ETHICS UPDATE 2010

Significant Developments in the Law of Lawyering

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State Bar of California Annual Meeting

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[1] These citations were current as of July, when these written materials were submitted. Most with missing citations to official reporters will now have those citations. Also, please check all citations for possible subsequent appellate history.

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NEW ETHICS OPINIONS

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ACQUIRING AN INTEREST ADVERSE TO CLIENT – ATTORNEY'S LIEN

PLUMMER V. DAY/EISENBERG, LLP (2010) 184 CAL. APP. 4TH 38

- **Triable issues precluded summary judgment for defense on conversion and interference with prospective economic advantage claims.**
- **An interest adverse to the client is not created under Rule 3-300 of the Rules of Professional Conduct when the attorney's lien is contained in the initial contingency fee agreement.**

Attorney Mark Plummer and two attorneys with the law firm of Bisom & Cohen orally agreed to represent the Acosta family in a personal injury suit; Bisom & Cohen would finance the case and provide certain support services, and Plummer would act as of counsel. The fee was to be split 50/50. The clients executed a two-page retainer agreement with Bisom & Cohen, acknowledging Plummer's involvement as of counsel and that he would receive 50 percent of the total fees. It also granted Plummer an independent lien on the family's recovery. These acknowledgements appeared on the second page of the agreement, entitled "Acknowledgement of Association," and were signed only by the clients, though the first page of the agreement also included Plummer's signature. After a year of the litigation, Plummer was replaced by the law firm of Day/Eisenberg. Plummer then gave notice of the lien. He was notified that the case settled for $1 million, but never received payment, though a check that included his name among several others as a payee was sent to Day/Eisenberg. It was negotiated without Plummer's endorsement. Plummer sued Day/Eisenberg for conversion of settlement funds and interference with prospective economic advantage. Day/Eisenberg claimed that it had no knowledge of the purported lien until after the settlement, and that it did not possess the check because, after signing the check, they gave it to the other lawyers and then invoiced them for the firm's share. Day/Eisenberg also argued that Plummer had no economic relationship with the clients. On summary judgment, the court held that Plummer had no direct contractual relationship with the clients and lacked the immediate right to the settlement funds.

The appellate court reversed and remanded, holding that there were triable issues regarding whether the attorney had an immediate right to possess the funds through the lien, that the law firm failed to show the lien was invalid as a matter of law, and that there were triable issues on the interference with contract claim. The court held that a lien gives an attorney the right to possess in support of a conversion claim if the funds were wrongfully disbursed, but would require a direct contractual relationship with the client. Here, the second page of the retainer agreement gave Plummer a lien, and the court found that the second page must be read together with the first page (which was signed by Plummer), thus purporting to create a contract between Plummer and the clients. Consistent with this, his name appeared on a complaint in the action, and he appeared on the client's behalf in court. In response to Day/Eisenberg's claim that there was a violation of Rule 3-300 of the Rules of Professional Conduct that impacted the validity of the lien because the retainer agreement did not comply with the disclosure requirements under the Rule, the court noted that the California Supreme Court, in *Fletcher v. Davis* (2004) 33 Cal. 4th 61, held that an attorney who includes a charging lien in an hourly fee agreement must

comply with Rule 3-300 because he or she has acquired an interest adverse to the client, but declined to decide if Rule 3-300 applies to a contingency fee coupled with a lien on proceedings. However, the court cited and adopted State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2006-170 for the proposition that an adverse interest is not created under Rule 3-300 when the lien is in the initial contingency fee contract. In such cases, the court noted, a lien is inherent and universally included, so disclosure regarding the right to advice from independent counsel is futile. With regard to the conversion claim, the court held that the defendant is not required to have retained physical custody of all proceeds, and that a triable issue was raised as to whether the settlement check was in Day/Eisenberg's possession and unnecessarily endorsed by two of the firm's partners to deceive the bank into cashing it without Plummer's endorsement. Triable issues also existed with regard to the interference claim; the court noted that the retention agreement did create a cognizable economic relationship between the clients and Plummer, that emails in evidence showed that Day/Eisenberg knew about the lien, and that evidence tended to show the firm may have interfered with Plummer's lien through the manner in which the check was endorsed.

***SCHROEDER V. SAN DIEGO UNIFIED SCHOOL DIST.* (S.D. CAL. MAY 12, 2010) 2010 WL 1948235, 2010 U.S. DIST. LEXIS 47121**

- **Attorney's lien in initial contingency fee agreement does not create an interest adverse to the client under Rule 3-300 of the Rules of Professional Conduct.**
- **Recovery of attorneys' fees on *quantum meruit* basis denied where attorneys' reason for withdrawing from the representation was not overwhelmingly and primarily for the purpose of adhering to ethical obligations.**

Plaintiff Jessica Schroeder, an 18-year-old mentally impaired former client, through her mother and guardian ad litem, Marina Schroeder, filed a motion to strike an attorney's lien of their former counsel, Amy and Thomas Vandeveld. Former counsel had represented both mother and daughter, as the mother had one individual claim in the initial complaint. Plaintiff argued that the lien was unenforceable because the former counsel had failed to comply with Rule 3-300 of the Rules of Professional Conduct, and because counsel also voluntarily withdrew from the case before recovery, making the lien unenforceable. The court held that, pursuant to *Plummer*, a charging lien in an initial contingency fee agreement does not create an interest adverse to the client under Rule 3-300. As such, the lien was valid. However, in order to obtain fees on a *quantum meruit* basis after withdrawing, the attorneys must show they had to withdraw for ethical reasons, as well as the following factors: 1) the withdrawal was mandatory; 2) their overwhelming and primary motivation was to adhere to their ethical obligations; 3) they commenced the action in good faith; 4) the clients obtained a recovery after the attorneys' withdrawal; and 5) that counsel demonstrated their work contributed in some measurable degree toward the recovery. Here, the court doubted the attorneys' argument that they withdrew because the damages claim as described by the mother was concocted and created an irreconcilable conflict between the mother and child, as the former counsel never advised the clients of the conflict. Rather, the record demonstrated that the overwhelming and primary reason for the withdrawal was a personality clash resulting in a breakdown in communications. As a result, the court held there would be no recovery of attorneys' fees permitted, but costs would not be stricken because they were provided for in the fee agreement and the plaintiff had not shown that California law precludes such recovery under the circumstances.

ANTI-SLAPP STATUTE (CODE OF CIVIL PROCEDURE § 425.16)

COULTER V. MURRELL (S.D. CAL. MAR. 30, 2010) 2010 WL 1289070, 2010 U.S. DIST. LEXIS 30573

- **The anti-SLAPP statute precluded a litigant from asserting claims against opposing counsel for misrepresenting facts during settlement negotiations in prior litigation.**

Plaintiff and his son first filed an action in San Diego Superior Court against a deceased relative's estate and the relative's surviving spouse for breach of contract and funds owed from an investment partnership. Attorney Murrell represented the surviving spouse. The first action was settled for a $30,000 payment and dismissed with prejudice. Before the dismissal, plaintiff filed a second action in San Diego Superior Court against the surviving spouse and attorney Murrell. In it, plaintiff alleged that during settlement discussions in the first action attorney Murrell misrepresented important facts concerning the identity of decedent's beneficiaries and the value of the investment partnership's remaining assets. The Superior Court granted attorney Murrell's anti-SLAPP special motion to strike the fraud and conspiracy claims pursuant to Code of Civil Procedure § 425.16. While the second action was on appeal, plaintiff filed a third action against attorney Murrell and the surviving spouse, this time in the U.S. District Court in San Diego. In it, he asserted many of the same claims based on the same factual allegations. Attorney Murrell filed an anti-SLAPP special motion to strike.

The District Court granted the motion and dismissed the fraud and conspiracy claims. The Court concluded that plaintiff's claims for fraud and conspiracy arose out of alleged statements that attorney Murrell made during settlement negotiations in the prior litigation and, therefore, constituted protected petitioning activity. The Court rejected plaintiff's contention that attorney Murrell's actions fell within a narrow exception applicable to conduct that is admittedly illegal. Although plaintiff alleged that attorney Murrell committed theft by false pretenses, attorney Murrell denied doing so. The Court concluded that plaintiff could not establish a reasonable probability of success on the merits because the representations upon which he based his fraud and conspiracy claims were inadmissible pursuant to the litigation privilege codified in Civil Code § 47(b).

DANIELS V. ROBBINS (2010) 182 CAL. APP. 4TH 204

- **The litigation privilege precluded plaintiff from making a satisfactory showing that her claims for abuse of process, negligence and intentional infliction of emotional distress would succeed on the merits.**
- **Plaintiff failed to make a satisfactory showing that she could establish the malice element of her malicious prosecution claim against the attorney defendants.**

After having successfully dismissed for failure to cooperate in discovery a prior action asserting slander and related claims, plaintiff Wilhelmina Daniels sued the plaintiff in the prior case and his attorneys for malicious prosecution, abuse of process, negligence and intentional infliction of emotional distress. The attorney defendants filed an anti-SLAPP special motion to strike. Defendants satisfied their initial burden of demonstrating that the claims arose out of protected petitioning activity. A malicious prosecution claim necessarily depends on written or oral

statements in a prior judicial proceeding, which falls squarely within the definition of protected petitioning activity. Plaintiff Daniels, however, was unable to satisfy her burden of establishing a probability of success on the merits. Her claims for abuse of process, negligence and intentional infliction of emotional distress were barred by the litigation privilege codified in Civil Code § 47(b). With respect to her malicious prosecution claim, plaintiff Daniels failed to make a prima facie showing that the attorney defendants acted with malice.

G.R. V. INTELLIGATOR (2010) 185 CAL. APP. 4TH 606

- **An attorney defendant's concession that her motion in the underlying action violated a California Rule of Court did not preclude her from invoking the anti-SLAPP statute.**

Plaintiff G.R. filed an action for violation of Civil Code § 1785.19 and for invasion of privacy against attorney Intelligator, who represented G.R.'s ex-wife in underlying marital dissolution proceedings. G.R. alleged that attorney Intelligator violated his rights of privacy and California Rule of Court 1.20 by attaching to a motion in the underlying marital dissolution proceedings an unredacted copy of his credit report that disclosed his personal identifiers. Citing Code of Civil Procedure § 425.16, attorney Intelligator filed an anti-SLAPP special motion to strike, arguing that the filing of the motion in the marital dissolution proceedings constituted protected petitioning activity. The trial court granted the motion and awarded attorney Intelligator $6,840 in fees and costs. The Court of Appeal affirmed. It reasoned that attorney Intelligator's conduct constituted protected petitioning activity even though she violated Rule of Court 1.20 by attaching G.R.'s unredacted credit report to the motion. The so-called *Flatley* exclusion for illegal conduct (*see Flatley v. Mauro* (2006) 39 Cal. 4th 299) is narrow and does not include the rule violation that attorney Intelligator admittedly committed. The Rules of Court gave G.R. a ready remedy in the underlying marital dissolution proceedings – seeking sanctions. "[I]f an attorney were subject to a separate action each time he or she committed a rule violation in the representation of his or her client, the effect would be to chill the hearty pursuit of a protected activity – the right to petition." In addition, G.R. could not establish a reasonable probability of success on the merits because the litigation privilege codified in Civil Code § 47(b) barred his claims. The Court also affirmed the award of costs and fees to attorney Intelligator. The trial court did not abuse its discretion in calculating the amount.

GUESSOUS V. CHROME HEARTS, LLC (2009) 179 CAL. APP. 4TH 1177

- **Petitioning activity undertaken in a foreign country is not protected by the anti-SLAPP statute.**

Plaintiff Guessous created a line of jewelry and collection of clothing and leather products marketed and sold through his company Five Bis, based in France. Following trademark litigation in the Central District of California, in August 1999, plaintiffs and defendant Chrome Hearts, LLC agreed that Chrome Hearts would not again sue Guessous or any affiliated entities for trademark infringement anywhere in the world. Nevertheless, in 2006 and 2007, Chrome Hearts filed two new trademark actions against Five Bis in Paris. While those actions were pending, Guessous and Five Bis filed an action against Chrome Hearts in the Los Angeles Superior Court for breach of contract and declaratory relief alleging that the filing of the French

actions violated the covenant not to sue. The Superior Court denied Chrome Hearts' anti-SLAPP special motion to strike the Los Angeles complaint. The Court of Appeal affirmed. Code of Civil Procedure § 425.16(b)(1) provides that the anti-SLAPP statute applies to any act "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." "It clearly limits the petitioning or free speech activity to that made pursuant to rights granted by the United States or California Constitutions, and neither Constitution grants a United States citizen the right to petition a foreign government." 179 Cal. App. 4th at 1185.

***PREDIWAVE CORP. V. SIMPSON THACHER & BARTLETT LLP* (2009)**
179 CAL. APP. 4TH 1204

- **The law firm defendants were not entitled to rely on the anti-SLAPP statute because the gravamen of the complaint was not based on protected petitioning activity, but on legal malpractice and undertaking an engagement notwithstanding irreconcilable conflicts of interest.**
- **The anti-SLAPP statute does not apply when a client sues a former attorney for acts ostensibly done in furtherance of the client's rights.**

PrediWave and New World TMT entered into a transaction pursuant to which New World purchased PrediWave's preferred shares for $35 million, purchased certain hardware and software from PrediWave for $381 million, and purchased the preferred shares of PrediWave affiliates for $256.4 million. As a result of these investments, New World appointed two directors to PrediWave's board. In April 2004, concerned that PrediWave's CEO was diverting PrediWave assets to himself, the New World representatives on the PrediWave board requested an audit. PrediWave retained Simpson Thatcher to handle the matter. Instead of investigating the claims, PrediWave sued the two New World directors in Los Angeles Superior Court to block their inspection rights and for breach of fiduciary duty. In the meantime, New World filed its own action against PrediWave and its CEO in Santa Clara Superior Court. New World asserted claims for fraud and breach of fiduciary duty, alleging that PrediWave's CEO had looted more than $100 million from PrediWave and its affiliates. PrediWave and its CEO retained Simpson Thatcher to represent them jointly in the Santa Clara action. While the litigation was ongoing, PrediWave's CEO paid himself a $25 million bonus in August 2004 and a second $25 million bonus in December 2004.

Simpson Thatcher withdrew from the engagements in May 2005. Between April 2004 and May 2005, Simpson Thatcher received $10 million in fees from PrediWave. PrediWave filed for bankruptcy in April 2006. Prior to that time, PrediWave's CEO had transferred his assets from the United States and fled the country. With relief from the bankruptcy stay, New World obtained a $2.817 billion judgment in the Santa Clara action against PrediWave and its AWOL CEO.

Now under the control of the New World group, PrediWave filed a complaint against Simpson Thatcher and two of its lawyers for breach of fiduciary duty, constructive fraud, legal malpractice and unfair business practices under Business & Professions Code § 17200. PrediWave alleged that given the nature of the allegations, a conflict of interest should have precluded Simpson Thatcher from representing both PrediWave and its CEO and that in

opposing the request for an audit and investigation of the CEO, Simpson Thatcher harmed PrediWave. In fact, Simpson Thatcher had performed an internal investigation that uncovered impropriety by the CEO, but did not disclose their findings to the board.

Simpson Thatcher filed an anti-SLAPP special motion to strike the complaint pursuant to Code of Civil Procedure § 425.16. Although the Superior Court granted the motion, the Court of Appeal reversed. In reversing, the Court of Appeal reasoned that the anti-SLAPP statute cannot be used when a former client sues an attorney for acts ostensibly done in furtherance of the client's interests. In this case, the gravamen of the complaint was not protected petitioning activity, but the lawyer defendants' concurrent representation of clients with irreconcilable conflicts of interest. Because the lawyer defendants failed to demonstrate their conduct constituted protected petitioning activity, the Court did not need to address whether PrediWave established a reasonable probability of success on the merits.

***SCALZO V. AMERICAN EXPRESS CO.* (2010) 185 CAL. APP. 4TH 91**

- **The anti-SLAPP statute cannot be used to dismiss claims for invasion of privacy against a defendant who obtained plaintiff's personal financial records by misrepresenting that he was a joint holder of the account.**

In an underlying litigation matter, Martin Scalzo filed an action in Orange County Superior Court against his brother (Frederick Scalzo) and sister (Donna Ostermiller) seeking an accounting of funds generated from commercial property held jointly by the three siblings. In that litigation, Martin, represented by attorneys at Baker & Baker subpoenaed certain American Express statements. Baker & Baker gave these records to their forensic accountants at Haynie & Company to review. In addition to the AmEx records obtained by subpoena, Martin obtained six years of AmEx statements for Frederick's personal account by misrepresenting to American Express that he (Martin) was a joint cardholder on the account. American Express sent the records to Martin's home, even though that was not the account address. Martin also gave these AmEx records to his attorneys and forensic accountants.

Frederick sued American Express, Martin, Martin's lawyers, Martin's forensic accountants and others for invasion of privacy and related claims. He named the lawyer and accountant defendants in a single claim for injunctive relief seeking to preclude them from using his (Frederick's) private financial information. The Superior Court granted the lawyer and accountant defendants' special anti-SLAPP motions to dismiss pursuant to Code of Civil Procedure § 425.16. The Court of Appeal affirmed. The claim against the lawyer and accountant defendants was based solely on protected petitioning activity and Frederick could not prevail because these defendants' acts were protected by the litigation privilege codified in Civil Code § 47(b).

Frederick then filed an amended complaint against Martin and others for invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, violation of Financial Code § 4050 *et seq.* and injunctive relief. Martin filed his own special anti-SLAPP motion to dismiss. The Superior Court granted the motion, but this one the Court of Appeal reversed. The Court of Appeal assumed that Martin's conduct was protected petitioning activity. The Court declined to address whether Martin's conduct fell within the narrow *Flatley* exception

for admittedly illegal conduct that is not constitutionally protected. *See Flatley v. Mauro* (2006) 39 Cal. 4th 299. The Court concluded that the Superior Court erred in granting the motion because Frederick sustained his burden of demonstrating a probability of success on the merits. Martin, as opposed to the attorney and accountant defendants, could not cloak his conduct in the litigation privilege. Martin, in attempting to justify his acts, testified that he sought these records to assist in the preparation of his (Martin's) tax returns, not for use in the litigation. Also, the litigation privilege does not protect illegal conduct that results in damages unrelated to the use of the fruits of that conduct in litigation. Frederick sought compensation for damage to his credit rating and the invasion of his privacy caused by the use and dissemination of the documents outside of litigation.

***SIMPSON STRONG-TIE CO., INC. V. GORE* (2010) 49 CAL. 4TH 12**

- **The burden of proof as to the applicability of the commercial speech exemption to the anti-SLAPP statute falls on the party seeking the benefit of it, namely the plaintiff.**
- **The publication of an attorney's advertisement soliciting calls from the users of potentially defective products was protected petitioning activity under the anti-SLAPP statute.**

After reviewing a District Attorney's Consumer Alert and other information, attorney Pierce Gore ran a newspaper advertisement inviting wood deck owners to "call if you would like an attorney to investigate whether you have a potential claim" if the deck was built with certain fasteners and connectors manufactured by Simpson Strong-Tie or one of its competitors because "you may have certain legal rights and be entitled to monetary compensation…" When attorney Gore declined to respond to Simpson Strong-Tie's lawyer's demand to pull the advertisement, Simpson Strong-Tie sued for defamation, trade libel, false advertising and unfair business practices. Pursuant to Code of Civil Procedure § 425.16, attorney Gore filed a special anti-SLAPP motion to dismiss the complaint.

The Superior Court granted the motion. The Court of Appeal affirmed. The Supreme Court accepted review (i) to resolve a split among the Courts of Appeal on which party bears the burden of proving or disproving application of the commercial speech exemption codified in Code of Civil Procedure § 425.17(c) and (ii) to decide whether the commercial speech exemption applies to attorney Gore's advertisement. The commercial speech exemption provides that the anti-SLAPP statute "does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services … arising from any statement or conduct by that person if … (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of … securing … commercial transaction in, the person's goods or services … (2) The intended audience is an actual or potential buyer or customer …"

Disapproving *Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal. App. 4th 324, the Court concluded that a plaintiff seeking to rely on the commercial speech exemption bears the burden of proving it. The Court reasoned that this approach is consistent with the traditional rule that one claiming an exemption to a general statute has the burden of proving that he or she comes

within the exemption. The Court concluded that attorney Gore's publication of the advertisement did not fall within the commercial speech exemption. Simpson Strong-Tie's causes were not based on a statement by attorney Gore about his services or about the services of one of attorney Gore's competitors. The commercial speech exemption does not apply to a person's statements about the goods or services of a non-competitor. Therefore, the commercial speech exemptions did not apply to attorney Gore's advertisement.

ATTORNEY-CLIENT PRIVILEGE

Attorney-Client Privilege–California Law- Communications with Insurer
***CONTINENTAL CASUALTY CO. V. ST. PAUL SURPLUS LINES INS. CO*. (E.D. CAL. 2010) 265 F.R.D. 510**

- **Communications between an insured and the insured's *Cumis* counsel, on the one hand, and an insurer who did not defend the insured or participate in the action are not privileged.**

An insurer assumed defense of an action subject to a reservation of rights, paid for *Cumis* counsel to defend, and ultimately paid to settle the claims against its insured, a forklift manufacturer in a wrongful death action. The insured also held an "indemnity-only" primary general liability insurance policy from another insurer that gave that insurer the right, but not the duty, to defend the action. In a contribution action by the defending insurer against the non-defending insurer, the defending insurer sought to compel production of communications between the non-defending insurer, on the one hand, and *Cumis* counsel and the insured, on the other. The non-defending insurer claimed the documents were protected by the attorney-client privilege and the work product doctrine.

The court concluded that the privilege that attaches to communications among an insured, its insurer and counsel retained by insurer, who are in a **"**tripartite relationship," did not apply to communications with the non-defending insurer that was not defended by the *Cumis* lawyer, was not paying for the defense of the action and did not agree to indemnify its insured. Any communications between the insured and/or the non-defending insurer were based on the insured's "obligation under the policy to disclose certain coverage information" to the non-defending insurer, and were *not* based on any effort by the non-defending insurer to participate in the insured's defense or assist *Cumis* counsel in that defense. Having sat on the sidelines in the underlying action, the non-defending insurer cannot now claim that it had a joint interest and a common goal in defending the insured, especially since the non-defending insurer acknowledged that it had the right to investigate and defend the insured in the action at any time but chose not to do so. The Court declined to create a previously unrecognized privilege over communications among an insured, defense counsel, and an insurer that is not defending its insured without reservation, let alone an insurer that is not defending its insured at all.

Communications between *Cumis* counsel and the insured that were shared with the non-defending insurer also were not privileged. Such communications did not qualify as "confidential communications" under Cal. Evid. Code § 952 since the non-defending insurer's

receipt of those communications was not reasonably necessary for the accomplishment of the purpose for which *Cumis* counsel had been retained, *i.e.*, defense of the underlying action. Any work product protection over documents *Cumis* counsel shared with the non-defending insurer also was waived because the disclosure of such work product was not reasonably necessary to the defense of the insured in the underlying action.

Attorney-Client Privilege – California law – Appeal of Disclosure Order
***COSTCO WHOLESALE CORPORATION V. SUPERIOR COURT (RANDALL)* (2009) 47 CAL. 4TH 725**

- **Under California law, a party seeking extraordinary relief from a discovery order that wrongfully orders disclosure of an attorney-client communication need not establish that its case will be harmed by disclosure of the evidence.**
- **A court cannot order disclosure of information claimed to be privileged in order to rule on the claim of privilege.**

In a class action wage and hour lawsuit in which plaintiffs alleged they had been misclassified as exempt employees and sought payment for past overtime, plaintiffs sought to compel production of a legal opinion letter which Costco had requested from an outside law firm several years before the class action was filed. Costco asserted the letter was protected by both the attorney-client privilege and the attorney work product doctrine. Plaintiffs asserted the document included unprivileged matter and that Costco had impliedly waived the privilege and the doctrine.

The court ordered that the document be reviewed by a discovery referee, who produced a heavily redacted document. The referee acknowledged that most of the contents of the letter were privileged but that the text involving "factual information about various employees' job responsibilities" was not protected by the privilege or the work product doctrine. The referee further held that in interviewing two employees, the lawyer who wrote the report was not acting as a lawyer but rather as a fact finder. The trial court, without ruling on plaintiffs' claim that Costco had impliedly waived the privilege, ordered Costco to produce the document redacted in accordance with the referee's order.

The Court of Appeal dismissed Costco's petition for writ of mandate on the grounds that Costco had not demonstrated that production of the unredacted portions of the letter would cause it irreparable harm in the action.

The Supreme Court reversed, holding: (1) the attorney-client privilege applies to the entire opinion letter, regardless of its content; (2) Evidence Code section 915 prohibits disclosure of the information claimed to be privileged as a confidential communication between attorney and client "in order to rule on the claim of privilege;" and (3) contrary to the Court of Appeal's holding, a party seeking extraordinary relief from a discovery order that wrongfully invades the attorney-client relationship need not also establish that its case will be harmed by disclosure of the evidence.

Attorney-Client Privilege – Federal Law – Subject Matter Waiver/Work Product/Common Interest Doctrine

***GONZALES V. U.S.* (N.D. CAL. MAY 4, 2010) 2010 WL 1838948, 2010 U.S. DIST. LEXIS 52950**

- **Communications between estate's attorney and decedent's attorney, who was a fact witness, were not privileged.**
- **Communications between estate's attorney and decedent's accountant, who was a fact witness, were not privileged.**

In a tax refund action by the representative of a decedent's estate, plaintiff sought to protect his communications with decedent's attorney under the attorney-client privilege and work product doctrine. The court held that the attorney-client privilege was waived because the estate had produced the attorney's opinion letter upon which decedent relied and that any privilege that may have attached to subsequent communications regarding the transaction that was the subject of the opinion letter was waived. The court also found that the attorney was a fact witness, not plaintiff's counsel in the litigation, and that the work product doctrine was therefore not applicable. The estate also argued that there was a common interest warranting application of the joint defense privilege because, after the attorney advised decedent with respect to the investment transaction, the attorney entered into an identical transaction on his own that was also being challenged by the IRS. The court found that there was no evidence of any joint defense agreement, and that the joint defense privilege did not apply.

The Court rejected the estate's unsupported argument that the estate is like a corporation and therefore counsel's communications with its accountant were privileged under the subject matter test for corporate communications. Even if an estate was like a corporation, there was no showing that the accountant was an employee of the corporation empowered to speak for the corporation under the test in *Upjohn Co. v. United States* (1981) 449 U.S. 383, 391-93. Nor, the Court held, was the accountant the estate's agent for purposes of the attorney-client privilege. With regard to the work product doctrine, the Court held that the accountant was the tax preparer and an important fact witness, so the estate had waived any work product protection for any of the accountant's documents. The Court observed that the plaintiff had created his current dilemma by communicating with a third party fact witness, rather than hiring an accounting expert.

Attorney-Client Privilege – Federal Law – Appeal of Disclosure Order/Limited Scope Waiver

***HERNANDEZ V. TANNINEN* (9TH CIR. 2010) 604 F.3D 1095**

- **By mandamus, Ninth Circuit ordered District Court to reconsider ruling that found blanket waiver of the attorney-client privilege.**

In an employment discrimination case, plaintiff employee filed his first attorney's notes regarding a communication with another employee in his response to defendant's summary judgment motion. The defendant then moved to compel production of 35 documents reflecting communications with or work product of plaintiff's first attorney. The district court granted the motion, holding there had been a blanket waiver of the attorney-client privilege. Plaintiff filed

an interlocutory appeal. Recognizing that the collateral order doctrine was no longer applicable under *Mohawk Industries, Inc. v. Carpenter*, the 9th circuit issued a writ of mandamus, ordering the district court to reconsider its order, noting that employee's waiver of the attorney-client privilege and work product doctrine was limited to communication and work product concerning only the matters that were disclosed. The Court held mandamus was proper because three of the five guidelines outlined in *Bauman v. U.S.D.C.* (9th Cir. 1977) 557 F.2d 650 were met: (1) the district court's order was clearly erroneous; (2) plaintiff had no other means to obtain the desired relief; (3) the blanket waiver order was particularly injurious, since it could result in disclosure of case strategy as well as the strengths and weaknesses of plaintiff's claims.

Attorney-Client Privilege –Federal Law – Inadvertent Production/Waiver
***LUNA GAMING-SAN DIEGO, LLC V. DORSEY* (S.D. CAL. JAN. 13, 2010) 2010 WL 275083, 2010 U.S. DIST. LEXIS 3188**

- **Counsel's repeated failure to object to use of inadvertently produced privileged documents waived the privilege as well as any rights under a protective order.**

In a legal malpractice case, plaintiff inadvertently produced four privileged documents. Plaintiff then failed to object to defendant's use of one or more of the documents at subsequent depositions and in support of two summary judgment motions. A magistrate ruled that the production was inadvertent and the privilege had not been waived, finding that once plaintiff finally did object to defendant's use of the documents and invoked the protective order, which outlined procedures for resolving disputes regarding inadvertently produced privileged documents, defendant should have immediately returned the documents. The district court reversed, concluding that plaintiff's repeated failures to object to the use of the privileged documents waived the privilege as well as any protections it could have involved under the protective order.

Attorney-Client Privilege – Federal Law – Appeal of Disclosure Order
***MOHAWK INDUSTRIES V. CARPENTER* (2010) __ U.S. __, 130 S. CT. 599**

- **In most cases, post-judgment appeals protect the rights of litigants and assure the vitality of the attorney-client privilege.**
- **The collateral order doctrine does not extend to disclosure orders.**
- **If a privilege ruling is particularly injurious, party may ask court to certify order for interlocutory appeal or defy a court-ordered disclosure and incur court-ordered sanctions.**

In a wrongful termination lawsuit, the district court ordered defendant Mohawk Industries, Inc. to produce documents that the court acknowledged were protected by the attorney-client privilege on the grounds that Mohawk had implicitly waived the privilege by making representations concerning the requested information in another lawsuit. The district court declined to certify its order for interlocutory appeal under 28 U.S.C. §1292(b), but stayed its ruling to allow Mohawk to explore other potential avenues of appeal. The 11th Circuit dismissed the appeal for lack of jurisdiction under 28 U.S.C. §1291 and rejected Mohawk's mandamus petition, finding no "clear usurpation of power or abuse of discretion" by the district court. The Supreme Court affirmed the 11th Circuit's dismissal, holding that the collateral order doctrine

does not extend to disclosure orders adverse to the attorney-client privilege and that in most cases post-judgment appeals protect the rights of litigants and assure the vitality of the attorney-client privilege.

The Supreme Court noted that litigants confronted with a particularly injurious or novel privilege ruling have three options. First, they can request the court to certify the ruling for interlocutory appeal under 28 U.S.C. §1292(b) if the ruling involves a controlling issue of law the prompt resolution of which may materially advance the ultimate termination of the litigation. Second, in extraordinary circumstances involving judicial usurpation of power or a clear abuse of discretion, a party may petition the court for a writ of mandamus. Third, a party can defy a court ordered disclosure and incur court-imposed sanctions, including deeming certain facts established or prohibiting the assertion of certain claims or defenses, which would allow a party to obtain a post-judgment review without having to reveal its privileged information. Alternatively, when circumstances warrant it, the district court may hold a non-complying party in contempt, which order can be appealed directly if it can be characterized as a criminal punishment.

Attorney-Client Privilege – Federal Law – Communications with Corporate Counsel
***UNITED STATES V. GRAF* (9TH CIR. JULY 7, 2010) ___F.3D___, 2010 WL 2671813, 2010 U.S. APP. LEXIS 13860**

- **The founder and consultant of a corporation could not invoke the privilege to protect his communications with corporate counsel where the corporation had waived the privilege and the founder/consultant held no personal attorney-client privilege.**

Corporate founder and purported outside consultant sought to preclude discovery of his communications with corporate counsel after the corporation waived the attorney-client privilege, claiming he had a personal attorney-client privilege with corporate counsel. Court first held that the *Upjohn* rationale that a corporation's privilege extends to communications between corporate employees and corporate counsel so long as the communications are made at the direction of corporate superiors in order to secure legal advice covers communications between corporate counsel and outside consultants, where the outside consultant acts as the functional equivalent of a corporate employee. The Court then adopted the five factor *Bevill* test for determining when a corporate employee has a personal attorney-client privilege, and concluded that the corporate consultant failed to satisfy three factors of that test. The five factors are that: (1) the employee had approached counsel for the purpose of seeking legal advice; (2) when the employee approached counsel, he made it clear that he was seeking legal advice in his individual rather than in his representative capacities; (3) the counsel saw fit to communicate with him in his individual capacity, knowing that a possible conflict could arise; (4) his conversations with counsel were confidential; and (5) the substance of his conversations with counsel did not concern matters within the company or the general affairs of the company. Here, the founder failed to establish that he had sought legal advice in his individual capacity, that counsel had communicated with him in his individual capacity or that the substance of the communications did not concern matters within the company.

Attorney-Client Privilege – Federal Law – Privilege Standards for Corporate Counsel
***UNITED STATES V. RUEHLE* (9TH CIR. 2009) 583 F.3D 600**

- **Information provided by CFO to law firm retained to conduct internal investigation was not privileged since CFO knew before the interview that the information he provided would be turned over to outside auditors.**

In the criminal prosecution of a former Broadcom CFO in connection with stock option backdating, the former CFO claimed that his early communications with outside counsel (Irell) hired by Broadcom to conduct an internal investigation of stock option practices were protected by his personal attorney-client privilege because, at the time of the interview, Irell was also representing him as an individual defendant in two pending and related civil lawsuits. The district court held the CFO's communications with outside counsel in connection with the internal review were privileged and that the law firm breached its professional duties in turning over the information to the FBI.

The Court of Appeals reversed and remanded. The court first noted that issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law, not state law, which the district court applied. Under federal common law, an eight-part test determines whether information is covered by the attorney-client privilege: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived. The court held that the CFO failed to establish that his statements to outside counsel during the interviews were made in confidence. Instead, as the CFO knew from his involvement in the review being conducted by the attorneys, the interviews were being conducted for the purpose of providing the relevant information to outside auditors. The court held that the fact that the CFO did not know that the attorneys might disclose his statements to the government for use in a criminal case against him was of no consequence since *any* voluntary disclosure of information to a third party waives the attorney-client privilege, regardless of whether the disclosure later turns out to be harmful. The court also held that any breaches of professional duties under California's Rules of Professional Conduct by outside counsel do not warrant suppression of the information in the criminal prosecution. Instead, evidence obtained in violation of neither the Constitution nor federal law is admissible in federal courts, even though obtained in violation of state law.

ATTORNEYS' FEES

***ASTRUE V. RATLIFF* (JUNE 14, 2010) ___U.S. ___, 177 L. ED. 2D 91**

- **Attorneys' fees award under Equal Access to Justice Act is payable to litigant and subject to offset for the litigant's federal debts.**

The trial court granted litigant Ruby Kills Ree an award of attorney's fees and costs under the Equal Access to Justice Act ("EAJA") for the benefits she obtained in a Social Security

Administration case, but allowed the offset of debts she owed to the federal government from the fee award. Ree's attorney, Catherine Ratliff, intervened and challenged the offset on the ground that the fees belong to the litigant's attorney and, therefore, could not be subject to offset for the litigant's federal debts. The Eighth Circuit reversed, and the Commissioner of Social Security petitioned for review. The Supreme Court granted review, and subsequently reversed and remanded the matter. The Court held that EAJA fee awards are payable to the litigant and subject to offset to satisfy pre-existing debts of the litigant. The Court stated that "prevailing party" is a term of art in attorneys' fees statutes and refers to the prevailing litigant. Further, the Court stated that statutory authority exists to use administrative offsets for awards payable by the federal government, and that no exemption exists under this provision. The Court noted that the government has discontinued direct payment to attorneys in Social Security Administration cases unless the litigant has no federal debt and has assigned the rights to his or her attorney, and that such an assignment would be unnecessary if the statute meant the fees belonged to the attorney.

***CROCKETT & MYERS, LTD. V. NAPIER, FITZGERALD & KIRBY, LLP* (9TH CIR. 2009) 583 F.3D 1232**

- **District court's determination of attorney's *quantum meruit* fee award was vacated and remanded for recalculation to properly account for value of referral to other attorney.**
- **Attorney terminated more than a year before case settled was entitled to reasonable value of services as a substitute for agreed contractual terms.**

Brian Fitzgerald, a New York attorney, had a client with a medical malpractice claim in Nevada. He contacted J.R. Crockett, a Nevada attorney, to serve as co-counsel in the matter. They reached an oral agreement for the arrangement, with a 50 percent referral fee for Fitzgerald. Fitzgerald later convinced Crockett to reduce his contingency fee from 40 percent to 33.33 percent. A three-way retainer agreement was executed between the two attorneys' firms and the client, in which a 50/50 split of attorneys' fees was agreed. Later, Fitzgerald requested that the client pay her share of court costs. Crockett separately told her that it was not his firm's policy and that she could fire Fitzgerald. The medical malpractice case was settled, and Crockett notified Fitzgerald, but did not forward him 50 percent of the fee. Instead, Crockett sought a judgment that Fitzgerald was only entitled to *quantum meruit*. Fitzgerald filed counterclaims, alleging breach of an oral referral agreement, breach of a written retainer agreement, breach of the implied covenant of good faith and fair dealing, breach of the duty of loyalty as a fiduciary by joint venture and breach of fiduciary duties by reason of joint representation.
The district court dismissed all of the counterclaims, and trial proceeded on the *quantum meruit* issue. The court issued an order finding that most of the time spent by Fitzgerald was roughly quantifiable, but compensation at an hourly rate did not reasonably represent the value of his services for reducing the contingency fee charged to the client and awarded Fitzgerald one-third of the additional benefit the client received in the settlement as a result of the reduced contingency fee. Crocket moved for an award of fees and costs. The court granted the costs, but denied the fees. Both litigants appealed.

On appeal, the Ninth Circuit affirmed dismissal of all of the counterclaims, but concluded that the district court did not properly account for the value of the referral to Crockett. The court rejected Fitzgerald's argument that he was entitled to 50 percent of the fees, as provided by the

retainer agreement. Rather, the court held that Fitzgerald was entitled to the reasonable value of his services as a substitute for the agreed contractual terms, since he was terminated more than one year before the case settled. While the district court had recognized the benefit the client received from Fitzgerald's careful selection of local counsel, it did not account for the value of the referral itself to Crockett, but rather focused solely on the value of the reduced contingency fee. The court also affirmed the district court's denial of Crockett's request for fees, even though Fitzgerald had rejected an offer of judgment and ultimately recovered less than the offer. The court noted that a *quantum meruit* award of attorney's fees is discretionary under Nevada law, and considered whether the plaintiff's claim was in good faith, whether the offer of judgment was reasonable and in good faith in timing and amount, whether the decision to reject the offer was grossly unreasonable or in bad faith, and whether the fees sought by the defendant were reasonable and justified in amount. Here, due to the complexity of the claims, the novelty of the legal issues and the amount requested, the court found that it could not definitively conclude there was a mistake. The court vacated and remanded the matter for recalculation on the value of the referral.

***DIETZ V. MEISENHEIMER & HERRON* (2009) 177 CAL. APP. 4TH 771**

- **Court did not err by refusing to dismiss entire action on premise that law firm defendant could not defend itself without violating ethical duties.**
- **No balancing is permitted in determining a lawyer plaintiff's ability to satisfy the burden of proof and dismissal is required if lawyer plaintiff cannot satisfy his or her burden without disclosing confidential client information, but balancing of competing interests is *required* to determine whether a defendant's right to present a defense premised on confidential client information mandates dismissal when the plaintiff's claim is not premised on confidential client information.**

Plaintiff, attorney William Dietz, had referred a bad faith insurance litigation matter involving Vital Services Company Inc. ("Vital") to Matthew Herron, a principal at the defendant law firm (Meisenheimer & Herron and Meisenheimer, Herron & Steele ("Meisenheimer")). Vital signed a written fee agreement with the defendant that provided for defendant to receive certain fees, including 40 percent of Vital's recovery in the matter, and for Dietz to receive 25 percent of that contingency fee. After the matter settled, Dietz claimed that defendant paid him only $50,000 of the $310,000 he claimed he was owed. Dietz filed an action for breach of contract, fraud, conversion, constructive trust, and money had and received against Meisenheimer. Dietz later added another breach of contract claim on the ground that he was a third party beneficiary of the contract.

Meisenheimer filed a motion for protective order to dismiss the case on the ground that it could not present a complete defense without violating ethical duties owed to Vital and the attorney-client privilege. Meisenheimer claimed that Vital refused to waive the right to protect certain information against disclosure concerning tax planning strategies with another lawyer for the proceeds of the settlement that would show that Vital did not pay the fee in the written fee agreement, but a different fee as a result of a dispute between them. Following an evidentiary hearing, the court dismissed the fraud claim, but allowed the remainder of the claims to proceed to trial on the ground that any motivations that would have been shown by the privileged information were not relevant beyond the fraud claim. At trial, Dietz prevailed on his claims for

breach of contract, money had and received, and conversion. Meisenheimer appealed claiming, *inter alia,* that the court violated its due process rights by not dismissing the entire action and by balancing Dietz's interest in prosecuting the action against Meisenheimer's inability to defend itself without violating its ethical duties.

The appellate court affirmed the trial court's judgment. The court clarified that no balancing is permitted in determining a lawyer plaintiff's ability to satisfy the burden of proof and that dismissal is required if the lawyer plaintiff cannot satisfy his or her burden without disclosing confidential and privileged information, but that balancing of competing interests is *required* to determine whether a defendant's right to present a defense premised on confidential information mandates dismissal when the plaintiff's claim is not premised on confidential information. In such cases, the court stated that various measures could be employed to permit the attorney to make the necessary proof while protecting the confidential information, such as sealing and protective orders, limited admissibility, orders restricting use of testimony in later proceedings and, where appropriate, in camera proceedings. In this regard, the court noted that the following factors at a minimum must be considered before dismissal of such claims on due process grounds: 1) the disclosure of confidential client information would be required in cases where the client insists that the information remain confidential; 2) the confidential client information is highly material to the defense; 3) whether there are ad hoc measures that could be employed; and 4) whether it would be fundamentally unfair to allow the case to proceed (such as where the client uses the attorney-client privilege as both a sword and a shield). Here, the appellate court found that there was no error in refusing to dismiss the case in its entirety because the evidence at issue did not arise from the attorney-client relationship with the defendants or even from Dietz. The court found the information to be far from the central issue in the case, and that the excluded evidence was exceedingly narrow in light of other waivers Vital had given.

***GORMAN V. TASSAJARA DEVELOPMENT CORPORATION* (2009)**
178 CAL. APP. 4TH 44

- **Attorney who litigates in *propria persona*, as an individual or a professional corporation, cannot recover his own attorneys' fees under Section 1717 of the Civil Code, but is permitted to recover fees of other attorneys and paralegals hired to represent him, even if they work in his law firm.**

Plaintiffs John Gorman and Jennifer Cheng, husband and wife, sued a contractor for defective construction work on their residence. Gorman is an attorney, who is the chief executive office, chief financial officer, president and secretary of Gorman & Miller, PC. Gorman initially filed the suit himself with his firm, but later associated in a separate law firm. In a settlement agreement with a number of defendants, the plaintiffs were deemed prevailing parties solely with respect to the right to recover attorneys' fees and costs under the contract and as authorized by law. The plaintiffs requested approximately $1.35 million in attorneys' fees, of which almost half were billed by Gorman personally, and costs of more than $260,000. The court's award, however, was for $416,581.37 in reasonable attorneys' fees and costs of $142,432.46. The plaintiffs requested a statement of decision and filed motions for a new trial and for reconsideration. The trial court denied the request and motions, and plaintiffs appealed.
The appellate court reversed and remanded on the basis that the unexplained reduction of the fee award was an abuse of discretion, insofar as the attorneys' fees were for representation of

Gorman himself and his wife by other members of his firm. In reaching this conclusion, the court noted that Section 1717 of the Civil Code provides for recovery of fees "incurred" to enforce the contract. Under Trope v. Katz, 11 Cal. 4th 274, 45 Cal. Rptr. 2d 241 (1995), an attorney who litigates in *propria persona,* rather than retaining another lawyer to represent him or her, cannot recover under Section 1717 for compensation for the time and effort spent or lost professional opportunities. As such, the court concluded that the rationale of Trope applies to a lawyer representing himself, whether or not the lawyer has chosen to incorporate as a professional corporation. The court also rejected the argument that Gorman's wife retained the Gorman & Miller law firm, because there was no indication that she suffered separate damages. Nonetheless, the court found that work by other attorneys and paralegals in the Gorman & Miller firm working on the case would constitute an economic detriment. The court stated its belief "that Trope does not preclude the recovery of fees for other attorneys and paralegals hired by Gorman to represent him, even if they work in his law firm," but held that, "[t]o the extent the trial court disallowed recovery of any fees generated by Gorman personally, there was no error." Further, the court concluded that there was no reasonable connection between the lodestar amount and the fee award, stating that "[w]hen a trial court makes an award that is inscrutable to the parties involved in the case, and there is no apparent reasonable basis for the award in the record, the award itself is evidence that it resulted from an arbitrary determination." The court added that "[i]t is not the absence of an explanation by the trial court that calls the award in this case into question, but its inability to be explained by anyone, either the parties or this appellate court."

***LOCKTON V. O'ROURKE* (2010) 184 CAL. APP. 4TH 1051**

- **Attorney litigant who was not representing himself, but was represented by other attorneys in his firm, was permitted to recover attorneys' fees under Section 1717 of the Civil Code.**
- **Law firm litigant represented by members of the same firm was entitled to recover attorneys' fees under Section 1717 of the Civil Code where retainer agreement specifically provided for prevailing party to receive a fee award in a proceeding to enforce the agreement, including time by firm attorneys to prosecute and defend the action.**

Following dismissal of a complaint for legal malpractice on statute of limitations grounds, plaintiff David Lockton appealed on the grounds that the trial court improperly based its ruling on facts that did not appear on the fact of the complaint and that the ruling was contrary to the purpose behind the continuous representation tolling rule. Defendants Quinn Emanuel Urquhart Oliver & Hedges, LLP ("Quinn Emanuel") and Richard Schirtzer appealed from the court's decision to deny their requests for attorneys' fees as prevailing parties. The appellate court affirmed the judgment of dismissal of the complaint, but reversed the order denying the award of attorneys' fees, and remanded for a determination of the awards. With regard to the denial of a fee award to Schirtzer, the court noted that an attorney litigant who is not representing himself, but is represented by other attorneys in his firm, as with Schirtzer, is not precluded from recovering attorneys' fees under Section 1717 of the Civil Code. With respect to a law firm's representation by members of that firm, Quinn Emanuel was entitled to fees because, unlike firms in other cases, its retainer agreement provided for a prevailing party to receive an award of

attorneys' fees and costs incurred in a proceeding to enforce the agreement, which expressly included the value of the time spent by firm attorneys to prosecute and defend the action.

***RUDNICK V. RUDNICK* (2009) 179 CAL. APP. 4TH 1328**

- **Probate Court acted within its broad equitable powers to charge award of attorneys' fees and costs against certain beneficiaries' future trust distributions.**

A majority of beneficiaries had voted to approve the sale of the principal asset of the Rudnick Estates Trust. Trustee Oscar Rudnick, the plaintiff, petitioned the probate court for instructions, requesting approval of the sale and the proposed distribution. The remaining beneficiaries opposed the petition, claiming the assets were worth substantially more and that the transaction was a violation of the trustee's fiduciary duties and the terms of the trust. The probate court issued an order instructing the consummation of the sale, and found that the opposition by the remaining beneficiaries was primarily for the purpose of causing unnecessary delay in the sale and was in bad faith. Upon the trustee's request for fees, the probate court awarded attorneys' fees and costs to be charged against the opposing beneficiaries' future trust distributions. On appeal, the appellate court affirmed, holding that the probate court had the authority to charge the fees as a court sitting in equity. The appellate court agreed with the probate court that the primary motivation of the opposition was to disrupt the sale by preventing the transaction from closing by the deadline through unnecessary delays and disingenuous arguments. The court further found that the award was not made pursuant to the probate court's supervisory powers, but rather under its broad equitable powers to charge certain beneficiaries' shares for frivolous litigation against the trust.

CAL. COMM. ON PROFESSIONAL RESPONSIBILITY AND CONDUCT, FORMAL OP. 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.

CAL. COMM. ON PROFESSIONAL RESPONSIBILITY AND CONDUCT, FORMAL OP. 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.

CAL. COMM. ON PROFESSIONAL RESPONSIBILITY AND CONDUCT, FORMAL OP. 2009-178

ISSUES: Is it ethically proper for an attorney who is settling a fee dispute with a client to include a general release and a Civil Code section 1542 waiver in the settlement agreement? Does the existence of a legal malpractice claim against the attorney alter the ethical propriety of including a general release and section 1542 waiver in the settlement agreement?

DIGEST: An attorney must promptly disclose to the client the facts giving rise to any legal malpractice claim against the attorney. When an attorney contemplates entering into a settlement agreement with a current client that would limit the attorney's liability to the client for the lawyer's professional malpractice, the attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must:

1. Comply with rule 3-400(B) by advising the client of the right to seek independent counsel regarding the settlement and giving the client an opportunity to do so;

2. Advise the client that the lawyer is not representing or advising the client as to the settlement of the fee dispute or the legal malpractice claim; and

3. Fully disclose to the client the terms of the settlement agreement, in writing, including the possible effect of the provisions limiting the lawyer's liability to the client, unless the client is represented by independent counsel.

ATTORNEY WORK PRODUCT

Attorney Work Product – California law–Waiver/Common Interest Doctrine
***MEZA V. MUEHLSTEIN* (2009) 176 CAL. APP. 4TH 969**

- **Plaintiff's law firm was disqualified because it hired attorney who had previously represented a defendant in the same action and who, in that capacity, had obtained confidential work product from counsel representing joint defendants.**
- **Defendants' attorneys did not waive the attorney work product doctrine by sharing their privileged work product with one.**

Defendants moved to disqualify plaintiff's law firm in a multi-defendant personal injury action because plaintiff's law firm hired an attorney who had previously represented one of the defendants in the same lawsuit and had participated in meetings with counsel for the other defendants where privileged work product was disclosed. Defendants' counsel had shared confidential work product with the lateral when he represented a co-defendant pursuant to a CMC order that stated that defense counsel could exchange information regarding their common interests without waiving the attorney-client privilege or the attorney work product doctrine. The trial court granted the disqualification motion, finding that under the common interest doctrine the defendants did not waive the attorney work product doctrine and that the lateral knowledge of the other defense attorneys strategies and opinions precluded him from working for plaintiff's law firm.

The Court of Appeal affirmed. The court rejected plaintiff's law firm's argument that the entire firm should not be disqualified because the lateral had been screened from the case, holding that an "ethical wall" will generally not preclude disqualification of a firm. The court also rejected plaintiff's argument that defendants lacked standing to move for disqualification because they did not have an attorney-client relationship with the lateral, noting that defendants clearly had an interest in protecting confidential work product that had been disclosed to the lateral. Finally the court held that defendants' work product privilege was protected under the common interest doctrine, since defendants had demonstrated that (1) the disclosures related to the common interest of the attorneys' respective clients; (2) the disclosing attorney had a reasonable expectation that the other attorney would maintain confidentiality; and (3) the disclosure was reasonably necessary for the accomplishment of the purposes for which the disclosing attorney was consulted. The fact that there were issues on which defendants were adverse did not defeat application of the doctrine.

CONFLICT OF INTEREST

Conflict of Interest – Concurrent Client Conflict - Disqualification - Delay
***CALIFORNIA EARTHQUAKE AUTHORITY V. METROPOLITAN WEST SECURITIES, LLC* (E.D.CAL. 2010) 2010 WL 1838284, 2010 U.S. Dist. LEXIS 44016**

- **Firm disqualified due to concurrent client conflict where it had previously entered into engagement agreement with opposing party of no defined duration, and had done little work, but had not terminated engagement agreement consistent with its terms.**

During 2002, Munger ,Tolles & Olsen, LLP (the Firm) met with California Earthquake Authority's (CEA) outside counsel for a three hour meeting to discuss CEA's desire to develop a compliance program. CEA entered into a retainer agreement (the Agreement) with the Firm the following day. The Agreement provided that the Firm would provide legal representation to CEA as directed, provided that the Agreement was "of no defined duration," and that either party could terminate the Agreement by giving written notice of termination. The Firm never did any further legal work for CEA, but no notice of termination of the Agreement was ever provided by either CEA or the Firm pursuant to the Agreement.

In 2009, the Firm commenced its representation of the defendant in the referenced case, and CEA moved to disqualify the Firm. The Firm first argued that the lack of activity resulting from the fact that the Firm had provided no further legal services effectively terminated the Agreement with CEA. The Firm later argued that there never was an attorney client relationship, since the Agreement merely evidenced an intention to enter into an attorney client relationship, but the Firm was never given any work to do pursuant to the Agreement. The court rejected both arguments, construing the contract between the Firm and CEA expansively, and interpreted the Agreement strictly against the attorneys. The court held that the Agreement "must be read to continue until a party terminates the Agreement by written notice."

Since the Agreement had not been terminated, the court found that the Firm simultaneously represented both CEA and the defendant, whose interests in the lawsuit were adverse by definition. Applying California Rule of Professional Conduct 3-310(C), the court held that disqualification was automatic, and granted CEA's motion.

The court further rejected the Firm's argument that the disqualification motion should be denied as untimely, and found that while it was not clear that the delay exception applied in concurrent conflict cases, even if applicable, the delay was not significant, in that the motion was filed immediately after plaintiffs filed the complaint, and defendant did not articulate any recognizable prejudice resulting from the delay.

Conflict of Interest – Former Client Conflict - Disqualification
***GENENTECH, INC. V. SANOFI-AVENTIS DEUTCHLAND GMBH* (N.D.CAL. MAR. 20, 2010) 2010 WL 113478, 2010 U.S. DIST. LEXIS 35889**

- **Court disqualified defendant's law firm where lawyer associated with firm previously represented plaintiff while associated with another firm approximately 20 years ago, where matters were substantially related, even though lawyer was**

semi-retired and had no memory of any confidential information from the earlier matter.

Plaintiff Genentech sued Defendant Sanofi-Aventis to determine the validity of two of defendant's patents and whether Plaintiff infringed the particular patents. Plaintiff moved to disqualify defendant's counsel and to prevent defendant's counsel McDonnell, and the McDonnell firm from using information obtained during McDonnell's former representation of Plaintiff. The former representation occurred in 1989 and 1990 when McDonnell, then associated with another firm, represented Genentech as lead counsel before the United States Patent and Trademark Office in the '054 Interference, submitting numerous motions, briefs and affidavits. Some twenty years later, McDonnell indicated he had no memory of the representation. Plaintiff Genentech articulated numerous factual similarities in the former and current representations, and moved to disqualify McDonnell's present firm, on the grounds that his former representation of Genentech was substantially related to the issues of nonobviousness and license in the present matter, despite McDonnell's lack of involvement in the present litigation and pending retirement.

The court cited Local Rule 11, requiring attorneys to comply with the standards of professional conduct required by the State Bar of California. Acknowledging that motions to disqualify often are tactically motivated, nonetheless the court applied California Rule of Professional Conduct 3-310(E), which prevents a former attorney from representation of an adverse party when the former attorney possesses confidential information adverse to the former client. Applying the substantial relationship test, the court held that the McDonnell's relationship with Genentech was direct and personal, and found it irrelevant that McDonnell had no recollection of any confidential information he received. Secondly, the court held that the facts involved in the former representation were material to the subsequent representation. Thus, McDonnell himself was disqualified from representation of Genentech. McDonnell's disqualification was imputed to the firm because affidavits stating that McDonnell was semi-retired and had no involvement with the matter were not sufficient to rebut the presumption that "attorneys, working together and practicing law in a professional association, share each other's, and their clients' confidential information." Thus the court also disqualified the firm.

<u>Conflict of Interest – Concurrent Client Conflict - Disqualification</u>
***GREAT LAKES CONST., INC. V. BURMAN* (CAL. APP. JULY 27, 2010) 2010 WL 2910077**

- **Court denied plaintiff contractors/designers' motion to disqualify defendants' counsel from joint representation of both owners and subcontractor based on alleged conflict of interest, due to lack of standing.**

Graham and Associates (the Firm) represented Jim and Martje Burman and Ted Kipers. The Burmans hired Hampton Builders for a remodeling project, and Hampton hired Kipers, a subcontractor. Kipers' subcontract contained an indemnification provision. Hampton and Great Lakes sued the Burmans for libel, breach of contract, and common counts related to the remodeling project. The Burmans cross-complained against Great Lakes and others, alleging failure to perform, abandonment of the project, and failure to pay Kipers, and sought rescission; They also sued the designers for negligence based on defective plans. Kipers also asserted

causes of action in the cross-complaint against both Hampton and Great Lakes. Hampton then cross-complained against Kipers for breach of contract, equitable indemnity, and sought express contractual indemnity.

Based upon Kipers' deposition testimony and discovery responses, Hampton and the designers moved to disqualify the Firm from joint representation of both the Burmans and Kipers, alleging the violation of rule 3-310(C) of the Rules of Professional Conduct. Although the Firm indicated that it had obtained written waivers of any conflict of interest arising from the joint representation from the Burmans and Kipers, the trial court granted the motion and disqualified the Firm.

On appeal, the court reversed and held that Hampton and the designers had no standing to bring the disqualification motion because neither Hampton nor the designers had any attorney client relationship with the Firm at any time, and therefore had no expectation of confidentiality or loyalty, and therefore, had no legally cognizable interest in the duty of loyalty owed to Kipers and the Burmans. The court stated that "some sort of confidential or fiduciary relationship must exist or have existed before a party may disqualify an attorney predicated on the actual or potential disclosure of confidential information." The court further held that the joint representation did not present an ethical breach that was manifest and glaring that "so infects the litigation… that it impacts the moving party's interest in a just and lawful determination of [his or] her claims." The court also rejected the argument that a non-client has standing to move to disqualify opposing counsel to ensure the integrity of the process and the fair administration of justice.

Conflict of Interest – Former Client Conflict -- Attorney Disqualification -- Screening
***KIRK V. THE FIRST AMERICAN TITLE INS. CO.*, 183 CAL.APP.4TH 776 (2010)**

- **Court allows screening of a lawyer consulted by plaintiffs, but not engaged, who later joined a law firm, where defendant's lawyers later joined the same law firm, finding the firm put an ethical wall in place, rebutting presumption of shared confidential information.**

Plaintiffs brought four complex class actions against First American concerning a variety of business practices. Lawyers Siegel, Newman and Machmann, (the First American Team) all with Bryan Cave, LLP, represented First American in the class actions. In October 2007, plaintiffs' counsel contacted Gary Cohen, a former state insurance commissioner, then chief counsel for Fireman's Fund, as a consultant in the class actions, and had a 17 minute phone call during which plaintiffs' counsel disclosed confidential information, conveyed attorney work produce, and discussed plaintiffs' theories of the cases, concerns with defense strategy, and estimates of the value of the cases. Cohen declined the engagement.

In December 2008, Cohen joined the Sonnenschein firm's San Francisco office, joining the insurance regulatory practice group, and plaintiffs contacted him again. Cohen then learned that the Sonnenschein firm represented First American and again declined the engagement. In February 2009, the First American Team moved to the Sonnenschein Firm.

When the First American Team filed substitutions of attorney in the class actions, plaintiffs

objected to the representation by the Sonnenschein firm due to plaintiffs' prior consultation with Cohen. The Sonnenschein firm then established an ethical screen around Cohen, notifying all attorneys, paralegals and secretaries of "mandatory screening procedures," prohibiting Cohen from working on the class actions, barring all discussions with Cohen regarding the class actions, forbidding Cohen's access to non-public documents regarding the class actions, and precluding Cohen from receiving any fees from work related to the class actions. However, early in 2009, Cohen consulted briefly with the First American Team in a separate case, the *Lyons* matter. In March 2009, plaintiffs moved to disqualify the Sonnenschein firm, and the firm opposed the motion. The trial court granted the motion due to the 17-minute call and the work in the *Lyons* matter, which it described as a breach of the ethical wall.

The appellate court reversed, finding that while Cohen was disqualified (and had left the Sonnenschein firm by this point), vicarious disqualification of the firm was not required, given the ethical screen the firm implemented. The court held that there was no evidence to support the trial court's conclusion that the ethical screen was ineffective, although the "safest approach" would have been to screen Cohen completely from the First American Team, and from all First American cases. The court stated that automatic vicarious disqualification applied in cases of a tainted attorney possessing confidential information who switches sides in the same case, but that exponentially increasing attorney mobility and law firm mergers have undermined the rationale for an automatic rule of vicarious disqualification in all cases. Although the court did not adopt a broad rule permitting ethical screening in all cases, the court held that, in proper situations, the presumption that confidential information is shared with all members of a firm can be rebutted by evidence of an effective screen preventing sharing confidential information. The court held that once the party seeking disqualification establishes that an attorney is tainted with confidential information, a rebuttable presumption arises that the attorney shared that information with the firm, and the burden shifts to the opposing party to rebut the presumption with evidence that an effective screen was timely implemented.

The court further indicated that a case-by-case analysis of the effectiveness of a screen should be conducted, to include the "typical elements" of an ethical wall, which the court said are not necessarily required in all cases, to wit: (1) the physical, geographical and departmental separation of attorneys; (2) prohibitions against and sanctions for discussion of confidential matters; (3) rules and procedures preventing access to confidential information; (4) procedures preventing a disqualified attorney from sharing profits from the representation; (5) continuing education in professional responsibility; and (6) notice to the former client, to enable enforcement and permit challenge of any breaches. Notably the court stated that the interested party's consent is not required.

Conflict of Interest – Former Neutral

***LEE V. PACIFIC TELESIS GROUP COMPREHENSIVE DISABILITY BENEFITS PLAN* (N.D. CAL. JULY 7, 2010) 2010 WL 2721449**

- **Court disqualified plaintiff's counsel who had served as an early neutral evaluator in a prior similar ERISA action, and met privately with defendant's representatives, who shared confidential information, including defense strategy.**

After attorney White filed an ERISA action against defendant on behalf of plaintiff Lee, defendant moved to disqualify White on the grounds that White had previously served as an

early neutral evaluator in a prior ERISA case brought by another plaintiff, Edwards, against defendant. In the Edwards proceeding, defendant's representative met privately with White, and claimed to have disclosed confidential information, including defendant's defense strategy, during the private sessions. White contended that he obtained no confidential information, and that any such information was disclosed to the plaintiff in the prior case.

The court granted the motion to disqualify White. First, the court held that, given that White had met privately with defendant's representative in the prior case, it was presumed that confidential information was communicated to the mediator. Secondly, the court determined that the two matters were "substantially factually related" and that there was a reasonable probability that the confidences presumed disclosed in the earlier matter would be useful to the plaintiff in the later case. Undertaking a careful comparison between the two representations, the court found disqualification necessary because the legal bases underlying the two cases were the same, and the cases involved the same benefits program provisions, interpreted and implemented by the same claims administrator, around the same general time period, so that White's acquisition of information regarding defendant's strategy and approach to litigation around the same general time frame could prove useful in the present plaintiff's case.

Conflict of Interest – Former Client Conflict – Expert Witness
***MONTGOMERY V. SUPERIOR COURT* (CAL. APP. JULY 16, 2010) 2010 WL 2795392, 2010 CAL. APP. LEXIS 1165**

- **Court refused to disqualify plaintiff's expert where defense counsel previously represented expert, assuming expert waived any conflict of interest as former client of defendant's counsel.**

Plaintiffs designated Dr. John M. Shamoun as an expert in their medical malpractice case against Dr. Mark Knight. Defendant Knight's counsel Shafer had previously represented Shamoun in defense of a medical malpractice case, creating a potential former client conflict of interest in violation of California Rule of Professional Conduct 3-310(E). When defense counsel brought this to plaintiffs' counsel's attention, Dr. Shamoun agreed to "waive the conflict, subject to admissibility issues at trial." Concerned with the limitation on the waiver, defendant's counsel brought a motion to disqualify Dr. Shamoun as the plaintiffs' expert, and the trial court granted the motion. Plaintiffs filed a writ of mandate challenging the trial court's order.

The appellate court granted the writ and remanded with instructions to vacate the order. In successive representation cases, the court held, the party seeking disqualification must show a substantial relationship between the two representations. Defendant had not made the required showing. In addition, a former client can waive a conflict of interest following full disclosure pursuant to Rule 3-310(A), which requires "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client." The court, however, agreed that Shamoun's consent should by unqualified, and directed the lower court to vacate the disqualification order if Dr. Shamoun provided the appropriate unqualified consent to waive the former client conflict.

Conflict of Interest – Former Client Conflict – Disqualification and Screening
***OPENWAVE SYSTEMS, INC. V. 724 SOLUTIONS (US) INC.* (N.D. CAL. APR. 22, 2010) 2010 WL 1687825, 2010 U.S. DIST. LEXIS 49628**

- **Court disqualified law firm representing defendant in patent litigation where firm previously represented plaintiff, where the former representation was substantially related to the current case.**
- **Court rejected screening as a resolution to the conflict, since the ethical wall was not timely implemented and might not be adequate where the attorneys work in close proximity.**

Plaintiff Openwave moved to disqualify Fish & Richardson (the Firm) from representing 724 Solutions in the pending suit, alleging the Firm had previously represented Openwave in patent prosecutions and patent opposition work that was substantially related to the current representation of 724 Solutions. Describing the decision as a "close call," the court applied the substantial relationship test described in cases interpreting California Rule of Professional Conduct 3-310(E), to determine that the Firm's former representation of Openwave in patent oppositions to Motorola and Infogear patents sought in Australia was substantially related to the Firm's current representation of 724 Solutions. Based upon declarations from Openwave's chief technology officer and in-house patent counsel detailing extensive discussions with the Firm's attorneys, as well as billing records substantiating communications regarding opposition of two Australian patents, the court concluded it was likely that the Firm normally would have obtained confidential information, and that such information was related to the present representation of 724 Solutions since the Motorola patent in particular was highly relevant to the Firm's representation of 724 Solutions. Following California case law, the court rejected the Firm's assertion that Openwave's allegations concerning the Firm's possession of confidential information were too vague, holding that the court should not engage in a subtle evaluation of the extent to which an attorney acquired relevant information in the first representation and the actual use of that knowledge in the subsequent representation. Rather, the court found it "reasonable to assume that Openwave would have normally imparted confidential information to [the Firm] that will be *directly* at issue in this action."

The court also rejected the Firm's argument that its implementation of an ethical screen warranted denial of the motion to disqualify the Firm. Distinguishing Kirk v. First American Title Ins. Co., discussed *infra,* the court observed that the conflict already existed within the Firm when it accepted the engagement, and the ethical wall was not implemented until after Openwave objected to the representation. In addition, the court observed that an ethical wall is not adequate where attorneys work in close proximity, in small practice groups, where separating the tainted attorney from the case "might not be sufficient."

Conflict of Interest – Recusal – Screening
***PEOPLE V. GAMACHE* (2010) 48 CAL. 4TH 347**

- **Court affirmed denial of defendant's motion to disqualify prosecutor's office, where victim/witness worked in a division of the office, where prosecutors in a different division determined whether to seek death penalty.**

- **Ethical screen adequately addressed the conflict given the size of the office and geographic separation of the office where the victim/witness worked.**

Defendant Richard Gamache burglarized and robbed, then kidnapped and later shot Lee Williams and his wife, Peggy Williams, killing Lee Williams. Peggy survived, and became a witness for the prosecution. Prior to trial, defendant moved to recuse the entire San Bernardino County District Attorney's Office pursuant to Penal Code Section 1424, on the grounds that the office had a conflict of interest because Peggy, the surviving victim of the crimes, had been employed by the San Bernardino County District Attorney's Office for 10 years. Section 1424 requires recusal when a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial, and articulates a two-part test: (1) whether there is a conflict of interest, and (2) whether the conflict is so severe as to disqualify the district attorney from acting. After a series of evidentiary hearings, the court denied defendant's motion. The jury convicted defendant of first degree murder, with robbery, burglary, and kidnapping special circumstances, for the abduction and killing of Lee Williams, and returned a death verdict.

On appeal, the Supreme Court agreed that the prosecution had a paradigmatic conflict of interest and found there was a reasonable possibility that the prosecution's impartial exercise of discretion might be affected by Peggy's roles as employee, victim, relative of second victim, and witness. Reviewing the trial court's decision for abuse of discretion, the Court found that the conflict did not require recusal of the entire office. The court observed that the office was large, with 500 employees and 122 deputy district attorneys, and geographically divided into three administratively/operationally separated divisions. The murder occurred in the Desert Division, where the case was initially handled, and where Peggy Williams worked, but after the filing of an amended complaint, the case was reassigned to the Central Division. The assigned prosecutor did not know Peggy Williams. Another chief deputy who did know her took no part in the decision to seek death. District Attorney Kottmeier made the decision to retain the case as a special circumstances case, and to seek the death penalty, following the reassigned prosecutor's initial recommendation. Kottmeier barely knew Peggy Williams, and testified that her status as an employee played no role in his decision to seek the defendant's death, although he did visit her in the hospital once, on the day she was shot, and later attended Lee Williams' funeral and offered Peggy Williams condolences. Another deputy district attorney had spoken to the office's victim witness personnel regarding providing services to Peggy Williams. However, the Court found that such actions were humane, and did not demonstrate that the district attorneys would have been subconsciously influenced to seek the death penalty by Peggy Williams' employment status.

The Court also found it significant that the reassigned prosecutor worked in an office 75 miles from the Desert Division where Peggy had worked, and that Kottmeier had "established an ethical screen so no Desert Division employees would have any role in the case." The Court found no evidence to demonstrate that the screen had not been or could not be effective. The Court also noted that the size of the office and ability to set up effective ethical screens distinguished the case from earlier cases in which prosecutor's offices had been disqualified.

Conflict of Interest – Concurrent Client Conflict – Duty of Loyalty – Duty of Confidentiality

***TETHYS BIOSCIENCE, INC. V. MINTZ, LEVIN, ET AL.* (N.D. CAL. JUNE 4, 2010) 2010 WL 2287474, 2010 U.S. DIST. LEXIS 55010**

- **Court denies motion to dismiss complaint for breach of fiduciary duty based on duty of loyalty and confidentiality, where firm simultaneously represented companies prosecuting allegedly competing patents, and allegedly disclosed confidential information to a competitor.**

Plaintiff Tethys, a biotechnology company, engaged the Mintz firm and attorney Elrifi (Defendants) to prosecute patent applications involving biological markers that indicate whether a person is likely to develop diabetes. Defendants also represented a competing company in prosecuting allegedly competing intellectual property, without informing Plaintiff of that representation. Plaintiff claimed Defendants disclosed its competing confidential intellectual property to the competitor without Plaintiff's permission. Plaintiff terminated Defendants' representation and sued for breach of fiduciary duty and conversion. Defendants moved to dismiss the complaint, and moved to strike Plaintiff's punitive damages claim. The court denied the motion to dismiss, finding Plaintiff stated a claim for breach of fiduciary duty based on violation Defendants' duty of loyalty and duty of confidentiality.

Plaintiff adequately alleged the violation of the duty of loyalty based upon (1) rule 3-310(C) of the California Rules of Professional Conduct which requires full disclosure and informed written consent of each client prior to accepting representation of clients whose interests potentially or actually conflict, and (2) the U.S. PTO's Code of Professional Responsibility parallel provision barring representation of adverse parties unless it is obvious that the practitioner can adequately represent the interest of each, and each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the practitioner's independent professional judgment.

Plaintiff also adequately alleged violation of the duty of loyalty based on alleged disclosures of information regarding Plaintiff's patent application to Plaintiff's competitor. The court observed that the duty of confidentiality is broader than the attorney client privilege, and cited State Bar of Cal. Formal Op. No. 1993-133, defining a client secret as "any information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate, or the disclosure of which might be embarrassing or detrimental to the client." However, the court dismissed Plaintiff's claim for conversion based on the copying of its patent application, declining to extend the tort of conversion to a degree that would implicate federal patent law. Finally, the court denied Defendants' motion to strike punitive damages, holding such damages were available on the breach of fiduciary duty claim based on fraud.

Conflict of Interest – Government Counsel - Contingent Fee Agreement

***COUNTY OF SANTA CLARA V. SUPERIOR COURT* (CAL. JULY 26, 2010) 2010 WL 2890318, 2010 CAL. LEXIS 7241**

- **Public entities may engage private counsel on a contingent fee basis in nuisance cases not implicating fundamental constitutional rights or criminal liability, where a**

government attorney retains control and supervises the litigation, and has veto power over decisions of private counsel.

Numerous public entities represented by government lawyers and private law firms retained by public entities on a contingent fee basis prosecuted a public nuisance action against numerous lead paint manufacturers. Defendants moved to bar public entities from compensating private counsel by contingent fees, contending attorneys prosecuting public nuisance actions must be absolutely neutral and could not have any financial stake in the outcome a case brought on behalf of the public. The trial court agreed, but the appellate court indicated applicable precedent did not bar all contingent fee agreements, but only those in which private attorneys appear in place of governments' attorneys.

The California Supreme Court acknowledged that "Because private counsel who are remunerated on a contingent-fee basis have a direct pecuniary interest in the outcome of the case, they have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest." The Court determined that the conflict did not require disqualification, however, as long as conflict-free government counsel retained control and supervision over the litigation. The Court required that "contractual provisions must provide explicitly that all critical discretionary decisions will be made by public attorneys – most notably, any decision regarding the ultimate disposition of the case." The Court rejected the argument that the concept of "control" was unworkable because it was too difficult to monitor. In addition, the Court stated that contingent fee agreements must provide that government attorneys retain veto power over any decisions made by outside counsel, and that a government attorney with supervisory authority must be personally involved in overseeing the litigation. These provisions, the Court said, were the "minimum" required to "ensure that critical government authority is not improperly delegated to an attorney possessing a personal pecuniary interest in the case."

In so holding, the Court determined that its former precedent limiting contingent fees in nuisance abatement cases should be narrowed to allow the contingent fee representation in nuisance cases where the claims did not infringe fundamental constitutional rights or impose criminal liability. Because some but not all of the agreements with the public entities involved contained some but not all of the required provisions, the Court reversed the appellate court and remanded, permitting the public entities to continue the litigation after revising the contingent fee agreements to comply with the requirements imposed by the Court's opinion.

Conflict of Interest-Ethics Opinion
ABA FORMAL OPINION 09-455 (OCT.8,2009)

- **Lawyers changing firms have a duty to protect their clients' confidential information when sharing information in order to evaluate potential conflicts of interest, and should share only limited information, and only when necessary, in order to resolve concurrent and former client conflicts of interest, and to determine whether screening is required.**

The Opinion addressed the duty to clients and former clients to resolve conflicts of interest when a lawyer moves between law firms, as well as the duty of confidentiality in connection with the resolution of conflicts of interest, based on the ABA Model Rules of Professional Conduct. The Opinion acknowledged the need to balance the need for lawyer mobility with professional duty of confidentiality to the client, and the client's right to autonomy in selection of counsel of the client's choice. The Opinion indicated that in order to resolve concurrent and former client conflicts of interest, and to implement ethical walls/screening where appropriate, a lawyer must be able to share information related to conflicts of interest when the lawyer is considering switching firms.

The duty of confidentiality covers all information relating to the representation. Consent of clients and former clients to disclosure of confidential information is an available exception to the duty of confidentiality, but often is not practical when a lawyer is switching firms. Such consent should be considered whenever information is especially sensitive. Because the disclosure is not likely to benefit the client, disclosure of information in order to resolve conflicts is not impliedly authorized by the client. Likewise, the ABA Model Rules exception to the duty of confidentiality where "other law" requires disclosure does not apply to permit disclosure. Although there is no clearly applicable exception allowing disclosure of information to resolve conflicts, the Opinion stated that the ABA Model Rules are "rules of reason" and must be interpreted in reference to the purposes of legal representation, and concluded it is permissible for lawyers to disclose limited information to resolve conflicts when switching firms.

Where such disclosure is required to resolve conflicts of interest in connection with a lawyer changing firms, the disclosure should occur only when necessary, normally sooner rather than later for more experienced lawyers, and the disclosure should be limited to persons and issues. In cases where a more fact intensive analysis is required, such as analysis of the substantial relationship between two matters, in order to determine whether a conflict exists, an independent third party intermediary lawyer can receive the client's confidential information to conduct the analysis, unless the client instructed the lawyer not to reveal such information.

EX PARTE COMMUNICATIONS WITH A REPRESENTED PARTY

***HTC CORPORATION V. TECHNOLOGY PROPERTIES LIMITED* (N.D. CAL. JUNE 7, 2010) __F. SUPP. 2D ___, 2010 WL 2265460**

- **Officer of company litigant, who was a member of the State Bar, did not violate Rule 2-100 of the Rules of Professional Conduct by contacting officer of opposing litigant because he did not represent company in any legal capacity in the action and did not hold any legal position in the company.**

Daniel Leckrone, the chairman of Technology Properties Limited ("TPL") and a member of the State Bar of California, had contacted the chairman of HTC Corporation, an opponent in patent litigation, regarding entering into a settlement agreement, rather than continuing to litigate. HTC's counsel requested that Leckrone cease and desist from contact with HTC's chairman, contending it was a violation of his ethical obligations under Rule 2-100 of the Rules of

Professional Conduct. TPL contended Leckrone's direct communications with HTC's upper management qualified as a communication between parties. HTC filed a motion for an order prohibiting such communications.

The court denied the motion, holding that Leckrone did not violate Rule 2-100. Leckrone did not represent TPL in any legal capacity in the action; he was not counsel of record and did not hold any legal position in the company. Further, TPL had not claimed the attorney-client privilege with respect to communications between Leckrone and TPL's employees. The Rule specifically provides that a "party" includes an "officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership," and Leckrone qualified as a party, not only as an officer, but also as a "managing agent," consistent with the definition provided in Snider v. Superior Court, 113 Cal. App. 4th 1187, 1209, 7 Cal. Rptr. 3d 119 (2003) (an employee "that exercise[s] substantial discretionary authority over decisions that determine organizational policy"). The Rule provides that it is not intended to prevent parties from communicating on the subject matter of a representation, and a member of the State Bar who is a party retains independent rights that should not be abrogated as a result of such professional status. The court noted that, because the purpose of the Rule is protect against an opposing attorney's intrusion and interference with the attorney-client relationship, its goal is not to penalize an attorney for a violation, but rather to determine an appropriate remedy if the misconduct may have had any improper effect in the case. The court held that, even if it had determined that the communications had been improper, HTC had been advised by two sophisticated international law firms as well as in-house counsel and failed to demonstrate any evidence of an improper effect.

OCHOA-HERNANDEZ V. CJADERS FOODS, INC. (N.D. CAL. APR. 2, 2010) 2010 WL 1340777

- **District court denied motion for protective order to prevent defendant company from engaging in *ex parte* communications with current or former employees regarding a wage and hour representative action for civil penalties brought by a former employee under the Labor Code Private Attorneys General Act of 2004 because the action was fundamentally a law enforcement action to protect the public, not private parties, and procedural rules of class actions would not apply.**

In a wage and hour representative action for civil penalties under the Labor Code Private Attorneys General Act of 2004 ("PAGA"), the plaintiff, a former employee, seeks a protective order to prevent the defendant company from engaging in *ex parte* communications with any current or former employees regarding the litigation. According to Arias v. Superior Court, 46 Cal. 4th 969, 975, 95 Cal. Rptr. 3d 588 (2009), such actions do not always have to be brought as class actions. Under the Labor Code, if a civil action for statutory penalties is brought personally and on behalf of other current or former employees, the employee bringing the action must comply with certain notice requirements to the employer and the California Labor and Workforce Development Agency ("Agency"), and the Agency has the opportunity to investigate. Counsel for the plaintiff claims that the attorney-client relationship was formed with all current and former employees of the defendant as soon as these requirements were met. The district court denied the motion for the protective order. In its opinion, the court noted that the California Supreme Court in Arias distinguished PAGA claims from California Unfair

Competition Law claims, which are required to meet procedural rules of class actions. A representative action under PAGA is fundamentally a law enforcement action and is designed to protect the public at large, as opposed to private parties. Therefore, the district court concluded that a PAGA claim is brought on behalf of the Agency.

The court noted that, in analogous EEOC cases, courts have held that government agencies filing public interest enforcement actions generally do not represent unnamed employees. Further, PAGA does not preclude unnamed plaintiffs from pursuing private claims with other remedies against the company, even if the representative claim for civil penalties is defeated. Rejecting plaintiff's claim that the EEOC cases are distinguishable because the agency sues in its own right as opposed to as a representative of the individual, the court noted that plaintiff wanted to stand in the shoes of the agency to avoid class certification requirements, but simultaneously wanted to claim to represent a class of employees and not the public interest. The court cited significant differences between class actions and PAGA claims to support its determination, including: that PAGA claims provide an incentive for private parties to recover civil penalties for the government, though they are not bound by the judgment as to remedies, whereas in a class action, unnamed plaintiffs benefit from numerous procedural protections, including notice of the claim, but are bound by the judgment if they do not opt out. Finally, the court stated that there are at least two inferential steps missing, but needed, to bridge the gap between Arias and the development of an attorney-client relationship: 1) identification of what procedures are required to perfect such representative status once the administrative requirements are met, in the absence of class action procedures; and 2) even if the representative status were perfected, when, if at all, the attorney-client relationship develops with the current or former employees.

JUDICIAL RECUSAL

PEOPLE V. FREEMAN (2010) 47 CAL.4TH 993

- **Judicial recusal was not required to avoid violation of defendant's due process rights where there was no probability of judicial bias that was constitutional intolerable based on judge's friendship with another judge whom defendant was thought at one point to be stalking.**

Defendant, accused of stalking her daughter's foster parents, appeared before Judge O'Neill in a Marsden hearing in which allegations surfaced that defendant also was stalking another judge, Judge Elias, who presided over her dependency proceeding. Judge O'Neill recused himself based on his friendship with Judge Elias, whom he had known for 25 years, worked with at the district attorneys' office, and considered a personal friend. After further investigation, no evidence showed defendant was stalking Judge Elias, so defendant's case was returned to Judge O'Neill. Defendant filed a motion to disqualify Judge O'Neill, then withdrew the motion. Defendant was convicted and asserted that she was pressured into withdrawing her recusal motion. She contended that Judge O'Neill was biased, and that this violated her right to due process. On appeal, the court found defendant's due process rights were violated by Judge O'Neill's refusal to recuse himself because the facts were "consistent with what one would typically associate with actual bias."

The California Supreme Court reversed, holding that recusal was not required under the United States Supreme Court's decision in Caperton v. A. T. Massey Coal Co., 129 S.Ct. 2252 (2009). The Court applied the Caperton test to determine whether the circumstances were such that, even without any demonstration of actual bias, the probability of judicial bias was so great that it was "constitutionally intolerable." Construing Caperton narrowly given the "exceptional" nature of the circumstances involved in that case, the California Supreme Court declared the reach of the case "limited." The Court held that although Caperton extended Due Process protections beyond historical concerns involving judicial pecuniary interests, to a "more general concept of interests that tempt adjudicators to disregard neutrality," recusal was not required in Judge O'Neill's case. The Court considered whether the probable bias was "constitutionally intolerable" and held that there was no unconstitutional potential for bias arising from Judge O'Neill's friendship with Judge Elias, despite the similarity of the stalking charges against defendant, and the allegation that she had stalked Judge Elias.

LEGAL MALPRACTICE – STATUTE OF LIMITATIONS

(CODE OF CIVIL PROCEDURE § 340.6)

***JOCER ENTERPRISES, INC. V. PRICE* (2010) 183 CAL. APP. 4TH 559**

- **Legal malpractice claim tolled under Code of Civil Procedure § 340.6(a)(4) while attorney defendant was out of state.**

Plaintiffs filed a legal malpractice claim against attorney Price on July 9, 2007. Plaintiffs alleged that attorney Price provided substandard legal representation on plaintiffs' behalf in (1) a trade secrets case that plaintiffs asserted against a former employee, that plaintiffs lost, and that resulted in a $95,600 sanction for having applied for an injunction in bad faith and (2) a malicious prosecution case that the former employee filed against plaintiffs that plaintiffs, represented by attorney Price, failed to dismiss through an anti-SLAPP special motion to strike. The court entered judgment against plaintiffs in case (1) in August 2004. In case (2), plaintiffs removed attorney Price and retained new counsel on July 3, 2006, while a motion to assess sanctions against plaintiffs for losing the anti-SLAPP motion was pending, which subsequently resulted in a $7,645 additional award against plaintiffs.

The Superior Court dismissed the complaint on demurrer as barred by the one-year statute of limitations set forth in Code of Civil Procedure § 340.6. The Court of Appeal affirmed the dismissal of the claim, but on different grounds. Code of Civil Procedure § 340.6(a)(4) tolls the statute of limitations applicable to legal malpractice claims when "[t]he plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." The Court reasoned that (notwithstanding the actual wording of the provision) the Legislature intended subsection (4) to encompass the general tolling provisions codified in Chapter 4, Title 2, Part 2 of the Code of Civil Procedure (§§ 350 *et seq*), which includes tolling when a defendant is absent from California (*see* Code of Civil Procedure § 351). The Court, nevertheless, concluded that plaintiffs had not adequately pled a cause of action for legal malpractice and, therefore, affirmed the dismissal of the complaint, but ordered the Superior Court to permit plaintiffs leave to amend.

LOCKTON V. O'ROURKE (2010) 184 CAL. APP. 4TH 1051

- **The continuous representation tolling rule is limited to a representation regarding the specific subject matter in which the alleged wrongful act or omission occurred.**
- **A client could not invoke the continuous representation rule to toll the statute of limitations on a legal malpractice claim because the relevant subject matter was specifically excluded from the engagement and the client retained another lawyer to handle the matter.**

In September 2002, plaintiff filed a legal malpractice claim against Morrison & Foerster that the Superior Court dismissed as time-barred on March 19, 2003. Over a year later, on April 23, 2003, plaintiff filed claims for legal malpractice against two of his other law firms – O'Rourke, McCloskey & Moody and Quinn Emanuel – for failing to preserve his malpractice claim against Morrison & Foerster. As of March 19, 2003, when plaintiff knew that his claims against Morrison & Foerster were time barred, Quinn Emanuel was still representing plaintiff in proceedings pending in federal court. Those proceedings ended on August 20, 2003, when the federal case was settled and dismissed. Several years prior to March 19, 2003, however, plaintiff was told that Quinn Emanuel would not pursue a legal malpractice claim on plaintiff's behalf against Morrison & Foerster and that he needed to retain other counsel if he wished to do so. In fact, plaintiff did retain separate counsel who filed the malpractice action against Morrison & Foerster in September 2002.

The Superior Court dismissed plaintiff's action against Quinn Emanuel, finding it barred by the one-year statute of limitations. *See* Code of Civ. Proc. § 340.6. The Court of Appeal affirmed the dismissal. The Court reasoned that the statute of limitations began to run on plaintiff's purported malpractice claim against Quinn Emanuel when the malpractice claims against Morrison & Foerster were dismissed – in March 2003. Because plaintiff did not file his malpractice claim against Quinn Emanuel until April 2004, the claims against Quinn Emanuel were time barred unless plaintiff could invoke the continuous representation tolling rule codified in Code of Civil Procedure § 340.6(a)(2). To invoke that rule, plaintiff could not simply allege the existence of an ongoing attorney-client relationship. The rule is limited to representation regarding the specific subject matter in which the alleged wrongful act or omission occurred. Here, although Quinn Emanuel continued to represent plaintiff in the federal action, it did not represent him with respect to his potential claims against Morrison & Foerster. In fact, plaintiff retained a separate lawyer to do so well before the claims against Morrison & Foerster became time barred. The fact that the federal action was replete with allegations against Morrison & Foerster was not enough to establish continuing conduct after plaintiff chose to pursue those claims through another lawyer. The Court rejected plaintiff's contention that he should not be forced to file a legal malpractice claim against Quinn Emanuel while Quinn Emanuel was representing him in the federal action. Plaintiff could have asked Quinn Emanuel for a tolling agreement.

***TRUONG V. GLASSER* (2009) 181 CAL. APP. 4TH 102**

- **For purposes of tolling the one-year statute of limitations on legal malpractice claims, actual injury, which triggers the running of the one-year period, occurs when a right is lost – not when the amount of damages is finally determined.**

In the underlying litigation, in March 2006, plaintiffs, a manufacturing business and its president, sued the landlord on their commercial property arising from plaintiffs' inability to occupy or use a certain portion of the leased property without substantial improvements. Plaintiffs lost and judgment was entered against them in August 2007, in part because plaintiffs had signed a lease addendum that waived the claims plaintiffs asserted and plaintiffs were unsuccessful in challenging the validity of the lease addendum. On September 4, 2007, plaintiffs sued the attorney Glasser, whom plaintiffs had retained to review the proposed lease and lease addendum. Plaintiffs had retained a different lawyer, however, to pursue their claims in March 2006 against the landlord.

The Superior Court granted attorney Glasser's motion for summary judgment contending that plaintiffs' legal malpractice claim was barred by the one-year statute of limitations codified in Code of Civil Procedure § 340.6. The Court of Appeal affirmed. The Court rejected plaintiffs' contention that the limitations period was tolled because plaintiffs did not incur an injury until August 2007, when judgment was entered against them in their case against the landlord. When malpractice results in the loss of a right, there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of damages ultimately incurred. Here plaintiffs sustained an actual injury when they were required to retain and pay new counsel to file a lawsuit seeking to escape the consequences of signing the lease addendum – which occurred more than one year before plaintiffs filed their malpractice action against attorney Glasser. The Court also rejected plaintiffs' contention that the statute should be tolled under the continuous representation rule codified in Code of Civil Procedure § 340.6(a)(2). This rule applies when an attorney continues to represent the client regarding the specific subject matter in which the alleged wrongful act or omission occurred. The last date upon which attorney Glasser provided services to plaintiffs with respect to the lease or lease addendum was in late December 2005. By March 2006, plaintiffs had retained other counsel to file plaintiffs' lawsuit seeking to invalidate the lease addendum. Therefore, the continuous representation rule did not preclude dismissal of plaintiffs' malpractice claim against attorney Glasser, which was filed on September 4, 2007 – more than a year after attorney Glasser's representation of plaintiffs with respect to the lease and lease addendum had ended.

MALICIOUS PROSECUTION

***FRANKLIN MINT CO. V. MANATT, PHELPS & PHILLIPS, LLP* (2010) 184 CAL. APP. 4TH 313**

- **A claim for malicious prosecution need not be addressed to an entire lawsuit; it may be based on only some of the causes of action alleged in the underlying lawsuit.**

- **Law firm lacked probable cause to prosecute false advertising and trademark dilution claims under the Lanham Act.**

After the death of Diana, Princess of Wales, on August 31, 1997, The Franklin Mint, a direct mail marketer of collectible memorabilia, designed and sold a line of products featuring Princess Diana, including one product from which, according to its advertisements, all proceeds would be donated to charity in her honor. The executors of Princess Diana's estate and the trustees of The Diana, Princess of Wales Memorial Fund, represented by Manatt Phelps & Phillips LLP, sued The Franklin Mint Company, its corporate parent, and its principals (collectively, "Franklin Mint") for misappropriating Princess Diana's name and image. They asserted, among other claims, claims for false advertising and trademark dilution under the Lanham Act. *See* 15 U.S.C. §§ 1125(a) & (c). The District Court granted summary judgment for Franklin Mint. In rejecting the false advertising claim, the District Court found that uncontroverted evidence established that, as advertised, Franklin Mint had donated over $4 million, including all of the proceeds of the relevant product, to charities associated with Princess Diana. In rejecting the trademark dilution claim, the District Court labeled "absurd" the estate's and Fund's contention that the words "Diana, Princess of Wales" had acquired a secondary meaning – a prerequisite for a trademark dilution claim – such that the words no longer primarily identified the individual, Princess Diana, but instead identified the Fund's charitable activities. Finding that these two claims were "groundless and unreasonable," the District Court also awarded Franklin Mint $1.635 million in attorneys' fees under the Lanham Act.

Franklin Mint then sued Manatt Phelps and the Fund for malicious prosecution based on the false advertising and dilution claims. After a 17-day jury trial, the Superior Court granted Manatt Phelps' motion for non-suit or directed verdict finding that the law firm had probable cause. The Court of Appeal reversed. It concluded, after a lengthy discourse on Lanham Act law, that no reasonable attorney could find tenable these two claims. It remanded the case for a trial solely on the issues of malice and damages.

***DANIELS V. ROBBINS* (2010) 182 CAL. APP. 4TH 204**

- **Dismissal of an underlying action for a party's failure to cooperate in discovery does not necessarily mean that the prevailing party is unable to establish a favorable termination as against the losing party's attorneys in a subsequent malicious prosecution action.**
- **An adversary's malice cannot be imputed to the adversary's lawyers.**
- **An absence of evidentiary support does not in itself prove that opposing counsel continued to prosecute a claim with malice.**

After having successfully dismissed for failure to cooperate in discovery a prior action asserting slander and related claims, plaintiff Wilhelmina Daniels sued the plaintiff in the prior case and his attorneys for malicious prosecution, abuse of process, negligence and intentional infliction of emotional distress. In the context of a special anti-SLAPP motion to dismiss, the Court concluded that plaintiff Daniels was unable to satisfy her burden of establishing a probability of success on the merits on her malicious prosecution claim. Daniels made a satisfactory showing that the dismissal of the underlying case for failure to participate in discovery constituted a termination favorable to her. In reaching this conclusion, the Court of Appeal rejected the

principle articulated in *Zeavin v. Lee* (1982) 136 Cal. App. 3d 766 that a favorable termination can never occur vis-à-vis an attorney defendant in a malicious prosecution action when the underlying case was dismissed for discovery sanctions. Daniels also made a satisfactory showing that the attorney defendants filed or maintained the underlying action without probable cause. The complaint in the underlying action included bare-bone factual allegations and the attorney defendants' client persistently refused to identify any witnesses and produce any documents supporting his allegations. Daniels, however, failed to make a satisfactory showing that the attorney defendants acted with malice. Daniels could not impute her prior litigation adversary's malice to his lawyers. Also, the attorney defendants' negligence in conducting factual research was not enough to establish malice. Malice can be inferred when a party continues to prosecute an action after becoming aware that the action lacks probable cause. The presentation of evidence that explicitly disproves material factual allegations may establish a lack of probable cause and, inferentially, malice. An absence of evidentiary support, however, is different. It does not necessarily establish a lack of probable cause and, therefore, cannot lead to an inference of malice.

MISCONDUCT

IN RE FINDLEY (9TH CIR. 2010) 593 F.3D 1048

- **Costs imposed on disciplined attorney by State Bar Court were not dischargeable in bankruptcy. They fell within the Bankruptcy Code's discharge exemption for governmental fines, penalties and forfeitures.**

In addition to a one-year suspension and two-year probationary period for violating various provisions of the Code of Professional Responsibility and Business & Professions Code, the State Bar Court assessed $14,054.94 in fees against attorney John William Findley III pursuant to Business & Professions Code § 6086.10(a) (which mandates such an assessment, absent proof of hardship, when an attorney is disciplined). Business & Professions Code § 6140.7 requires payment of attorney discipline costs as a prerequisite to reinstatement. While his case was pending before the State Bar Court's Review Department, attorney Findley filed a Chapter 7 bankruptcy. In due course, his debts were discharged. Subsequently, Findley sought reinstatement to the State Bar without having to pay the discipline costs, a debt that Findley claimed had been discharged.

Bankruptcy Code § 523(a)(7) excepts a debt from discharge "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." In a prior case, *State Bar of California v. Taggart (In re Taggart)* (9th Cir. 2001) 249 F.3d 987, the Ninth Circuit concluded that an attorney discipline cost award imposed under a prior version of Business & Professions Code § 6086.10 was dischargeable in bankruptcy because it provided "compensation for actual pecuniary loss." In response to *Taggart*, in 2003 California amended § 6086.10 by adding a subsection (e). § 6086.10(e) provides that "costs imposed pursuant to this section are penalties, payable to and for the benefit for the benefit of the State Bar of California, a public corporation … to promote rehabilitation and to protect the public…" As a result of the amendment, the Ninth Circuit

concluded that the disciplinary costs assessed against attorney Findley by the State Bar Court were non-dischargeable pursuant to Bankruptcy Code § 523(a)(7).

IN RE THOMAS V. GIRARDI (9TH CIR. JULY 13, 2010) __ F.3D __, 2010 U.S. APP. LEXIS 14292

- **An experienced and respected plaintiffs' attorney was formally reprimanded for allowing his name to be signed by co-counsel on appellate briefs that turned out to contain false statements.**

- **Another experienced and respected plaintiffs' attorney and his colleague were suspended from practicing before the Ninth Circuit for six months for filing a frivolous appeal and briefs containing false statements.**

- **A junior associate, who tried unsuccessfully to persuade more senior lawyers at his firm not to continue an appeal, was privately reprimanded for "allowing his superiors to overcome his sound instincts" and for his role in drafting an appellate brief that contained false statements.**

In 2000, attorneys Walter Lack and Thomas Girardi signed a master fee agreement with a Nicaraguan law firm to represent Nicaraguan claimants in litigation concerning the effects of the pesticide DBCP on banana plantation workers. Attorney Paul A. Traina, a member of Lack's firm, assisted in the engagement. In September 2001, 466 Nicaraguan plaintiffs filed in Nicaragua a lawsuit naming "Dole Food Corporation" and others as defendants. "Dole Food Corporation" does not exist. Plaintiffs intended to sue Dole Food Company, a U.S. company based in Westlake, California. Dole Food Company retained a Nicaraguan lawyer who requested the Nicaraguan court to change the defendant's name, but the Nicaraguan court failed to do so. That court also denied Dole Food Company's motion to intervene in the action because it was not a party. In December 2002, the Nicaraguan court entered a default judgment for $489 million against "Dole Food Corporation" and others. In April 2003, a Nicaraguan notary issued a notary affidavit that purported to provide an exact Spanish to English translation of the Nicaraguan court's writ of execution. The affidavit falsely stated that Dole Food Company was one of the judgment debtors.

In May 2003, attorneys Lack and Traina, with attorney Girardi listed as co-counsel, filed an action in the Los Angeles Superior Court under the California Recognition Act to enforce the Nicaraguan judgment against Dole Food Company and others. (According to the master fee agreement, among plaintiffs' counsel, attorney Lack and his firm had responsibility for filing the complaint and all pleadings in the case.) The case was removed to federal court and subsequently dismissed because the notary affidavit was "suspect" and plaintiffs failed to produce the Nicaraguan judgment, as opposed to the writ of execution. Plaintiffs appealed to the Ninth Circuit. After the appellate briefs were completed, Dole moved for sanctions against plaintiffs and their counsel for filing a frivolous appeal and making false statements. In July, 2005, a week before oral argument, attorney Lack dismissed the appeal. In August, 2005, the Ninth Circuit issued an order to show cause directed to attorneys Lack, Girardi, Traina, their law firms and other lawyers within their firms as to why they should not be sanctioned and disciplined under Federal Rules of Appellate Procedure 38 and 46 and 28 U.S.C. §§ 1912 and

1927, for filing a frivolous appeal, falsely stating that the writ of execution named Dole Food Company as a judgment debtor, and falsely stating that the notary affidavit constituted an accurate translation of the writ. The Ninth Circuit appointed Judge A. Wallace Tashima as Special Master to oversee further proceedings. After a four-day trial, Judge Tashima recommended that plaintiffs' attorneys pay $390,000 in monetary sanctions, which plaintiffs' attorneys accepted. Concurrently, Judge Tashima issued a second report recommending that the Ninth Circuit appoint a disinterested prosecutor to determine appropriate discipline. The Ninth Circuit appointed Professor Rory K. Little to serve as Independent Prosecutor.

Based on Professor Little's report, the Ninth Circuit issued a formal reprimand for attorney Girardi and suspended attorneys Lack and Traina from practice before the Ninth Circuit for six months. The Court reasoned that attorney Girardi, although he took almost no active part in the actual proceedings to enforce the Nicaraguan judgment, acted recklessly in authorizing the Lack firm to sign his name on briefs that turned out to contain false statements. The Court reasoned that attorneys Lack and Traina on multiple occasions "chose to remain willfully blind to the fact that they were making false statements." "By the time they appeared in this court, the attempt to salvage their case became indistinguishable from a knowing submission of false documents. Suspension is the appropriate discipline for these Respondents." Finally, the Court issued a private reprimand to an unnamed junior associate in the Lack firm, who had attempted unsuccessfully to persuade attorneys Lack and Traina not to continue the appeal, "for allowing his superiors to overcome his sound instincts and for his role in drafting briefs that contained false statements."

***IN THE MATTER OF BENJAMIN THOMAS FIELD* (CAL. ST. BAR CT. FEB. 12, 2010) __ CAL. STATE BAR CT. RPTR. __, 2010 WL 489505**

- **Prosecutor's multiple violations of court orders + withholding evidence favorable to defense + deceptive & reprehensible closing argument + multiple acts of moral turpitude = 5-year suspension stayed with 5-year probation with conditions.**

Attorney Benjamin Thomas Field, licensed since 1993 and a career prosecutor for Santa Clara County, engaged in professional misconduct in four criminal matters: (1) In 1995, in violation of a court order, he obtained a dental examination of a minor accused of sexual assault to try to establish that the minor was 16 and could be charged as an adult; (2) in 2003, in a habeas corpus proceeding involving a sexual assault case, he intentionally withheld a witness's address and tape-recorded interview that was favorable to the defense and suggested to the court that the witness could not be located; he also used search warrants to obtain discovery even though this procedure was not appropriate in habeas corpus proceedings and a judge had told him not to; (3) in 2003, he intentionally withheld a defendant's statement favorable to co-defendants in a murder case; and (4) in 2005, in a sexually violent predator prosecution, he violated an in limine order by eliciting from a witness the evidence that was to be excluded and, on retrial, made an improper closing argument that mentioned the evidence again; the appellate court described his closing as "deceptive and reprehensible." Thus, attorney Field violated Business & Professions Code §§ 6103 and 6068(a), failed to act with competence (*see* Rule of Professional Conduct 3-110(A)), and committed multiple acts of moral turpitude (*see* Business & Professions Code § 6106). After weighing aggravating and mitigating factors, the Review Department of the State

Bar Court ordered a five-year suspension, stayed during a five-year probationary period, with numerous conditions.

LAHIRI V. UNIVERSAL MUSIC & VIDEO DISTR. CORP. (9TH CIR. 2010) 606 F.3D 1216

- **Pursuing frivolous copyright action for 5 years + misrepresenting ownership of marks to court + retaining District Court judge's former law firm to attempt to preclude judge from deciding sanctions motion = $258,206.04 in sanctions.**

Attorney Anthony Kornarens, who specializes in copyright law, filed a Lanham Act claim on behalf of plaintiff Lahiri, who alleged that the defendants (music and video distributors) used unauthorized excerpts of a song that Lahiri had composed several years before for an Indian movie. Under Indian law, which applied, the film's producer, and not Lahiri, owned the rights to the song as a work for hire. Nevertheless, Lahiri registered a copyright in the song with the U.S. Copyright Office and pursued a copyright infringement claim against defendants for roughly five years. During the course of the litigation, attorney Kornarens misrepresented to the Court that Lahiri and the film's producer jointly owned the rights to the song. In part in reliance on this misrepresentation, the District Court denied defendants' motion for summary judgment. Ultimately, the District Court granted defendants' renewed motion for summary judgment, but only after the case was hotly litigated for several more years. The District Court then awarded defendants roughly $260,000 in fees and costs as sanctions against attorney Kornarens for his five-year bad faith pursuit of a frivolous copyright infringement claim.

The Ninth Circuit affirmed. Unequivocally, Indian law vested copyright in the song to the film's producer. "Had Kornarens, a self-described experienced copyright lawyer, made even a cursory investigation into the circumstances of Lahiri's … composition …, he would have known Lahiri had no copyright interest in music he composed for hire." Also, Kornarens misrepresented to the Court that his client and the film producer jointly owned the rights to Lahiri's song. Finally, Kornarens acted in bad faith by retaining the District Court judge's former law firm to represent Kornarens in connection with the sanctions motion, with the intent of causing the recusal of the District Court judge and reassignment of the case to another judge without familiarity of the proceedings. The Ninth Circuit criticized attorney Kornarens for using this "manipulative tactic."

RELIEF FOR MISTAKE, INADVERTENCE, SURPRISE OR NEGLECT

GUTIERREZ V. G & M OIL CO., INC. (2010) 184 CAL. APP. 4TH 551

- **Code of Civil Procedure § 473 required the court to set aside a default based on in-house counsel's declaration admitting that the default resulted from his mistake, inadvertence and neglect.**

Defendant's in-house attorney agreed to accept service of the summons in a wage and hour class action, but failed to file an answer, make court appearances, or respond to court orders. The in-house lawyer also failed to disclose the lawsuit to defendant's executives. Ultimately, the court entered a $4 million default judgment against the company. When advised of the default

judgment, the company fired the in-house lawyer and retained an outside law firm. That firm filed a motion to set aside the default under Code of Civil Procedure § 473, supported by the ex-in-house lawyer's declaration that the default resulted from his mistake, inadvertence and neglect. In affirming the order setting aside the default, the Court of Appeal reasoned, "[I]n-house counsel do have an attorney-client relationship with their corporations, and … do represent their employers. It therefore follows that the legislative intent in enacting the mandatory provision of section 473 was to protect corporations represented by in-house counsel as much as any other class of litigants represented by counsel." The Court also rejected plaintiff's argument that the motion should have been denied because the in-house lawyer was also defendant's vice president. The in-house lawyer was acting in his capacity as an attorney, not as defendant's vice president.

***RON BURNS CONSTR. CO., INC. V. MOORE* (2010) 184 CAL. APP. 4TH 1406**

- **Reliance on opposing counsel's agreement to extend a deadline – even though a Rule of Court requires a stipulation memorializing the extension to be filed with the Court – was excusable neglect as a matter of law.**
- **Because the requirements for relief under Code of Civil Procedure § 473 were met, the viability of relief under § 473 could not be defeated because the requirements for relief under Code of Civil Procedure § 1008 were not also met.**

The trial court entered judgment in favor of plaintiff that the Court of Appeal subsequently affirmed. The Court of Appeal also awarded plaintiff costs on appeal. Pursuant to Rule of Court 3.1702(c)(1), plaintiff had 40 days from notice of the remittitur to file a motion for attorney fees on appeal. The parties stipulated to extend the deadline on multiple occasions while they attempted to resolve the issue of appellate costs. Plaintiff's lawyer confirmed the stipulations in writing, but neglected to file the stipulations with the court. The trial court denied the motion as untimely and denied plaintiff's counsel's motion for relief under Code of Civil Procedure § 473. The Court of Appeal reversed, reasoning "[a]dmittedly, the law frowns on an attorney's neglect to comply with a clear rule. However, it positively glowers at another attorney's exploitation of such neglect as an excuse to break his word." The Court rejected defendant's argument that plaintiff was really seeking reconsideration of the order denying his motion for attorney fees without satisfying the requirements of Code of Civil Procedure § 1008.