ETHICS UPDATE 2011

Significant Developments in the Law of Lawyering

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**** Note:** Readers should consult the full text of the following cases and opinions before applying them to specific facts and circumstances. In addition, all authorities should be checked for contrary decisions and changes in the law.

TABLE OF AUTHORITIES

ANTI-SLAPP MOTIONS

BLEAVINS v. DEMAREST (2011) 196 CAL.APP.4TH 1533

- **Lawsuit against law firm paid by insurer of opposing party in underlying litigation precluded under strategic lawsuit against public participation statute; allegations of misrepresentations, abuse of the legal system, frivolous tactics and discovery abuses constituted protected activity and plaintiff failed to show probability of prevailing on the merits.**

In action by a landowner against the law firm that represented his neighbors in a prior easement lawsuit, landowner claimed misrepresentations were made in the course of the litigation, and that the law firm engaged in frivolous tactics and had failed to provide the landowner with documents and information that had been promised. The law firm filed a special motion to strike on the basis that the action was a strategic lawsuit against public participation (SLAPP) under section 425.16 of the Code of Civil Procedure, which motion the trial court granted only as to the fraud claim. The trial court concluded the remaining claims did not fall with the scope of the statute because they were based on an agreement between the insurer and the law firm to provide a defense, allegedly allowing the neighbors to have "peace of mind" in continuing to commit intentional torts. On appeal by the law firm, the court of appeal affirmed in part and reversed in part with directions, finding that the trial court should have granted the anti-SLAPP motion in its entirety because the law firm's representation of the neighbors and acceptance of payment by their insurer was protected activity and further that the landowner had not demonstrated any probability of prevailing on the merits. The appellate court also concluded that the trial court erred by failing to award the law firm its attorneys' fees and costs as the prevailing party under the statute.

In analyzing the statute, the appellate court determined that if a communication falls within the clauses concerning "official proceedings," the statute would apply without the need for a separate showing that a public issue or issue of public interest is present since those proceedings necessarily involve a public issue or interest. Following the two-step process followed by courts in an anti-SLAPP analysis, the appellate court first concluded that the law firm's actions at issue in the litigation – representing the neighbors at the insurer's expense – were in furtherance of the right of petition under the statute. The appellate court stated that depriving the neighbors of a defense by the insurer or permitting a suit against the way the law firm practices would interfere with and burden the neighbor's right to petition, as the landowner's claim "would necessarily be based on counsel's written and oral statements 'made before … a judicial proceeding' (§ 425.16, subd. (e)(1)) or 'in connection with an issue under consideration or review by a … judicial body" (*id.*, subd. (e)(2))." With respect to the second step, the appellate court concluded that the landowner had no chance of prevailing on the merits for four reasons: 1) lack of standing to assert claims relating to the contractual relationship between the insurer and the neighbors; 2) lack of authority to support a claim that counsel to the opposing litigant owned duties of care to the landowner, entitling him to damages; 3) the landowner's only possible remedies for his claims that the law firm made misrepresentations, abused the legal system, filed frivolous motions and violated discovery obligations were monetary sanctions or some other form of relief

in the underlying easement action; and 4) the complaint was based on conclusory references without supporting factual allegations.

CORETRONIC CORP. v. COZEN O'CONNOR (2011) 192 CAL.APP.4TH 1381

- **Action by insureds against their insurer's coverage counsel for simultaneous representation of adverse party in unrelated matter did not arise from protected activity under the SLAPP statute.**

In action by insureds against their insurer's coverage counsel for fraud and various other claims related to the coverage counsel's simultaneous representation in an unrelated matter of the adverse party to the insured in the underlying litigation, coverage counsel moved to strike the complaint under the SLAPP statute. The trial court denied the motion. On appeal, the court of appeal affirmed, holding that the simultaneous representation did not arise from protected litigation activity under the statute.

The appellate court first addressed coverage counsel's argument that the trial court erred in failing to consider evidence to determine whether it owed any ethical duty to the insureds, and that without such a duty from an attorney-client relationship, the insureds failed to show that their claims fell outside of the statute. It found that such an argument conflated the first and second steps in the anti-SLAPP analysis, as courts do not consider the probability of prevailing on the merits until there is first a conclusion that the claims arise from protected speech or petitioning activity. Finding certain other cases instructive, the appellate court stated "this case does not arise from defendants' protected activity representing their clients in pending or threatened litigation," but "[r]ather, the complaint alleges concealment of defendants' representation [in an unrelated matter of the adverse party in the underlying litigation] while obtaining plaintiffs' sensitive information of benefit to [the adverse party] in its lawsuit against plaintiffs." Although coverage counsel argued that the insureds' request to enjoin coverage counsel's continued communication with its client demonstrates that the suit falls within the SLAPP statute, the appellate court stated that the remedy sought by the insureds does not affect whether the claim is based on protected activity. The appellate court added that the complaint neither targets coverage counsel's advocacy or advice to the insurer, nor challenges its conduct in the litigation. Because the appellate court found that the claims do not arise from protected activity, it concluded that no consideration of whether the insureds demonstrated a probability of prevailing on the merits was necessary.

***GERBOSI v. GAIMS, WEIL, WEST & EPSTEIN, LLP* (2011) 193 CAL.APP.4TH 435**

- **Claims against law firm of opposing party in underlying litigation alleging criminal conduct do not constitute protected activity under SLAPP statute.**
- **Claims asserted by an individual who was a stranger to the underlying litigation did not constitute protected activity under SLAPP statute.**
- **Expiration of statute of limitations on remaining claims precluded lawsuit from proceeding.**

In related actions by ex-girlfriend and neighbor against ex-boyfriend and his attorneys for invasion of privacy and other claims associated with unlawful wiretapping, ex-boyfriend's law firm filed a special motion to strike under the SLAPP statute, which the trial court denied. On appeal, the court of appeal affirmed in part, reversed in part and remanded.

Following the two-step process in addressing anti-SLAPP motions, the appellate court first looked at whether the claims arise from any protected activity. With respect to the neighbor's claims, the appellate court concluded that he had no connection to the various litigation matters between the ex-boyfriend and girlfriend or with the firm's representation of the ex-boyfriend other than happenstance. As such, the claims alleged by the neighbor did not "arise from" any protected activity by the firm, and the review ends there. With respect to the ex-girlfriend's claims, the appellate court found that, to the extent the claims allege criminal conduct (i.e., invasion of privacy, eavesdropping and violation of the UCL predicated on violations of the Penal Code), there is no protected activity under the SLAPP statute and there is no need to determine whether the ex-girlfriend showed a probability of prevailing on those causes of action. In considering the ex-girlfriend's claims for intentional infliction of emotional distress, negligence, malicious prosecution and abuse of process, the appellate court found that they "arise from" the law firm's representation of the ex-boyfriend in the underlying litigation against her and that the SLAPP statute applies. Moving to the second step of the analysis, the appellate court considered whether the ex-girlfriend showed she had a reasonable probability of prevailing (as the "probability of prevailing" element means a reasonable probability, not a preponderance of the evidence standard) and found that she did not due to expiration of the statute of limitations. The discovery rule argument was rejected by the appellate court as making no sense where the ex-girfriend's litigation-related claims were that she knew about the underlying litigation and this known exposure to the litigation caused her to suffer emotional harm. Nor did the appellate court find the ex-girlfriend's argument that the law firm was equitably estopped from asserting the limitations defense because there was no evidence that the law firm deterred her from filing her litigation-related claims after she and her ex-boyfriend signed a settlement agreement, and that alleged intimidation during the underlying litigation leading to fear of another suit could not be an excuse for sitting on her rights.

Turning to attorneys' fee awards under the statute, the appellate court concluded that the trial court was within its discretion in finding that no reasonable attorney would have believed there was merit to the attempt to strike the neighbor's complaint given the nature of his claims, but that the motion as to the ex-girlfriend's complaint had partial merit and, thus, was not "totally and completely" without merit or filed with the "sole" purpose to harass. As such, the cause was remanded to the trial court to consider the attorneys' fees issues anew, to make a reasonable apportionment of fees filed on joint application by the ex-girlfriend and neighbor and enter an

award in favor of the neighbor only for attorneys' fees incurred in opposing the anti-SLAPP motion, not for the entire action.

ARBITRATION

REBMANN v. ROHDE (2011) 196 CAL.APP.4TH 1283

- **Arbitrator had no duty to disclose that he was Jewish or family history in relation to the Holocaust in case involving German representatives of corporate party; objective standard applies to potential bias.**

In *Rebmann*, the court examined the issue of whether an arbitrator, involved in a case with a corporation represented by members who were German, had a duty to disclose his family history which included losing family members and property in the Holocaust, as well as his involvement with an organization that maintained historical information about the Holocaust. The court held that the arbitrator had no duty to disclose his German ancestry, or that he was Jewish. The court reiterated an arbitrator's duty to disclose information as governed by the same standard that would apply to a judge, arising "if for any reason a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Any potential prejudice or bias must be examined through the use of an objective standard. The court also stated that the impartiality of an arbitrator should not be questioned simply because of who they are, and pointed out that belonging to a minority group does not in and of itself cause one to be prejudiced or call his or her impartiality into question.

ATTORNEY-CLIENT PRIVILEGE & WORK PRODUCT

CLARK v. SUP. CT. (VERISIGN) (2011) 196 CAL.APP.4TH 37

- **Court disqualifies attorney after attorney read privileged documents attorney received from his client and used.**

Grant Clark sued his former employer, VeriSign, after his position as VeriSign's chief administrative officer was eliminated. In connection with the litigation, Clark gave his attorneys numerous documents that VeriSign alleged were protected by the attorney-client privilege. VeriSign's counsel demanded in writing the return of the company's privileged documents, and when plaintiff's counsel did not reply, defense counsel sent another written demand, specifically referring to case law on the obligations imposed when in receipt of privileged information, namely, *Rico v. Mitsubishi Motors Corp*. (2007) 42 Cal.4th 807, and its predecessor, *State Comp. Ins. Fund v. WPS Inc.* (1999) 70 Cal.App.4th 644.

In response to a subsequent discovery demand by VeriSign, Clark produced numerous internal company documents, many of which were prominently labeled "prepared at request of counsel," "highly confidential," and "attorney-client privileged." VeriSign then demanded the return of other documents within Clark's possession that were allegedly privileged and confidential that

Clark had taken in violation of the nondisclosure agreement he was bound by while working for VeriSign. The documents were neither returned nor destroyed.

At his deposition, Clark admitted some of the documents contained privileged information and that he used one of the privileged documents as the basis of a claim he was pursuing against VeriSign. He was apparently relying on another one to support several other claims. VeriSign moved to disqualify Clark's lawyers on the basis of improperly obtaining, retaining, reviewing, and using privileged documents in violation of *Rico* and *State Fund*, to which Clark responded the two cases only applied if the documents were inadvertently provided. Clark also maintained there should be no sanctions unless the documents were actually privileged, denied the misuse of any information, and alleged there was no proof VeriSign had been prejudiced by his lawyer's review of the information.

The trial court granted the disqualification motion, and granted VeriSign's motion for other ancillary relief as well, finding Clark's lawyers received documents that contained obvious indicia of privilege and were explicitly marked as such, and that they had a duty not to review the documents any more than was reasonably necessary to determine their privileged nature, and then to immediately notify VeriSign. The appellate court cited the approach outlined in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, that is, since the attorney-client privilege protects a *transmission* between attorney and client, regardless of its content, there was no need to examine the content of the transmission to rule on an issue of privilege. Using this rationale, the appellate court determined all of the communications in dispute were in fact privileged. The appellate court concluded that an *in camera* review is not a prerequisite to determining whether the documents were in fact privileged. Rather, when the party claiming privilege shows that the dominant purpose of the *relationship* between the parties to the communication was attorney-client, the court must treat the communication as protected by the privilege.

The court also found that substantial evidence supported the trial court's finding that all the disputed communications were privileged because they involved an officer or employee of the defendant transmitting a communication to an attorney for the defendant or someone working at the attorney's direction.

The court concluded that the actions of Clark's attorneys upon receiving the privileged documents were in violation of *Rico* and *State Fund* because their review of the documents exceeded what would have been necessary to determine that the documents were privileged. In addition, there was evidence that Clark's attorneys affirmatively used some of the information to advance Clark's case.

***DATEL HOLDINGS LTD. v. MICROSOFT CORP.* (N.D. CAL. MAR. 11, 2011)**
NO. C-09-05535 EDL, 2011 WL 866993 (Slip Copy)

- **Computer glitch in standard discovery software used for document production supported determination of inadvertent disclosure under Rule 502 of the Federal Rules of Evidence.**
- **No post-production review was required as long as there was no obvious indication that privileged information had been produced.**

In case where certain documents were produced by the defendant and later claimed to be protected by privilege or work product, the plaintiff filed a motion to compel seeking production of six documents and an order that the defendant re-review its privilege log and provide additional information, claiming that the information is not privileged and, even if it were, the defendant waived the privilege by not taking necessary steps to avoid the waiver under Rule 502(b) of the Federal Rules of Evidence. The magistrate issued an order granting in part and denying in part the motion.

The district court noted that, under Rule 502(b), disclosure of a privileged document does not constitute waiver if the disclosure was inadvertent, and the holder of the privilege took reasonable steps to prevent disclosure and promptly took reasonable steps to correct the error. Under the circumstances, the magistrate concluded that the disclosure was inadvertent and did not waive the attorney-client privilege or work product protection.

In reviewing the issues in the case, the district court concluded that an unintentional computer glitch in the document collection process that prevented defendant's lawyers from recognizing the privileged nature of the email chain "falls squarely on the inadvertent side of the divide between intentional disclosure under Rule 502(a) and unintentional disclosure under Rule 502(b)." As such, the production of the six documents was inadvertent.

With regard to whether the defendant took reasonable steps to prevent disclosure, the district court concluded that it did. Here, the defendant's production review process included a group of contract lawyers reviewing for privilege, a team of attorneys screening responsive documents and identifying possible privileged documents, a quality control team to review the documents, and a privilege team to review any documents still designated as such and enter them into a privilege log. The process included written instructions and a tutorial, as well as quality control checks. The district court considered the proportion of inadvertently produced documents in comparison to the total number produced and the expedited discovery schedule in reaching the conclusion that such a mistake in production should not constitute waiver and that no post-production review was required as long as there was no obvious indication that privileged information had been produced.

Further, the district court concluded that the defendant took reasonable steps to rectify the error once it first became aware of the truncated nature of the emails that were produced. As soon as it obtained the full text of the emails, it interrupted the deposition to put its privilege assertion on the record and, within a few days, reviewed its entire production to identify any other documents affected by the computer glitch.

In addition, the district court rejected the argument that the attorney-client privilege did not attach since none of the authors or recipients of the emails were lawyers, stating "[t]he attorney-client privilege may attach to communications between nonlegal employees where (1) 'the employees discuss or transmit legal advice given by counsel;' and (2) 'an employee discusses her intent to seek legal advice about a particular issue.'" In this case, the original email in the chain transmitted legal advice and was protected by privilege, but the remaining messages in the chain were communications between employees about the revelations of the computer testing, not the transmission of legal advice, and thus were not privileged. Nor had the defendant made a showing that the rest of the emails in the chain were prepared "because of" the prospect of litigation, but rather explored business and technological countermeasures. However, even if the emails were work product, the district court concluded the plaintiff had a substantial need for the materials to prepare its case and could not obtain their substantial equivalent without undue hardship. It was unlikely that employees could remember the details, and there had been no showing of alternative means to obtain the information without undue hardship. Coupling this with the fact that defendant did not assert the work product protection at the deposition, as opposed to the generic "privilege," the district court found that waiver had occurred with respect to the remaining messages.

FIREMAN'S FUND INSURANCE CO. v. SUP. CT. (FRONT GATE PLAZA, LLC) **(2011) 196 CAL.APP.4TH 1263**

- **Attorney-client privilege applies to communications among or between multiple counsel for client as well as counsel's communications with a non-attorney agent retained by counsel to assist with the representation.**
- **Opinion work product that has not been reduced to writing is protected by absolute work product privilege.**

A discovery dispute developed in an action by an insured against its insurer for bad faith handling of claims, where defense counsel was contacted by whistleblower claiming to have documents showing insurance claims were fraudulent. The trial court ordered the insurer's former attorney to answer questions to which attorney-client privilege and/or work product privilege had been asserted in connection with the law firm's handling of the whistleblower on the basis that: 1) the attorney-client privilege applies only to communications directly between an attorney and client, not to communications among or between multiple counsel or other parties representing the client and 2) absolute work product privilege applies only to what has been reduced to writing. The insurer petitioned for a *writ of mandate* to vacate the order. The court of appeal granted the petition, holding that the ruling improperly restricted the privileges, and remanded with directions.

In reviewing Evidence Code section 952 concerning "confidential communications," the appellate court found that the definition includes "a legal opinion formed," which precluded the conclusion that uncommunicated legal opinions of an attorney (including impressions and conclusions) would not be protected by the attorney-client privilege. Further, the appellate court noted that section 952's language provides that a "confidential communication" will not lose its confidential status as long as it is not disclosed to "third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably

necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." The appellate court concluded that section 954 codifying the privilege also emphasized that the relationship between the attorney and client exists between the client and all other attorneys in the same firm. In light of these provisions, the attorney's legal opinions, even if shared with another attorney in the same firm or a non-attorney agent retained by the attorney to assist with the representation (e.g., an investigator), would remain protected by the attorney-client privilege.

With regard to work product, the appellate court focused on the language of section 2018.030 of the Code of Civil Procedure distinguishing between an absolute privilege for "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" and a qualified privilege for all attorney work product "other than a writing" described in the first subsection covered by the absolute privilege. In analyzing whether this language supported the trial court's interpretation that the absolute work product privilege only applied if the information was reduced to writing, the appellate court compared Rule 26(b)(3) of the Federal Rules of Civil Procedure and considered the legislative history of the work product privilege in California as intending to establish "substantially the same rule" as in the United States Supreme Court decision in *Hickman v. Taylor* (1947) 329 U.S. 495. The appellate court concluded that an assumption existed that unwritten work product was already inviolate, supporting the interpretation of section 2018.030 as providing "absolute protection to written opinion work product and qualified protection to written non-opinion work product, with the implicit understanding that unwritten opinion work product is already entitled to absolute protection." To conclude that only attorney opinions that have been reduced to writing are provided absolute protection, the appellate court noted, would lead to the absurd result of lawyers having to document every thought, at greater expense to the client, to ensure the protection of the information and avoid malpractice lawsuits.

HOLMES v. PETROVICH DEVELOPMENT CO. (2011) 191 CAL.APP.4TH 1047

- **Employee's communications with her attorney on work computer not privileged in light of employee's awareness of company policy against use of computers for personal matters and warnings of company monitoring for compliance.**

In an action by an employee against her employer and supervisor for various claims relating to sexual harassment, wrongful termination and violation of the right to privacy, the trial court granted summary adjudication with respect to certain causes of action and entered judgment on a jury verdict for the remaining causes of action in favor of the defendants. The employee appealed and argued, among other things, evidentiary and instruction errors relating to her contention that the communications she had with her attorney on her work computer were privileged. The employee argued that the trial court abused its discretion in denying her motion for the return of privileged documents, permitting the introduction of such documents at trial, and giving a limiting instruction in relation to such privilege determinations that undermined her claim for invasion of privacy.

The court of appeal affirmed the trial court's rulings, finding that the attorney-client communications via the employee's work computer were not privileged and that the judge's admonishment to the jury as such did not improperly undermine her invasion of privacy claim.

The appellate court concluded that emails the employee sent to her attorney on her work computer did not constitute "confidential communication[s] between client and lawyer" under Evidence Code section 952 because she had been told of the company's policy against personal use of the computers, she had been warned of the company's monitoring and inspections for compliance with the policy, and she had been expressly advised that employees using company computers for personal information "have no right of privacy with respect to that information or message." The appellate court noted that the electronic means used belonged to the employer and that the employee was aware of and agreed to the employer's conditions of business use of the company equipment and monitoring for compliance.

Acknowledging that "an attorney-client communication 'does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication'" under Evidence Code section 917(b), the appellate court concluded that "the e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him." As section 952 requires that the information not be disclosed to third persons other than those present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of information or the accomplishment of the purpose of the legal consultation, the communications at issue were not privileged. In light of the company's policy and warnings, the appellate court found use of a password for her email and her deletion of the emails after they were sent not to be supportive of a belief that her communications were private. The appellate court also rejected the employee's "operational reality" argument that she nonetheless had a reasonable expectation of privacy because, even if such test applied outside of the Fourth Amendment context in other cases, she incorrectly contended there was no auditing of the company computers in contradiction with the policy.

***LENZ v. UNIVERSAL MUSIC CORP.* (N.D. CAL. NOV. 17, 2010)**
NO. 5:07-CV-03783 JF (PVT), 2010 WL 4789099 (Slip Copy)

- **Client's communications with third parties and postings about her counsel's interest and views found to waive privilege with respect to certain subject matter at issue in case.**

In a case brought against Universal Music Corp. ("Universal") under the Digital Millennium Copyright Act for misrepresenting to YouTube that plaintiff's video infringed Universal's copyright, the magistrate found that the attorney-client privilege had been waived in three areas and granted Universal's motion to compel documents and deposition testimony related to email and electronic "chats," blog postings and statements to a reporter the plaintiff made in which she discussed conversations with her counsel. The plaintiff objected to the discovery order, and the district court overruled the objections on the grounds that the plaintiff waived the privilege as to communications relating to the subject matter at issue. Since there is no bright line test for determining what this includes, the district court stated that courts must "weigh 'the circumstances of the disclosure, the nature of the legal advice sought and the prejudice to the

parties of permitting or prohibiting further disclosures.'" (internal citations omitted.) The district court concluded that the magistrate's order was neither clearly erroneous nor contrary to law.

First, the district court found that the plaintiff's statements regarding her counsel's interest in the case and plans for publicity and/or a lawsuit were closely intertwined with the plaintiff's motivations for filing the action and the extent of any injury. Second, the district court found that the plaintiff's discussions about her decision to abandon a claim, whether she had exposure in a "SLAPP" suit, and the timing of the suit were relevant to her motivation in pursuing her case and damage claims when she said that one of the ends she had in mind was "clarification of the *Rossi* decision." Third, the district court concluded that the privilege was voluntarily waived by: the plaintiff's statements to third parties about her attorney's thought that the artist Prince forced Universal to fight the suit; her statements to a reporter that, when discussing her situation with her counsel, they came to the conclusion that she did not infringe the copyright and decided to file the action; and her statement on a blog that her case is not about fair use. The first comments were relevant to the basis for specific factual allegations, while the second comments concerning the nature and extent of her and her counsel's investigation on whether she infringed the copyright "may be" relevant to the issue of whether Universal should have known there was no violation. As to the last comment, the district court stated "[a] party may not attempt to explain an apparent admission as a misinterpretation of a conversation with counsel, and then deny the opposing party on the basis of privilege access to the very conversations at issue."

***OAKLEY, INC. v. BUGABOOS EYEWEAR CORP.* (S.D. CAL. OCT. 15, 2010) NO. 09-CV-2037-JLS (JMA), 2010 WL 4117223**

- **Anticipated "advice of counsel" defense does not result in waiver of privilege; reliance upon advice of counsel as a defense or to negate an element of a claim must occur before the court would determine the scope of any waiver.**

In discovery dispute between parties to an action involving patent and trademark infringement claims and counterclaims, the magistrate denied the defendants' motion to compel certain documents without prejudice in connection with an anticipated "advice of counsel" defense. Noting the legal principle that, "[w]hen a party puts at issue legal advice it received, e.g., by way of an advice of counsel defense, it waives the attorney-client privilege with respect to those communications," the district court concluded that the plaintiff's filing of a proposed amended answer asserting reliance on advice of counsel as a defense does not waive the privilege as the defense has not yet been asserted. Further, the district court determined that an admission to a discovery request that the party relied on the advice of counsel in preparing a document did not waive the privilege. Rather, it would only do so if that party relies on the advice of counsel to defend itself or negate an element of a claim. In so doing, the district court stated that it declined "to provide an advisory opinion on the scope of the waiver until the waiver has been made and the advice relied upon has been disclosed."

PEOPLE v. GRAY (2011) 194 CAL.APP.4TH 1133

- **Client's use of alleged attorney-client privileged communications to refresh memory at witness stand resulted in waiver of the privilege.**

In appealing conviction for rape, burglary and other changes, the defendant argued, among other things, that the trial court erred in denying his pretrial motion to suppress evidence, specifically that it was reversible error to order him to disclose to the prosecutor the documents he brought to the witness stand where he claimed they were protected by the attorney-client privilege and the prosecutor's use of the notes during cross-examination to elicit certain admissions severely damaged his defense. The court of appeal rejected this argument and affirmed.

The trial court had reviewed the documents *in camera*, determining that they contained no work product and were just a summary of the defendant's recollection of events, and concluded that because he brought them to the witness stand to refresh his memory during trial testimony, he had waived any attorney-client privilege that may have applied. The trial court ruled that, under section 771 of the Evidence Code, "the prosecutor had a right to review any writing defendant actually used to refresh his memory."

Assuming the documents were confidential communications between the defendant and his attorneys and presumptively privileged for purposes of the argument, the court of appeal found that the trial court did not abuse its discretion in ordering the disclosure and made a reasonable finding that the defendant waived any privilege by using the documents to refresh his memory during testimony. The appellate court noted that it would be unjust to permit the defendant to use such documents to allow him to present his case, but hide behind the privilege when his adversary seeks to review the same documents.

PEOPLE v. SHRIER (2010) 190 CAL.APP.4TH 400

- **Communications among attorneys for joint defense group members and their clients are privileged.**
- **Under the circumstances of the case, intentional eavesdropping on privileged communications by law enforcement agent did not justify dismissal of action; trial court has broad discretion in fashioning remedy, but appellate court directed that, at a minimum, it must bar use of any information and derivative information resulting from eavesdropping.**

In case against five defendants for grand theft and filing of fraudulent Medi-Cal claims, the trial court denied a motion to reinstate the complaint after the magistrate dismissed the action for intentional eavesdropping on attorney-client privileged communications by law enforcement agents. The People appealed. On appeal, the court of appeal found that the magistrate had properly found communications among attorneys for joint defense group members and their clients had not waived privilege, as such communications were reasonably necessary to accomplish the clients' purpose in consulting their own attorneys. Consequently, the communications overheard could not be disclosed without the client's or his representative's consent.

However, in considering the remedy of dismissal, the appellate court distinguished this case from its opinion in *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, where it had concluded that dismissal was appropriate because the prosecutor had engaged in conduct so outrageous that it violated due process rights. First, the appellate court noted that *Morrow* involved eavesdropping orchestrated by the prosecutor, whereas here it was orchestrated by the law enforcement agent and the prosecutor was unaware of it. Second, the eavesdropping occurred in a conference room at the Attorney General's office in this case, but had occurred in the "hallowed confines of a courtroom" in *Morrow*. Third, the prosecutor and investigator in *Morrow* were called as witnesses by the defense, but asserted the privilege against self-incrimination and refused to testify, preventing the trial court from making a reliable finding as to what was overheard. Here, however, neither the prosecutor nor the agents were called as witnesses, as the content of the conversations were contained in a confidential report under seal. Fourth, the appellate court considered the nature of the crime and related factors, including harassment by the prosecutor and investigator, and concluded that this case involved a more serious offense that was of critical importance to society in prosecuting and, unlike *Morrow*, the harassment was limited to the eavesdropping at issue since the defendants had been released on bail. As such, the appellate court reversed the trial court's order of dismissal, and also directed that the trial court shall have broad discretion in fashioning a remedy and, at a minimum, shall bar use of any information and derivative information resulting from the eavesdropping.

REILLY v. GREENWALD & HOFFMAN, LLP (2011) 196 CAL.APP.4TH 891

- **Dissolved company sued in shareholder derivative action entitled to maintain attorney-client privilege, and claims against counsel for dissolved company could not proceed in light of counsel's inability to mount a meaningful defense.**

In shareholder derivative action which included claims against corporation's attorney for conduct in facilitation of majority shareholder's alleged conversion of funds after agreement to dissolve corporation, the trial court sustained the attorney's demurrer without leave to amend. In appealing the decision, the minority shareholder argued that the court erred in finding that the claims against the attorney were barred under *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, on the basis that the *McDermott* decision does not apply to a dissolved corporation. The court of appeal found the recent opinion rejecting that argument in *Favila v. Katten Muchin Roseman LLP* (2010) 188 Cal.App.4th 189, to be persuasive and affirmed the trial court's judgment.

Noting that a derivative action does not result in a waiver of the corporation's privilege, the appellate court reiterated the holding of *McDermott* that the filing of claims against the corporation's counsel would have the dangerous potential for denying the attorney of the ability to mount a meaningful defense. The appellate court added that, shortly before the plaintiff filed the opening appeal brief in this matter, the *McDermott* court issued a decision in *Favila* that, because "a dissolved corporation continues to exist for various purposes," its ongoing management "should be able to assert the privilege, at least until all matters involving the company have been fully resolved and no further proceedings are contemplated." The appellate court noted that it is only logical that if a dissolved corporation continues to exist for purposes of defending this action against it under section 2010 of the Corporations Code, it continues to be

the holder of the attorney-client privilege during such an action. In addition, the appellate court stated that the status of a corporation's dissolution does not affect an attorney's inability to defend against claims in a shareholder derivative suit without the corporation's waiver of the privilege. The appellate court concluded that, regardless of whether the majority shareholder/president and chief financial officer was following the proper windup procedures under the Corporations Code, the attorney had a duty to continue to claim the privilege unless the privilege is waived by someone at the company with the authority to do so.

The court of appeal also considered the plaintiff's argument that the privilege issue should not be decided at the pleading stage, and determined it would be fundamentally unfair to proceed against the attorney under the circumstances where the confidential communications are highly material to his defenses, there is no allegation of waiver and the client insists on confidentiality. It acknowledged the *Favila* court's approach, that "if a demurrer to a derivate complaint against outside counsel would otherwise be overruled but for the *McDermott*…issue and there appears to be a realistic possibility that litigation of the remainder of the action against corporate insiders will result in a waiver of the corporation's privilege or produce additional evidence supporting an exception to that privilege, the trial court should not sustain the demurrer and dismiss the action," but rather "conditionally stay further proceedings against outside counsel, including discovery as to the causes of action against them, and defer consideration of any demurrer or judgment on the pleadings based on counsel's inability to defend because of the lawyer-client privilege." It also noted the attorney's arguments against such an approach, including that it would require factual findings on demurrer, would implement a vague procedure, and would prejudice counsel in the event the stay was lifted after discovery and trial proceeded against other defendants. Nonetheless, the appellate court noted that the plaintiff in this case did not argue that there was any realistic possibility of the company's waiver of the privilege or that any evidence might develop to show an exception existed. Nor did the plaintiff argue that a conditional stay was appropriate under *Favila*. As such, the appellate court concluded that the plaintiff forfeited review of the issue and determined that it need not decide whether it agreed with the *Favila* approach.

UNITED STATES v. JICARILLA APACHE NATION (2011) 131 S.CT. 2313

- **Fiduciary exception to attorney-client privilege does not apply to government communications relating to management of proceeds held in trust for Indian tribe.**

In a breach-of-trust action by the Jicarilla Apache Nation (the "Tribe") against the federal government in relation to proceeds held in trust by the United States for the Tribe, the U.S. Court of Federal Claims ordered the federal government to produce certain documents on the basis that departmental communications relating to the management of trust funds fall within a "fiduciary exception" to the attorney-client privilege preventing the trustee from asserting the privilege against trust beneficiaries in connection with legal advice related to trust administration. The United States filed a petition for *writ of mandamus* seeking an order to vacate the production order. The Federal Circuit agreed that the fiduciary exception was justified in that the trust relationship was sufficiently similar to a private trust. The Supreme Court reversed and remanded for further proceedings consistent with the opinion.

With respect to the argument that the government was similar to a private trustee subject to common law fiduciary duties, the Court found that that the relationship is defined and governed by statutes as opposed to the common law, and that the government is sovereign, determining whether it consents to be liable to private parties. It concluded that the two reasons for applying the fiduciary exception – that the beneficiary is the "real client" and the trustee has a common law duty to disclose all information relating to trust management to the beneficiary – are absent in this relationship. The Court applied the following factors in identifying the real client: whether the advice was paid for by the trust corpus, whether the trustee had reason to seek personal advice rather than as a fiduciary, and whether the advice could be intended for a purpose other than the benefit of the trust. As the government attorneys were paid out of congressional appropriations at no cost to the Tribe and the government seeks legal advice in a personal capacity due to its many competing legal concerns and the multiple interests involved (such as environmental and conservation obligations, and conflicting obligations to different tribes), it determined that the government does not obtain the legal advice as a mere representative of the Tribe such that the Tribe is the real client. The Court concluded that the conflicting interests were too pervasive for a case-by-case approach in invoking the attorney-client privilege, because the privilege must be predictable to be effective and the government will not always be able to predict what may be a specific competing interest in advance of receiving legal advice.

The Court also found that the government does not have the same common law disclosure obligations as a private trustee insofar as the statute, 25 U.S.C. § 162a(d), provides narrowly defined disclosure obligations. Accordingly, the Court determined it would not read in a catchall provision to impose general obligations superfluous to those specifically enumerated.

Finally, the laws and regulations classify the documents at issue as "the property of the United States" though others are identified as "the property of the tribe." The Court found ownership of the records to be a significant factor in deciding who should have access to the documents.

***WI-LAN, INC. v. LG ELECTRONICS, INC.* (N.D. CAL. FEB. 8, 2011)**
NO. C-10-80254 JF (PSG), 2011 WL 500072 (Slip Copy)

- **Client's sharing of legal opinion letter with opposing party prior to litigation resulted in subject matter waiver with respect to attorney-client privileged communications, but not opinion work product – especially where the opposing party has not shown a compelling need for the information.**

In connection with a fraudulent inducement and patent infringement action in the Southern District of New York, the plaintiff's law firm filed a motion to quash a subpoena *duces tecum* against them to appear for deposition and produce responsive documents seeking disclosure of matters the firm contended were protected by attorney-client privilege and the work product doctrine. The discovery dispute centered on the plaintiff's use of an opinion letter by the firm addressing infringement and fraudulent inducement issues, which the plaintiff sent to the defendant prior to the filing of any litigation in connection with the matter. The magistrate granted the motion in part and denied it in part, focusing on subject matter waiver of the attorney-client privilege where the party voluntarily provides the contents of a confidential communication to a third party. The magistrate acknowledged that there is no bright line test for

what constitutes subject matter waiver and that courts weigh the circumstances of the disclosure, the nature of the legal advice being sought and the prejudice to the parties caused by the disclosures. Further, the magistrate noted that the work product doctrine is a qualified privileged protecting certain materials prepared in anticipation of litigation.

While the firm conceded that the opinion letter, being advertently produced by the plaintiff, resulted in a waiver of privilege as to that document, it did not concede that that waiver extended to privileged communications and work product concerning the subjects discussed in the opinion letter. Based on Federal Rule of Evidence 502(a)'s statement that waiver extends to undisclosed communications or information in a federal or state proceeding only if, among other things, the disclosed and undisclosed communications ought to be considered together in fairness, the firm argued the waiver should be limited to the actual opinion letter since the plaintiff had pledged not to use the opinion letter in support of its claims. The magistrate disagreed insofar as Rule 502(a), by its plain language, would not apply here where the disclosure occurred before the proceeding was filed.

The magistrate went on to find that the plaintiff's intention not to place the advice of the firm at issue in the litigation is irrelevant where the waiver was voluntary. As such, the disclosure constituted a subject matter waiver.

Finally, as to the firm's argument that the plaintiff's waiver cannot extend to the firm's own opinion work product under Rule 26 of the Federal Rules of Civil Procedure, the magistrate concluded that the Ninth Circuit requires that a party seeking opinion work product must show that its need for the material is compelling. In addition, the magistrate noted that other federal courts have rejected the application of a subject matter waiver to opinion work product, especially when there has been no assertion of the advice of counsel defense. Finding that the defendant had not shown a compelling need for the materials in preparation of its case and has not been unable to obtain the substantial equivalent of the materials by other means, the magistrate granted the motion to quash in connection with the subpoena's request for opinion work product.

ATTORNEYS' FEES

ANTI-SLAPP MOTIONS

MOORE v. KAUFMAN (2010) 189 CAL.APP.4TH 604

- **The prevailing defendant in an anti-SLAPP motion is entitled to mandatory attorneys' fees, but not from the losing plaintiff's attorney.**

The defendant filed a successful motion to dismiss an underlying lawsuit under Code of Civil Procedure section 425.16 (anti-SLAPP -- Strategic Lawsuit Against Public Participation). In an accompanying motion for sanctions, the defendant sought an award for attorneys' fees *against both the plaintiff and his lawyer*. Supporting his request for fees from the plaintiff's attorney, the defendant cited Code of Civil Procedure section 425.16, "'and the Court's inherent discretionary powers.'" However, the defendant later conceded that trial courts have no inherent power to award attorneys' fees. Therefore, the only basis for awarding fees, in this case, was under the

anti-SLAPP statute. The trial court ultimately awarded $39,596.25 in fees and $1,627.50 in costs against both the plaintiff and his attorney. Plaintiff's attorney refused to pay and eventually the costs and fees rose to $131,635.14. Finally, when the plaintiff's attorney refused to answer questions at a judgment debtor examination, she was held in contempt and sentenced to jail until she answered the defendant's questions. She appealed.

Under the anti-SLAPP statute the award of attorneys' fees to the prevailing defendant is mandatory. The reason for this "is to discourage SLAPP suits 'by imposing the litigation costs on the party' that files a SLAPP suit." However, while fees and costs have been awarded to defendant(s), no case has ever granted awards against the losing plaintiff's attorney. Not only are there no such cases the appellate court held that, "[f]ee awards against attorneys are ordinarily available only as sanctions and are generally not allowed under routine fee-shifting provisions like the one in [the anti-SLAPP statute]."

ARBITRATION AGREEMENT

***BENJAMIN, WEIL & MAZER v. KORS* (2011) 195 CAL.APP.4TH 40**

- **Client fee disputes can only be resolved under the Mandatory Fee Arbitration Act.**

Firm and client had a fee dispute, and the trial court ordered arbitration under the California Arbitration Act (CAA) (Code of Civ. Proc., § 1280, et seq.) and also ordered that the arbitration be conducted under the rules of the Bar Association of San Francisco (BASF). This was error as fee disputes are resolved *only* under the Mandatory Fee Arbitration Act (MFAA) (Bus. & Prof. Code, § 6200, et seq.).

The appellate court reversed the trial court's order confirming the arbitration award and further reversed the order that denied the client's request for reasonable attorneys' fees – remanding the case to grant the client's request for fees incurred in enforcing the fee agreement arbitration clause. The court held that the duty to arbitrate which was imposed by the arbitration clause was enforceable under CAA. Nonetheless, the arbitration process mandated by the agreement was not the one contemplated by the CAA, but instead, a different process outlined by bar association rules under the MFAA. Under the MFAA and the rules of the BASF, a law firm was not permitted to require clients to submit to binding arbitration to solve fee disputes before such disputes arose – which was the scenario in the case at issue. In addition, while the arbitration clause was enforceable per the CAA, the trial court erroneously directed arbitration per MFAA procedure. The result was that "the trial court's order for binding arbitration under BASF rules deprived the client of her right to the disclosure required by Code Civ Proc section 1281.9."

As the court noted in issuing its opinion: "This case vividly illustrates the confounding problems that can be created by the failure of counsel to appreciate the significant distinction between the CAA and the MFAA with respect to predispute agreements to arbitrate." Fee arbitration is only permitted under the MFAA.

***GLASER, WEIL, FINK, JACOBS & SHAPIRO, LLP v. GOFF* (2011)**
194 CAL.APP.4TH 423

- **Appellate or trial court may determine if arbitrator's jurisdictional decision was in error.**

Former clients and their attorneys participated in fee arbitration pursuant to the Mandatory Fee Arbitration Act (MFAA) (Bus. & Prof. Code, § 6200 et seq.). As the precursor to this proceeding, the firm wrote the clients that they were seeking to file a claim under the MFAA, and in response the clients invoked their right to arbitration. Initially, the clients asked for binding arbitration, but the firm did not agree. However, once the firm learned the identity of the arbitration panel, they agreed to binding arbitration. Subsequently, the clients refused to sign the agreement to submit the dispute to binding arbitration. The arbitrators found that there was a binding agreement, because the firm accepted the initial offer for binding arbitration. On appeal the clients claimed the arbitrators exceeded their powers in that there was no agreement to binding arbitration.

The appellate court found that the arbitrators' decision regarding the binding nature of their decision was subject to judicial review. The court defined the issue and its resolution as, "[c]an a court treat an arbitration award as binding and hence unreviewable solely on the grounds that the arbitrator both ruled it is binding and had authority to rule on that issue? The answer must be: No. Unless a court has first determined for itself that the parties agreed to be bound, the court has no basis for treating any part of the arbitrator's award as binding." (Emphasis omitted.) In this case there was no binding agreement, as the clients' offer to engage in binding arbitration was not immediately accepted by the firm. Instead, the firm waited until they knew the panel members before accepting the binding arbitration offer, which was too late for a binding agreement. As the appellate court noted, "when the Firm unequivocally rejected the [clients'] written request for binding arbitration and communicated that rejection to [them], the [clients'] offer was terminated and could not later be accepted by the Firm."

DISSENT: The dissent argued that the: "The majority's new rule makes a mockery of the arbitration process, undermines the basic principles of severely limited judicial review of matters parties have agreed to submit to arbitration, and ignores countless decades of California jurisprudence that the rulings of arbitrators are reviewable only in very limited circumstances." The contention being that even though the arbitration panel may have been wrong on the law, as to whether there was a valid binding arbitration agreement, that decision should be final and not open to judicial review.

CONTINGENCY FEE DISCLAIMERS

***ARNELL v. SUP. CT.* (2010) 190 CAL.APP.4TH 360**

- **Fee agreements containing both a contingency and set fee are subject to the disclosure disclaimers found in Business and Professions Code section 6147.**
- **Fee agreements that do not contain the mandated disclosures are voidable by the client and subsequently permit the attorney to collect a reasonable fee.**

An attorney who specializes in taxation and complex business transactions entered into a fee agreement to provide advisory services aimed at minimizing the impact of some "specified taxable income." The attorney was to receive "$20,000 per month for nine months" and a "'success fee'" of 2% of the reductions and economic savings. That agreement was later modified to omit the monthly stipend, but now included "a $2 million success fee." A second agreement was entered regarding "certain oil and gas investments" that provided a monthly stipend ($20,000) and a success fee of 1%. The company terminated the attorney's services and alleged that the fee agreements were void under Business and Professions Code section 6147.

The attorney filed a claim, but the company sought summary adjudication arguing "that the agreements were void under section 6147 for want of a statutorily required statement, namely, that the success fees were 'not set by law but [were] negotiable between attorney and client.'" The trial court ruled for the attorney, and the company filed a petition for *writ of mandate* challenging that ruling.

In reversing the trial court, the court of appeal found that the Legislature amended Business and Profession Code section 6147 in 1982 to regulate the form and content of contingency fee agreements. Failure to abide by these requirements gives the client the power to void the fee agreement, but permits the attorney to then "collect a reasonable fee." In this case, the focus of the inquiry was Business and Professions Code section 6147, subdivision (a)(4), which mandates that a contingency fee contract "must contain 'a statement that the fee is not set by law but is negotiable between attorney and client.'" It is without dispute that the agreement in this case did not include that statement.

In resolving the issue, the court of appeal found that since the statute's subsequent amendment in 1994, the disclaimer section applies to both litigation and transactional matters, not just litigation. Consequently, the agreement was void at the client's discretion. The attorney attempted to avoid this result by arguing that the agreement was a hybrid with both a contingent part and a stated monthly fee. This contention was rejected by the appellate court because exempting such agreements would defeat the Legislature's goal of ensuring that contingency agreements are "fair and understood." This goal applies even where the attorney would only receive a small contingency percentage, which still could be a large amount of money.

ENFORCEABILITY OF FEE AGREEMENT

BROWN v. GRIMES (2011) 192 CAL.APP.4TH 265

- **Fee agreements are enforced under contract law, and a failure of performance bars restitution where there was adequate consideration.**

A former, now resigned with discipline pending, California attorney working as an investigator referred cases from a Texas oil refinery explosion to a California attorney. The investigator and attorney subsequently contacted another California attorney, who agreed to be the lead counsel representing 53 clients, with the clients agreeing to a fee splitting agreement between the lawyers. Under the agreement, the first attorney would pay the investigator. The cases were settled and money disbursed (about $38 million), but the first attorney did not pay the investigator.

In seeking to enforce the fee sharing agreement, the first attorney claimed that he was entitled to damages because the second attorney did not pay the investigator. However, this claim failed because there was no breach of contract because the first attorney had agreed to pay the investigator.

Before the agreement fell apart, the second attorney had paid a portion of the fees to the first attorney. However, as part of the litigation, the first attorney was ordered to pay back that money. Despite the breach, however, this does not mean the fist attorney must pay back the fees he received. The appellate court observed, "a failure of performance generally gives rise to a claim for restitution of money had and received only when there has been a total breach—i.e., total failure of consideration or repudiation." However, in this case the second lawyer received consideration, as the referrals from the first attorney provided him with the opportunity to earn a substantial fee.

The trial court had also found that the first lawyer's hands were unclean for having entered into a fee-sharing agreement with a non-lawyer, the investigator. The unclean hands doctrine was not applicable however because the first lawyer's agreement with the non-lawyer did not directly affect the fee agreement with the second lawyer.

FEE SPLITTING AGREEMENT

OLSEN v. HARBISON (2010) 191 CAL.APP.4TH 325

- **Attorney who enters into fee sharing agreement with another lawyer is not entitled to a share in that fee, if he is fired by the client prior to the conclusion of the matter.**

The client initially hired the first attorney to represent her in a personal injury action. He subsequently brought in associate counsel to assist him. They agreed to "a division of attorney fees that gave 60 percent to the second attorney and 40 percent to the first. If the case went to trial, second attorney would receive two-thirds of the fees; if the case settled at mediation, the fees would be split equally." The client, in compliance with Rule 2-200 of the California Rules of Professional Conduct, signed an authorization for the fee division. The client subsequently fired the first attorney.

The fired attorney did not receive any of the $775,000 settlement. The attorney sued and the trial court ruled against him.

His first claim was that he was entitled to $310,000 in *quantum meruit*, which permits the "recouping of attorney fees when action for breach of contract is untenable [,]" such as where there was no consent to the fee agreement as required by Rule 2-200. However, here the first attorney had a properly signed fee agreement and was not seeking to recover from his former client, but from the other lawyer. As such, there was no basis for a *quantum meruit* award.

In his second cause of action, he argued that he should receive part of the fee based on a claim for fraud and deceit. Such a claim failed, however, because plaintiff sought to prove this by statements allegedly made by the other attorney to the client. Of course, such statements were protected by the litigation privilege (Code Civ. Proc., § 47, subd. (b)), this privilege attaches to

statements made by litigants and attorneys during and in anticipation of litigation. The appellate court noted that the elements of the litigation privilege apply "to any communication '"(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action.'"'"

The first attorney also claimed that he was entitled to a share of the fees because his contract with the defendant attorney was breached. However, once he was fired by the client, the fee contract ceased to exist. Thus, there was no viable contract to breach.

FEDERAL CIVIL RIGHTS MANDATORY FEES

FOX v. VICE (2011) 131 S.CT. 2205

- **A federal court may grant reasonable attorneys' fees to a defendant, but only for costs that would not have been incurred for any frivolous claims.**

The winning party in a local election for sheriff filed a civil rights claim (42 U.S.C. § 1983) against the defeated incumbent (defendant) alleging both state and federal violations. At the conclusion of discovery in federal court, the defendant moved for summary judgment on the federal claims arguing that they were "'not valid.'" The District Court granted the motion with prejudice, and the defendant sought an award for attorneys' fees under 42 U.S.C. § 1988. He contended that the plaintiff's federal claims were "'baseless and without merit.'" The plaintiff submitted bills, but did not differentiate between the dismissed federal claims and the still valid state claims being litigated in the state court. The trial court imposed attorney's fees as requested and did not require that the plaintiff separate out fees for the frivolous federal claim from the valid state claims. A divided court of appeal affirmed.

A unanimous Supreme Court (Kagan), held that "a court may grant reasonable fees to the defendant in [§ 1983 lawsuits], but only for costs that the defendant would not have incurred but for the frivolous claims. A trial court has wide discretion in applying this standard. But here we must vacate the judgment below because the court used a different and incorrect standard in awarding fees." This upholds the importance of fee shifting as a tool of providing an incentive to protect civil rights, but does not allow an attorney to reap a windfall just because both frivolous and meritorious claims are contained in the same lawsuit.

FEES FOR PRO SE REPRESENTATION

CARPENTER & ZUCKERMAN v. COHEN (2011) 195 CAL.APP.4TH 373

- **An attorney who represents him or herself in a litigation matter *pro se*, is not eligible to receive attorney's fees.**

Attorneys/plaintiffs in lawsuit were awarded reasonable fees they incurred as the result of an anti-SLAPP appeal. They submitted a bill for $33,168.75. After the trial court granted the fee

request, the defendants moved to tax the costs on the basis that the law firm was not entitled to costs as "they represented themselves on appeal."

The plaintiffs opposed, claiming that an attorney in their firm provided them legal services on "'an independent contractor basis.'" The trial court, at the hearing, nonetheless reviewed a previous document filed by the firm, which described the lawyer not as an independent contractor, but as "an associate" in the firm.

When an attorney represents himself or herself *pro se*, he or she is not entitled to attorney fees. To permit a *pro se* attorney to self-representation fees would place him in a position that is not open to any other non-attorney *pro se* litigant. (Code Civ. Proc., § 1717.)

SETTLEMENT TERMS

LEMMER v. CHARNEY (2011) 195 CAL.APP.4TH 99

- **Attorney may not enforce fee agreement which divests client of right to dismiss or settle lawsuit.**

An attorney altered his fee agreement with his clients to change his compensation from an hourly rate to a contingency fee. As part of that agreement, the clients agreed that they would either take the case to trial or settlement. A month before trial the clients called attorney and told him to settle the case. The attorney spoke with the other party, whose only offer was a "walk away" settlement, one without any compensation. Clients instructed attorney to accept the no compensation settlement offer.

Following the dismissal, the attorney sued clients, contending they fraudulently induced him to enter into the contingency agreement, instead of an hourly fee. Despite his filing, a retainer agreement that prohibits a client from settling a lawsuit is "void as against public policy." As the court held, "just as the law will not enforce an agreement between the parties constraining a client to pursue an unwanted lawsuit, the law does not recognize a tort cause of action for damages for the client's decision to abandon it, because that would equally constrain defendant to keep his lawsuit alive just for his attorney's profit, despite his own fears and desire to abandon the case."

BREACH OF FIDUCIARY DUTY

GUITERREZ v. GIRARDI (2011) 194 CAL.APP.4TH 925

- **Class action plaintiffs stated causes of action for breach of fiduciary and *quantum meruit* alleging misappropriation of settlement funds where settlement occurred after plaintiffs settled with certain defendants, despite court holding in underlying case that claims against non-settling defendants were barred by statute of limitations.**

Plaintiffs filed a class action complaint against former counsel who had represented plaintiffs in a class action litigation against Lockheed and other defendants, alleging breach of fiduciary duty and *quantum meruit* (money had and received) based on misappropriation of settlement proceeds. The firm filed a motion for summary judgment on the grounds that the plaintiffs could not state causes of action against the firm, since the court in the original class action found (after a partial settlement with some of multiple defendants) that plaintiffs' claims were barred by the statute of limitations. Although the trial court granted the motion, the appellate court reversed, and found that the firm had not met its burden of proof and had failed to contradict the factual allegations in the complaint. The court further indicated that because the alleged misappropriation of the settlement funds occurred after the settlement of the underlying class action case with some defendants, whether those claims would have been barred by the statute of limitations was not relevant. The court further rejected the firm's argument that the claims based on misappropriation of funds failed because the firm had no written settlement agreement with plaintiffs, and held that even with no written fee agreement, the firm was only entitled to collect a reasonable fee, and to comply with ethical obligations regarding trust accounts so that the firm "did not have a carte blanche with respect to attorneys fees and costs it deducted from the settlement proceeds merely because there allegedly was no written fee agreement."

CONFIDENTIALITY & COMPETENCE

CALIFORNIA STATE BAR FORMAL OPINION 2010-179

ISSUES:

Does an attorney violate the duties of confidentiality and competence he or she owes to a client by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties?

DIGEST:

Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications.

CONFLICTS OF INTEREST

BUSINESS TRANSACTION WITH CLIENT

CHAN v. LUND (2010) 188 CAL.APP.4TH 1159

- **A lawyer's offer to discount his attorney's fees is not a "business transaction" with a client within the meaning of Rule 3-300, where the lawyer does not obtain any interest in the settlement proceeds or in the client's third-party claims.**

After a client settled a dispute with neighbors at a mediation, the client discharged his lawyer, and obtained new counsel, then claimed his former lawyer had employed duress, fraud, and undue influence in order to pressure the client into settling and sought to rescind the settlement, in order to avoid a motion to enforce the settlement. The client also contended that the former lawyer had breached his ethical duties under Rule 3-300 of the California Rules of Professional Conduct by not making the required disclosures in advance of agreeing to discount his fees. In denying this claim, the court determined that a lawyer's offer to discount his fees in order to encourage his client to settle litigation did not constitute a "business transaction" with his client within the meaning of Rule 3-300, and thus did not require these safeguards. The court's analysis turned on the Discussion to Rule 3-300 indicating that Rule 3-300 is not intended to apply to an agreement by which the attorney is retained by the client, unless the agreement confers an ownership, possessory, security, or other pecuniary interest adverse to the client. The court reasoned that, while the Rule would apply to a situation where the lawyer obtains a security interest, it does not apply where the lawyer merely discounts his fee without acquiring an interest in the client's third-party claims or the settlement proceeds.

FAIR v. BAKHTIARI (2010) 195 CAL.APP.4TH 1135

- **Attorney violated Rule 3-300 where he entered into business transactions with clients and failed to advise clients in writing to seek independent counsel and advise clients in writing of terms of transactions.**
- **Attorney breached fiduciary duties by entering into business transactions with client, warranting denial of *quantum meruit* recovery.**

Over 10 years, an attorney invested in real estate with his clients through two corporations and an LLC, while providing business, real estate and legal services for the original client and entity clients. The attorney was compensated in distributions and salary. The court held that because the attorney represented the original client and the entities through which investments were made, compliance with Rule 3-300 of the California Rules of Professional Conduct was required. Rule 3-300 governs business transactions between attorneys and clients, and requires that lawyers engaging in business transactions with their clients may do so only if (1) the transactions are fair and reasonable to the client, and fully disclosed to the client in writing, in a manner which would be reasonably understood by the client; (2) the client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice, and given a reasonable opportunity to do so; and (3) the client thereafter consents in writing to the terms of

the transaction. Because the lawyer did not advise the original client or the entity clients as required by Rule 3-300 before going into business with the clients, and in particular, did not advise them in writing of their rights to seek independent legal advice, or get their written consent to the terms of the transactions, he violated Rule 3-300. The court also held that the lawyer failed to rebut the presumption of undue influence under Probate Code section 16004, and breached his fiduciary duties to the same clients. As a result, the court held that the lawyer's serious ongoing breach of fiduciary duty required denial of *quantum meruit* recovery.

IN RE ALLEN (2010) 5 CAL. STATE BAR CT. RPTR. 198

- **Attorney who purchased residential duplex from client did not violate Rule 3-300 where there was insufficient evidence of the attorney-client relationship at the time of the purchase to meet the clear and convincing standard of proof.**

A lawyer purchased a residential duplex from a longtime friend and occasional client. The lawyer had represented the client over two years earlier in several small real estate related matters. In litigation between the lawyer and her former client after the purchase of the duplex, a jury found that the lawyer was not representing the client at the time of the purchase of the duplex. Despite this, the State Bar charged the lawyer with violating Rule 3-300 of the California Rules of Professional Conduct. Rule 3-300 governs business transactions between attorneys and clients, and requires that lawyers engaging in business transactions with their clients may do so only if (1) the transactions are fair and reasonable to the client, and fully disclosed to the client in writing, in a manner which would be reasonably understood by the client; (2) the client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice, and given a reasonable opportunity to do so; and (3) the client thereafter consents in writing to the terms of the transaction. The State Bar contended that "once a client, always a client," and alternatively, sought to extend the application of Rule 3-300 to former clients. The court held that the evidence was insufficient to satisfy the clear and convincing standard of proof. In addition, the court observed that Rule 3-300 generally applies only to clients, and only in limited circumstances have courts extended the application of Rule 3-300 to transactions involving former clients.

CURRENT CLIENT CONFLICT

BLUE WATER SUNSET LLC v. MARKOWITZ (2011) 192 CAL.APP.4TH 477

- **An attorney who simultaneously represented plaintiff LLCs and defendant LLC members in a derivative action in connection with a demurrer to the plaintiff member's derivative claims is disqualified due to a concurrent conflict of interest.**
- **Where an attorney represents an LLC and one of two members of the LLC, and consent to a conflict of interest is required by the LLC, the unrepresented LLC member has vicarious standing to move to disqualify the attorney.**

At a hearing on a demurrer in a derivative action, an attorney represented both certain defendants and certain LLC plaintiffs at the same time. Some of the LLC clients were nominal defendants in the derivative causes of action, so that in fact they really were plaintiffs. The attorney

represented these clients concurrently without obtaining the conflict waivers required by Rule 3-310(C) of the California Rules of Professional Conduct. The court held that Blue Water, an LLC which itself was a member of other LLCs, had standing to seek to disqualify the attorney who had jointly represented other LLCs as well as defendant Markowitz in connection with a demurrer, even though Blue Water itself had no attorney-client relationship with the attorney, and thus the attorney had no confidential information concerning Blue Water. Under Rule 3-600, an attorney may represent an organization and its constituents, with the organization's consent. The court said the Blue Water, as a member of other LLCs, had the right to either waive or not waive a conflict of interest the attorney might have in representing the other LLCs. This right provided Blue Water vicarious standing to insist on the attorney's disqualification.

The court then determined that the attorney had an attorney-client relationship with the LLC parties, and had an actual conflict of interest at the time he jointly represented Markowitz. Markowitz and Four Star, one of the LLCs, who had interests adverse to the other LLCs sued by Blue Water derivatively, because each claimed ownership of certain real property to the exclusion of the other. Although named as defendants, the other LLCs were actually plaintiffs since they stood to benefit from the recovery. Accordingly, when the attorney represented plaintiff LLCs and defendants at a demurrer hearing on the derivative causes of action, he represented clients with adverse interests in the same litigation, which the court characterized as a "paradigmatic instance of dual representation – one roundly condemned by courts and commentators alike." Although the attorney later withdrew from the representation of the other LLCs, the law does not permit the resolution of the conflict through withdrawal from representation of the less favored client. Accordingly, the court held the attorney was automatically disqualified.

KULLAR v. FOOT LOCKER (2011) 191 CAL.APP.4TH 1201

- **Rule of Professional Conduct 3-310(C) does not require disqualification of counsel simultaneously representing objector-employees to a settlement of one wage and hour class action and representing the putative class in a subsequently filed, partially overlapping class action against the same employer.**

An attorney and firm who represented certain parties objecting to a proposed settlement in an employment class action against Foot Locker (the *Kullar* class action) also represented those same parties in a separate putative class action filed against Foot Locker which had not been certified (the *Echeveria II* class action). Defendant Foot Locker filed a motion to disqualify the attorney and firm, claiming the concurrent representation of the objectors in *Kullar* and the putative class members in *Echeveria II* violated California Rule of Professional Conduct 3-310(C). Rule 3-310(C) provides that a lawyer shall not, without informed consent of each client, represent a client in a matter and at the same time in a separate matter, accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter. Relying on comment 25 to rule 1.7 of the ABA Model Rules of Professional Conduct, the court held that, because no class was yet certified in *Echeverria II*, the attorney and firm did not have an attorney-client relationship with the putative class members. Accordingly, the court concluded that there was no conflict of interest requiring disqualification.

CURRENT CLIENT CONFLICT – FORMER CLIENT CONFLICT

***BANNING RANCH CONSERVANCY v. SUPERIOR COURT (CITY OF NEWPORT BEACH)* (2011) 193 CAL.APP.4TH 903**

- **No current client conflict of interest exists where firm has entered into a framework retainer agreement requiring that representation be requested by client, and confirmed by firm, but where all such representation has concluded, so that there is no ongoing representation.**
- **No former client conflict of interest exists where current representation is not substantially related to former representation.**

A law firm entered into a "framework" retainer agreement with City providing that the firm would provide legal services to the City on an "as required" basis, if the firm had the ability to take on the matter, at specified rates. The firm performed a minor amount of work in two matters in 2005 and 2006. The first matter involved airport noise. The second matter involved a challenge by an arbor group to a development project. The firm then performed no further work for the City. However, the "framework" retainer agreement was not terminated. The City moved to disqualify the firm from representing a Conservancy against the City, and the court considered whether there was a current client conflict or a former client conflict. The court held that no current attorney-client relationship existed, and the firm had not violated Rule 3-310(C) of the California Rules of Professional Conduct prohibiting concurrent representation of adverse clients. Aside from the two former representations, the City had not requested, nor had the firm confirmed, any subsequent representation, as required by the language of the agreement.

The court also considered whether to disqualify the firm based on a former client conflict of interest. The court held that a firm is subject to disqualification based on a prior representation only where there is a substantial relationship between the current representation and the former representation. In that scenario, an attorney's access to the client's privileged and confidential information in the prior representation is presumed. However, mere knowledge of a former client's general business practices or litigation philosophy does not warrant disqualification. Here, the court found a lack of evidence of any substantial representation between the former representation of the City and the current representation of the Conservancy. In such a situation, the court balanced the competing considerations in favor of the Conservancy's choice of counsel, and issued a peremptory *writ of mandate*, setting aside the order disqualifying the firm.

DUTY OF LOYALTY – PERSONAL CONFLICT OF INTEREST

***OASIS WEST REALTY, LLC v. GOLDMAN* (2011) 51 CAL.4TH 811**

- **Duty of loyalty required that lawyer not use confidential information to detriment of client following termination of representation, even if confidential information was not disclosed.**
- **Lawyer failed to comply with Rule 3-310(B) by disclosing to client his personal conflict of interest stemming from his opposition to a redevelopment project.**

A lawyer and his firm represented Oasis in seeking approval of a redevelopment project with the City. After the representation terminated, the lawyer became involved in efforts opposing the same project. Oasis sued the lawyer and his firm, alleging breach of fiduciary duty, professional negligence, and breach of contract, and asserted defendants had breached the duty of confidentiality and duty of loyalty. The defendants filed a special motion to strike the lawsuit, asserting their rights to freedom of speech under the U.S. Constitution, First Amendment, and California Constitution. The California Supreme Court held that the plaintiff Oasis demonstrated a probability of prevailing on the merits of its claims that the lawyer had used confidential information to the detriment of Oasis. The Court reiterated that the duty of loyalty precluded the lawyer from doing anything to injuriously affect his former client in the subject matter of the representation, and also prohibited the lawyer's use of any client knowledge or information obtained in the prior relationship to the client's detriment, even after the termination of that relationship. The Court said the duty of loyalty extended to situations involving use of client information even where no confidential information is disclosed. The Court also found that the lawyer had failed to comply with the requirements of Rule 3-310(B) of the California Rules of Professional Conduct, which required the lawyer to disclose any personal interests or relationships that are known or reasonably should be known, and that could substantially impact the lawyer's professional judgment.

FORMER CLIENT CONFLICT

***LIBERTY NATIONAL ENTERPRISES, LP v. CHICAGO TITLE INS. CO.* (2011) 194 CAL.APP.4TH 839**

- **Where defendant delayed for two years after inquiry notice of potential conflict of interest of defense counsel, defendant impliedly waived the right to disqualify counsel who had previously represented defendant.**

Plaintiff Liberty sued Chicago Title for bad faith denial of tender of its defense. Counsel for Liberty had previously represented Chicago Title and testified at his deposition in the case regarding his familiarity with Chicago Title's policies prior to the purchase of Chicago Title by Fidelity Title. Only after completion of extensive litigation, including discovery, followed by phase one of the trial, in which Liberty prevailed, did Chicago Title's replacement counsel move to disqualify Liberty's counsel. The court held that the deposition of Liberty's counsel had put Chicago title on notice of the conflict of interest, and that Chicago Title failed to present any justification for the two-year delay in bringing the motion to disqualify, which the court held was unreasonable under the circumstances. The unreasonable delay in bringing the motion to

disqualify counsel for Liberty resulted in an implied waiver of the right to do so by Chicago Title. The court further held that disqualification of Liberty's counsel after phase one of the trial, in which Liberty had prevailed, would cause extreme prejudice to Liberty.

OPENWAVE SYSTEMS INC. v. MYRIAD FRANCE S.A.S. (N.D. CAL. MAR. 31, 2011) NO. C 10-02805 WHA, 2011 WL 1225978

- **Screening measures adequately rebutted presumption of sharing of confidential information as a result of former client conflict, warranting denial of motion to dismiss.**
- **Four-month delay in moving to disqualify resulted in prejudice where the parties conducted extensive discovery during that period.**

Plaintiff Openwave entered into an asset purchase agreement with defendant Myriad, previously known as Purple Labs prior to a name change. Myriad moved to disqualify Morgan, Lewis & Bockius LLP (Morgan) from representation of Openwave, on the grounds that attorney Olivier Edwards, now a Morgan partner, while he was a partner at Jones Day in Paris, had represented Purple Labs. Morgan contended that Edwards had not represented Purple Labs, but rather had represented Sofinova Partners, a shareholder of Myriad Group, parent company to Purple Labs. Nonetheless, upon insistence by Myriad that a conflict of interest existed, Morgan implemented screening procedures against Edwards. The court applied Rule 3-310(E) of the California Rules of Professional Conduct prohibiting a member from accepting employment adverse to a former client without the former client's consent, where the lawyer obtained confidential information from the prior representation that is material to the current employment.

The court found that Edwards, through email to Purple Labs' CEO, had rendered legal advice, and that Purple Labs paid legal fees to Jones Day, albeit on behalf of Sofinova, and found that Edwards had an attorney-client relationship with Purple Labs, based in part on Purple Labs' subjective belief. However, the court further found that Morgan had successfully rebutted the presumption of sharing of confidential information through implementation of the screening procedures. The court noted that "Professional responsibility should trump profitability" and indicated it would have been better if Morgan had learned of the conflict and bowed out early on. But, the court further held that Myriad's delay of four months in bringing the motion, during which extensive litigation and discovery had ensued, resulted in significant prejudice to Openwave should its counsel be disqualified. Accordingly, the court denied the motion to disqualify Morgan from representation of Openwave.

***SCHIMMEL v. LEVIN* (2011) 195 CAL.APP.4TH 81**

- **Attorney and law firm representing client were disqualified from representing party adverse to client where the subject matter of the first case was material to the second case.**
- **Court properly exercised its discretion to strike all pleadings previously filed by disqualified counsel.**

Attorney and her law firm represented Dr. Schimmel in defense of a suit brought against him arising from his management of a medical practice, and developed a very close working relationship. The same lawyer and firm later began to represent the medical practice in a suit brought by Schimmel. When Schimmel moved to disqualify the attorney and her firm, they contended that no substantial relationship existed between the first and second representations, and that Schimmel had waived the conflict of interest. However, the court found that the first matter was in fact material to the second lawsuit, and further determined that Schimmel had not waived the conflict of interest. The court concluded that Schimmel had a right to expect that the lawyer that defended him in the first case would not be defending the company against his later lawsuit, given that she possessed confidential information in the successive representations. The court also granted Schimmel's request that the pleadings prepared by the disqualified lawyer be stricken, out of concern regarding the unfairness to Schimmel.

CONTACT WITH REPRESENTED PARTIES

***UNITED STATES v. CARONA* (9TH CIR. 2011) 630 F.3D 917**

- **Prosecutors do violate Rule 2-100 of the Rules of Professional Conduct when they use a co-defendant to solicit incriminating statements from a co-defendant prior to charges being filed.**

Carona, the Sheriff of Orange County, was the target of a federal corruption investigation. Carona's attorney had notified prosecutors that he was representing the Sheriff during the investigation. Despite this notification, prosecutors entered into a plea agreement with a co-conspirator who agreed to tape conversations with Carona in an attempt to secure incriminating statements. Carona met with the co-conspirator and did make incriminating statements.

Carona was subsequently charged and sought to suppress his statements, contending that prosecutors had violated Rule 2-100 of the Rules of Professional Conduct, which prohibits an attorney from contacting a represented party. Rule 2-100(A) provides, "[w]hile representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

The trial court refused to suppress the statements, but found that the prosecutors violated Rule 2-100. [The district court reported the prosecutors to the State Bar, which later decided to take no

action against the prosecutors.] The court of appeal upheld the decision not to suppress Carona's statements and additionally found that the prosecutors did not violate Rule 2-100.

The Ninth Circuit noted that questions of whether or not pre-indictment contacts with represented parties is a violation of the no contact rule is evaluated on a case-by-case analysis. In fact, the court observed, "our cases have more often than not held that specific instances of contact between undercover agents or cooperating witnesses and represented suspects did not violate Rule 2-100." That was true in Carona's case, even though prosecutors had provided the co-conspirator with a phony subpoena to bolster his need to talk to the Sheriff. The court found that the false documents were merely props, and this trick did not overcome Carona's free will when he was speaking with what he believed to be a co-conspirator, who in reality was a government agent.

The court acknowledged that law enforcement often must resort to use of undercover agents who mislead future defendants. However, the court noted, "[i]t would be antithetical to the administration of justice to allow a wrongdoer to immunize himself against such undercover operations simply by letting it be known that he has retained counsel."

UNITED STATES v. SIERRA PACIFIC INDUSTRIES **(E.D. CAL. 2011)**
759 F.SUPP.2D 1215

- **Counsel contacting government employees exceed scope of permitted contact with government when he interviewed government employees about issues in the case, where employees were represented by the U.S. Attorneys in connection with the litigation.**

The issue here was what should a court do where defense counsel, as part of representing his corporation client, attends an event held by the opposing party that is open to the public and counsel takes the opportunity to interview employees of the opposing party about issues in the case without disclosing his litigation role or purpose and without the knowledge or consent of opposing counsel.

Rule 2-100 of the California Rules of Professional Conduct does not prohibit *ex parte* "[c]ommunication with a public officer. . . ." The purpose of the exception is to recognize an attorney's First Amendment right as a citizen to petition the government for redress of grievances. The district court quoted a proposed, but unadopted, State Bar opinion (Proposed Formal Opinion 98-0002) as limiting the exception to *ex parte* contact with a government employee "who, for example, has the authority to address, clarify or alter governmental policy; to correct a particular grievance; or to address or grant an exception from regulation." "The analysis set out in the unadopted opinion would bar such questioning of a government employee where the employee lacked the authority to decide the matter or policy question addressed in the communication." The district court called the Proposed State Bar Opinion's focus on the authority of the particular official approached, as opposed to the purpose of the communication, "problematic" and of "little assistance in determining the ultimate question of whether the communication is protected by the First Amendment." The district court concluded that what it

regarded as the Proposed Opinion's distorted focus, however, was inconsequential because "the fact that the purpose for the communication has nothing to do with the exercise of First Amendment rights can be inferred by the lack of authority of the official who was contacted."

Applying this authority to the facts, the district court found that, apart from simply attending the public tour sponsored by the Forest Service – as it was his undisputed right to do – defense counsel questioned agency employees in "an attempt to discover and gather evidence and statements from those employees for use in this litigation." Defense counsel had "carrie[d] the [public official] exception too far" in construing it to afford him unfettered access to agency employees he encountered on the tour. Such a construction of Rule 2-100 would "eviscerate[] the rule by the mere presence of the government in the litigation."

The district court found that defense counsel had abused his right as a member of the public to attend the tour to take unfair advantage of a litigation opponent, in this case the United States. The district court granted the government's requested remedy for this transgression: counsel was required to disclose to opposing counsel the identity of all federal employees he had contacted without the knowledge of opposing counsel and to relinquish any information he had obtained through this tactic, including transferring to the government and then deleting any information from the interview stored on counsel's iPhone. The district court also barred defense counsel from using information obtained through those *ex parte* contacts in this litigation and barred him from "engag[ing] in such contact in the future." The district court called defense counsel's encroachment into attorney-client boundaries foul; the result was no gain on the play.

SAN DIEGO COUNTY BAR ASSOCIATION ETHICS OPINION 2011-2 (2011)

- **A friend request on Facebook is an indirect *ex parte* communication in violation of Rule 2-100 where the target of the request is represented by counsel.**

The San Diego County Bar Association recently released opinion 2011-2, which states that "friending" a represented party violates California Rule of Professional Conduct 2-100. The opinion explains that a friend request is at least an indirect *ex parte* communication with a represented party for purposes of Rule 2-100(A), recognizing that the more challenging aspect of the analysis is whether the friend request amounts to a communication "about the subject of the representation." The opinion notes that at this point, the context in which that statement is made and the attorney's motive in sending the request become relevant. It concludes that if the communication transmitted to the represented party is motivated by the desire to obtain information about the subject of the representation, the communication is "about the subject matter of that representation." In support of this conclusion, the opinion cites case law holding that the subject of the representation need not be directly referenced in the request to be "about," or concerning, the subject of the representation. Indeed, the opinion notes that a communication "about the subject of the representation" is more expansive in scope than a communication that is relevant to the issues in the representation, which determines admissibility at trial. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1392.) The opinion notes that in a litigation context, discovery is permitted "regarding any matter, not privileged, that is relevant to the subject matter of the pending matter. . . ." (Cal. Code Civ. Proc., § 2017.010), and further notes that "the breadth of the attorney's duty to avoid ex parte

communication with a represented party about the subject of a representation extends at least as far as the breadth of the attorney's right to seek formal discovery from a represented party about the subject of litigation." Information from the represented party's Facebook page that is accessed after he or she perhaps unwittingly accepts a friend request from an opposing attorney might assist the requesting attorney in preparing for trial, evaluating the strength of the case, and even possibly formulating a proposed settlement, which is the attorney's only motivation for making the friend request in the first place.

The opinion also addresses the duty of candor, concluding that the attorney violates his ethical duty not to deceive in sending a friend request to a represented party on Facebook without disclosing his motivation. While California has not adopted ABA Model Rule 3.3's version of the duty of candor, it does impose a generalized duty not to deceive in Business & Professions Code section 6068(d), which makes it the duty of a California lawyer "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never seek to mislead the judge . . . by an artifice or false statement of fact or law." While this provision is typically applied to allegations that an attorney misled a judge and no authority was found applying the provision to attorney deception of anyone other than a judicial officer, the opinion concludes that its language is not necessarily so limited. The opinion points out that the fact that the provision is phrased in the conjunctive may indicate a general duty not to deceive *anyone* and then a more specific duty not to mislead a judge by any false statement or fact or law. The opinion then cites cases demonstrating that California courts have recognized a common law duty of an attorney not to deceive that extends beyond the courtroom into a range of aspects of an attorney's handling of a matter.

GIFTS

CALIFORNIA STATE BAR FORMAL OPINION 2011-180

ISSUE:

When does an attorney violate 4-400 of the California Rules of Professional Conduct by accepting a gift from a client?

DIGEST:

An attorney who demonstrates by words or conduct an intent to cause a client to give the attorney a substantial gift violates rule 4-400. Whether a gift is substantial must be determined by examining issues such as the value of the gift from the perspective of both the client and the attorney, both financially and otherwise, as well as general standards of fairness.

JUDICIAL ETHICS

CALIFORNIA JUDICIAL ETHICS COMMITTEE OPINION 66 (2011)

- **Judges may participate in social networking, however, judges should refrain from posting comments that pertain to pending cases, and avoid comments that would cast doubt on their ability to act impartially, and avoid the appearance of impropriety in online interactions, particularly with attorneys who appear before the judge.**
- **Judges should disclose in every case where an attorney involved is online friends with the judge, and should "unfriend" lawyers on active cases pending before the judge.**

Whether they talk about it publically or not, an increasing number of California judges have ventured into the cyberspace world of online social networking. California joins a handful of other states who have already publically opined on this issue in releasing California Judicial Ethics Committee Opinion 66, the first California opinion to discuss the issue of judges' involvement in the online social networking community. Recognizing the realities of modern online communication, the opinion states that a judge may indeed participate in an online social networking community, and his or her online social network may include lawyers who may appear before him or her. The opinion states, however, that a judge's online social network may not include lawyers who have cases pending before the judge.

The opinion notes that judges should not be isolated from their communities, which in today's world includes online communities. Their ethical duties remain the same regardless of whether they are interacting online or in person. The opinion's conclusions in this regard are consistent with other jurisdictions that have addressed this issue, such as New York, South Carolina, and Kentucky. Streamlining the issue, the opinion notes that a judge should conduct his or her online social activities in the same fashion he or she conducts such activities in person. Per Canon 4A, a judge shall conduct his or her extrajudicial activities in a fashion that does not "(1) cast reasonable doubt on the judge's capacity to act impartially; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties." Participating in online social networking does not *automatically* violate any of these provisions any more than offline social networking would.

The opinion does, however, discuss ethical concerns raised by the decision to join the cyberspace community, which include issues related to the loss of control of content posted online. Anything posted by a judge on a social networking site is not private. Consequently, any such comments a judge posts should therefore be viewed as public comments per Canon 3B(9), which prohibits a judge from making any type of public comment on a pending case. In addition, posts made by judges online may cast doubt upon their ability to act impartially. Canon 4A prohibits judges from expressing prejudice or bias that may cast reasonable doubt on the judge's impartiality, even when such expressions are made outside of the judge's judicial activities.

What distinguishes a judge's comments made online from those made offline at a cocktail party for example, is the memorialization of online posts, which makes the comments accessible to

everyone with access to the site, and thus able to be printed out and garnished with an evidence tag should anything the judge has said ever become an ethical issue. And not only do such comments remain memorialized online, so do any comments made in response to what the judge has posted. If such responsive comments are offensive and the judge doesn't check his or her social network site often enough to see and remove them, others viewing the site may infer the judge has adopted the supplemental comments. Opinion 66 thus states that judges who decide to use social networking sites must vigilantly check their network page frequently in order to determine whether or not anyone has posted offensive material, and are obligated to delete such material, hide it from public view, or repudiate the offending comments.

Opinion 66 notes other potential ethical issues raised by using online social network sites, such as the use of photos, videos, or links that might demean the judiciary (Canon 4A) or violate a judge's "duty to act at all times in a manner that promotes public confidence in the integrity of the judiciary" (Canon 2A). Judges also must comply with Canon 5A's prohibition from publicly endorsing or opposing any non-judicial candidates and Canon 5B's rule against engaging in circumscribed political activity; compliance with such rules would in effect, prohibit the posting of virtually any political statements on a social networking site because, by their very nature, such sites are public.

Not only are judges permitted to participate in social networking sites, the opinion states that there is no *per se* prohibition against interacting online with lawyers who may appear before them. The opinion notes the similarity between online social interaction and in person social interaction as is permitted through participation in organizations such as the American Inns of Court, which is designed to promote professionalism and civility, as well as other social or civic organizations. Such online interactions are of course subject to the same rules that apply to any other interactions in the sense that they cannot elicit the appearance of bias or undue influence in violation of Canon 2A, which requires that judges must "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," Canon 2B, which prohibits a judge from conveying or permitting anyone else to convey "the impression that any individual is in a special position to influence the judge," or Canon 4B(1), which prohibits extrajudicial activities that would "cast reasonable doubt on the judge's capacity to act impartially."

The opinion notes the potential for the appearance of impropriety as a critical issue, recognizing that modern litigation often involves cyberspace savvy litigators investigating their opposition as well as the court on line. Facebook is presented as an example of an online social network where one's online "friends" are easily discovered. The opinion presents several factors to examine in determining when online interactions between judges and lawyers might create the appearance of impropriety. These are listed as 1) the nature of the social networking site (the more personal the site the greater the potential for the appearance of impropriety), 2) how many "friends" the judge has on his or her page (the more friends the less likelihood of the appearance of impropriety), 3) the judge's practice in deciding who to include in his or her online social network (the more inclusive the judge's site the less likely the appearance of impropriety), and 4) how regularly the specific attorney appears before the judge.

Regarding disclosure, the opinion states that when a judge is online "friends" with an attorney, disclosure is required in every case. This arises from the unique nature of online social networks where the connection is obvious, but the nature of the connection may not be readily discernable. The opinion makes clear that a judge may *not* include a lawyer in his or her social networking site if the lawyer has a case pending before the judge. If this scenario arises, the judge is required to disclose the online connection and "unfriend" the attorney. The opinion explains that an ongoing connection via an online social network in such a circumstance would create the impression that the attorney holds a special position of influence due to the easy communicative access provided on the social networking site.

LEGAL MALPRACTICE

ARBITRATION

DESERT OUTDOOR ADVERTISING v. SUP. CT. (2011) 196 CAL.APP.4TH 866

- **Sophisticated businesspersons are bound by arbitration clause in second fee agreement, which they signed, in connection with their claims for professional negligence.**

In *Desert Outdoor*, the law firm's clients sued for professional negligence. The law firm successfully petitioned to compel arbitration. The clients sought a *writ of mandate* to set aside the order to compel arbitration, which was denied by the court of appeal. Although the original fee agreement did not contain an arbitration clause, when the attorney changed firms mid-litigation the clients signed a new fee agreement that did contain an arbitration clause. The court found that the attorney had no duty to explain the arbitration clause separately to the clients, who were "sophisticated businesspersons." The clients signed the new agreement, regardless of how carefully they read it. The attorney also sent the clients the new fee agreement urging them to read it and encouraging them to seek advice from independent counsel before the agreement was executed. The court noted the clients should have noticed the second agreement was a new one because it was twice as long as the first agreement. In addition, the arbitration provision was clear and readily visible and there was no evidence that it had been the subject of any affirmative misrepresentations.

CONFIDENTIALITY – MEDIATION PRIVILEGE

CASSEL v. SUP. CT. (WASSERMAN, COMDEN, CASSELMAN & PEARSON LLP) (2011) 51 CAL.4TH 113

- **Attorney's discussions with client during mediation proceeding fall within the absolute mediation privilege, and cannot be disclosed by client during litigation regarding the client's subsequent legal malpractice claim against the attorney.**

Attorneys represented client in connection with a mediation proceeding, at which time client settled the case. Client later sued attorneys for legal malpractice, breach of fiduciary duty, fraud

and breach of contract, alleging the lawyers gave bad advice, engaged in deception and coercion, and had a conflict of interest, and induced the client to settle his case for an amount less than he had told the lawyer he would accept, and for less than the case was worth. Plaintiff claimed though he was tired and hungry and felt ill, his attorneys pressured him to accept a settlement, telling him he was greedy to insist on more. The lawyers allegedly harassed and coerced plaintiff, and threatened to abandon him, falsely stated they would discount a portion of his legal bills, and followed him to the bathroom, continuing to "hammer" him into settling over 14 hours, though he was exhausted and unable to think clearly, then presented him with a written draft of a settlement agreement and evaded questions about its complex provisions. Without hope of finding new counsel prior to trial, plaintiff signed the agreement.

The lawyers moved *in limine* to exclude evidence of private attorney-client communications preceding and during the mediation, based on the statutes governing mediation confidentiality. The Supreme Court acknowledged that the attorney-client privilege did not apply, since the exception set forth in Evidence Code section 958 permitted disclosure of such communications in litigation between attorney and client. In contrast, the Court held that the statutes governing mediation confidentiality do not create a privilege, and precluded disclosure of the evidence and did not violate due process. The Court recognized the purpose of the mediation confidentiality statutes is to promote a candid exchange by assuring participants that what is said in the mediation cannot later be used to their detriment, in order to encourage the resolution of disputes. The broad language of the mediation confidentiality statutes, specifically the term "participants" and the extension of the mediation confidentiality protection to every oral or written communication by any person "for the purpose of, in the course of, or pursuant to, a mediation," extended to the attorney-client communications in question, and the applicable statutes did not contain any attorney malpractice exception for disputes between attorney and client. In a concurring opinion, Justice Chin noted that the mediation confidentiality statutes will shield an attorney's actions even when they are incompetent or deceptive, and suggested the Legislature may wish to address the consequences of these statutes.

DUTY TO THIRD PARTY

HALL v. KALFYAN (2010) 190 CAL.APP.4TH 927

- **Plaintiff could not state a legal malpractice claim against an attorney, who had no duty to prospective will beneficiary that was not a beneficiary of estate plan and not a client of attorney.**

In *Hall*, a prospective will beneficiary sued an attorney for legal malpractice alleging the malpractice deprived plaintiff of the majority of the estate of the conservatee. The trial court granted a motion for summary judgment in favor of the attorney, finding he owed the plaintiff no duty because he was not a beneficiary of an executed estate plan nor a client of the attorney. The court of appeal affirmed the judgment, noting the plaintiff could not establish a duty on the part of the attorney, which is required in a case of professional negligence. The plaintiff claimed the attorney had failed to complete the conservatee's estate plan and execute it on her behalf by her conservator before her death, which deprived plaintiff of his share of the estate of the

conservatee. However, without an executed and approved (in this case) testamentary document that named plaintiff as a beneficiary, plaintiff can only be considered to be a potential beneficiary. The attorney had a duty to the conservatorship on behalf of the conservatee. The attorney did not owe a duty of care to plaintiff regarding preparing the conservatee's estate plan. The court noted that this conclusion was particularly appropriate under these facts due to the fact that the conservatee did not express a desire for a new will, and only conversed briefly with the attorney regarding disposing of her estate. To extend the attorney's duty to potential estate beneficiaries would have exposed the attorney to being liable to the niece of the conservatee, as her share of the estate would have been reduced.

STATUTE OF LIMITATIONS

CALLAHAN v. GIBSON, DUNN & CRUTCHER (2011) 194 CAL.APP.4TH 557

- **Compensation for drafting a partnership agreement, without more, is not enough to start Code of Civil Procedure section 340.6's period of limitation.**

In *Callahan*, the law firm of Gibson Dunn was retained to advise two brothers on how to restructure their business to minimize tax consequences and incorporate a succession plan. When one of the brothers died and the other brother became "disabled and/ or incompetent to act in the business of [the company]," there was no general partner left to run the business. When the second brother died, the bank had already begun a probate action. The family of the brothers sued Gibson Dunn for professional negligence, breach of fiduciary duty and negligent infliction of emotional distress. They noted that the partnership agreement did not provide for the continuation of the partnership if the sole remaining partner became disabled, incompetent, or retired, and they further alleged that there was a reasonable likelihood that one of the brothers could fall into this category – which would make the partnership terminate by operation of law due to the law firm's negligent drafting of the partnership agreement's provisions.

The trial court granted Gibson Dunn's motion for summary judgment, finding the action to be barred by the statute of limitations. The appellate court found that the trial court erroneously granted summary judgment based on finding the family members were injured upon execution of the partnership agreement or compensating the firm for preparing the agreement. Gibson Dunn's complained of negligent drafting resulted in only speculative or contingent harm or potential future harm before the second (surviving) brother became disabled. The court thus held that compensation for drafting the partnership agreement without more was not enough to start Code of Civil Procedure section 340.6's period of limitation. The court held that Gibson Dunn was not, however, entitled to summary judgment on its lack of causation theory because there was a disputed issue of fact relating to whether or not the family members incurred attorneys' fees for defending claims arising out of Gibson Dunn's negligent drafting of the succession and termination provisions. Attorneys' fees paid to a second attorney to rectify a prior attorney's errors constituted damages recoverable in an action for legal malpractice.

VENUE

***E-PASS TECHNOLOGIES INC. v. MOSES & SINGER LLP* (2010) 189 CAL.APP.4TH 1140**

- **California legal malpractice action requires 1) the duty of an attorney to use the level of skill, prudence, and diligence required of other members of his or her profession, 2) a breach of that duty, 3) proximate cause between the attorney's negligence and the resulting injury, and 4) actual damage or loss stemming from the negligence of the attorney.**

In *E-Pass*, the court re-iterated the elements of a California legal malpractice action as 1) the duty of an attorney to use the level of skill, prudence, and diligence required of other members of his or her profession, 2) a breach of that duty, 3) proximate cause between the attorney's negligence and the resulting injury, and 4) actual damage or loss stemming from the negligence of the attorney. Regarding the client's malpractice claim against the attorney, the court held that the trial court, not the federal court, was the proper venue to hear the client's claim that no reasonable attorney would have advised the client to proceed, because under the facts there was "no reasonable possibility of prevailing in the federal action."

MALICIOUS PROSECUTION

***ANTOUNIAN v. LOUIS VUITTON MALLETIER* (2010) 189 CAL.APP.4TH 438**

- **Dismissal of malicious prosecution action brought by plaintiffs against law firm and lawyers was proper, where lawyers filed and continued prosecution of underlying trademark and copyright action with probable cause, and plaintiffs could not demonstrate favorable termination of the underlying action, which was dismissed for tactical reasons.**

Louis Vuitton and Dior brought trademark infringement and counterfeiting claims in federal court against the Antounians, based in part on information from investigators indicating the Antounians sold counterfeit merchandise at a particular location. After errors in one of the investigative reports came to light, lawyers amended the complaint, and no longer relied on erroneous reports. Other investigative reports continued to attribute illegal counterfeiting activity to Antounians. The Antounians brought a motion for summary judgment in the federal suit, which the court denied, finding that genuine issues of material fact existed. For tactical reasons, Louis Vuitton chose to dismiss federal claims against the Antounians without prejudice, and the court granted a motion to dismiss, expressly finding that the court was not making an adjudication on the merits. The Antounians followed with a lawsuit alleging malicious prosecution, naming Louis Vuitton/Dior, and its lawyers, alleging the investigative reports upon which Louis Vuitton based its suit were false as were the claims alleged in the underlying suit. The lawyer defendants filed an anti-SLAPP motion, which the trial court granted, and the appellate court affirmed. The appellate court found that the Antounians could not show a

probability of prevailing on the malicious prosecution claim, because they could not show that Louis Vuitton/Dior lacked probable cause to bring and continue the underlying action based on a total absence of merit to the claim. Despite the errors in one of the investigative reports, the court determined that other investigative reports provided Louis Vuitton and its lawyers with a good faith belief that the Antounians were counterfeiting the merchandise. In addition, the court held that the denial of the summary judgment motion demonstrated probable cause to bring the federal claims as the ruling necessarily reflecting some merit to the claim. The court also stated in *dicta* that the Antounians had not shown malice merely from arguing a lack of probable cause and that more was required. Finally, the court indicated that a dismissal of the underlying action for tactical reasons did not constitute a favorable termination.

MENDOZA v. WICHMANN (2011) 194 CAL.APP.4TH 1430

- **Court dismissed malicious prosecution action brought by lawyer against plaintiff and counsel in underlying defamation action, based on existence of probable cause to file and prosecute defamation action as a matter of law.**

Defendant Wichmann was a defendant in Wallis v. PHL Associates, Inc., a wrongful termination case, in which plaintiff Mendoza represented plaintiff Wallis. Wallis and Mendoza experienced incidents of harassment and vandalism, and reported these to Livingston, owner of Mendoza's firm. The report to Livingston resulted in a meeting with Woodward, property manager of the firm's building, which in turn resulted in a police report, which in turn resulted in a report to the court claiming Wichmann was unstable, had called in threats, and vandalized the firm's vehicles. Wichmann sued Mendoza, Livingston and the firm for defamation, and ultimately that case was dismissed and judgment entered for all defendants, following arbitration. Mendoza then sued Wichmann and his attorney Kolb for malicious prosecution, and Wichmann and Kolb brought an anti-SLAPP motion, which the trial court denied. On appeal, the appellate court reversed and entered judgment dismissing Mendoza's claim for malicious prosecution, finding that at the time Wichmann and Kolb filed the defamation claim, and as they continued to prosecute it, they had probable cause to do so, given the circumstantial evidence in their possession was sufficient for a reasonable attorney to suspect that Mendoza had made the alleged defamatory remarks or took a responsible part in their publication. Accordingly, Mendoza could not demonstrate that there was no evidentiary support whatsoever to support a defamation case, since Mendoza was involved in meeting with Livingston, and Livingston indicated Mendoza gave Wichmann's name to the property manager who in turn contacted the police. Because Mendoza could not succeed on the merits, the anti-SLAPP motion against her complaint should have been granted.

***VAFI v. MCCLOSKEY* (2011) 193 CAL.APP.4TH 874**

- **A malicious prosecution against an attorney is subject to a one-year limitation period under Code of Civil Procedure section 340.6, rather than a two-year limitation under Code of Civil Procedure section 335.1 – which governs malicious prosecution actions generally.**

In *Vafi*, the court held that a malicious prosecution against an attorney was subject to a one-year limitations period under Code of Civil Procedure section 340.6, rather than a two-year limitations period under Code of Civil Procedure section 335.1 – which governs malicious prosecution actions generally. Section 340.6 applies to all actions brought against an attorney, except for fraud, for wrongful acts or omissions arising within the performance of professional services. The statute contains no language that exempts claims of malicious prosecution from the limitations period. Because the plaintiff filed the lawsuit almost two years after the dismissal of the action in question, their suit was time-barred.

PROSECUTORIAL ETHICS

***CONNICK v. THOMPSON* (2011) 131 S.CT. 1350**

- **A district attorney has no liability for failure to train based on a single discovery violation.**

In 1985, Thompson was prosecuted for capital murder by the Orleans Parish District Attorney's Office. As a result of publicity from the initial murder charge, victims of a separate robbery came forward and accused Thompson of having committed that crime as well. The robbery was tried first, and about a week before trial a swatch of cloth, from that crime, stained with the robber's blood, was sent out for testing. The results of that test were never provided to Thompson's attorney. However, "[t]here [was] no evidence that the prosecutors ever had Thompson's blood tested or that they knew what his blood type was."

Following his robbery conviction, the murder case was tried, and Thompson elected not to testify because of the robbery conviction. He was sentenced to death. Fourteen years later a private investigator working for Thompson discovered test results proving that he was not the source of the blood. His murder conviction was subsequently reversed and he was acquitted at a second trial.

[A footnote, in the majority opinion notes the horrific circumstances surrounding Thompson's conviction: "After Thompson discovered the crime lab report, former assistant district attorney Michael Riehlmann revealed that Deegan [one of the robbery prosecutors] had confessed to him in 1994 that he had 'intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant.' [Citation omitted.] Deegan apparently had been recently diagnosed with terminal cancer when he made his confession. [He was to die six months later.] Following a disciplinary complaint by the district attorney's office, the Supreme Court of Louisiana reprimanded Riehlmann for failing to disclose Deegan's admission earlier." *In re Riehlmann* (2005) 891 So.2d 1239.]

Thompson sued the district attorney's office under 42 U.S.C. § 1983, claiming that the prosecutor's office violated its discovery obligations under *Brady v. Maryland* (1963) 373 U.S. 83 by failing to train its prosecutors. It was conceded that the prosecutor's office had conducted no training on discovery issues. The jury found the prosecutor's office was liable for failure to train and assessed damages of $14 million, and the district court imposed attorney's fees and costs of $1 million. [This amount is more than the annual budget of the Orleans District Attorney's Office.]

The court of appeals affirmed the award and noted that, while there was no evidence of a pattern of similar *Brady* violations, liability could be imposed based on only one such incident. On appeal, the majority of the Supreme Court found that for Thompson to prevail he must prove both that the District Attorney was indifferent to the need for training and that the lack of training caused the *Brady* violation. The majority found that Thompson failed to prove that there was deliberate indifference. To show deliberate indifference a party must prove that there had been similar constitutional violations by untrained employees.

Thompson, however, asserted that a single violation was enough. The majority disagreed, holding that failure to train on *Brady* is not a situation like a city employing armed officers and giving them no training in apprehending fleeing felons. This was because, "attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits and exercise legal judgment." In addition to this legal training, "[a]ttorneys who practice with other attorneys, such as in district attorney's offices, also train on the job as they learn from more experienced attorneys. For instance, here in the Orleans Parish District Attorney's Office, junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial, and trial chiefs oversaw the preparation of the cases. Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments."

As the majority observed, "[i]t does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to 'a decision by the city itself to violate the Constitution.' [Citation omitted.] To prove deliberate indifference, Thompson needed to show that [the District Attorney] was on notice that, absent additional specified training, it was 'highly predictable' that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was so predictable that failing to train the prosecutors amounted to conscious disregard for defendants' *Brady* rights."

DISSENT: The dissent's perspective is perhaps best described by this quote, "mindful that *Brady* violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps. The prosecutorial concealment Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility -- made tangible by § 1983 liability -- for adequately conveying what *Brady* requires and for monitoring staff compliance."

SPEAKER BIOGRAPHIES

CAROLE J. BUCKNER

Carole Buckner is the Dean of Abraham Lincoln University School of Law, and Chief Academic Officer of Abraham Lincoln University in Los Angeles, California. She has taught Professional Responsibility, Legal Ethics in Business Representation, and Contemporary Ethical Issues, as well as Evidence, Civil Procedure, Legal Writing, Torts, and Remedies.

A 1980 graduate of the University of California, Berkeley, she holds her J. D. from Hastings College of the Law (1984). She is a former Special Assistant United States Attorney and also served as corporate counsel to Amplicon, Inc. and California First National Bancorp. Ms. Buckner's practice experience includes white collar criminal litigation, civil litigation, and arbitration involving a wide range of business, employment, finance, and real property matters.

Ms. Buckner practices law through Buckner Law Corp. in Irvine, California.

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

SHAWN M. HARPEN

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

Ms. Harpen presently serves as Chair of the State Bar of California's Standing Committee on Professional Responsibility and Conduct and as Co-Chair of the Professionalism and Ethics Committee of the Orange County Bar Association. Ms. Harpen is also a Fellow of the Litigation Counsel of America. She has been a speaker and contributing author for various programs on corporate compliance, securities litigation, professional responsibility and ethics. Ms. Harpen is admitted to practice in California and before the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit, the United States District Courts for the Central, Southern and Northern Districts of California and the Eastern District of Michigan, and is certified to practice in Nevada as in-house counsel.

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

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

WENDY PATRICK

Wendy L. Patrick is a San Diego County Deputy District Attorney named by her peers in 2010 as one of the Top Ten criminal attorneys in San Diego by the *San Diego Daily Transcript* and one of San Diego's 2010 *Super Lawyers.* She has completed approximately 150 trials including over 100 jury trials ranging from hate crimes, to domestic violence, to first-degree murder. In her current assignment in the Sex Crimes and Stalking Division she prosecutes cases involving vice, human trafficking, child molestation, and sexually violent predators.

Ms. Patrick has been a Chair of the San Diego County Bar Association's (SDCBA) Ethics Committee for over five years, is Vice Chair of the California State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC), and is an accomplished public speaker on the topic of ethics both nationally and internationally. She teaches ethics around the country on a regular basis for various legal and business organizations, is an Institute of Criminal Investigation certified instructor for law enforcement, and teaches business ethics at San Diego State University. Ms. Patrick has been featured as a media topic area expert on the radio as well as on both local and international television.

Ms. Patrick has been teaching trial skills for over a decade around the country to national and international audiences through programs like the National Institute of Trial Advocacy and the National College of District Attorneys, as well as for educational institutions, law firms, and other legal organizations. She has presented to audiences as diverse as Crown prosecutors in Canada, to unemployment insurance judges at their national annual meeting, to the American Truckers Association Litigation Center. Ms. Patrick also presents motivational seminars, keynote speeches, and workshops nationwide on topics related to persuasion and impression management. She is a frequent conference opening speaker around the country on the subjects of "Reading People," "How to Make a Great Impression," "Effective Communication with Difficult People," "Leadership," "Building Partnerships," and related subjects.

Ms. Patrick is published on a regular basis. She is co-author of the revised version of the *New York Times* bestseller *Reading People* (Random House 2008), and was a contributing author to the *Encyclopedia of Race and Racism* (Macmillan Reference 2007), and *Hate Crimes: Causes, Controls, and Controversies* (SAGE 2004). She has her own ethics column in the *San Diego Daily Transcript*, a regular column in *Law Enforcement Quarterly*, is a writer and editorial Board member for *San Diego Lawyer* and *The Bencher*, and has been published multiple times in California District Attorneys Association publications and the California State Bar *Criminal Law Journal*. She is published frequently in the *Los Angeles Daily Journal*, writes ethics articles on a regular basis for the *California Bar Journal* and *The Practical Litigator* (ALI ABA national publication), and has been published in *The Professional Lawyer*, published by the American Bar Association Center for Professional Responsibility and the Standing Committee on Professionalism. She is also a contributing ethics author for *Doing Justice* and *The Practical Prosecutor* (National College of District Attorneys national publications).

Ms. Patrick has been recognized for her legal work as well as her work in the community. She received the *SART Response With a Heart Award* based on her significant contribution to the professional field of sexual assault prosecution in 2011, the Service to the San Diego County Bar Association award in 2005, the Friend of the Community Award from the Tom Homann Law Association in 2003, and was recognized as one of San Diego *Metropolitan Magazine's* 40 under 40 honorees in 2001. She sits on the Executive Committee of the California State Bar Criminal Law Section and is a Master and team leader in the Louis M. Welsh American Inn of Court. She is a past Vice President of the SDCBA, a past Vice President and Programs Chair of the Lawyers Club of San Diego, and a past Board member of the San Diego Crime Victim's Fund and the San Diego Chapter of the National Speakers Association.

She received her Bachelor's degree in psychology with honors from the University of California Los Angeles, and her Law Degree from California Western School of Law. Her legal education was multi cultural and included study in Vienna, Austria, Budapest, Hungary, and with a Barrister firm in London, England. Ms. Patrick is admitted to practice law in California, the United States District Court in the Southern District of California, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

On a personal note, Ms. Patrick holds a purple belt in Shorin-Ryu karate, is a concert violinist with the La Jolla Symphony, and plays the electric violin professionally with a rock band, performing both locally and in Hollywood. Regarding Ms. Patrick's true passion in life, she holds a Master of Divinity degree *summa cum laude* from Bethel Seminary San Diego where she was awarded the Excellence in Preaching Award and the Zondervan Biblical Languages Award. She also holds a Certified Biblical Counseling Certificate from Horizon College.

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WILLIAM WOODS

William Woods, a graduate of the Southwestern University School of Law, is the Assistant Head Deputy District Attorney of the Los Angeles County District Attorney's Training Division. Prior to joining the Training Division, he served for 13 of his 25 years with LADA in their Appellate Division. During that time he amassed 14 published opinions, including two in the California Supreme Court. He also was the counsel of record on cases in Federal District Court and the Ninth Circuit.

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