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Ethics Update 2014: Significant Developments in the Law of Lawyering

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Ethics Update 2014

Significant Developments in the Law of Lawyering

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State Bar of California Annual Meeting

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ANTI-SLAPP SPECIAL MOTIONS TO STRIKE

***GetFugu, Inc. v. Patton Boggs LLP*, 220 Cal. App. 4th 141 (2013)**

- **Defamation claim against a lawyer and his firm based on allegedly false statements the lawyer made in a press release to the effect that opponents' alleged investment scam was under FBI criminal investigation was not barred by the litigation privilege.**

GetFugu arose from an underlying RICO action in which Davies and Warnock, represented by the Patton firm and the Cummins firm, filed a RICO action on behalf of themselves and GetFugu shareholders. In the course of the litigation, the Patton attorney made two statements which became the subject of the instant defamation case: one, a press release stating "FBI SAID TO BE INVESTIGATING GETFUGU'S CARL FREER", and two, a Tweet saying "GetFugu runs an organization for the benefit of its officers and directors, not shareholders and employees. The RICO suit was not frivolous. The 500K lawsuit is frivolous, however, so buyer be wary." 220 Cal. App. 4th at 145-46.

The district court dismissed the underlying RICO claim. That same day, GetFugu and Freer filed the instant action for malicious prosecution, defamation, and declaratory relief. The attorney defendants filed a special motion to strike under Civil Procedure Code section 425.16. The trial court granted the motion; the court of appeal partially reversed.

The court of appeal agreed with the trial court that the defamation claim relating to a press release arose out of an issue of public interest, thereby satisfying the protected activity prong of Section 425.16. GetFugu was a public company. Investment scams are a matter of public interest, and investors depend on the integrity of the markets.

Prong 1 having been met, the court turned to the second prong – the probability of prevailing. The court of appeal disagreed with the trial court that the litigation privilege barred the claim. The litigation privilege applies 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 have some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). The principal purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed by derivative tort actions. While case law has expanded the litigation privilege to include publication to nonparties with a substantial interest to the proceedings, that expansion does not encompass publication to the general public through the press. Such an expansion would swallow up the general rule that the litigation privilege does not protect republications to nonparticipants to the action, and would not serve the purposes of the privilege.

The publications at issue publicized the alleged misdeeds of GetFugu and Freer. Those statements were posted on the Internet and thus released worldwide. Dissemination of the publications to a

segment of the population as large as the "investment community" is essentially the same as disclosure to the general public. Thus, the litigation privilege did not bar the claims.

The court of appeal rejected the attorney defendants' argument that the statement in the press release was true, which would be a defense to a defamation claim. There was conflicting evidence about whether in fact the FBI was conducting a criminal investigation as asserted in the press release. This met the "minimal burden" required of a plaintiff to defeat a special motion to strike under the probability of prevailing prong.

The statement in the Tweet, however, was non-actionable opinion. Deprecatory statements regarding the merits of litigation are nothing more than the predictable opinion of one side to the lawsuit and cannot be the basis of a defamation claim. *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1403 (1999).

***Graham-Sult v. Clainos*, 738 F.3d 1131 (9th Cir. 2013)**

- **Ninth Circuit affirmed grant of anti-SLAPP motion against lawyer who represented trustee of a will, finding that the accused conduct was activity protected as related to a judicial proceeding and also protected by California's litigation privilege.**

Plaintiffs were beneficiaries of the will and trusts of Bill Graham ("Graham"), a successful concert promoter. Nicholas Clainos was the trustee of the trust, and Richard Greene and his law firm ("Greene") represented Clainos. The primary assets in dispute were rights to certain copyrights at one time owned by Graham. Clainos and Greene understood those rights to be owned by a corporation owned by Graham, rather than by Graham himself. When Graham's beneficiaries sold the shares of the corporation, the copyrights presumably became the property of the new shareholders. Without notice to plaintiffs, Clainos prepared a back-dated assignment transferring ownership of the intellectual property to the corporation. Greene assisted him.

When plaintiffs learned of the assignment, they filed a lawsuit against, among others, Clainos and Greene. The claims against Greene included aiding and abetting Clainos' breach of fiduciary duty, conversion, and fraud. Greene filed a special motion to strike under California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16(b)(1). The district court granted Green's motion and awarded him attorneys' fees. Plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit first considered whether Greene's alleged tortious activity was an act in furtherance of his constitutional right to free speech. As the court explained, if Greene could make that showing, the burden would shift to plaintiffs to show they have a reasonable probability of prevailing on their claims. The court noted that, where a cause of action is based both on protected activity and unprotected activity, it is subject to the anti-SLAPP statute unless the protected activity is merely incidental to the unprotected activity.

In determining whether Greene's conduct was protected activity, it explained, "Protected activity under the anti-SLAPP statute includes 'writing[s] made in connection with an issue under consideration or review by . . . a judicial body.'" 738 F. 3d at 1142 (citing Cal. Civ. Proc. Code § 425.16(b)(2)). With respect to plaintiffs' cause of action for aiding and abetting breach of fiduciary duty, the court found it was made in connection with the probate proceedings and, thus, is based on protected activity. With respect to the conversion cause of action, the court found that Greene's activity included both protected and unprotected activity – specifically, assisting in the preparation of the assignment was not protected, but representations and omissions made to plaintiffs about the assignment were protected. Thus, the court concluded that the cause of action was subject to the anti-SLAPP statute. Finally, with respect to the fraud claim against Greene, the court concluded that the alleged fraudulent statements and omissions were in connection with the probate proceeding, and thus constituted protected activity.

The court next considered whether the plaintiffs had met their burden of showing a reasonable probability of prevailing. The court concluded that plaintiffs had not made that showing as against Greene because Greene was likely to prevail on his defenses that his conduct was privileged under Civil Code section 47(b). This "litigation privilege" protects statements made in judicial proceedings, including statements made outside the judicial proceedings that are related to the judicial proceedings. The court also found that plaintiffs were unlikely to prevail against Greene because their claims were barred by the one-year statute of limitations of Civil Procedure Code section 340.6(a). The Ninth Circuit thus affirmed the district court's granting of Greene's anti-SLAPP motion and his separate motion to dismiss.

The Ninth Circuit also affirmed the attorneys' fees award to Greene. Plaintiffs had challenged the award as including fees incurred in connection with the motion to dismiss, which Green was not entitled to recover under the anti-SLAPP statute. The Ninth Circuit concluded that it was not an abuse of discretion to award Greene fees incurred in connection with the motion to dismiss, as they were fees incurred responding to an improper lawsuit.

***Jay v. Mahaffey*, 218 Cal. App. 4th 1522 (2013)**

- **Associate attorney was potentially subject to liability for malicious prosecution despite assertions she was just following the instructions of the lead attorney, where Associate signed certain of the pleadings, her name appeared on deposition notices served on limited partners, and she negotiated with counsel for the limited partners.**

In *Jay*, limited partners in a real estate and development company that held a long-term ground lease brought a malicious prosecution action against the property owners and their attorneys for joining the limited partners in an underlying action for an improper purpose.

Defendants filed a special motion to strike/anti-SLAPP motion under Civil Procedure Code section 425.16. The trial court denied the motion as to both lead counsel and associate attorney. The court of appeal affirmed.

The court first found that the protected activity prong of Section 425.16 was "readily satisfied here, as it is in nearly all claims for malicious prosecution." 218 Cal. App. 4th at 1538.

Next, the court turned to the probability of prevailing prong of Section 425.16. A plaintiff in a malicious prosecution case must show that the prior action was commenced by or at the direction of the defendant and was favorably terminated in favor of the plaintiff; that it was brought without probable cause; and it was initiated with malice.

Finding plaintiffs met their burden of proof as to the first two elements on the facts, the court turned to the malice element. Malice refers to the subjective intent or purpose with which the defendants acted in initiating the prior action. A plaintiff must plead and prove actual ill will or some improper ulterior motive.

The court of appeal first affirmed the order denying lead counsel's anti-SLAPP motion, finding there was "overwhelming" evidence that lead counsel had acted with malice in suing the limited partners.

The court of appeal then upheld the trial court order denying the associate attorney's anti-SLAPP motion, acknowledging that the evidence that the associate had acted with malice was not as strong as it was against lead counsel, but that, nevertheless, plaintiffs met their burden with respect to the associate as well. The court stated, "[w]e recognize that an associate attorney is not in the same position as an attorney associating into a case. There is a clear imbalance of power between an often younger associate and an older partner or supervisor, and situations may arise where an associate is put into a difficult position by questioning a more experienced attorney's choices. Nonetheless, every attorney admitted to practice in this state has independent duties that are not reduced or eliminated because a superior has directed a certain course of action. *See* Bus. & Prof. Code § 6068. Thus, the fact that she was following a superior's instructions is not a valid defense to malicious prosecution." *Id*. 1546.

The associate signed 25 of the Roe amendments, and her name appeared in the captions of five deposition notices served on the limited partners. She communicated with opposing counsel when asked why the limited partners were being sued. She offered to dismiss the limited partners if the first Civil Procedure Code section 170.6 motion was withdrawn, raising a strong inference that the associate knew the case had no merit and was being prosecuted for an improper purpose. While this evidence was "not overwhelming," her actions were sufficient to raise an inference of malice.

***Roger Cleveland Golf Co. v. Krane & Smith, APC*, 225 Cal. App. 4th 660 (2014)**

[See discussion under Statute of Limitations]

ARBITRATION

***Mt. Holyoke Homes, LP v. Jeffer Mangels Butler & Mitchell, LLP*, 219 Cal. App. 4th 1299 (2013)**

- **Arbitration award in favor of a law firm in a legal malpractice dispute with a former client properly vacated where arbitrator failed to disclose a prior relationship with a partner in the defendant firm.**

In *Mt. Holyoke Homes*, real estate developers retained two attorneys at law firm to represent them in an application to subdivide the property. The two attorneys subsequently joined the Jeffer Mangels firm, and plaintiffs signed a retainer agreement with Jeffer Mangels. That Jeffer Mangels agreement included a provision requiring binding arbitration of any disputes. The agreement further advised plaintiffs to consult independent counsel with respect to the agreement.

After several years, Plaintiffs' application to subdivide and develop the land was denied by a court of appeal. Plaintiffs subsequently filed a legal malpractice action against the law firm and the two attorneys. The trial court granted defendants' petition to compel arbitration pursuant to the arbitration clause in the retainer agreement. The parties selected Judge Eli Chernow, a retired superior court judge, to preside over the arbitration. Judge Chernow made the following disclosures: (1) defendants had represented a party in a mediation before him in the past five years, (2) he had known one of the attorneys for many years, and (3) he had conducted an arbitration and mediation involving one of the plaintiffs over five years ago. The parties agreed to the selection of Judge Chernow despite those disclosures.

Judge Chernow ruled in favor of defendants, and awarded defendants $18,132.81 in unpaid legal fees, $285,000 in attorneys' fees incurred during the arbitration, and over $150,000 in costs. The trial court confirmed the arbitration award.

After the confirmation, plaintiffs discovered that Judge Chernow had listed Jeffer Mangels name partner Robert Mangels as his reference on his resume on the National Academy of Distinguished Neutrals webpage.

Plaintiffs appealed the trial court judgment. Plaintiffs argued the arbitration provision was void for fraud in the execution because it was "not adequately disclosed or explained." *Id*. at 1307. Plaintiffs also contended the award should be vacated due to Judge Chernow's failure to timely disclose his relationship to Jeffer Mangels.

The appellate court affirmed the trial court's order compelling arbitration, holding the attorneys had no duty to point out or explain the arbitration provision where the clause was clear and conspicuous, and plaintiffs were sophisticated business persons with substantial experience with legal matters.

The court went on to vacate the order based upon Judge Chernow's insufficient disclosure. The inquiry was whether a reasonable person would doubt whether the arbitrator would be able to be impartial, not whether the arbitration actually was biased. If a reasonable person would doubt impartiality, the arbitrator was required to disclose that fact within ten days of his nomination or appointment, pursuant to Section 1281.9(a) of the California Arbitration Act.

The court found that a reasonable person "could conclude that an arbitrator listing a prominent litigator as a reference on his resume would be reluctant to rule against the law firm in which that attorney is a partner as a defendant in a legal malpractice action…. To entertain a doubt as to whether the arbitrator's interest in maintaining the attorney's high opinion of him could color his judgment in these circumstances is reasonable, is by no means hypersensitive, and requires no reliance on speculation." *Id*. at 1313.

Rejecting the argument that the motion should be denied because the arbitrator's resume was readily available on the Internet, and therefore appellant had constructive notice the arbitrator had listed the Jeffer Mangels partner as a reference, the court stated that a party "is not required to investigate a proposed neutral arbitrator in order to discover information, even public information, that the arbitrator is obligated to disclose. Instead, the obligation rests on the arbitrator to timely make the required disclosure. The fact that the information is readily discoverable neither relieves an arbitrator of the duty to disclose nor precludes vacating the award based on the nondisclosure." *Id*.

***Optimal Mkts., Inc. v. Salant*, 221 Cal. App. 4th 912 (2013)**

- **Trial court cannot award sanctions under Civil Procedure Code section 128.7 against lawyer based on his advocacy in an arbitration proceeding where the lawyer did not file the initial complaint in court, and did not substitute into the matter until after the matter had been ordered to arbitration.**

After an arbitrator found in favor of defendants in a trade secret misappropriation case, plaintiffs moved the trial court under Civil Procedure Code section 128.7 for sanctions for the filing of a frivolous action. The matter initially had been filed in state court, but upon stipulation of the parties had been ordered to arbitration. The trial court entered an order staying the action in court pending the conclusion of the arbitration, and retained jurisdiction. Defendant attorneys substituted in to the matter after it had been ordered to arbitration; they had not been the attorneys who filed the state court complaint.

The trial court denied defendants' motion for sanctions, finding the defendant attorneys had not signed, filed, submitted, or advocated a pleading to the court, and thus were not subject to Section 128.7 sanctions. The court of appeal affirmed. It agreed with the trial court that, whether or not the defendant attorneys had advocated frivolous positions in the arbitration, they had not done so before the court. "There is no authority supporting the position that a superior court, after a matter has been stayed and ordered to binding arbitration, may impose *section 128.7* sanctions for an

attorney's prosecution of a client's meritless claim before the arbitrator." 221 Cal. App. 4th at 922. The court also noted that a court's authority to impose sanctions under Section 128.7 is discretionary and based on its direct knowledge of the facts and issues presented in the case. Here, only the arbitrator, and not the trial court, had that direct knowledge, and, thus, allowing the trial court to award sanctions under Section 128.7 would be "antithetical to the requirement that ''all the material facts in evidence must be both known and considered . . .'' by the court in properly exercising its discretion." *Id.* at 926 (citing *In re Cortez*, 6 Cal. 3d 78, 85-86 (1971)).

***Roldan v. Callahan & Blaine*, 219 Cal. App. 4th 87 (2013)**

- **In dispute with indigent client, attorney sought to enforce arbitration provision that required the parties to share the costs of the arbitration. The court found that plaintiffs could not be forced to share the costs, as doing so would effectively deprive them of access to justice.**

Plaintiffs in *Roldan* were among a group of residents of an apartment complex who brought an underlying lawsuit for damages from toxic mold contamination of their apartments. Each of the plaintiffs in the underlying case was elderly and of limited means, relying on Section 8 housing subsidies. After setting the underlying claim, plaintiffs in *Roldan* sued their attorneys, Callahan & Blaine ("Callahan"), for pressuring them to accept an inadequate settlement in the underling case. In the underlying case, Callahan had attempted to have them declared legally incompetent so that a guardian *ad litem* could be appointed to cooperate with the attorneys' efforts to settle.

Callahan successfully moved to compel arbitration based on an arbitration provision in the retainer agreement. Plaintiffs subsequently moved to be relieved from paying any portion of the arbitration costs because they were indigent. They argued that having to pay for the up-front arbitration costs effectively precluded them from pursuing their claims against Callahan. Callahan opposed the motion and filed a motion to dismiss the arbitration on the basis that plaintiffs were not complying with their obligation to share in the arbitration costs. The trial court denied both motions.

At issue before the court of appeal was whether the plaintiffs, each of whom was granted permission to proceed *in forma pauperis* in court, could likewise be excused from the obligation to pay fees associated with arbitration. The court concluded that they could.

The court agreed with plaintiffs' contention that to require them to share arbitration costs would effectively deprive them of access to any forum for resolution of their claims against Callahan. The court acknowledged that the retainer agreement constituted a contract and that, under general principles of contract law, the plaintiffs were presumed to understand they would have to share in the costs of arbitration. But the court would not go so far as to presume that the plaintiffs understood ***how much*** the arbitration fees could be. The court also noted California's "public policy of ensuring that all litigants have access to the justice system for resolution of their grievances, without regard to their financial means." 219 Cal. App. 4th at 94 (citing *Martin v. Super. Ct.*, 176 Cal. 289 (1917)). The court concluded that Callahan's efforts to force plaintiffs to

pay a pro rata share of the arbitration costs "suggests an affirmative effort to deprive plaintiffs of access to any forum at all." *Id.* at 95.

Ultimately, the court did not find the arbitration clause unenforceable, but instead held that it could excuse plaintiffs from the obligation to pay the arbitration fees. Accordingly, the court reversed and remanded to the trial court with directions to determine whether any of the plaintiffs are financially able to pay their anticipated share of those costs. If any of them were found not to be able to pay, Callahan could not be ordered to pay their share. Callahan, instead, would be given a choice: pay plaintiffs' share of the arbitration fees or waive its right to arbitration and allow the case to proceed in superior court.

ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

***Citizens for Ceres v. Super. Ct.*, 217 Cal. App. 4th 889 (2013)**

- **Common-interest doctrine does not protect otherwise privileged communications shared between a project developer and a city prior to approval of the project under CEQA.**

In *Ceres*, a citizens group brought a CEQA action to challenge a shopping center development. They challenged certification of an administrative record which omitted claimed privileged communications between the developer and the city. The trial court upheld the common interest doctrine, and the citizens group petitioned for a writ of mandate. The court of appeal issued the writ.

Observing that the area of privilege is "one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme," the court of appeal found that the Legislature did not likely intend to make CEQA administrative records a privilege-free zone by including the phrase "notwithstanding any other provision of law" in the beginning of Public Resources Code section 21167.6. 217 Cal. App. 4th at 913. The Supreme Court has held that the policies behind the privilege are as applicable when the client is a public agency as in other contexts. The same considerations apply to work product.

Turning to the common interest doctrine, the court noted that it is not an independent privilege, nor the creation of an expanded attorney-client relationship; rather the doctrine specifies circumstances under which disclosure to a third party does not waive privileges. To apply, (1) the parties sharing such privileged communications must have a common interest in securing legal advice about the same matter, and (2) the communications must be made to advance their shared interest in securing legal advice on that common matter. *OXY Res. Cal. LLC v. Super. Ct.*, 115 Cal. App. 4th 874 (2004).

The court was careful to discuss the origins of the doctrine under California state law, finding that the doctrine applies only if it is necessary to accomplish the privilege holder's purpose in seeking legal advice. The "doctrine extends no further than this" because California has no independent statutory joint defense or common interest privilege – and California courts are not authorized to establish one. 217 Cal. App. 4th at 917. This is in contrast to federal law, wherein common law governs privilege and the Ninth Circuit has recognized a joint defense privilege.

The critical question for the court of appeal, thus, was "whether a lead agency can share with the project applicant a preapproval interest in the creation of a legally defensible [environmental impact report, ["EIR"]] that supports the applicant's proposal." *Id.* The court concluded that the agency could not.

The court acknowledged CEQA contemplates that the lead agency and applicant will work together on the environmental impact report needed for approval. Before completion of review and project approval, however, the lead agency is neutral and objective, and its interest is compliance with

CEQA. Its unbiased evaluation of the environmental impact of the applicant's proposal is the bedrock upon which CEQA's process is based. Thus, the lead agency cannot have an interest prior to project approval in producing a legally defensible EIR or other environmental document that supports the applicant's proposal.

By contrast, the applicant's interest is to have the agency produce a favorable EIR that will pass legal muster. These interests are "fundamentally at odds." *Id*. at 918. It is only after approving the proposal that the agency can be said to join forces with the applicant. Before completion of the environmental review, the agency cannot have as a legitimate goal the secret preparation, in collaboration with the application, of a legal defense of a project to which it still must be uncommitted. Consequently, the court concluded that the city and developer had waived the attorney-client privilege and the protection of the attorney work product doctrine for all communications they disclosed to each other before the city approved the project.

Once the project is approved, the agency and the applicant's interests are aligned, assuming the approval has not left any dispute remaining between them. At that point, both are legitimately committed to the same goal – defending the project as approved. At that point, the common interest doctrine would apply, assuming the elements of the doctrine are met with respect to the particular document at issue.

***Dunfee v. Truman Capital Advisors, L.P.*, No. 12-cv-1925, 2013 U.S. Dist. LEXIS 165936 (S.D. Cal. Nov. 20, 2013)**

- **Plaintiffs are not entitled to categorically quash bank's deposition and records subpoena directed to their tax attorney based on the attorney-client privilege and the attorney work product doctrine.**

Dunfee was an action relating to a loan modification. Bank issued a deposition subpoena with request for documents to plaintiffs' tax attorney. Plaintiffs offered to produce redacted copies of their tax returns, to be certified as correct by the attorney. Bank rejected the proposal. Plaintiffs moved to quash the subpoena. The district court denied the motion without prejudice, finding no categorical basis to block the discovery outright, but that plaintiffs could raise objections at deposition on a document by document/question by question basis.

Plaintiffs' complaint contained both state law and federal claims. Where there are federal question claims and pendant state law claims present, the federal privilege law applies. Under federal law, tax returns generally are discoverable when necessary in private civil litigation. Tax returns do not enjoy absolute privilege from discovery. On the other hand, public policy disfavors unnecessary public disclosures in order to encourage taxpayers to file complete and accurate returns. To balance the interests, a court will look at relevance, and whether there is compelling need for the returns. With the exception of some overbreadth in the request, the bank demonstrated that the requested returns (subject to the court's narrowing of the scope) were relevant; plaintiffs offered no alternative sources of their financial condition during the relevant years.

The court next turned to the attorney-client privilege. Issues concerning application of the attorney client privilege in the adjudication of federal law are governed by federal common law. Under federal law, where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose are permanently protected from disclosure by himself or his attorney unless the protection was waived. Because it has the effect of withholding relevant information, the attorney-client privilege is applied only when necessary to achieve its limited purposes of encouraging full and frank disclosure by the client to his attorney.

The tax returns could not be withheld categorically on the basis of the federal attorney-client privilege simply because they were prepared by an attorney. Federal law does not recognize an accountant or tax preparer's privilege. A taxpayer may not be allowed to hire a lawyer to do an accountant's work and gain greater protection than if he did not use a lawyer. Plaintiffs did not meet their burden to show whether the documents sought contained legal advice as opposed to accounting advice. The privilege might exist, depending on the types of documents in attorney's possession. The court could not rule in a vacuum, however, not having reviewed them. The court overruled the objection without prejudice – the privilege, if applied, could be raised at the attorney's deposition on a document by document/question by question basis.

Turning to work product, the court found that, because accountant worksheets are not privileged, a lawyer's privilege is no greater when he is doing an accountant's work. A dual purpose document is entitled to work product protection where, taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole. Here, plaintiffs failed to demonstrate that the documents at issue were prepared in anticipation of litigation. Rather, they appeared to have been prepared in the regular course of business in the attorney's preparation of plaintiff's tax returns. The court overruled the objection, subject to reassertion at deposition if the doctrine were triggered.

The case was decided under federal law. The court acknowledged that California law provided greater, though not absolute, protection of tax records from discovery.

***Hawker v. BancInsurance, Inc.*, 1:12-cv-01261, 2013 U.S. Dist. LEXIS 180831 (E.D. Cal. Dec. 27, 2013)**

- **The attorney-client privilege applied to emails between insurer's law firm and an adjustment firm related to denial of coverage where the law firm did factual investigation before recommending denial of coverage and where the adjustment firm adopted attorney's recommendation to deny coverage; work product protection did not apply.**

In *Hawker*, Bank obtained a directors and officers liability policy. The FDIC eventually was appointed as receiver for the Bank. Bank gave notice to insurer of the FDIC's seizure and that the FDIC likely would commence action against Bank's directors. Insurer hired an adjustment firm,

who conducted an investigation. Insurer later hired law firm, who prepared a series of position letters that were approved by Insurer. Insurer eventually denied coverage via letter drafted and issued by law firm. Insurer denied subsequent demands for indemnity, after consultation with counsel.

Plaintiffs filed a diversity action alleging wrongful denial of insurance coverage. Plaintiffs brought a motion to compel production of documents, and the district court denied the motion in part, and granted it in part.

In a federal diversity case, issues regarding privilege are determined under state law. The court rejected plaintiffs' argument that the privilege should not apply because Law Firm was acting predominantly as a claims adjuster rather than as an attorney. Law Firm was hired to protect Insurer due to threat of litigation and settlement demands being made by the FDIC. A third party administrator had been assigned before Law Firm was hired to investigate the claims. Law Firm made a legal recommendation on the coverage question, which the insurer adopted. The fact that the insurer adopted Law Firm's recommendation did not make Law Firm the final decision maker. Law Firm's factual investigation done in order to render its legal opinion did not destroy the privilege. "While the privilege is not applicable if the attorney is retained for a purpose other than offering legal advice, that the attorney was required to engage in some fact finding in order to render a legal opinion does not destroy the privilege." 2013 U.S. Dist. LEXIS 180831, at *14. The attorney-client privilege applied.

Turning to the work product doctrine, the court noted that Law Firm was not retained until FDIC sent its letter threatening litigation. Clearly, litigation was anticipated. However, documents created during the ordinary course of business are not protected by work product because they would have been created regardless of the litigation. The analysis is complicated in the insurance realm because insurers are in the business of conducting, investigating, and evaluating claims against its policies. Insurers have independent obligations to review and follow up on claims, and their reports thus are not protected, even though they usually are prepared with an eye towards litigation. Where it must be determined at what point in time an insurer's activity shifted from ordinary course of business to anticipation of litigation, the court is to consider whether, in light of the nature of the document and the factual situation in the particular case, the document fairly can be said to have been prepared or obtained because of the prospect of litigation. Where the insurer argues that it acted in anticipation of litigation prior to denying a claim, it bears the burden of presenting specific evidentiary proof of objective facts demonstrating a resolve to litigate.

Here, Law Firm was directed to prepare a formal legal evaluation of whether the insurer was entitled to decline the FDIC's claim. This would indicate it was not focused on litigation, but instead focused on the ordinary course of business to determine whether there was a legal basis to deny the claim. Defendant failed to meet its burden to prove objective facts demonstrating a resolve to litigate and thus the work product doctrine did not apply.

Finally, the court denied the motion to compel relating to redacted portions of insurer's reinsurance reports. Under California law, where reinsurance documents include attorney-client privileged or work product protected communications, they are entitled to the same protection as would similar communication between the ceding insurer and the attorneys handling the insured's claim.

***Integrated Global Concepts, Inc. v. j2 Global, Inc.*, No. 5:12-cv-03434, 2014 U.S. Dist. LEXIS 37027 (N.D. Cal. Mar. 20, 2014)**

- **Documents maintained by a party's former general counsel who continued to provide legal advice to the party were protected by the attorney-client privilege, and the privilege was not waived by the former general counsel's storage of the documents at his new employer's workplace.**

Plaintiff Integrated Global Concepts, Inc. sought the production of documents from defendant j2 Global, Inc.'s ("j2") former general counsel, Nicholas Morosoff. Morosoff asserted the attorney-client privilege over various documents he kept in his possession after leaving j2, while he continued to provide legal advice to j2 to help get the new general counsel up to speed. Plaintiff contended that the privilege does not apply and that, even if it did, it was waived by virtue of Morosoff storing the documents at his new employer's workplace (on a password-protected hard drive).

The district court applied California privilege law because the underlying dispute concerned breach of a contract with a California choice of law provision. It first determined that the privilege applied because, under California law, communications in the course of the attorney-client relationship are presumed confidential for purposes of the attorney-client privilege. Next, it found that Morosoff did not waive the privilege by storing the documents at his new employer's workplace. It noted that "attorney-client communications do not lose their privileged character 'for the sole reason that [they are] communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communications may have access to the content of the communication[s].'" 2014 U.S. Dist. LEXIS 37027, at *3-*4 (quoting Cal. Evid. Code § 917(b)). The court also noted that Morosoff did not have the ability to waive the privilege as j2, as the client, and not Morosoff, was the holder of the privilege.

***Radware, Ltd. v. A10 Networks, Inc.*, No. C-13-02021, 2014 U.S. Dist. LEXIS 2769 (N.D. Cal. Jan. 8, 2014)**

- **Party who submitted attorney-client privileged communications *in camera* in connection with a motion to disqualify waived the attorney-client privilege with respect to those communications, although the waiver would be construed narrowly.**

Radware moved to disqualify the law firm of Irell & Manella ("Irell") from representing the opposing party, A10 Networks ("A10"), in a pending litigation on the grounds that Irell previously represented Radware and, as a result of that previous representation, had obtained material

confidential information. In support of its motion, Radware submitted *in camera* a number of attorney-client privileged communications between it and Irell. It argued that the Irell attorneys who previously represented Radware could review the documents, but that the Irell attorneys who currently represented A10, along with their co-counsel in the current case, Latham & Watkins, could not.

A10 argued that, by putting the privileged documents at issue in its motion to disqualify Irell, Radware had waived the attorney-client privilege. The court analyzed the waiver issue under the Ninth Circuit's three-part "fairness principle" test, which finds a waiver where: "(1) 'the party is asserting the privilege as the result of some affirmative act, such as filing suit,' (2) 'through this affirmative act, the asserting party puts the privileged information at issue,' and (3) 'allowing the privilege would deny the opposing party access to information vital to its defense.'" 2014 U.S. Dist. LEXIS 2769, at *5 (citing *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999)). The court found that A10 had met all three elements and, thus, Radware had impliedly waived the attorney-client privilege as to the documents submitted *in camera*.

With respect to the third element, Radware argued that supplying the privileged documents to the Irell lawyers who previously represented it was a sufficient disclosure to protect Irell's and its current clients interests in defeating the motion to disqualify. The court rejected that argument, finding that those lawyers may not have enough familiarity with the pending litigation to be able to fully understand the significance of the privileged documents for purposes of opposing the motion to disqualify. Thus, the waiver had to extend to the Irell lawyers currently representing A10 against Radware.

In crafting the waiver, the court noted it "'must impose a waiver no broader than needed to ensure the fairness of the proceedings before it.'" *Id.* at *7 (citing *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003)). The court concluded that the proper scope of the waiver here would apply to all Irell lawyers, but not to Latham or A10. The court also provided Radware with the option of withdrawing the privileged documents from *in camera* consideration in lieu of the implied waiver.

***Seahaus La Jolla Owners Ass'n v. Super. Ct.*, 224 Cal. App. 4th 754 (2014)**

- **Communications between counsel for a homeowners association and individual homeowners not represented by that same counsel were protected by the association's attorney-client privilege, as it was reasonably necessary for the accomplishment of the purpose for which counsel was consulted.**

Seahaus La Jolla Owners Association ("Association") was the plaintiff in a construction defect litigation alleging damage to the common areas of a development. Separately, certain individual homeowners filed construction defect lawsuits in connection with damage to their individual units. The separate matters were consolidated for discovery.

Before filing the lawsuit, the Association had several meetings with individual homeowners to discuss the potential lawsuit and the claims involved. In doing so, they were complying with Civil Code section 6150(a), which requires homeowner associations to communicate with individual owners about proposed construction defect lawsuits regarding common areas. Defendants in the lawsuit deposed several individual homeowners and questioned them about, among other things, their communications with the Association's counsel at these meetings. The court granted a motion to compel these communications over the Association's claim of attorney-client privilege. The court of appeal issued a peremptory writ of mandate vacating the trial court's order.

The court of appeal first clarified that extraordinary review of the trial court's order compelling disclosure was warranted because the compelled disclosure of attorney-client privileged information constitutes an immediate harm for which there is no other adequate remedy.

The court then analyzed the defendants' argument that the privilege was waived because the communications were made to homeowners who did not share counsel, and that the meetings themselves were not confidential. The court analyzed Evidence Code section 952, which provides that the confidentiality of a communication is retained if the attorney-client communication is made in confidence "'to no third persons other than those who are present to further the interest of the client in the consultation . . . .'" 224 Cal. App. 4th at 768 (quoting Cal. Evid. Code § 952). It further quoted *OXY Resources Cal. LLC v. Superior Court*, 115 Cal. App. 4th 874, 890 (2004): "[W]hen disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, [it] is not a waiver of the privilege." 224 Cal. App. 4th at 768. This exception to the waiver rule is referred to as the common interest doctrine, and can protect disclosures to third persons to whom disclosure is reasonably necessary to further the purpose of the attorney-client relationship. Here, the court found that disclosure to the individual homeowners was reasonably necessary because they shared a common interest of recovering for the defects to the common areas, and also because the Association was mandated by law to communicate with the individual homeowners about the lawsuit, pursuant to Civil Code section 6150(a).

The court also rejected the argument that the meetings were not maintained in confidence, notwithstanding the presence of third parties other than individual homeowners, including even some homeowners who were affiliated with defendants. The court found that the Association and its counsel made reasonable efforts under the circumstances to keep the meeting confidential and limited to individual homeowners. Accordingly, the court held that the subject communications between the Association's counsel and the non-client individual homeowners were protected by the attorney-client privilege.

***Skynet Elec. Co. v. Flextronics Int'l Ltd.*, No. C 12-06317, 2013 U.S. Dist. LEXIS 176372 (N.D. Cal. Dec. 16, 2013)**

- **Plaintiff did not waive work product protection of communication by forwarding it to a Taiwan patent attorney who is not a member of the Taiwan bar, where Taiwan patent attorneys are similar to U.S. patent agents and need not be licensed attorneys.**

Skynet addressed a motion to compel in a patent infringement action. The motion involved an email chain containing legal advice given by plaintiff's counsel to plaintiff's founder and president. The email referenced a legal memorandum with the preliminary legal opinions and mental impressions of plaintiff's U.S. legal counsel regarding a proposed patent certificate of correction. It was seemingly inadvertently produced to defendants during discovery. Defendant advised plaintiff that it believed privilege had been waived because it had been disclosed to an administrative assistant to a Taiwan patent attorney. That assistant reviewed emails intended for, but not addressed to, the Taiwan patent attorney, and responded to those emails providing the Taiwan patent attorney's direction.

In Taiwan, patent attorneys are similar to United States patent agents, and do not need to be attorneys-at-law or have a license to practice law. The Taiwan patent attorney at issue in the case was not listed on the Taiwan Ministry of Justice's registry of persons licensed to practice law in Taiwan and did not appear to be a member of the Taiwan bar.

The work product doctrine – referred to by the court as "work product immunity" – protects from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation. The communication at issue here was created in anticipation of litigation of the subject patent.

Unlike the attorney-client privilege, work product does not protect evidence from disclosure to the outside world, but rather protects it only from knowledge of opposing counsel and client, thereby preventing its use against the lawyer gathering the materials. Disclosure to a third party does not waive work product protection unless it has substantially increased the opportunity for the adverse party to obtain the information. If a document protected by work product is disclosed to the other side with the actual intention, or reasonable probability, that an opposing party may see it, a party who made the disclosure may not subsequently claim work product protection. A voluntary waiver only occurs where a party discloses protected information to a third party who is not bound to maintain its confidence or otherwise shows disregard for the protection by making the information public. Waiver of work product protection does not destroy work product protection for other documents of the same character.

Here, disclosure of the work product to the Taiwan patent attorney did not make it substantially more likely that defendants would discover it. In fact, plaintiff cited extensive authority that Taiwan patent agents are bound by law from disclosing their clients' confidential work product.

Further, although the Ninth Circuit has not directly addressed the issue, the great weight of authority holds that disclosure of work product to individuals who share a common interest with the disclosing party does not constitute waiver. Thus, disclosure of work product to the Taiwan patent attorney is not sufficient to waive work product protection.

The court rejected defendants' argument that plaintiff did not take reasonable steps to protect the information, finding plaintiff's opposition established that plaintiff complied with Federal Rules of Evidence 502(b), and promptly asserted work product protection and requested the return of the information at issue upon being advised of its inadvertent production.

The court rejected defendants' argument that, by conceding that the mail chain had been prepared in anticipation of litigation, plaintiff had placed in issue plaintiff's founder's state of mind in requesting the certificate of correction from the USPTO. Plaintiff's mere assertion that the filing of the certificate of correction would lead to litigation did not establish that the filing was improper.

Finally, the court held that defendants had failed to show that the crime-fraud exception applied to the documents. Since defendants had never had access to the referenced memorandum, defendants' argument as to that document was based on mere speculation. The court's review of the certified English translation of the document found no evidence of fraud.

Since the court found that the work product doctrine protected the documents at issue from discovery, the court declined to address whether plaintiff had waived the attorney-client privilege.

***Zimmerman v. Super. Ct.*, 220 Cal. App. 4th 389 (2013)**

- **Attorney-client privilege does not preclude a finding of contempt against a deputy public defender for refusing to answer questions about how she received specific evidence that she delivered to the prosecution, where counsel merely asserted privileged agency without providing actual facts to prove the existence and scope of that agency.**

Zimmerman involved a first degree murder trial, where the trial court entered a contempt charge against defendant's former attorney, a deputy public defender, for failing to answer questions regarding the circumstances under which she came into possession of specific evidence relevant to the prosecution's case. The attorney filed a petition for a writ of prohibition, and, in a case of first impression, the court of appeal denied it.

The attorney lodged a large manila envelope with the court containing various pieces of evidence. After no objection to their release was received, the court released the documents. The prosecution later sought discovery of the details regarding how counsel came to possess the evidence, filing an untimely motion to compel.

At the hearing, upon counsel's continued assertion of the attorney-client privilege as a basis for refusing to answer questions about how she came into possession of the evidence, the trial court

held counsel in contempt, remanding her to custody under Civil Procedure Code section 1219 until she testified or until the proceedings were concluded, notwithstanding the trial court's finding that counsel was competent and committed to the defense function, and that she did not take her actions without her belief that the law demanded it. The court ordered counsel remanded to sheriff's custody. A day before she was to report for custody, counsel filed an appeal, and the court of appeal issued a stay pending resolution.

The court of appeal called the matter one of first impression. Reviewing the attorney-client privilege, the court noted that the privilege protects disclosure of communications between attorney and client, and extends to protect observations made as a consequence of protected communications, but does not protect the disclosure of the underlying facts which were communicated, and does not extend to independent witnesses.

Here, counsel concedes she did not receive the evidence at issue directly from her client; she received it through agents. The mere citation of case law to support the existence of a preliminary fact, here agency, is not sufficient to establish a prima facie claim of the attorney-client privilege. While case law stands for the proposition that the attorney-client privilege may exist where a defendant's agent provides evidence to the defendant, that standing alone does not answer the issue before the court, where there was meager evidence beyond counsel's mere claim that an agency situation existed. "On such a sparse record, we cannot contemplate how the superior court would have been able to find agency. We certainly cannot." 220 Cal. App. 4th at 402.

The court acknowledged that a court may not require disclosure of information claimed to be privileged to rule on a claim of privilege. *See* Cal. Evid. Code §915. The court further acknowledged that the very facts that could establish agency might be the same facts counsel believed were privileged. It expressly stated that it did not hold that counsel must disclose the facts she believes are privileged to establish the basis for the privilege.

However, it noted that most of the questions counsel refused to answer did not call for privileged information. The court found only two of them – asking from whom she received the evidence – even arguably called for privileged information. The other ten questions did not require disclosure of privileged information unless counsel's answers would allow the prosecution to identify the agent or to disclose contents of a privileged communication between counsel and client. But counsel made no such argument in her petition, and failed to otherwise explain how the other ten questions would call for privileged information.

Because counsel claimed the privilege, it was her burden to establish its existence. Her mere testimony that defendant's agent gave her the evidence was insufficient. In a criminal context, a defense attorney's representation of agency is not the talisman that protects the circumstances under which the attorney received the evidence absent actual facts to establish agency. The court declined to alleviate the burden of proving the existence of the privilege such that the party invoking it

merely has to represent an agent was involved in the delivery of the evidence without having to prove the existence of agency.

The court held that the attorney-client privilege can protect the information coming to an attorney from the client's agent so long as the agent is acting within the scope and authority of his agency. The attorney's observations could be privileged if they were made as a direct consequence of protected communication. The party claiming the existence of agency has the burden of proving the existence and scope of agency with actual facts.

ATTORNEYS' FEES

***In re GFI Commerical Mtg.*, Nos. C 12-03956, C 12-04214, 2013 U.S. Dist LEXIS 124077 (N.D. Cal. Aug. 28, 2013)**

- **Firm was entitled to keep the fees it had earned where firm did not obtain the informed written consent to the potential conflict of interest in the dual representation of two clients in a bankruptcy matter, where the parties had been aware of the dual representation and did not object, where clients had chosen the dual arrangement to minimize costs, and where there was no evidence of fraud or unfairness.**

In *GFI*, the law firm served as dual counsel for both the liquidator and the creditor's committee in a Chapter 11 proceeding. When an actual dispute arose between the liquidator and the committee about the proper disposition of an asset of the bankruptcy estate, the firm withdrew from representing either client. Subsequent counsel for the creditor's committee asserted that a conflict of interest had existed all along, and that all fees paid to firm were unauthorized. The committee then filed a motion to the bankruptcy court to disallow fees paid, and to require disgorgement of all prior fees paid. The firm filed an application for allowance of compensation and expenses as former counsel for the liquidator and the committee. The firm argued that the committee had impliedly consented to the dual representation, and that the lack of a written waiver is not a basis for disgorgement.

The bankruptcy court approved the firm's application, finding that there was no undisclosed conflict. On appeal, the district court affirmed.

California Rule of Professional Conduct 3-310(C)(1) requires an attorney to obtain the informed written consent of each client upon accepting representation in a matter in which the interests of the clients potentially conflict. In the bankruptcy matter, "all along" there was a significant possibility that the interests of the liquidator in the manner of disposing the assets of the estate would diverge from the interests of the creditor committee in receiving the proceeds of asset dispositions

However, assuming without deciding that the firm failed to obtain informed written consent for a potential conflict in violation of Rule 3-310(c), such violation does not automatically extinguish the committee's obligation to pay past and presently due fees. "Under California law, although an attorney's breach of a rule of professional conduct may warrant a forfeiture of fees, forfeiture is not automatic but depends on the egregiousness of the violation." 2013 U.S. Dist LEXIS at *13-14 **(***citing Mardirossian & Associates, Inc. v. Ersoff*, 153 Cal. App. 4th 257 (2007)).

Any violation of Rule 3-310 was "slight, if at all." While the conflict may not have been formally waived in writing, it was not undisclosed to the court or to the parties. Both the committee and the liquidator indisputably were aware of the dual representation, and affirmatively chose it to minimize costs. There was no evidence that the relationship was tainted with fraud or unfairness.

Given the equities, the bankruptcy court did not abuse its discretion in awarding fees pursuant to the fee application.

The court went on to uphold the bankruptcy court's finding that the fees submitted in the firm's fee application were reasonable, notwithstanding the committee's subjective dissatisfaction. The court also agreed with the bankruptcy court that firm was entitled to fees incurred in defending the award of its fees.

***Syers Properties III, Inc. v. Rankin*, 226 Cal. App. 4th 691 (2014)**

- **Trial court did not abuse its discretion when, in awarding fees to a prevailing party in a legal malpractice matter, it awarded them based on an hourly rate that exceeded the actual rate charged by the law firm.**

After prevailing in a legal malpractice action brought by its former client, Syers Properties III, Inc. ("Syers"), the defendant law firm, Rankin, sought to recover its attorneys' fees pursuant to an attorneys' fees clause in its engagement agreement with Syers. Based on the declaration of counsel who defended Rankin in the malpractice action (Murphy) setting forth the total hours spent defending the matter, and information about the reasonable rate, the trial court awarded $843,000 in fees. Syers appealed the fee award, arguing that there was insufficient showing of the hours spent and that the trial court abused its discretion by awarding a "reasonable" fee that exceeded the fee actually charged by the Murphy law firm. The court of appeal affirmed the award.

First, the court found that the trial court had not abused its discretion by accepting the declaration of counsel as to the fees, even though the Murphy law firm did not submit its actual bills. The court found the declarations – which organized the hours spent by task, rather than providing a line by line recitation of the hours spent each day – was particularly helpful and within range of information on which a trial court could rely in making a fee award. It is not always necessary in a fee request to submit the actual bills.

Second, the court found the trial court had not abused its discretion by basing the award on an hourly rate that exceeded the actual rate charged by the Murphy law firm. Rankin submitted information showing the reasonable community rate in San Francisco for each level of attorney who worked on the matter. Syers argued that this rate exceeded what was reasonable for insurance defense firms to charge, as well as what was actually charged by Murphy. The court rejected Syers' argument, finding "[t]here is no requirement that the reasonable market rate mirror the *actual* rate billed." 226 Cal. App. 4th at 701. The court further noted, "The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel." *Id.* (internal citations omitted). In finding the trial court had not abused its discretion, the court pointed out that the trial court also likely would not have abused its discretion if had determined that the reasonable rate in this instance was the actual rate charged.

BAR ADMISSION

***In re Garcia*, 58 Cal. 4th 440 (2014)**

- **The California Supreme Court granted admission to the State Bar to Sergio Garcia, an undocumented immigrant. It rejected argument that federal immigration law preempted California law on this subject because the relevant federal statute expressly allows states to authorize issuance of professional licenses to undocumented immigrants.**

Sergio Garcia was an undocumented immigrant who applied for admission to the California State Bar. Garcia had lived in the United States continually since 1994, and attended high school, college, and law school in California. He took and passed the California bar exam in July 2009. The Committee of Bar Examiners concluded that Garcia possessed the requisite good moral character to qualify for admission. Because of his immigration status, however, the State Bar brought the issue to the California Supreme Court, who issued an order to show cause directing the Committee to show cause why Garcia's admission should be granted.

The Supreme Court heard oral argument on September 4, 2013. One of the issues addressed at the hearing was whether Garcia's admission would violate federal law – specifically, 8 U.S.C. Section 1621. Section 1621 generally restricts an undocumented immigrant's eligibility to obtain a professional license, but Section 1621(d) provides an exception when a state statute expressly authorizes a state to issue a professional license to an undocumented immigrant. Shortly after the oral argument, the California legislature passed, and the Governor signed, a statute expressly providing such authorization. The new legislation became Business and Professions Code section 6064(b), and became effective January 1, 2014.

In light of the new statute, the California Supreme Court granted Garcia's admission to the State Bar. The Court stated that issues of bar admission are governed by state law and, in particular, by the Supreme Court itself. It noted that the Supremacy Clause of the U.S. Constitution could prevent certain state actions regarding professional licenses, but that, in this case, the federal statute at issue, Section 1621, expressly contemplated states passing statutes like Business and Professions Code section 6064(b). Thus, Section 1621 did not preempt California law.

The Court also considered whether there were any reasons under state law why undocumented immigrants should not be admitted to the State Bar. The Court rejected the argument that, because undocumented immigrants could not legally be employed, they should not be allowed a law license. The Court noted that lawyers could practice in ways other than as employees of law firms. The Court also rejected the argument that Garcia's violation of U.S. law – by virtue of being in the United States unlawfully – rendered him unfit. The Court explained, "'every intentional violation of the law is not, ipso facto, grounds for excluding an individual from membership in the legal profession.'" 58 Cal. 4th at 460, quoting *Hallinan v. Comm. of Bar Exam'rs*, 65 Cal. 2d 447, 459 (1966). It concluded that an undocumented immigrant's mere

presence in the United States does not itself involve moral turpitude or otherwise indicate unfitness to be admitted to the State Bar. Finally, the Court concluded that Garcia himself was morally fit.

***In re Glass*, 58 Cal. 4th 500 (2014)**

- **The California Supreme Court denied admission to an applicant, finding that he had engaged in moral turpitude when he fabricated numerous stories while working as a journalist, and that he had not met his burden of proving he had been rehabilitated.**

Before applying for admission to the California Bar, Stephen Randall Glass had a career as a journalist for The New Republic magazine and other publications. That career ended in disgrace when it came to light he had fabricated multiple stories. Glass then went to law school and applied to the New York bar, but withdrew his application when he was informally told that it would be rejected. He then took and passed the California Bar examination in 2006 and, in July 2007, filed an application for determination of moral character. The Committee of Bar Examiners denied his application, and then conducted a hearing at Glass' request. The State Bar Court found that Glass had established good moral character in the years following his journalism debacle, and the State Bar Court Review Department affirmed the decision. It found that, although "Glass's misconduct had been 'appalling' and 'egregious,' [it] believed that Glass had satisfied his 'heavy burden of proof' and established his rehabilitation." 58 Cal. 4th at 518.

The Supreme Court reversed, denying Glass admission. It stated that, when an applicant establishes a prima facie case of his or her good moral character, the burden shifts to the State Bar to rebut that case with evidence of poor moral character. Once the State Bar produces such evidence, as it did here, the burden shifts back to the applicant to demonstrate that he or she has been rehabilitated. The Court found that Glass did not meet his burden.

The Court noted that Glass' misconduct was not a single lapse of judgment, but rather a course of '"fraud of staggering proportions"' that continued over many years. *Id.* at 522. It also noted that Glass was not completely honest during his New York bar application process, nor even during his California State Bar review hearing, finding "hypocrisy and evasiveness in Glass's testimony at the California State Bar hearing." *Id.* at 523. The Court emphasized the danger to the public if Glass were to fabricate evidence in legal matters the way he did while working as a journalist. Considering all of the evidence, the Court found that Glass had not met his burden of proving that he had been rehabilitated.

***Sander v. State Bar of Cal.*, 58 Cal. 4th 300 (2013)**

- **Relying on the common law right of public access, the Supreme Court held that plaintiffs could gain access to information contained in the State Bar's admissions database provided the information could be redacted to remove any individual applicant's information and provided there were no countervailing interests weighing against disclosure.**

A law professor, Richard Sander, and the First Amendment Coalition requested that the State Bar release to them information contained in the bar admissions database, including applicants' bar exam scores, law schools attended, grade point averages, LSAT scores, and race or ethnicity. Plaintiffs sought that information so Sander could conduct research on racial and ethnic disparities in bar passage rates and law school grades. After the trial court denied plaintiffs' request, the court of appeal reversed. The Supreme Court affirmed the court of appeal's decision, holding that the State Bar is required to provide access to the requested information, provided it can be done in a form that protects the privacy of applicants and there is no countervailing interest that outweighs the public's interest in disclosure. The Supreme Court remanded to the trial court to determine if the information could be redacted to protect the privacy of applicants and if any countervailing interests weighed in favor of nondisclosure.

The Court found that the California Public Records Act, Cal. Gov. Code §§ 6250 *et seq.*, does not apply to the judicial branch, which includes the State Bar. Rather, access to judicial branch records, including State Bar records, is governed by common law principles as well as constitutional principles derived from the First Amendment right of public access to trials.

The Court first concluded that Rule of State Bar, tit. 2, rule 4.4 – which it stated is the only State Bar rule that "is arguably relevant here" – does not preclude disclosure because that rule is intended to protect the identify of specific applicants. Nor, however, does Rule 4.4 expressly permit the requested disclosure. Accordingly, the Court turned to common law, including the common law right of public access. The Court concluded that that right of public access required the requested disclosure here. To support that conclusion, the Court noted the public interest in the admissions database, including the public's legitimate interest in knowing whether different groups of applicants perform differently on bar examinations.

CONFIDENTIALITY

***Carroll v. Cal.*, No. 2:13-cv-00249, 2013 U.S. Dist. LEXIS 117358 (E.D. Cal. Aug. 19, 2013)**

- **Former staff counsel for public agency was allowed to maintain a retaliatory termination claim against the agency, rejecting the agency's argument that plaintiff's ethical obligation to her former client barred her from bringing the lawsuit.**

Plaintiff alleged she was terminated from her position as a staff counsel for the defendant state agency in violation of the First Amendment and California whistleblower statutes. Plaintiff reported various alleged improper and illegal activities by defendant, refused to take actions she believed violated the law or her duties as an attorney, and maintained that her termination was a result of such reporting and refusal. Defendant moved to dismiss, claiming that plaintiff was barred from bringing the wrongful termination action by her ethical obligations to it as her former client.

The court denied defendant's motion to dismiss on the basis of plaintiff's ethical obligations. Applying principles expressed by the California Supreme Court in *General Dynamics Corp. v. Superior Court*, 7 Ca1. 4th 1164 (1994), the court found that confidentiality concerns did not categorically bar plaintiff's claim under the California whistleblower statutes. It would have been "premature to dismiss at the pleading stage because it was not clear to what extent the lawsuit would actually require disclosure of the defendant's confidential information." 2013 U.S. Dist. LEXIS 117358, at *17. The court found that plaintiff adequately pled that some of the alleged conduct leading to her termination was required or supported by the California Rules of Professional Conduct.

The court declined defendant's invitation to follow a California Attorney General's published opinion that concluded that attorneys cannot maintain claims under the California whistleblower statutes because such statutes were not intended to supersede the attorney-client privilege. The court found that the Attorney General's opinion misrepresented a key provision of the whistleblower statutes on which its analysis was based. Again relying on *General Dynamics*, the court further found that whether the whistleblower statutes were intended to supersede the attorney-client privilege was not relevant when the attorney has alleged that she was terminated for refusing to violate a mandatory ethical duty prescribed by professional rule or statute.

The court found the rationale of *General Dynamics* for permitting retaliatory discharge actions by former in-house attorneys especially applicable when the employer is a public agency with an explicit duty to the public. The responsibilities and obligations of government lawyers differ from those of private lawyers. "While this theoretical tension does not support plaintiff's broad theory that her client, for the purposes of the confidentiality privilege, is the people of California, the unique role of governmental lawyers requires a nuanced interpretation of California's Rules of Professional Conduct." *Id.* at *20.

The court dismissed plaintiff's First Amendment retaliation claim because she had not met her burden in establishing that she spoke as a private citizen rather than as a public employee in expressing her concerns. To state a claim under the California's whistleblower statutes as an in-house attorney, "plaintiff must demonstrate that her alleged protected actions were taken according to a mandatory or permissive law or ethical duty. If plaintiff had a mandatory duty as an attorney or, more specifically, as an in-house attorney for the [public agency], to perform any of the actions for which she allegedly suffered adverse consequences, then those actions cannot as a matter of law serve as the basis for a First Amendment retaliation claim." *Id.* at *40-41. The court also rejected, however, defendants' argument that plaintiff's First Amendment claim was categorically barred because of confidentiality concerns for the same reasons it rejected the argument that the whistleblower claim was barred for this reason.

Bar Association of San Francisco Ethics Opinion 2014-1 (2014)

Issue: When a client publishes a negative online review of his former attorney accusing that lawyer of incompetence, may the attorney respond to the review if she can do so without revealing confidential information?

Answer: Even though some part of a lawyer's duty of loyalty survives the termination of the attorney-client relationship, the lawyer likely may respond to the client's online review without violating that duty, provided the lawyer does not reveal confidential information. There may be some situations, however, where even responding without confidential information could be deemed adverse to the former client and, thus, a breach of the lawyer's duty of loyalty.

The lawyer's duty of confidentiality also survives the termination of the attorney-client relationship, and would preclude the lawyer from disclosing any confidential information or "secrets," which includes any information gained in the professional relationship, whether or not subject to the attorney-client privilege. The "self-defense" exception contained in California Evidence Code section 958 would not permit the disclosure of client secrets in the absence of a pending litigation.

CONFLICTS OF INTEREST

***Cuevas v. Joint Benefit Trust,* No. 13-cv-00045, 2013 U.S. Dist. LEXIS 124050 (N.D. Cal. Aug. 29, 2013)**

- **Counsel for retired union members was disqualified due to his prior representation of the defendant union where the matters were substantially related and he had received material confidential information.**

Retired union members brought action for denial of benefits in violation of ERISA and for age discrimination in violation of the California Fair Employment and Housing Act. Plaintiff union members were represented by former counsel to the defendant union, who moved to disqualify counsel. The court granted the motion.

Plaintiff's counsel had represented defendant union off and on over a period of seven years. The union had requested that he withdraw. Counsel refused, but agreed to turn over closed files pertaining to his representation of the union. The files included letters sent by counsel to a state agency on behalf of the union and minutes of union executive board meetings in which pay and retirement benefits were discussed.

The court found that plaintiffs' counsel must be disqualified from representing plaintiffs because a substantial relationship existed between the successive representations. The court found it reasonable to presume that, in order to draft the letters to the state agency on behalf of the union, plaintiffs' counsel would have had to become familiar with confidential information about how the union handled discrimination claims. It did not matter that the discrimination claims in the prior representation are not identical to the discrimination claim at issue in this case.

The court rejected counsel's argument that disqualification was not warranted because his prior representation had been limited to the facts of those claims and had not involved any analysis of the union's general employment practices. The court found it was enough that there was the appearance of the possibility that counsel had access to confidential information that could be material in this action, and that counsel in fact he had actual possession of confidential information material to this action.

***Fiduciary Trust Int'l v. Super. Ct.*, 218 Cal. App. 4th 465 (2013)**

- **Law firm for marital trust's trustee disqualified because it previously represented husband and wife in forming their estate plan.**

Law firm drafted wills for husband and wife. The husband's will established a marital trust that was expected to generate several million dollars in annual income. Following the death of both husband and wife, a dispute arose between wife's personal representative (petitioner) and the marital trust trustees regarding the terms of husband's will. Petitioner moved to disqualify the law

firm from representing the trustees because of the law firm's prior representation of husband and wife.

The court of appeal granted a writ reversing the trial court order denying the motion to disqualify. There was no dispute that the law firm's prior representation was direct and was substantially related to the current tax dispute. The court of appeal found it was rational to conclude that, during the course of the representation of wife, the firm attorney handling the matter would have explained to her the meaning and effect of significant terms of the wills, including the terms relating to tax obligations. The law presumes that such confidential information had been shared, and disqualification was required regardless of whether confidential information actually was shared.

The court of appeal rejected the law firm's argument that disqualification was not warranted because the law firm had represented husband and wife jointly and, therefore, there could be no confidences between the clients during the representation which would have required the law firm's disqualification in the subsequent representation. The duty not to represent interests adverse to a former client without informed written consent, however, is broader than the joint-client exception to the attorney-client privilege. After severing the attorney-client relationship, an attorney cannot be adverse to the former client in any matter in which the attorney formerly represented the client.

***FlatWorld Interactives LLC v. Apple Inc.*, No. C-12-01956, 2013 U.S. Dist. LEXIS 111496 (N.D. Cal. Aug. 7, 2013)**

- **Disqualification of law firm representing plaintiff was not warranted even though partner at defendant's law firm, who was the husband of one of plaintiff's co-founders and directors, provided legal assistance to plaintiff in violation of his ethical duties.**

In a patent infringement action, a partner at one of the defendant's outside law firms who was not involved in the case, but who was the husband of one of plaintiff's co-founders and directors, provided legal assistance to plaintiff in violation of his ethical duties. Defendant moved to disqualify plaintiff's law firm as a result of being tainted by the conduct of the partner. The court denied defendant's motion.

Defendant argued that the partner and his law firm would be barred from being adverse to defendant in the pending matter because such matter is substantially related to work the law firm had done in other matters for defendant. Defendant further argued that plaintiff's law firm would be "infected" with partner's conflict and therefore must be disqualified.

The court found that partner himself never worked on any of defendant's matters, was involved in a different practice area and worked in an office that was different from those offices that handled defendant's patent matters. Although the court found that the partner acted contrary to his legal and professional duty, the court held there was no evidence that he possessed material confidential information about the defendant or that he had communicated substantively with plaintiff about the

pending litigation. The partner's involvement in the litigation "has been minimal at best." 2013 U.S. Dist. LEXIS 111496, at *22.

While there was evidence that plaintiff's co-founder and the partner's wife had forwarded to partner numerous emails reflecting plaintiff's counsel's advice in the litigation, such "unidirectional flow of information – away from the counsel of record, no less – does not suggest the existence of a material role being played by" the partner is this case. *Id*. at *32.

The court also found that plaintiff would suffer significant hardship by having its counsel disqualified. It would be difficult for plaintiff to find replacement counsel, would result in duplicative effort, and any such replacement of counsel would unduly delay prosecution of the case.

***IPVX Patent Holdings, Inc. v. 8x8, Inc.*, No. 4:13-cv-01707, 2013 U.S. Dist. LEXIS 178858 (N.D. Cal. Dec. 19, 2013)**

- **Disqualification of two attorneys from representing plaintiff not warranted where first attorney had no confidential information and did not represent plaintiff, and there was no evidence that such attorney shared material confidential information with the other attorney.**

In a patent infringement action, defendant moved to disqualify two attorneys from representing the plaintiff. The first attorney ("Luner") held a telephone meeting with the defendant's CEO & CFO to discuss possible representation. Defendant alleged that highly confidential information was disclosed during the meeting. Luner did not undertake representation of the defendant; instead, he became counsel to a predecessor of plaintiff in connection with a different lawsuit that already had been dismissed. Defendant moved to also dismiss the second attorney ("Yanney") on the grounds that Yanney was tainted by the conduct of co-counsel Luner.

The court first denied defendant's motion to disqualify Luner, the attorney who had consulted with defendant years before the action was filed. The court found that the telephone meeting had established a prima facie attorney-client relationship between Luner and the defendant even though no engagement had resulted. "'When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established prima facie.'" 2013 U.S. Dist. LEXIS 178858, at *7 (internal citation omitted).

The court sought to determine whether there was a "substantial relationship" between Luner's former representation of defendant and the current representation, and looked at whether confidential information material to the current representation normally would have been imparted to the attorney. The court considered the relationship between the former client and the attorney in addressing the legal problems in the former representation and the relationship between the subjects of the former and the current representations. The court concluded that, because the attorney's relationship to defendant had been only "attenuated," the court would not presume that Luner acquired confidential information material to the current representation. Further, the defendant was

unable to identify any specific products that had been discussed and, as a result, the court was not persuaded that any material confidential information had been disclosed.

Moreover, Luner was not counsel of record in this action for either plaintiff or plaintiff's predecessor. Since Luner was not involved in the current litigation, even in any of the related consolidated cases, the attorney could not be disqualified from the current action.

The court then went on to hold that Yanney, who was plaintiff's counsel, could not be disqualified by imputation. The court found insufficient evidence to create a reasonable probability that confidential information from the telephone meeting was divulged to Yanney, and that defendant's speculation that Luner provided confidential information was unfounded.

***Nextdoor.Com, Inc. v. Abhyanker,* No. C-12-5667, 2013 U.S. Dist. LEXIS 101440 (N.D. Cal. July 19, 2013)**

- **Law firm not disqualified from representing plaintiff, even though it previously represented defendant, because there was insufficient evidence that the prior representation was substantially related to the current adverse representation.**

Defendant moved to disqualify plaintiff's law firm in a dispute over intellectual property related to social network websites. The law firm previously had represented defendant in various corporate matters, but the firm's billing records indicated that the partner designated in the retainer agreement as the primary support partner with respect to intellectual property matters had never billed any time to defendant's matter. The court found that there was insufficient evidence that the prior representation was substantially related to the current adverse representation to warrant disqualification.

The court credited the statements in a declaration of an attorney at the law firm, not involved in the current proceeding, who had reviewed the file of the law firm's former representation of the defendant and his company and had determined that the representation had not included advice about intellectual property matters. According to the declaration, the law firm's prior representation had been limited to incorporating the defendant's company, drafting documents related to financing and corporate structure. "The fact that [the law firm] represented a corporation for the purposes of incorporation and related matters is not likely to put [the law firm] in the position where they would ordinarily be expected to have received confidences material to this representation (*e.g.*, identity and ownership of trade secrets)." 2013 U.S. Dist. LEXIS 101440, at*48-49. Bolstering this conclusion was the facts that the only attorneys who billed time to defendant's company were in the law firm's corporate practice group and that the attorney who had been designated lead on intellectual property matters did not bill any time to the matter.

The court also found it significant that the attorneys and paralegals who had spent the majority of the time handling defendant's matter no longer with were the law firm. While the attorney designated the lead on intellectual property matters still was with the law firm, "the fact that he did

not bill any hours on the [defendant's] matter suggests that he did not receive any confidential information in his role as an attorney at [the law firm]." *Id.* at *50.

The court also found that the law firm had effectively screened from the current matters the attorney designated the lead in intellectual property matters during the former representation, though only after defendant raised concerns about the conflict in the first-filed lawsuit between the parties. The screen applied not only to that attorney, but to all attorneys who had billed time to the former matter as well as to those who had attended social functions with defendant at that attorney's home.

***TRC & Assocs. v. Nuscience Corp.*, No. 2:13-cv-6903, 2013 U.S. Dist. LEXIS 162529 (C.D. Cal. Nov. 14, 2013)**

- **Disqualification was not warranted even though attorney represented other litigants against the same opponent, where he allegedly may have received the opponent's confidential trade secrets.**

In an action for fraud against a dietary supplement manufacturer and its domestic distributor brought by a customer, the defendants moved to disqualify the plaintiff's attorney. Concurrent with and prior to the representation of plaintiff, plaintiff's attorney also was representing two individuals who were sued by defendant manufacturer, one for misappropriation of trade secrets and unfair competition and the other, who was a former vice president of defendant manufacturer, for violating a separation agreement and other trade-secret related claims. In its lawsuit against the first individual, the defendant manufacturer prevailed, obtaining a judgment that prohibited the individual and his attorney from revealing trade secrets of manufacturer and from intentionally interfering with manufacturer's business. The defendants claimed that plaintiff's attorney, in bring this action, violated the judgment, and that representation of the former vice president constituted a conflict of interest because that individual shared manufacturer's confidential information with plaintiff's attorney.

In denying the motion for disqualification, the court found that defendants misinterpreted the judgment in the prior action, which has no bearing on plaintiff's right to file suit against manufacturer. Further, the subject matter of the current action (fraud) was entirely unrelated to the prior matter, and the complaint in this action revealed no trade secrets in violation of the judgment. The court also rejected defendants' claim that the former vice president shared confidential information with plaintiff's attorney. The court found no evidence that the former vice president, who's employment with manufacturer ended five years before this action was brought, had participated in any attorney-client privileged discussions regarding the current action. The court distinguished *Packard Bell NEC, Inc. v. Aztech Sys. Ltd.*, No. CV 98-7395, 2001 U.S. Dist. LEXIS 11194 (C.D. Cal. Jan. 22, 2001), where the former employee had a continuing fiduciary duty to his employer and participated in attorney-client privileged discussions while still employed.

***United States v. Kahre*, 737 F.3d 554 (9th Cir. 2013)**

- **Federal prosecutor who was sued in a *Bivens* action by the criminal defendant need not be disqualified absent proof of a conflict by clear and convincing evidence.**

Appellants Robert Kahre, Lori Kahre, and Alexander Loglia (collectively, "Kahre") were convicted for various criminal offenses arising from their use of gold and silver coins to pay employee wages, thereby avoiding the reporting of payroll and income taxes due. After Kahre's first trial ended without a verdict, Kahre moved to disqualify the prosecutor, an Assistant United States Attorney, on the ground that he had a conflict of interest due to his being a defendant in a related *Bivens* action filed by Kahre and others. Kahre also asserted that the prosecutor had made statements to the effect that the *Bivens* action was personal because it was threatening his job and pension. The district court denied the motion to disqualify.

Kahre appealed the denial of the motion to disqualify, along with several other issues, to the Ninth Circuit. The Ninth Circuit affirmed the denial. The court noted that it previously has held that the mere threat of civil litigation does not warrant a prosecutor's disqualification, but that it had not previously addressed disqualification premised on a pending civil action against the prosecutor. The court followed a D.C. Circuit case, *United States v. Kember*, 685 F.2d 451 (D.C. Cir. 1982), which held that a conflict "'would have to be very strong before disqualification would be justified.'" 737 F.3d at 573 (citing *Kember*, 685 F.2d at 459). If further followed *Kember* in holding that "proof of a conflict must be clear and convincing to justify removal of a prosecutor from a case." *Id.* at 574. Otherwise, prosecutors could be removed by a defendant's mere filing of a lawsuit against them.

***White v. Experian Info. Solutions*, No. SACV 05-01070, 2014 U.S. Dist. LEXIS 61433 (C.D. Cal. May 1, 2014)**

- **Where a concurrent conflict of interest arose in the context of the representation of a plaintiff class – specifically relating to a proposed settlement with an incentive award to lead plaintiffs only – the court declined to apply the automatic disqualification rule. Instead, the court applied a more flexible approach, ultimately concluding that disqualification was not warranted.**

This case concerns a conflict of interest within the context of a class action. Counsel represented a class suing several credit agencies for violations of the Fair Credit Reporting Act and its California counterpart, Civil Code section 1785.14(b). After reaching a settlement of the class action (which actually was several consolidated class actions), and in response to objections to the settlement by one of the lead plaintiffs in one of the class actions, counsel negotiated into the settlement an incentive award for the lead plaintiffs. The court approved the settlement with the incentive award. On appeal, the Ninth Circuit reversed and vacated the settlement, finding that the incentive award rendered those lead plaintiffs who signed onto to the settlement agreement inadequate class representatives under Rule 23(a)(4).

Following the reversal, one group of the class plaintiffs moved to disqualify the counsel who had drafted the incentive award into the settlement, arguing that the incentive award created a conflict of interest between the lead plaintiffs and the absent class members.

The district court analyzed the conflict and the appropriate remedy under California law, citing to the Central District's Local Rule 83-3.1.2, which specifies that the California Rules of Professional Conduct and the State Bar Act govern ethics issues arising in actions before the Central District. The district court then provided a lengthy and detailed discussion of California conflict rules under 3-310(C) and the various cases discussing the duty of loyalty. After noting that automatic disqualification usually is the remedy for a concurrent conflict among clients, the court noted that California is less clear on how that rule should be applied in the context of a class action. It cited a number of class action cases in which courts did not apply the automatic disqualification rule, but rather exercised discretion after balancing various competing interests.

After analyzing a number of cases, the district court held that the automatic disqualification rule was not appropriate in this case, but that instead California's disqualification rule should be applied "flexibly" in this context. 2014 U.S. Dist. LEXIS 61433, at *29. The district court emphasized that the conflict at issue was one that was temporary and was mooted when the Ninth Circuit vacated the settlement. The district court also discussed the various policy rationales for the automatic disqualification rule in other contexts, and concluded that none of those rationales applied here. For example, because the conflict no longer existed, there was no threat to counsel's duty of loyalty. Nor was there a risk that the conflict would "place well-meaning counsel in a position of choosing between clients." *Id.* at *31. It further noted there was no risk to the public confidence because the conflict was not on-going. In the end, the district court could "not find that there is a violation of loyalty to the class serious enough to warrant the same type of treatment as the most 'egregious' concurrent violations.'" *Id.* at *35.

***Yanez v. Plummer*, 221 Cal. App. 4th 180 (2013)**

- **Because the interests of an employee and his employer were adverse in connection with the employee's deposition in a separate lawsuit by a co-worker, in-counsel had a conflict of interest in representing both at the deposition.**

A former employee sued his employer for wrongful discharge, as well as the employer's in-house counsel for legal malpractice, breach of fiduciary duty, and fraud. The employer fired the former employee for dishonesty, citing a discrepancy between a deposition response and a witness statement, in both instances that the former employee gave in an unrelated lawsuit involving the injury of a co-worker. At the deposition, the in-house counsel had represented both the former employee and the employer. The former employee claimed that the alleged dishonesty was simply a miswording in his witness statement that the in-house counsel exploited for the benefit of the employer. The in-house counsel moved for summary judgment on the basis that the former employee had not sufficiently demonstrated causation, but the court denied the motion.

The former employee had been present when a co-worker suffered an accident. The former employee prepared two witness statements on the day of the accident. The first witness statement suggested that the former employee was aware that his co-worker had slipped and fallen, whereas the second more detailed witness statement expressly stated that the former employee had seen his co-worker slip and fall. When the co-worker sued the employer, the in-house counsel was assigned to defend the former employee in his deposition in co-worker's action. Before the former employee's deposition in that action, the in-house counsel told the former employee that he was the former employee's attorney for purposes of the deposition. In response to the former employee's expressed concern about his job, the in-house counsel assured the former employee that his job would be unaffected if he told the truth at the deposition. The in-house counsel did not tell the former employee about any conflict of interest raised by the in-house counsel representing both the former employee and the employer at the deposition.

At the deposition, the former employee testified that he had not witnessed the accident, but was aware of it shortly thereafter. He also testified as to several unsafe conditions at the accident site. The in-house counsel, in an apparent attempt to impeach the former employee's testimony, questioned the former employee regarding his second witness statement that said that he had seen the accident. The former employee admitted he had worded his second statement incorrectly. Following the deposition, the former employee was fired for violating the company's policy against dishonesty.

Because the former employee was aware of unsafe work conditions that may have contributed to his co-worker's injury, there were conflicting interests between the former employee and the employer. As a result, the in-house counsel was obligated under Rule of Professional Conduct 3-310(C) to obtain both the former employee's and the employer's informed written consent before representing both of them at the deposition, which he failed to do. Instead, not only did he represent both the former employee and the employer, he confronted the former employee at the co-worker's trial with his contradictory witness statement in order to benefit his other client, the employer. The court of appeal found that this was sufficient evidence of in-house counsel's malpractice and breach of fiduciary duty to withstand summary judgment.

DISCIPLINE

***In re Felicity S.*, 225 Cal. App. 4th 1389 (2014)**

- **Court declined to decide whether a court of appeal had the power to publicly admonish a lawyer, but found that public admonishment was unwarranted in the case before it in any event.**

Counsel was appointed as appellate counsel for a minor, Felicity, in the appeal of a petition to remove her from her mother. Counsel filed a brief on behalf of Felicity arguing that she should live with her mother, which was the opposite position taken by Felicity's trial counsel in the proceedings below. Because of that change in position, as well as several other issues that troubled the court, the court of appeal issued an Order to Show Cause ("OSC") why counsel should not be publicly admonished.

The court first addressed the threshold issue of whether it even had jurisdiction to consider admonishing counsel. Counsel argued that the matter before the court of appeal already had terminated when the court denied counsel's petition for a rehearing. The court rejected that argument, finding that jurisdiction continued under Civil Procedure Code section 187 until a remittitur to the juvenile court was issued.

Counsel also argued the court lacked subject matter jurisdiction because only the Supreme Court or the State Bar can discipline attorneys. Prior to 1951, courts of appeal and superior courts could disbar or suspend attorneys, but in a 1951 amendment to Business and Professions Code section 6100, those powers were taken away from courts of appeal and superior courts. Counsel argued that the power to admonish attorneys also was taken away by the same amendment. The court considered the argument, pointing out that the 1951 amendment did not expressly take away any powers from the courts of appeal or superior court, other than the power to disbar or suspend. The court ultimately concluded, however, that it need not decide whether it had the power to publicly admonish a lawyer because, in this case, public admonishment was unwarranted.

***In the Matter of Seltzer*, No. 11-O-12820, 2013 Calif. Op. LEXIS 23 (Apr. 16, 2013)**

- **The Review Department of the State Bar Court reduced an attorney's suspension from one year to six months after finding that she violated rules 3-110(A) and 3-700(D)(2), but that the aggravating factors did not warrant a one-year suspension.**

Attorney Margaret Alice Seltzer was hired by a construction company to resolve a dispute with a school district. The construction company paid Seltzer a $6,000 advance fee. Over the next few weeks, the client repeatedly called Seltzer asking about the status, but each time received either no response or a short response saying only that she was working on the matter. The client expressly asked multiple times if she had completed a demand letter, but was never provided with one.

Eventually, the client terminated Seltzer and demanded return of the $6,000 advance fee. Seltzer returned only $1,500 of the fee, providing the client with a bill for the remaining $4,500.

The State Bar Court found that Seltzer violated rule 3-110(A) by providing no service of value to her client and that she violated rule 3-700(D)(2) by failing to return unearned fees. In light of these violations and Seltzer's previous 60-day suspension for another matter, the State Bar Court recommended a one-year suspension.

The Review Department of the State Bar Court reduced the suspension from one year to six months. It found, as the State Bar Court did, that Seltzer willfully violated rule 3-110(A) by failing to perform legal services competently. It noted that "'[a]dequate communication with clients is an integral part of competent professional performance as an attorney.'" 2013 Calif. Op. LEXIS 23, at *14. It also found that Seltzer violated rule 3-700(D)(2) by failing to return $4,500 of the $6,000 advance fee after the client demanded its return.

The Review Department also agreed with the State Bar Court that there were three aggravating factors: (1) a prior discipline record; (2) uncharged misconduct (*i.e.*, failure to return the advance fee); and (3) lack of insight. It disagreed with the State Bar Court, however, that Seltzer's conduct was further aggravated by multiple acts of misconduct or significant client harm. As for the aggravating factor of a prior discipline record, the Review Department considered the aggravating weight greatly diminished because she was not disciplined for the prior act until after she committed the acts in question here. The Review Department agreed with the State Bar Court that there were no mitigating factors. However, in light of its analysis of the aggravating factors, the Review Department ordered a six-month suspension rather than a one-year suspension.

FEE AGREEMENTS

***Knight v. Aqui*, 966 F. Supp. 2d 989 (N.D. Cal. 2013)**

- **Contingency fee paid up front out of initial installments of settlement payments without regard to actual recovery by client not valid, at least not without the express agreement of the client and compliance with other statutory requirements.**

In this legal malpractice action, client claimed attorney violated her fiduciary duty and ethical responsibilities with respect to the contingency fee to be paid attorney in connection with the underlying action. Client entered into a contingency agreement providing for a contingency fee of 40%, but the agreement did not address timing of payment relative to client's receipt of settlement funds nor did it address installment payments. After the underlying action settled, attorney took her entire contingency fee from the initial payments received from the defendant. Defendant then became insolvent and failed to pay the remaining installments, which constituted the majority of the settlement amount.

Client brought this action, claiming breach and professional negligence by falsely advising client that the contingency agreement required attorney be paid before client, and by failing to advise client to seek independent counsel.

The court granted client's motion for partial summary judgment, finding that the attorney unlawfully misappropriated funds. The court noted that the contingency fee agreement did not comply with California Business and Professions Code section 6147, which requires that such fee agreements include statements as to how disbursements will affect the contingency fee and the client's recovery and that the fee is not set by law but is negotiable. Since the agreement in question here contained neither statement, the agreement was voidable at the option of the client. The court determined that failure to include the statutorily required statements meant that general rule of California law applied: a contingency fee is payable only as a client obtains recovery. That meant, in this case, the fee was payable pro rata from the periodic payments when, as and if actually received by the client. "An attorney whose fee agreement is silent as to how attorneys' fees shall be paid in the event of a structured settlement is permitted to receive fees only on the same pro rata basis that the client receives compensation." 966 F. Supp. 2d at 998, citing Cal. State Bar Form. Op. 1994-135.

San Diego County Bar Association Legal Ethics Opinion 2013-3 (2013)

Issue: Where an attorney and a client agree, in a contingency fee case, that the client will pay costs and expenses, may the attorney charge the client for providing in-house services such as secretarial overtime, photocopying, processing electronic discovery, electronic legal research, the cost of CDs, mileage and parking, meals, postage, and long distance telephone charges?

Answer: Rule of Professional Conduct, Rule 4-200(A) prohibits an attorney from entering an agreement for, or charging or collecting, an illegal or unconscionable fee. There is no authority, however, determining whether an attorney can bill his client for in-house services. ABA Formal Opinion 93-379, which has been endorsed by at least one California court (*In the Matter of Kroff*, 3 Cal. State Bar Ct. Rptr. 838 (1998)), allows an attorney to charge a client for in-house services as long as those services are actually specified in the initial fee agreement and are not unconscionable. Absent specification in the agreement, the attorney may charge a client for the direct cost of in-house services that are necessary for the representation. Unless allowed by agreement, however, the attorney may not add a sur-charge or otherwise make a profit on the services. The attorney also may bill a client for a reasonable allocation of overhead expenses directly associated with providing the in-house services.

MALPRACTICE CLAIMS

***McClintock v. West*, 219 Cal. App. 4th 540 (2013)**

- **Attorney who acted as guardian *ad litem* for husband in connection with a dissolution proceeding was covered by quasi-judicial immunity, and was not otherwise subject to legal malpractice liability for damages from the dissolution action.**

In *McClintock*, Attorney West was appointed as plaintiff's guardian *ad litem* when, upon the commencement of trial in his dissolution, plaintiff's attorney, Kaufman, advised and provided proof to the trial court that plaintiff had checked himself into a hospital in Massachusetts for severe depression. West, with Kaufman, negotiated stipulated judgments on various reserved issues with plaintiff's ex-wife. The court approved the stipulations. A final judgment was eventually entered, awarding sole legal and physical custody of plaintiff's children to his ex-wife, with future contact to occur only at the request of the minor children through a qualified therapist.

Plaintiff sued West for malpractice, alleging financial losses and loss of custody of his children. West successfully demurred on the basis that the doctrine of quasi-judicial immunity and the litigation privilege precluded plaintiff's claims. The court of appeal affirmed.

A guardian *ad litem*, even one who is an attorney, does not have an attorney-client relationship with her ward. A guardian *ad litem*'s role is as representative of the ward; she does not act as an advocate, and does not simply represent the ward's wishes. The court is in effect the guardian, and the guardian *ad litem* is but an officer and representative of the court. The guardian *ad litem* is an agent with limited powers, similar to the role of a conservator, who derives her authority from the power of the state to protect incompetent persons.

Judicial immunity bars civil actions against judges for acts performed in the exercise of their judicial functions and applies to all judicial determinations, including those rendered in excess of the judge's jurisdiction, no matter how erroneous or even malicious or corrupt they may be.

Quasi-judicial immunity extends absolute judicial immunity to persons other than judges if those persons act in a judicial or quasi-judicial capacity. The test to apply is whether a guardian *ad litem* fulfills a function that is intimately related to the judicial process. In the case at bar, the answer is yes.

Further, depriving a guardian *ad litem* of such immunity would both discourage individuals from serving, and also distort how she performed her role. The guardian *ad litem*'s job is acting in the ward's interest. Her ability to act would be compromised if the threat of future liability encouraged a guardian *ad litem* to put a ward's wishes above the court's interests. Sufficient mechanisms exist in the law to ensure accountability.

Because the guardian *ad litem* does not answer to the ward, but to the court, there is no basis to find an attorney-client relationship between the ward and the guardian *ad litem*. Moreover, there were no factual indicia of an attorney-client relationship. There was no attorney-client agreement, West

never appeared in court without plaintiff's attorney, West never signed a document as plaintiff's attorney, and West was never named an attorney in any document. The trial court properly sustained guardian *ad litem*'s demurrer to this claim without leave to amend.

***White Mountains Reinsurance Co. v. Borton Petrini, LLP*, 221 Cal. App. 4th 890 (2013)**

- **Although legal malpractice claims generally are not assignable, the court applied a narrow exception to the rule in the case of a transfer of the legal malpractice claim from one insurance company to another in the context of a broader sale of all of the first company's assets and liabilities to the second company.**

In *White Mountains*, the court bucked a long line of California authority holding that legal malpractice claims cannot be assigned, instead choosing to follow the reasoning of several out-of-court cases. In *White Mountains*, an insurance company had hired the law firm of Borton Petrini to defend its insured against claims arising out of an automobile accident. Early in the underlying case, the plaintiff had served a Civil Procedure Code section 998 offer to compromise, which Borton Petrini let lapse without a response. Later, the insurer sold all of its assets and liabilities, including the claim at issue in the underlying case, to another insurer. The other insurer then settled the underlying case for substantially more than the amount of the lapsed offer to compromise, and then sued Borton Petrini for legal malpractice.

The court discussed the long and consistent history of California's rule against assignment of legal malpractice claims, starting with the seminal case of *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389 (1976). *Goodley* and its progeny generally relied on the "'personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises, and public policy considerations based thereon.'" 221 Cal. App. 4th at 896 (citing *Goodley*, 62 Cal. App. 3d at 395). It then discussed a number of out-of-state cases and concluded that the reasoning in those cases was more relevant to the specific and narrow facts before it, and that the policy rationale of the California cases was not applicable. Accordingly, the court concluded that, in the instant case, the assignee had standing to assert the claim for legal malpractice. The court stated its holding – and the exception to *Goodley* and its progeny – narrowly. Specifically, it held that a legal malpractice claim is transferable to another party where:

> (1) the assignment of the legal malpractice claim is only a small, incidental part of a larger commercial transfer between insurance companies; (2) the larger transfer is of assets, rights, obligations, and liabilities and does not treat the legal malpractice claim as a distinct commodity; (3) the transfer is not to a former adversary; (4) the legal malpractice claim arose under circumstances where the original client insurance company retained the attorney to represent and defend an insured; and (5) the communications between the attorney and the original client insurance company were conducted via a third party claims administrator.

Id. at 892.

SANCTIONS

***Apple, Inc. v. Samsung Electronics Co.,* No. 5:11-cv-01846, 2014 U.S. Dist. LEXIS 11778 (N. D. Cal. Jan. 29, 2014)**

- **Court sanctioned lawyers for Samsung who mistakenly disseminated an unredacted expert report in violation of a protective order. The court was less troubled by the initial mistake than it was by the repeated disclosures and the failure to notify the other side of the mistake.**

In the course of one of the many pending patent litigations between Apple and Samsung, a junior associate at Samsung's counsel, Quinn Emanuel, mistakenly failed to redact certain information in a confidential, attorneys' eyes only expert report. The unredacted report was then sent to Samsung and subsequently provided to numerous parties – possibly hundreds – both within and outside of Samsung. The error came to light when the confidential information was used by Samsung during certain licensing negotiations with a third party. The Northern District issued an Order To Show Cause why sanctions should not be issued, and ultimately issued sanctions against Quinn Emanuel.

The court found that Quinn Emanuel had violated the protective order numerous times, including when the junior associate first produced the document with insufficient redactions. The court noted that mistakes like this may be inevitable, but that what was particularly troubling here was not the initial mistake, but the widespread and repeated distribution of the unredacted report and related information. The court concluded that the appropriate sanction should take into account "the totality of the circumstances surrounding each violation." 2014 U.S. Dist. LEXIS 11778, at *37. "Sanctions may be warranted where a relatively innocent violation leads [to] great harm, where there is strong evidence of bad faith or willful conduct (even if there is minimal evidence of harm), and certainly where both are present. In all circumstances, an appropriate sanction will stem from the balance of the two." *Id.* at *38.

Here, the court noted that the initial mistake by the junior associate might not warrant sanctions at all. But the court also noted that, given the significance of the confidential information and the steps both parties had taken to make sure information like this was protected, Quinn Emanual should have had more than one level of review (here, described as a junior associate working late at night) before allowing production of a confidential expert report. Even more troubling, however, was that Quinn Emanuel widely and repeatedly distributed the unredacted report, thereby compounding the initial error. The court also was troubled by the fact that, once an associate at Quinn Emanuel discovered the error and brought it to the attention of a more senior associate, they chose not to bring the matter to Apple's counsel's attention, notwithstanding the requirement under the protective order that they do so. The court ultimately awarded monetary sanctions against Quinn Emanuel, rejecting the more draconian sanctions suggested by Apple. The court commented that the monetary sanctions, coupled with "the public findings of wrongdoing, is, in the court's

opinion, sufficient both to remedy Apple['s] . . . harm and to discourage similar conduct in the future." *Id.* at *52-*53.

***Ellis v. Toshiba Am. Info. Sys., Inc.*, 218 Cal. App. 4th 853 (2013)**

- **Court sanctioned plaintiff class action counsel and refused her fee request in its entirety because she failed to comply with several court orders to produce electronic billing records to justify her multi-million dollar fee request.**

Lori Sklar represented plaintiffs in a class action against Toshiba America Information Systems, Inc. ("Toshiba"). The class action settled, and Sklar and her co-counsel, Caddell & Chapman, sought an award of attorneys' fees. Specifically, Caddell & Chapman sought $1.05 million in fees, while Sklar sought $24.7 million, which was approximately 25 percent of the settlement amount. The trial court approved the settlement, but allowed Toshiba to conduct discovery regarding Sklar's fee request.

Over the next several months, Toshiba tried unsuccessfully to obtain Sklar's unredacted electronic time records. Although Sklar produced pdf copies of the time records, there was a question as to whether those records actually were created contemporaneously, as Sklar represented. The court ordered production of electronic records and, subsequently, inspection of Sklar's computers by a neutral expert. Sklar repeatedly violated those court orders, and failed to meet and confer about the inspection.

The trial court entered monetary sanctions against Sklar in the amount of Toshiba's attorneys' fees incurred litigating the billing records issue. It also denied the entirety of Sklar's attorney's fees award, which Sklar had subsequently reduced from $24.7 million to approximately $12 million.

The court of appeal affirmed the award of sanction and the denial of Sklar's attorneys' fees recovery. The court of appeal rejected Sklar's argument that she was substantially justified in disobeying the trial court orders because the records sought contained privileged information. The court noted that the trial court had entered a stipulated protective order which, among other things, provided that Sklar's production of the electronic information did not constitute a waiver of any party's claims of privacy, confidentiality, or privilege. The court further noted, "[A] party may not defend against enforcement of a court order by contending merely that the order is legally erroneous." 218 Cal. App. 4th at 880 (internal citation and quotation omitted).

The court of appeal also stated that the trial court has broad discretion to determine the amount of Sklar's reasonable fee, and that the trial court did not abuse that discretion when it awarded her zero fees. The court noted that "Sklar's billing records were 'unusable' for the purpose of calculating the lodestar. The records were inconsistent, contained omissions, and billing entries were inaccurate and even contradictory." *Id.* at 883. The court further found that "the contradictory and multiple billing 'destroys Ms. Sklar's credibility' as to the hours she claimed to have spent during the entire litigation . . . ." *Id.* at 883. In light of these problems, the trial court was unable "*even to*

apply the lodestar method." *Id.* The court also concluded that Sklar's initial request for over $24 million in fees, even though she subsequently reduced it by half, provided further grounds to deny her any fees. The court quoted the California Supreme Court case of *Serrano v. Unruh*, 32 Cal. 3d 621, 635 (1982), which held, "'A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.'" *Id.* at 884.

***Target Nat'l Bank v. Nelson*, 503 B.R. 466 (Bankr. C.D. Cal. 2013)**

- **Bankruptcy court issued sanctions against law firm that filed dischargeability complaint against chapter 7 debtor that included objectively baseless allegations.**

Elizabeth Blanche Nelson filed a chapter 7 bankruptcy petition which, among other things, listed an unsecured credit card debt to Target. Target referred the account to the law firm of Weinstein, Pinson & Riley ("WPR"). WPR, on behalf of Target, filed a dischargeability complaint under Sections 523(a)(2)(A) and (C) of the Bankruptcy Code. The complaint alleged that Nelson had incurred within 90 days of her bankruptcy filing charges not reasonably necessary for her maintenance, had engaged in fraud, and had engaged in "credit card kiting." At the trial, WPR was not prepared to proceed, and the court dismissed the complaint. It then issued an Order To Show Cause ("OSC") why sanctions should not be imposed against WPR pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 9011 (the bankruptcy equivalent to Federal Rule of Civil Procedure, Rule 11).

After a hearing on the OSC, the court found that sanctions against WPR were warranted. The court first clarified that bankruptcy courts have express authority under the Bankruptcy Code and the FRBP to sanction attorneys. Specifically, Rule 9011 "allows a bankruptcy court to impose sanctions in three situations – where papers are submitted [sic] demonstrate factual frivolity, legal frivolity, or where papers are submitted for an 'improper purpose.'" 503 B.R. at 473 (citing *Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 892 F.2d 802, 808 (9th Cir. 1989)). The court found that, in filing the dischargeability complaint, WPR lacked "an objectively reasonable basis" to conclude that certain of Nelson's charges were for luxury goods, as the complaint alleged. The court also found that the complaint's allegations of fraud and credit card kiting were objectively baseless within the meaning of Rule 9011. In response to WPR's argument that the allegations were made in good faith, the court stated, "FRBP 9011 makes no exception for a 'pure heart, empty head' defense." *Id.* at 479 (citing *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986)).

In deciding the amount and type of sanctions, the court noted that WPR was not forthright in answering questions about the firm's history with sanctions. It also rejected WPR's argument that it relied on a computer program, dubbed FAST (Fraudulent Activity Screening Technology), which "purportedly 'analyzes many indicia of fraud that are identified as factual elements of objective intent to commit fraud. . . .'" *Id.* at 481. The court stated, "it is unreasonable to delegate this legal decisionmaking process to a non-attorney, let alone a computer system." *Id.* at 482. The court

ordered WPR and one of its partners to pay $5,000 each in sanctions, and to report the sanctions order not only to the State Bar, but also to the Offices of the U.S. Trustee of several courts, and to several pro bono legal service entities who represent debtors in bankruptcy proceedings.

STATUTE OF LIMITATION

***Lee v. Hanley*, No. G048501, 2014 Cal. App. LEXIS 620 (July 15, 2014)**

- **Client's claim for return of unearned attorneys' fees was not subject to the one-year statute of limitations of Civil Procedure Code section 340.6 because the alleged wrongful retention of the fees was not "in the performance of professional services."**

Attorney Hanley represented Lee in a litigation matter. After the matter settled, Lee sought a refund of unearned attorneys' fees, which Hanley refused to return. Lee sued Hanley for return of the funds, but the court sustained a demurrer to Lee's complaint on the ground that the claim was time-barred under Civil Procedure Code section 340.6.

The court of appeal reversed, finding the alleged wrongful conduct did not arise "in the performance of professional services," as required for Section 340.6 to apply. The court specifically noted that Lee's claim could be pled as one for conversion, which cannot be considered as arising in the performance of professional duties. In so finding, the court distinguished *Levin v. Graham & James*, 37 Cal. App. 4th 798 (1995), and *Prakashpalan v. Engrstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105 (2014), both of which broadly construed the "in the performance of professional services" language of Section 340.6. The court described the alleged conduct of Hanley as more akin to stealing, which cannot be part of the professional services. It also noted that the unearned fees were paid before Hanley began performing legal services for Lee.

The court also analyzed the legislative history of Section 340.6, concluding that it was intended to apply only to legal malpractice claims, and thereby rejecting the broader application of Section 340.6 followed in other cases. In so finding, the court agreed with *Roger Cleveland Golf Co., Inc. v. Krane & Smith APC*, 225 Cal. App. 4th 660 (2014). The court also found that the plain language of Section 340.6 supported the narrower interpretation.

***Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105 (2014)**

- **Claim for wrongfully withholding settlement funds is a claim arising out of the provision of legal services and thus subject to the one-year statute of limitations of Civil Procedure Code section 340.6. In defending against such a claim, information about other clients' recovery in the aggregate settlement is not confidential.**

Defendant law firm Engstrom represented plaintiffs in several real estate litigation matters, including claims arising from the 1994 Northridge earthquake. After settling one of the matters, plaintiffs learned there was over $22 million of settlement funds obtained on behalf of 93 clients that was unaccounted for. Plaintiffs claimed that Engstrom wrongfully withheld the funds. In another of the matters, plaintiffs claimed Engstrom had a conflict of interest in that it was representing another party with conflicting arguments about the land at issue. Plaintiffs sued Engstrom for, among other things, professional negligence, fraud, concealment, and breach of

fiduciary duty. The court sustained Enstrom's demurrer without leave to amend, finding that many of the claims were barred by the one-year statute of limitations of Civil Procedure Code section 340.6. Other claims the court dismissed pursuant to *Solin v. O'Melveny & Myers*, 89 Cal. App. 4th 451 (2001), because Engstrom could not defend itself without breaching its attorney-client privilege vis-à-vis one or more of its other clients.

The court of appeal reversed the trial court's ruling with respect to seven of the causes of action, finding that plaintiffs had constructive knowledge of the facts of Engstrom's wrongful conduct more than a year before filing the lawsuit. Thus, plaintiffs' claims for professional negligence and breach of fiduciary duty were time barred. With respect to the claims arising out of the wrongful withholding of settlement funds, the court of appeal rejected plaintiffs' argument that such alleged wrongdoing was a fraud separate and apart from Engstrom's provision of legal services, and thus not subject to the one-year statute of limitations of Section 340.6. It found that only fraud claims were excluded from Section 340.6 and, thus, only those claims survived the one-year statute of limitations. The court noted that plaintiffs' fraud claims were saved by the discovery rule, whether it applied the general fraud statute of limitations of Civil Procedure Code section 338(d) or the more specific statute governing trust accounts, Probate Code section 16460. The court ultimately applied Probate Code section 16460 because it was the more specific statute.

The court of appeal also overruled the trial court's holding with respect to Engstrom's need to disclose privileged information in order to defend itself. Specifically, the court held that information about another client's settlement under an aggregate settlement is not confidential information, and thus Engstrom was not prevented from disclosing such information to plaintiffs.

On the various other claims relating to the conflict of interest and Engstrom's concealment of that conflict, the court of appeal held that plaintiffs were unable to plead causation – that is, how the conflict caused then to settle the underlying matter for less than they otherwise would have.

***Roger Cleveland Golf Co. v. Krane & Smith, APC*, 225 Cal. App. 4th 660 (2014)**

- **Court rejected sister court rulings that a malicious prosecution action against an attorney is governed by the one-year statute of limitations of Civil Procedure Code section 340.6, finding instead that it is governed by the more general malicious prosecution statute of Section 335.1.**

Attorneys represented plaintiff Sportsmark Trading, Ltd. ("Sportsmark") in a lawsuit against Roger Cleveland Golf Company, Inc. ("RCG"). The lawsuit resulted in a nonsuit and dismissal of Sportsmark's complaint on April 26, 2010. On June 21, 2010, Sportsmark filed a notice of appeal. The appeal was dismissed on February 2, 2011. On May 24, 2011, RCG filed a malicious prosecution action against Sportsmark and Attorneys. Thus, the malicious prosecution action was filed 13 months after the underlying lawsuit was dismissed. During those 13 months, however, an appeal was pending for over eight of them.

Attorneys filed an anti-SLAPP motion, pursuant to Civil Procedure Code section 425.16(b)(1). Among other things, Attorneys argued that RCG was unlikely to prevail because its claim against Attorneys was barred by the one-year statute of limitations of Civil Procedure Code section 340.6, which it argued was not tolled during the pendency of Sportsmark's appeal. The trial court granted the anti-SLAPP motion, agreeing that a malicious prosecution action is governed by Section 340.6, and further finding that the running of the one-year statute was not tolled while Sportsmark's appeal was pending.

The court of appeal affirmed the trial court's order granting the anti-SLAPP motion, but only because it found that RCS had not met its burden of establishing a probability of prevailing on the merits. On the issue of the statute of limitations, the court of appeal disagreed with the trial court. Specifically, the court of appeal found that Section 340.6 does not provide the statute of limitations for malicious prosecution actions; rather, the more general two-year malicious prosecution statute of limitations found in Civil Code section 335.1 applied to such actions, even if filed against an attorney. Accordingly, RCG's lawsuit against Attorneys was timely.

In so finding, the court expressly disagreed with two prior decisions of different appellate districts, both of which found that Section 340.6 applies to any action against an attorney arising from his legal representation, other than actual fraud. *See Vafi v. McCloskey*, 193 Cal. App. 4th 874 (2011), and *Yee v. Cheung*, 220 Cal. App. 4th 184 (2013). As the court noted, "[W]e are not bound by opinions of other District Court of Appeal. Unlike the *Vafi* and *Yee* courts, we read the language in *section 340.6* as a professional negligence statute, similar to *section 340.5*, the statute of limitations applicable to a claim for professional negligence of a health care provider." 225 Cal. App. 4th at 677 (internal citation omitted). Having decided that Section 340.6 does not apply to malicious prosecution actions, the court of appeal then concluded that the limited tolling provisions of Section 340.6 do not apply, and the more general tolling provisions of Section 335.1 do. Accordingly, the court of appeal found that RCG's claim was tolled during the pendency of the appeal, although that was irrelevant because RCG's claim would have been timely under Section 335.1 with or without tolling.

UNAUTHORIZED PRACTICE OF LAW

***In the Matter of Huang*, Nos. 11-0-15502, 11-0-19312; 12-0-14025, 2014 WL 232686 (Cal. State Bar Ct. Jan. 16, 2014)**

- **Lawyer suspended for three years for failing to competently supervise non-lawyers performing loan modification services for clients, thereby aiding and abetting the unauthorized practice of law.**

Jack Chien-Long Huang, a lawyer, commenced a loan modification practice with two non-lawyers, Campoy and Martinez, who had a loan modification business. The non-lawyer staff of the new practice performed all loan modification services. Huang instructed the staff not to give legal advice and to refer any cases to him where a bank denied a loan modification application or where a client complained. As the business grew, Huang lost control over it. In March 2011, he discovered accounting irregularities and learned that his employees were violating office procedures. As a result, Huang fired his entire staff of 30, including Campoy and Martinez. When he tried to retrieve his files, however, Campoy and Martinez changed the locks and threatened Huang with physical violence. Huang then notified the District Attorney's Office and the State Bar.

The State Bar charged Huang with 49 counts of misconduct based on the complaints of nine loan modification clients. Among the charges were several counts of failing to perform competently by not supervising non-attorney staff, in violation of Rule 3-110(A). The hearing judge found him not culpable, but the Review Department disagreed. It noted that "[u]nder his standard procedures, he was not involved in any case unless his staff consulted him. Thus, in a routine client request for loan modification, Huang knew that nonattorneys performed *all* legal services under his fee agreement. These activities constituted the practice of law." WL 232686, at *7. Accordingly, Huang violated Rule 3-110(A). Analogizing the case to *In the Matter of Jones*, 2 Cal. State Bar Ct. Rptr. 411 (1993), the Review Department recommended that Huang be suspended for three years.

***In the Matter of Lenard*, 2013 Calif. Op. LEXIS 22 (Apr. 15, 2013)**

- **The State Bar recommended disbarment of a California attorney who had engaged in the unauthorized practice of law in nine other states, rejecting the argument that the State Bar lacked jurisdiction to assess whether the rules of practice of other states had been violated. The attorney's prior record of three previous disciplines weighed heavily in favor of disbarment.**

Richard Allen Lenard, a lawyer licensed only in the state of California, was charged with engaging in the unauthorized practice of law. Specifically, Lenard contracted with three consumer debt relief companies to provide legal services for clients regarding their consumer debt. Clients and creditors were located in various states. Lenard entered into a Legal Services Agreement with each of the clients on behalf of the "Law Offices of Richard Lenard, by Richard Lenard, Attorney at Law." Nowhere in the Agreement did it indicate that Lenard was licensed to practice only in California,

although it did state that the law firm was "not licensed to practice in all states." Among the limited services Lendard provided to the clients, he wrote cease and decist letters to creditors on his law firm letterhead and looked into the clients' potential to file for bankruptcy.

The State Bar court first rejected Lenard's objection that the State Bar did not have jurisdiction to examine the practice rules of other states. Citing Rules of Professional Conduct, Rule 1-300(B), which states, "A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction," the State Bar court looked at the rules of nine different states in which Lenard allegedly practiced. In each case, the court concluded that Lenard had violated the rules by engaging in the unauthorized practice of law in that state. In so concluding, the court rejected Lenard's argument that his services were reasonably related to his practice in California, which is an exception under ABA Model Rule 5.5(c)(4) (the rule applicable to seven of the nine states at issue).

After concluding that Lenard had engaged in the unauthorized practice of law, the court next looked at any aggravating and mitigating circumstances, as it was required to do under Standards for Attorney Sanctions for Professional Misconduct, Standard 1.2(b) & (e). The court found several aggravating circumstances, including Lenard's prior record of three disciplines, which it described as "a very significant factor in aggravation." 2013 Calif. Op. LEXIS 22, at *19-*20. On the side of mitigation, the court found only that Lenard had cooperated in the State Bar proceedings, but considered mitigation diminished because Lenard continued to dispute culpability. Accordingly, the State Bar court recommended disbarment, noting, "Standard 1.7(b) provides that an attorney who commits professional misconduct who 'has a record of two prior impositions of discipline . . . shall be disbar[red] unless the most compelling mitigating circumstances clearly predominate.'" *Id.* at *25. It found that Lenard did not "present compelling mitigation." *Id.*

***In re Marriage of Bianco*, 221 Cal. App. 4th 826 (2013)**

- **Attorney not subject to sanctions for violating the Rules of Professional Conduct in a family law proceeding.**

Attorney was sanctioned by a trial court for violating the Rules of Professional Conduct for negligently hiring an attorney ineligible to practice law to assist attorney in representing wife in a dissolution trial. The trial court learned on the last day of trial that attorney's co-counsel was ineligible to practice law due to failure to comply with mandatory continuing legal education requirements. The trial court declared a mistrial and granted husband sanctions under California Rule of Court 2.30.

Rule of Court 2.30 does not authorize a trial court to issue sanctions against an attorney for violating Rule of Professional Conduct 1-300, which prohibits a member of the bar from aiding any person in the authorized practice of law. Rule of Court 2.30(b) authorizes sanctions only for violations of "the rules in the California Rules of Court relating to general civil cases, unlawful

detainer cases, probate proceedings, civil proceedings in the appellate decision of the superior court, and small claims cases."

The court of appeal held that the trial court abused its discretion in sanctioning the attorney under Rule 2.30 for two reasons. First, Rule of Court 2.30 does not authorize sanctions for violations of the Rules of Professional Conduct, which are rules of the State Bar, not Rules of Court. Second, Rule of Court 2.30 applies to general civil cases, not family law proceedings.

Orange County Bar Association Formal Opinion 2014-1 (2014)

[See discussion under Duty of Candor]

WITHDRAWAL

***Graves v. McEwen*, 731 F.3d 876 (9th Cir. 2013)**

- **Ninth Circuit held that counsel appointed to pursue a habeas appeal for a criminal defendant may withdraw by filing an *Anders* brief informing the court that there are no non-frivolous grounds for appeal.**

Kinte Graves was convicted of various felonies; those convictions were affirmed on appeal. Graves then filed a 28 U.S.C. Section 2554 habeas corpus petition to the Eastern District. The court denied the petition, but issued a certificate of appealability on five issues. The court then appointed appellate counsel under the Criminal Justice Act, 18 U.S.C. § 3006A.

Counsel filed an opening brief in the style required by *Anders v. California*, 386 U.S. 738 (1967) (an "*Anders* brief"). An *Anders* brief is one in which appointed appellate counsel informs the court that none of the issues warrant appellate relief and requests to withdraw from the representation. An *Anders* brief is mandated where appellate counsel in a direct appeal of a criminal conviction does not believe there are any non-frivolous issues for appeal.

Here, Graves filed a *pro se* "Declaration of Conflict," requesting that the court strike the *Anders* brief and substitute counsel. The Ninth Circuit concluded that counsel had appropriately filed the *Anders* brief and denied Graves' motion.

The Ninth Circuit recognized that there was no clear consensus, either within the Circuit or around the country, on whether an *Anders* brief was required or even appropriate in a collateral post-conviction review proceeding. Some courts have concluded that an *Anders* brief only is necessary and appropriate in a direct appeal in order to safeguard a defendant's Sixth Amendment right to direct appellate counsel. The Sixth Amendment does not guarantee right to habeas appellate counsel. The Ninth Circuit relied on its Rule 4-1, which it concluded directly applies to habeas appeals. Specifically, Rule 4-1(c)(6), which expressly deals with withdrawal of counsel appointed under the Criminal Justice Act, provides, "'[I]f after conscientious review of the record appointed counsel believes the appeal is frivolous, on or before the due date for the opening brief, appointed counsel shall file a separate motion to withdraw and opening brief that identifies anything in the record that might arguably support the appeal. . . . *See Anders v. California*, 386 U.S. 738. . . . The cover of the opening brief shall state that the brief is being filed pursuant to *Anders v. California*." 731 F.3d at 879-80 (citing Rule 4-1(c)(6)). Accordingly, the Ninth Circuit concluded that, even though an *Anders* brief is not constitutionally mandated by the Sixth Amendment in a habeas appeal when appointed counsel seeks to withdraw, Ninth Circuit rules expressly contemplate following that procedure.

State Bar of California Formal Opinion 2014-190 (2014)

Issue: Upon the dissolution of a law firm, what duties do the attorneys affiliated with the firm owe to a client of that firm? Does it matter if the attorney directly provided legal services to that client prior to the firm's dissolution? Do the steps an attorney must take depend on the nature of the attorney's position with the firm?

Answer: Rules of Professional Conduct, Rule 3-700(A)(2) requires that an attorney withdrawing from a representation of a client take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. . . ." The requirements of Rule 3-700(A)(2) apply when an attorney's withdrawal is prompted by his firm's dissolution. In the event of dissolution, all attorneys with the dissolving firm – whether employed by or partners of the firm – must comply with Rule 3-700(A)(2), regardless of their connection to the specific client or the specific nature of their affiliation with the firm. However, what "reasonable" steps an attorney must take to protect a particular client's rights may vary considerably depending on the circumstances, including the attorney's relationship to the client and its matter and the attorney's position within the firm.

MISCELLANEOUS ISSUES

Candor to the Court

Orange County Bar Association Formal Opinion 2014-1 (2014)

Issue: When a lawyer "ghostwrites" for another lawyer a brief filed with a California court, must the fact of the ghostwriting be disclosed to the court or the client? If the ghostwriting lawyer is outside of California and not admitted to practice in California, has he or she engaged in the unauthorized practice of law?

Answer: Unless the attorneys intend to seek from the court recovery of fees incurred by the ghostwriting attorney, the fact of the ghostwriting need not be disclosed to the court. California Rule of Court 3.37 expressly allows ghostwriting without disclosure to the court in the context of the representation of a *pro se* litigant. The Orange County Bar Association concluded that the rule should be no different where the attorney is ghostwriting for another attorney instead of for a *pro se* litigant. It opined that ghostwriting did not violate either lawyer's duty of candor to the court, as provided in Business and Professions Code section 6068(d) or Rule of Professional Conduct 5-200(B). The opinion further concluded that ghostwriting must be disclosed to the client only if it would be considered a "significant development," as required by Rule 3-500. Factors to consider are "whether responsibility for overseeing the clients' matter is being changed" and "whether the new attorney will be performing a significant portion or aspect of the work." Formal Op. 2014-1 (quoting *In re Wright*, 290 B.R. 145, 151-52 (Bankr. C.D. Cal. 2003)).

On the issue of whether a non-California attorney can ghostwrite for a California attorney in a California proceeding, the opinion concludes that it will depend on the specific facts, including whether the out-of-state attorney had significant contact with the client.

Civil Rights

***Law School Admission Council, Inc. v. Cal.*, 222 Cal. App. 4th 1265 (2014)**

- **Reversing order preliminarily enjoining the State from enforcing Education Code section 99165.5, which required the non-profit company that administers the LSAT exam to refrain from informing law schools that specific applicants received disability accommodations in connection with the exam.**

The Law School Admission Counsel ("LSAC"), which administers the LSAT, challenged California Education Code section 99165.5, which was signed into law in September 2002 and required LSAC to provide certain testing accommodations to test subjects with various disabilities. The statute also prohibited LSAC from notifying the recipients of test scores (*i.e.*, law schools) of an applicant's accommodation. Among other things, under its current policy, LSAC's reporting to law schools of test scores of applicants provided accommodations differed from its reporting of test scores of other applicants such that law schools would know which applicants' received

accommodations. According to LSAC, test scores of applicants' receiving accommodations were not comparable to those of other applicants, which is why they so notified law schools.

LSAC filed a complaint for declaratory and injunctive relief, challenging the constitutionality of Section 99165.5 under, among other things, the Equal Protection Clause. The trial court granted a preliminary injunction, finding a likelihood that LASC would prevail on its claims because the statute lacked a rational basis for directing its prohibitions against LSAC exclusively, and not other testing entities.

The court of appeal reversed the entry of the preliminary injunction. It found that LASC was not similarly situated with other testing entities with respect to the particular statutory provisions at issue and, thus, the statute did not violate the Equal Protection Clause. Among other things, the LASC had a more onerous procedure for applicants to request accommodations than did other testing entities. This created a gap between those who could afford to meet the procedural requirements and those who could not. The court noted that the legal profession had a disproportionately low percentage of disabled lawyers, which might be explained by the more onerous requirements to obtain accommodations when taking the LSAT.

The court also addressed LSAC's argument that the statute's limitation on how and what it could inform law schools regarding applicants' test scores abridged its right of free speech. The court first determined that LSAC's freedom to inform law schools of test results should be analyzed as commercial speech, subject only to intermediate scrutiny. The court concluded that the State had a substantial interest in reducing discrimination based on disabilities, but also concluded that the State had not met its burden of proving that Section 99165.5 would further that interest. Nor could it conclude, however, that the State would not be able to carry that burden at trial. Accordingly, it found that granting the preliminary injunction on this basis was reversible error. The court also rejected LSAC's arguments that Section 99165.5 constituted an impermissible special legislation or bill of attainder.

Conspiracy

***Stueve v. Kahn*, 222 Cal. App. 4th 327 (2013)**

- **Civil Code section 1714.10 does not require a court to strike former clients' facially valid action against law firm, filed without advance court approval, alleging that firm attorneys conspired with others to siphon off client assets through fraudulent estate planning, including the diversion of those assets to entities created and controlled by other clients of the firm.**

In *Steuve,* former clients brought action against attorneys and Law Firm for conspiracy and other causes of action. Law Firm moved to strike under Civil Code section 1714.10. Trial court granted the motion, ordering all conspiracy causes of action stricken. The court of appeal reversed.

Civil Code section 1714.10 was enacted to combat the use of frivolous conspiracy claims brought as a tactical ploy against attorneys and their clients, designed to disrupt the attorney-client relationship. The statute was designed to perform a gatekeeping function, and requires a plaintiff to establish a reasonable possibility of prevailing before she can pursue a cause of action for civil conspiracy between an attorney and his or her client arising from any attempt to contest or compromise a claim or dispute.

In the case at bar, none of the claims arose from an attempt to contest or compromise a claim or dispute, but rather arose from transaction advice. The statute does not impede a plaintiff's pursuit of a potentially meritorious claim against a firm that is alleged to have conspired to abscond with a client's assets.

Debt Collection

***Green v. Creditor Iustus Remedium, LLP*, No. 1:13-CV-01414, 2013 U.S. Dist. LEXIS 161298 (E.D. Cal. Nov. 12, 2013)**

- **California's Rosenthal Fair Debt Collection Practices Act ("RFDCPA") expressly exempts "lawyers" from its coverage; that exemption applies equally to law firms.**

Defendant Creditor Iustus Remedium ("CIR") was a law firm engaged in debt collection for its clients. After reaching a settlement with debtor Terry Green, Green sued CIR for violating, among other things, California's Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ. Code §1788.2. CIR moved to dismiss on the ground that law firms were expressly exempt from the RFDCPA. The language at issue was the RFDCPA's definition of "debt collector," which stated that it "does not include an attorney or counselor at law." 2013 U.S. Dist. LEXIS 161298, at *10. CIR argued that this attorney exemption also applied to law firms, like CIR.

The court noted that there was a split in authority among district courts on the issue of whether the attorney exemption in fact applied to law firms. The court then discussed at length the Eastern District's recent *Vo v. Nelson & Kennard* decision, 931 F. Supp. 2d 1080, 1087-94 (E.D. Cal. 2013), which reviewed the current state of the law and analyzed the issue in detail. In particular, *Vo* explicitly rejected a California case, *Carney v. Rotkin, Schmerin & McIntyre*, 206 Cal. App. 3d 1513 (1988), as a basis for including law firms within the exemption. Instead, *Vo* found that only lawyers, and not law firms, were regulated by the State Bar and that, accordingly, exempting law firms from the RFDCPA would leave them unregulated.

Green, however, disagreed with *Vo*. It concluded that the language exempting lawyers from liability under the RFDCPA also applied to lawyers, "for what is a law firm engaged in the process of debt collection made up of other than attorneys and their employees." 2013 U.S. Dist. LEXIS at *20. "For better or worse, *Cal. Bus. & Prof. Code § 6077.5*, hands off discipline of such entities to the State Bar." *Id.*

***People v. Persolve, LLC*, 218 Cal. App. 4th 1267 (2013)**

- **Debt collection company's alleged violation of California and federal debt collection statutes was not protected by the litigation privilege of Civil Code section 47(b), notwithstanding that the conduct related to litigation.**

The State of California filed a complaint against Persolve LLC, a debt collection company, for violation of the Unfair Business Practices Act, Bus. & Prof. Code §§ 17200 *et seq*., alleging that Persolve's debt collection practices violated both California's Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§ 1788 *et seq.*, and the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* Specifically, the State alleged that Persolve sent letters to debtors that were misleading and unlawfully threatening. Persolve demurred to the complaint, arguing that its activity was related to litigation and, accordingly, was absolutely protected by the litigation privilege, Cal. Civ. Code § 47(b). The court sustained the demurrer without leave to amend.

The court of appeal reversed, finding that Persolve's conduct was not protected by the litigation privilege, notwithstanding that it was related to litigation. The court acknowledged that the litigation privilege "covers communications that have some connection or logical relation to the action," and that it is "absolute in nature, applying to all publications irrespective of their maliciousness." *Id.* at 1273 (internal citations omitted). But the court also noted that courts have found exceptions to the litigation privilege where the alleged conduct violates some specific state law. For example, courts have found that "the litigation privilege does not apply to perjury, subornation of perjury, false report of a criminal offense, and attorney solicitation through the use of runners and cappers." *Id.* at 1274 (internal citations and quotations omitted).

Here, the alleged conduct expressly violates the California Fair Debt Collection Practices Act and the equivalent federal Act. Citing *Komarova v. National Credit Acceptance, Inc.*, 175 Cal. App. 4th 324, 339-40 (2009), the court found that those statutes are more specific than Civil Code section 47(b) and, thus, rules of statutory construction mandates that the conflict between those statutes and Section 47(b) be resolved in favor of those statutes. The court rejected Persolve's argument that, whether or not the California Fair Debt Collection Practices Act and the federal Act are more specific than Section 47(b), Section 17200 is not more specific, as other courts have found. *See, e.g.*, *Rubin v. Green*, 4 Cal. 4th 1187, 1203-04 (1993). But *Rubin* and other similar cases were not based on the violation of an express provision of a borrowed statute, as this case was. Accordingly, the court held, "Where, as here, the 'borrowed' statute is more specific than the litigation privilege and the two are irreconcilable, unfair competition law claims based on conduct specifically prohibited by the borrowed statute are excepted from the litigation privilege." 218 Cal. App. 4th at 1276.

***Steiner v. Super. Ct.*, 220 Cal. App. 4th 1479 (2013)**

- **Trial court violated an attorney's constitutional right to speech when the court ordered her to remove two pages from her website, discussing her success in similar actions, to keep the jury from seeing those pages.**

Steiner arose out of asbestos litigation against auto manufacturers and distributors. After a jury was empaneled, manufacturers filed a motion for an order requiring plaintiff's attorney to remove pages from her law firm internet website touting recent successes against auto manufacturers in similar actions. The trial court granted the motion, and ordered jurors not to do any web searches regarding the attorneys. Plaintiffs, their attorney, and her law firm filed a petition for mandamus. The court of appeal denied the petition. The Supreme Court granted review and transferred with instructions to issue an order to show cause. The court of appeal exercised its discretion to reach the petition on the merits, even though the underlying trial had since concluded. The court held that the order was more restrictive than necessary, and thus violated free speech. However, the order was no longer in effect. Thus no relief could be granted and so the court denied the petition for writ of mandate.

Orders which restrict or preclude a citizen from speaking in advance, known as prior restraints, are disfavored and presumptively invalid. An order restricting the speech of trial participants, typically a gag order, is a prior restraint. A court seeking to ensure a fair trial may not impose a prior restraint unless the gravity of the evil, discounted by the improbability, justifies such invasion of free speech as is necessary to avoid the danger.

As a general rule, gag orders on trial particpants are subject to strict scrutiny, and may not be imposed unless the speech sought to be restrained poses a clear and present danger or serious or imminent threat to a protected competing interest, the order is narrowly tailored to protect that interest, and no less restrictive alternatives are available. The trial court did not apply this or any other standard because auto manufacturer's motion did not address First Amendment concerns.

On appeal, manufacturer contends the order was not subject to strict scrutiny, but rather the less restrictive standard for commercial speech. Lawyer advertising is commercial speech and accorded an intermediate level of First Amendment protection. To determine whether a state regulation on commercial speech is constitutionally valid under an intermediate standard, the court must determine 1) whether the speech concerns lawful activity and is not misleading. If it satisfies that criteria, the court must decide 2) whether the asserted governmental interest is substantial, 3) whether the restraint directly advances that interest, and 4) whether it is more extensive than is necessary to serve that interest (*citing Central Hudson Gas v. Public Service Comm'n,* 447 U.S. 557 (1980)). While manufacturer cited no cases applying *Central Hudson* in a judicial restraint matter, the court agreed with Petitioner that the trial court's order fails under even the intermediate standard and, therefore, does not reach the question of whether *Central Hudson* in fact applies to judicial

restraints on commercial speech. The court decided only that because the trial court's order cannot satisfy the intermediate scrutiny test, it necessarily also fails under a strict scrutiny analysis.

The court rejected manufacturer's first argument that the two webpages were misleading because manufacturer did not seek removal of those pages to prevent deceptive or misleading advertising at the trial level – it filed its motion to deny juror access. Manufacturer presented no evidence or argument demonstrating the pages were subject to restraint as misleading advertising and the trial court made no such finding. The court found it had no basis to make that determination.

Turning to the second prong, the parties conceded that a substantial governmental interest exists in assuring parties receive a fair trial.

Prongs 3 and 4 were the focus of the disagreement. The court found the trial court's restraint was more extensive than necessary to serve the government interest in question, and thus failed. A frequent and specific cautionary admonition and jury instruction is the accepted, presumptively adequate and plainly less restrictive means of dealing with jury contamination. It must be assumed that a jury does its duty, abides by the cautionary instructions, and finds facts only because those facts are proven. The trial court's order required attorney to remove information from her website about prior verdicts involving an auto manufacturer, but did not apply to any other websites discussing such verdicts.

While it is true that modern jurors have significant access to the internet which increases the risk of contamination, proposed solutions focus on controlling juror behavior – not on controlling that of the trial participants. The focus is on tougher admonition rules and contempt consequences, rather than trying to restrain speech on the internet. This is particularly true where, as is the case before the court, the speech does not directly concern the case before the court.

The trial court's admonition was proper and the court accepts that jurors will obey such admonitions. If a juror ignores the admonition, the trial court has tools to address it. It did not, however, have authority to prophylactically order attorney to remove pages from her website to ensure they would be inaccessible to a disobedient juror.

In Pari Delicto

***Sharp v. Bryan Cave LLP*, Nos. 12-56009, 12-56011, 2014 U.S. App. LEXIS 5417 (9th Cir. Mar. 24, 2014)**

- **Although a law firm may assert the defense of unclean hands or *in pari delicto* in a legal malpractice action where the client engaged in wrongful conduct, those defenses are only available where the misconduct was so obviously wrongful that the client must have known them to be unlawful notwithstanding any negligent advice from the lawyer.**

A bankruptcy trustee sued the law firm of Bryan Cave for providing negligent legal advice to the debtors, Estate Financial, Inc. and Estate Financial Mortgage Fund. Bryan Cave moved to dismiss on the ground of unclean hands or *in pari delicto*, which provides a defense to a legal malpractice claim filed by a client where the client's conduct was "so obviously wrong that, notwithstanding the lawyer's erroneous legal advice, no lay person could be confused about its illegality or impropriety." 2014 U.S. App. LEXIS 5417, at *3. The debtors were alleged to have failed to comply with licensing requirements, to have issued unauthorized promotional notes, to have engaged in unauthorized loan transactions, to have exceeded the maximum number of investors, and to have improperly commingled funds.

In reversing the district court's order dismissing the complaint, the Ninth Circuit concluded that, construing the allegations of the complaint in the light most favorable to the plaintiff, the conduct was not so obviously wrongful that the principals of the debtors must have known it was unlawful notwithstanding Bryan Cave's alleged negligent legal advice. The Ninth Circuit distinguished the debtors' wrongdoing, at least as set forth in the complaint, with other more obviously wrongful conduct, such as lying under oath, self-dealing, or running a Ponzi scheme.

The Ninth Circuit expressly declined to resolve the question of whether an unclean hands or *in pari delicto* defense could be applied to claims brought by a bankruptcy trustee.

Moral Turpitude

***In re Grant*, 58 Cal. 4th 469 (2014)**

- **Supreme Court concluded that knowing possession of child pornography constitutes moral turpitude per se, thus mandating disbarment.**

Gary Grant pled guilty to three counts of possession of child pornography. Subsequently, the State Bar Court recommended he be disbarred pursuant to Business and Professions Code section 6102(c) for engaging in conduct that constitutes "moral turpitude per se." The Review Department of the State Bar Court reversed, finding there was not sufficient admissible evidence showing moral turpitude. The Chief Trial Counsel requested Supreme Court review.

The Supreme Court held that possession of child pornography involves moral turpitude per se, and thus requires disbarment. The Court noted, "Whether "[a]n offense *necessarily* involves moral turpitude [because] the conviction would *in every case* evidence bad moral character . . . is a question of law to be determined by this court.' . . . Moral turpitude is a concept that 'defies exact description.'" 58 Cal. 4th at 475. The Court further noted that "'[c]onviction of some crimes establishes moral turpitude on its face . . . include[ing] particular crimes that are extremely repugnant to accepted moral standards such as . . . serious sexual offenses. . . .'" *Id.* at 476. Because Grant pled guilty to the felony of knowingly possession child pornography, his actions constitute moral turpitude per se.

***In the Matter of Song*, 2013 Calif. Op. LEXIS 24 (May 10, 2013)**

[See summary, below, under "Trust Funds"]

Opposing Expert

***Kane v. Chobani, Inc.*, No. 12-CV-02425, 2013 U.S. Dist. LEXIS 109900 (N.D. Cal. Aug. 2, 2013)**

- **Counsel not disqualified despite consulting with opposing expert who had received confidential information from opposing counsel, absent evidence the opposing expert shared such confidential information with counsel.**

Plaintiffs brought action against defendant alleging misbranding of products. Plaintiffs' counsel had brought similar but separate actions against numerous other defendants in the same industry. At the time this action was filed and continuing thereafter, defendant had engaged an expert specializing in FDA regulatory matters. Following the filing of this action, counsel for defendant had a series of confidential conversations with the expert about the claims in this action, including discussions about defense arguments and other strategies in this action. During this same time period, plaintiffs' counsel contacted the same expert to discuss retaining the expert to provide expert services in FDA regulatory matters. The expert was retained by plaintiffs' counsel to work on a number of cases, but declined to be retained in this action (suggesting the possibility of a conflict). In connection with the other cases, plaintiffs' counsel discussed with the expert the allegations in their complaints.

Upon discovery of the expert's engagement with plaintiffs' counsel, defendant moved to disqualify plaintiffs' counsel from this action. The court denied the motion.

The court first found that the expert had obtained confidential information from defendant, requiring that the expert be disqualified from this action. The court further found that plaintiffs' counsel will be disqualified from this action if they further communicate with the expert about any of the issues in this action in connection with the other cases filed by plaintiffs' counsel.

The court then turned to the question of whether plaintiffs' counsel should be disqualified. Finding that the expert must be disqualified because it had obtained confidential information from defendant did not alone resolve the question of whether such information already had been disclosed to plaintiffs' counsel, such that plaintiffs' counsel also must be disqualified.

In its argument for disqualification of plaintiffs' counsel, defendant cited to *Shadow Traffic Network v. Superior Court*, 24 Cal. App. 4th 1067, 1085 (1994), for the proposition that, once it had established that confidential information had been shared with an expert who subsequently had ex parte contact with an opposing party, there was a rebuttable presumption that the expert had shared that confidential information with the opposing party.

The court rejected defendant's argument, relying in part on the more recent case of *Shandralina G. v. Homonchuk*, 147 Cal. App. 4th 395, 400 (2007), which held that the burden-shifting presumption of *Shadow Traffic* should not apply where there was no legal impediment to the ability of the moving party to obtain evidence from the expert as to whether confidential information in fact had been shared.

The court then examined the evidence as to whether confidential information had been shared, and determined that defendant failed to meet its burden of demonstrating that the expert disclosed defendant's confidential information to plaintiffs' counsel.

Absent such evidence, the court held that the "drastic" measure of disqualification was not appropriate because there was not "a genuine likelihood that allowing the attorney to remain on the case will affect the outcome of the proceedings before the court." 2013 U.S. Dist. LEXIS 109900, at *49 (citing *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 815 (2010)). The court, however, did find fault with plaintiffs' counsel for not identifying and exploring the potential conflict once it became apparent, but such failure did not justify the potentially "disastrous" consequences of granting defendant's motion to disqualify plaintiffs' counsel.

Supervision

***In the Matter of Huang*, 2014 WL 232686 (2014)**

[See discussion under Unauthorized Practice of Law]

Threats

***Lopez v. Banuelos*, No. 1:11-CV-466, 2013 U.S. Dist. LEXIS 127656 (E.D. Cal. Sept. 6, 2013)**

- **Although Deputy California Attorney General's email to plaintiff's counsel sufficiently resembled an improper threat under Rule of Professional Conduct 5-100, disqualification was not warranted where court could fashion remedies to alleviate the harm caused by it.**

Lopez arose from an encounter between Lopez and two CHP officers. Plaintiff Lopez moved to disqualify defense counsel for alleged violation of California Rule of Professional Conduct Rule 5-100 (prohibiting threating criminal, administrative or disciplinary charges). The district court denied the motion.

Defense counsel from the Attorney-General's office had sent an email to plaintiff's counsel that said, '"If he [plaintiff] sets foots [sic] in California, I bet he never leaves as there is a very real chance he will be arrested. We do intend to have both federal and state law enforcement present during the trial.'" 2013 U.S. Dist. LEXIS 127656, at *21. After receipt of plaintiff's motion to disqualify him, defense counsel emailed again, saying that he did not threaten to have plaintiff arrested, but that he merely stated plaintiff's anticipated testimony may lead the various authorities expected to be in the courtroom to take action.

Motions to disqualify are decided under California law. Courts have the inherent power to disqualify counsel because of an ethical violation. However, disqualification is a drastic measure that is disfavored. Such a motion involves a conflict between a client's right to choose counsel and the need to maintain ethical standards. The paramount concern is the preservation of the public's trust in the scrupulous administration of justice and the integrity of the Bar. Because of the potential for abuse, disqualification motions should be subjected to strict judicial scrutiny. A court should consider a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the motion.

Not every violation of an ethical rule compels disqualification. Courts should consider the needs that the disciplinary rule is designed to serve. Punishment for violations of the Rules of Professional Conduct is the purview of the State Bar. The court's goal is not to punish the attorney but rather to fashion a remedy for whatever improper effect the misconduct has had on the case.

The court first denied the motion to disqualify the entire Attorney General's office. Plaintiff's counsel did not address it in plaintiff's reply brief, focusing on disqualification of the specific defense counsel handling the case. Due to the nature of the operation of the Attorney General's office, disqualification of the entire office would be extreme.

Turning to the request to disqualify the individual defense counsel, the court noted that motions to disqualify are fact and circumstance specific and that the paramount concern is to preserve the public's trust in the scrupulous administration of justice and the integrity of the Bar. Such motions are not limited only to situations of improper *ex parte* contact, conflicts of interest, or attorney witnesses.

On its face, the email constituted a threat of criminal prosecution to gain an advantage in a civil dispute, to secure a favorable settlement, in violation of Rule of Professional Conduct 5-100.

The court accepted defense counsel's contention, which plaintiff did not challenge, that Rule 5-100 requires a finding of an intent to threaten. The court found plausible defense counsel's assertion that the email was meant as a poorly-worded joke, in the nature of good-natured chiding of an opposing counsel. The court pointed to plaintiff counsel's initial reaction that he thought the email was a joke, and that counsel had an amicable working relationship. Plaintiff's counsel also acknowledged that the two had sometimes said things in jest to each other over the course of the litigation.

Whether the email violated Rule 5-100 or not, the court found that the email was close enough to an unethical threat that it violated the court's Local Rule 180, prohibiting attorneys from engaging in conduct that interferes with the administration of justice. Even if counsel did not intend for it to be a threat, it objectively reads like one – so much so that the trial court vacated the trial date in order to resolve the issue. It also had the effect of making plaintiff anxious about whether to attend his own trial. At minimum, the email "sufficiently resembles a violation of rule 5-100" that it constituted "grossly negligent conduct" by defense counsel. *Id*. at *25-26

Having found the violation, the court's task was to address the harm caused. The court found that the harm could be addressed without disqualifying defense counsel. First, the parties were ordered to meet and confer about a new trial date. Second, plaintiff would be allowed to file a motion in limine regarding testimony and exhibits at trial about his drug use. Third, defense counsel was ordered not to cause plaintiff's arrest or the initiation of criminal proceedings against plaintiff based on plaintiff's pursuit of this action or plaintiff's testimony at trial.

<u>Trust Funds</u>

***In the Matter of Song*, No. 11-O-11436, 2013 Calif. Op. LEXIS 24 (May 10, 2013)**

- **Attorney who made 65 unauthorized withdrawals from his client trust account should be disbarred for violating Rule 4-100(A) (requiring attorneys to maintain client's trust funds in a client trust account) and for engaging in an act of moral turpitude under Business and Professions Code 6106.**

Attorney John Young Song represented a client, Son Young Lee, in a breach of promissory note action. Lee obtained a judgment in the case, but the defendant filed for bankruptcy and had the

judgment discharged. Notwithstanding the discharge, Song unexpectedly received a $145,528.77 check from the underlying defendant's title insurance company, which he deposited into his client trust account. Song was unable to locate Lee to tell her about the money, and held the money in his client trust account for two years. After that, Song began to routinely withdraw money from the account, making at least 65 unauthorized withdrawals over the next three years.

When Lee finally learned of the money, she hired a lawyer to get it back, and filed a lawsuit against Song. In the meantime, Song obtained $139,500 from his parents (the entire amount of their retirement account) in order to replenish the client trust account. Song then settled the civil lawsuit with Lee for $80,000.

The State Bar court found that Song violated Rule 4-100(A), which requires attorneys to maintain a client's trust funds in a client trust account. The court also found that Song misappropriated client funds, which is an act of moral turpitude under Business and Professions Code section 6106.

In considering whether Song should be disbarred, the court considered both aggravating and mitigating factors. As aggravating factors, the court found that Song engaged in multiple acts of misconduct and lacked insight or remorse. As mitigating factors, the court found that Song had no prior discipline record, acted with candor and cooperation during the proceedings, provided restitution to his client, and generally showed good character. After considering these factors, the court recommended disbarment, citing Standards for Attorney Sanctions for Professional Misconduct, Standard 2.2(a), which provides that "an attorney who misappropriates entrusted funds should be disbarred unless 'the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate.'" 2013 Calif. Op. LEXIS 24, at 20-21.

Unfinished Business Claims

***Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP*, No. C14-01236, -37, -38, -39, 2014 U.S. Dist. LEXIS 81087 (N.D. Cal. June 11, 2014)**

- **The bankruptcy trustee of a dissolved law firm, Heller Ehrman, may not recover from former Heller partners' new law firms fees collected by those new law firms for work done on matters that had begun while those partners still were at Heller. In so ruling, the Northern District effectively overruled *Jewel v. Boxer*, 156 Cal. App. 3d 171 (1984), and the "unfinished business" doctrine.**

This case arose out of the dissolution and bankruptcy of the Heller Ehrman law firm ("Heller"), and the bankruptcy trustee's efforts to recover for the estate the profits earned by four law firms that had hired former Heller partners. Those partners continued working on matters begun while they were partners at Heller – the work being referred to as "unfinished business." The bankruptcy court ruled that the Heller firm and, by extension, the Heller bankruptcy trustee, had a property interest in Heller's clients' unfinished business. In so finding, the bankruptcy court followed *Jewel v. Boxer*,

156 Cal. App. 3d 171 (1984), which made former partners of a dissolved firm accountable to the other former partners for their continued work on unfinished business.

Reviewing the bankruptcy court's ruling *de novo*, pursuant to *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the Northern District reversed the bankruptcy court's decision, holding that the Heller bankruptcy trustee had no interest, and thus could not recover, third party law firms' fees collected for performing Heller's clients' unfinished business. Although the court did not expressly overrule *Jewel v. Boxer*, it found that *Jewel*, a 1984 case, was decided under the Uniform Partnership Act, and not under the Revised Uniform Partnership Act ("RUPA"), which applies after 1999 to all California partnerships. Thus, it effectively overruled *Jewel*. Specifically, the court found that, under the RUPA, partners of a dissolved law firm who work on unfinished business are allowed to retain "reasonable compensation" for that work. Cal. Corp. Code § 16401(h). This "undermines the legal foundation on which *Jewel* rests." 2014 U.S. Dist. LEXIS 81087, at *14. The court also criticized other courts that "'have cited *Jewel* reflexively and uncritically,' that is, without much analysis or consideration of the changes in law firm practice or law." *Id.* at *15 (citing *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 739 n.2 (S.D.N.Y. 2012)).

The court also noted some significant differences between the former *Jewel* partners and the former Heller partners. These differences included that the law firm dissolution in *Jewel* was voluntary, while the Heller dissolution was not (having been forced by the withdrawal of its line of credit). Thus, the Heller partners did not have the option of completing their work at Heller. Yet another significant difference noted by the court was that the "new, third-party firms" in *Jewel* were merely two new firms each formed by two of the original four partners of the dissolved firm. Each of the partners in those new firms owed fiduciary duties to the partners in the other new firm. By contrast, the third-party law firm defendants in Heller were existing firms with partners who owed no fiduciary duty to the other Heller partners.

The court also based its decision on both the equities and policy. First, it found, "Balancing the equities, it is simple enough to conclude that the firms that did the work should keep the fees." *Id.* at *16. Regarding policy, the court rejected the policy reasons attributed to *Jewel* as being inapplicable to the Heller situation. That included the *Jewel* partners' incentive to delay completing the more lucrative work for clients they planned to take to their new firm. That was not a concern here because, unlike with the voluntary dissolution in *Jewel*, the Heller partners did not have the option of staying at Heller and continuing the work there. The court also noted that the bankruptcy court's ruling, which followed *Jewel*, would "discourage third-party firms from hiring former partners of dissolved firms and discourage third-party firms from accepting new clients formerly represented by dissolved firms." *Id.* at *24. That would not be in the public interest.

SPEAKER BIOGRAPHIES

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Wendy Wen Yun Chang is a partner in the Los Angeles office of Hinshaw & Culbertson LLP. Ms. Chang's practice focuses on the representation of businesses in all types of litigation, with particular emphasis in high exposure complex litigation, trials and appeals. She also represents lawyers in all types of complex matters that involve the practice of law, including risk management counseling, ethics counseling, crises management, fee related issues, disciplinary defense work, and litigation defense. Hinshaw & Culberson LLP is the 2014 US News Best Law Firm of the Year for Ethics and Professional Responsibility law.

Ms. Chang is Chair of the California State Bar's Standing Committee on Professional Responsibility & Conduct (COPRAC). Ms. Chang is a Certified Specialist in Legal Malpractice Law by the State Bar of California's Board of Legal Specialization. Ms. Chang also serves as Co-Chair of the Judiciary Committee for the National Asian Pacific American Bar Association, as well as on the Professional Responsibility and Ethics Committee (PREC) and the State Appellate Judicial Evaluation Committee for the Los Angeles County Bar Association. Ms. Chang is a frequent speaker and author on the subject of the law governing lawyers, and on the issue of diversity in the judiciary. She is a member of the Chancery Club.

Ms. Chang received her J.D. from Loyola Law School, Los Angeles in 1995, and her B.A. from the University of California, at Los Angeles in 1992.

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Mr. Garner currently serves as Vice Chair of the State Bar's Committee on Professional Responsibility and Conduct and is the Co-Chair of the Orange County Bar Association's Professionalism and Ethics Committee. He also serves as a member of the Board of Directors of the Orange County Bar Association and as Treasurer of the Orange County Chapter of the Association of Business Trial Lawyers. He is a frequent author and speaker on ethics-related topics.

Mr. Garner graduated *cum laude* from Harvard Law School in 1991, and received his B.A. degree with distinction from Stanford University in 1988.

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

Mr. Wertlieb is also an Adjunct Professor of Law at the UCLA School of Law, and the former Chairman of both the Business Law Section of the California State Bar and its Corporation Committee. He has been recognized in The Legal 500 for his M&A work, and was recognized as one of the top 100 most influential lawyers in California (California Law Business, October 30, 2000). Mr. Wertlieb is the General Editor of the legal treatise Ballantine & Sterling: California Corporation Laws. He has also served as an expert witness in litigation and arbitration involving transactional matters.

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