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Program 60

Ethics Update 2012: Significant Developments in the Law of Lawyering

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ETHICS UPDATE 2012

Significant Developments in the Law of Lawyering

Shawn M. Harpen

Wendy L. Patrick

Neil J Wertlieb

William Woods

State Bar of California Annual Meeting

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SPEAKER BIOGRAPHIES

SHAWN M. HARPEN

Shawn M. Harpen is Chief Legal Officer and General Counsel of Patrón Spirits International AG and The Patrón Spirits Company. Before joining Patrón, she was a partner in the law firm of Jones Day, where her practice focused on complex commercial and shareholder litigation, as well as corporate governance.

Ms. Harpen was Chair of the State Bar of California's Standing Committee on Professional Responsibility and Conduct ("COPRAC") during the 2010-2011 Term, and presently serves as Advisor to COPRAC. She is a member of the Nevada State Bar Standing Committee on Ethics and Professional Responsibility, as previously served as Co-Chair of the Professionalism and Ethics Committee of the Orange County Bar Association.

Ms. Harpen is also member of the RAND Institute for Civil Justice Southern California 50 Leadership Council and a Fellow of the Litigation Counsel of America. She has been a speaker and contributing author for various programs on corporate compliance, securities litigation, professional responsibility and ethics. Ms. Harpen is admitted to practice in California and before the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit, the United States District Courts for the Central, Southern and Northern Districts of California and the Eastern District of Michigan, and is certified to practice in Nevada as in-house counsel.

Ms. Harpen received her bachelor's degree, *summa cum laude*, from The University of Toledo College of Arts & Sciences in 1990. In 1998, Ms. Harpen received her juris doctor, *magna cum laude*, from The University of Toledo College of Law.

Ms. Harpen's comments do not represent the views of any of the organizations with which she is affiliated, but are solely her own personal views.

WENDY L. PATRICK

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

Ms. Patrick is a San Diego County Deputy District Attorney named by her peers in 2010 as one of the Top Ten criminal attorneys in San Diego by the *San Diego Daily Transcript* and one of San Diego's 2010 *Super Lawyers.* She has completed over 150 trials including over 100 jury trials ranging from hate crimes, to domestic violence, to first-

degree murder. In her current assignment in the Sex Crimes and Stalking Division she prosecutes cases involving vice, human trafficking, child molestation, and sexually violent predators.

Ms. Patrick is published on a regular basis. She is co-author of the revised version of the *New York Times* bestseller *Reading People* (Random House 2008), and was a contributing author to the *Encyclopedia of Race and Racism* (Macmillan Reference 2007), and *Hate Crimes: Causes, Controls, and Controversies* (SAGE 2004). She has had her own ethics column in the *San Diego Daily Transcript* for over a decade and writes and publishes for a variety of other publications.

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

NEIL J WERTLIEB

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

Mr. Wertlieb is a member of the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC), where he currently serves as Vice Chair and has been appointed Chair for 2012-2013. He is also the Chairman of his firm's Ethics Group for its California practices, and the author of a series of articles on ethical issues, including: "Ethical Issues for the In-House Transactional Lawyer" (*Business Law News*, 2010 Issue 2), "Ex Parte Communications in a Transactional Practice" (*Business Law News*, 2009 Issue 3), and "Addressing Conflicts of Interest in a Transactional Practice" (*Business Law News*, 2008 Issue 4).

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

legal treatise *Ballantine & Sterling: California Corporation Laws*. He has also served as an expert witness in litigation and arbitration involving transactional matters.

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

For additional details, go to: http://www.milbank.com/attorneys/neil-j-wertlieb.html.

WILLIAM WOODS

William Woods, a graduate of the Southwestern University School of Law, is the Assistant Head Deputy District Attorney of the Los Angeles County District Attorney's Training Division. Prior to joining the Training Division, he served for 13 of his 26 years with LADA in their Appellate Division. During that time he amassed 14 published opinions, including two in the California Supreme Court. He also was the counsel of record on cases in Federal District Court and the Ninth Circuit.

Mr. Woods has both written and taught for the California District Attorney Association on topics such as bail law, ethics and the Public Records Act. He is the current author of Chapter 2, Professional Responsibility, in the Continuing Education of the Bar publication, California Criminal Law Procedure and Practice. He has been a member of LADA's Professional Responsibility Committee since 2005, and lectures to prosecutors and law enforcement officers across California about ethics issues. He also serves on the State Bar of California Committee on Professional Responsibility and Conduct.

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ANTI-SLAPP LAW

***PERSONAL COURT REPORTERS INC. V. RAND* (2012) 205 CAL.APP.4TH 182**

- **The anti-SLAPP statute provisions do not apply in contract disputes where there is little evidence that the litigation arises from a desire to limit the free exercise of an individual's constitutional rights.**

The plaintiff, Personal Court Reporters, claimed to have provided court reporting services to the defendants and was owed $32,323.45. The defendants filed a motion to strike the complaint, asserting that it was barred by California's anti-SLAPP law, Code of Civil Procedure section 425.16. That statute bars lawsuits that curtail public participation by chilling an individual's or corporation's exercise of constitutional rights to petition the government and engage in free speech.

In an attempt to bring their fee dispute claim within the ambit of the anti-SLAPP statute, the defendants alleged that after Personal Court Reporters provided services to the defendants' clients, the lawyers protested that the fees charged were illegal, excessive, and unnecessary. They claimed that, following their protests, the plaintiff sued them for the disputed fees.

In rejecting the defendants' claim, the appellate court found that just because a lawsuit was filed after some protected activity, here protesting the allegedly illegal and excessive fees, does not mean that the lawsuit grew out of that action. Instead, the focus of the inquiry for purposes of the anti-SLAPP statute is whether the gravamen of the lawsuit is aimed at barring protected activity, not just if there were incidental references to, for example, free speech concerns. Here, the court concluded the main thrust of the lawsuit was a fee dispute, in which the alleged free speech issue was merely incidental. Therefore, there was no basis for invoking the anti-SLAPP statute.

As a further warning, the appellate court found the appeal of the trial court's denial of the anti-SLAPP motion was without merit and done only for purpose of delay. Citing Code of Civil Procedure section 904 and California Rules of Court, rule 8.276(a)(1), it ordered the defendants and their counsel to pay the plaintiff's attorneys' fees of $22,000.

***FREMONT REORGANIZING CORP. V. FAIGIN* (2011) 198 CAL.APP.4TH 1153**

- **Allegations that the day after he was fired a former in-house counsel told authorities about the client's allegedly illegal conduct allow the company to pursue claims that the lawyer breached his fiduciary duty and duty of confidentiality.**
- **The company's additional claims that the lawyer violated his duties under a conflict of interest rule and that he is liable for equitable indemnity cannot survive the lawyer's "special motion to strike" under California's anti-SLAPP law.**

The court in *Fremont Reorganizing Corp.* addressed whether the anti-SLAPP statute required dismissal of claims in a cross-complaint brought by a financial company-subsidiary against the terminated in-house counsel of its parent company. The plaintiff was suing for wrongful termination, and the financial company-subsidiary cross-complained for breach of fiduciary duty and breach of confidence on grounds that counsel had wrongfully informed the Insurance Commissioner the day after his termination that the parent company and the financial company-subsidiary to which counsel had provided legal services were about to liquidate certain artwork owned by yet another subsidiary, an insolvent insurer, for which a court had appointed the Commissioner as liquidator.

The court first determined that all of the company's claims -- for breach of confidence, breach of fiduciary duty, equitable indemnity, and violation of rule 3-310(C), prohibiting the simultaneous representation of clients with conflicting interests without informed written consent -- arose out of protected activity within the ambit of the anti-SLAPP law. At the time former in-house counsel made the statements to the Insurance Commissioner, the Commissioner was in the process of liquidating the insolvent insurer-subsidiary and marshaling its assets. Such statements therefore were within Code of Civil Procedure section 425.16(2) since they were made "in connection with" an issue under consideration by a court in a judicial proceeding.

The court then concluded that the rule in *Flatley v. Mauro* (2006) 39 Cal.4th 299, which held that an attorney's attempted extortion of a litigation opponent was outside the protection of the anti-SLAPP statute, was limited to allegations of criminal conduct. The conduct therefore could not be considered "illegal" as a matter of law, as that term was used in *Flatley*.

The court also rejected the company's reliance on cases holding that the anti-SLAPP law does not apply in an action by a former client against its attorney for breach of professional duties. Those cases, observed the Court, addressed instances where "the principal thrust of the particular causes of action did not concern a statement made in connection with litigation, but concerned some other conduct allegedly constituting a breach of professional duty." In those cases, "any statements made in connection with the litigation were merely incidental to the causes of action." By contrast, the statements company's former in-house counsel made to the Insurance

Commissioner were at the heart of, rather than merely incidental to, the company's claims against him.

Having found that the company's claims arose out of its former in-house counsel's protected activity, the Court of Appeal went on to hold that the company had established a probability of prevailing on its claims for breach of fiduciary duty and breach of confidence, while not showing a likelihood of prevailing on two other claims. The Court of Appeal began its analysis by rejecting in-house counsel's assertion that the litigation privilege, Civil Code section 47(b), barred all of company's claims: "The litigation privilege, if applicable, would preclude essentially any action by a former client against an attorney for breach of professional duties arising from communicative conduct in litigation on behalf of that client. We believe that to allow litigation attorneys to breach their professional duties owed to their own clients with impunity from civil liability would undermine the attorney-client relationship and would not further the policies of affording free access to the courts and encouraging open channels of communication and zealous advocacy."

The Court of Appeal cited the California Supreme Court's recent ruling in *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 for the proposition that "the prohibition against acting in a manner that would injure a former client in any matter in which the attorney formerly represented the client is not limited to the situation where the attorney concurrently or successively represents another client with interests adverse to the former client." Further relying on *Oasis West*, the court ruled that the company had established a probability of prevailing on its claims against in-house counsel for breach of fiduciary duty and breach of confidence. The court found that evidence that in-house counsel served as staff counsel for the financial-company subsidiary and that he was aware of the court order in the liquidation proceedings that all of the financial company's entities cooperate with the Commissioner in connection with the liquidation supported the presumption that in-house counsel had acquired confidential information in connection with representing the subsidiary. In light of the presumption, the court found it reasonable to infer that he used that confidential information in making his post-termination statements to the Insurance Commissioner about the allegedly illegal imminent auction of the artwork by his former client. Such use of that information would constitute a breach of the fiduciary duty and duty of confidence in-house counsel owed his former clients. [*Ethics Quarterly*, 8.3.13 (October, 2011).]

ATTORNEYS' FEES

GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER LLP V. ROSENSON **(2012) 203 CAL.APP.4TH 688**

- **Binding arbitration provided for by written contract under the California Arbitration Act may follow nonbinding Mandatory Fee Arbitration Act ("MFAA") arbitration if invoked within the 30-day period specified in section 6204 of the Business & Professions Code.**
- **A demand for arbitration within 30 days after service of the MFAA award prevents such an award from becoming final; an action to compel arbitration is not the only method that may be used.**

A fee dispute led to nonbinding arbitration before the Beverly Hills Bar Association pursuant to the MFAA at the request of client, Bernard Rosenson. Within 30 days following receipt of the arbitration decision, Greenberg Glusker filed a demand for private arbitration, consistent with the terms of the parties' retainer agreement, which provided for arbitration of fee disputes before a retired judge or justice in Los Angeles County. Rather than participate, Rosenson, filed a petition to confirm the nonbinding arbitration award, which the trial court granted. Greenberg Glusker appealed, and the Second District Court of Appeal reversed, finding that if the parties had agreed in writing to binding arbitration, a demand for arbitration within 30 days after service of the MFAA award prevents such an award from becoming final. Since an MFAA award is not binding unless the parties agree in writing to make it binding any time after the dispute over fees, costs or both has arisen, section 6204 of the Business and Professions Code provides that either party can seek trial within 30 days after service of notice of the nonbinding arbitration award. However, the appellate court noted that trial is not the only dispute resolution process available after an MFAA award, pointing out that section 6201(c) of the statute references that "[t]he action or other proceeding, may thereafter proceed subject [only] to the provisions of Section 6204" and that the California Supreme Court had determined in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, that binding arbitration provided for by written contract under the California Arbitration Act may follow nonbinding MFAA arbitration if invoked within the 30-day period specified in section 6204. In so holding, the appellate court rejected the argument that an action to compel arbitration in superior court is the only method that may be used to prevent the finality of the MFAA award. The court noted that such a requirement would run afoul of California law prohibiting an action to compel arbitration until it can be alleged that the "opposing party refuses to arbitrate the controversy" and would be inconsistent with the efficiency goals of arbitration.

***LITTLE V. AMBER HOTEL CO.* (2011) 202 CAL.APP.4TH 280**

- **A litigation opponent who induces a lawyer's client to bypass a valid attorneys' lien in a secret "walk-away" settlement is liable to the lawyer for interference with contract.**
- **Although clients have the final say on whether to accept a settlement offer, the deal cannot effectively nullify the client's contractual duty to pay counsel from its prevailing party fees.**

In *Little*, the court held that a litigant is liable to opposing counsel for tortious interference with contract if it induces its former adversary to thwart the lawyer's valid fee lien by waiving its right to collect prevailing party fees in exchange for the litigant's promise to drop the appeal. The court concluded that the lawyer's contractual right to collect his fee out of any court-awarded fees and costs can't be so easily bypassed.

Although the client has the last word on whether to accept a settlement offer, the court said that deal cannot be structured to make a valid attorneys' lien evaporate; any opponent who induces the client to enter into such a settlement exposes itself to liability for tortious interference with contract.

***GIORGIANNI V. CROWLEY* (2011) 197 CAL.APP.4TH 1462**

- **Small claims suit was effective to reject arbitration award where lawyer waived right to collect amounts in excess of jurisdictional limit of court.**

In *Giorgianni*, the court ruled that a lawyer effectively rejected an adverse fee arbitration award by filing a request for trial de novo in small claims court, even though the amount of the award exceeded that court's modest jurisdictional limit.

In the arbitration, the lawyer claimed the client had an outstanding bill of $11,000; the client claimed she had been overbilled by $40,000. The arbitration panel awarded the client nearly $30,000. The lawyer challenged the award in small claims court. The client insisted that her lawyer was stuck with the adverse arbitration because he didn't reject it in time. Although the state's Mandatory Fee Arbitration Act allows a dissatisfied party to disavow an arbitration award by filing suit within 30 days, the client argued that the small claims court filing was not an effective repudiation because that court has a jurisdictional limit of $5,000. The court disagreed, holding that the lawyer's filing effectively rejected the award because when he filed he explicitly waived the right to collect anything more than the $5,000 jurisdictional amount. If the client wants to confirm the larger amount that the arbitrators awarded her, the court added, she may file a parallel action in superior court seeking to enforce that award.

***CROCKETT & MYERS LTD. V. NAPIER, FITZGERALD & KIRBY LLP* (2011) 664 F.3D 282**

- **Quantum meruit value of referral is one-third of fee.**

A law firm's custom of paying one-third of its contingent fee for referrals is the most accurate measure for gauging the quantum meruit value of a contested referral fee, the court ruled in *Crockett*. In reaching the $100,000 award, the court reasoned that the receiving firm's practice of paying a one-third referral fee was the most accurate yardstick for valuing the referral. One-third of the total $500,000 original contingent fee comes to $166,666, the court said; but it reduced that figure to $100,000 to account for the fact that the referring lawyer shrank the overall value of the case by negotiating the client's contingent fee obligation from 40 percent down to one-third of the recovery.

***DZWONKOWSKI V. SPINELLA* (2011) 200 CAL.APP.4TH 930**

- **Attorney-sole practitioner who prevailed in a fee dispute arbitration against a former client is entitled to recover attorney's fees as costs when the attorney was represented by another attorney-sole practitioner officed in another city who was listed as "of counsel" to the prevailing attorney's law offices.**

The Court of Appeal affirmed the trial court order awarding fees. There are three factors that must be present for an award of attorney's fees for a prevailing party under Civil Code section 1717: (1) an obligation to pay attorney's fees; (2) the existence of an attorney-client relationship; and (3) distinct interests between the attorney and the client. The court held all three factors were present, even though the of counsel attorney had been the attorney responsible for representing the client in the underlying litigation. That the attorney was of counsel to the prevailing attorney's law offices did not preclude the prevailing plaintiff-attorney and the of counsel attorney from forming an attorney-client relationship.

The court noted that the rule announced in *Trope v. Katz* (1995) 11 Cal.4th 274, precluding attorneys from recovering attorney's fees when they represent themselves *pro se*, is a narrow one that did not apply to the representation of the prevailing attorney in a fee dispute by the of counsel attorney. Awarding fees in the context of such a representation is analogous to awarding fees to corporations represented by in-house counsel (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1092-1094) or to a lawyer represented by other members of his or her law firm in a matter concerning the lawyer's personal interests. [*Ethics Quarterly*, 8.4.5 (January, 2012).]

COLLABORATIVE FAMILY LAW

ORANGE COUNTY BAR ASSOCIATION ETHICS OPINION 2011-01 **(2011)**

ISSUE:
Can a family lawyer enter into a collaborative law agreement consistent with her ethical duties, notwithstanding the obligations and limitations typically imposed on the lawyers in such agreements?

CONCLUSIONS:
The lawyer's participation as a party to the Agreement, along with parties and lawyers involved in a family law dispute, does not violate the California Rules of Professional Conduct or other ethics law in California. The Agreement implements a permissible form of limited scope representation. Specifically, the OCBA finds that:

(1) The lawyer must exercise competence in advising the client regarding optional processes, including the likely outcomes with alternative processes, and advantages and disadvantages of entering into the Agreement. In addition, the lawyer must competently perform the collaborative process.

(2) The potential conflict of interest created by a collaborative law agreement does not require the lawyer to withdraw from representation, and may be resolved by disclosure of the potential adverse consequences of the conflict of interest to the client.

(3) Even when engaged in the collaborative law process, the lawyer must continue to satisfy his or her duty of confidentiality, and may do so by obtaining the client's informed consent to disclosure of otherwise confidential information, including financial information, even without a request for discovery.

(4) Entering into a collaborative law Agreement does not impermissibly restrict the lawyer's right to practice law. The limitation on the representation resulting from the Agreement, pursuant to which the lawyer agrees not to represent the client in litigation, is a permissible limitation on the scope of the representation.

(5) If the lawyer participating in a collaborative law Agreement must withdraw from representation, the withdrawal must be accomplished without prejudice to the client other than that inherent in and contemplated by the parties in entering into the Agreement.

CONFIDENTIALITY & ATTORNEY-CLIENT PRIVILEGE

COITO V. SUPERIOR COURT (2012) 54 CAL.4TH 480

- **Statements that lawyers or their agents take from witnesses are attorney work product.**

The California Supreme Court decided that witness statements recorded by lawyers or their agents are attorney work product entitled to at least qualified protection from discovery by opponents in civil litigation. The court also ruled that a list of witnesses from whom a lawyer took statements is presumptively not work product, but that a party may be able to establish qualified or absolute protection for such a list under the circumstances.

Following the death of her child, a mother filed a wrongful death action against the state and others. Counsel for the state sent investigators to interview other children who witnessed the events. Some of the children were interviewed, and those interviews were audio-recorded. The mother's counsel requested that the state provide a list of the witnesses it had interviewed about the incident, and any witness statements that had been taken. The Court reversed the court of appeal, which had held that neither the witness list nor the statements themselves were protected by the work product doctrine and that the state must provide the requested discovery.

In light of the origins and development of the work product doctrine in California, the Court decided that witness statements obtained as a result of an interview conducted by a lawyer, or by a lawyer's agent at the lawyer's behest, constitute work product under California Code of Civil Procedure section 2018.030. Witness statements would not exist but for the lawyer's initiative and effort to obtain them, the Court reasoned.

Some recorded interviews, the Court said, may be entitled to absolute protection as revealing the attorney's impressions, conclusions, opinions, or legal research or theories. On the other hand, witness statements that lawyers obtain will not always reveal their thought process, such as when a lawyer sends an investigator to interview all witnesses listed in a police report and the investigator asks the witnesses few if any questions. However, the Court decided that witness statements obtained through an attorney-directed interview are always entitled as a matter of law to at least qualified work product protection, which enables them to be withheld unless the opposing party shows that denial of discovery will unfairly prejudice her preparation or result in an injustice.

BUYER'S DIRECT INC. V. BELK, INC. **(C.D. CAL. APR. 24, 2012) NO. SACV 12-00370-DOC (MLGx), 2012 WL 1416639**

- **The attorney-client privilege extends to communications with registered patent agents who are nonlawyers, up until the patent is issued.**

Acknowledging a deep split on the issue, the court in *Buyer's Direct* concluded that the federal policy of allowing applicants to use nonlawyer patent agents to represent them in proceedings before the U.S. Patent and Trademark Office would be frustrated if the privilege were not available for those communications. But the court decided that the rationale for extending the privilege to nonlawyer patent agents disappears once the patent is issued.

The court noted that although traditionally the attorney-client privilege does not cover nonlawyer representatives engaged in legal work, a line of cases recognizes an exception for registered patent agents representing clients in proceedings before the PTO. The court cited authority under federal law authorizing nonlawyer registered agents to pursue patent applications, and that a client's federally protected freedom to choose a nonlawyer registered patent agent would be substantially impaired if the attorney-client privilege were afforded to communications with patent attorneys but not to communications with patent agents.

E-PASS TECHNOLOGIES, INC. V. MOSES & SINGER, LLP **(N.D. CAL. AUG. 26, 2011) NO. C09-5967 EMC (JSC), 2011 WL 3794889**

- **During the attorney-client relationship, if firm intended to separately and confidentially represent itself in matters that involved a conflict of interest with the client, it had a duty to disclose the conflict and obtain the client's consent to the continued representation. If it did not do so, the firm's internal communications on such matters were not privileged.**

E-Pass Technologies sued its former legal counsel, Moses & Singer, and one of its partners for professional negligence, breach of fiduciary duty and negligent misrepresentation arising out of representation in multiple patent infringement actions where summary judgment was granted against E-Pass. During discovery, the defendants produced two privilege logs identifying about 87 documents from 2002 through 2009, generally described as email communication with counsel. E-Pass moved to compel on grounds that the documents were not privileged because the defendants represented E-Pass through 2008, communications were between counsel and staff who represented E-Pass during the relevant time period, the defendants billed E-Pass for some of the communications, and an undisclosed conflict of interest had developed at the time they were made. The parties agreed to court resolution through in camera inspection, and the court turned to the decision in *Thelan Reid & Priest LLP v. Marland* (N.D. Cal. Feb. 21, 2007)

2007 WL 578989, on whether intra-firm communications relating to the representation could be withheld as privileged.

The *Thelan* court had recognized the value in encouraging attorneys to consult on legal and ethical obligations to clients, and that a rule requiring disclosure of all communications would dissuade attorneys from doing so and would be costly if the firm had to refer such issues to outside counsel or terminate the representation. Yet, the firm owes fiduciary duties to a current client that could conflict with that policy and eliminate a claim to privilege during the representation. With that in mind, and applying the same approach to work product as privileged communications, the *Thelan* court suggested it was taking a more moderate approach and determined that the information should remain confidential until the firm learns the client may have a claim or that it needs client consent to continue a representation, and then it is subject to disclosure. In *Thelan*, that meant that certain documents on the firm's ethical and legal obligations to the client would remain confidential, but that the firm would have to produce certain documents relating to the conclusion of that consultation.
Applying that approach in *E-Pass*, the court undertook an analysis of each category of documents. With regard to communications during the attorney-client relationship (the majority related to the attorneys' fees motion brought against E-Pass and the firm in the underlying action), the court determined that if the firm intended to separately and confidentially represent itself, it had a duty to disclose the conflict and obtain E-Pass's consent to continued representation. Because it did not do so, the communications were not privileged. With regard to communications after the termination of the relationship, but for which time was billed to E-Pass, the court stated that the firm was free to engage in internal communications at this stage, but should have set up a separate billing system. There was no authority addressing when this conduct results in a waiver of the privilege, and the court found it unnecessary to decide because the documents were not relevant to E-Pass's claims. With regard to communications involving third parties (from E-Pass's new counsel, but circulated to individuals within the defendant firm), the court determined such communications with E-Pass's new counsel were not privileged, nor was the identity of the individuals at the firm who received them (noting they were on the privilege log).

BILLER V. TOYOTA MOTOR CORP. (9TH CIR. 2012) 668 F.3D 655

- **In an appeal by Biller, the Ninth Circuit affirmed an arbitrator's decision that found that an attorney who served as former in-house counsel for Toyota had violated his severance agreement when he publicly posted information he previously agreed to keep secret. Former in-house counsel was ordered to pay $2.6 million to the company.**

Biller worked for Toyota as in-house counsel from the years 2003 to 2007. He alleged constructive wrongful discharge relating to alleged unethical discovery practices of Toyota.

Biller settled the claims with Toyota and signed a severance agreement that contained, among other things, an agreement from Biller to refrain from disclosing confidential information gained about Toyota – which was defined within the agreement.

After he left Toyota, Biller began a consulting business and used information on his business website that Toyota alleged was confidential and in violation of the attorney-client privilege. Toyota sued in order to obtain a temporary restraining order and permanent injunction to prevent Biller from acting in violation of the attorney-client privilege, and Biller cross-complained seeking a permanent injunction to prohibit Toyota from interfering in the practices of his business.

The arbitrator found that the provisions of the severance agreement were enforceable, and found for Toyota on all of its claims, including breach of contract and conversion.

The arbitration award was confirmed by a federal trial court – a result that the appeals court declined to change. The Ninth Circuit also rejected arguments by Biller claiming the inaccuracy of the ruling of the district court.

SAN DIEGO COUNTY BAR ASSOCIATION ETHICS OPINION 2011-1 **(2011)**

QUESTION PRESENTED:
May Attorney, under the California Rules of Professional Conduct and the State Bar Act, answer a court's question asking if she has any idea why her client is not in court, when Attorney is aware of incriminating information that she suspects may explain her client's absence?

ANSWER:
No. Under the California Rules of Professional Conduct and State Bar Act, Attorney may not answer the court's question in any fashion; she must respectfully decline to answer, citing her ethical duty of confidentiality. This is true even though in jurisdictions that follow some version of the ABA Model Rules the result may be different.

CONFLICTS OF INTEREST

BELTRAN V. AVON PRODUCTS, INC. (C.D. CAL. JUNE 1, 2012) NO. 2:12-CV-02502-CJC (ANx), 2012 WL 2108667

- **Screening measures do not prevent a firm's imputed disqualification under California law for a conflict arising from a lawyer's prior practice at another firm.**
- **Holding indicates that courts in California continue to reach varying conclusions on whether screening can prevent imputation of lateral conflicts.**

Rejecting the use of screening to avoid vicarious disqualification when a law firm takes in a lawyer with a conflict from another firm, the court disqualified a law firm and its co-counsel from representing the plaintiff in a putative class action because a member of the firm was privy to the defendant's confidential information in his earlier work at another firm.

In *Beltran*, the court ruled that an ethical screen does not prevent a firm's imputed disqualification when a lawyer in the firm has key confidential information from work at another firm. The court also found that even if screening were accepted, the procedures that were implemented were inadequate to prevent vicarious disqualification because they were not set up quickly enough, the former client was not notified of the screen in writing, and the lawyer's new firm is a small one. The lawyer's conflict must be imputed not only to his new firm, but also to a second firm that is acting as co-counsel for the plaintiff.
"As a matter of law … an ethical wall is insufficient to overcome the possession of confidential information by the segregated attorney, except in very limited situations involving former government attorneys now in private practice," the court stated, citing a 1992 California appellate case and a 1996 federal district court case applying California law. The decision did not mention *Kirk v. Great Am. Title Ins. Co.*(2010) 108 Cal. Rptr.3d 620, which held that a law firm's use of effective screening measures may in some circumstances enable the firm to avoid vicarious disqualification based on an incoming lawyer's knowledge of client confidences acquired at another private firm.

KENNEDY V. ELDRIDGE (2011) 201 CAL.APP.4TH 1197

- **Judge properly disqualified attorney from representing his son in contentious custody action brought by the mother of the attorney's grandchild.**
- **Attorney's family ties to party in custody proceeding and firm's likely access to relevant confidential information from prior representations may result in disqualification, regardless of the lack of an attorney-client relationship with the adverse party.**

In *Kennedy*, the court held that a lawyer was properly disqualified from representing his son in a custody and support action brought by his grandson's mother. In upholding a disqualification

order, the court emphasized that the lawyer's firm had previously represented the mother's father in his divorce case, which provided access to confidential information that could be used to gain an unfair advantage over the mother in this litigation. The court also stressed that the lawyer was a potential witness in the custody case. His multiple and conflicting roles in the proceeding—lawyer, father, grandfather, and potential witness—raised an appearance of impropriety and imperiled the administration of justice, the court found.

The lawyer had argued that his son's girlfriend lacked standing to seek the lawyer's removal since she was not a former client of his firm and he owed her no duty of loyalty or confidentiality that would be breached by his continued representation of his son. The court stated that "no California case has held that only a client or a former client may bring a disqualification motion." While acknowledging that federal courts generally limit such standing to clients or former clients, the court stated that California courts do not take that approach. "It makes no sense for a court to stand idly by and permit conflicted counsel to participate in a case merely because neither a client nor a former client has brought a motion," the court wrote. The court concluded that "where an attorney's continued representation threatens an opposing litigant with cognizable injury or would undermine the integrity of the judicial process, the trial court may grant a motion for disqualification, regardless of whether a motion is brought by a present or former client of recused counsel."

The court found that the trial court could reasonably find that as a result of the lawyer's firm's prior involvement in the girlfriend's father's divorce case, the firm likely acquired relevant confidential information about the girlfriend to which it otherwise would not have access.

CALIFORNIA STATE BAR FORMAL OPINION NO. 2011-182 (2011)

ISSUES:

1. When at the outset of representation it appears an attorney would need to serve a discovery subpoena for production of documents on another current client of the attorney or the attorney's law firm, may the attorney accept the representation of the new client and serve the discovery subpoena on the current client?

2. If doing so raises a conflict of interest, may the attorney seek informed written consent in order to accept the representation including possible service of the subpoena?

3. What obligations arise if an attorney seeks informed written consent?

DIGEST:

When an attorney discovers at the outset of representation that the attorney must serve a discovery subpoena for production of documents on another current client of the attorney or the attorney's law firm, serving the discovery subpoena is an adverse action such that a concurrent client conflict of interest arises. To represent a client who seeks to serve such a subpoena, the

attorney must seek informed written consent from each client, disclosing the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client providing consent.

ORANGE COUNTY BAR ASSOCIATION ETHICS OPINION 2011-02 (2011)

ISSUE:
What professional responsibilities does a lawyer have upon considering or accepting legal work and a board of directors position from an entity in which he is a current investor, but for which he has not performed legal services in the past?

CONCLUSIONS:
Accepting the roles of legal advisor and director for a company in which a lawyer has invested raises a number of professional responsibility issues that should be considered in advance, such as the lawyer's ability to perform legal services with competence, the ability to act effectively as either counsel and/or a director due to conflicts of interest, and possible ramifications on the lawyer's duty of confidentiality and the attorney-client privilege. Each circumstance will require an individual assessment under the Rules of Professional Conduct, State Bar Act and other applicable law, but will often require written disclosures to the organization and/or the organization's informed written consent before undertaking the representation. In addition, as a director, the lawyer also may need to make certain disclosures of personal interests, where such interests are relevant to matters under consideration by the board of directors.

LOS ANGELES COUNTY BAR ASSOCIATION ETHICS OPINION 524 (2011)

QUESTION:
What are the ethical responsibilities of an attorney with regard to the hiring of nonlawyer employees who may be in possession of confidential information?

SUMMARY:
This opinion addresses the duties of an attorney who hires a nonlawyer (such as a law clerk, secretary, researcher, investigator, etc.), who has previously worked in a capacity in which the nonlawyer may have been exposed to or acquired confidential information, pertaining to an adverse party, which may be material to matters on which the hiring firm is engaged.

The Committee believes that it is the obligation of the hiring firm, before hiring a nonlawyer employee who has worked on matters at another firm, to conduct a reasonable investigation into whether the proposed employee has been exposed to or acquired confidential information during prior employment relevant to legal matters that may arise in the course of the new employment. The hiring firm should in particular ascertain whether the proposed employee's former firm is or

has been opposing counsel to the hiring firm on any current cases, to determine whether the proposed employee has been exposed to confidential information of an adverse party or witness regarding those cases. However, the hiring firm must not attempt to delve into the substance of any information the nonlawyer may have acquired. It is the obligation of the hiring firm to instruct the nonlawyer employee, once hired, as to his or her confidentiality obligations, and, absent first obtaining the consent of the former employer or the affected client of the former employer, to promptly screen the nonlawyer employee from involvement in particular matters if the nonlawyer is in possession of confidential information that is materially related to matters in which the hiring firm represents an adverse party. The opinion also addresses the elements of an adequate screen.

CONTACT WITH REPRESENTED PARTIES

CALIFORNIA STATE BAR FORMAL OPINION NO. 2011-181 (2011)

ISSUES:
May consent under the "no contact" rule of California Rule of Professional Conduct 2-100 be implied, or must it be provided expressly? If consent may be implied, how is implied consent determined?

DIGEST:
Consent under the "no contact" rule of California Rule of Professional Conduct 2-100 may be implied. Such consent may be implied by the facts and circumstances surrounding the communication with the represented party. Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party's attorney.

LAWYER-CLIENT RELATIONSHIP

PEOPLE V. TOWNLEY HERNANDEZ (2012) 53 CAL.4TH 1095

- **A criminal defendant whose right to counsel is violated by an order forbidding his attorney to discuss with him information about a prosecution witness must demonstrate prejudice from the error to win reversal.**

This case involves a gag order that prohibited a criminal defendant's attorney from discussing a prosecution witness with the defendant before trial. The court held that the gag order did not create the presumption of prejudice that would rise to the level of a denial to consult with an attorney at a "critical stage" of a criminal proceeding.

This case raises the issue discussed in *Strickland v. Washington* (1984) 466 U.S. 668, and *United States v. Cronic* (1984) 466 U.S. 648, where the Supreme Court discussed exceptions to the general rule that a violation of a criminal defendant's Sixth Amendment right to the "effective assistance of counsel" requires a criminal defendant to demonstrate prejudice.

The charges against Townley Hernandez involved allegedly being a participant in a gang-related shooting. A companion of Hernandez was stabbed in jail and ended up taking a plea bargain that involved providing incriminating evidence against Hernandez. This agreement was then sealed. Hernandez's lawyer was permitted to cross-examine the witness with his declaration, but was prohibited from discussing its contents.

The Court held that the order did not amount to a denial of counsel "altogether," but only prevented the defense attorney from discussing the testimony of one witness. It reasoned that Hernandez had the benefit of an attorney who "appeared at all critical times and actively represented him throughout the proceedings." The Court went on to recognize that "[a]ccordingly, there was no violation of the right to counsel derived from the root meaning of the Sixth Amendment to the United States Constitution." It further held that "[t]he trial court's order, which implicated only that aspect of the Sixth Amendment protecting [Hernandez's] right to the effective assistance of counsel, amounts to constitutional error only if [Hernandez] suffered resulting prejudice."

LEGAL MALPRACTICE

COLE V. PATRICIA A. MEYER & ASSOCIATES, APC (2012) 206 CAL.APP.4TH 1095

- **Attorneys who sign pleadings and play a "standby" trial counsel role cannot avoid liability for malicious prosecution simply by asserting that they did no work on the case because it was dismissed before their duties were triggered.**

Plaintiff had been sued in an underlying shareholder fraud and securities action for alleged insider trading and inappropriate sale of stock, among other things. These claims were terminated via summary judgment, and this ruling was affirmed on appeal in *Bains v. Moores* (2009) 172 Cal.App.4th 445. In the subsequent malicious prosecution action, plaintiff sued the attorneys who had prosecuted *Bains*. The defendant attorneys filed anti-SLAPP motions to strike (Code Civ. Proc., § 425.16), and the trial court granted the motion as to some claims and denied it as to others. The trial court agreed with certain defendant-attorneys' argument that they had been associated in the case only for purposes of trial and should not be held liable for malicious prosecution if the underlying claims lacked merit. Plaintiff appealed the granting of the motion and certain defendant-attorneys cross-appealed the denial of their motion.

The Court of Appeal reversed as to the motion that had been granted and affirmed as to the motion that had been denied, finding that plaintiff had made the requisite prima facie showing of malicious prosecution. As they had in the trial court, the defendant trial counsel argued that they could not be liable for malicious prosecution because they had not taken an active part in the underlying case and reasonably relied on the other defendant–attorneys' decision to sue plaintiff in the prior action. The court rejected this argument.

"On the parties' respective showings, we cannot conclude as a matter of law that these attorneys may avoid liability for malicious prosecution by learning nothing or close to nothing about the [underlying] case, throughout which they allowed themselves to be consistently identified as counsel of record for the plaintiffs." The court noted that the defendant-co-counsel were identified in the pleadings in the underlying case as "[a]ttorneys for [p]laintiffs" along with the other defendant-attorneys, that they apparently were listed as counsel for the plaintiffs on all filings in case, including the appellate briefs filed after the summary judgment, and that they were served with all filings from opposing counsel without any objection and had not notified the trial court or opposing counsel that they did not actually represent the underlying plaintiffs. Although these defendant-attorneys submitted various declarations to the effect that they did not sign, draft, review or prepare the pleadings, did not participate in the case in any way, and did not have the requisite securities law expertise to determine whether the underlying claims had merit, the court reasoned that as "counsel of record, the [defendant-attorneys] had a duty of care

to their clients that encompassed 'both a knowledge of the law and an obligation of diligent research and informed judgment.'"

Defendants' reliance on California Rule of Professional Conduct 3-110(C), which allows an attorney who lacks sufficient learning/skill for competent representation to associate with or consult another lawyer reasonably believed to be competent, was of no moment. California law certainly allows such association of counsel and division of duties in handling a case. "This does not mean, however, that an associated attorney whose name appears on all filings in a case and who is served with all documents filed by the other side need not know anything about the case with which he or she is associated. Nor should an associated attorney whose name appears on all filings be able to avoid liability by intentionally failing to learn anything about a case that may turn out to have been maliciously prosecuted in whole or in part."

Further, Code of Civil Procedure section 128.7(b) provides that an attorney who presents a pleading, motion or similar paper to a court impliedly certifies its legal and factual merit. Thus, willful ignorance of the merits of allegations made against a party is no defense. The court relied on the Fourth District, Division One opinion in *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, as authority "for holding an attorney liable for the very act of associating into a case containing frivolous claims."

The Court of Appeal explained how attorneys may avoid malicious prosecution liability in similar circumstances. "Attorneys may easily avoid liability for malicious prosecution without having to engage in premature work on a case if they refrain from formally associating in it until their role is triggered. Attorneys may also avoid liability if they refrain from lending their names to pleadings or motions about which they know next to nothing." [*Ethics Quarterly*, 9.2.14 (July, 2012).]

***SMITH V. CIMMET* (2011) 199 CAL.APP. 4TH 1381**

- **Successor representative of an Oregon estate did not have capacity to sue attorneys in California because his authority was limited to Oregon, but could seek to obtain ancillary appointment by a California court.**
- **Both Oregon and California statutory laws permit a successor representative to sue lawyers retained on the estate's behalf by the prior representative. Even if the law had been different in the states, California law should apply here because of the state's compelling interest in the regulation of California attorneys.**

In *Cimmet*, the First District Court of Appeal reviewed the process in which a personal and successor representative of an Oregon estate brought a malpractice action against attorneys

previously representing the estate in California. In so doing, the appellate court reversed and remanded a decision by the trial court granting judgment on the pleadings to the attorneys on the basis that Oregon law controlled the rights of an Oregon estate representative, and that a successor representative does not have standing to prosecute a legal malpractice claim against attorneys that had been retained to represent the previous estate representative under Oregon law.

Noting that a probate or trust estate is not a legal entity and has no capacity to sue or be sued, its personal representative's capacity to sue is generally restricted to the state of appointment under the common law followed by California, unless expressly authorized by statute. Although the appellate court concluded that the successor representative did not have capacity to sue in California because his authority was limited to Oregon, he could seek to obtain ancillary appointment by a California court and had to be given such an opportunity through leave to amend. In rejecting the plaintiff's reliance on an Oregon statute that he claimed allowed a representative to prosecute actions for the estate's protection in any jurisdiction, the appellate court stated that California statutes must provide authority for a foreign representative to file an action in California.

Further, undertaking a three-step governmental interest analysis, the appellate court concluded that, under both states' statutory laws, the successor representative has standing to sue lawyers retained on the estate's behalf by the prior representative. The court of appeal concluded that even if the law had been different in the states, California law should apply because of the state's compelling interest in the regulation of California attorneys.

FILARSKY V. DELIA **(2012) 132 S.CT. 1657**

- **A private individual retained by the government for temporary work is entitled to seek qualified immunity in connection with a 42 US.C. § 1983 lawsuit.**

In *Filarsky*, the Supreme Court reviewed the issue of whether a private attorney retained by a city to assist in an internal investigation of a firefighter was entitled to qualified immunity. The firefighter, Nicholas Delia, had been on an extended absence after becoming ill upon responding to a call regarding a toxic spill. The city had hired a private investigation firm to conduct surveillance on him, at which time he was observed buying building supplies. Initiating an internal affairs investigation, the city hired Steve Filarsky, a private attorney with 29 years of specialized experience in labor, employment and personnel matters, with particular expertise in internal affairs investigations, to conduct an interview of Delia. During the interview, with Delia's counsel and fire department officials present, Delia acknowledged buying the materials, but claimed not to have done any work on his home. Filarsky asked if a fire department official could enter Delia's home and view the unused items. When Delia refused, Filarsky ordered him

to bring the materials outside of his house for the official to view. Delia's attorney threatened a civil rights action, though Delia thereafter complied with the order and produced the materials.

Delia then filed an action against the city, fire department, Filarsky and others under 42 US.C. § 1983 for violating his Fourth and Fourteenth Amendment rights. The district court found that qualified immunity protected the defendants and granted summary judgment on their behalf. On appeal, the Ninth Circuit affirmed the judgment for all of the defendants, except Filarsky, who it found was not entitled to such protection as a private attorney. The Supreme Court disagreed on appeal, and reversed.

The Court held that a private individual retained by the government for temporary work is entitled to seek qualified immunity in connection with a section 1983 lawsuit. In looking at the general principles of tort immunities and defenses that applied at common law when section 1983 was enacted in 1871, the Court noted that there was no distinction in protection afforded to full-time public servants and private persons engaged in public service. The Court also noted that the reasons protection has been afforded under section 1983 do not counsel against continuing to apply the common law rule, including avoiding "unwarranted timidity" by those carrying out public business, ensuring talented candidates for public service are not deterred by the threat of damages, and protecting against distractions that accompany lawsuits in the performance of government duties. Finally, the Court noted that to create a distinction between public and private individuals in this case would create significant line-drawing problems that could deprive individuals of the ability to "reasonably anticipate" when conduct may lead to liability.

SALE OF PRACTICE

RAPPAPORT V. GELFAND (2011) 197 CAL.APP.4TH 1213

- **In the valuation of a dissociating partner's interest in a limited liability partnership law firm under the Uniform Partnership Act, court determined "liquidation value" is based on the amount a willing and informed buyer would pay a willing and informed seller when neither is under compulsion to buy or sell, and "buyout price" means the liquidation value discounted to present value as of the partner's date of dissociation.**
- **Remaining individual partners are not liable for the payment of the buyout price unless such partners agree in advance and in writing, according to applicable voting requirements, to be liable in their capacities as partners.**

In *Rappaport*, the Second District Court of Appeal reviewed a decision by the Los Angeles Superior Court determining the buyout price for a dissociating partner's interest in a limited

liability partnership law firm and holding the remaining partners of the firm individually liable for such payment. Upon appeal by the law firm and remaining partners, the appellate court considered, among other issues, two matters of first impression, namely, the meaning of the term "liquidation value" under the Uniform Partnership Act of 1994 ("UPA") and whether partners could be held individually liable for their law firm's payment obligation on such a buyout. Noting that the partners had no oral or written partnership agreement to govern the dissociation, the appellate court stated that the default provisions contained in section 16701(b) of the California Corporations Code governed the dissociation.

With no definition of liquidation value in the statute and no California cases interpreting the provision, the court determined that reference to the comments to the Revised Uniform Partnership Act ("RUPA") supported the conclusion that liquidation value should be based on the amount a willing and informed buyer would pay a willing and informed seller when neither is under compulsion to buy or sell. Further, the court determined that "buyout price" under section 16701(b) means the liquidation value discounted to present value as of the partner's date of dissociation. The appellate court concluded that this interpretation contemplated variations from different appraisal techniques under different business circumstances, consistent with the intent of the RUPA drafters that "buyout price" be an independent concept. With this as the basis, the appellate court upheld the trial court's reliance on the technique used by the dissociating partner's expert to value the firm's assets and liabilities based on a payout over time, considering the risks and other issues involved, then discounting to the date of dissociation.

However, the appellate court reversed the trial court's judgment on the issue of the remaining partner's individual liability for the payment. The appellate court reached this conclusion based on the following: 1) the language of section 16701 expressly contemplates payment by the partnership and an action against the partnership to determine buyout price; 2) section 16306 provides that "a partner in a registered limited liability partnership is not liable or accountable, directly or indirectly, … for debts, obligations, or liabilities of or chargeable to the partnership…" unless all or specific partners agree according to applicable voting requirements to be liable in their capacities as partners to the specified debts, obligations or liabilities in writing before they are incurred; and 3) there was no evidence in the record that either of the remaining partners agreed to be personally liable. The appellate court noted the dissociating partner's reliance on section 16405(b)'s reference to maintaining an action against another partner under these circumstances was not dispositive because it had to be construed in the context of the provisions that apply to limited liability partnerships (as opposed to general partnerships) like section 16306.

TRIAL CONDUCT

KIM V. WESTMOORE PARTNERS INC. (2011) 201 CAL.APP.4TH 267

- **The filing of a boilerplate brief following a request for an extension based on the additional work required, and requesting unwarranted sanctions against an opponent, resulted in sanctions of $10,000 and counsel being reported to the State Bar.**

The appellate counsel in *Kim* filed a request for a continuance of briefing in which he claimed to need additional time because of the complex issues, additional research and to "'finalize [his] brief.'" When the brief was filed it was a "verbatim duplicate of" a brief he had filed in a previous case in the same appellate court. In fact, the other side claimed that there were "only 15 words" that were different.

To add to the misconduct, the attorney also requested sanctions against opposing counsel for "'false[ly] arguing the case.'" Once again, this portion of his brief mirrored that filed in the previous case. The attorney also included a "*word-for-word identical* assertion that the appeal [was] frivolous," from the previous case. (Emphasis in original.)

The appellate court notified counsel that it was considering imposing sanctions for his "unreasonable violations" of the rules of court in seeking the extension. In response, the attorney denied any wrongdoing, and then argued that the court must be mistaken in seeking to impose sanctions on him.

Counsel failed to appear at the sanction hearing, sending instead another lawyer who had not been informed about the type of hearing to be conducted. Appellate counsel finally did appear at a second hearing.

In imposing a sanction of $10,000, the appellate court observed, "[w]e cannot overlook such conduct. It is critical to both the bench and the bar that we be able to rely on the honesty of counsel." The court was especially troubled by his actions in seeking sanctions against opposing counsel, by merely copying a similar accusation from another brief. As the court observed, "[i]t is difficult for us to express how wrong that is. Sanctions are serious business. They deserve more thought than the choice of salad dressing. 'I'll have the sanctions, please. No on second thought, bring me the balsamic; I'm trying to lose a few pounds.'"

The decision also discussed the need to maintain standards in the legal profession, observing: "[o]ur profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It's time to stop talking about the problem and act on it. For decades,

our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." The court also reported the counsel to the State Bar.

KLESTADT & WINTERS LLP V. CANGELOSI (9TH CIR. 2012) 672 F.3D 809

- **The Ninth Circuit does not have jurisdiction over the immediate appeal of a sanction order issued by a district court sitting in bankruptcy.**

Debtors involved in a contract suit in federal court in Nevada declared bankruptcy and filed a Chapter 11 petition in New York. That matter was subsequently transferred to Nevada. After further legal proceedings, the lenders filed a motion for sanctions in the district court against both the debtors and their counsel. The court imposed sanctions under Federal Rule of Bankruptcy Procedure 9011 and the court's inherent power to sanction the filing of bankruptcy cases for "'improper purposes....'" The district court imposed sanctions of $279,615 and also ordered the counsel to "disgorge its retainers ($300,000 each) received for filing and litigating the underlying bankruptcy case." The debtors and their counsel appealed the sanctions.

The Ninth Circuit dismissed the appeal because it was not appealable as a "final decision" under 28 U.S.C. § 1291, or an appealable collateral order under *Cohen v. Beneficial Indus. Loan Corp.* (1949) 337 U.S. 541 [69 S.Ct. 1221; 93 L. Ed. 1528]. This decision is in conflict with several other circuits which have held bankruptcy sanctions to be subject to an immediate appeal.

In its decision the Ninth Circuit noted that, under section 1291, it only has jurisdiction over "appeals from final decisions of the district courts of the United States." However, it noted that, under *Cohen,* some collateral orders are appealable if they "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment."

The debtors had contended that the appellate court had jurisdiction under the more flexible bankruptcy rules – in particular, 28 U.S.C. § 158(d)(1), which gives appellate courts jurisdiction over appeals from "final decisions, judgments, orders, and decrees" entered by district courts. The appellate court agreed that section 158(d)(1) provides jurisdiction over certain interlocutory orders in bankruptcy cases that "are distinct and conclusive" and are therefore immediately appealable, but it had previously held in *Cannon v. Hawaii Corp. (In re Hawaii Corp.)* (9th Cir. 1986) 796 F.2d 1139, that "these flexible jurisdictional principles 'do not apply to [section 1291] appeals from district judges sitting in bankruptcy.'" Even without *Hawaii Corp.,* the court found the result would be the same since the Supreme Court mandates a narrow construction of section 1291.

***MILLER V. CITY OF LOS ANGELES* (9TH CIR. 2011) 661 F.3D 1024**

- **Attorney sanctions were beyond a federal district court's inherent authority when there was no actual violation of a court order because there could not have been bad faith conduct, despite the attorney's apology at the time.**

An attorney for the City of Los Angeles conceded that he violated an in limine order prohibiting reference to whether the plaintiff decedent had a gun at the time he was shot by a police officer. For his error, the district court imposed a sanction of $63,687.50. However, in reversing that order, the Ninth Circuit offered words of caution to attorneys: "Don't apologize unless you're sure you did something wrong."

Prior to trial, the district court judge had barred any reference to whether the decedent still had a gun as he exited a building where he had just shot someone. In arguing why the decedent did not heed the officer's instruction to get down, the attorney said, "[h]e (decedent) can't because he had shot Bean (the other man) inside." The plaintiff objected and made a motion to strike, which was granted. The jury was also admonished to ignore the statement. Finally, the city's counsel stated, "I stand corrected. There is absolutely no evidence that he had a gun in his hand. Sergeant Mata even admits that."

There was a hung jury, and the trial court, after the city conceded error, imposed the sanctions. On appeal, the Ninth Circuit reversed, looking first at the order the city's counsel was alleged to have violated. The appellate court found that the order prohibited comment on whether the decedent possessed a gun at the time of the shooting, not whether he had one shortly before when he shot the man inside the building. As such, the attorney did not violate the order. The Ninth Circuit noted, "[o]rders can constrain conduct only to the extent their words give clear notice of what is prohibited."

The appellate court concluded that, while the city had conceded error, it did not admit the statement was made in bad faith. The court concluded, "[the attorney] couldn't have acted in bad faith if he did not, in fact, violate the district court's order. You can't have chicken parmesan without chicken; you can't have an amazing technicolor dreamcoat without a coat; you can't have ham and eggs if you're short of ham or eggs. And you can't have a bad faith violation without a violation."

Finally, the sanction order could not be upheld because there was no showing that the amount of the sanctions was the result of the alleged misconduct, especially in light of the admonition to the jury to ignore the remark and counsel's statement clarifying that the decedent did not have a gun at the time he was shot.

Additional Cases and Ethics Opinions Published in 2012

- *Missouri v. Frye* (2012) 132 S.Ct. 1399 [2012 WL 932020]
- *In re Pacific Pictures Corporation* (9th Cir. 2012) 679 F.3d 1121
- *United States v. Gonzalez* (9th Cir. 2012) 669 F.3d 974
- *Shifren v. Spiro* (2012) 206 Cal. App. 4th 481 [141 Cal. Rptr. 3d 764]
- *Croucier v. Chavos* (2012) 207 Cal.App.4th 1138 [144 Cal.Rptr.3d 180]
- State Bar Formal Opinion No. 2012-183
- State Bar Formal Opinion No. 2012-184