

Recent Developments in the Law of Lawyering 2005-2006

Presented by

**State Bar of California
Committee on Professional
Responsibility and Conduct**

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Recent Significant Cases

Ambrose v. Michelin North America

134 Cal.App.4th 1350 (2005)

Attorney Mistake

In a products liability action against a tire manufacturer, the driver challenged the trial court's ruling denying (a) his oral request to continue the hearing on the manufacturer's summary judgment motion to allow him time to submit an expert witness declaration, and (b) his motion for relief from the judgment [Code of Civil Procedure §473] based on his counsel's alleged excusable mistake in failing to request the continuance in the written opposition to the summary judgment motion. The court of appeal affirmed on both issues. With respect to the motion for relief from the judgment, the court ruled that (1) discretionary relief was not available because conduct falling below the professional standard of care, such as failing to request a continuance in a timely manner with proper affidavits because of the stresses of a busy law practice or the rush to meet a deadline, is not excusable, and (2) mandatory relief was not available because entry of an adverse judgment after a party submits a timely opposition to a motion for summary judgment is not akin to a default judgment and thus does not trigger the mandatory provisions of section 473(b).

American Products Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP.,

134 Cal.App.4th 1332 (2005).

Third Party Liability

Litigation Privilege

Unfair Business Practices

Attorneys sent pre-litigation demand letters to auto parts retailers demanding that they pay damages for selling illegal products manufactured by plaintiff. When the demands were not met, attorneys sued retailers under unfair competition laws, but did not sue manufacturer.

Manufacturer then sued attorneys for, *inter alia*, unfair business practices under Bus.& Prof. Code §17200. The court of appeal held that while the litigation privilege [Civ. Code §47(b)] extends to an unfair competition claim against an attorney where the claim is founded on the attorney's misconduct in earlier litigation against the plaintiff, it does not apply where, as here, the plaintiff/manufacturer was not a party to the earlier litigation brought by the attorney.

Because the litigation privilege did not apply, and because there was evidence that attorneys engaged in a wrongful pattern and practice of filing unfair competition lawsuits for settlement purposes, summary judgment in favor of the attorneys was reversed.

Anderson, McPharlin & Connors v. Yee

135 Cal. App. 4th 129 (Dec. 23, 2005)

Fee-splitting

Rule of Professional Conduct 2-200(A)

Departing partner

Partnership agreement

Defendant Yee, a partner in the law firm Anderson, McPharlin & Connors (AMC), left the firm with 27 open files from which he collected \$526,000 in fees over the next two years. AMC sued Yee to enforce the firm's partnership agreement, under which partners who departed AMC with

files agreed to pay the firm 25% of revenues for all legal services rendered for 24 months after their departure, as liquidated damages. The Second District Court of Appeal rejected Yee's argument that the contract was an unenforceable fee-splitting agreement under Rule 2-200(A) of the Rules of Professional Conduct, noting that Rule 2-200(A) expressly excludes arrangements between partners. The Court interpreted the clause as a permissible "termination payment," not a fee-splitting agreement.

Augustine v. Dept. of Veterans Affairs

429 F.3d 1334 (Fed. Cir. 2005)

Unauthorized practice of law

State regulation of federal proceedings

Federal preemption

Attorney fees

Petitioner Augustine prevailed in her appeal to the federal Merit Systems Protection Board, but her petition for attorneys' fees was denied on the ground that her attorney, who was licensed in Massachusetts and New York, was not admitted to practice law in California where he represented petitioner before the Board. The Federal Circuit vacated the ruling and remanded the case. The Court of Appeals held that any attempt to apply Cal. Business and Professions Code § 6125 ("No person shall practice law in California unless the person is an active member of the State Bar") to practice before a federal agency would be invalid because state or local attempts to impede or control the federal government or its instrumentalities are presumptively invalid under the Supremacy Clause. "California has no authority to require that attorneys practicing before the Board obtain a state license or to regulate the award of fees for work before federal agencies." *Id.* at 1340.

Benninghoff v. Superior Court (State Bar of California),

136 Cal.App.4th 61 (Jan. 30, 2006)

Unauthorized practice of law

Practice of law

Federal preemption

Petitioner Benninghoff resigned from the State Bar after pleading guilty to four federal felonies and with disciplinary charges pending. His resignation letter acknowledged that he was ineligible to practice law, but he continued to represent parties in state and federal administrative proceedings as a self-styled "lay representative." The Superior Court ruled that Benninghoff had been illegally practicing law, and granted the State Bar's application for the court to assume jurisdiction over his law practice under Business and Professions Code § 6180. On review, Benninghoff's writ petition was denied in part and granted in part. The Fourth District Court of Appeal affirmed the assumption of jurisdiction over his state administrative practice, but granted the petition with respect to his federal administrative practice, citing **Augustine v. Dept. of Veteran Affairs**, *supra*, and other authority for the rule that state law cannot restrict the right of federal court and agencies to control who practices before them. The court of appeal held the Superior Court erred by assuming jurisdiction over Benninghoff's federal practice and ordered the court to relinquish jurisdiction and the State Bar to return any seized materials regarding the federal practice.

City and County of San Francisco v. Cobra Solutions, Inc.

38 Cal. 4th 839 (June 5, 2006)

Conflicts

Government Attorney

Screening

An attorney in a small private law firm advised a company on its service contract with the city. After being elected City Attorney, the city named the company in a public corruption lawsuit relating to the same service contract. The trial court disqualified the City Attorney and his entire office. The Court of Appeal upheld the disqualification order. The Supreme Court agreed with the Court of Appeal that the City Attorney and his entire office should be disqualified from representing the city against the company in a matter substantially related to the city attorney's former representation of the company. Further, the Supreme Court held that an ethical screen was not sufficient to overcome the former client's legitimate concern that a government law office, headed by its former counsel, would have an unfair advantage in possessing confidential information relating to the current litigation.

County of Los Angeles v. Construction Laborers Trust Funds for Southern California Admin. Co.,

137 Cal.App.4th 410 (2006)

Attorney's Fees

Attorney Charging Liens

Attorney and client entered into a written fee agreement covering attorney's representation of client in a federal court case. The agreement provided the attorney with a lien against the client's claims (recovery). Attorney then represented client on a number of other matters. Although there were no additional written agreements, attorney and client both acknowledged that the attorney's representation of client on the additional matters was on the same terms as the original written agreement. In connection with one of the additional matters, attorney and two of client's creditors had competing claims to a settlement. Attorney notified the other parties (with a copy to the client) that attorney was placing a \$55,000 attorney's fee lien on the proceeds of the settlement. Because of the competing claims, the funds were deposited into court in an interpleader action. The trial court gave priority to the attorney's fee lien on grounds it was earlier in time than one of the other claimant's liens. The other lien claimant appealed on grounds that the attorney's lien was oral and therefore not enforceable. The court of appeal affirmed the trial court's ruling, holding that the attorney had an "equitable lien" created by the client's promise to pay the attorney from the recovery, the attorney's responsible conduct in representing the client even though he was not being paid, and the attorney's detrimental reliance on the understanding he would be paid from the proceeds. The court of appeal did not mention *Fletcher v. Davis* (2004) 33 Cal.4th 61, holding that in an hourly fee arrangement, an attorney's oral charging lien is unenforceable and that the attorney must comply with the provisions of Rule of Professional Conduct 3-300. (See also, State Bar Formal Opinion No. 2006-170 concluding that compliance with Rule 3-300 is not necessary to enforce a charging lien in a contingency fee agreement.)

Frye v. Tenderloin Housing Clinic, Inc.

38 Cal.4th 23 (Cal. March 9, 2006)

Unauthorized practice of law

Nonprofit legal corporation

Corporations Code §13406(b)

Business and Professions Code §6160, et seq.

Frye, a tenant represented in successful litigation against his landlord by California non-profit corporation Tenderloin Housing Clinic, Inc. (THC) sued to recover attorneys fees which THC had deducted as a contingent fee from the judgment pursuant to his retainer agreement, and other relief, contending THC was engaged in the unauthorized practice of law because it was not licensed to practice law in California. The court of appeal ruled that THC violated Corporations Code § 13406(b) which provides a professional law corporation may be organized as a nonprofit public benefit corporation if it is a legal aid program, or if all of its members and directors are licensed attorneys, 70% of its clients are lower income individuals, and its does not enter into contingency fee agreements. THC did not meet these requirements; among other things, it did not register with the State Bar as a professional corporation and it entered into contingency fee agreements. The Supreme Court reversed, holding that Sec. 13406(b) does not govern all nonprofit corporations that provide legal services. The traditional rule against the corporate practice of law is subject to exceptions for legal aid, mutual benefit, and advocacy groups which the legislature did not abrogate; also, the First Amendment protects the associational and expressive rights of persons to join together to employ litigation to redress grievances. Noting that THC had repaid Frye the contingent fee plus interest, the Court further held that he had not been injured by THC's noncompliance with the statutes, and therefore, could not seek disgorgement. It referred the matter to the State Bar for further study of the practice of law by nonprofit corporations and for recommendations to the Court.

Gonzalez v. Kalu

140 Cal.App.4th 21 (2006)

Legal Malpractice

Statute of Limitations

Client hired attorney in June 2000 to represent her in a sexual harassment claim against her employer. Attorney filed an administrative complaint against client's employer and told client that the case would take a very long time. Client and attorney had no contact between July 2000 and June 2003 when client came to pick up her file. Client sued attorney for malpractice in January 2004 claiming he negligently allowed the time to sue her employer to lapse. The trial court granted attorney's summary judgment motion finding that plaintiff's claim was barred by the one-year legal malpractice statute of limitations. [CCP §340.6.] On appeal, client argued that the legal malpractice statute of limitations was tolled because attorney continued to represent her regarding the specific subject matter in which the alleged wrongful act or omission occurred. [CCP §340.6(a)(2).] The court of appeal analyzed numerous published decisions defining the "continuing representation" tolling provision of section 340.6, expressly rejecting some authorities and embracing others. The court then concluded that "in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services." That belief may be based upon an express communication between attorney and

client, or inferred from the circumstances, and should be viewed objectively from the client's perspective. Based on that interpretation of the "continuing representation" tolling provision of the legal malpractice statute of limitations, the court of appeal reversed the trial court's decision granting the attorney's motion for summary judgment.

Hecht, Solberg, Robinson, Goldberg & Bagley, LLP v. Superior Court

137 Cal.App.4th 579 (2006)

Legal Malpractice

Collectibility

Privacy Rights

Law Firm One represented Client in a real estate transaction in which Client lost his investment. Client, represented by Law Firm Two, filed a legal malpractice action against Law Firm One, which was resolved by settlement. Client then sued Law Firm Two for under-settling the case against Law Firm One. In the legal malpractice case against Law Firm Two, Client sought financial discovery against Law Firm One to show that a larger settlement against Law Firm One would have been collectible (a necessary element of his claim against Law Firm Two). Asserting privacy rights, Law Firm One objected to a deposition subpoena for production of business records. The trial court granted Client's motion to compel, subject to a protective order limiting the production to records pertaining to the relevant time period. The court of appeal affirmed, concluding the trial court had appropriately balanced Law Firm One's privacy rights and Client's need for the information to meet his burden of proving causation and damage in his case against Law Firm Two.

Jerry's Shell v. Equation Enterprises, LLC

134 Cal.App.4th 1058 (2005)

Attorney Mistake

Discovery Sanctions

When plaintiff failed to respond to discovery requests, defendant filed a motion to compel. Plaintiff filed no opposition, and the motion was granted with an order that the responses were to contain no objections. Plaintiff again failed to respond to the discovery, and a second motion to compel (again unopposed) was granted, this time with a warning that failure to comply could result in terminating sanctions. Plaintiff then served general objections, responded to some interrogatories, and failed to respond to others. Defendant filed a motion for terminating sanctions. Before the hearing on that motion, plaintiff provided supplemental responses that addressed some, but not all, of the problems. Plaintiff's counsel, who did not file any opposition to the motion for terminating sanctions, appeared at the hearing but submitted no argument. Several months later, plaintiff sought relief from the terminating sanctions order, claiming the dismissal was the result of counsel's inadvertence and poor health. The trial court denied the motion for relief, noting that counsel was present during the hearing awarding terminating sanctions and chose not to oppose the motion. The court of appeal upheld the ruling, finding (1) repeated failure to respond to discovery and to comply with court orders justifies terminating sanctions, and (2) CCP §473 relief is not available when terminating sanctions have been imposed because of obstructionist discovery tactics that amount to an intentional strategic decision to delay justice.

In re Koven

134 Cal. App. 4th 262 (Nov. 22, 2005, as modified, Dec. 14, 2005)

Contempt

The Second District Court of Appeal found attorney Koven guilty of two counts of criminal contempt for filing petitions for rehearing in which she accused the appellate court of deliberate judicial dishonesty. The appellate court accepted the lawyer's apology, but refused to purge her of the contempts because her unsupported allegations of judicial misconduct were patently outrageous and she had engaged in a pattern of abuse by impugning the integrity of the trial judge, opposing counsel, and counsel's expert witnesses. "The Court of Appeal will not quietly suffer an attack upon its integrity." *Id.* at 265. The court ordered Koven to pay fines of \$2,000 and directed the clerk of the court to forward to the State Bar a copy of the judgment of contempt.

Latshaw v. Trainer Wortham & Co., Inc.

2006 WL 1843400 (9th Cir. 2006)

Relief from settlement

Legal malpractice

Plaintiff sought to set aside a settlement under Federal Rule of Civil Procedure 60(b), alleging that she accepted the settlement offer under coercion from and based on fraud by her counsel. She claimed her attorneys gave her erroneous legal advice and threatened to withdraw from her case if she rejected the settlement offer because they had "lost interest in the case." She also claimed that her attorneys falsely advised her that she would be liable for the opposing party's attorneys' fees if she rejected the settlement offer and her ultimate judgment failed to exceed the offer when in fact, the plaintiff would only have been potentially responsible for costs. The Ninth Circuit held that Rule 60(b) is not intended to remedy prior erroneous legal advice of counsel, and affirmed the district court's denial of the plaintiff's motion. The court stated that attorney mistakes are more appropriately addressed through legal malpractice claims.

Lindelli v. Town of San Anselmo

139 Cal App 4th 1499 (May 26, 2006)

Attorney Fees

The trial court denied a law firm's motion to intervene, concluding that the law firm lacked standing to seek an award of fees on its own behalf. The Court of Appeal reversed the judgment and remanded the case to the trial court with directions to grant the law firm's motion to intervene and motion for attorney fees and to award a reasonable fee. The court held that the law firm had the type of direct interest in a fee award that was necessary to support intervention under Code of Civil Procedure, section 387. Attorney fees awarded to a successful party pursuant to Code of Civil Procedure, section 1021.5, belong to the attorneys, absent an enforceable agreement to the contrary. The law firm's interest in a fee award would be directly and adversely affected if a final judgment issued prior to a motion for fees. A fee award was proper because the law firm's work resulted in the enforcement of an important right and conferred a significant benefit on the general public. The amount of a reasonable fee was a factual issue to be considered by the trial court on remand.

Mooney v. Caspari

138 Cal.App.4th 704 (2006)

Legal Malpractice

Causation

Collateral Estoppel

Client sued Attorney Two for failing to timely file a legal malpractice action against Attorney One. The jury returned a verdict in favor of client. On appeal, Attorney Two argued that in a prior action brought by another party (Praxis) who shared a unity of interests with client, a court of appeal had concluded that the alleged negligence of Attorney One did not cause Praxis any injury or damage. As such and because client's and Praxis's claims were essentially one and the same, and because client actually helped Praxis pursue the case against Attorney One, client could not prove that Attorney One's alleged negligence caused client any damage. As such, client could not prove that Attorney Two's failure to timely sue Attorney One caused client any damage. The court therefore reversed a judgment in favor of client.

People v. Navarro

138 Cal App 4th 146 (March 30, 2006)

Attorney-client Privilege

During the course of representing her clients, an attorney learns information which her clients believe she disclosed to law enforcement including where to obtain evidence of the crimes. The defendants contend that the police obtained a search warrant and found evidence leading to criminal charges against them as a result of their attorney's alleged breach of the attorney-client privilege. The Court of Appeal, on rehearing, concluded that the search warrant should not be quashed or the evidence suppressed since the government did not procure or induce the alleged breach.

People v. Ramirez

2006 WL 2241355 (Cal. August 7, 2006)

Conflict of interest

Defendant Richard Ramirez appeals his sentence of death for the so-called Night Stalker murders. After initial representation by the public defender, Ramirez and his family retained two lawyers, Daniel Hernandez and Arturo Hernandez (unrelated). The court questioned Ramirez regarding the arrangement, advising Ramirez of possible conflicts of interest arising from the agreement of his attorneys with both Ramirez and his family members. The court appointed independent counsel to consult with Ramirez regarding the potential conflicts of interest, but Ramirez refused to meet with the independent counsel. In responses to the court's inquiry, Ramirez advised the court he understood the situation and felt that there was no conflict of interest. He waived any conflict of interest, as well as the opportunity to speak with independent counsel. The lawyers representing Ramirez confirmed to the court that no conflicts of interest existed and promised to advise the court if any arose. Later in the penalty phase, Ramirez and his counsel made a "tactical decision" not to call any witnesses. On appeal, among numerous assertions, Ramirez claimed that the court should not have allowed him to substitute Daniel Hernandez and Arturo Hernandez into the case and that Ramirez "was denied the right to conflict-free counsel in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and article I, section 15 of the California Constitution because the trial court

failed to conduct an adequate inquiry into whether his attorneys suffered from a conflict of interest stemming from their retainer agreement with defendant's family.” He asserted that the court did not inquire fully into and adequately consider the impact of the fee arrangements involving Ramirez and the family. He further claimed that the tactical decision during the penalty phase evidenced a conflict of interest which the court should have addressed. The California Supreme Court held that the trial court’s inquiry regarding the conflict of interest sufficed and that Ramirez had not demonstrated a denial of the right to conflict free counsel. The Court further held that Ramirez had not shown any connection between the tactical decision during the penalty phase and the alleged conflicts of interest.

Peregrine Funding Inc. v. Sheppard Mullin Richter & Hampton LLP

133 Cal App 4th 658 (October 19, 2005)

Anti-SLAPP

Fraud

Unclean Hands

Investors who lost millions in an investment “Ponzi” scheme and a bankruptcy trustee sued a law firm claiming its malpractice and affirmative misconduct aided the perpetrators of the fraudulent scheme to avoid detection and prosecution by securities regulators. The trial court denied the law firm’s special motion to strike the complaint under the anti-SLAPP statute, and the law firm filed an interlocutory appeal. The Appellate Court, ruling on procedural grounds, held that (1) the attorney’s opposition to the SEC actions was protected activity under the anti-SLAPP statute; (2) the doctrine of unclean hands barred action by the bankruptcy trustee; and (3) the investors’ action was barred by the statute of limitations.

Pony v. County of Los Angeles

433 F 3d 1138 (January 11, 2006)

Attorney Fees

The Ninth Circuit held that a client’s right to seek statutory attorney’s fees under 42 U.S.C. § 1988 is derivative of the underlying civil rights action, and cannot be transferred contractually to her attorney.

Pound v. DeMera DeMera Cameron

135 Cal App 4th 70 (December 21, 2005)

Conflict of Interest

Successive Representation

Associated Counsel

This case presents an issue of first impression involving attorney disqualification in a successive representation setting. The issue is whether the firm representing one party must be disqualified when it associates as counsel an attorney who previously obtained confidential information from the opposing party, even in the absence of any evidence that confidential information was shared between the firm and the associated counsel. The court held that disqualification of the firm was required, even if the firm erected an ethical wall around the attorney who possessed the opponent's confidences. When the attorney for one side of litigation associated counsel who may have received confidential information from an adversary during an earlier discussion of possible

association with adversary's counsel, disqualification was required. The court found that both the associated and associating counsel should be disqualified, even if the attorney never associated into the case. The court expressed great concern about the disclosure of confidential information.

Renteria v. Juvenile Justice, Department of Corrections and Rehabilitation

135 Cal.App.4th 903 (2006)

Attorney Mistake

An inmate failed to present a timely government tort claim and then petitioned to file a late claim, arguing that his failure to timely file was due to his attorney's mistake, inadvertence, and excusable neglect under Gov. Code §911.6(b)(1). The inmate based his petition upon evidence that a secretary in his attorney's office erroneously removed the six-month public entity statute of limitations from the office calendaring system after receiving a letter from the deputy attorney general regarding his motion and petition to preserve evidence. The trial court denied the petition for leave to file the late claim. Citing Supreme Court authority, the court of appeal noted that in deciding whether a mistake is "excusable" courts should look to the nature of the mistake and whether counsel was otherwise diligent in pursuing the claim. Reviewing those considerations, the court of appeal concluded that the trial court had abused its discretion in denying the petition for relief. Reversing the trial court, the court of appeal determined (a) it was reasonable for the secretary to interpret the submission from the attorney general as evidence that the government had received notice of the claim, (b) it was reasonable for the attorney to rely on office staff and calendaring procedures, and (c) the inmate and his attorney acted diligently in pursuing the claim and the request for relief.

Rusheen v. Cohen

37 Cal.4th 1048 (2006)

Abuse of Process

Litigation Privilege

Third Party Liability

Where an abuse of process action is based upon an attorney's communicative acts of filing allegedly false declarations of service to obtain a default judgment, the litigation privilege [Civ. Code §47(b)] extends to necessarily related non-communicative acts including the attorney's subsequent efforts to collect the judgment through a writ of attachment and levying on the debtor's property. Because the gravamen of the action was the procurement of the judgment, the attorney's actions in executing against the judgment did not provide an independent basis for liability separate and apart from the privileged filing of the false declarations of service used to procure the judgment.

Rus, Miliband & Smith, APC v. Yoo (In re Dick Cepek, Inc.)

339 B.R. 730 (2006)

Fee disgorgement

Security interest in fees

With the court's approval, a bankruptcy debtor paid a pre-petition retainer to a law firm. After the case was converted from a Chapter 11 proceeding to a Chapter 7 proceeding, the court, *sua sponte*, claimed that the law firm should disgorge part the retainer in order to allow the court to make a pro rata distribution to all administrative claimants. The law firm contended that it had a

security interest in the retainer, removing the fees from the unsecured class of administrative claimants, and that the secured retainer was protected from disgorgement. The court vacated the order of disgorgement of the fees, and remanded the case for a determination of whether the debtor granted the firm an enforceable security interest in the fees, and whether the firm adequately disclosed the security interest in the fees.

Tien v. Superior Court

139 Cal.App.4th 528 (2006)

Attorney-Client Privilege

Work Product Protection

Right of Privacy

In a putative class action lawsuit involving wage and hour issues, the trial court ordered plaintiffs to provide employer with contact information for all employees who contacted plaintiffs' counsel in response to a neutral letter from a third party informing a sample of putative class members that they could contact the employees' counsel if they would like more information. The court of appeal concluded that the names of putative class members who contacted plaintiffs' counsel (a) did not constitute the work product of plaintiff's counsel who passively received the information; and (b) did not come within the scope of the attorney-client privilege which does not ordinarily protect the client's identity, unless disclosure might expose the client to civil or criminal liability or betray personal and confidential information about the client, but (c) the names were protected by the right to privacy contained in Article 1, section 1 of the California Constitution. In reaching its conclusion regarding the violation of privacy rights, the court determined that the privacy rights of putative class members whose identities would be disclosed outweighed the employer's right to the information because (1) disclosure of the identity of people who consult counsel implicates their right of privacy, and (2) withholding their identity would have no significant impact on the employer's ability to defend itself.

United States v. Gonzalez-Lopez

16 L.Ed.2d 409 (2006)

Right to counsel

Contact with represented persons

The defendant was charged with conspiracy to distribute marijuana. Defendant engaged attorney Fahle and later attorney Low (a California lawyer) to represent defendant. The defendant later decided he wanted only Low, and not Fahle, to represent him in the case. Fahle accused Low of violating Missouri Rule of Professional Conduct 4.2 prohibiting contact by a lawyer with a represented party concerning the subject matter of the representation. The court erroneously denied Low's application for pro hac vice admission due to the alleged violation and a similar violation in another action pending before the same court. Defendant engaged new counsel Dickhaus, who lost the defendant's case. Justice Scalia, writing for the majority, indicated that the denial of a criminal defendant's counsel of choice was a structural defect under the Sixth Amendment, entitling the defendant to a reversal of the conviction. The structural defect was not reviewable under the harmless error standard and did not require inquiry into the effectiveness of subsequent counsel. The dissent by Justice Alito characterized the error as harmless and asserted that it is the quality of the representation, not the identity of counsel, that is the focus of the Sixth Amendment.

In re Wells

2005 WL 3293313 (Review Dept. of the State Bar Court Dec. 5, 2005, as modified on Feb. 3, 2006 and March 7, 2006)

Unauthorized practice of law

Rule of Professional Conduct 1-300(B)

Discipline

Rule 1-300(B) of the Rules of Professional Conduct provides that a member of the State Bar “shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.” Respondent Wells was admitted to the California bar in 1984 and moved to South Carolina in 1996. When she returned to California in 2001, she was prosecuted by the State Bar for the unauthorized practice of law in South Carolina where she was not admitted to practice and was not eligible for pro hac vice admission. Wells contended that since her practice in South Carolina consisted of prosecuting federal civil rights claims before the Equal Employment Opportunity Commission, federal law preempted state regulation. The State Bar Court rejected this argument because her practice was not limited to federal agencies and courts and she had held herself out as entitled to practice in South Carolina without limitation.

Recent Opinions of the American Bar Association Standing Committee on Ethics and Professional Responsibility

Formal Opinion No. 06-439 (2006)

Truthfulness in negotiations

Caucused mediation

This Opinion addresses the lawyer’s obligation of truthfulness when representing a client in negotiations in a caucused mediation, and specifically, whether “puffing” or “posturing” statements of fact by a lawyer regarding the client’s willingness to compromise are permissible. The Opinion states that “statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules.” In the context of a caucused mediation, one in which the mediator meets privately with individual parties or aligned groups in confidential caucuses, the same standards governing lawyers engaged in negotiations are applicable. The Opinion cautions that lawyers should take care, however, not to communicate the client’s position in terms that would convert them into statements of fact. For example, the Opinion states:

Even though a client’s Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than \$50. However, it would not be permissible for the lawyer to state that the Board of directors had formally disapproved any settlement in excess of \$50, when authority had in fact been granted to settle for a higher sum.

Formal Opinion No. 06-438 (February 10, 2006)

Aggregate Settlement

Conflict of Interest

This Opinion addresses the obligations of the lawyer regarding aggregate settlements, which are defined as settlements in which two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas. Under Model Rule 1.8(g), such a settlement

presents a situation in which the interests of the lawyer conflict with those of the clients, and also presents the risk that the lawyer may favor the interests of one client over another, requiring an additional level of disclosure by the lawyer in order to obtain the clients' informed consent. The Opinion requires that a lawyer disclose to the clients all information required to permit the clients to make an informed decision regarding a proposed settlement, and requires that the clients' consent to any aggregate settlement be in writing. The lawyer must disclose to the clients not only the total amount of the aggregate settlement, but also all details of each client's participation, the total fees and costs and the apportionment among clients of such fees and costs.

Formal Opinion 05-437 (October 1, 2005)

Inadvertent disclosure

Because of a change in the ABA Model Rules of Professional Conduct in 2002, in this Opinion, the ABA withdrew Formal Opinion 92-368. The earlier opinion required a lawyer receiving inadvertently produced documents to (1) refrain from examining them; (2) notify the sending lawyer of receipt and (3) abide by the instructions of the sending lawyer. Model Rule 4.4 narrowed the receiving lawyer's obligations, and this Opinion confirms that all the lawyer receiving inadvertently produced documents must do is to notify the sender, consistent with Model Rule 4.4(b).

Note that under California law, the receiving attorney would still be precluded from reviewing the documents any more than is necessary to determine that they are privileged, and must notify the sender. *State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644 (1999).

Recent Opinions of the California State Bar Committee on Professional Responsibility and Conduct (COPRAC)

Formal Opinion No. 2005-168

Duty of Confidentiality

This Opinion addresses whether a lawyer who provides electronic means on his website for visitors to submit legal questions owes a duty of confidentiality to visitors who accept the offer, but whom the lawyer elects not to accept as clients, if the attorney disclaims formation of an attorney-client relationship and a "confidential relationship." The Opinion indicates that a lawyer who provides to such a means of communication through a website, or by email or some other form of electronic communication through his website may effectively disclaim owing a duty of confidentiality to website visitors only if the disclaimer is in sufficiently plain terms to defeat the visitors' reasonable belief that the lawyer is consulting confidentially with the visitor. Simply having a visitor agree that an "attorney-client relationship" or "confidential relationship" is not formed would not defeat a visitor's reasonable understanding that the information submitted to the lawyer on the lawyer's website is subject to confidentiality. In this context, if the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from representing either.

Formal Opinion No. 2005-169

Client trust account

This Opinion addresses the attorney's use of overdraft protection for a Client Trust Account. The Opinion indicates that an attorney does not commit an ethical violation merely by obtaining or using overdraft protection on a Client Trust Account, so long as the protection in question does not entail the commingling of the attorney's funds with the funds of a client. Overdraft protection that compensates exactly for the amount that the overdraft exceeds the funds on deposit (plus funds reasonably sufficient to cover bank charges) is permissible, whereas overdraft protection that automatically deposits an amount leaving a residue after the overdraft is satisfied is not. In all cases, banks must report to the State Bar any presentment of a check against a Client Trust Account without sufficient funds, whether or not the check is honored. Although overdraft protection will not avoid State Bar notification, nor exculpate any unethical conduct that caused the overdraft, it may avoid negative consequences to a client resulting from a dishonored check. The Opinion further provides that when a check is issued against a Client Trust Account with insufficient funds to cover the amount of the check, an attorney must deposit funds sufficient to clear the dishonored check or otherwise make payment, must take reasonably prompt action to ascertain the condition or event that caused the check to be dishonored, and must implement whatever measures are necessary to prevent its recurrence. In addition, if a client will experience negative consequences from the dishonoring of the check, the attorney may have to advise the client of the occurrence. The Opinion also states that an attorney must withdraw earned fees from a Client Trust Account at the earliest reasonable time after they become fixed in order to comply with the attorney's ethical obligations, but need not do so immediately.

Formal Opinion No. 2006-170

Attorneys' fees

Charging lien

This Opinion addresses an attorney's compliance with California Rule of Professional Conduct 3-300 in connection with inclusion of a charging lien in a contingency fee agreement. The Opinion provides that the inclusion of a charging lien in the initial contingency fee agreement does not create an "adverse interest" to the client within the meaning of rule 3-300 of the California Rules of Professional Conduct. Unlike a charging lien in an hourly case, the charging lien is a natural corollary of the contingency arrangement. This conclusion is not intended to discourage lawyers from conforming to the standards established in rule 3-300 in their contingency agreements.

Cases Pending Review in the California Supreme Court

Beal Bank, SSB v. Arter & Hadden

135 Cal.App.4th 643 (2006) rev. granted & depub. 43 Cal. Rptr. 301 (2006)

Legal malpractice

Statute of limitations

The court addressed a conflict in authority on the application of the continuing representation tolling provision to an attorney's prior firm. In March, 1997, defendant Arter & Hadden (A&H) represented Beal Bank in collection of default interest from certain debtors. After those debtors filed bankruptcy, in June, 1997, attorney Gubner of A&H represented Beal Bank in the

bankruptcy in which the court denied a motion for summary judgment. Gubner appealed and the district court affirmed ruling. Gubner then left A&H, but continued representing the Bank at his new firm, appealing the denial of the summary judgment to the Ninth Circuit, which affirmed the rulings below. Beal Bank later sued defendants including A&H, and A&H partner, Gubner and his new firms, for professional negligence. The court held that the continuous representation provision of Section 340.6 applies to toll the statute of limitations for a legal malpractice action by a current attorney's former law firm and one of that firm's partners with whom the current attorney was associated when the alleged malpractice occurred, where the malpractice liability arose while the current attorney worked at the former law firm and that current attorney continues to represent the client in the same specific subject matter in which the alleged malpractice occurred. The California Supreme Court granted a petition for review and republished the lower court's opinion.

Jasmine Networks v. Marvell Semiconductor, Inc.

117 Cal. App. 4th 794 (2004), rev. granted & depub. by 117 Cal. App. 4th 794 (2004)

Attorney client privilege

Crime fraud exception

Waiver

Inadvertent disclosure

Three Marvell executives (including one the general counsel) called Jasmine's director of legal affairs. After leaving a message, the Marvell executives failed to hang up the speakerphone, so that an otherwise confidential communication was inadvertently recorded by the Jasmine voicemail system. The recorded conversation between Marvell's executives and counsel involved theft of trade secrets and unlawful hiring of Jasmine's employees. After Jasmine then sued Marvell, Marvell obtained a preliminary injunction against Jasmine prohibiting disclosure of the voicemail which the lower court determined contained attorney client privileged information. On appeal, Marvell argued that the inadvertent disclosure did not constitute a waiver of the attorney client privilege. The court held that the disclosure was made not only by counsel but also by non-lawyer executives, and therefore that Marvell waived the attorney client privilege. The appellate court further held that, even if the disclosure did not constitute a waiver, the crime-fraud exception to the attorney client privilege. The California Supreme Court granted a petition for review and republished the lower court's opinion.

Rico v. Mitsubishi Motors Corp.

116 Cal.App.4th 51 (2004), rev. granted & depub. by 14 Cal. Rptr. 3d 210 (2004)

Work product

Inadvertent disclosure

A plaintiff's lawyer inadvertently obtained a memorandum containing the defense counsel's work product including communications between defense counsel and defense experts regarding the strengths and weaknesses of defense evidence. The plaintiff's lawyer did not inform the defense counsel that he possessed the document, disseminated the document to other plaintiffs' counsel and their experts and used the information at a deposition to impeach the testimony of the opposing experts. The appellate court found the lawyer's conduct unethical, and disqualified the lawyer and the lawyer's firm. The California Supreme Court granted a petition for review and republished the lower court's opinion.

Supplemental Case Briefs

***Ford v. Long Beach Unified School District* (2006) __ F.3d __ (9th Cir. No. 04-56263; WL 2422670)**

Attorney's Fees

Child's mother, an attorney, represented Child in settling lawsuit against School District brought under Individuals with Disabilities Education Act (IDEA). Ninth Circuit held that the IDEA does not authorize fees for attorney parents. "Like an attorney appearing *pro se*, a disabled child represented by his or her parent does not benefit from the judgment of an independent third party." Even though mother's representation was competent, Congress's intentions are better served by a rule that irrefutably presumes that parents or guardians cannot provide objective and dispassionate legal advice.

***In re the Marriage of Erickson* (2006) 141 Cal.App.4th 707**

Attorney's Fees

Husband appeals from an order requiring him to pay attorney's fees directly to Law Firm that Wife used in dissolution proceedings. Before the order was made, Law Firm formally substituted out as counsel of record for Wife. When an attorney's representation of a spouse ceases before an attorney's fees order is made, the court's power is limited in making an order payable to the attorney rather than the spouse. The court must determine whether the former client authorized the former attorney to make the fee request on the former client's behalf. The pivotal inquiry is whether the fee pursued by the discharged attorneys was legitimately made on behalf of the former client with the former client's approval. Here, Wife authorized the fee request. Therefore, the trial court had jurisdiction to make the order requiring Husband to pay attorney's fees directly to Law Firm.

***Estate of Stevenson v. Wilks* (2006) 141 Cal.App.4th 1074**

Attorney's Fees

Trial court initially approved a Lodestar fee agreement entitling estate attorney to attorney fees based on two times hourly rates times the total number of hours worked. Under the Lodestar agreement, attorney petitioned the trial court for \$1.25 million plus costs. The trial court awarded attorney \$200,000 plus costs, noting that, despite the attorney's heroic efforts in limiting creditor's claims, the estate had a negative net worth. Attorney challenged the ruling on grounds the trial court had previously approved the Lodestar agreement, which the attorney characterized as a contingent fee agreement under Probate Code §10811(c). Section 10811(c) permits an attorney to perform extraordinary services on a contingency fee basis provided the fee agreement is first approved by the court. The court of appeal affirmed the trial court ruling, rejecting the claim that the Lodestar agreement was a contingent fee within the scope of section 10811(c)(2). Normal contingency fees provide a flat or sliding scale percentage of any recovery, with the fee dependent upon the recovery. Here, the agreement provided for an

award of fees as soon as attorney started work on the matter regardless of the outcome. Moreover, the use of percentages in contingency fee agreements ensures that the client will receive a portion of any recovery, whereas here the use of the Lodestar agreement would have deprived the client/estate of any recovery.

***Witte v. Kaufman, et al.* (2006) 141 Cal.App.4th 1201**
Anti-SLAPP Statute
Attorney's Fees

Law Firm that prevailed on motion to strike pursuant to the anti-SLAPP statute was not entitled to attorney's fees because the work done in connection with the motion was performed by Law Firm's attorneys who were representing their own interests.

***Flatley v. Mauro* (2006) 39 Cal.4th 299**
Anti-SLAPP Statute
Third Party Liability

Plaintiff sued Defendant Attorney for civil extortion, intentional infliction of emotional distress, and wrongful interference with economic advantage, based on a demand letter Defendant Attorney sent to Plaintiff, a public figure, on behalf of a woman who claimed Plaintiff had raped her. Defendant Attorney filed a motion to strike Plaintiff's complaint under the Anti-SLAPP statute. The trial court denied the motion, and the appellate court affirmed, holding that Defendant Attorney's letter and subsequent phone calls were criminal extortion as a matter of law and that extortionate speech is not constitutionally protected. The Supreme Court held that a defendant whose allegedly protected speech or petitioning activity is illegal as a matter of law cannot use the anti-SLAPP statute to strike a complaint.

***Soukup v. Law Offices of Herbert Hafif, et al.* (2006) __ Cal. __ (Supreme Court No. S126715)**
Anti-SLAPP Statute
Malicious Prosecution
Third Party Liability

The issue before the California Supreme Court was whether a litigant whose malicious prosecution action was dismissed under the anti-SLAPP statute may, in turn, invoke that statute as a defense to a subsequent action for malicious prosecution and abuse of process (a so-called SLAPPback suit). The Supreme Court concluded that while SLAPPbacks are not exempt from the anti-SLAPP statute, and a motion to strike a SLAPPback suit may be made under the anti-SLAPP statute, the plaintiff demonstrated a probability of prevailing so as to defeat the motion to strike.

***Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688**
Third Party Liability
Fiduciary Duty

Attorney represented the buyer in connection with a purchase of stock and agreed to act as an escrow holder for the transaction. The seller decided to terminate the sale and notified the parties of his decision, but Attorney nonetheless closed the transaction. When an attorney/escrow holder faces conflicting demands from his or her own client and another party to the escrow, the attorney cannot favor his or her own client and disregard the rights of the other party. The appropriate step for Attorney is to file an interpleader action. Because Attorney closed the transaction before the escrow conditions had been satisfied, before the parties had a written agreement regarding material terms of the contract, and after he received notice of rescission, Attorney breached his fiduciary duty as an escrow holder to the seller.