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Lawyering**

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## ANTI-SLAPP SPECIAL MOTIONS TO STRIKE

*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481 [156 Cal.Rptr.3d 492]

- **Action against attorney by clients alleging breach of fiduciary duty, breach of duty of loyalty, conversion and invasion of privacy arising out of attorney's actions in allegedly providing confidential documents from one set of clients to another, was not protected activity, and thus, not subject to dismissal under the anti-SLAPP statute.**

In *Castleman*, Attorney resigned from law firm, but prior to leaving, he reviewed confidential documents. He then provided them to a set of clients, Group A, engaged in litigation with a different group of clients (Group B) represented by the same firm. The lawyer representing Group B used the wrongfully disclosed confidential information to file a fraud action against the Group A clients. The resigning attorney testified in that action. The resigning attorney was then sued by Group A for breach of fiduciary duty, breach of the duty of loyalty, conversion, and invasion of privacy and he sought to dismiss the action with an anti-SLAPP motion.

The appellate court rejected his motion as he could not meet his burden under the first prong of the anti-SLAPP statute to show that his allegations arose out of protected activity in connection with the lawsuit of Group B brought against Group A. “A growing body of case law holds that actions based on an attorney’s breach of professional and ethical duties owed to a client are not SLAPP suits, even though protected litigation activity features prominently in the factual background.”

The foundation of the causes of action were that the attorney-defendant chose to align himself with his former clients Group A’s adversaries in direct opposition to their interests, thereby breaching the duties of loyalty and confidentiality he owed them as a result of his former attorney-client relationship with them. The complaint alleged that his conduct specifically breached Rule of Professional, rule 3-310 which concerns the representation of adverse interests of current or former clients. Given the nature of the allegations, the Court concluded that the challenged causes of action did not arise out of protected activity and the attorney-defendant could not meet his burden under the first prong of the anti-SLAPP statute.

*Chodos v. Cole* (2012) 210 Cal.App.4th 692 [148 Cal.Rptr.3d 451]

- **Attorney's cross complaint for indemnity against concurrent independent counsel alleged a breach of their professional duty against the client, and was therefore conceptually indistinguishable from the client's claim against the cross-complaining attorney for malpractice. Thus, the anti-SLAPP statute does not apply to a client's claim against attorneys for conflict of interest and negligence, and anti-SLAPP motion was improperly granted.**

In *Chodos*, Attorney A was sued by a former client for malpractice in connection with a marital dissolution settlement and related proceedings. Attorney A then cross-complained against another group of lawyers for indemnification on the ground that they had provided concurrent, independent advice to the Attorney A’s former client, which included reviewing Attorney A’s

work and recommending that the client accept a settlement, which the client now claimed were the result of Attorney A's malpractice. The other attorneys then filed an anti-SLAPP motion against the cross-complaining lawyer, Attorney A, which was granted by the trial court.

The Court of Appeal reversed, finding that Attorney A's claim for indemnity against independent counsel was a breach of their professional duty against the client. That claim, the court found was conceptually indistinguishable from the client's claim against the cross-complaining attorney for malpractice. Under *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, the Anti-SLAPP statute does not apply to a client's claim against attorneys for conflict of interest and negligence.

"Because a client's action against an attorney for a breach of duty by an act of malpractice is not subject to the anti-SLAPP statute, logically [Attorney A's cross-complaint]...based on a breach of duty by an act of malpractice likewise should not be subject to the anti-SLAPP statute. The conduct of the attorney for purposes of the anti-SLAPP statute is the same as to the case of a client's claim against a former attorney and as to the claim here for indemnification. If an act of malpractice by an attorney alleged by a client is not petitioning or free speech under the anti-SLAPP statute, the same act for the same client should not be deemed to be such petitioning or free speech solely because it is the basis of a claim for indemnity by someone other than the client."

***Malin v. Singer* (2013) 217 Cal. App.4th 1283 [159 Cal.Rptr.3d 292]**

- **Pre-litigation demand letter which did not threaten to disclose any alleged wrongdoing to any prosecuting agency or the public at large, was not criminal extortion as a matter of law, did not trigger the criminal activity exception to the anti-SLAPP statute's definition of protected activity, and was thus subject to dismissal under the anti-SLAPP statute when Plaintiff could not establish a probability of prevailing on the claim due to application of the litigation privilege.**

In *Malin*, an attorney sent a demand letter and proposed complaint. The recipient contended that the demand was extortionate because it contained a threat to disclose personal information, that he had misused company assets to set up "sexual liaisons with older men" including a judge. The demand letter included a photograph of the judge. The demand letter said:

I am litigation counsel to Shereene Arazm. I am writing to you with respect to your outrageous, malicious, wrongful and tortuous conduct.... Because Mr. Moore has also received a copy of the enclosed lawsuit, I have deliberately left blank spaces in portions of the Complaint dealing with your using company resources to arrange sexual liaisons with older men such as 'Uncle Jerry,' Judge [name redacted] a/k/a 'Dad' (see enclosed photo), and many others.

The recipient sued the attorney for civil extortion, civil rights violations and intentional and negligent infliction of emotional distress. He also alleged that his private communications and emails had been illegally obtained. The attorney filed an anti-SLAPP motion contending that his actions arose from protected activity. The recipient countered that the attorney's activities were

illegal, triggering the illegality (extortion) exception found in *Flatley v. Mauro* (2006) 39 Cal.4th 299. The attorney responded that *Flatley* only applies if the defendant concedes or the evidence conclusively establishes the allegedly protected speech or petitioning activity was illegal as a matter of law, and since they made no such concession, *Flatley* was not triggered. The Trial Court denied the motion, but the Court of Appeal reversed in part.

First, the Court of Appeal noted that a demand letter sent in anticipation of litigation was normally legitimate speech or petitioning activity protected by the anti-SLAPP statute. The Court then observed that attorneys are subject to the prohibitions against extortion as a matter of professional conduct, citing Rules of Professional Conduct, rule 5-100(A), which prohibits attorneys from threatening criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. However, this case was unlike *Flatley* and *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799, where the threats to report criminal conduct to enforcement agencies was coupled with a demand for money, which is criminal extortion as a matter of law. By contrast, the demand letter in this case did not threaten to disclose any alleged wrongdoing to any prosecuting agency or the public at large.

As well, the "secret" to be exposed was inextricably tied to the pending complaint. "The fact that the funds were allegedly used for a more provocative purpose does not make the threatened disclosure of that purpose during litigation extortion. We cannot conclude that the exposure of Malin's alleged activities would subject him to any more disgrace than the claim that he was an embezzler." Further, because the demand letter threatened the disclosure of the secret affecting a third party, who is not a relative or family member, does not constitute criminal extortion.

Thus, the demand was based on protected activity that triggered prong 1 of the anti-SLAPP statute. Turning to the second prong of §425.16, the Court found the recipient could not establish a probability of prevailing on the extortion claim, because it was barred by the litigation privilege, reversing the trial court's denial of the anti-SLAPP motion as to the extortion cause of action.

***Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799 [155 Cal.Rptr.3d 832]**

- **Pre-litigation letter by attorney to the opposing party threatening to report him for tax fraud unless the party repaid the lawyer's client's alleged damages was criminal extortion and not within the purview of the anti-SLAPP statute.**

In *Mendoza*, Plaintiff sued attorney for sending a pre-litigation letter to the opposing party threatening to report him to among others, the California Attorney General and the Los Angeles District Attorney, for tax fraud unless the party repaid the lawyer's client's alleged damages. The attorney defendant filed a special motion to dismiss the lawsuit under the anti-SLAPP statute because he claimed he did not list the specific crimes in the demand letter.

The Court of Appeal rejected denied the motion, finding the letter constituted a threat to accuse the party of a crime accompanied by a demand for payment of money to prevent an accusation from being made, thus constituting criminal extortion as a matter of law. Under the California Supreme Court's ruling in *Flatley v. Mauro* (2006) 39 Cal.4th 299, the anti-SLAPP statute does

not apply to criminal extortion. The rule excluding criminal extortion from the anti-SLAPP statute is a “bright line rule.” However, the court also noted that that rude and belligerent pre-litigation threats and demands without demanding money are not criminal extortion.

***Thayer v. Kabateck Brown Kellner LLP (2012) 207 Cal.App.4th 141 [143 Cal.Rptr.3d 17]***

- **Lawsuit by wife of law firm class action client against law firm for breach of fiduciary duty and fraud dismissed after anti-SLAPP motion granted, as plaintiff was not a firm client, and firm's legal services were thus protected activity under the Anti-SLAPP statute. Plaintiff could not thereafter show probability of prevailing in her suit, because she was neither a client nor a third party beneficiary to the legal services contract, the special motion to strike was properly granted.**

In *Thayer*, plaintiff’s husband entered into a class action settlement arising from the sale of fraudulent resort memberships. Her husband was unhappy with a 2.5% settlement reduction to pay for a fraud fund to be used to support a related criminal prosecution. The plaintiff’s husband, despite his objections, signed the agreement, and then the plaintiff sued the attorneys responsible for negotiating the settlement on the behalf of her husband and other class members. She was not involved in the class action suit.

The defendant law firm filed an anti-SLAPP motion, based on Code of Civil Procedure section 425.16, seeking to bar plaintiff’s lawsuit. The court first found that claims in the lawsuit arose from the attorneys’ conduct in the underlying litigation and thus, was protected activity that fell within the anti-SLAPP statute, which “protects lawyers sued for litigation-related speech and activity.” “[L]egal advice and settlement made in connection with litigation are within section 425.16, and may protect defendant attorneys from suits brought by third parties on any legal theory or cause of action ‘arising from’ those protected activities.”

The Court rejected plaintiff’s argument that her lawsuit was outside of the anti-SLAPP statute since it concerned a breach of a settlement agreement, as one party to a settlement agreement may sue another party to the agreement for breach. While that is true, this case alleged breach of plaintiff’s husband’s agreement with defendant law firm to handle the litigation, not breach of the settlement agreement in the underlying action.

The Court also rejected plaintiff’s argument that her lawsuit fell outside of the anti-SLAPP statute because it was based on the defendant attorneys’ breaches of their fiduciary duty and on fraud. “[I]f the plaintiff is a nonclient who alleges causes of action against someone else’s lawyer based on the lawyer’s representation of other parties, the anti-SLAPP statute is applicable to bar such nonmeritorious claims.”

The court also found that the plaintiff failed to show that she could prevail on the merits as she could not show that she was a third-party beneficiary on the contract between her husband and the resort service.

## ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT

*California Earthquake Authority v. Metropolitan West Securities, LLC.* (E.D. Cal. 2012) 285 F.R.D. 585

- **Federal attorney work product doctrine bars discovery of investigation related documents investigated by an outside auditing firm retained by general counsel to conduct an investigation after a failed investment, both in anticipation of litigation and also for general investment risk management purposes.**

Plaintiff's litigation purpose for conducting the investigation was inextricably intertwined with the non-litigation purpose of seeking review of, and guidance on revisions to, plaintiff's investment policies and procedures. The federal work product doctrine shielded from discovery correspondence between the auditing firm and plaintiff's general counsel, notes from the auditing firm's interviews with individuals affiliated with plaintiff, and drafts of the never-completed audit report.

The litigation purpose of the investigation was demonstrated by general counsel's initiation of a litigation hold on documents related to Investment Company's investments and investment policies at the same time he contacted outside counsel to discuss the possibility of litigation over the loss, and shortly before contacting the auditing firm about conducting the investigation. In addition, auditing firm's engagement letter referred to its services being used to assist the general counsel in giving legal advice to Investment Company.

The Court rejected defendant-bank's contention that the business purpose of the investigation precluded application of work product to the auditing firm's investigation-related documents. The bank contended that it had cooperated in the audit based on representations that the audit was being conducted to improve plaintiff's investment practices, and that it would not have done so if it had known the audit was contemplated to be used in litigation against the bank. While not doubting investment company may have used vague generalized language about the audit, bank provided no documentation suggesting that plaintiff had misrepresented the purpose of the audit. Further, bank had independent incentives to cooperate in the investigation - as failing to cooperate threatened the loss of plaintiff as a client and heightened the risk plaintiff would sue. Finally, there also was no evidence the bank requested a hold-harmless agreement in exchange for its cooperation.

While an assertion of work product protection may be overcome where the requesting party shows a substantial need for the materials and that the party would suffer undue hardship were the documents not produced, bank made no such argument and the Court declined to consider it on its own.

The Court declined to consider whether California's attorney-client privilege also protected those categories of documents it found covered by the federal work product doctrine. The attorney-client privilege protected correspondence between plaintiff's staff and its general counsel or outside counsel that plaintiff provided to the auditing firm as background documents potentially relevant to the investigation. The Court rejected bank's contention that plaintiff waived privilege

over these documents because providing the documents was not reasonably necessary to conduct the investigation into the investment losses. Plaintiff's general counsel and general counsel's staff culled these privileged documents from plaintiff's files based on their relevance to the investigation.

Plaintiff was ordered to submit a privilege log to the bank, but declined to order plaintiff to explain why each communication was given to the auditing firm. To require such detail would essentially compel general counsel to reveal his analysis and strategy, and would unduly interfere with the attorney-client relationship.

***Garcia v. Progressive Choice Ins. Co.* (S.D.Cal. 2012) 2012 WL 3113172**

- **Defendant-insurer waived attorney client privilege over newly discovered emails through previous disclosure to plaintiff of contemporaneously related emails.**

In *Garcia*, applying California privilege law, the district court held that defendant-insurer waived the attorney-client privilege over newly discovered emails between claims adjuster and outside counsel concerning plaintiff's claim that were recovered after disclosure to plaintiff of communications between outside counsel and claims adjuster as part of turning over the underlying claims file subject to objection on the grounds of attorney-client privilege, but also after insurer withdrew its advice of counsel defense.

The court found that the insurer had expressly waived the privilege over the newly discovered communications by earlier disclosing "a significant part" of communications between insurer and outside counsel in previously producing emails between outside counsel and claims adjuster that were contemporaneous with those over which insurer was asserting the privilege after withdrawing its advice of counsel defense.

While waiver of the attorney-client privilege is narrowly construed, waiver by a party's disclosure of a significant part of privileged communications is not limited to each individual communication partially disclosed, but may extend to related contemporaneous communications. "The attorney-client privilege is designed to foster open communication between client and attorney, in this case, between [outside counsel] and Defendant. However, Defendant voluntarily disclosed a large amount of communications it had with [outside counsel] regarding" the underlying claim, "and the purpose of that privilege was lost."

In extending waiver not only to the communication at issue, but also to "other related and otherwise privileged contemporaneous communications," the *Garcia* court rejected the statements in the Rutter Group California Practice Guides on Professional Responsibility and in Civil Trials and Evidence that disclosure of a significant part of a privileged communication waives the privilege only with respect to that communication.

***In re Elijah W.* (2013) 216 Cal.App.4th 140 [156 Cal.Rptr.3d 592]**

- **Trial court abused its discretion in rejecting a request by public defender to appoint psychologist to assist with representation of juvenile client, where psychologist indicated intent to refuse to reveal information under duty of confidentiality.**

In *In re Elijah W.*, the issue was whether a juvenile court's rejection of a request by a public defender to appoint a psychologist to assist with the representation of a juvenile client was an abuse of discretion – where the psychologist indicated an intention to refuse to reveal information in compliance with child abuse reporting obligations and Tarasoff dangerous client obligations, citing the duty of confidentiality.

The court held that the trial court's actions were improper. It stated that refusing the public defender's request was error. The court explained that a defendant's right to counsel includes the right to necessary case assistance through defense services. A client can also take steps to protect confidential communications between the client and the attorney, citing Evid. Code § 954 and discussing attorney's ethical duty of confidentiality under Rule of Prof. Conduct 3-100 and Bus. & Prof. Code § 6068(e). The court found that "Taken together, these fundamental principles mandate that defense counsel's right to appointment of necessary experts, including medical or mental health experts, also includes the right to have communications made to the experts remain confidential to the same extent as communications directly between client and lawyer."

The court held that a defense court appointed psychotherapist appointed per Evidence Code section 730 must maintain client confidentiality per the attorney client privilege and the psychotherapist-patient privilege. And even confidential information that might fall within an exception to the psychotherapist-patient privilege may still be protected under the attorney-client privilege.

***In re High-Tech Employee Antitrust Litigation* (N.D.Cal. 2013) 2013 WL 772668**

- **Defendant A could withhold emails from plaintiffs based on the attorney-client privilege relating to communications sent between the chairman of the board of directors of Defendant B (who simultaneously served as a consultant or part-time employee to Defendant A) and counsel for Defendant A, where consultant/employee's duties included serving as an advisor to Defendant A's on corporate strategy and internal business processes, even where the emails in question were sent to employee/consultant's email address at Defendant B.**

In *In Re High-Tech*, the court found that the duties of consultant/employee, as well as the sensitive nature of communications with him, indicated that, both before and after he signed a formal part-time employment contract with Defendant A, the consultant/employee was the functional equivalent of an employee and had substantial input into the development of the issue at the heart of the litigation, thus communications between him and counsel for Defendant A were covered under Defendant A's attorney client privilege. *United States v. Graf* (9th Cir. 2010) 610 F.3d 1148.

The court rejected plaintiff's contention that Defendant A waived the privilege by sending them to the consultant/employee at his email address at Defendant B. The court reviewed the four factor test of *In re Asia Global Crossing, Ltd.* (S.D.N.Y. 2005) 322 B.R. 247 concerning whether the attorney-client privilege applies to attorney-client communications sent to the email address at a third-party corporate employer: (1) whether Defendant B had a policy banning personal use of the company's email system; (2) whether Defendant B monitored its employees' use of email; (3) whether Defendant B, a third party, had the right to access the computer and emails; and (4) whether the consultant/employee or Defendant A were aware of Defendant B's use and monitoring policy.

Applying those factors to the case, the court concluded that Defendant B's policy that said that company email generally "should" be used only for company business fell slightly short of an all-out ban and this factor slightly favored Defendant A's claim of privilege. As to the second factor, while Defendant B's code of conduct reserved the right to monitor emails sent over its computer system, there was no evidence that Defendant B actually did monitor its employee's emails, further weighing in favor of the assertion of the privilege. The third and fourth factors weighed against the assertion of the privilege since Defendant B had the right to access the emails and the consultant/employee, who also was chairman of Defendant B, had at least constructive knowledge of the company's policy reserving the right to monitor emails. Although the factors split in favor of and against the application of the privilege, the court found that the importance of the privilege and the lack of evidence that Defendant B actually monitored employee emails warranted a finding that receipt of the emails at consultant/employee's Defendant B email address did not destroy the privilege.

***Melendrez v. Sup. Ct.* (2013) 215 Cal.App.4th 1343 [156 Cal.Rptr.3d 335]**

- **Attorney client privilege of bankrupt corporation either passes to a director or officer with authority, or if that is not possible, to its liability insurer, for the purposes of the determination of whether Corporation should waive its privilege for its attorney to verify discovery responses as an agent of Corporation.**

*Melendrez* involved a bankrupt corporation was sued for wrongful death based on asbestos exposure. Corporation had filed for bankruptcy years before the lawsuit was filed, wherein pursuant to its Second Amended Plan of Reorganization, Corporation was reduced to a shell for the sole purpose of processing asbestos lawsuits. Under the plan, a registered agent was appointed to accept service of claims, who was required to forward all claims to Corporation's insurers. The insurers, in turn, were required to handle the claims pursuant to the policies, and applicable state insurance law.

Upon receipt of *Melendrez's* suit, insurance defense counsel was appointed. When discovery was propounded to Corporation, insurance defense counsel filed substantive responses to the discovery but represented that the responses could not be verified, as Corporation had no officer, director, employee or agent who could verify the discovery responses, and because an attorney is mandated by statute to assert the attorney client privilege when privileged communications are sought. The trial court agreed that there was no one available to verify the responses, and simply deemed the responses verified. Plaintiff sought a writ, which was granted.

While attorneys can verify response on behalf of a corporation, such act, by statute, constitutes a limited waiver of the attorney client privilege and work product privilege with respect to the identity of the sources of the information contained in the responses. The case at bar involved a corporation, whose management normally holds the privilege. When a corporation is no longer in operation, the privilege is held by a representative. If the corporation is dissolved, it continues to exist for limited purposes of winding up, with its management for that windup holding the privilege. *Melendrez* involved a non-operational corporation. Its attorneys were agents with knowledge who could technically verify discovery responses. However, because such attorney verification would result in a limited waiver, and in the absence of a Corporate officer or director, there is no individual who could authorize waiver of Corporation's privilege and by statute, the attorneys were obligated to assert the privilege. The *Melendrez* court agreed that defense counsel could not waive the privilege on Corporation's behalf; however, Corporation could have waived the privilege on its own behalf. The trial court could have directed further effort to be made by counsel to have a director elected or appointed on behalf of the corporation. If that was not possible, and if because the Corporation no longer existed and no such election or appointment was possible, the corporation's attorney client privilege passed to its insurers, as de facto assignees of its policies and the claims against corporation. In either scenario, Corporation could decide whether to waive its privilege to the limited extent necessary for its attorney to verify discovery responses. If Corporation chose not to waive the privilege, the unverified discovery could not be deemed verified, and the trial court was to proceed on the motions as it would with any other unverified discovery motion. The matter was remanded for further proceedings.

***Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc.* (N.D.Cal. 2012) 2012 WL 3062294**

- **Privilege and work product waived where plaintiff's counsel forwarded email to trustee of plaintiff-fund, who then forwarded email to a non-party union official, after which the email was forwarded several more times until it reached defense counsel, as well as various union members.**

In *Resilient*, within the context of an ERISA action against the sponsoring employer's successor, the issue at hand arose out of a forwarded e mail. Plaintiffs' counsel sent an e mail to the trustee of plaintiff-fund that described counsel's comprehension of the facts, issues, and merits of the case. The trustee forwarded this e mail to a union official, not a party in the case. The e mail was forwarded several more times ending up reaching defense counsel, as well as various union members. The issue was whether or not in sending the e mail, plaintiff waived the attorney-client privilege and work product.

The court held that the privilege and work product had been waived. The court found the e mail was protected by the attorney-client privilege. The e mail was entitled "Attorney-Client Privileged/Attorney Work Product," and the body of the e mail was an analysis of the application of relevant law to the facts of the case.

The court also found, however, that plaintiffs waived the attorney-client privilege by the trustee's forwarding the email to non-party union officials. The court also held that the legal analysis contained within the e mail was protected by work product, but that the fashion in which the e mail was forwarded waived this protection.

***Stephan v. Unum Life Ins. Co. of America* (9th Cir. 2012) 697 F.3d 917**

- **In an ERISA action asserting disability plan administrator-insurer abused its discretion in excluding beneficiary's bonus to calculate his predisability earnings, internal memoranda between administrator's, an insurer, claims analyst and its in-house counsel about how the policy should be interpreted held discoverable under the fiduciary exception to the attorney-client privilege, where the communications did not address any liability the administrator might face, and communications did not indicate they were prepared with such liability in mind.**

An insurer that serves as a plan administrator has a structural conflict of interest in processing claims since it decides both who gets benefits, and also pays for those benefits, giving it a financial incentive to deny claims. In a question of first impression in the Ninth Circuit Court of Appeals, the *Stephan* court recognized that the fiduciary exception to the attorney-client privilege, which bars an administrator from asserting privilege over communications with counsel on administrative matters such as whether to grant or deny benefits, also applies to insurers acting as plan administrators. The court noted that in recognizing the fiduciary exception to the attorney-client privilege, other courts have done so on one of two bases: the ERISA trustee's duty to disclose to beneficiaries all information about plan administration; or the theory that the beneficiaries are the clients, not the ERISA fiduciary who acts as the representative of the beneficiaries of the plan. Under either theory, the *Stephan* court concluded that the duty to disclose all information regarding plan administration applies equally to insurance companies and trustees alike.

The *Stephan* court reversed the trial court order denying discovery of the disputed documents on the ground, even assuming that the fiduciary exception applied to insurers, the documents had been created after contact from the beneficiary's counsel and therefore after an adversarial relationship had begun. The court reviewed the disputed documents in camera, and found that they related solely to how the policy should be interpreted and whether beneficiary's bonus should be included in the calculation of his pre-disability monthly earnings as opposed to bearing any indication that they were created in contemplation of any criminal or civil liability the plan administrator may face. There was no binding precedent in the Ninth Circuit on when the interests of the plan fiduciary and the beneficiary become so adverse that the fiduciary exception does not apply. The Court of Appeals sided with authorities from other jurisdictions that have held that "it is not until after the final determination – that is, after the final administrative appeal – that the interests of the Plan fiduciary and the beneficiary diverge for purposes of application of the fiduciary exception."

***Theranos, Inc. v. Fuisz Technologies, Ltd.* (N.D.Cal. 2013) 2013 WL 2153276**

- **Defendant company waived attorney client privilege over communications concerning entire subject matter of patent at issue by its namesake sending copies of communications to Plaintiff's board of directors in response to letter from Plaintiff's counsel, and by later producing those communications in discovery.**

In *Theranos*, defendant-company in a patent dispute was found to have waived the attorney-client privilege over communications concerning the entire subject matter of its prosecution of the patent at issue, both before and after the patent was filed, by defendant's namesake, sending a binder of 54 emails between namesake and his patent prosecution counsel to plaintiff's board of directors, in response to a letter from plaintiff's counsel, that discussed the scope of the invention, how it legally could coexist with plaintiff's product, and how the patent in dispute addressed an issue that plaintiff and other inventors had missed and by defendant later producing those emails in response to discovery in the litigation.

Under Federal Rule of Evidence 502(a), the disclosure of a privileged communication extends to undisclosed communications only if the waiver is intentional, the disclosed and undisclosed communications concern the same subject matter, and the disclosed and undisclosed communications "ought in fairness" be considered together. Defendant, as the party resisting production, had the burden to show that fairness did not require waiver of the privilege over documents relating to the same subject as the documents it indisputably intentionally had disclosed to plaintiff's board. Defendant had failed to meet its burden. Defendant did not expressly disavow its reliance in the litigation on the privileged documents its namesake had disclosed to plaintiff's board of directors. Disclosure to plaintiff's board combined with the production in the case in discovery, and defendant's failure to disavow any reliance on the emails, was sufficient to require any disclosure of all of the remaining documents on the entire patent at issue, the invention and reduction to practice, and defendant's awareness of plaintiff's confidential information.

Plaintiff was also entitled to the additional documents to adduce the context of the emails already disclosed, and to rebut any inferences defendant may seek to draw from those documents, particularly since the defendant's namesake had offered the absence of references to confidential information in the disclosed documents to show that he never used plaintiff's intellectual property to develop the patent in dispute. Because the court could not tell whether defendant's namesake may have chosen a representative sample of communications or he may have cherry-picked selective communications that are favorable to him, disclosure was necessary.

The Court held that defendant was not required to produce its communications with, or work product created by, its counsel in this litigation.

***Trabakoolas v. Watts Water Technologies, Inc.* (N.D.Cal. 2013) 2013 WL 1563232**

- **Communications between insured and insurer's counsel at time insureds had no interest in litigation and where there was no indication they sought legal advice was not protected by the attorney client privilege merely because of insured's status as an insured.**

In *Trabakoolas*, the court held that communications between counsel for named plaintiffs' insurer and plaintiffs, about becoming named plaintiffs in the action were not covered by the attorney-client privilege where insurer's counsel initiated the contact with plaintiffs, the communications occurred after the insurer had paid plaintiffs' claims for water damage, where at the time of the communication with insurer's counsel, plaintiffs had no interest in litigation against the defendant-manufacturers, and where plaintiffs ultimately were represented by a different firm in the class action?

Under California law, a "client" for purposes of the attorney-client privilege is a person who consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity. Cal. Evid. Code § 951. There is no "blanket privilege" that covers all communications within the tripartite attorney-client relationship. The communications between the insurer's attorney and the plaintiffs in the case were not for the common purpose of defeating a claim by, or prosecuting a claim against, a third party in which the attorney would be representing the insured. The focus must be on Plaintiffs' intent and purpose in the communications. Plaintiffs did not automatically become clients of attorney for purposes of the attorney-client privilege by mere virtue of being insureds.

Neither plaintiff had any intention of suing the defendant-manufacturers when each was contacted by the insurer's attorney - they decided to become class representatives only after that contact. Thus, they did not have a purpose for retaining a lawyer in the phone call, nor was there any indication that they intended to secure legal services or advice during the phone call. Thus, plaintiffs failed to make the requisite preliminary showing that they were each a "client" of the insurer's attorney under California Evidence Code section 951, either directly or through any showing of a common interest.

## ATTORNEYS' FEES

*Barnes, Crosby, Fitzgerald & Zeman LLP v. Ringler* (2012) 212 Cal.App.4th 172 [151 Cal.Rptr.3d 134]

- **Attorneys referred a class action matter may be equitably estopped from denying enforceability of a fee sharing agreement, where recipient attorneys later replace the original named class representative with two new class representatives from a list of potential class representatives that recipient attorneys obtained from referring attorneys, recipient attorneys did not disclose the fee-sharing arrangement to the new class representatives who therefore did not give their informed written consent to the fee-sharing arrangement, and where recipient attorneys declined to advise the trial court of the fee-sharing arrangement in seeking approval of the settlement of the class action.**

The *Barnes* court held that the recipient attorneys could not rely on their own wrongdoing in failing to disclose to, and obtain the informed written consent of, the new class representatives to the fee-sharing arrangement required by Rule of Professional Conduct 2-200 as a defense to the enforcement of the fee-sharing agreement. Recipient attorneys could not rely on recipient attorneys' failure to disclose the arrangement to the trial court in seeking approval of the class action settlement as a defense to enforcement of the fee-sharing arrangement.

Ordinarily, the failure of a client to give informed written consent to a fee-sharing arrangement results in invalidation of the agreement. An attorney cannot enforce a fee-sharing agreement if that attorney could have obtained written client consent as required by rule 2-200, but failed to do so." Rule of Court 3.769 also requires an attorney seeking approval of a class action settlement to disclose any fee-sharing arrangement to the trial court.

Under the unique circumstances of the case, however, because the steps recipient attorneys took, including the calculated switch in class representatives, the referring attorneys were unable to protect their rights under the fee-sharing agreement. The *Barnes* court concluded that the trial court should have allowed a trial on whether the fee-sharing agreement applied to the class action that ultimately settled, and on whether the recipient attorneys were equitably estopped from claiming the fee-sharing agreement was unenforceable due to non-compliance with rule 2-200. While existing case law holds that an attorney who willfully or negligently violates rules 2-200 and 3.769 will be denied judicial enforcement of a fee-sharing agreement, the public policy objectives of motivating compliance and disclosure and client protection are circumvented when one attorney refuses to comply with the rules' disclosure and consent requirements and inequitably blocks the other attorney from doing so. "In such a case, the offending attorney is equitably estopped from wielding rule 2-200 as a sword to obtain unjust enrichment." The *Barnes* court rejected Defendants assertion that "there is no 'bad guy' exception to' rule 2-200." "Under the unique circumstances presented by this case, defendants are wrong."

***In re Estate of Wong* (2012) 207 Cal.App.4th 366 [143 Cal.Rptr.3d 342]**

- **Probate attorney entitled to statutory compensation for work on behalf of executor after discharge even though there was no written fee agreement and executor rescinded attorney services agreement.**

In *In re Estate of Wong*, a probate attorney was entitled to statutory compensation for work on behalf of the executor of an estate following his discharge and replacement by other counsel, even though the parties did not execute a written fee agreement and the executor rescinded her attorney services agreement because attorney allegedly committed constructive fraud by misleading the executor about the attorney's intention to seek statutory fees from the probate court.

The court noted that compensation for "ordinary services" rendered to the executor of an estate is governed by Probate Code section 10810 et seq, where payment for the attorney's ordinary services is "based on the value of the estate accounted for by the personal representative" and is calculated pursuant to a statutory formula. The court rejected the executor's contention that Business and Professions Code section 6148(a) nonetheless required a written fee agreement, as compensation for legal services rendered to the personal representative of a probate estate is not paid by the client, but out of the estate. Thus, it was impossible that the "total expense" to the client of an attorney rendering ordinary probate services will exceed \$1,000. The Court rejected as "not supported by any reasoning or case authority" contrary guidance given in the CEB guide California Decedent Estate Practice.

The Court further rejected executor's claim of rescission based on constructive fraud because the executor failed properly to raise the issue of constructive fraud in the trial court, the executor failed to take the steps necessary to effect a unilateral rescission, and there was substantial evidence in the trial court that the executor was not in fact deceived by about her attorney's intention to seek a statutory fee for the ordinary probate work.

***In re Thomas* (N.D.Cal. 2012) 476 B.R. 579**

- **Bankruptcy court was not required to disqualify attorney and order attorney to disgorge fees who failed to disclose in his application for employment of attorney in a Chapter 11 case that his retainer was paid by debtors' son, where record revealed that attorney disclosed that information in two separate documents filed with debtors' bankruptcy schedules, including the Statement of Financial Affairs.**

The employment of an attorney for a debtor-in-possession in a Chapter 11 case is governed by §327(a) of the Bankruptcy Code and requires approval of the bankruptcy court. To enable the bankruptcy court to evaluate an attorney's potential for employment, an application for employment of attorney must be accompanied by a verified statement disclosing the attorney's connections with the debtors, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. (Fed. Rule Bankruptcy Proc. 2014(a).) The purpose of the disclosures is to allow the bankruptcy court and parties in interest to determine whether the connection disqualifies the

applicant from the employment sought, or whether further inquiry should be made before deciding whether to approve the employment. The disclosure provision is applied strictly.

While the two other documents in which the information about the source of the retainer was disclosed serve purposes different from the application for employment, the bankruptcy court had discretion to consider that disclosure had, in fact, been made in these other documents in deciding whether disqualification and disgorgement of fees were warranted. The bankruptcy's court's finding that the attorney had failed to disclose the information in *any* document was error warranting reversal and remand. Because the bankruptcy judge indicated that he may have made a different ruling had he been aware that the information about the source of the retainer had been disclosed in other documents, the matter was remanded for further consideration.

***Rickley v. Goodfriend* (2012) 207 Cal.App.4th 1528 [145 Cal.Rptr.3d 13] ("*Rickley I*")**

- **Judgment denying motion for attorney's fees under CCP 1218 reversed and remanded for a fee award if an attorney client relationship existed between attorney and her represented spouse.**

In *Rickley*, trial court erred in holding that an attorney, representing herself as well as her spouse in connection with post-judgment contempt proceedings, was not entitled to an award of attorneys' fees for the successful outcome under C.C.P. §1218(a).

In analyzing this issue of first impression, the Court of Appeal looked to prior authorities on the issue of attorney awards for pro se attorney litigants. The Supreme Court had consistently not allowed pro se awards for those litigating for themselves, but had recognized an attorney's right to fees in a pro se litigation where an attorney had assisted a pro se litigant in an attorney-client relationship and the litigant had "incurred" a liability for fees. A Court of Appeal case denied fees to a homeowner attorney representing himself and his spouse, finding the attorney's interests were not separate from his spouse, and no liability for fees was established. (*citing Gorman v. Tassajara Development Corporation* (2009) 179 Cal.App.4th 44.)

Reviewing the purpose of the contempt statute at issue, CCP §1218 authorizes a fee/cost award against a party adjudged guilty of contempt for violating a court order. Finding contempt proceedings to be quasi-criminal in nature to encourage wronged parties to prosecute, to indirectly encourage all involved parties to comply with court orders, and finding appellants enforced an important public interest by garnering the respondents' compliance, the court found no clarity in the representation status with her spouse and whether others similarly situated would benefit from the contempt citation, as the trial court did not analyze whether or not an attorney-client relationship existed.

Rejecting *Gorman*, the court found neither identical damages, nor joint and indivisible interests between the spouse-attorney and the other spouse such that it would defeat an attorney-client relationship. The dispositive question instead is whether the non-attorney spouse consulted the attorney-spouse in her professional capacity and whether their relationship in the lawsuit was for the purposes of obtaining legal advice, a matter left to the trial court on remand. If the attorney client relationship was found, an award was directed.

***Rodriguez v. Disner* (9th Cir. 2012) 688 F.3d 645**

- **Class counsel who engaged in dual representation of clients with adverse interest correctly denied attorney's fees even though amount of settlement negotiated substantially exceeded the settlement sum that would have triggered the maximum incentive payment to the initial class representatives.**

In *Rodriguez*, the Ninth Circuit Court of Appeals held that class counsel was correctly denied attorneys' fees where class counsel contracted to submit a request for an additional incentive to the initial five class representatives, thereby excluding the rest of the class plaintiffs, based on the amount of recovery, and even though the amount of the settlement negotiated substantially exceeded the settlement sum that would have triggered the maximum incentive payment to the initial class representatives.

Class counsel engaged in the dual representation of clients with an actual conflict of interest. The arrangement between class counsel and the initial class representatives created a conflict of interest between the interests of the class representatives and the interests of the remainder of the class in violation of California Rule of Professional Conduct 3-310(C). The class representatives had an interest only to secure a settlement triggering the maximum incentive award and foregoing a trial that would have put that award at risk in return for only a marginal additional gain even if the verdict substantially exceeded the settlement. The balance of the class had an interest in securing the highest recovery possible, even if it meant rejecting a settlement that would have triggered the maximum incentive award to the class representatives and proceeding to trial.

While *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000 allows a trial court to consider the degree of harm suffered by the client as the result of the ethical violation, and even though the award of fees in this case ultimately benefitted the class, the court observed that California cases were persuasive authority, but federal equitable principles guided the decision. Class counsel's simultaneous representation of the conflicting interests was particularly "egregious" because it was willfully created at the inception of the representation. Counsel further violated its fiduciary duties to the class and its duty of candor to the court by not disclosing the agreement it had with the class representatives.

While the district court could have awarded at least some fees, since counsel had achieved a settlement well above the sum at which the maximum incentive award would have been triggered, the district court's decision not to was within its discretion.

The court did, however, affirm an award of \$500,000 to class counsel for work performed after the district court denied the request for incentive awards to class counsel, as that rejection cured any conflict of interest, and class counsel's services thereafter were properly performed and conferred a benefit on the class, *citing Jeffrey v. Pounds* (1977) 67 Cal.App.3d 6, 12 (attorney entitled to fees for work preceding an ethical breach.)

***Sands & Associates v. Juknavorian* (2012) 209 Cal.App.4th 1269 [147 Cal.Rptr.3d 725]**

- **Law firm who used an of counsel attorney to pursue a former client for unpaid fees not entitled to "prevailing party" attorney's fees, where of counsel attorney was held out to public as such, and who had a close, personal, continuous, and regular relationship with the law firm.**

In *Sands*, a prevailing law firm litigant in an action for unpaid fees against a former client may not recover attorney fees pursuant to a "prevailing party" contract clause where the firm was represented by "of counsel" attorneys at the firm who were held out to the public as such, and who submitted no evidence of how they were compensated (proving the firm had incurred fees), even though of counsel were not on the firm's payroll.

Adopting a "bright line" rule, when a law firm holds an attorney out to the public as "of counsel," the firm cannot recover attorney fees under a prevailing party clause when, as a successful litigant, it is represented by "of counsel." The court relied on the California Supreme Court's holding disqualifying a law firm where an of counsel attorney had a disqualifying conflict, and the "of counsel" relationship was that of a "close, personal, continuous, and regular relationship between a law firm and the attorneys affiliated with it as of counsel" making the of counsel and the firm with which the attorneys are affiliated a de facto single firm for purposes of conflicts analysis under Rule of Professional Conduct 3-310, citing *People ex. rel. Dept. of Corrections v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153-1155.

Due to that close relationship, the *Sands* court found that in recovering unpaid fees from the former client, the of counsel attorneys were pursuing both the interests of the law firm and their own interests and that the firm and the of counsel attorneys had the same interests. Because the of counsel attorneys and the law firm were de facto a single entity, there could be no attorney-client relationship between them triggering a right to fees.

The Court of Appeal distinguished *Dzwonkowski v. Spinella* (2011) 200 Cal.App.4th 930, which held that an attorney-sole practitioner who prevailed in a fee dispute arbitration against a former client was entitled to recover attorney fees as costs when the attorney was represented by another attorney-sole practitioner officed in another city who was "of counsel" to the prevailing attorney's law offices. In *Dzwonkowski*, there was no indication that the of counsel attorney was held out to the public as such, such as by being listed on the other sole practitioner's letterhead. There was no evidence that anyone other than the two sole practitioners knew of the of counsel arrangement. There also was no evidence in that case of a close, personal, continuous and regular relationship between the two attorneys.

***State Bar of California Formal Opinion No. 2012-187***

Issue: Who is entitled to the refund of remaining advanced fees at the end of a case where fee were paid by a non-client?

Answer: Where a third-party pays the attorneys' fees for a client and there are funds remaining after the representation is concluded, the attorney must return the balance to the payor rather than to the client unless the agreements with the client and the payor specify otherwise.

***State Bar of California Formal Opinion No. 2013-189***

Issue: Has an attorney engaged in deceitful conduct by not alerting opposing counsel of (A) an apparent material error made by opposing counsel in contract language; or (B) a material change made by the attorney in contract language?

Answer: Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligations.

## ATTORNEY WITNESS

*U.S. v. Murray* (N.D.Cal. 2013) 2013 WL 942514

- **Disqualification of defense counsel warranted where attorney was potential advocate witness in federal criminal trial. Client could not give informed written consent to attorney's continued representation at trial, notwithstanding CRPC Rule 5-210's provision permitting it, as federal courts have independent interest in insuring the appearance of fairness and ethics.**

In *Murray*, the court found disqualification of defense counsel was warranted where the government presented documents that defense counsel received allegedly tainted funds in partial payment of fees, and then allegedly laundered a substantial portion of those funds by sending them to defendant's father who in turn sent a substantial portion of the funds to defendant and an entity defendant controlled.

There were two distinct kinds of conflicts of interest between defense counsel and his client. First, defense counsel has an interest in funds the government claims were tainted. Under ABA Model Rule 1.8(i), a lawyer is, with limited exceptions not applicable here, prohibited from acquiring a proprietary interest in litigation the lawyer is handling for a client. It is not true that defense counsel and his client have aligned interests in resisting a finding of a conflict of interest simply because they have a joint interest in establishing that the transferred funds were not tainted. Defendant would be an important witness in establishing the circumstances of the transfer of funds, but such testimony would risk waiving his Fifth Amendment rights. "The calculus of weighing the costs and benefits of waiving [defendant's] Fifth Amendment rights in the hearing on conflict of interest differs between [defendant] and [defense counsel];" defense counsel not only has the transfer of the received funds at risk, but also compensation for his continued representation of the defendant; and defense counsel does not have the same personal stake in the underlying criminal action as his client does.

Because defense counsel received a portion of the allegedly tainted funds, defense counsel had become a potential percipient witness. That implicated the advocate-witness rule, reflected in ABA Model Rule 3.7(a) and California Rule of Professional Conduct 5-210(c) generally prohibiting an attorney from acting as both a trial advocate and a witness on a contested issue. Defense counsel may have knowledge as to the rightful ownership of the allegedly tainted funds.

The court found that defendant could not waive the conflict of the attorney serving as both advocate and witness by consenting to it, even though California Rule of Conduct 5-210(c) allows such waiver with the informed written consent of the client. Federal courts have an independent interest in ensuring that criminal trials are conducted within the bounds of ethics and that such trials appear to be fair to observers. The court was unwilling to condone defense counsel's continued representation of the defendant, given that counsel's receipt of allegedly tainted funds effectively amounted to an actual conflict of interest between his client and him. Counsel's potential role as a trial witness would be particularly problematic since the government was investigating whether counsel was a knowing participant in the alleged money laundering scheme.

## COMPETENCE

*Dizon v. Wells Fargo* (N.D.Cal. 2013) 2013 WL 978191; 2013 U.S. Dist. LEXIS 16971

- **Attorney's pattern of failure to prosecute his cases results in referral to District Court Standing Committee on Professional Conduct.**

In *Dizon*, Plaintiff challenged bank's foreclosure actions, and trial court referred him to the Standing Committee on Professional Conduct because he allegedly (1) failed to respond to bank's motion to dismiss; (2) failed to comply with a court order to send a copy of a Magistrate Judge's recommendation that the action be dismissed with leave to amend two claims to counsel's client and file a declaration that he had done so; and (3) failed to file a declaration stating that he had complied with a later court order to send a subsequent order dismissing the action to his client.

The Court found that counsel's "pattern of missing deadlines, failing to oppose dispositive motions, and giving weak and often tardy excuses" amounted to bad faith. "The fact that [plaintiff's counsel] has failed to prosecute nearly every action he has brought in this district shows that his disregard of the local rules and the courts' orders is more than mere recklessness. His repeated failures to respond to orders to show cause amount to willful disobedience."

While Counsel's disrespect for the Court was troubling, it was his clients who were most keenly harmed by his failing to prosecute their claims. The Court acknowledged that lawsuits challenging foreclosure proceedings were difficult to win and may have been dismissed even had plaintiff's counsel opposed motions to dismiss. However, plaintiff's counsel "is representing plaintiffs attempting to stave off or in throes of losing their home as part of the mortgage crisis. These clients are potentially more vulnerable than some others who may have a greater opportunity to vet a prospective attorney. And he is doing his clients no service by bringing claims and then failing to represent their interests. He is, in fact, shirking his duty as an attorney" to perform competently.

*In re Haynes* (N.D.Cal. 2013) 2013 WL 1195524; 2013 U.S. Dist. LEXIS 40649

- **Disbarment from practice in district court granted for attorney's failure to fulfill his ethical duties toward his clients and his ongoing pattern of failure to comply with court orders, failure to follow the rules of practice, and professional misconduct involving abusive and antagonistic behavior toward opposing counsel.**

The Standing Committee on Professional Conduct for the United States District Court for the Northern District of California sought to disbar attorney from district court bar because he (1) used profanity in written and oral communications with opposing counsel, including using profane and demeaning insults; (2) failed to pursue matters with diligence and competence, including failing to file timely oppositions to dispositive motions and failing to serve discovery responses, resulting in terminating sanctions; (3) failed to notify a client that her case had been summarily dismissed as a result of counsel's failure to file a timely opposition to a summary

judgment motion; (4) filed an appeal despite the client's express emailed insistence that no appeal be filed; (5) failed to pay sanctions and otherwise comply with court orders; (6) delayed for 18 months the return of a client's files despite numerous requests; (7) physically threatened opposing counsel and uttered profanities in a courtroom hallway in connection with a discussion about discovery matters, making opposing counsel fearful for his physical safety and requiring the intervention of federal law enforcement officers; (8) filed misleading statements with the court about his conduct; and (9) failed to cooperate with the federal disciplinary committee.

The District Court approved the disbarment finding it was warranted even if the only misconduct was counsel's failure to fulfill his ethical duties toward his clients in the two cases on which the disciplinary charges primarily were based. "In addition, however, the undisputed evidence reveals an ongoing pattern of failure to comply with court orders, failure to follow the rules of practice, and professional misconduct involving abusive and antagonistic behavior toward opposing counsel."

The Court further pointed out that counsel failed to cooperate with the Standing Committee at every turn. He sought multiple continuances of every deadline set by the court. "His written work product is sloppy, bordering on incomprehensible, and replete with typographical and grammatical errors, making it difficult for the court to even understand his arguments. In short, he has failed to practice competently." Counsel compounded this by refusing to accept responsibility for his actions or even acknowledge that he had done anything wrong, casting blame instead on opposing counsel, the judges of the Northern District, the Standing Committee and his own clients for his professional failings.

## CONFIDENTIALITY

*Endurance American Specialty Ins. Co. v. WFP Securities Corp.* (S.D.Cal. 2013) 2013 WL 1316701

- **Disqualification of plaintiff-insurer's counsel not warranted where insured's counsel in the prior interpleader action did not authorize disclosure of the emails to the insurer.**

In *Endurance American*, an insurer brought a coverage action against its insured broker/dealer and related parties alleging the broker/dealer provided misleading information about pre-existing or potential claims at the time the policy was issued. During a previous interpleader action brought by the insurer that ultimately was dismissed, insurance coverage counsel obtained from insurance defense counsel, counsel plaintiff-insurer had appointed to defend broker/dealer (under a reservation of rights) in a number of FINRA actions from which the instant coverage dispute arose, a set of emails in the underlying FINRA actions insurance defense counsel was then defending. Disqualification of insurance coverage counsel was held not warranted under these circumstances, where insurance defense counsel in the prior interpleader action did not authorize disclosure of the emails to the insurer.

The emails insurer's counsel obtained from the attorney representing the insured in the underlying FINRA actions were not attorney-client privileged communications and were not made privileged by having been transmitted by the insured to its attorney and marked "confidential." In addition, the court found that the insurer eventually would have obtained access to these emails through discovery even had the insurer not obtained them from insured's counsel in the underlying FINRA actions because the insurer was entitled to obtain from insured's counsel all documents, except privileged documents relevant to the coverage dispute, that triggered the insurer's reservation of rights. Because the insurer received nothing from the insured's counsel that he was not entitled to receive under California law, disqualification of plaintiff-insurer's counsel was not warranted.

### ***State Bar of California Formal Opinion No. 2012-183***

Question: May an attorney disclose client confidences to her own attorney to evaluate a wrongful discharge action against her former firm, and, in pursuing her claim, may she or her attorney publicly disclose those client confidences?

Answer: While an attorney may disclose client confidences to her own attorney to evaluate a potential wrongful discharge claim against her former firm, neither she nor her attorney may publicly disclose those confidences except in the narrowest of circumstances.

## CONFLICTS OF INTEREST

*Advanced Messaging Technologies, Inc. v. Easylink Services International Corp.* (C.D.Cal. 2012) 2012 WL 6618239

- **Law firm for defendant is disqualified for conferring with defendant's "outside in-house counsel," where such counsel had previously represented plaintiff in substantially related matters.**

In *Advanced Messaging Technologies*, a law firm for defendant corporation was disqualified as a result of having conferred with an attorney who was assigned as temporary "outside in-house counsel" to defendant, where the attorney had represented the plaintiff in prior actions while employed at his former firm. The attorney was assigned as outside in-house counsel for intellectual property matters in patent infringement actions. While at his prior law firm, the attorney had spent 15 months (billing about 235 hours) as part of a team of attorneys representing plaintiff in prior actions, working on discovery strategies and motions relating to some of the patents in the current actions. The attorney had also sent, received or was copied on over 120 emails to or from plaintiff's general counsel, including emails relating to a key witness and an affirmative defense asserted in the current actions. The federal court, affirming the rule that a federal court in California must apply California law in a disqualification motion, determined that disqualification was appropriate under the circumstances.

The court found that the attorney presumptively had confidential information about plaintiff because there was a substantial relationship between the matters on which he worked for plaintiff and the current actions. In evaluating the standard, the court held that all that is required to find that the matters are substantially related is "a rational link between the subject matter of the two cases." Anything more than, the court stated, "would effectively require a mini-trial on the merits, entailing a comparison of the patents as they existed initially with any subsequent modifications". Further, since the court would still not know whether the former attorney communicated confidential information to the law firm, "[s]uch a time-consuming process would add little value."

The court also held that it did not matter that the attorney was a junior member of the team at his former firm when they represented the plaintiff or that the attorney's role on the team may have been too limited to presume that he had acquired confidential information about the plaintiff. "[A] de minimis level of involvement in a prior case is sufficient for presuming that an attorney acquired confidential information about that prior case." In any event, given the number of hours he billed and the volume of email traffic he received, the court found that the attorney's involvement on behalf of the plaintiff was significant.

The court found that the law firm in the current actions was presumed to have the same confidential information about plaintiff that the attorney had obtained during his work for plaintiff, even though the attorney did not work for the law firm. In resolving this apparent issue of first impression, the court found analogous cases involving co-counsel, where one law firm was vicariously disqualified as a result of working with a conflicted law firm. The attorney served as the defendant's outside in-house counsel, and effectively acted as the law firm's co-counsel.

Once learning of the attorney's prior work for plaintiff, the law firm screened the attorney from the current actions. However, the court found that the screening was ineffective and untimely because the screening did not occur until after the deposition of the key witness, which occurred eight months after the attorney began serving as defendant's outside in-house counsel.

Although it praised the professionalism of the law firm, and characterized the law firm as an innocent victim in the matter, the court determined that the law firm's innocence did not prevent its disqualification: "Motions to disqualify are not about punishing guilty parties. They are primarily about preserving public trust in the scrupulous administration of justice and the integrity of the bar."

In addition to disqualifying the law firm, the court ordered that the defendant's general counsel, as well as all other in-house attorneys who substantively discussed the current cases with the attorney, be screened from the current cases.

The court authorized the disqualified law firm to transmit to its successor counsel written files in the current actions, but held that non-public documents could only be shared if the law firm attested that such documents did not contain any information provided by the attorney.

***Bernhoft Law Firm v. Pollock* (S.D.Cal. 2013) 2013 WL 542987**

- **Attorney is disqualified from defending a former client of plaintiff law firm in a fee dispute where attorney, while at plaintiff law firm, generated much of the fees that are the subject of the dispute.**

In an action by a law firm against a former client for unpaid legal fees, disqualification of defense counsel was warranted on the grounds that he was a former attorney at plaintiff-firm and, while at the firm, was the lead attorney representing the former client in the underlying tax proceeding for which the firm was seeking fees and took the client and the proceeding with him when he left the firm.

The court in *Bernhoft Law Firm* found that there was "an obvious conflict of interest" between defense counsel and his client in defending the fee dispute. The legal fees defendant was refusing to pay largely were generated and approved by defense counsel when he was an attorney at the law firm. "In the event that [the former client defendant] refutes the validity of these fees during the course of this litigation, such an argument will require [defense counsel] to attack the appropriateness of his own representation, a position that the court finds untenable." The court determined that defense counsel could not zealously represent his client in the fee dispute if it meant challenging the fees he billed and the services he provided. These circumstances created a substantial risk that counsel's own interests would compromise his ability to represent his client, thereby creating a disqualifying conflict of interest.

*[Editorial Note: We find it interesting that the court disqualified defense counsel on the basis that his conflict would adversely affect his representation of defendant, when defendant was the party opposing the disqualification. Presumably, defendant could have simply waived the conflict, which waiver might be inferred by his opposition to the disqualification.]*

***Davis v. EMI Group Limited* (N.D.Cal. 2013) 2013 WL 75781**

- **Disqualification of law firm was warranted where some of its attorneys worked on substantially related matters, even though all of those attorneys had left the law firm more than a decade prior to the current action.**

Disqualification of defendants' law firm was warranted where the firm had previously represented the plaintiff in negotiating the contracts from which the action arose, notwithstanding the fact that the law firm's representation of plaintiff had ended 11 years before the current action was brought and all of the attorneys who had done work substantially related to the matters at issue in the current action had left the firm by the time the firm's work for plaintiff had ended.

In this action brought by the lead singer of a band against record labels and related entities for breach of royalty provisions, the firm representing the defendants previously represented the lead singer and her band, sent demand letters to defendants on plaintiff's behalf, and unsuccessfully sought a written conflict waiver from plaintiff. Also, two attorneys and one paralegal who worked on unrelated matters for plaintiff and her band were still with the firm, and lead counsel for defendants was a senior firm partner at the time of the firm's extensive representation of plaintiff and her band.

The court disqualified the law firm due to the "clear and substantial relationship" between the royalty agreements at issue in the current case and the firm's prior representation of plaintiff and her band in negotiating the same contracts. "That relationship is sufficient to create the presumption that [the law firm] has confidential information material to the current matter and that this information is shared by all attorneys in the firm."

The court held that "[w]hen a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney or subordinates for whose legal work he was responsible, the attorney's knowledge of confidential information is presumed."

The court rejected law firm's argument that no vicarious disqualification was warranted because the attorneys who had handled the substantially related matters had not been with the firm for over a decade. The court found that the law firm's relationship with the plaintiff was extensive, and that both senior defense counsel and 58 other current firm attorneys and paralegals worked at the firm during its work for the plaintiff and her band. The assurances from lead counsel that he and the other employees had never received any confidential information about the plaintiff were "not sufficient to overcome the presumption that attorneys in the same firm share a close, fluid, and continuing relationship, with its attendant exchanges of information, advice, and opinions that create ample opportunity for imparting confidential information and impressions from one to another."

***Deluca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671 [158 Cal.Rptr.3d 761]**

- **Disqualification of law firm not warranted for hiring on retrial an expert who testified for the other side at the first trial.**

In *Deluca*, the Court of Appeal decided that a law firm's hiring for retrial of an expert witness used by the opposing party in the first trial did not warrant disqualification because the opponent failed to prove that the expert possessed confidential information materially relevant to the pending proceeding.

In reaching its decision, the Court distinguished between confidential information possessed by a consulting expert and confidential information possessed by a testifying expert. As a general rule, unlike with respect to a consulting expert, "neither the attorney-client privilege nor the work product protection will prevent disclosure of statements to, or reports from, a testifying expert."

As a practical matter, *Deluca* puts the burden on the party seeking disqualification to show that the expert possessed confidential information protected by the attorney-client privilege or work product doctrine.

***Havasu Lakeshore Investments LLC v. Fleming* (2013) 217 Cal.App.4th 770 [158 Cal.Rptr.3d 311]**

- **Disqualification of a law firm representing a company and its management in a case against minority equity holders is not necessarily warranted, especially where the interests of the company and its management are aligned and not in conflict.**

In *Havasu Lakeshore Investments*, the Court of Appeal held that disqualification of the law firm simultaneous representing a limited liability company, its managing member (a partnership) and the person who managed that partnership was not warranted in this suit against two of the minority members of the limited liability company.

The minority members, who each owned less than 10% of the limited liability company, argued that the law firm was conflicted, in part, because they had communicated confidential information to the limited liability company and to the law firm on behalf of the limited liability company. The Court of Appeal, however, found that the interests of the clients of the law firm were actually aligned, and that no actual conflict existed and there was no reasonable likelihood that a conflict of interest would arise. The Court further found that, contrary to the argument of the minority members, there was no authority for the proposition that an attorney may never jointly represent an entity and its management against a non-managing minority member: "That notion is contrary to [California Rule of Professional Conduct] 3-600(E), which expressly permits counsel to represent an organization and its constituents, subject to rule 3-310."

***Khani v. Ford Motor Company* (2013) 215 Cal.App.4th 916 [155 Cal.Rptr.3d 532]**

- **Disqualification is not necessarily warranted just because counsel worked on similar cases for opposing party while at a previous firm. For disqualification to be warranted based on successive representation, there must be a substantial relationship between the matters – it is not enough that the legal issues in the matters are the same.**

Disqualification in this action under the Song-Beverly Consumer Warranty Act (California's lemon law) was not warranted despite the fact that plaintiffs' trial counsel worked on 150 cases for defendant-manufacturer, including lemon law cases, while at a previous firm.

For disqualification to be warranted based on successive representation, there must be a substantial relationship between the former and current representations. It is not enough that the legal issues in the matters are the same. California courts have rejected a "playbook approach" barring an attorney from ever being adverse to a former client from whom the attorney had acquired general information about the former client's structure and practices: "The substantial relationship test requires comparison not only of the legal issues involved in successive representations, but also of evidence bearing on the materiality of the information the attorney received during the earlier representation."

Just because the same lemon law was involved does not mean that the prior cases in which plaintiffs' counsel represented defendant-manufacturer were substantially related to the current action. The court found there was an insufficient showing that defendant-manufacturer, while at his former firm, had been exposed to information material to the plaintiffs in the current case.

***Radcliffe v. Experian Info. Solutions* (9th Cir. 2013) 715 F.3d 1157**

- **Legal counsel in a class action was conflicted as a result of conditioning class representatives' eligibility for an incentive payment on representatives' supporting the proposed settlement.**

Legal counsel for a class in a putative class action was impermissibly conflicted after having included a clause in a settlement agreement that conditioned class representatives' eligibility for an incentive payment on representatives' supporting the proposed settlement. Inclusion of such an incentive award provision caused the interests of the class representatives to differ from those of the rest of the class. Because it depended on the class representatives' support of the settlement, the incentive award provision undermined the duty of the class representatives to evaluate the fairness and adequacy of the settlement to the class as a whole. "There is a lack of congruent interests between [class representatives] and the class at large because the class representatives would be expected to support the settlement so that class counsel would request awards on their behalf." As a result, class counsel was representing clients with actual conflicts of interest simultaneously, and could not settle the case on behalf of the absent class members.

A concurring opinion had harsh words for class counsel, suggesting that the district court on remand exercise its discretion to deny all fees to class counsel upon resolution of the case on the merits: "[C]lass counsels' actions in orchestrating and advocating the disparate incentive award

scenario without any concern for, or even recognition of, the obvious conflicts presented underscore, in my opinion, that class counsel were singularly committed to doing whatever was expedient to hold together an offer of settlement that might yield, as it did, an allowance of over \$16 million in lawyers' fees. Such adherence to self-interest, coupled with the obvious fundamental disregard of responsibilities to all class members – members who had little or no real voice or influence in the process – should not find favor or be rewarded at any level.”

***Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489 [155 Cal.Rptr.3d 452]**

- **A partner in a private law firm was not permitted to represent a city's decision-making body in its consideration of an arbitrator award in which another partner in the same law firm represented a city department.**

In *Sabey*, the court found that it was an impermissible conflict of interest for one partner in a private law firm to represent a city department at an arbitration in a personnel matter, while a different partner in the same law firm will be advising the city's decision-making body in its consideration of whether to reject or confirm the arbitrator's award. Such determination was proper even if the two partners abstain from talking to each other about the matter and the law firm establishes an ethical wall between the two partners preventing them from accessing each other's files in the matter.

The law firm partner who was advising the city's decision-making body owes a fiduciary duty to his partner who advised the city department in the personnel matter under review. Further, such law firm partner has a financial incentive to validate the work of his partner because doing so would enhance the law firm's reputation and business prospects. As a result, allowing the law firm partner to provide advice concerning whether or not to uphold a ruling in a matter in which his partner represented a city department creates an appearance that the advice of such law firm partner was tainted by impermissible bias. Such an appearance of bias is inconsistent with the constitutional due process rights of the city employee whose arbitration matter was under review. The court highlighted that its holding was “premised solely on the appearance of unfairness and bias.”

The court considered *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, which allowed an attorney from a county counsel's office to advise a city department while another attorney from the same county counsel's office advised the decision-making body reviewing the disciplinary decision of the city department where an ethical wall was established between the two attorneys. The court distinguished *Howitt* on the basis that, unlike partners in a private law firm, public attorneys owe no fiduciary duty to one another. Further, the public attorney advising the decision-making body had no financial incentive to validate the work of the public attorney who advised the city department.

***Sharma v. VW Credit, Inc.* (C.D.Cal. 2013) 2013 WL 1163801**

- **Disqualification not granted, despite a clear conflict of interest, because moving party waited too long before bringing a motion to disqualify.**

In *Sharma*, disqualification of plaintiffs' counsel was not granted, despite plaintiffs' counsel work on clearly substantially related cases for defendant while an associate at the firm representing defendant, because defendant waited 16 months before bringing a motion to disqualify.

In this putative class action alleging creditor failure to provide statutorily mandated notice of rights, the court found that defendant's delay in bringing the motion less than six months before plaintiffs' motion for class certification was due to be unreasonable. The court held that the delay could not be excused by defense counsel's asserted informal efforts to get plaintiffs' counsel to withdraw from the case. Since the grounds for disqualification were so "black and white" given the substantial relationship between the current action and the matters on which plaintiffs' counsel had worked when he was employed at the firm representing the defendant, a potential resolution of the request to withdraw on some "middle ground" could not justify the delay. The court found that the defendant would not have been prejudiced had it moved to disqualify earlier, and that plaintiffs would have been prejudiced had the motion been granted after such a long and unjustified delay.

***Chih Teh Shen v. Miller* (2012) 212 Cal.App.4th 48 [150 Cal.Rptr.3d 783]**

- **Representation of one of two 50% shareholders in a windup proceeding of the corporation, while also bringing a derivative action nominally on behalf of the corporation, did not create a disqualifying conflict of interest.**

In *Chih Teh Shen*, an attorney was not subject to disqualification for representing one of two 50% shareholders in both a derivative action nominally brought on behalf of the corporation and in a windup proceeding of the corporation, where the attorney had never otherwise been retained by the corporation. The court held that the presence of the corporation as a nominal party in the derivative action did not create an attorney-client relationship between the attorney and the corporation. The other 50% shareholder failed to meet his burden of proving that an attorney-client relationship existed between the attorney and the corporation.

The Court of Appeal rejected the other 50% shareholder's argument that, even in the absence of an attorney-client relationship between the attorney and the corporation, disqualification was warranted because there is an expectation that the attorney owes a duty of fidelity or confidentiality to the corporation. The Court of Appeal distinguished both *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1043, and *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, where the attorneys in question had access to confidential information about one party that could be useful to other party's action. In this case, by contrast, the attorney whose disqualification was sought had never represented the corporation and no access to the corporation's confidential information.

***Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93 [146 Cal.Rptr.3d 742]**

- **Disqualification of the district attorney’s office by vicarious disqualification is appropriate in a criminal matter only where the evidence shows that the district attorney’s conflict of interest would render it unlikely that the defendant would receive a fair trial.**

Disqualification of the Los Angeles District Attorney’s office was not warranted in connection with the prosecution of an official with the City of Bell, even if (as the official alleged) the prosecution related in part to misconduct in connection with the official’s role in hiring Bell’s Chief of Police, the person hired had spoken to the District Attorney about the Bell’s offer to become Chief of Police, and the District Attorney had encouraged the person to accept the job.

The Court of Appeal distinguished the California Supreme Court case of *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 (which held that the rule of vicarious disqualification of a law firm in a civil matter also applies to a government office). In *Spaccia*, the Court of Appeal ruled that that vicarious disqualification rule does not apply to criminal cases. In particular, the Court of Appeal referenced Penal Code section 1424, which provides for the disqualification of a local prosecuting office only when “the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial”.

The Court of Appeal found that, even if the facts establish that the District Attorney himself had a conflict of interest, the official offered no evidence to support any contention that such conflict made it unlikely the official would receive a fair trial.

***Transperfect Global, Inc. v. Motionpoint Corporation* (N.D.Cal. 2012) 2012 WL 2343908**

- **Concurrent representation of the defendant and of the two 99% co-owners of plaintiff-corporation created an impermissible conflict of interest, subjecting defense counsel to disqualification.**

In *Transperfect Global*, the court held that disqualification of defense counsel in a patent infringement action was warranted six months before trial based on defense counsel’s current representation of plaintiff-closed corporation’s two 99% co-owners. The holding was based on the following facts: (1) an estate planning partner at the defense counsel’s firm prepared prenuptial and postnuptial agreements on behalf of one co-owner; (2) the partner represented both co-owners with respect to a draft buy-sell shareholder agreement the partner had first prepared at her former firm; (3) neither co-owner signed an engagement agreement that included an advance waiver of conflicts in matters not related to services provided to them; and (4) all of the co-owners’ legal bills were paid by plaintiff-corporation.

As a threshold matter, the court concluded that plaintiff-corporation had standing to bring the motion to disqualify because defense counsel’s representation of the company’s co-owners was “inextricably intertwined” with the business of the company. The company was an S corporation whose net income was passed to the co-owners; the two co-owners were co-CEOs of the company and its only two shareholders; and the drafting of one co-owner’s prenuptial and postnuptial agreements was critical to ensuring the company’s survival. In addition, the buy-sell

agreement allowed for the possibility of continuity of ownership upon the death of either co-owner.

Relying on *People v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, and other precedents, the court observed that under California law, a firm may generally avoid automatic disqualification for simultaneous representation only “if full disclosure of the situation is made to both clients and both agree in writing to waive the conflict.” In this case, there was no document that the co-owners signed that explicitly disclosed the conflict.

The court rejected defendant’s contention that disqualification for simultaneous representation in this case would be an unwarranted inversion of the duty of loyalty since plaintiff’s co-owners became clients of defense counsel *after* defendant had been a client of the firm. The court acknowledged that there was support for that view in *Friskit, Inc. v. RealNetworks, Inc.* (N.D.Cal. 2007) 2007 WL 1994204, but found that *Friskit* does not represent the prevailing view in California courts.

Agreeing with defendant that a court may consider delay in bringing a motion to disqualify as one of many factors in deciding a motion to disqualify, the court concluded, however, that delay in bringing the motion without a suggestion of tactical abuse is insufficient without more to deny a disqualification motion based on concurrent representation. “Limiting the delay exception to only the successive representation context is supported by the different interests involved with both conflicts – the duty of confidentiality for successive conflicts, and the duty of loyalty for concurrent conflicts. . . . The delay exception’s limitation is consistent with the higher level of difficulty associated with disqualifying counsel due to successive conflict as opposed to concurrent conflict.”

The court found that any delay in bringing the motion to disqualify was understandable. The co-owners were legitimately surprised when they realized for the first time six months before trial that the firm representing their company’s adversary was the same firm that was representing them in other matters.

The court recognized that disqualification is a drastic measure, but concluded that it was necessary here. Defense counsel owed the same duty of loyalty to the co-owners of plaintiff as it owed to defendant and breached that duty of loyalty by representing the defendant against the plaintiff.

### ***Orange County Bar Association Ethics Opinion 2012-01 (2012)***

#### **ISSUE:**

If an attorney’s corporate client is acquired or is merged into a larger corporation, and that larger corporation is an adverse party in litigation the attorney is handling for a second client, what are the attorney’s ethical obligations following the acquisition or the merger?

#### **CONCLUSIONS:**

1. Whether a conflict of interest has arisen due to the merger will depend upon whether there is a “unity of interests” between the second client and its new parent corporation.

2. Whether a unity of interests exists will depend upon the extent to which the merged corporations' functions – particularly its law departments - are integrated.
3. If a conflict of interests exists, and one or both clients refuse to waive the conflict, the attorney should examine his ethical duties of loyalty and confidentiality.
4. The attorney may withdraw from representing either client if the attorney complies with his ethical duties regarding withdrawal from representation.
5. The attorney may ethically withdraw from representing one client and continue to represent the other if he has not received from the now-former client confidential information that is substantially related to the matter in which representation is ongoing.

***San Diego County Bar Association Ethics Opinion 2013-1 (2013)***

**QUESTIONS PRESENTED:**

What are an attorney's ethical duties to joint clients when settlement discussions give rise to an actual and irreconcilable conflict of interest? Does a general conflict waiver in an engagement agreement allow an attorney to continue a representation after an actual and irreconcilable conflict of interest arises?

**ANSWER:**

An attorney may not continue to represent both joint clients unless both provide informed, written consent to the actual conflict and must withdraw from representing the clients in any proceedings where their interests conflict.

## DUTY NOT TO MISLEAD COURT

*In re Hubbard* (S.D.Cal. 2013) 2013 WL 435945

- **Lawyer who misled judge and opposing counsel into believing signature on settlement agreement was that of his mother client, when in fact it was signed by another after mother client's death, warranted a 2 year suspension from the federal district court bar.**

In *Hubbard*, a lawyer misled opposing counsel and the judge into believing a signature on a settlement agreement was that of his client (his mother), when actually the agreement had been signed by someone else after the client's death. The issue was whether such dishonesty warranted a year-long suspension from the federal district court bar.

The court found the suspension to be warranted. Counsel's misconduct not only included misleading the court and opposing counsel about the signature, but also included misleading the judge about his personal knowledge of his mother's declining health and the issue of who would replace her as plaintiff in the case at bar.

The court noted that Rule 83.4(b) of the Local Rules of the Southern District of California adopts the standards of professional conduct applicable to California State Bar members. The Local Rule, however, warns that those standards are not exhaustive, citing the rules of professional conduct of the American Bar Association. The court found that the attorney had engaged in "intentionally deceptive and misleading conduct" in violation of ABA Model Rules 3.3, 4.1(a), 7.1 and 8.4; California Rules of Professional Conduct 5-200 and 5-220; and State Bar Act §§ 6101, 6068(b), and 6068(d). Consequently, the court held that these violations constituted unprofessional conduct in violation of Local Rule 83.4.

## IMPROPER ACCESS TO INFORMATION

*U.S. Ex Rel. Hartpence v. Kinetic Concepts, Inc.* (C.D.Cal. 2013) 2013 WL 2278122

- **Disqualification of relator's counsel was warranted where counsel received, and knowingly used, privileged information in pleadings that it was not authorized to possess.**

In *Hartpence*, the district court held that disqualification of counsel for putative relators was warranted where counsel quoted in pleadings attorney-client privileged documents that relators took from their employer when they left, some of which documents the U.S. Attorney's office had notified counsel the government would not use in its investigation because the documents appeared to be privileged.

Counsel that receives an opposing party's privileged material has a duty to take "reasonable remedial action." In such circumstances, "the path to an ethical resolution is simple: when in doubt, ask the court."

Relators' counsel told their clients not to give them any privileged documents that they had taken from their former employer. The clients nonetheless had included some privileged documents among those given to the attorneys who in turn reviewed the documents and transferred them to the U.S. Attorney's office for use in the government's investigation of the claims. After the government informed counsel that it would not be using specified documents in its investigation because the government was concerned they were privileged, counsel still quoted from those documents as well as other privileged documents in pleadings rather than seeking direction from the Court. Counsel should have sought guidance from the Court even before transferring such documents to the government. Because Relators' counsel took no such reasonable remedial action to address privilege issues, and instead they transferred privileged documents to the government, and thereafter repeatedly quoted them in the pleadings, disqualification was warranted.

Attorneys' were not "merely exposed" to the privileged materials – they actively quoted them. Attorneys were not being disqualified because of the actions of their clients, but because of their own actions. While it is true that an attorney may not be disqualified simply because the client is the source of privileged material that comes into the attorney's possession, it also is true that attorneys do not have a license to do whatever they wish with privileged material they obtain from their clients.

Defendant-employer showed sufficient risk of prejudice to justify disqualification because counsel not only used the privileged material to craft their clients' claims, but also quoted from such material verbatim in the pleadings. A finding of bad faith was not required to warrant disqualification - but even if it were, counsel's quoting from the privileged documents in pleadings without seeking guidance from the Court after being notified of the government's concerns that some of the documents were privileged was tantamount to bad faith. There is no authority for the proposition that counsel's obligation to take reasonable remedial action was excused by defendant-employer giving final copies of the same materials.

Finally, while a qui tam action is under seal, relators' counsel have a special obligation to contact the court for ethical guidance about how to handle an opposing party's potentially privileged materials, because relators' counsel cannot contact the defendant about privilege issues while the action is under seal, and the defendant itself is unable to protect its privileged material. As in other kinds of ex parte proceedings, "courts expect greater care and candor from counsel."

***State Bar of California Formal Opinion No. 2013-188***

Issue: If an attorney receives from a non-party a confidential written communication between opposing counsel and opposing counsel's client, what should the attorney do if the attorney reasonably believes that the communication may not be privileged because of the crime-fraud exception to the attorney-client privilege?

Answer: If an attorney receives an unsolicited intentionally transmitted written communication between opposing counsel and opposing counsel's client under circumstances reasonably suggesting that it is a confidential communication apparently sent without the consent of its owner, the attorney may not ethically read the communication, even if she suspects the crime-fraud exception might vitiate the privilege. The attorney must notify opposing counsel as soon as possible that the attorney has possession of the communication. The two attorneys should try to resolve the privilege issue or, if that fails, obtain the assistance of a court. Attorney may not read, disseminate, or otherwise use the communication or its contents absent court approval or consent of its owner.

## NO CONTACT RULE

***Guthrey v. California Department of Corrections and Rehabilitation* (E.D.Cal. 2012) 2012 WL 3249554; 2012 U.S. Dist. LEXIS 110862**

(Opinion by former COPRAC Member and current Magistrate Judge Barbara A. McAuliffe)

- **Correctional officers are represented parties under California Rules of Professional Conduct Rule 2-100 in suit by former correctional officer challenging his dismissal.**

A former correctional officer, challenging his dismissal, seeks to discover the home addresses and phone numbers of correctional officers, who may have witnessed an encounter between the fired officer and his supervisor. He hopes to contact them ex parte, and, he claimed the testimony would prove his supervisor's hostility toward him was based on his religion, race and ancestry.

The Court found that the correctional officers could not be contacted ex parte as "public officers" under Rule of Professional Conduct, rule 2-100(C)(1) as that exception only applies where an individual is exercising his constitutional right "to contact a policy level official for change in policy or to address a grievance," which was not the case before the court.

The Court also held the correctional officers were "represented parties" under rule 2-100 since, under Federal Rule of Evidence 801(d)(2), a statement the officers made concerning a matter within the scope of their employment could constitute a party admission. The Court declined to follow *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, limiting the prohibition on ex parte communication to a party's "managing agents," because *Snider* applied California's more limited party admissions rule.

The court also denied the motion to disclose the officers' addresses and phone numbers on the primary ground that the benefits of producing the information did not outweigh the burden of the production on the safety of the correctional officers and their families.

***Quezada v. Schneider Logistics Transloading and Distribution* (C.D.Cal. 2013) 2013 WL 129676; 2013 U.S. Dist. LEXIS 47639**

- **In wage/hour litigation, defense counsel interviews and obtaining of sworn declarations of 106 employee potential class members without informing them of the evidence gathering purpose of the interview, and their lack of choice in participating in the interview, was improper, leading to bar from further contact by employer or its agents with employees about the lawsuit without leave of court, the declarations being nullified for use, and curative notice that declarations would not be considered by court, and they could not be retaliated against by cooperating in the suit.**

Defense counsel in wage and hour violation class action matter took 106 sworn declarations from employees all of whom were potential class members. The interviews were held in a manager's office, and were conducted after the employee was summoned there during work hours. The

issue before the court was whether the defense counsel should be barred from further communication with potential class member-employees because he did not disclose the evidence-gathering purpose of the interview and did not tell the interviewees that the document they were signing was a sworn affidavit that could be used in the lawsuit to limit their potential recovery.

The court held that, “Failing to inform the employees of the evidence-gathering purpose of the interviews rendered the communications fundamentally misleading and deceptive because the employees were unaware that the interview was taking place in an adversarial context, and that the employees’ statements could be used to limit their right to relief.” The court also found that failing to disclose the evidence-gathering nature of the interviews led to an apparent violation of Rule of Professional Conduct, rule 3-600(D), which prohibits an attorney representing a company or other organization from misleading an employee into believing that the employee may share confidential information in a way that will not be used against the employee’s interests.

The Court found that relief was warranted on the additional ground that the interviews were “impermissibly coercive.” As defense counsel told the interviewees that their participation was “voluntary”, but they had been ordered to attend.

Accordingly, the Court: (1) barred further contact by the defendant-employer or its agents with the employees about the lawsuit without written permission from the Court; (2) held that the 106 declarations would be disregarded if the employer attempted to use them for any purpose; and (3) issued a curative notice to potential class members that any declaration they signed would not be considered by the Court and that the employer could not retaliate against them for cooperating with plaintiffs’ counsel in the lawsuit.

## SANCTIONS

### *Haynes v. City and County of San Francisco* (9th Cir. 2012) 688 F.3d 984

- **28 U.S.C. §1927 Sanctions award should take into account attorney's ability to pay.**

*Haynes* reversed a district court's sanctions order under 28 U.S.C. §1927 for failure to take into account an attorney's ability to pay when imposing sanctions for the opposing party's attorneys' fees and costs in a meritless lawsuit. A district court has discretion to decide whether to reduce the amount at all, and to what amount the amount. Looking to the Seventh Circuit, which had previously compared a § 1927 violation to an intentional tort, where a tortfeasor's assets play no part in damages, only the victim's loss (*citing Shales v. General Chauffeurs, Sales Drivers and Helpers Local Union No. 330* (7th Cir. 2009) 557 F.3d 746, 749,) the Ninth Circuit Court of Appeal in *Haynes* found fault with the reasoning and conclusion of the district court, noting that damages for an intentional tort are determined as a matter of fact, while the district court has discretion to award and determine the amount of a §1927 sanction. Instead, the *Haynes* court adopted the reasoning of the Second Circuit in a similar case, holding that it is within the district court's discretion to consider a violating attorney's ability to pay a § 1927 sanction, citing *Oliveri v. Thompson* (2d Cir. 1986) 803 F.3d 1265, 1281. The court finally noted that, while a sanctions award may be less than the total excess costs and expenses incurred by the opposing party, the award may in no case be more than the total costs and expenses incurred by the opposing party.

### *Ingenuity 13 LLC v. John Doe* (C.D.Cal. 2013) 2013 WL 1898633

- **Attorneys involved in scheme of accusing people of downloading pornography illegally, with quick offers to settle, sanctioned by district court judge as bordering on deception, and defrauding the court. Financial sanctions of \$81,319.72 ordered, referrals made to numerous bars and criminal investigation agencies, and notice to be given to all judges before whom the attorneys had cases.**

In *Ingenuity*, plaintiffs, whose principals were attorneys, were involved in a scheme of accusing people of downloading pornography illegally, and then offering to settle the cases for financial gain with little intent to actually litigate. The court noted that many people agreed to settle in order to avoid the embarrassment of being associated with the allegations.

Finding the Plaintiffs' conduct, and that of their attorneys, to be deceptive, the court ordered sanctions against plaintiffs under its inherent authority, reasoning that "The needs of the many outweigh the needs of the few." - Spock, *Star Trek II: The Wrath of Khan* (1982)." (Id. at \*1). Plaintiffs were sanctioned for defrauding the court, ignoring the court's discovery-stay order, and filing complaints without reasonable investigation. The court held that plaintiff's unlawful scheme operates on deception – which was made possible in part through eliciting cooperation from the court. By manipulating the copyright laws in their favor and defrauding the court, they were able to facilitate their settlements.

The court ordered financial sanctions totaling \$81,319.72 to the Plaintiffs' principal attorneys, and plaintiffs' lawyers, jointly and severally, referred the matter to the United States Attorney's office and the Criminal Division of the Internal Revenue Service for investigation as a RICO enterprise, to the state and federal bar associations for disciplinary investigation, referred two of the lawyers to the Standing Committee on Discipline in the relevant District under Local Rule 83-3, and finally, indicated it was going to notify all judges before whom the attorneys had cases pending, of his order.

***Interstate Specialty Marketing, Inc v. ICRA Sapphire, Inc. (2013) 217 Cal.App.4th 708 [158 Cal.Rptr.3d 743]***

- **Sanctions order under 128.7 payable to defense counsel due to plaintiff's failure to detect and cure error in attaching a nonoperative agreement as the final settlement agreement was abuse of discretion.**

In *Interstate Specialty Marketing*, after plaintiff attached a document that purported to constitute the final terms of an agreement, discovery revealed the document was in fact not the operative agreement. The issue was whether or not the trial court abused its discretion in financially sanctioning plaintiff per Code of Civil Procedure 128.7, payable to defense counsel, due to plaintiff's failure to detect and cure the error in a more timely fashion, where the OSC for sanctions was set at the summary judgment hearing.

The court held that the trial court did abuse its discretion, and the order for sanctions was reversed. The court explained that section 128.7(c)(2) only permits a court to order section 128.7 sanctions on its own motion when the party is given twenty one days (from service of the OSC) to cure the erroneous filing or to withdraw. Here, the trial court issued the OSC at the motion for summary judgment hearing – and gave plaintiff permission to cure the defective pleading at the same hearing.

In addition, the court held that the plaintiff's attachment of the agreement draft to the verified complaint was not sanctionable under 128.7 because the attachment did not contain allegations or arguments that were frivolous, and it was not done for purposes of delay or harassment, quoting Code of Civ. Proc. § 128.7(b.)

The court also held that when a court imposes sanctions on its own motion, the sanctions may not be directed to be awarded to the opposing party.

***People v. Whitus (2012) 209 Cal.App.4th Supp. 1 [146 Cal.Rptr.3d 823]***

- **Attorney, whose offensive oral argument was full of insults and affronts, was properly monetarily sanctioned and referred to the State Bar.**

In *Whitus*, a lawyer's oral argument consisted of "a parade of insults and affronts" that included calling the appellate division the fox watching the hen house, asking each appellate panel member articulate for the record whether or not they had discussed the case with the trial judge, and disparaging the trial judge. The court considered whether referral to the State Bar instead of monetary sanctions was warranted, and decided that it was.

The Court expressed significant concern with the attorney's oral argument, quoting some of the objectionable comments. Then the Court added: "[W]hat is missing from the discussion is the tone of [the attorney's] entire argument, something not captured in a written transcript, which can best be described as confrontational, accusatory and disdainful."

In addition to monetary sanctions, the Court noted that "something more therapeutic needs to be done. There is no place for this sort of argument in any courtroom, state or federal, trial or appellate. It demeans the profession, lowers public respect and, if left unaddressed, conveys the impression that it is acceptable behavior, perhaps even effective advocacy. Most assuredly, it is neither acceptable behavior nor effective advocacy." Therefore, while the Court did not express any opinion on what if any discipline might be appropriate, ordered the clerk to send the opinion to the State Bar for consideration of discipline.

***Valdez v. Kismet Acquisition, LLC* (S.D. Cal. 2012) 474 B.R. 907**

- **Sanctions award against counsel in bankruptcy court should have considered the extent of sanctioned counsel's specific responsibility for opposing party's actual loss, as well as sanctioned counsel's ability to pay the amount of the award.**

In *Valdez*, the underlying bankruptcy court had sanctioned counsel pursuant to court's inherent authority for counsel's advising client to disobey a bankruptcy court order directing client to transfer certain foreign assets, for collaterally attacking the order by pursuing an injunction against the transfer in a foreign court, and for filing generally meritorious objections to transfer documents solely for delay and with knowledge that the client had no intention of signing the documents. The district court held that while the order for sanctions was warranted, the bankruptcy court erred in not considering the extent of sanctioned counsel's specific responsibility for the opposing party's actual loss, not considering sanctioned counsel's ability to pay the amount of the sanctions.

The *Valdez* court noted that the actual losses incurred by the opposing party were primarily caused by the sanctioned attorney's client's refusal to sign the transfer documents, in addition to being caused by the conduct of other attorneys who were not held jointly and severally responsible for the sanctions. While the sanctioned attorney prolonged the proceedings, the bankruptcy court erred in making no specific findings of fact that the size and scope of the sanction were tied to or proportionally related to the extent of the delay resulting from her particular actions. The bankruptcy court's failure to consider sanctioned counsel's ability to pay up to \$700,000 in sanctions for which she was found jointly and severally liable with her client was an independent legal basis for vacating the monetary sanctions.

## SOLICITATION, ADVERTISING

*Ramirez v. Trans-Union, LLC* (N.D.Cal. 2013) 2013 WL 1164921

- **Counsel not subject to disqualification and sanctions for posting on website, as posting was neither a solicitation in violation of CRPC Rule 1-400, nor improper trial publicity, in violation of CRPC Rule 5-120.**

In *Ramirez*, the district court held disqualification of plaintiffs' counsel was not warranted where, after the action was filed, plaintiffs' counsel posted on his website allegedly false information about credit agency's response to plaintiff's request to remove his erroneous inclusion on a list of persons blocked from loans because of connection with terrorist groups, and by plaintiffs' counsel's invitation to others to contact plaintiffs' counsel if credit bureau refused to correct similar false alerts.

Counsel's posting did not violate CRPC Rule 1-400, the ethical rule addressing attorney solicitation. Solicitation is a communication (a) delivered in person or by telephone, or (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication. CRPC Rule 1-400(B)(2). Because the posting on counsel's website does not fall within either category, it is not a solicitation and therefore did not violate Rule 1-400.

The posting also did not offend Rule 5-120, the ethical rule addressing trial publicity. Rule 5-120 generally prohibits an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." CRPC Rule 5-120(A). The rule does not prohibit statements about the claim involved and, except when prohibited by law, the person involved. CRPC Rule 5-120(B)(1)-(2).

The issue of the truthfulness of Plaintiff's statement about the agency's response to request to correct the alert was a disputed one. Thus, the court held it could not find that the posting was materially false or misleading. Moreover, the statements fell "well below" the prohibition on extrajudicial statements likely to prejudice an adjudicative proceeding, noting Defendant did not cite a single case in which an attorney was found to have violated Rule 5-120 based on a website, and certainly no case in which a court disqualified counsel based on a website posting about a case. Disqualification of and sanctions against plaintiff's counsel unwarranted.

## TECHNOLOGY

### ***Los Angeles County Bar Association Ethics Opinion No. 525 (2012)***

Attorney may respond to former client's adverse public comments about the attorney, so long as rebuttal does not disclose confidential information, does not injure former client in any matter involving the prior representation, and which is proportional and restrained, where client has not disclosed any confidential information and there is no litigation or arbitration pending between attorney and client

### ***State Bar of California Formal Opinion No. 2012-184***

Issue: May an attorney maintain a virtual law office practice ("VLO") and still comply with her ethical obligations if the communications with the client, and storage of and access to all information about the client's matter, are all conducted solely through the internet using the secure computer servers of a third party vendor (i.e. "cloud computing")?

Answer: As it pertains to the use of technology, B&P and COPRAC do not impose greater or different duties upon a virtual law office ("VLO") practitioner operating in the cloud than they do upon an attorney practicing in a traditional law office. While an attorney may maintain a VLO in the cloud where communications with the client, and storage of and access to all information about the client's matter, are conducted solely via the internet using a third party's secure servers, Attorney may be required to take additional steps to confirm that she is fulfilling her ethical obligations due to distinct issues raised by the hypothetical VLO and its operation. Failure of attorney to comply with all ethical obligations relevant to these issues will preclude operation of the VLO in the cloud as described herein.

### ***State Bar of California Formal Opinion No. 2012-186***

Issue: Under what circumstances would an attorney's postings on social media websites be subject to professional responsibility rules and standards governing attorney advertising?

Answer: Material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a "communication" within the meaning of rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California; or (2) "advertising by electronic media" within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act. The restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting.

### ***San Diego County Bar Association Ethics Opinion No. 2012-1***

A California attorney may represent a client that regularly transmits and stores information digitally in litigation only if the attorney is reasonably competent in understanding the client's data storage and transmission technology, or professionally consults with another attorney who has the requisite technological competence.

## **MISCELLANEOUS ISSUES**

### **Agreements Restricting a Member's Practice**

#### ***Bar Association of San Francisco Ethics Opinion 2012-1***

Defense counsel may not propose, and plaintiff's attorneys may not accept, a settlement provision which obligates the attorneys to take actions that will either directly or indirectly restrict their right to practice law. Prohibiting an attorney from disclosing public information regarding the attorney's handling of a particular type of case against the settling defendant is an impermissible restriction on the attorney's right to practice and deprives legal consumers of information important to their evaluation of the competence and qualifications of potential counsel. Prohibiting an attorney from disclosing that he or she has experience in a particular area of the law is also an impermissible restriction on the attorney's right to practice regardless of whether that information is otherwise public.

Although this opinion posits a factual scenario involving settlement of existing litigation, the Committee believes that the same issues would be raised with regard to the settlement of a non-litigation matter.

### **Agreements Seeking Client Agreement Not to File State Bar Complaint**

#### ***State Bar of California Formal Opinion No. 2012-185***

Issue: In settling a dispute with a former client, may an attorney seek: (1) the former client's written representation that no State Bar complaint has been filed; (2) the former client's representation that he or she has no present intention to file a State Bar complaint; (3) the former client's written contractual agreement not to file a State Bar complaint against the attorney based on matters relating to or arising out of the representation; or (4) the former client's oral agreement not to file a State Bar complaint against the attorney based on matters relating to or arising out of the representation?

Answer: Business and Professions Code section 6090.5 prohibits an attorney from seeking a client's written or oral agreement not to file a State Bar complaint against that attorney. "Seeking" an agreement includes any attorney communication to a client proposing or suggesting a prohibited agreement. "Seeking" also may encompass factual recitations in the settlement agreement that the client has not filed a State Bar complaint, or concerning the client's future intentions regarding filing a State Bar complaint. Section 6090.5 might prohibit these types of recitations because they could produce an impermissible chilling effect on the client's future filing of a State Bar complaint. If a lawyer seeks an oral or written agreement to not file a State Bar complaint, withdrawal of that request does not cure the ethical violation.

## Arbitration

*Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790 [145 Cal.Rptr.3d 795]

- **In international arbitration, arbitrator’s failure to timely disclose that he had represented a client who had an account and over which he had signatory authority did not warrant vacation of the arbitration award.**

An arbitrator’s duties under California’s international commercial arbitration statutes (“international arbitration statutes”) and the consequences from failure to disclose materially differ from those governing domestic disputes. The requirements of the international commercial arbitration statutes expressly supersede those under the domestic arbitration statutes. (C.C.P. §1297.17.) An international commercial arbitrator’s failure to disclose a C.C.P. §1297.121 disqualifying ground is not specifically listed in C.C.P. §1286.2(a) as a basis for vacating an arbitration award, even though subsection 6 of §1286.2(a) makes an arbitrator’s failure to disclose a ground for disqualification of which the arbitrator was then aware a ground to vacate the award in a domestic dispute.

A litigant in an international commercial arbitration may challenge such a failure to disclose by way of writ petition rather than through a post-award judicial vacatur order.

*Gray v. Chiu* (2013) 212 Cal.App.4th 1355 [151 Cal.Rptr.3d 791]

- **In a medical malpractice arbitration, judgment of a three-arbitrator panel in favor of the defense must be vacated where, subsequent to commencement of the arbitration proceeding but prior to the hearing, lead trial counsel for defendant-doctor affiliated with the firm providing the neutral arbitrator on the panel, and neither counsel nor the arbitrator discloses that fact?**

In a consumer arbitration, the plain language of the applicable rule requires an arbitrator to disclose whether “a party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated is a member of” the administering dispute resolution provider organization, quoting Ethics Standard 8 adopted by the Judicial Council pursuant to C.C.P. § 1281.5. The arbitrator has a continuing duty to disclose, and should have done so.

The Court of Appeal rejected defendants’ contention that plaintiff was estopped from seeking vacatur on this basis or had waived her right to do so. Standard 8 requires that the neutral arbitrator alone disclose the required information. There was no waiver, even though plaintiff knew from the posters in the hallways of the provider’s offices where the arbitration had been held over nine working days that lead trial counsel for defendant-doctor was affiliated with the provider. That is because the ethics standards could not be waived and because plaintiff did not become aware of the arbitrator’s violation of his disclosure obligation until months after expiration of the 10-day disclosure period after the arbitrator himself had become aware of defense counsel’s affiliation with the dispute resolution provider organization.

California Code of Civil Procedure section 1286.2(a)(6) mandated vacatur of the arbitration award for failure of the neutral arbitrator to make the timely required disclosure.

***Nemecek & Cole v. Horn* (2012) 208 Cal.App.4th 641 [145 Cal.Rptr.3d 641]**

- **Arbitration award in attorney-client fee dispute was not required to be vacated due to failure to disclose ordinary and insubstantial business relationships resulting from involvement in the legal or business community**

In *Nemecek*, the Court held that an arbitration award in an attorney-client fee dispute was not required to be vacated due to arbitrator's failure to disclose his previous involvement in a 186-member bar association committee with a witness for respondent, his appearance with respondent's expert witness as a panelist at various seminars and their service together on the board of governors of the Association of Business Trial Lawyers, his employment as of counsel to a law firm representing legal malpractice clients in five cases (including two for itself) in an otherwise criminal defense and civil litigation firm, and a prior appearance by respondents once before the arbitrator when the arbitrator was a district court judge.

Though arbitrators are required by the California Arbitration Code (CCP §1281.9) to timely disclose any and all matters that could raise doubts a proposed neutral arbitrator would be unable to be impartial, an arbitrator is not required to disclose ordinary and insubstantial business relationships resulting from involvement in the legal or business community. The arbitrator's relationships were not substantial and did not involve financial considerations that could create the impression of possible bias.

In reaching its conclusion of "ordinary and insubstantial business relationships", the court relied on prior authority: *Luce, Forward, Hamilton & Scripps v. Koch* (2008) 162 Cal.App.4th 720 (participation in a large organization within the legal community with other members was "slight and attenuated," absent a close and personal relationship); *Benjamin, Weill, & Mazer v. Kors* (2011) 195 Cal.App.4th 40 (arbitration award vacated as the arbitrator was found to be primarily employed in legal malpractice and had financial considerations at stake, as distinguishable from 5 cases (2 for itself) where firm was primarily engaged in other types of cases).

Finally, the court rejected the argument that the arbitrator should have disclosed a single prior appearance by attorneys at the respondent law firm when the arbitrator was a federal judge as borderline frivolous.

**Communications with Tribunal**

***San Diego County Bar Association Legal Ethics Opinion 2013-2***

An attorney should tread carefully in engaging in ex parte communication of any kind with a judge before whom the attorney has a matter pending, even if ex parte communications is benign and unrelated to a pending matter. Such contact is ill-advised in any context. Any reference in such a communication to the pending matter, or any demonstrable motive to influence the pending matter, may offend the letter and the spirit of the rule addressing such ex parte contact.

## Conspiracy

*Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136 [145 Cal.Rptr.3d 13 ] ("*Rickley II*")

- **Litigation privilege does not bar plaintiffs from amending complaint to add claims against defense counsel for civil conspiracy with their clients, neighbor-defendants, where plaintiff alleged attorney's violations of two independent duties owed to plaintiffs .**

California Civil Code section 1714.10 prohibits the assertion of a cause of action against an attorney for a civil conspiracy with his or her client, arising out of his or her attempt to contest or settle a dispute, and which is based on the attorney's representation of his/her client, unless the trial court first grants leave, after plaintiff's showing of a reasonable probability of success on the merits. Section 1714.10 was intended to weed out the harassing claim of conspiracy that is so lacking in reasonable foundation as to verge on the frivolous.

Section 1714.10 does not apply if the attorney has an independent legal duty to the plaintiff or the attorney has acted in furtherance of his own financial gain. (Civ. Code § 1714.10(b).) In this 2-1 ruling, the *Rickley* court held that the trial court properly allowed the amendment because the proposed amended complaint alleged that the attorney-defendants violated two independent duties owed to plaintiffs: (1) the duty not to engage in affirmative misconduct that would interfere with the remediation of the contaminated debris and (2) the duty to disburse fairly the funds from the attorneys' trust account designated to remove contaminated debris from both neighbors' properties. The complaint alleged that defendant-neighbors' attorneys interfered with the court-ordered remediation process by, among other things, contacting the third-party contractors doing the remediation work through unapproved emails thereby personally disrupting the remediation process, interfering with the remediation plan by one defendant-attorney misdirecting employees of the contractor, and personally digging in the contaminated soil after a judge told him in a telephone conference to stop. The majority concluded that, in these ways, the attorneys continued to the continuation of the nuisance.

If the allegations of the amended complaint were proven, attorneys violated their duty to disburse funds for the remediation in way that did not unfairly benefit their clients. At the attorney-defendants' clients' request, the court in the action in which the remediation had been ordered required the defendant-neighbors to fund the remediation of both properties rather than awarding damages to plaintiff-neighbors. The attorneys held those funds in their client trust account and thus assumed a duty to disburse the funds fairly. Instead, in the proposed conspiracy cause of action, they are alleged to have disbursed those funds without plaintiffs' knowledge in a way that unduly favored their own clients' interests.

The litigation privilege was no bar to the conspiracy cause of action because the alleged misconduct was done to contravene the original remediation judgment rather than enforce it. The privilege does not bar a civil conspiracy claim against a defendant and his or her attorney when they jointly act to interfere with efforts to remove contaminated debris from a neighbor's property, resulting in a continuing nuisance.

Nor was the conspiracy claim barred because defense of the claim would require disclosure of confidential communications between the attorney-defendants and their clients. The conspiracy claims against the attorney-defendants were based on their non-confidential communications with third parties, and their non-confidential conduct. The determination of whether the attorney-defendants and their client] participated in a conspiracy to thwart the remediation effort and unfairly disburse the remediation funds can be resolved by the trier of fact without any evidence of statements between the attorneys and their clients.

In any event, dismissal of a claim because the attorney-client privilege precludes an adequate defense is warranted only after a trial court conducts an evidentiary hearing and determines ad hoc measures to shield confidential material from public view would be inadequate to allow the action to proceed. No such evidentiary hearing had been held in this action.

Justice Frances Rothschild dissented, contending that the attorney-defendants had no conceivable liability since they were acting only as agents of their clients. If the allegations of the proposed conspiracy claim were true, the defendant-attorneys only were assisting their clients in the violation of the clients' duties to the defendants rather than violating an independent duty the attorneys owed the plaintiffs. Justice Rothschild also rejected the majority's reasoning that the litigation privilege was inapplicable to the proposed conspiracy cause of action against the attorney-defendants because the attorney-defendants' misconduct was taken to contravene, rather than enforce, the original remediation judgment. "The difference between enforcement and obstruction . . . is often in the eye of the beholder. Remediation work that plaintiffs view as implementing the judgment might be viewed by defendants as beyond the judgment's scope, and conduct the defendants view as endeavoring to make sure the judgment is enforced strictly according to its terms might be viewed by plaintiffs as obstruction. The protection afforded by the litigation privilege is hollow if it can be defeated by a mere allegation that plaintiffs are right and defendants are wrong."

### **Expert Disqualification**

***Ziptronix Inc. v. Omnivision Technologies Inc.* (N.D.Cal. 2013) 2013 WL 146413**

- **Disqualification of a defense expert was not warranted where the expert signed a non-disclosure agreement with plaintiff, but no retainer agreement, where plaintiff shared no confidential information with expert, and plaintiff had no contact with expert for nearly two years after the NDA had been signed.**

Under *Hewlett-Packard Co. v. EMC Corp.* (N.D. Cal. 2004) 330 F.Supp.2d 1087, disqualification of an expert in a federal question action generally is warranted only where: (1) the party seeking disqualification had a confidential relationship with the expert and (2) the party seeking disqualification disclosed confidential information to the expert relevant to the current litigation. Neither element was satisfied. The NDA did not establish a confidential relationship between the plaintiff and expert. The NDA was not a retainer agreement. Plaintiff gave expert no consulting work nor informed expert what patents were at issue in the current litigation. Plaintiff had shared no confidential information with expert.

Considerations of fairness did not warrant a different result. Plaintiff showed no interest in working with expert, even as this case moved forward, and only belatedly contacted expert after she contacted Plaintiff almost two years after the NDA was signed. It is not clear from Plaintiff's conduct that it intended to retain expert. Plaintiff's own inaction over the nearly two years after the NDA was signed that precluded plaintiff's retention of expert, not any improper motive by defendant in reaching out to expert.

### **TriPartite Relationship**

***Bank of America, N.A. v. Sup. Ct. (2013) 212 Cal.App.4th 1076 [151 Cal.Rptr.3d 526]***

- **Tripartite relationship existed between title insurance company, insured bank, and counsel retained by title insurer making communications among them privileged, even where counsel was retained to initiate an action.**

A tripartite relationship existed among title insurer, the bank, and the attorney retained by the insurer to represent the bank in the underlying action even though there was no formal retainer agreement between the title insurer and counsel for the bank - retaining counsel to represent its insured the bank was enough to establish the tripartite attorney-client relationship. That relationship was not defeated by insurer providing counsel to its insured the bank under a reservation of rights. The reservation of rights was based on the timing of the tender of the claim to the insurer rather than on the merits of the underlying lawsuit. There was no evidence that the retained firm was acting as independent *Cumis* counsel for the bank rather than as counsel retained by the insurer for its insured, the bank. Even if there was a disqualifying conflict, the right to assert that conflict would belong exclusively to the insured bank rather than its litigation adversary. If counsel were serving as *Cumis* counsel, counsel, the bank would still be obligated to share with the insurer information concerning the representation except privileged material related to the coverage dispute.

The tri partite relationship is not limited only to where an insurer pays counsel to defend an action, rather than prosecute one. The insurance policy both obligated insurer to defend its insured in an action and gave it the right to initiate and initiate an action, such as a lawsuit to quiet title against an adverse claim. As discussed in *Jarchow v. Transamerica Title Ins. Co.* (1975) 48 Cal.App.3d 917 and illustrated by the current action, it is often necessary for a title insurer to initiate an action to protect its insured's title. In the current action, another bank foreclosed on the underlying property, jeopardizing the insured bank's assertedly superior lien. Therefore, the means of the title insurer to protect its insured's lien rights was to initiate this action for equitable subrogation. "If a tripartite attorney-client relationship did not arise in such a situation, the title insurer would be unable to communicate with counsel retained to represent the insured without the risk of being forced to disclose confidential or privileged information." While California case law addressing the tripartite attorney-client relationship to date has done so only in the context of liability policies, no case has limited the principle to such policies or held the relationship does not apply when a title insurer initiates litigation pursuant to the terms of the policy.

*Schaffer v. Elder* (2013) 217 Cal.App.4th 1 [157 Cal.Rptr.3d 654]

- **Insured entitled to both independent counsel paid for by insurer, and to disqualification of his insurance defense counsel appointed under a reservation of rights in action against insured in construction defect action, wherein plaintiff-homeowner could establish liability by proving that workers who did the defective work were either insured's employees or his independent contractors, but where coverage was implicated only if the workers were found to be insured's employees.**

In *Schaefer*, the insured was entitled to independent counsel paid for by insurer since there was an actual divergence of the interests of insurer and those of insured. It was in insurer's interest to argue that the defective work was done by independent contractor; it was in insured's interest to argue that the work was done by insured's employees. That raised a conflict of interest for counsel appointed by insurer, since counsel had an ethical duty to insurer to try to establish that the workers were independent contractors and a conflicting ethical duty to insured to try to establish that the workers were employees. That conflict entitled insured to independent counsel.

It did not matter that insured would be liable to plaintiff-homeowner regardless of whether the workers who did the defective work were insured's independent contractors or his employees. This argument avoided rather than resolved the conflicts question.

The Court also rejected insurer's argument that the status of the hired persons would not be resolved in the construction defect action, finding Plaintiff-homeowner would have to establish that those who did the defective work were related in a business sense to insured. The determination of that relationship would impact a later declaratory relief action regarding coverage that insurer separately had filed.

Insured was entitled to have insurance defense firm disqualified from further involvement in the matter. The firm simultaneously represented insurer and insured in the litigation. The Court had to assume that the firm received confidential information from the insured in, among other things, responding to interrogatories on the employee/independent contractor question. If the firm had exclusively represented the insurer from the outset of the litigation, it might be allowed to participate in the litigation pursuant to Civil Code section 2860(f) where insured selects independent counsel, but that was not this case.

### **Unauthorized Practice of Law**

*People ex rel. Herrera v. Stender* (2013) 212 Cal.App.4th 614 [152 Cal.Rptr.3d 16]

- **Preliminary injunction properly issued against immigration law firm, an immigration lawyer not licensed to practice law in California, and a former California lawyer who resigned from the state bar with disciplinary charges pending, for aiding and abetting resigned lawyer's engaging in the unauthorized practice of law.**

In *Stender*, a City brought an action against an immigration law firm, an immigration lawyer not licensed to practice in California, and a former California lawyer under California's unfair

competition law (B & P Code § 17200). The City alleged, among other things, that the firm and lawyer had aided and abetted former lawyer, who had resigned from the state bar with disciplinary charges pending, in engaging in the unauthorized practice of law. The *Stender* court held a preliminary injunction properly issued to require that the law firm and the non-California lawyer provide notice to its clients that the former lawyer had resigned from the bar pending charges, was no longer authorized to practice law, and notifying the clients of their right to fire the former lawyer, obtain return from the former attorney and the firm of unearned fees, and get their client files back.

The *Stender* court found that the injunction could issue based on a violation of rules and statutes related to the unauthorized practice of law, even though those rules and statutes were intended for disciplinary purposes, not as the basis of a civil action – a §17200 action may be based on a statute the plaintiff cannot directly enforce. Nothing precluded the City from using the Rules of Professional Conduct as the asserted measure of the unlawful practice, as opposed to asserting the breach of the rules as an independent cause of action.

The fact that neither non-California lawyer nor his law firm were members of the California Bar changed the analysis. As a registered California law corporation under Business and Professions Code section 6167 entitled to practice law in California, the law firm was bound to adhere to the ethical rules applicable to individual members of the State Bar. Since the non-California lawyer controlled the activities, and alleged unlawful practices, of the law firm, he, too, was subject to liability for the law firm's unlawful practices.

The *Stender* court upheld findings that the lawyer and his law firm had aided and abetted former lawyer's unauthorized practice of law. The lawyer and law firm argued that, since licensed firm attorneys signed the pleadings in federal court, they were responsible for the legal actions taken on behalf of clients, making it irrelevant whether former lawyer gave legal advice to the firm's clients. The court rejected this, and found that by assuming legal responsibility for the actions taken on behalf of firm clients that the lawyer and other attorneys in his firm enabled the former attorney to continue his law practice in giving advice to clients and developing legal strategies.

The lawyer and his firm could be liable for aiding and abetting the former attorney's unauthorized practice of law even though the lawyer and former lawyer were both employees of the firm. The rule that agents/employees cannot act in concert with their principal does not apply where the actions of the agents are in pursuit of individual advantage rather than on behalf of the principal. In practicing law without a license, former lawyer was not acting on the firm's behalf; rather the complaint alleged that the firm and non-California lawyer made it possible for former lawyer to continue practicing despite his resignation from the Bar. The signing of the pleadings by the lawyer and other firm attorneys was one means to aid the unauthorized practice of law.

The City's UCL action was not an attempt to regulate the practice of law, in derogation of the prerogatives of the State Bar and the federal court to regulate the practice of law. There was a difference between regulating the practice of law, which the City was not allowed to do, and taking action to prevent a fraud upon the public, which the City was authorized to do.

The injunction remained appropriate even though the former attorney had left the firm, the firm itself was no longer in operation, and there was assertedly no continuing risk that clients would

continue to receive services from former lawyer in the mistaken belief that he was licensed to practice law. There was evidence before the trial court that the non-California attorney saw the former attorney as an asset to the practice, facilitated the former attorney's practice of law, assured clients that the former attorney continued to be their attorney, and told clients that the former attorney had not been forced to leave the firm. The injunction was needed to keep the non-California attorney from resuming such enabling conduct should former lawyer return.

The Court rejected non-California attorney and law firm's final argument that the mandatory injunction was improper because they could not defend themselves without revealing privileged or private client information. Finding that dismissal of a case against an attorney on this ground is extremely rare and warranted only under extraordinary circumstances, the court noted it was not apparent how clients' confidential information would be necessary to defend against City's claims, as allegations unfair business practices pertained to firm's conduct regarding former attorney's loss of the right to practice law, such as what notice was given to the clients and the bar about the former attorney's status, and what clients were told and observed about whether the former attorney or a different attorney performed legal services. How defense of these claims implicated details of the clients' cases or legal advice given was not obvious. Disclosure of the immigration clients' identity would not constitute confidential information, even if disclosure carried the risk of the client being prosecuted or deported. Nevertheless, at least some of the defendants' clients were present in the United States legally and therefore available to provide testimony in support of defendants. The names of clients who were at risk could be redacted by the trial court. To allow defendants to avoid liability for permitting and assisting an unlicensed lawyer to provide legal services to their clients by invoking attorney-client privilege would turn the purpose of the attorney-client privilege – to protect clients' right to legal counsel - on its head.

### **Unfinished Business Rule – Jewel Waiver**

***Heller Ehrman LLP v. Jones Day et al. (In re Heller Ehrman LLP) Bankr., N.D. Cal. 10-3221 DM 3/11/13 Order ND Cal. 10-3221***

- **In bankruptcy, unfinished business from dissolved firm was the dissolved law firm's property absent the disputed *Jewel* waiver, *Jewel* waiver was not given to the departing partners in exchange for anything, dissolved law firm, at the time of the *Jewel* waiver, was incurring debts that were beyond its ability to pay, and therefore transfer of the dissolved-law-firm matters to defendant law firms constituted a fraudulent transfer. Because defendant law firms gave nothing of value for the transferred property (benefits would have been given to the new partners in any event), they had no defense to the fraudulent transfer and summary judgment granted to the dissolved law firm.**

A law firm defaulted on its loans, and its partners voted to dissolve the partnership pursuant to a written dissolution plan. The plan included a provision known as a "*Jewel* waiver." from the California appellate decision, *Jewel v. Boxer* (1994) 156 Cal. App. 3d 17, which held that when a lawyer moves from a failing firm to a new firm, the new firm and the lawyer must pay the failed firm any profits on unfinished business taken to the new firm. In this case the dissolving firm's "*Jewel* waiver" gave up the firm's rights and claims to seek payment of legal fees generated after

the departure date of any lawyer or group of lawyers with respect to unfinished firm business. After the dissolved law firm filed for Chapter 11 bankruptcy, its plan administrator sued various law firms, to which former partners of the dissolved law firm transferred, to recover profits those firms earned while completing the dissolved-law-firm's client matters that were pending, but unfinished on the date of the dissolved law firm's dissolution.

The dissolved law firm's plan administrator moved for summary judgment, contending the *Jewel* waiver constituted a fraudulent transfer to the defendant law firms under both federal and California law. The bankruptcy court concluded that "unfinished business" meant "any business covered by retainer agreements between the firm and its clients for the performance of partnership services that existed at the time of dissolution," and that such unfinished business was the dissolved law firm's property absent the disputed *Jewel* waiver.

The court next concluded the partners who left the dissolved law firm and joined defendant law firms did not provide "reasonably equivalent value" to the dissolved law firm in exchange for the *Jewel* waiver. The court concluded there was no evidence that any partner would have refused to execute the dissolution agreement absent the *Jewel* waiver. Therefore, the *Jewel* waiver was not given to the departing partners in exchange for anything. Based on these conclusions and the finding that the dissolved law firm, at the time of the *Jewel* waiver, was incurring debts that were beyond its ability to pay, the court ruled the transfer of the dissolved-law-firm matters to defendant law firms constituted a fraudulent transfer.

The bankruptcy court considered whether the defendant law firms had any defenses to the fraudulent transfer claim, determining that they were "subsequent transferees" of the fraudulent transfers because the departing partners transferred to them unfinished business "free of any burden to account for profits." Under both federal and California law, a subsequent transferee may be protected from recovery by the plaintiff, but only where the transferee "gave value" for the transferred property "in good faith." The court found that while defendant law firms bestowed many benefits on the former partners of the dissolved law firm, such as office space, staff and compensation, none were in exchange for the *Jewel* waiver, as defendant law firms all provided evidence that they did not hire the partners based on their unencumbered unfinished business. Because the benefits provided to the incoming partners would have been provided even without the *Jewel* waiver, defendant law firms could not take advantage of this affirmative defense.

Based upon the existence of a fraudulent transfer and the lack of any affirmative defense by defendant law firms, the court granted the dissolved law firm's motions for summary judgment and ordered a trial to determine amount of money earned by defendant law firms as profit on the unfinished business from the dissolved law firm.

## **SPEAKER BIOGRAPHIES**

### ***WENDY WEN YUN CHANG***

Wendy Wen Yun Chang is a Partner in the Los Angeles law office of Hinshaw & Culbertson LLP, where she represents businesses in all types of business litigation and employment litigation, with particular emphasis in high exposure complex litigation, trials and appeals. She also represents lawyers in all types of complex matters that involve the practice of law, including lawyer risk management counseling, ethics, crisis management, claims repair, fee claims, fee disputes, conflicts, discipline, and litigation defense. Ms. Chang is a Certified Specialist in Legal Malpractice Law by the State Bar of California's Board of Legal Specialization. Ms. Chang serves on the State Bar's Standing Committee on Professional Responsibility & Conduct (COPRAC), and is the incoming Chair for the 2013/2014 year. Ms. Chang also serves as Co-Chair of the Judiciary Committee for the National Asian Pacific American Bar Association. She is also a 2007 appointee as an alternate to the California State Bar's 2008 Commission on Judicial Nominees Evaluation (JNE). In addition, Ms. Chang serves on the Professional Responsibility and Ethics Committee (PREC) and the State Appellate Judicial Evaluation Committee for the Los Angeles County Bar Association. She is the Conference Director for the annual Legal Malpractice & Risk Management Conference (Imrm.com). Ms. Chang received her J.D. from Loyola Law School, Los Angeles, and her B.A. from the University of California, at Los Angeles.

Ms. Chang regularly presents and writes on issues involving the practice of the law. For additional information, as well as a listing of Ms. Chang's presentations and publications, please visit [www.hinshawlaw.com/wchang](http://www.hinshawlaw.com/wchang). She may be reached at [wchang@hinshawlaw.com](mailto:wchang@hinshawlaw.com).

### ***WENDY L. PATRICK***

Wendy L. Patrick is the immediate past Chair and current Advisor of the California State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC), past Chair of the San Diego County Bar Association's (SDCBA) Ethics Committee, and is an accomplished public speaker on the topic of ethics both nationally and internationally. She teaches ethics around the country on a regular basis for various legal and business organizations, is an Institute of Criminal Investigation certified instructor for law enforcement, and teaches upper division business ethics at San Diego State University.

Ms. Patrick is a San Diego County Deputy District Attorney named by her peers in as one of the Top Ten criminal attorneys in San Diego by the San Diego Daily Transcript. She has completed over 150 trials ranging from hate crimes, to domestic violence, to first-degree murder. In her current assignment in the Sex Crimes and Stalking Division she prosecutes cases involving human trafficking, child molestation, and sexually violent predators.

Ms. Patrick is published on a regular basis. She is co-author of the revised version of the New York Times bestseller *Reading People* (Random House 2008), and was a contributing author to the *Encyclopedia of Race and Racism* (Macmillan Reference

2007), and *Hate Crimes: Causes, Controls, and Controversies* (SAGE 2004). She has had her own ethics column in the San Diego Daily Transcript for over a decade and writes and publishes for a variety of other publications.

Ms. Patrick received her PhD from the University of Wales Trinity Saint David and her Master of Divinity degree summa cum laude from Bethel Seminary San Diego where she was awarded the Excellence in Preaching Award and the Zondervan Biblical Languages Award. She received her law degree from California Western School of Law, and her Bachelor's degree in psychology with honors from the University of California Los Angeles. On a personal note, Ms. Patrick holds a purple belt in Shorin-Ryu karate, is a concert violinist with the La Jolla Symphony, and plays the electric violin professionally with a rock band, performing both locally and in Hollywood.

### ***NEIL J WERTLIEB***

Neil J Wertlieb is a Partner in the Los Angeles office of Milbank, Tweed, Hadley & McCloy LLP. Mr. Wertlieb's practice focuses on corporate transactions, primarily acquisitions, securities offerings and restructurings. He has represented clients in a wide variety of business matters, including formation and early round financings, mergers and acquisitions, initial public offerings, international securities offerings and other international transactions, fund formations, joint ventures, partnerships and limited liability companies, reorganizations and restructurings, independent investigations and general corporate and contractual matters. He is admitted to practice in California, New York and Washington, DC.

Mr. Wertlieb is a member of the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC), where he currently serves as Chair. He is also the Chairman of his firm's Ethics Group for its California practices, and the author of a series of articles on ethical issues, including: "Ethical Issues for the In-House Transactional Lawyer" (*Business Law News*, 2010 Issue 2), "Ex Parte Communications in a Transactional Practice" (*Business Law News*, 2009 Issue 3), and "Addressing Conflicts of Interest in a Transactional Practice" (*Business Law News*, 2008 Issue 4).

Mr. Wertlieb is also an Adjunct Professor of Law at the UCLA School of Law, and the former Chairman of both the Business Law Section of the California State Bar and its Corporation Committee. He has been recognized in *The Legal 500* for his M&A work, and was recognized as one of the top 100 most influential lawyers in California (*California Law Business*, October 30, 2000). Mr. Wertlieb is the General Editor of the legal treatise *Ballantine & Sterling: California Corporation Laws*. He has also served as an expert witness in litigation and arbitration involving transactional matters.

He received his law degree from the UC Berkeley School of Law, and his undergraduate degree in Management Science from the School of Business Administration also at the University of California, Berkeley. Mr. Wertlieb served as a Judicial Extern for Associate Justice Stanley Mosk on the California Supreme Court.

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***WILLIAM WOODS***

William Woods, a former high school history teacher and graduate of the Southwestern University School of Law, is the Assistant Head Deputy District Attorney of the Los Angeles County District Attorney's Training Division. Prior to joining the Training Division, he served for 13 of his 27 years with LADA in the Appellate Division. During that time he amassed 14 published opinions, including two in the California Supreme Court. He also was the counsel of record on cases in Federal District Court and the Ninth Circuit.

Mr. Woods has both written and taught for the California District Attorneys Association on a diverse range of topics including bail law, ethics, immunity, and the Public Records Act. He is the current author of Chapter 2, Professional Responsibility, in the Continuing Education of the Bar publication, California Criminal Law Procedure and Practice. He has been a member and is currently the chairperson of LADA's Professional Responsibility Committee, and lectures to prosecutors and law enforcement officers across California about ethics issues. He concludes his service on the State Bar of California Committee on Professional Responsibility and Conduct in December.

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