Dr. Morris. Loftus brought a medical malpractice action against Dr. Marcisz and a separate medical malpractice action against Dr. Morris, both in superior court. The court consolidated the two actions for jury trial, in the course of which Loftus lied more than once about his secret recording of the telephone conversation. The trial resulted in verdicts for Drs. Marcisz and Morris. Following the jury's discharge, Loftus contacted former juror Stuart Shafer to investigate whether the court had committed prejudicial error when it informed the jury at one point during trial that they would not have jury duty on a specified day, that it was not the court's obligation to inform their employers of the fact, and that they were "on the honor system" in that regard. Loftus started out cordially in his questioning of

former juror Shafer, became adversarial when Shafer declined to sign an affidavit relating to the court's "honor system" statement, and ended up threatening to write a letter to Shafer's employer disclosing that Shafer did not have jury duty on the day in question, a day Shafer admitted he did not go to work.

The Office of Trial Counsel of the State Bar filed a Notice of Disciplinary Charges against Loftus charging him with, among other things, violating Business and Professions Code § 6106 for committing acts involving moral turpitude by secretly recording his telephone conversation with Dr. Morris, and violating Rule of Professional Conduct 5-320(D) for harassing former juror Shafer. The Hearing Department found Loftus culpable for harassing a former juror but not for secretly recording a conversation, and recommended as discipline that he be suspended from the practice of law for one year, that the execution of that suspension be stayed, and that he be placed on probation for 18 months.

After both Loftus and the Office of Trial Counsel sought review, the Review Department adopted the Hearing Department's culpability finding that Loftus harassed former juror Shafer, and made its own culpability finding that he secretly recorded his telephone conversation with Dr. Morris. In addition, it amended the disciplinary recommendation to include an actual period of suspension of 90 days, finding that: (1) Loftus' harassing of former juror Shafer was "intolerable" and "damages the integrity of the legal system . . . and discourages the public from participating in a vital function of the administration of justice"; (2) his lying about his secret recording of the telephone conversation on more than one occasion was "troubl[ing]"; and (3) he failed to "fully appreciate[] the extent of his wrongdoing."

## **V. LEGAL MALPRACTICE**

### **NIELSEN v. BECK (2008) 157 CAL.APP.4TH 1041**

#### **Legal malpractice**

#### **Statute of limitations**

Prior to this case, the California Supreme Court, in *Beal Bank SSB v. Arter & Hadden LLP* (2007) 42 Cal.4th 503, interpreted a provision of the statute of limitations for legal malpractice, Code of Civil Procedure § 340.6(a)(2), which tolls malpractice claims as long as "[t]he attorney continues to represent the [client] regarding the subject matter in which the alleged wrongful act or omission occurred." The court held that a law firm does not continue to represent the client so as to toll the statute when a lawyer leaves the firm and takes the client with him.

In this case, also applying the "continuous representation" rule, the Court of Appeal came to a different conclusion. Attorney Beck defended Robert and William Nielsen against a claim for unpaid rent until they became unhappy with his services and substituted in new counsel. After Beck turned over his file to the new lawyer and signed a substitution of attorney form in August 2004, Robert Nielsen telephoned Beck for advice on three occasions in September 2004, and Beck billed him for their conversations. On September 2, 2005, Nielsen sued

Beck for malpractice, and Beck moved for summary judgment on the ground the claim was barred by the one-year statute of limitations, based on his execution of the substitution of attorney form in August 2004. He contended he was not acting as Nielsen's lawyer after that date and only took his calls out of "professional courtesy." The Court of Appeal reversed summary judgment for Beck, noting that he had been paid for the calls, and held that a jury could find a continuing professional relationship.

**ZEVNIK v. SUPERIOR COURT (RAYONIER, INC.) (2008) 159 CAL.APP.4TH 76**

**Legal malpractice**

**Collateral estoppel**

Rayonier, Inc. and Southern Wood Piedmont Company sued lawyer Zevnik and his law firm in superior court for legal malpractice arising from concurrent representation of them and other companies as co-plaintiffs in a previous insurance coverage action. In the insurance coverage lawsuit, Rayonier and Southern Wood had moved to disqualify the lawyers from representing the other plaintiffs on the grounds of alleged conflicts of interest and violations of professional responsibilities. The superior court denied the motion to disqualify both for laches and also on the merits, finding that Rayonier and Southern Wood had failed to establish a basis for disqualification. The Court of Appeal affirmed on the basis of laches alone and did not reach the merits.

In the subsequent malpractice action, the lawyers moved for a determination that the ruling on the merits of the disqualification motion in the prior insurance coverage action had conclusively established facts for purposes of the malpractice claim and precluded any finding that they had breached a duty to Rayonier and Southern Wood. When their motion was denied, petitioners sought an extraordinary writ. The Court of Appeal denied the petition, holding that only the ground relied on by the appellate court in the prior action was laches.

**VI. PROSECUTOR RECUSAL**

**HOLLYWOOD v. SUPERIOR COURT (THE PEOPLE) (2008) 43 CAL.4TH 721**

**Conflict of interest**

**Disclosure of confidential information**

A prosecutor in a capital murder/kidnapping case in superior court became a consultant to a movie script writer. The prosecutor provided the writer with material from his files, including work product information. The prosecutor's stated interest was to help locate the defendant who was a fugitive. The prosecutor also provided information to *America's Most Wanted*, a television program. The defendant moved to disqualify the prosecutor and the entire district attorney's office for conflict of interest, claiming that the prosecutor (1)

disclosed confidential information, (2) interfered with a witness by telling him not to cooperate with the defendant, (3) cooperated in the distribution of *Alpha Dogs*, an inflammatory film, and (4) received incidental benefits from working with film makers.

The superior court denied defendant's motion to disqualify the prosecutor.

The Court of Appeal reversed, holding that the prosecutor should be disqualified due to a conflict of interest, but that the entire office need not be disqualified.

The California Supreme Court held that no disqualification was required, although the prosecutor could be disciplined by the State Bar, and may have committed misconduct by disclosing attorney-client privileged information. The disclosure did not require disqualification because it did not create any conflict of interest and did not create any prejudice to defendant or prevent defendant from having a fair trial. The court further observed that, although a prosecutor cannot manipulate the jury pool, a prosecutor can discuss information necessary to apprehend a fugitive, and noted that the superior court accepted the statement of the prosecutor that he was solely motivated by desire to apprehend the defendant, at that time a fugitive. The court observed that voir dire could be used to address any issues with the jury pool resulting from the movie, so that measures short of recusal would suffice to address any potential unfairness. Finally, the court observed that the prosecutor did not receive any benefits. Examining the totality of circumstances, the court held that disqualification of the prosecutor was not required.

## **HARAGUCHI v. SUPERIOR COURT (THE PEOPLE) (2008) 43 CAL.4TH 706**

### **Conflict of interest**

A prosecutor wrote a novel about a prosecutor and a case involving a rapist. The defendant alleged the novel was similar to the case in which the prosecutor was prosecuting him, and moved to disqualify the prosecutor and her entire office due to conflict of interest.

The superior court characterized any similarities between the book and the ongoing case as a coincidence, and held that the prosecutor's recusal was not required.

The Court of Appeal disqualified the prosecutor, but held that the entire office need not be disqualified.

The California Supreme Court addressed whether the prosecutor should be disqualified from the case based on a disabling conflict of interest, and whether her interest in promoting her book adversely impacted her duty to handle the case competently and to seek justice and possibly to negotiate a plea agreement.

Reviewing for abuse of discretion, the Supreme Court examined the superior court's application of Penal Code Section § 1424, which requires that a prosecutor to be recused if (1) a conflict of interest exists so that there is a possibility of less than impartial treatment; and (2) the conflict would render it unlikely the defendant would receive a fair trial. The

unseemliness of the conduct or appearance of improper conduct is not enough to warrant disqualification; an actual likelihood of unfair treatment must exist.

The Supreme Court held that the prosecutor need not be disqualified. It found that there was a substantial basis for the superior court's findings that book was not similar to the underlying case, and that the book was not timed to coincide with the case. Further, it found that there was no reason to think the views of the fictional character depicted in the novel represented the views of the prosecutor, stating that, "Protagonists in a novel need not be paragons of impartiality to permit their creators to fairly prosecute criminals." It also found that, because the prosecutor had minimal financial incentive, given the modest sales of the novel, there was no "likelihood" of unfair treatment of the defendant. Other methods would suffice to address any possible unfairness, such as a sequestered voir dire. That a prosecutor may pursue a writing career does not alone create a conflict with the public interest and disqualify her, absent proof her writings create a material conflict in a particular case. The court did warn prosecutors to be careful about writing that touches on pending matters, which may compromise their ability to carry out the duty to represent the people and seek justice impartially. Similarly, it cautioned that defense counsel too must take pains to ensure that any literary endeavors do not interfere with delivery of the effective representation essential to the criminal justice system.

#### **PEOPLE v. SUPERIOR CT. (HUMBERTO S.) (2008) 43 CAL.4TH 737**

##### **Conflict of Interest**

The Los Angeles County District Attorney's Office (LADAO) represented the People in the prosecution of Humberto S., a minor charged with molestation of his niece Samantha F. Humberto sought the niece's medical and psychotherapy records through issuance of subpoenas to medical providers. The People objected to production of the records. The mother of Samantha F. objected to the production, but her father consented, and the court eventually ordered the records produced, over strenuous objections from prosecutors, including a request for the appointment of a guardian *ad litem*. Humberto then moved to recuse the LADAO in its entirety, asserting that its representation of the interests of three different parties (Samantha F., her mother, and the custodian of records for a psychiatrist) created a conflict of interest so great as to make a fair trial unlikely.

The superior court granted the motion to recuse the prosecutor participating in the motions regarding production of the records, and some LADAO supervisors, but did not disqualify the entire office.

The Court of Appeal denied the People's petition for a writ, holding that the prosecutors demonstrated a "one sided perspective" in their representation of the victim's privacy interests, and indicating that the prosecutors should have ceased their efforts after the father gave consent to disclosure of the records.

The California Supreme Court reversed, holding that the prosecutors' good faith assertion of non-frivolous legal arguments did not warrant recusal. The court further held that, although prosecutors are not entitled to submit argument in certain third-party discovery proceedings,

the superior court is permitted to allow prosecutors to participate in third-party discovery issues. The superior court had sought the prosecutors' input in the present case. In addition, the Supreme Court held that such participation did not constitute the literal representation of third-party interests, even when the prosecution's interests are aligned with third parties. Recusal is proper where there is true third-party representation, which creates a potential for the prosecutor to elevate the interests of the third party over the interest in impartial justice. The court held, however, that such divided loyalty did not exist under the circumstances of this case, and that there was no reason to believe that the prosecutor would elevate the victim's interests over the prosecutor's duty to act fairly and impartially.

## VII. ATTORNEY'S FEES

### ***TAHERI LAW GROUP v. EVANS* (2008) 160 CAL.APP.4TH 482**

#### **Intentional interference with prospective economic advantage**

#### **Anti-SLAPP motions and attorney's fees**

Taheri, Client's former attorney, sued Evans, Client's new attorney, for intentional interference with prospective economic advantage and intentional interference with business relations. Taheri claimed Evans knew of the economic relationship between Taheri and Client and induced Client to terminate his relationship with Taheri by promising "unobtainable and ethically improper litigation objectives." Evans filed an anti-SLAPP motion *in propria persona*, asserting that the claims arose out of petitioning activity and that his actions were protected by the litigation privilege. The superior court granted Evans' anti-SLAPP motion and awarded Evans attorney's fees for time he spent on the motion.

Taheri appealed, asserting that the anti-SLAPP statute was not applicable because Evans' conduct fell within the commercial-speech exemption of Code of Civil Procedure § 425.17. The Court of Appeal affirmed in part, holding that while, technically, Evans' advice to Taheri's Client regarding the pending litigation might fall within the commercial-speech exemption, the circumstances were fundamentally different from the "commercial disputes" the Legislature intended to exempt from the anti-SLAPP statute and the exemption was therefore not applicable. The court noted, however, that lawyers were not categorically excluded from the commercial-speech exemption, which might apply in certain circumstances, such as a "massive advertising campaign" divorced from individualized legal advice. The court reversed the attorney's fees award, holding that attorney's fees are not recoverable under the anti-SLAPP statute by a prevailing defendant who represented himself.

## **STROUD v. TUNZI (2008) 160 CAL.APP.4TH 377**

### **Contingent fee agreements**

#### **Material changes and Business and Professions Code § 6147**

After ruling against attorneys and in favor of a former client in the latter's action for declaratory relief based on a contingent fee agreement, the superior court ordered the attorneys to release funds that they wrongfully withheld from the former client in an attempt to recover attorney's fees.

On an appeal by the attorneys and their firm, the Court of Appeal affirmed. The attorneys claimed that the contingent fee agreement, which entitled them to recover \$75,000, was modified by two later handwritten documents signed by the former client, which purportedly entitled them to recover \$300,000. The court concluded that any material change to a contingent fee agreement, like that which would have been effected by the documents in question, had to comply with Business and Professions Code § 6147. The court also concluded that the documents did not comply with § 6147 because they (1) were not signed by the attorneys, (2) did not state the contingent rate and did not discuss costs, and (3) did not disclose that the fees were negotiable and were not established by law.

## **STATE BAR FORMAL OPINION 2008-175**

### **Duties of successor attorney to prior attorney as to contingency fee**

The State Bar's Committee on Professional Responsibility and Conduct (COPRAC) addressed the question of a successor attorney's ethical obligations when her client in a contingency fee matter instructs her not to notify prior counsel, who has a valid lien against the recovery, of the fact or the amount of a settlement.

COPRAC opined that, when a client instructs successor counsel not to disclose a settlement to a prior counsel with a valid lien, successor counsel must advise the client of the adverse ramifications of concealing the settlement, including a potential claim by prior counsel against the client. Should the client persist, successor counsel must nevertheless disclose the settlement to prior counsel.

COPRAC further opined that a lawyer may not reveal confidential client information except with the consent of the client or as authorized or required by the State Bar Act, the Rules of Professional Conduct, or other law. Disclosure is required by law to fulfill the attorney's fiduciary duties to prior counsel. Disclosure is also authorized by law to enable both attorneys to protect their right to recover fees.

COPRAC went on to opine that, while the successor attorney is both obligated and permitted to disclose the fact and the amount of the settlement to the prior attorney, successor counsel may not disclose anything more to the prior attorney, without the client's consent, including the client's demand that the fact and the amount of the settlement be concealed from the prior attorney.

COPRAC finally opined that, once prior counsel is notified, both attorneys must remain mindful of their duty of confidentiality to the client in attempting to reach an accord, amicably or through legal process, on the proper allocation of fees. Moreover, should the attorneys resort to legal process to resolve any dispute over allocation of the fee, successor counsel should provide the client with notice and an opportunity to participate. In any legal proceeding, the presiding officer will be in a position to limit the disclosure of confidential information appropriately.

## VII. MALICIOUS PROSECUTION

**ESTATE OF TUCKER v. INTERSCOPE RECORDS, INC.  
(9TH CIR. 2008) 515 F.3D 1019**

### **Malicious prosecution**

#### **Proof of malice**

Cynthia Tucker, a long-time civil rights activist, organized a coalition of prominent entertainers to lobby against the sale of “gangsta rap” music, with misogynist and violent lyrics, to young people. A focus of her campaign was Death Row Records and its distributor Interscope Records. Death Row and Interscope sued Tucker for tortious interference with contract, racketeering, extortion, and abuse of process, and after they dismissed their action without prejudice, Tucker and husband sued the record company, its distributor, Interscope’s lawyers from Paul, Hastings, Janofsky & Walker LLP, and Death Row’s lawyer, David Kenner, for malicious prosecution. (When Tucker died during the litigation, her estate was substituted.) The federal district court granted summary judgment for defendants, and the Court of Appeals affirmed except for the underlying claim for abuse of process.

In California, malicious prosecution requires proof that the underlying lawsuit (1) resulted in a favorable termination in the malicious prosecution plaintiff’s favor, (2) was brought without probable cause, and (3) was initiated with malice. *Zamos v. Stroud* (2004) 32 Cal.4th 958. Malice is present when the suit is instituted primarily for an improper purpose; it requires evidence of the subjective mental state of the party instituting the action and must be established by “other, additional evidence” apart from a lack of probable cause. Tucker argued it could be inferred from derogatory lyrics about her that Death Row and Interscope harbored hostility towards her and brought the lawsuit for the improper purpose of chilling her anti-rap campaign, but the Court of Appeals disagreed, holding that malice must be shown through evidence of the subjective mental state of the defendant in instituting the prior action, and the lawsuit predated the song lyrics. It also held that prosecuting the case for three years without seeking a hearing on the claims for injunctive relief and dismissing the suit without prejudice did not create triable issues of fact as to malice.

The Court of Appeals also affirmed summary judgment on the malicious prosecution claims against the lawyers, except one claim against Kenner, Death Row’s lawyer. A party’s malfeasance in initiating a lawsuit is not imputable to counsel, and Tucker’s suit required independent evidence that the lawyers acted with malice, which was lacking. The only

exception was her claim against Kenner based on his inclusion of an abuse of process claim against Tucker which lacked probable cause. This raised a triable issue of fact regarding his subjective state of mind when he filed the claim.

**SYCAMORE RIDGE APARTMENTS, LLC v. NAUMANN  
(2007) 157 CAL.APP.4TH 1385**

**Malicious prosecution**

**Anti-SLAPP motions**

This malicious prosecution case arose out of an underlying case filed on behalf of 145 tenants and/or employees against Sycamore, an apartment complex. The underlying complaint alleged 18 causes of action on behalf of all plaintiffs and claimed that Sycamore had failed to maintain the apartments in habitable condition and had engaged in unfair business practices with both tenants and employees. After Powell, who was one of the former tenants, voluntarily dismissed her claims against Sycamore, Sycamore sued Powell and the two law firms who were counsel of record at the time of the voluntary dismissal for malicious prosecution. Both law firm defendants filed anti-SLAPP motions. The superior court denied the anti-SLAPP motion filed by the firm that had filed the lawsuit and represented all plaintiffs from that time forward, but granted the anti-SLAPP motion filed by the firm that had associated into the case only shortly before Powell voluntarily dismissed her claims and had had no contact with Powell.

The Court of Appeal affirmed with respect to the first firm but reversed as to the second firm, holding that by becoming co-counsel, the associating firm became the proponent of all the individual plaintiffs' claims, many of which were untenable, and there was no evidence that the firm had taken immediate steps to dismiss the meritless claims.

**IX. CONTACT WITH REPRESENTED PARTY**

**MCMILLAN v. SHADOW RIDGE AT OAK PARK HOMEOWNER'S ASSN.  
(2008) \_\_\_ CAL.APP.4TH \_\_\_ [2008 DJDAR 12211]**

**Contact with a represented party**

**Motion to disqualify**

Denise McMillan brought an action in the superior court against Shadow Ridge at Oak Park Homeowner's Association, alleging that the Association failed to act in accordance with the terms and conditions of the covenants, conditions, and restrictions and breached its fiduciary duty to her. At the time she brought the action, McMillan was represented by counsel as attorney of record. Later, she removed her original counsel and substituted new counsel as attorney of record. Later still, she removed subsequent counsel and substituted herself as attorney of record in propria persona. As time for trial was fast approaching, the

Association's attorney placed a telephone call to McMillan and confirmed that she was representing herself as attorney of record. The Association's attorney did so because he must meet and confer to arrange for the depositions of McMillan's experts and had been informed by an attorney "on the sidelines," who was *not* McMillan's attorney of record, that he would be making limited appearances in deposition and other unspecified matters for McMillan. In the course of the telephone call in question, the Association's attorney discussed housekeeping matters and the possibility of settlement with McMillan. Within days, McMillan, through the "sidelines" attorney, moved to disqualify the Association's attorney based on his alleged violation of Rule of Professional Conduct 2-100, which prohibits an attorney's communication with a party known to be represented by another attorney without that other attorney's consent. The superior court denied the motion.

On appeal, the Court of Appeal affirmed. It concluded that a party could be represented by an attorney or could represent him- or herself—but could not *both* be represented *and also* self-represented. McMillan chose to represent herself, and thereby put herself out of the scope of Rule 2-100.

#### **MYERCHIN v. FAMILY BENEFITS, INC. (2008) 162 CAL.APP.4th 1526**

##### **Contact with a represented party**

##### **Motion to disqualify**

In this action, a plaintiff sought to avoid a settlement agreement he had entered into on the ground that opposing counsel had negotiated the settlement agreement with him directly, despite knowing that he was represented by counsel. After considering the evidence, the superior court held that opposing counsel's violation of Rule of Professional Conduct 2-100 did not support rescission of the settlement and dismissed plaintiff's lawsuit.

The Court of Appeal affirmed. It noted that there were competing public policies involved: On the one hand, there was the public policy of favoring preservation of the attorney-client relationship, which underlies Rule of Professional Conduct 2-100; on the other hand, there were the public policies favoring settlement and enforcement of contracts freely entered into. It also noted that the goal is to focus on identifying an appropriate remedy for any improper effect the attorney's violation of the Rule may have had, not to impose a penalty for the violation, which is the purview of the State Bar. Finding no evidence that the attorney's direct communication with plaintiff actually impaired plaintiff's ability to make a reasoned decision about the settlement, it held that the mere fact of an improper communication was insufficient to nullify the agreement. It then examined the facts to determine whether the settlement was induced by economic duress, undue influence, or actual or constructive fraud or whether it was unconscionable, and concluded that there was no such evidence.

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Ms. Buckner's comments do not represent the views of the government or the OCBA, but are solely her own personal views.

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