ETHICS UPDATE 2009

Significant Developments in the Law of Lawyering

Carole J. Buckner

Dennis Peter Maio

Suzanne M. Mellard

State Bar of California Annual Meeting

September 2009

82nd Annual Meeting of the State Bar of California
September 10 – 13, 2009

NAME: Carole J. Buckner

ADDRESS: 12 Pompeii

CITY/STATE/ZIP: Irvine, CA 92606

E-MAIL ADDRESS: cbuckner@cox.net

Carole J. Buckner is a Special Assistant United States Attorney with the United States Postal Service Office of Inspector General. She teaches Professional Responsibility and Legal Ethics in Business Representation, as well as Remedies at Western State University College of Law in Fullerton, California.

A 1980 graduate of the University of California, Berkeley, she holds her J. D. from Hastings College of the Law (1984). She has extensive experience in business litigation and also served as corporate counsel to Amplicon, Inc. and California First National Bancorp in Santa Ana, California.

Ms. Buckner is the Vice Chair of the State Bar's Committee on Professional Responsibility and Conduct (COPRAC). She is a former co-chair of the Professionalism and Ethics Committee of the Orange County Bar Association (OCBA), and is a contributing editor of the *Ethically Speaking* column in the Orange County Lawyer Magazine. She is also a member of The Association of Professional Responsibility Lawyers. She speaks and writes frequently on ethics-related issues.

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

82nd Annual Meeting of the State Bar of California
September 10 – 13, 2009

NAME:	Dennis Peter Maio	
FIRM:	Reed Smith LLP	
ADDRESS:	101 Second Street, Suite 1800	
CITY/STATE/ZIP:	San Francisco, CA 94105	
BUSINESS PHONE:	415-659-5942	FAX NUMBER: 415-391-8269
E-MAIL ADDRESS:	dmaio@reedsmith.com	

Dennis Maio is a counsel in the Appellate Group of the Litigation Department of Reed Smith LLP, resident in its San Francisco office. For almost 20 years, Mr. Maio served on the staff of the Supreme Court of California, first for the Honorable Stanley Mosk, and after his death, for the Honorable Ronald M. George, the Chief Justice of California. During his tenure at the Supreme Court, he drafted almost 300 published opinions, which cover a broad range of matters, including the ethical obligations of attorneys and issues of professional responsibility and conduct. Since joining Reed Smith LLP, Mr. Maio has appeared in numerous appellate and other matters on diverse questions, including legal ethics, in courts such as the United States Supreme Court, the United States Circuit Courts of Appeals, the Supreme Court of California, the Courts of Appeal of California, and the International Court of Arbitration of the International Chamber of Commerce. Mr. Maio is presently Advisor to the Committee on Professional Responsibility and Conduct of the State Bar of California, and was previously its Chair and Vice Chair. He was a member of the State Bar's Committee on Appellate Courts. He was also a member of the State Bar's Committee on Administration of Justice, of which he served as Chair and Vice Chair.

82nd Annual Meeting of the State Bar of California
September 10 – 13, 2009

NAME:	Suzanne M. Mellard	
FIRM:	Rogers Joseph O'Donnell	
ADDRESS:	311 California Street, 10th Floor	
CITY/STATE/ZIP:	San Francisco, CA 94104	
BUSINESS PHONE:	415-365-5330	FAX NUMBER: 415-956-6457
E-MAIL ADDRESS:	smellard@rjo.com	

Suzanne Mellard is counsel at Rogers Joseph O'Donnell in San Francisco where she specializes in the law governing lawyers, counseling lawyers and law firms regarding ethical obligations, risk management and partnership disputes. Ms. Mellard also represents lawyers and law firms in malpractice, malicious prosecution and other types of lawsuits, disqualification motions, and state bar investigations. She lectures frequently on ethics and malpractice issues. Ms. Mellard is the current Chair of the State Bar Committee on Professional Responsibility and Conduct. She received her law degree from Boalt Hall School of Law and her undergraduate degree from the University of California, Santa Barbara.

ETHICS UPDATE 2009
Significant Developments in the Law of Lawyering

INDEX OF CASES BY SUBJECT AREA

ETHICS UPDATE 2009
Significant Developments in the Law of Lawyering

INDEX OF CASES BY SUBJECT AREA

ETHICS UPDATE 2009
Significant Developments in the Law of Lawyering

ALPHABETICAL INDEX OF CASES

ETHICS UPDATE 2009
Significant Developments in the Law of Lawyering

I. ATTORNEYS FEES/MANDATORY FEE ARBITRATION

FAGELBAUM & HELLER, LLP V. SMYLIE (2009) 174 CAL. APP. 4TH 1351

- **Waiver of Mandatory Fee Arbitration by Seeking Affirmative Relief**
- **Appealability of Orders Compelling Arbitration**

F&H represented Smylie, its landlord, in two different lawsuits. When Smylie failed to pay F&H's legal fees, F&H agreed Smylie could reduce his debt by providing F&H with rent credits. In April 2006, after Smylie refused to accept further rent credits, F&H initiated binding arbitration under the fee agreement by submitting a demand to ADR, Inc. Smylie responded by initiating nonbinding fee arbitration under the MFAA, in which he alleged that F&H's malpractice had damaged Smylie in an amount exceeding the amount of fees claimed. In August 2006, when Smylie issued an order to vacate the premises, F&H invoked the binding arbitration provision in the lease agreement by submitting a demand to AAA. On September 14, 2006, Smylie served a cross-demand in the AAA arbitration, alleging he had paid F&H $471,670 in legal fees and costs, and that F&H claimed that $605,927 was still owing, but that due to F&H's overbilling and malpractice, Smylie was entitled to a refund. After an unsuccessful mediation, F&H filed a lawsuit against Smylie for unpaid legal fees and a motion to compel binding arbitration, asserting that Smylie had waived his right to an MFAA arbitration by alleging a claim for affirmative relief in both the MFAA arbitration and in his AAA cross-demand. The trial court granted the motion and consolidated the MFAA arbitration and the AAA arbitration into the ADR binding arbitration, which proceeded immediately. Following arbitration, the ADR issued an award to F&H for $1,078,897. F&H moved to confirm the award and Smylie objected, asserting that the arbitrators were without authority to proceed because Smylie had demanded but had not been afforded a nonbinding MFAA arbitration. The trial court affirmed the arbitration award, holding that Smylie had waived any right to MFAA arbitration on five occasions. Smylie appealed.

The Court of Appeal first rejected F&H's argument that the appeal of the order compelling arbitration was untimely, holding there is no immediate direct appeal from an order compelling arbitration and that such an order is subject to review on appeal from the final judgment (an order confirming the arbitration award). The Court held then that Smylie had waived his right to non-binding MFAA arbitration by requesting affirmative relief in the cross-demand filed in the AAA arbitration (B&P Code section 6201(d)(2)), finding that the cross-demand was a "pleading" and that it sought affirmative relief consisting of money that would be due only upon elimination of the outstanding legal fees and costs by deducting Smylie's alleged damages for malpractice and misconduct.

PEREZ V. GRAJALES (2008) 169 CAL. APP. 4TH 580

- **Mandatory Fee Arbitration Act/Trial de Novo**
- **Effect of Involuntary Dismissal of Action for Fees**
- **Waiver of Right to Mandatory Fee Arbitration**

Perez represented Grajales under a contingency fee agreement in employment litigation that was resolved by a substantial settlement. In a subsequent fee dispute, Grajales claimed she was entitled

to a bigger share of the settlement proceeds than Perez gave her. Grajales prevailed in a non-binding arbitration under the MFAA and was awarded $173,715. Perez rejected the arbitration award by timely filing a complaint seeking a trial de novo pursuant to the provisions of the MFAA. More than five years later, Grajales filed a motion to dismiss Perez's complaint for failing to bring the action to trial within five years, pursuant to Code Civ. Proc. sections 583.310, 583.360 and a motion to confirm the fee arbitration award and to enter judgment on the confirmed award. The trial court dismissed the complaint but denied Grajales' motion to enter judgment on the arbitration award. The Court of Appeal reversed, holding that the involuntary dismissal of Perez's complaint for failure to prosecute constituted a repudiation of Perez's prior rejection of the arbitration award, effectively reinstating the arbitration award.

***SCHATZ V. ALLEN MATKINS LECK GAMBLE & MALLORY LLP* (2009) 45 Cal. 4TH 557**

- **Mandatory Fee Arbitration**
- **Right to Trial de Novo**
- **Binding Arbitration Provision in Fee Agreement**

Dr. Schatz entered into a fee agreement with Allen Matkins (the Firm) pursuant to which Schatz agreed to submit any disputes related to the fee agreement to binding arbitration before a retired judge or justice. After Schatz failed to pay his fees to the Firm, the Firm asserted its right to binding arbitration. Schatz objected, and elected to pursue non-binding fee arbitration pursuant to the Mandatory Fee Arbitration Act (MFAA) Cal. Business & Prof. Code § 6200, et seq. After the non-binding fee arbitration, Schatz elected to pursue a trial de novo pursuant to the provisions of the MFAA. The Firm asserted its right to binding arbitration pursuant to the provisions of the fee agreement and the California Arbitration Act (CAA). The California Supreme Court held that the CAA requires that a party who agrees to arbitration resolve those claims through arbitration, even after the party elects to pursue mandatory fee arbitration pursuant to the MFAA. Although the MFAA would ordinarily permit a trial de novo after any MFAA arbitration, where the client has agreed previously to arbitrate fee disputes, the client is bound by such an agreement. The MFAA did not impliedly repeal the CAA, nor did the MFAA supersede the CAA, the court held. The Court held, rather, that both arbitration provisions should be given effect, particularly given the strong public policy favoring arbitration.

***WINTERROWD V. AMERICAN GENERAL ANNUITY INS. CO.* (9TH CIR. 2009) 556 F.3D 815**

- **Court Awarded Attorney's Fees**
- **Unauthorized Practice of Law**

Neil Winterrowd, Kevin Yurkus, and Gregory Stopp, former employees of American General Annuity Insurance Co. (AGAIC), sued AGAIC, their former employer, for breach of a severance contract. The former employees and the former employer eventually settled the litigation, leaving to the district court the issue whether and in what amount the former employees were entitled to an award of attorney's fees. The former employees moved for attorney's fees pursuant to section 218.5 of the California Labor Code. The district court held that the former employees were entitled to attorney's fees as a matter of law; it applied California law to determine a reasonable hourly rate for their attorneys, finding that $300 per hour was an appropriate rate for their counsel of record, William Wheatley Jr. and Robert Wheatley. The court determined that the former employees were not entitled to attorney's fees for William Wheatley, Sr., an attorney admitted to the Oregon Bar but

not the California Bar, because Wheatley, Sr.'s "work on this case dealt with matters of California law for a California client's claim in the Central District of California, … in violation of the State Bar Act [and] the Central District Local Rules," and amounted to the unauthorized practice of law. The Court of Appeals, however, held that the former employees were indeed entitled to attorney's fees for Wheatley, Sr.: Although not a member of the California Bar, Wheatley, Sr., was a distinguished member of the Oregon Bar and merely assisted members of the California Bar in litigating a case in the Central District; he did not physically appear before the Central District, did not sign pleadings in the case before the Central District, had minimal contact with the former employees, had no direct contact with opposing counsel, was supervised by Wheatley, Jr., who was a member of the California Bar and was the person who alone remained responsible to the former employees, and would have been admitted pro hac vice had he applied. As a result, Wheatley, Sr., did not engage in the unauthorized practice of law.

***COHEN V. BROWN* (2009) 173 CAL. APP. 4TH 302**

- **Fee-Sharing Agreements**
- **Failure to Comply with Rule 2-200**
- **Anti-SLAPP**

Cohen sued Michael Brown after Brown refused to share the contingency fees he obtained after the settlement of a personal injury lawsuit that Cohen and Brown had agreed to jointly litigate and divide fees. Cohen alleged causes of action for fraud, breach of contract, conversion and extortion by means of filing a false State Bar complaint against Cohen. Brown filed an anti-SLAPP motion to strike the complaint, asserting that the action was in retaliation for Brown having represented the client in the underlying litigation and collected a fee and for assisting the client in filing a State Bar Action. Brown also asserted that most of Cohen's claims were based upon his actions in assisting the client in filing a State Bar complaint and were subject to B&P Code section 6094's protection for communications concerning an attorney's competence or misconduct and barred by the litigation privilege (CC 47). Brown also noted that Cohen had failed to obtain the written Rule 2-200 consent from the client for the fee sharing agreement.

Cohen's law partner filed a declaration stating that Brown threatened to file a State Bar complaint if he refused to sign off on the client's settlement check, telling him that Cohen and the law partner could lose their licenses to practice law. A few days later Cohen received a letter from the State Bar regarding the client's complaint.

The trial court denied Brown's motion to strike finding that the State Bar complaint was filed in an "extortive context" and not in furtherance of the right to petition. It was therefore as a matter of law illegal and not a protected activity. The Court of Appeal affirmed citing *Flatley v Mauro* (2006) 38 Cal. 4th (speech or petitioning activity that is conceded or shown to be illegal as a matter of law cannot support an anti-SLAPP motion) and finding that Brown's actions with respect to filing the State Bar complaint constituted extortion under Penal Code 518 et seq. The court noted that the fact that Cohen's claims against Brown may ultimately be barred by the litigation privilege or by B&P Code section 6094 was not an issue since the burden never shifted to Cohen to demonstrate a probability of prevailing.

Finally, the court acknowledged that, absent written Rule 2-200 consent from the client, Cohen could not recover fees pursuant to his agreement with Brown. The court noted that Rule 2-200 only requires that client consent be given prior to the actual division of the fees, so consent was still a possibility. In addition, Cohen could obtain a quantum meruit recovery, based upon the reasonable

value of his services, provided that such recovery would not increase the amount of attorney's fees paid or owed by the client.

***STRONG V. BEYDOUN* (2008) 166 CAL. APP. 4TH 1398**

- **Fee Sharing Agreements**
- **Rule 2-200**

Kathleen Strong, an attorney, rendered legal services to Ali Beydoun and Edwin Craig Sheldon under a fee-sharing agreement with Bill Suojanen, another attorney. Strong sued Beydoun and Sheldon for attorney's fees under the theories of quantum meruit and unjust enrichment for the reasonable value of her services. The superior court entered a judgment of dismissal against Strong after it sustained a demurrer by Beydoun and Sheldon to her complaint, without leave to amend, on the ground that rule 2-200 of the California Rules of Professional Conduct rendered her fee-sharing agreement with Suojanen unenforceable because Beydoun and Sheldon had not signed it. The Court of Appeal affirmed. It concluded that Strong's failure to obtain Beydoun's and Sheldon's written consent to her fee-sharing agreement with Suojanen precluded her from recovering the reasonable value of her services from Beydoun and Sheldon under theories of quantum meruit or unjust enrichment, even if Beydoun and Sheldon knew that she was working on their case and that she expected payment, absent evidence that they asked her to work for them or that they agreed to pay her. The Court of Appeal reasoned: "Rule 2-200 was adopted for the protection of the client, who is a 'consumer [ ] of the legal expertise possessed by the attorney.'… 'The consumer protection comes from the attorney's written disclosure and the client's written consent...."… It makes no sense to allow an attorney whose only connection to the client is through an unenforceable fee-sharing agreement to recover fees directly from that client. Strong's recourse is against Suojanen."

***SHOPOFF & CAVALLO, ET AL. V. HYON*, ET AL. (2008) 167 CAL. APP. 4TH 1489**

- **Charging liens**
- **Referral fees**
- **Lawyer Referral Services**
- **Legal malpractice**

Plaintiffs Hyon and Colangelo hired Eric Selten, a non-lawyer and president of National Legal Network (NLN) pursuant to which Selten was to hire counsel for Hyon and Colangelo to pursue the so-called Decker Island litigation, and Selten/NLN would consult on such litigation, in exchange for an initial fee of 10% of the recovery from such litigation, later increased to 12%. Selten assisted with hiring attorneys Disner and Kirk (on a 5% contingency agreement) who each entered into contingency fee agreements with the plaintiffs Hyon and Colangelo. After a $42 million verdict, set aside on a motion for judgment notwithstanding the verdict, attorney Bien was hired to handle an appeal on a 6% contingency fee agreement. The appeal succeeded, and the case was remanded for retrial. Attorney Shopoff was hired pursuant to a 21% contingency agreement, including a lien on the recovery, to handle the retrial, which resulted in a $7.6 million verdict, followed by a settlement pursuant to which payments totaling $2.6 million were agreed upon. At this point, Shopoff sought to enforce his lien on the recovery, and Selten, Kirk and Bien also sought payment, while the plaintiffs themselves asserted conflicting rights to the settlement proceeds. Shopoff filed a complaint in interpleader (in San Francisco) to resolve the multiple conflicting interests in the settlement. Hyon sued Selten and Colangelo in Los Angeles for breach of fiduciary duty, fraud,

and other claims, also in relation to the recovery, and cross complained against Shopoff in the interpleader action for malpractice. Colangelo cross-complained against Hyon in the interpleader action for dissolution of partnership and an accounting.

The court addressed several ethical issues. First, the court addressed whether Selten's contract with Hyon and Colangelo was illegal on two bases: whether the contract with Selten involved an illegal lawyer referral service because the service was not registered with the State Bar as required by Business & Professions Code § 6155. The court held that the doctrine of collateral estoppel made the determination of the appellate court in the San Francisco litigation—that the contract was unenforceable—binding. But, Selten could recover reasonable fees for lawful services rendered (approximately 8,000 hours) under a *quantum meruit* theory.

Hyon also contended that the attorneys to whom Selten had referred Hyon should be barred from recovery because they accepted illegal referrals from Selten. Factually, the court determined that most of the attorneys did not in fact accept referrals from Selten, with the exception of Disner, as to whom the court found no evidence presented that Disner knew of a referral service, legal or otherwise, being operated by Selten. In addition, Disner had paid no compensation to Selten, and Section 6155 does not make uncompensated attorney referrals illegal.

The court also addressed Hyon's claim that Shopoff's charging lien violated California Rule of Prof. Conduct 3-300, because Shopoff did not comply with the requirements of that Rule that the transaction be fair and reasonable, fully disclosed in writing, and that the client be advised in writing that he may seek the advice of independent counsel, and be given the opportunity to do so, then consent to the terms of the transaction in writing. The court acknowledged that, the precise issue whether rule 3-300 applies to a contingency fee agreement had not been decided by the California Supreme Court. The court held that, "Any violations of rule 3-300 may prevent respondents from enforcing the liens, but those violations do not taint or preclude recovery under the valid contingent fee agreements."

The court also determined that Shopoff's filing of the interpleader was proper in view of the conflicting claims and did not constitute legal malpractice or conversion. Finally, the court dismissed the legal malpractice claim against Shopoff on the grounds that the damages involved were speculative at the time the claim was filed, and because Hyon had not filed an amended pleading after Hyon arguably incurred damages.

II. ATTORNEY-CLIENT PRIVILEGE

TRITEK TELECOM, INC. V. SUPERIOR TRITEK TELECOM, INC. V. SUPERIOR COURT (2009) 169 CAL. APP. 4TH 1385

Chik-Lun Mak, who was a director of Tritek Telecom, Inc., a closely-held corporation, successfully petitioned the superior court to enforce his right to inspect Tritek's books and records in the course of an action he brought against it as a shareholder to vindicate his personal rights. Tritek, in turn, successfully petitioned the Court of Appeal for a writ of mandate to vacate the order. The Court of Appeal opened its discussion by noting that, although a corporate director generally has an absolute right at any reasonable time to inspect all corporate books and records, the director loses the right when he or she announces an intention to violate his or her fiduciary duties to the corporation. The Court of Appeal concluded that Mak did not have a right to inspect Tritek documents protected by the attorney-client privilege or the attorney work-product doctrine, absent evidence that Tritek had waived the protection of the privilege and the doctrine: Mak would not have been able to obtain the documents in discovery in his shareholder action, and any documents obtained in his capacity as

director could be used to advance his own personal interest in obtaining damages against Tritek. Although it recognized that a corporate director is generally presumed to be acting in good faith, the Court of Appeal held that Mak did not enjoy the benefit of the presumption at the time he sought to enforce his right to inspect Tritek's books and records because he had already filed a shareholder action against Tritek to vindicate his personal rights.

III. CONFLICTS OF INTEREST

IN RE EDWARD S. (2009) 173 CAL. APP. 4TH 387

- **Competence**

Defendant Edward S. alleged that his original public defender, Hauschild, provided ineffective assistance of counsel by failing to adequately investigate a juvenile matter in which the defendant was accused of, and found by the court to have committed, a molestation of a minor with whom defendant resided. After the case was transferred to a new county due to defendant's change of residence, a new public defender moved for a new trial. In support of the motion, Hauschild submitted a declaration indicating that his caseload was too heavy for him to effectively litigate all of his cases, and that his supervisor had not been receptive to Hauschild's requests for resources for the particular defendant's case or to his concerns about his workload. After the request for new trial was denied, the appellate court reversed and remanded for a new hearing on the merits, finding that Hauschild had (1) failed to request an adequate continuance (due to his misunderstanding of the law); (2) failed to adequately investigate the case; and (3) failed to request new counsel, despite recognizing that he lacked the time and resources to competently represent the defendant.

The court held that "The conduct required of attorneys in this state is determined not just by the Rules of Professional Conduct, the State Bar Act . . . and judicial opinions, but also by consideration of "[e]thics opinions and rules and standards promulgated by other jurisdictions and bar associations." Rules of Prof. Conduct, rule 1-100(A). The court adopted ABA Formal Ethics Op. 06-441, which addressed the obligations of public defenders to address their workloads, finding the Opinion consistent with California Rule of Prof. Conduct 3-110(A)-(B), requiring a California lawyer not to intentionally, recklessly or repeatedly fail to perform legal services with competence, and Rule 3-700, requiring that a lawyer withdraw from representation she/he cannot perform competently. The court indicated that California Penal Code Section 987.2 also required withdrawal because a public defender forced to choose between representation of indigent clients has a conflict of interest.

ALL AMERICAN SEMICONDUCTOR, INC. V. HYNIX SEMICONDUCTOR, INC. (N.D. CAL., DEC. 18, 2008) 2008 U.S. DIST. LEXIS 106619

- Conflict of Interest
- Joint Defense Agreement
- Screening
- Advance Waiver

Attorney Vandevelde represented the Vice President of Sales for Infineon (the VP) in a DOJ investigation into price fixing, to which the VP pleaded guilty. Vandevelde also represented the same VP in preparing the VP for his deposition in civil litigation. In these representations, Vandevelde, the VP and Infinion entered into a joint defense agreement, which addressed sharing of confidential information and included an advance waiver, waiving certain future conflicts of interest

arising from the joint representation. After Vandevelde's representation of the VP concluded, Vandevelde's law firm merged with the Crowell firm, and became that firm's Los Angeles office. The Washington DC office of Crowell was representing the plaintiffs in a civil case against Infineon and several other defendants involving the same price fixing allegations. Infineon sought to disqualify Crowell based on Vandevelde's prior representation of the VP, and considering the joint defense agreement between the VP and Infenion. In response, Crowell asserted that Vandevelde never had an attorney client relationship with Infineon, and indicated that Crowell had screened Vandevelde from discussing his former representation of the VP with anyone from Crowell. The court held that Cal. Rule of Professional Conduct 3-310(E) required the disqualification of the entire Crowell firm, because Vandevelde had obtained confidential information through the joint defense of the VP and Infineon in relation to the same price fixing allegations, and California has not recognized ethical walls as effective to prevent disqualification in matters where private lawyers change firms. The court applied the substantial relationship test normally applicable to successive representation, and held that disqualification was required here, where the matters in question were closely related, and the lawyer Vandevelde had spent significant time working on the prior matter. The court also concluded that the advance waiver of future conflicts of interest that was incorporated into the joint defense agreement did not prevent the disqualification of the Crowell firm, because an advance waiver must be evaluated based on a seven factor test to determine among other factors, its intended scope. The court held that the advance waiver here covered only the situation of an attorney cross-examining testifying defendants, and therefore, it was too narrow to cover the conflict arising from the merger of Vandevelde's firm into the Crowell firm. Despite the burden of disqualification in a multi-district price fixing case only six months prior to trial, the court disqualified the entire firm.

After the ruling, Crowell withdrew from representation of the plaintiffs against Infineon, but continued representation of the plaintiffs against the remaining defendants. In a subsequent decision, Infineon sought contempt sanctions against Crowell for its continued representation of plaintiffs against the remaining defendants. The court denied the contempt sanction, but clarified its earlier order to indicate that the Crowell firm was disqualified from further representation of the plaintiffs against any of the defendants in the case.

***LYMS, INC. V. MILLIMAKI* (S.D. CAL., JAN. 15, 2009) 2009 U.S. DIST. LEXIS 3214**

- **Conflict of Interest – Rule 3-310(E)**

LYMS sued Bruce Millimaki and Michael Eggert, among others, for mismanagement of its qualified employee retirement benefit plan under ERISA. Prior to the filing of the complaint, counsel for Millimaki and Eggert, which was Butterfield Schechter LLP, discussed mediating the dispute with counsel for LYMS, which was then Branton and Wilson APC and Solomon Ward Seidenwurm & Smith LLP. Pursuant to these discussions, Robert Butterfield, of Butterfield Schechter, contacted nationally-recognized ERISA expert Robert Ridley, of Farmer & Ridley LLP, to inquire whether he would serve as mediator. The contact between Butterfield and Ridley consisted of a voice-mail message left by Butterfield for Ridley and a subsequent telephone conversation in which Ridley declined to serve as mediator. After the complaint was filed, LYMS substituted Farmer & Ridley as counsel in place Branton and Wilson and Solomon Ward. Millimaki and Eggert moved to disqualify Farmer & Ridley on the ground that the contact between Butterfield and Ridley gave rise to a conflict of interest sufficient to prevent Farmer & Ridley from serving as LYMS' counsel. The district court denied the motion. Under rule 3-310(E) of the California Rules of Professional Conduct, an attorney "shall not, without the informed written

consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." Although Millimaki and Eggert admitted that they had never been clients of Farmer & Ridley, they argued that rule 3-310(E) nevertheless applied because Butterfield had communicated "confidential information" to Ridley in the course of his contact with him about his possible service as mediator, to the effect that (1) the case involved an ERISA dispute; (2) LYMS had incurred substantial legal fees in an earlier, related action; (3) Butterfield felt that Millimaki and Eggert had a strong case and were not going to settle for a large amount of money; (4) Millimaki and Eggert were of the opinion that the third party administrator of the ERISA plan might have been at fault; (5) Butterfield thought the dispute could be resolved on a legal analysis under ERISA and (6) Millimaki and Eggert wanted a mediator versed in ERISA law who would be able to assess blame to LYMS. The district court rejected the argument, finding that any information Butterfield communicated to Ridley was *not* confidential, amounting to nothing more than "generic musings by defense counsel" in an ERISA dispute.

***PEOPLE V. DOOLIN* (2009) 45 CAL. 4TH 390**

- **Conflicts arising from flat fee arrangements**

Keith Zon Doolin was charged in superior court with two counts of first degree murder under special circumstances making him eligible for a sentence of death. Because Doolin was indigent, the superior court appointed counsel for him. At that time, the superior court's policies for capital cases provided for three categories of compensation depending on the complexity of the case. Appointed counsel were paid a lump sum, as follows: Category 1, $40,000 for a noncomplex case with one defendant and one victim; Category 2, $60,000 for a case involving multiple victims or defendants, complicated special circumstances, or complex factual or legal issues; and Category 3, $80,000 for a case involving multiple victims or defendants, highly unusual publicity, complicated special circumstances, or complex factual or legal issues. The lump-sum amount covered all attorney's fees as well as costs for investigative services. Upon written justification, appointed counsel could obtain additional attorney's fees for cases that received extensive publicity or that involved numerous victims or crimes. And as the case progressed, appointed counsel could request additional funding for investigative services. Upon appointment, counsel would make an initial evaluation of the case by rating its complexity and projecting the kind and extent of investigative services that might be required. In connection with his appointment, Doolin's appointed counsel proposed that the case be designated as Category 3, calling for the highest compensation rate of $80,000, and estimated $60,000 in costs for investigative services; the superior accepted the proposal. Doolin was subsequently tried, convicted as charged, and sentenced to death. After trial, Doolin's appointed counsel submitted a final accounting, which showed that he had received $80,000 and had spent only $8,676.15 for investigative services. On appeal, Doolin argued that his conviction and sentence should be reversed because his appointed counsel's lump-sum compensation arrangement inherently created an irreconcilable conflict of interest. The Supreme Court rejected the argument. Although it acknowledged that, under the lump-sum compensation arrangement, Doolin's appointed counsel could maximize his own compensation by cutting expenses for investigative services, the Supreme Court stated that such a "theoretical possibility was qualitatively no different from other flat fee agreements that have been held acceptable": " ' "[A]lmost any fee arrangement between attorney and client may give rise to a 'conflict.' An attorney who received a flat fee in advance would have a 'conflicting interest' to dispose of the case as quickly as possible, to the client's disadvantage; and an attorney employed at a daily or hourly

rate would have a 'conflicting interest' to drag the case on beyond the point of maximum benefit to the client. [¶] The contingent fee contract so common in civil litigation creates a 'conflict' when either the attorney or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of 'conflict' are infinite. Fortunately most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying the client's interest." ' "

***U.S. FIRE INS. CO. V. SHEPPARD, MULLIN, RICHTER & HAMPTON* (2009) 171 CAL. APP. 4TH 1617**

- Conflict of Interest
- Screening

U.S. Fire filed a lawsuit seeking to enjoin Sheppard Mullin from representing third party witnesses - an informal committee of asbestos creditors and their respective law firms—in connection with discovery in an action filed by Plant Insulation Company against U.S. Fire for asbestos-related injuries. U.S. Fire claimed that Sheppard Mullin had previously represented U.S. Fire in a matter involving similar claims for asbestos-related bodily injury and had obtained confidential information relevant to those claims during the representation. Sheppard Mullin filed an anti-SLAPP motion, asserting it was entitled to dismissal of U.S. Fire's complaint because the action arose from Sheppard Mullin's acts in furtherance of its right of petition and free speech and because U.S. Fire could not show a probability of prevailing. In support of its motion to strike, Sheppard Mullin submitted declarations concerning its attorneys' role in representing the creditors in the bankruptcy proceedings and the fact that an ethical wall had been erected isolating the bankruptcy team from contact with the files and attorneys who worked on the prior litigation for U.S. Fire. The trial court denied the anti-SLAPP motion, finding that although the action arose out of Sheppard Mullin's protected acts, U.S. Fire had shown a probability of success as to the merits.

The Court of Appeal affirmed on different grounds, finding that Sheppard Mullin had failed to prove that the lawsuit arose out of protected First Amendment activity. The court found that the action arose out of Sheppard Mullin's breach of its duty of loyalty that occurred by virtue of entering into an attorney-client relationship with the committee of creditors and their law firms, rather than through any protected speech. The court noted that once the attorney accepts a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old, he or she has breached a duty of loyalty. The court noted that the *breach of fiduciary duty lawsuit* may follow litigation pursued against the former client, but does not arise from it. The court also noted that evidence that confidential information was actually used against the former client in the litigation would help support damages, but is not the basis for the claim. In sum, U.S. Fire's claim is not based on 'filing a petition for arbitration on behalf of one client against another, but rather, for failing to maintain loyalty to, and the confidences of, a client.' "

***PLUMLEY V. DOUG MOCKETT & COMPANY, INC.* (C.D. CAL., DEC. 22, 2008) 2008 U.S. DIST. LEXIS 105634**

- **Conflict of Interest**
- **Expert Witness**
- **Screening**

Plaintiff moved to disqualify defendant's legal expert witness, Gerald Mossinghoff, and defendants' lead counsel, Miles & Stockbridge, on the grounds that plaintiff's prior attorney had consulted with Charles Goltz, a partner at the expert's law firm on a substantially related matter. The evidence indicated that over a 4-year period Goltz had billed plaintiff a total of 5.6 hours for telephone conferences, reviewing briefs and files and performing legal research in a matter involving a dispute between the same parties concerning the same patent. Goltz stated in his declaration that he did not receive any confidential information from plaintiff's counsel but plaintiff's former counsel stated that he had discussed strategy with Goltz. The court held that the matters were substantially related, that Goltz was disqualified from representing defendants in the new matter and that his conflict was imputed to Mossinghoff, who was of counsel to Goltz's firm at the time Goltz consulted with plaintiff's former attorney. The court found that the "ethical wall" erected around Mossinghoff was ineffective because it was a "self-imposed" restraint without any external constraints; although Mossinghoff had provided a declaration stating that he did not access the files in the earlier matter and did not discuss the matter with other attorneys at the firm, there was nothing in place at the firm to keep Mossinghoff from accessing the files before the files were moved offsite, there was no barrier to Mossinghoff accessing other attorney's computer files, and there was no indication that other attorneys or Goltz were precluded from discussing case with Mossinghoff – in other words no formal screening had been put in place. The court rejected defendant's argument that Mossinghoff should not be disqualified because he was acting as an expert witness rather than a lawyer. The court refused to disqualify defendants' lead counsel, based upon a double imputation of Goltz's conflicts of interest, absent evidence that Mossinghoff had actually disclosed any confidential information to defendants' counsel.

***MORONGO BAND OF MISSION INDIANS V. STATE WATER RESOURCES CONTROL BOARD* (2009) 45 CAL. 4TH 731**

- **Conflicts – public lawyers**

The Morongo Band of Mission Indians held certain water rights. The Morongo Band unsuccessfully petitioned the State Water Resources Control Board to disqualify an agency attorney who was prosecuting a license revocation proceeding against it on the ground that the attorney was simultaneously acting as legal advisor to the Board in an unrelated administrative proceeding. The Morongo Band then successfully petitioned the superior court for a writ of mandate to compel the Board to disqualify the agency attorney. On the Board's appeal, the Court of Appeal affirmed. But on the Board's petition, the Supreme Court granted review and subsequently reversed. The Supreme Court explained: Whenever an administrative agency conducts adjudicative proceedings, the state and federal constitutional guarantees of due process of law require a fair tribunal, meaning one in which the decision maker is free of bias for or against a party; but unless it has a financial interest in the outcome, the decision maker is presumed to be free of bias. The Morongo Band argued that because the agency attorney who was prosecuting the license revocation proceeding was simultaneously acting as legal advisor to the Board, albeit in an unrelated administrative

proceeding, there was such a risk that the Board would be biased in favor of the agency attorney as to overcome the presumption of impartiality. The Supreme Court rejected the argument. Noting that "[b]y itself, the combination of investigative, prosecutorial, and adjudicatory functions within a single administrative agency does not create an unacceptable risk of bias and thus does not violate the due process rights of individuals who are subjected to agency prosecutions," the Supreme Court concluded that any tendency of the Board to favor the agency attorney because of the attorney's concurrent advisory role in an unrelated matter was "too slight and speculative to achieve constitutional significance."

***UNITED STATES V. NICHOLAS* (C.D. CAL. 2009) 606 F.SUPP. 2D 1109**

- **Joint Representation of Multiple Clients**
- **Duty of Loyalty**
- **Attorney-Client Privilege**

A law firm represented Broadcom and its officer in several cases in which it obtained informed written consent to the joint representation, and in another case without obtaining informed written consent. When Broadcom was investigated by the government regarding options backdating, the same law firm interviewed the officer in connection with the options backdating investigation, according to the court's findings, without advising the officer that the firm was not representing the officer, that he might want another lawyer, and that the firm would be disclosing the information he provided them to the government. Later Broadcom turned over the notes from the law firm's interview of the officer to the government, and the government produced the information back to the officer in discovery. The officer sought to suppress the information on the grounds that it was protected by the attorney-client privilege. The court held that the information should be suppressed and reported the lawyers involved to the state bar for violating the California Rules of Professional Conduct. The court held that the officer was a client, and the firm owed him a duty of undivided loyalty. The officer's statements to the firm were protected by the attorney-client privilege. By disclosing that information, the firm breached its duty of loyalty to the officer in three ways. First, the firm failed to get the officer's informed written consent to the joint representation as required. Secondly, the firm improperly interrogated one client, the officer, on behalf of another client, Broadcom, without adequate warning. Finally, the firm disclosed information protected by the attorney-client privilege without the officer's informed written consent.

***IN RE CASEY* (REV. DEPT. CAL. STATE BAR CT., DEC. 4, 2008) 2008 CALIF. OP. LEXIS 3**

- **Conflict of Interest Arising from Multiple Representation**
- **Moral Turpitude**

Clifford Casey, an attorney, negotiated a business transaction between Thomas and Ida Stewart, an elderly couple, and Ajax Corporation, a business. The Stewarts were clients of Casey. So was Ajax; in fact, Ajax's President, Ray Lyons, was a long-standing client and friend of Casey. Under the terms of the transaction, which were favorable to Ajax and unfavorable to the Stewarts, the Stewarts sold Ajax a condominium maintained as rental property, Casey's minor son, Chance, received a one-half ownership interest in the condominium at Ajax's direction, and Casey undertook to manage the premises. Casey, however, failed to fully disclose the terms of the transaction to the Stewarts and failed to advise them to consult independent counsel, leaving the

Stewarts to believe that they retained ownership of the condominium and that Casey was simply managing it for them. The State Bar filed a Notice of Disciplinary Charges against Casey, including acquiring a pecuniary interest adverse to a client in violation of rule 3-300 of the California Rules of Professional Conduct and moral turpitude in violation of section 6106 of the California Business and Professions Code. The hearing judge found Casey culpable of acquiring a pecuniary interest adverse to a client, but found him not culpable of moral turpitude. The hearing judge recommended as discipline a three-year stayed suspension, three year's probation, and 90 days' actual suspension. Casey sought review, but the State Bar did not. The Review Department adopted the hearing judge's discipline recommendation, but not its basis. Specifically, the Review Department found that Casey was not culpable of acquiring a pecuniary interest adverse to a client: Under the terms of the transaction, Casey did not acquire any pecuniary interest in the condominium, and could not be deemed to have done so as a result of his relationship with Ajax and Lyons, his agreement to manage the premises, or his minor son Chance's receipt of a one-half ownership interest. By contrast, the Review Department found Casey culpable of moral turpitude: Casey failed to act as a fiduciary to the Stewarts by (1) failing to fully disclose the terms of the transaction to them, (2) acting under a conflict of interest and favoring Ajax over them, and (3) failing to advise them that they should consult independent

***SIMONCA V. MUKASEY* (E.D.CAL., NOV. 25, 2008) 2008 U.S.DIST. LEXIS 101969**

- **Disqualification by Non-client**

On June 28, 2008, Plaintiff Vasile Smonca filed an action seeking declaratory, injunctive and mandamus relief pursuant to 28 USC 1361 and 2241, governing writs of mandamus and habeas corpus, alleging that the adjudication of his asylum application was improperly delayed due to the ongoing criminal investigation of plaintiff's attorneys who allegedly prepared fraudulent asylum applications. The government sought to disqualify plaintiff's counsel in the civil case due to an alleged conflict of interest created by counsel's indictment on October 18, 2006 for filing fraudulent asylum statements and conspiracy to defraud the United States.

Plaintiff had filed an initial application for asylum in 2002 which was denied. Plaintiff successfully appealed the immigration judge's decision and his case was remanded for issuance of an order consistent with the Board's conclusions. After the government informed the judge of the criminal investigation into plaintiff's attorneys with respect to plaintiff's asylum application and others, the judge suspended plaintiff's application and administratively closed his case pending outcome of his attorney's criminal trial. In its disqualification motion, the government asserted there was a conflict because (1) the outcome of the criminal case could affect the substantive adjudication of the asylum applications, (2) civil discovery in the this action could create a conflict with evidentiary matters in the criminal trial and (3) any settlement or plea agreement in either case will influence the other pending matter.

The court applied the majority rule, which provides that non-clients cannot move to disqualify opposing counsel unless they can show how counsel's continued representation of plaintiff affects their own interests in a just and fair determination of the case. The court concluded that the government, as the moving party, had failed to do that, instead showing only how plaintiff would be harmed by his counsel's continued role in case. The court denied the motion to disqualify, refusing to consider the government's argument regarding harm to the government raised for the first time in the government's reply brief.

***WOOD V. JAMISON* (2008) 167 CAL. APP. 4TH 156**

- **Conflict of Interest – Elder Abuse**

Craig Wood, the trustee of the trust and executor of the estate of Merle Peterson, sued Eddie Jamison for legal malpractice, breach of fiduciary duty and financial abuse of an elder, arising out of Jamison's representation of Peterson in connection with obtaining a $250,000 loan secured by her home. Patrick McComb had befriended Peterson, a 78-year-old woman, and convinced her to give him $174,000, claiming he was her nephew. McComb then convinced Peterson to obtain a $250,000 loan secured by her primary residence to invest in a nightclub joint venture. McComb introduced Peterson to Jamison, the attorney who represented McComb in the joint venture. Jamison performed several services for Peterson, including meeting with her and McComb to discuss financing of the night club, advising Peterson about various lenders, selecting the lender, gathering the documents necessary to close the loan, transmitting the documents under his letterhead, communicating with the lender and title company, reviewing loan documents and attending the loan escrow closing with Peterson. After the loan closed, Jamison was paid out of the loan proceeds a $4,000 referral fee from the lender and a $10,000 repayment of a loan Jamison had previously made to McComb. Peterson immediately defaulted on the loan, which bore interest at 18.41 percent, and then died. The lender began foreclosure proceedings. As successor trustee, Wood sued McComb, Jamison, the lender and others to stop the foreclosure proceedings. After settling with the lender for $118,322.23, Woods proceeded to trial against Jamison (McComb never appeared). After a court trial, a $122,322 plus attorneys fees judgment was entered against Jamison for malpractice, breach of fiduciary duty and financial abuse of an elder as provided by W&I Code section 15610.30 (a).

Jamison's motion for a new trial based upon newly discovered evidence and other grounds was denied and Jamison appealed. The newly discovered evidence consisted of a document purporting to be a signed agreement between McComb and Peterson for the formation of the night club, which included a paragraph entitled "Waivers" in which Peterson agreed, among other things, that Jamison was solely McComb's Attorney and that she would have the agreement reviewed by independent counsel before the loan closing in order to protect her interests. Jamison claimed he received the "newly discovered" document in the mail from an anonymous source, approximately 7 months after the close of trial. The Court of Appeal affirmed the judgment against Jamison, finding that the document was not material since Jamison failed to advise Peterson regarding the conflicts of interest, failed to advise her that the night club investment was inappropriate for her or to refer her to an investment advisor, and obtained an undisclosed profit from the transaction. The court also affirmed the elder abuse judgment, finding that Jamison committed financial abuse of an elder when he took the undisclosed finder's fee and knowingly aided and abetted McComb's abusive scheme to take $250,000.

***RODRIGUEZ V. WEST PUBLISHING CORP*. (2009) 563 F.3D 948**

- **Business Transactions with Client**
- **Attorneys Fees**
- **Duty of Candor**

Plaintiffs purchasing BarBri and Kaplan courses from West Publishing brought a class action lawsuit against West alleging antitrust violations. Seven class representatives and class counsel settled for $49 million. Five of the class representatives entered into incentive agreements with

their counsel, obligating class counsel to seek payments for the class representatives based on a sliding scale relative to the total recovery. Objectors to the settlement contended that the incentive fee arrangements created a conflict of interest, and also objected to the attorneys' fees sought, on the grounds that attorneys fees cannot be recovered for conflicted representation. Objectors further contended the incentive fee agreements constituted impermissible fee sharing between attorney and clients. On appeal, the court determined that the incentive fee arrangements created a conflict of interest between class counsel, the class representatives, and the other members of the class. The failure of the class representatives and class counsel to disclose the incentive arrangements to the court also violated the duty of candor to the court. Because two of the class representatives had no conflicts of interest, since they had no incentive agreements, it was not necessary to invalidate the settlement agreement. However, the court remanded the matter directing the district court to address how ethics concerns should impact the attorneys fees awarded to class counsel, after observing that simultaneous representation of conflicting interests constitutes an ethics violation, and also noting that attorneys are not permitted to recover fees for conflicted representations.

IV. CONTACT WITH REPRESENTED PARTIES

HERNANDEZ V. VITAMIN SHOPPE INDUSTRIES, INC. (2009) 174 CAL. APP. 4TH 1441

- **Class Actions**

Attorney Spencer represented plaintiff Hernandez in *Perry v. Vitamin Shoppe Industries, Inc.*, a wage and hour class action, and also represented another plaintiff in *Thompson v. Vitamin Shoppe Industries, Inc.*, another wage and hour class action involving similar claims. After the court conditionally approved a settlement in the *Perry* class action, Spencer sent a letter to the class members in *Perry* in which Spencer, identifying himself as counsel in the *Thompson* matter, advised that if the class members did not opt out, they would forfeit substantial compensation, urged them to opt out of the *Perry* settlement, solicited them to retain him as counsel, or contact him for advice or assistance, and enclosed his retainer agreement.

The trial court enjoined Spencer from further communication with the class, and the appellate court addressed whether Spencer's letters violated California Rule of Professional Conduct 2-100, which precludes a lawyer from contacting a party the member knows to be represented by another lawyer in the matter about the subject matter of the representation, unless the lawyer has the consent of the other party's lawyer. The court determined that, given the court's obligations to protect class members, rule 2-100 did not constitute an unconstitutional prior restraint on speech. In concluding that the post-conditional class certification contact by Spencer violated rule 2-100, the California appellate court followed federal case law interpreting the ABA Model Rules. Addressing whether class members who are not class representatives were "parties" within the meaning of rule 2-100, the court held that, while class members who are not class representatives are not considered parties for some purposes, they are considered parties for other purposes, and concluded that class members of a conditionally certified class are "parties" represented by class counsel. The court also rejected the argument that rule 2-100 was limited to communication by opposing counsel, on the grounds that the language of the rule did not contain such a limitation. The court also rejected Spencer's argument that the injunction required Spencer to violate California Rule of Professional Conduct 3-500, requiring a lawyer to keep his clients informed of significant developments in their cases, primarily because the record did not indicate that the persons contacted were Spencer's clients. The court did not address whether the letter constituted an impermissible solicitation in violation of California Rule of Professional Conduct 1-400.

V. DUTY TO ADVERSARY RE INADVERTENTLY DISCLOSED CONFIDENTIAL DOCUMENTS

BAK V. MCL FINANCIAL GROUP INC. (2009) 170 CAL. APP. 4TH 1118

- **Copying Adversary's Inadvertently Disclosed Privileged Documents**

Plaintiffs, registered members of the Financial Industry Regulation Authority (formerly NASD), sued their former employers for alleged failure to pay commissions. The dispute was referred to an arbitration panel appointed by FINRA, pursuant to plaintiffs' agreements with defendants. After producing documents to defendants prior to the arbitration hearing, plaintiffs discovered that they had included 112 pages of documents they claimed were protected by the attorney-client privilege. Plaintiffs sent defendants a letter informing them of the privileged documents, claiming they were produced inadvertently and demanding that they be returned immediately. Before returning the originals to plaintiffs, defendants' counsel made a cursory review of them, copied them and placed the copies in a sealed envelope, which he then sent to the staff attorney at FINRA who was handling the case.

Plaintiffs filed an emergency motion with the arbitrators for an order prohibiting defendants from using the documents and seeking destruction of the documents unilaterally sent to FINRA. Defendants' attorney acknowledged that defendants would not use the documents but asserted that copying them was appropriate. Following a hearing, the arbitrators ordered defendants' attorney to pay plaintiffs' counsel $7,500 as a sanction for copying the privileged materials and to execute an affidavit confirming defendants had not retained any copies, had not given copies to anyone else and that no other copies existed. Defendants' attorney submitted the requested affidavit and unsuccessfully sought reconsideration of the sanctions award.

The trial court affirmed the sanctions award and Defendants' attorney appealed, asserting that the arbitrators lacked authority to sanction a lawyer who was not a party to the arbitration agreement, that the evidence was insufficient to support the award because his actions were consistent with *the State Fund* rule and that the panel failed to comply with the requirements of CCP 128.5 before sanctioning him. The Court of Appeal affirmed, finding that defendants' attorney had submitted himself to the jurisdiction of the arbitration panel by appearing for defendants in the proceedings and responding to plaintiffs' claims that some of the documents were privileged. The court further held that the *State Fund* rule did not approve of a receiving party copying privileged documents and sending them to a third party, but instead suggests that the lawyer should have sought guidance from the arbitration panel. Finally, the court concluded that in ruling on a petition to confirm or vacate an arbitration award, the court cannot review the merits of the controversy or claims that the decision was legally or factually erroneous and that there was nothing in the Code of Arbitration Procedures that required the arbitrators to decide issues in accordance with California law.

WALLIS V. PHL ASSOCIATES, INC. (2008) 168 CAL. APP. 4TH 882

- **Protective Orders**
- **Filing Under Seal**

In the course of an action for misappropriation of trade secrets, the superior court issued a protective order, to which the parties had agreed, allowing the parties to file under seal certain confidential documents containing alleged trade secrets. Cross-complainant PHL Associates, Inc.,

filed a declaration of its attorney containing what PHL alleged were trade secrets. Although the declaration designated that it was filed under seal pursuant to the protective order and was sent to the superior court in a sealed envelope and labeled appropriately, it later found its way into the court's public files. Upon learning of the public availability of the declaration, Joanna Mendoza, an attorney who represented cross-defendants including Dale Wallis and James Wallis, notified the Wallises of the fact. In an attempt to defeat PHL's claim that the declaration contained trade secrets, the Wallises and Mendoza had third-parties view and copy it. PHL filed a motion for sanctions pursuant to section 128.5 of the California Code of Civil Procedure against the Wallises and Mendoza for their conduct relating to the declaration. The superior court granted the motion, finding that the actions of the Wallises and Mendoza were frivolous and taken in bad faith, and imposed sanctions of almost $44,000 against them. The Court of Appeal affirmed. It rejected an argument by the Wallises and Mendoza that the superior court erred because various circumstances showed that they believed the declaration was not entitled to the protection of the protective order and that the declaration did not contain trade secrets, all of which established that they did not act frivolously or in bad faith. The Court of Appeal also rejected an argument by the Wallises and Mendoza that the superior court had acted prematurely because there had not been, as yet, any determination that the information in the declaration constituted protectable trade secrets. The Court of Appeal rejected both arguments because their underlying premise—that the appearance of the declaration in the superior court's public files allowed them to disclose the information it contained—was frivolous and also because they acted in bad faith when they disclosed it.

VI. JUDICAL DISQUALIFICATION

CAPERTON V. MASSEY (2009)__ U.S. __, 129 S.CT. 2252

A West Virginia jury found A.T. Massey Coal Co. liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations and awarded Hugh Caperton $50 million in damages. West Virginia then held scheduled judicial elections. Knowing that the West Virginia Supreme Court of Appeals would consider the appeal, Don Blankenship, Massey's chairman and principal officer, supported Brent Benjamin rather than the incumbent justice seeking reelection. Blankenship $3 million in contributions exceeded the total amount spent by all other Benjamin supporters and by Benjamin's own committee. Benjamin won by fewer than 50,000 votes. Before Massey filed its appeal, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause of the Fourteenth Amendment, based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion, indicating that he found nothing showing bias for or against any litigant. The state supreme court then reversed the $50 million verdict. During the rehearing process, Justice Benjamin refused twice more to recuse himself, and the state supreme court once again reversed the jury verdict. Justice Benjamin subsequently filed a concurring opinion, defending the reversal and his refusal to recuse himself. On certiorari, the United States Supreme Court reversed. The Due Process Clause requires recusal where, as an objective matter, the probability of actual bias on the part of the judge is too high to be constitutionally tolerable. The question is whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. There is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The proper inquiry centers on the contribution's relative size in comparison to the total amount contributed to

the campaign, the total amount spent in the election, and the apparent effect of the contribution on the outcome. In an election decided by fewer than 50,000 votes, Blankenship's campaign contributions—compared to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it must be forbidden if the guarantee of due process is to be adequately implemented. The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical, for it was reasonably foreseeable that the pending case would be before the newly-elected justice. Although there was no allegation of a quid pro quo agreement, the extraordinary contributions were made at a time when Blankenship had a vested stake in the outcome. Just as no person is allowed to be a judge in his or her own cause, similar fears of bias can arise when—without the other parties' consent—a person chooses the judge in his or her own cause. Applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.

VII. MISCONDUCT

IN RE FAHY (REV. DEPT. CAL. STATE BAR CT., MAR. 6, 2009) 2009 CALIF. OP. LEXIS1

- **Moral turpitude**
- **Disbarment**

Fahy, a lawyer, was serving on a jury for a trial involving a medical malpractice claim. When the jury became deadlocked, Fahy told the other jurors that if the judge did not declare a mistrial, Fahy would need to change his vote in order to be able to return to his work at his law practice the following week. Fahy then changed his vote, resulting in a verdict for defendant. When another juror reported the conduct by "another juror" to the court, Fahy then made false statements to the judge upon questioning, leading the judge to find, incorrectly, that no misconduct had occurred, and to affirm the jury's verdict. Fahy later provided a declaration to the plaintiff in support of a motion for new trial, indicating that in fact he had changed his vote in order to be able to return to his law practice. The State Bar prosecuted Fahy on the grounds that his conduct demonstrated moral turpitude and prejudiced the administration of justice, alleging he failed to comply with the statutory duties required of a juror. The court found that Fahy violated the law when he changed his vote for personal convenience, and held that his false statements to the court in the civil case constituted moral turpitude. Given several aggravating factors involving prior misconduct, including misappropriation of funds from a client trust account, and Fahy's lack of understanding of the seriousness of his misconduct, the court recommended disbarment. Upon review, the court found disbarment an appropriate sanction for Fahy's misconduct.

*IN RE LEHTINEN (*9TH CIR. 2009) 464 F. 3D 1052

- **Court's Inherent Sanction Authority**
- **Disbarment**

Patricia Lehtinen, who was primarily interested in selling her house to repay certain debts, retained attorney Jim Price to represent her in a chapter 13 bankruptcy proceeding. Price did not attend the meeting of creditors, sending a contract attorney in his place. Price then referred Lehtinen to a lender (to obtain a loan to fix up her home) who told her that the lender would be repaid from the

proceeds of the sale only if Lehtinen retained Price as the broker of the sale. Lehtinen proceeded to sell her house through another realtor without informing Price. Price then failed to advise Lehtinen of or attend the confirmation hearing. Lehtinen found out about the hearing from the trustee and attended alone. After learning that Lehtinen's house was pending sale, the bankruptcy court confirmed the plan with a 100% payout to all creditors. Assuming the bankruptcy court had dismissed Lehtinen's case, Price sent Lehtinen a letter stating her case had been dismissed, that Price could file another case or help her sell the house and that the bank could proceed with foreclosure. Lehtinen sent a letter to the bankruptcy court complaining of Price's conduct, including (1) failing to inform her of and failure to attend the confirmation hearing; (2) referring her to a friend for a home improvement loan, who conditioned the loan on her engaging Price as her broker; (3) soliciting her five times to act as her broker and (4) sending her the letter falsely advising her that her case had been dismissed. The bankruptcy court issued an OSC re why Price should not be sanctioned, suspended or disbarred from practice before the bankruptcy court for bad faith conduct. The OSC identified 4 instances of alleged misconduct, stated the facts pointed to a clear conflict of interest and specified the evidence required regarding the sanctionable conduct. After a hearing, the bankruptcy court ordered Price to disgorge his $1,500 fee and suspended him for 3 months from practicing before the bankruptcy court. The BAP concluded that the bankruptcy court "was within its authority in sanctioning Price, and afforded him due process" but vacated the suspension and remanded to the bankruptcy court for considered of the ABA Standards in disciplining Price. Price appealed, asserting that the bankruptcy court lacked power to suspend him, that he was not accorded due process and that the bankruptcy court abused its discretion by failing to follow ND Cal rule 11-6, which requires referral of suspension actions to a standing committee.

The Court of Appeal affirmed the BAP's order, holding that the bankruptcy court's inherent sanction authority includes the power to suspend attorneys from practicing before the bankruptcy court. Although a court's inherent sanction authority does not authorize significant punitive damages or criminal penalties, the court found that a lawyer disciplinary proceeding is not a criminal proceeding since its purpose is not to punish but instead to maintain the integrity of the courts and the profession. The court also found that Price was provided the due process he was entitled to as a lawyer subject to discipline, specifically notice of the alleged misconduct, the basis of the sanction authority, and an opportunity to be heard. Finally, the court held that the referral of the disciplinary proceeding to a standing committee pursuant to ND Cal rule 11-6 was discretionary and not required.

NEW RULES

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

RULE 1-650 LIMITED LEGAL SERVICES PROGRAMS

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and
(2) has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would have a conflict of interest under rule 3-310 with respect to the matter.

(B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

(C) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

(D) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and
(2) has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would have a conflict of interest under rule 3-310 with respect to the matter.

(E) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

(F) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
(2) the prohibition is based upon Rule 1.9(a), (or (b)), and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore;
(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9© that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

NEW OPINIONS FROM THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT (COPRAC)

FORMAL OPINION NO. 2008-175

ISSUES: What are a successor attorney's ethical obligations when her client in a contingency fee matter instructs her not to notify prior counsel, who has a valid lien against the recovery, of the fact or the amount of a settlement?

DIGEST:

1. When a client instructs successor counsel not to disclose a settlement to a prior counsel with a valid lien, successor counsel must advise the client of the adverse ramifications of concealing the settlement, including a potential claim by prior counsel against the client. Should the client persist, successor counsel must nevertheless disclose the settlement to prior counsel.
2. A lawyer may not reveal confidential client information except with the consent of the client or as authorized or required by the State Bar Act, the Rules of Professional Conduct, or other law. Disclosure is required by law to fulfill the attorney's fiduciary duties to prior counsel. Disclosure is also authorized by law to enable both attorneys to protect their right to recover fees.
3. While the successor attorney is both obligated and permitted to disclose the fact and the amount of the settlement to the prior attorney, successor counsel may not disclose anything more to the prior attorney, without the client's consent, including the client's demand that the fact and the amount of the settlement be concealed from the prior attorney.
4. Once prior counsel is notified, both attorneys must remain mindful of their duty of confidentiality to the client in attempting to reach an accord, amicably or through legal process, on the proper allocation of fees. Moreover, should the attorneys resort to legal process to resolve any dispute over allocation of the fee, successor counsel should provide the client with notice and an opportunity to participate. In any legal proceeding, the presiding officer will be in a position to limit the disclosure of confidential information appropriately.

FORMAL OPINION NO. 2009-176

ISSUES: In a lawsuit prosecuted by Attorney A against Defendant, Client has a statutory right to seek an award of attorney's fees. Attorney B, Defendant's counsel, makes a settlement offer, conditioned on Client's waiver of his statutory right to attorney's fees, that is insufficient to compensate Attorney A for her fees. (1) May Attorney A bar the settlement notwithstanding Client's desire to accept it? (2) Does Attorney B violate any ethical obligation by recommending or conveying the fee-waiver settlement offer in this case? (3) Does Attorney B violate any ethical obligation by recommending or conveying fee-waiver settlement offers in cases generally?

DIGEST:

1. A lawyer must inform the client of a fee-waiver settlement offer and consummate the settlement in accordance with the client's wishes even if it reduces the likelihood of recovering some or all of his or her fees.
2. A lawyer does not violate any ethical obligation by recommending or conveying a fee-waiver settlement offer in a given case.
3. A lawyer does not violate any ethical obligation by recommending or conveying fee-waiver settlement offers in cases generally.

FORMAL OPINION NO. 2009-177

ISSUE: In what manner may an attorney maintain her rights in a charging lien when her former client demands that the attorney endorse a settlement check jointly payable to the client and his current and former attorneys without violating the requirement of rule 4-100 of the California Rules of Professional Conduct that the attorney promptly pay or deliver funds to which the client is entitled?

DIGEST: When responding to a request to endorse a settlement check made jointly payable to a client and his or her current and former attorneys where the former attorney has asserted a valid lien on the settlement proceeds, the former attorney must take prompt steps to find a reasonable method or methods of delivering the undisputed portion of the proceeds to which the client is entitled. The former attorney does not violate rule 4-100 by refusing to use a method that would extinguish the attorney's charging lien, but has a duty to consult governing legal authorities and make a reasonable determination of the amount to which he or she is entitled under the circumstances. If the client does not agree to proposed reasonable methods for delivering the undisputed portion or does not agree with the former attorney's determination of the amount of the proceeds that undisputedly belong to the client, the attorney must promptly seek resolution of the fee dispute through arbitration or judicial determination, as appropriate.

NEW ABA OPINIONS

ABA FORMAL OPINION 08-452 (OCTOBER 17, 2008)

Judges Soliciting Contributions for "Therapeutic" or "Problem-solving" Courts

A judge who participates in fundraising activities on behalf of a court, including a "therapeutic" or "problem-solving" court, must limit the participation to activities permitted by Model Code of Judicial Conduct Rule 3.7(A). The judge also must ensure that her conduct does not violate Judicial Code Rules 3.1, 1.2, or 1.3.

ABA FORMAL OPINION 08-453 (OCTOBER 17, 2008)

In-House Consulting on Ethical Issues

The desire to ensure that law firm members comply with their ethical obligations has given rise to the designation of "ethics counsel" within law firms to whom the firm and its members may turn for advice on ethics matters. Ethics consultations within law firms create client-lawyer relationships separate from those between law firms and their outside clients. A firm's ethics counsel typically represents the organization as a whole, and not individual firm lawyers, although simultaneous representation of an individual firm member is permitted where no conflict exists between the firm and the individual lawyer. A firm's ethics counsel may be obligated to disclose an individual lawyer's ethical violations to firm management. Whether ethical misconduct must be reported to disciplinary authorities will be determined under the principles that generally apply to lawyers advising clients. The obligation to disclose an individual lawyer's possible misconduct to the firm's client turns on the firm's duty fully to inform the client on matters related to the representation.