



THE STATE BAR OF CALIFORNIA

88th Annual Meeting

Session #28

**Ethics Update 2015:
Significant Developments in the Law of Lawyering**

**Friday, October 9, 2015
8:30 AM - 10:00 AM**

**Sponsored by
Committee on Professional Responsibility and Conduct**

The State Bar of California and the Office of Education of the State Bar of California are approved State Bar of California MCLE providers.

Points of view or opinions expressed in these pages are those of the speaker(s) and/or author(s). They have not been adopted or endorsed by The State Bar of California's Board of Trustees and do not constitute the official position or policy of The State Bar of California. Nothing contained herein is intended to address any specific legal inquiry, nor is it a substitute for independent legal research to original sources or obtaining separate legal advice regarding specific legal situations.

©2015 The State Bar of California
All Rights Reserved

#28: Ethics Update 2015
Significant Developments in the Law of Lawyering

Merri A. Baldwin

Wendy Wen Yun Chang

Scott B. Garner

State Bar of California Annual Meeting

October 8 – 11, 2015

SPEAKER BIOGRAPHIES

Merri A. Baldwin

Merri A. Baldwin is a shareholder at Rogers Joseph O'Donnell in San Francisco where her practice focuses on attorney liability, including legal malpractice, State Bar discipline, disqualification and ethics advice. She also handles partnership disputes and breach of contract matters. She is the vice-chair of the State Bar of California Committee on Professional Responsibility and Conduct for 2014-2015. She is a committee co-chair for the American Bar Association Litigation Section Committee on Professional Services Litigation and is the Treasurer of the Bar Association of San Francisco. Ms. Baldwin frequently lectures and writes on issues related to legal malpractice and ethics issues, and she is an adjunct professor at the University of California, Berkeley School of Law. Ms. Baldwin co-edited The Law of Lawyers' Liability (ABA/First Chair Press 2012) and has served as a consulting editor for the Attorney Fee Agreement Forms Manual, published by CEB. She is certified as a specialist in legal malpractice law by the California Board of Legal Specialization.

Ms. Baldwin received her J.D. from the University of California at Berkeley School of Law (Boalt Hall) and her A.B. from Smith College, where she graduated Magna cum laude with High Honors. Before attending law school, she was a Fulbright Scholar at the London School of Economics. She can be reached at mbaldwin@rjo.com.

Wendy Wen Yun Chang

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 & Culbertson LLP is the 2014 US News Best Law Firm of the Year for Ethics and Professional Responsibility law.

Ms. Chang is the immediate past 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.

Ms. Chang may be reached at wchang@hinshawlaw.com and @wendychang888 on Twitter. Her full biography, and a full list of her publications and speaking engagements, can be found at www.hinshawlaw.com/wchang.

Scott B. Garner

Scott Garner is a partner in the Irvine office of Morgan, Lewis & Bockius LLP, where he serves as deputy leader of the Southern California Litigation Group and as one of the firm's loss prevention partners. His practice focuses on complex business litigation, with an emphasis on attorney liability defense. He also has significant experience in the areas of securities litigation, intellectual property litigation, and hospital and health care law.

Mr. Garner currently serves as 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 Vice President 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.

Mr. Garner may be reached at sgarner@morganlewis.com.

TABLE OF CONTENTS

ADMISSION TO THE PRACTICE OF LAW.....	9
ANTI-SLAPP SPECIAL MOTIONS TO STRIKE.....	10
ATTORNEY-CLIENT PRIVILEGE.....	16
ATTORNEY DISCIPLINE	21
ATTORNEYS' FEES	24
ATTORNEY LIENS.....	26
CONFLICTS/DISQUALIFICATION	29
LEGAL MALPRACTICE	40
MEDIATION PRIVILEGE	56
UNFINISHED BUSINESS DOCTRINE	57
MISCELLANEOUS	59
ETHICS OPINIONS.....	62

CASES SUMMARIZED

Cases*	Page
<i>Acacia Patent Acquisition, LLC v. Superior Court of Orange County</i> , 234 Cal. App. 4th 1091 (2015)	29
<i>Amis v. Greenberg Traurig LLP</i> 235 Cal. App. 4th 331 (2015)	56
<i>Anten v. Superior Court of Los Angeles County</i> , 233 Cal. App. 4th 1254 (2015)	16
<i>AT&T Mobility LLC v. General Charles E. “Chuck” Yeager</i> , 2015 WL 4460715 (E.D. Cal. July 21, 2015)	17
<i>Bergstein et al., v. Strook & Strook & Lavan LLP</i> 236 Cal. App. 4th 793 (2015)	40
<i>Britton v. Girardi</i> , 235 Cal. App. 4th 721 (2015)	41
<i>Castaneda v. Superior Court of Los Angeles</i> , 237 Cal. App. 4th 1434 (2015)	31
<i>Chubb & Son v. Superior Court of San Francisco</i> , 228 Cal.App.4th 1094 (2014)	18
<i>Coldren v. Hart, King & Coldren, Inc.</i> , 239 Cal.App.4th 237 (2015)	32
<i>Drell v. Cohen</i> , 232 Cal. App. 4th 24 (2014)	10
<i>Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC</i> , 230 Cal.App.4th 244 (2014)	10
<i>Finton Construction, Inc., v. Bidna & Keys, APLC</i> , 238 Cal. App. 4th 200 (2015)	11
<i>In the Matter of Guzman</i> , 5 Cal. State Bar Ct. Rptr. 308, 2014 WL 1979258 (2014)	21

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

<i>Hernandez v. Siegel</i> , 230 Cal. App. 4th 165 (2014)	24
<i>Hogan Lovells US LLP v. Howrey LLP</i> , 531 B.R. 814 (N. D. Cal. 2015)	57
<i>In re Hong Yen Chang</i> , 60 Cal. 4th 1169 (2015)	9
<i>Kasem v. Dion-Kindem</i> , 230 Cal.App.4th 1395 (2014)	42
<i>Kim v. The True Church Members of Holy Hill Community Church</i> , 236 Cal. App. 4th 1435 (2015)	33
<i>Klotz v. Milbank, Tweed, Hadley & McCloy</i> , 238 Cal. App. 4th, 1339 (2015)	43
<i>Kumaraperu v. Feldsted</i> , 237 Cal. App. 4th 60 (2015)	45
<i>Lee v. Hanley</i> , Cal.4th --; 2015 WL 4938308 (Aug. 20, 2015)	47
<i>Lennar Mare Island, LLC v. Steadfast Ins. Co.</i> , 2015 WL 1540631 (E.D. Cal. April 7, 2015)	34
<i>Loanvest I, LLC v. Utrecht</i> , 235 Cal.App.4th 496 (2015)	12, 13
<i>Lynn v. Gateway Unified School District</i> , 771 F.3d 1135 (9th Cir. 2014)	36
<i>McElroy, v. Pacific Autism Center for Education</i> , 2015 WL 2251057 (N.D. Cal. May 13, 2015)	36
<i>In re McIntosh</i> , 2015 WL 241130 (Bankr. N.D. Cal. Jan. 16, 2015)	37
<i>Mojtahedi v. Vargas</i> , 228 Cal. App. 4th 974 (2014)	26
<i>Moua v. Pittullo, Howington, Barker, Abernathy, LLP</i> , 228 Cal. App. 4th 107 (2014)	49
<i>Old Republic Construction Program Group v. Boccardo Law Firm, Inc.</i> , 230 Cal. App. 4th 859 (2014)	13
<i>Palmer v. The Superior Court of Los Angeles</i> , 231 Cal.App.4th 1214 (2014)	19

<i>Parrish v. Latham & Watkins,</i> 238 Cal. App. 4th 81 (2015)	14
<i>Paul v. Patton,</i> 235 Cal. App. 4th 1088 (2015)	51
<i>People, v. Anderson,</i> 234 Cal. App. 4th 1411 (2015)	59
<i>Pope v. Babick,</i> 229 Cal.App.4th 1238 (2014)	60
<i>Ringgold-Lockhart v. County of Los Angeles,</i> 761 F.3d 1057 (9th Cir. 2014)	60
<i>Ryan v. Editions Ltd. West Inc., et al.,</i> 786 F. 3d 754 (9th Cir. 2015)	24
<i>In the Matter of Sangary,</i> State Bar Ct. Case No. 13-O-13838-DFM (2014)	22
<i>Shaoxing City Maolong Wuzhong Down Products Ltd., v. Keehn & Associates, APC,</i> 238 Cal. App. 4th 1031, (2015)	52
<i>In the Matter of Smithwick,</i> 5 Cal. State Bar Rptr. 320, 2014 WL 2093484 (2014)	22
<i>Stenehjem v. Sareen,</i> 226 Cal.App.4th 1405 (2014)	15
<i>Stine v. Dell’Osso et al.,</i> 230 Cal. App. 4th 834 (2014)	54
<i>United States v. Tillman,</i> 756 F. 3d 1144 (9th Cir. 2014)	27
<i>Western Sugar Coop. v. Archer-Daniels-Midland Co., et al.,</i> 2015 WL 690306 (C.D. Cal. Feb. 13, 2015).....	38
<i>In the Matter of Yee,</i> 5 State Bar Ct. Rptr. 330, 2014 WL 3748590 (2014).....	23
<i>Zapata v. Vasquez,</i> 788 F.3d 1106 (9th Cir. 2015)	61

AUTHORITIES CITED

Statutes

Business & Professions Code §6068	20, 63
Civil Code §47	12, 15, 41
Civil Code §1714.10	43, 44
Civil Procedure Code §340.6.....	<i>passim</i>
Civil Procedure Code §425.16.....	<i>passim</i>
Evidence Code §451	42
Evidence Code §958	16, 64, 65
Evidence Code §1115 et seq.	56
Probate Code §8524.....	53
Probate Code §9820.....	53
Probate Code §16460.....	41

Ethics Opinions

California State Bar Formal Opinion 2015-192.....	65
California State Bar Formal Opinion 2015-193.....	65
California State Bar Formal Opinion 2014-191.....	66
Los Angeles County Bar Association Ethics Opinion No. 526.....	66
Los Angeles County Bar Association Ethics Opinion No. 527	66
San Francisco Bar Association Ethics Opinion 2014-1	67
San Francisco Bar Association Ethics Opinion 2015-1	68

California Rules of Professional Conduct

Rule 1-311.....	22, 23
Rule 1-320.....	23
Rule 1-400.....	22

Rule 3-110.....	23
Rule 3-120.....	64
Rule 3-310.....	37, 63
Rule 3-600.....	32, 33
Rule 3-700.....	23, 62
ABA Model Rules of Professional Conduct	
Rule 1-2.....	64, 65

ADMISSION TO THE PRACTICE OF LAW

In re Hong Yen Chang, 60 Cal. 4th 1169 (2015)

- **The California Supreme Court granted posthumous admission to an attorney who, in 1890, was denied admission to the California bar.**

This interesting and moving decision of the California Supreme Court rights a historic wrong. Hong Yen Chang was a native of China who came to the United States in 1872 through a program aimed at teaching Chinese youth about the West. After graduating from Philips Academy, Andover, and Yale, he earned a J.D. at Columbia Law School. After being turned down initially in his application to the New York bar in 1887, he was admitted in 1888 after obtaining a certificate of naturalization. Mr. Chang moved to San Francisco, intending to serve the Chinese community.

However, the California Supreme Court denied Mr. Chang admission to the bar. A state statute at the time provided that only United States citizens or “persons who have bona fide declared their intention to become such in the manner provided by law” could gain admission to the bar upon presentation of a license issued by another state. The Court held that because of the federal Chinese Exclusion Act of 1882, the naturalization certificate Mr. Chang had obtained in New York was issued without authority of law. On that basis, the Court denied the application.

One hundred and twenty five years later, the Court issued this opinion, which traces through what it calls a “sordid chapter of our state and national history.” *Id.* at 1171. Tracing the history of anti-Chinese laws and sentiment in California, the Court details how California’s advocacy led to Congress enacting the Chinese Exclusion Act. The Court also chronicles the efforts since the 1970s to repeal the discriminatory laws and recognize the state’s harmful history, and noting the Court’s 2014 decision to admit Sergio Garcia to the bar, an undocumented immigrant from Mexico. “In light of these developments, it is past time to acknowledge that the discriminatory exclusion of Chang from the State Bar of California was a grievous wrong. . . .Even if we cannot undo history, we can acknowledge it and, in so doing, accord a full measure of recognition to Chang’s path-breaking efforts to become the first lawyer of Chinese descent in the United States.” *Id.* at 1175.

ANTI-SLAPP SPECIAL MOTIONS TO STRIKE

Drell v. Cohen, 232 Cal. App. 4th 24 (2014)

- **Declaratory relief action to establish a predecessor attorney’s right to attorneys’ fees did not constitute a challenge to that attorney’s litigation-related activity and, thus, was not subject to dismissal under the anti-SLAPP statute.**

Drell arose from an attorneys’ fees lien dispute. Attorney Cohen represented a plaintiff on a contingency basis in a personal injury lawsuit, but was later replaced by attorney Drell. When Drell settled the lawsuit, Cohen submitted an attorneys’ fees lien, along with a demand letter, to the underlying defendant’s insurer. The insurer made out the settlement check to plaintiff and defendants. Drell then filed a declaratory relief action to determine his and Cohen’s respective rights in the settlement payment. Cohen filed a special motion to strike under Civil Procedure Code section 425.16. The trial court denied the motion, and Cohen appealed.

The court of appeal focused its analysis on the first prong of the anti-SLAPP statute, under which the moving party (Cohen) must make a prima facie showing that the challenged causes of action arise from protected activity. The court noted that statements made in litigation, or in connection with litigation, are protected by Section 425.16(c), but found that Cohen’s conduct here was not so protected. “[I]t is not enough to establish that the action was filed in response to or in retaliation for a party’s exercise of the right to petition.” *Id.* at 29. “Protected conduct which is merely incidental to the claim does not fall within the ambit of section 425.16.” *Id.* The court concluded that Drell’s lawsuit did not allege that Cohen engaged in wrongdoing by asserting his lien, but rather merely asked the court to declare the parties’ respective rights to attorneys’ fees. Thus, Cohen’s alleged conduct was not protected activity, and the trial court’s order denying his anti-SLAPP motion was affirmed.

Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC, 230 Cal.App.4th 244 (2014)

- **Law firm that prevails in anti-SLAPP motion may not recover attorneys’ fees incurred by one of its members, even though the member claimed to be an independent contractor**

The issue in *Ellis Law Group* was whether a law firm could recover attorneys’ fees incurred by an “independent contractor” attorney following its successful anti-SLAPP motion. Under the anti-SLAPP statute, “a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.” Cal. Civ. Proc. Code § 425.16(c)(1). An exception exists, however, for self-represented attorneys.

In *Ellis Law Group*, the fees at issue were incurred by attorney Joseph Major, who was described by the law firm in its attorneys’ fees motion as an independent contractor, and not a member of the firm. The trial court ultimately concluded that the firm could not recover for time spent by Major.

In so concluding, the court relied on the facts that Major held himself out as being a member of the law firm, in particular by including his name on the pleadings for the anti-SLAPP motion. The court of appeal affirmed.

After discussing previous cases holding that “of counsel” to law firms were members of the firm for purposes of attorneys’ fees recovery statutes, the court then discussed what it meant to be an independent contractor in this context. The court rejected the notion that whether an attorney truly is an independent contractor is dictated by Internal Revenue Service Revenue Ruling 87-41, which describes the factors to be considered in determining, for tax purposes, whether an individual is an independent contractor or an employee. Instead, the court found that Major was a member of the firm because he and the firm repeatedly represented to the trial court and to opposing counsel that he was a member of the firm. The court also noted that Major performed legal work using a computer, office, and malpractice insurance provided by the law firm. Accordingly, the law firm could not recover fees incurred by Major.

***Finton Construction, Inc., v. Bidna & Keys APLC*, 238 Cal. App. 4th 200 (2015)**

- **Lawsuit filed by construction company against opposing law firm for receipt of stolen property, based on a law firm accepting from its client a hard drive containing information supposedly taken from construction company by the client, is subject to anti-SLAPP motion to strike.**

The Bidna & Keys (“B&K”) law firm represented the plaintiff in connection with allegations that the defendants, his former partners in a construction business, conspired to reduce his ownership interest and ultimately terminate his involvement. The construction company (“FCI”) cross-complained against plaintiff and other former FCI employees based on their alleged stealing of confidential client information. During discovery, a hard drive that supposedly contained stolen information was turned over to B&K by its client. FCI’s counsel demanded B&K return the hard drive, but B&K agreed to do so only after making a copy. Ultimately, FCI filed a lawsuit against B&K, alleging receipt of stolen property. FCI also filed a police report and a complaint with the State Bar.

B&K filed an anti-SLAPP motion under Civil Procedure Code section 425.16, which the court granted. The court of appeal affirmed, and its opinion included some scathing remarks aimed at FCI and its counsel. Indeed, the court stated that “FCI’s overreach does not suggest zealotry or righteousness, but a calculated effort to undermine the parties in the underlying case by turning their attorneys into fellow defendants.” *Id.* at 204. The court also noted that it decided to publish the opinion “as an example to the legal community of the kind of behavior the bench and the bar together must continually strive to eradicate.” *Id.* at 205.

After laying into FCI and its counsel with remarks like these, the court then carefully went through the two-pronged analysis applicable to anti-SLAPP motions to strike. First, the court found that B&K had met their burden of demonstrating that the conduct at issue arose from protected activity.

The court stated that “[i]n the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant’s protected free speech or petitioning activity.” *Id.* at 209-10. The court concluded that this determination was easy in this case, where the actions of B&K involved simply representing their client and obtaining documents from them. The court rejected application of the “narrow” exception that illegal conduct is not protected. *Id.* at 210 (discussing *Flatley v. Mauro*, 39 Cal. 4th 299, 320 (2006)).

After concluding that B&K met their burden of demonstrating that their conduct was protected activity, the court next found that FCI failed to meet its burden of demonstrating that it was likely to prevail. In that regard, the court found that B&K’s actions were protected by the litigation privilege of Civil Code section 47(b). The court cited previous cases holding that the litigation privilege is to be broadly construed, including one case where a court found that “even materials obtained illegally by the litigants and turned over to attorneys have been subject to the privilege.” *Id.* at 212 (discussing *Scalzo v. Baker*, 185 Cal. App. 4th 91, 102 (2010))

***Loanvest I, LLC v. Utrecht*, 235 Cal.App.4th 496 (2015)**

- **A client’s breach of loyalty claim against its former lawyer was not subject to a special motion to strike under the anti-SLAPP statute because it did not arise from the lawyer’s protected activity**

Attorney Utrecht represented Loanvest I, LLC (“Loanvest”) while Loanvest was controlled by South Bay Real Estate Commerce Group and, subsequently, by George Cresson. Among other things, Utrecht drafted the LLC’s operating agreement, which provided that individuals or entities purchasing membership interests in Loanvest would have no voting or management rights. Later, James Madow purchased a 70 percent ownership interest in Loanvest and took over control. He then filed a lawsuit, on behalf of Loanvest, against Utrecht, alleging that Utrecht breached its duty of loyalty to his true client, Loanvest, by favoring the interests of Cresson over Loanvest.

Utrecht filed a special motion to strike under the anti-SLAPP statute, arguing that Madow’s lawsuit arise from Utrecht’s constitutionally protected activity. The trial court granted the motion, and Madow appealed. The court of appeal reversed, finding that Utrecht had not made the requisite threshold showing that the lawsuit challenged his protected activity.

The court’s analysis began with a discussion of *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, LLP*, 133 Cal. App. 4th 658 (2005), which held that an attorney may bring an anti-SLAPP motion under Civil Procedure Code section 425.16 where the challenged conduct relates to statements made on behalf of a client rather than on the attorney’s own behalf. *Id.* at 670 n.7. The court then discussed the case of *PrediWave Corp. v. Simpson Thacher & Bartlett LLP*, 179 Cal. App. 4th 1204 (2009), which divided potential scenarios under which the anti-SLAPP statute might be used to challenge a lawsuit: “(1) clients’ causes of action against attorneys based upon the attorneys’ acts on behalf of those clients, (2) clients’ causes of action against attorneys based upon statements or conduct solely on behalf of different clients, and (3) nonclients’ causes of action

against attorneys.” *Loanvest I*, 235 Cal. App. 4th at 502-03 (discussing *PrediWave*, 179 Cal. App. 4th at 1227). The court concluded that the action before it fell under (1) – that is, a client’s cause of action against the attorney based upon the attorney’s acts on behalf of that client.

The court rejected the argument that challenged conduct is protected simply because it occurs after a lawsuit is filed. Rather, “the critical point is whether the plaintiff’s cause of action itself was based on an act in furtherance of the defendant’s right of petition or free speech.” *Id.* at 502 (internal citation omitted). Here, the court concluded that the causes of action for breach of the duty of loyalty and legal malpractice were not based on an act in furtherance of Utrecht’s right of petition or free speech, and allowing the lawsuit to proceed would not chill the exercise of Utrecht’s protected rights.

Because the court found that Utrecht had failed the first prong of the anti-SLAPP analysis, it did not undertake an analysis of the second prong – that is, whether plaintiff had a probability of prevailing on his claim.

***Old Republic Construction Program Group v. Boccardo Law Firm, Inc.*, 230 Cal. App. 4th 859 (2014)**

- **A law firm’s alleged wrongful withdrawal of settlement funds from a client trust account is neither a communicative act nor an act of public importance, and thus an action based on that conduct is not subject to attack under the anti-SLAPP statute.**

In an opinion that Strunk & White might applaud, but most of us will have a hard time reading, the court of appeal affirmed an order denying a law firm defendants’ anti-SLAPP motion to strike. The defendant law firm, on behalf of its client, settled a personal injury lawsuit. In connection with that settlement, the parties stipulated that certain funds would be placed in the law firm’s client trust account pending a determination on how the funds were to be distributed. Before certain motions were resolved regarding the distribution of the funds, however, the case was dismissed, ending the court’s jurisdiction over the issue. The law firm consequently distributed the disputed funds to his client, and was then sued by the other party for breach of contract and conversion, among other things.

The law firm filed a special motion to strike under Civil Procedure Code section 425.16 (the anti-SLAPP statute), which the trial court denied. The court of appeal affirmed.

The court first concluded that the challenged cause of action did not arise from protected conduct. The plaintiff argued that the conduct arose from the stipulation, which by definition was in connection with a litigation matter. However, the court rejected this argument, finding that the challenged conduct was not entering into the stipulation, but rather withdrawing settlement funds in contravention of the stipulation. As the court noted, “a cause of action arises from protected conduct if the wrongful, injurious act(s) alleged by the plaintiff constitute protected conduct.” *Id.* at

868. Here, while entering into the stipulation may have constituted protected conduct, withdrawing settlement funds did not.

Next, the court concluded that the challenged conduct – that is, withdrawing settlement funds – was neither communicative in character nor in connection with a public issue, and thus outside the scope of Section 425.16. Plaintiff argued for a construction of the statute that, according to the court, would torture normal grammatical rules and understanding, and limit the “public issue” language to only speech-related activity and not to petition-related activity. The court rejected plaintiff’s argument, finding that the public issue language applied to both speech-related and petition-related activity.

***Parrish v. Latham & Watkins*, 238 Cal. App. 4th 81 (2015)**

- **Law firm who prosecuted an unsuccessful trade secret misappropriation claim was not subject to a malicious prosecution complaint because, in the underlying case, the trial court had denied the defendants’ motion for summary judgment; the “interim adverse judgment” demonstrated probable cause to bring the underlying complaint.**

The law firm of Latham & Watkins filed a trade secret misappropriation action on behalf of an employer, alleging that several former employees misappropriated certain technology assets in starting a new business. The former employee defendants filed a motion for summary judgment, which the court denied. The case proceeded to a bench trial, at which the former employees prevailed. They also obtained a finding that the plaintiff employer had acted in bad faith in bringing the claim, thereby awarding the employees their attorneys’ fees under the Uniform Trade Secrets Act. The employees then sued Latham & Watkins for malicious prosecution.

Latham & Watkins filed a special motion to strike under the anti-SLAPP statute, Civil Procedure Code section 425.16. It argued that, based on the court’s denial of the employees’ motion for summary judgment, the employees were unlikely to prove that Latham & Watkins had no probable cause to file the complaint. The trial court granted the motion to strike, and the court of appeal affirmed.

The parties agreed that the first prong of the anti-SLAPP statute had been met because the action arose out of Latham & Watkins’ protected petitioning activity. Therefore, the issue before the court on the motion to strike was whether the former employees could establish a reasonable probability of prevailing on their complaint.

In finding that the employees could not establish a reasonable probability of prevailing, the court discussed the effect of the interim adverse judgment rule on a malicious prosecution action. In this case, the interim adverse judgment rule was the order denying the employees’ motion for summary judgment. As the court explained, “Under established law, certain nonfinal rulings on the merits may serve as the basis for concluding that there was probable cause for prosecuting the underlying

case on which a subsequent malicious prosecution action is based.” *Id.* at 96 (internal citation omitted). The employees argued that the summary judgment order in the underlying case should not bar the malicious prosecution action because the trial judge effectively reversed that order when he later found, after trial, that the action had been brought in bad faith. The court rejected this argument, finding that the interim ruling denying summary judgment demonstrated that the employees could not establish a reasonable probability of prevailing. As the court stated, “Critically, success in defeating an interim dispositive motion on the merits establishes probable cause even if that result is subsequently reversed by the trial court.” *Id.* at 97 (internal citation omitted). Thus, the bad faith finding after trial “does not negate the court’s prior conclusion that the trade secret claim had ‘at least some merit’ so as to warrant a trial on the conflicting evidence.” *Id.* at 102.

***Stenehjem v. Sareen*, 226 Cal.App.4th 1405 (2014)**

- **Party’s settlement communication was found to constitute extortion, and thus was not protected free speech under the anti-SLAPP statute.**

Plaintiff Stenehjem sued his former employer for defamation, among other causes of action. While the action was pending, Stenehjem sent by email a settlement communication that threatened to expose the former employer to federal False Claims Act and other criminal liability if the case proceeded and did not settle. Based on this communication, the former employer cross-complained for defamation and extortion. Stenehjem filed an anti-SLAPP motion to strike, arguing that the email constituted protected constitutional speech, thereby satisfying the first prong of the anti-SLAPP statute, because it was a pre-litigation settlement communication, protected under Civil Procedure Code section 425.16(e). The trial court granted the anti-SLAPP motion, finding that the settlement communication constituted protected activity, and also finding that Stenehjem was likely to prevail on the merits because his communication was protected by the litigation privilege of Civil Code section 47.

The court of appeal reversed. Focusing primarily on the first prong of the anti-SLAPP statute, the court found that Stenehjem’s email communication constituted extortion and, accordingly, was not protected free speech. The court relied in large part on the 2006 California Supreme Court decision *Flatley v. Mauro*, 39 Cal. 4th 299 (2006), in which the Court held that a pre-litigation threat to expose celebrity dancer Michael Flatley to public statements that he raped someone constituted extortion that was not protected as constitutional free speech. Here, the court found the same reasoning applied even though a lawsuit already was pending. Although the court was careful to point out that pre-litigation settlement demands will not typically be deemed extortion, the threats of criminal prosecution contained in Stenehjem’s email crossed the line, just as the threats in *Flatley* had. Nor did it matter that Stenehjem’s threats were vague in nature and did not contain a specific monetary demand. Accordingly, Stenehjem could not satisfy the first element of the anti-SLAPP statute.

ATTORNEY-CLIENT PRIVILEGE

Anten v. Superior Court of Los Angeles, 233 Cal. App. 4th 1254 (2015)

- **The attorney client privilege does not bar discovery of communications between an attorney and one joint client from the request of the other joint client**

Anten was a writ proceeding after denial of a motion to compel. Two joint clients (Clients A and B) retained Law Firm to represent them about tax advice given to clients by their former attorneys. Law Firm advised the joint clients that former attorneys' erroneous legal advice barred favorable tax treatment and that the error was not curable. On the basis of Law Firm's advice, the joint clients settled with the Internal Revenue Service, paying over \$1 million. Law Firm further advised the joint clients that their former attorneys had committed malpractice and recommended that joint clients sue their former attorneys. Client A declined, wanting to pursue settlement instead of litigation. Law Firm fired Client A, then represented Client B in filing suit against their former lawyers. Client A then filed the instant case against Law Firm and the former attorneys.

In the course of discovery, plaintiff Client A requested communications made between Law Firm and Client B in the underlying representation. Law Firm objected, stating that the communications were protected by the attorney-client privilege, and Client B had not waived the privilege. The trial court denied plaintiff's request for the documents.

The appellate court reversed. The Court first discussed Evidence Code §958, which states there is no privilege as to communications relevant to an issue of breach of a duty arising out of the attorney client relationship. The rationale for the exception is that it would be unjust to permit a client to accuse his attorney of a breach of duty then invoke the privilege to prevent the attorney from defending the charge. Section 958 is limited to communications between the lawyer charged with a breach of duty and the client charging the breach of duty only, and does not apply to attempts to obtain discovery of communications of a plaintiff and the plaintiff's attorney in a malpractice case, or to attempts to obtain discovery of communications between a defendant attorney and other clients not privy to the attorney client relationship at issue in the lawsuit.

As it pertains to joint clients, the Court found Evidence Code §958 applies. Communications between joint clients in common interest and their attorneys are not confidential as to those joint clients. The communications are privileged against strangers, but not among the joint clients and the attorneys. Here, the attorneys were trying to invoke the attorney-client privilege to protect communications with one joint client from being given to the other, when the communications were not confidential as to the joint clients. Thus, the privilege could not be invoked to bar plaintiff joint client from discovering them. The court also noted that permitting application of the privilege in these communications would create a risk of collusion by attorneys and non-suing joint clients, or between the joint clients themselves.

AT&T Mobility LLC v. General Charles E. “Chuck” Yeager, 2015 WL 4460715 (E.D. Cal. July 21, 2015)

- **Attenuated relationships between individual attorneys and various parties in cases, and unsubstantiated allegations of bias, did not warrant recusal of judge who presided over three related cases.**

AT & T arose from an original right of publicity case, alleging that AT&T Mobility wrongfully used Plaintiff Yeager's name to promote their products, without permission. A prior motion for summary judgment had been denied by a prior judge, and the motion was renewed before Judge Mueller, who also denied the motion. The right of publicity case proceeded to trial and the jury awarded the Yeagers \$135,000. Judge Mueller thereafter granted the Yeagers' motion for fees and costs.

Thereafter, AT&T filed an action in interpleader, depositing the funds awarded in the right of publicity case with the court, due to competing claims against the funds. The interpleader action was transferred to Judge Mueller, after being deemed related to the publicity action. On the eve of trial, the interpleader action was settled. However, General Yeager thereafter refused to sign the settlement agreement. Proceedings on a motion to enforce the settlement raises resulted in proceedings to determine whether General Yeager would consent to the appointment of a guardian ad litem, due to Judge Mueller's concerns about General Yeager's competency to proceed in pro se.

While those issues were pending, Mr. and Mrs. Yeager filed a malpractice action in state court. The malpractice action was removed to federal court, and after being deemed related to the first two lawsuits, was assigned to Judge Mueller. The Yeagers then filed a motion to recuse Judge Mueller. Judge Mueller denied the motion.

On the first allegation, that a former attorney for Judge Mueller's husband and mother in law, Attorney O'Neal, was a partner in a law firm that was a named defendant in the interpleader action, Judge Mueller noted that she had no involvement with the company at issue in the litigation alleged to have involved Judge Mueller's husband and mother in law, and that she had no knowledge of either that litigation, nor the attorney identified on the pleading of that litigation (not Ms. O'Neal). Ms. O'Neal never appeared in the interpleader nor was she identified in any of the pleadings before Judge Mueller.

On the second allegation, Plaintiffs alleged that Judge Mueller used to work at a law firm between 1995-2000 in which Attorney Stroud was a senior associate, that at some point during that time frame they worked together, that Attorney Stroud and Judge Mueller are both members of certain groups, and that Attorney Stroud and Judge Mueller were friends. Plaintiffs finally noted that Attorney Stroud was an attorney in the right of publicity action. Judge Mueller noted Attorney Stroud was not legal counsel in the right of publicity action, and that while he had some involvement in the case, he did not play a big part, and that she never discussed the case with him, consistent with her practice and as required by the judicial canons.

On the final allegation, Plaintiffs alleged they would call her as a witness in the interpleader and the malpractice action.

Judge Mueller found there was no authority requiring her recusal. Recusal was required relating to a spouse only if the spouse is a party in the proceeding before the judicial officer. Ms. O’Neal was also not a material witness in the pending cases. Neither Judge Mueller nor Attorney Stroud served as an attorney in any of the Yeager cases while Judge Mueller and Attorney Stroud practiced together (over 15 years before), and his role was only in the original action – he was not a material witness whose testimony could be reasonably required. Their friendship did not interfere with her compliance with the judicial canons and that that in fact, the Judge had been impartial and fair – even deciding many questions against Mr. Stroud’s clients, and in the Yeagers’ favor. Finally, Judge Mueller noted that she could not be called as a material witness under the circumstances before the Court, and that the Yeagers provided no facts to establish a basis to doubt her impartiality. She had no bias or prejudice. The motion was denied.

Chubb & Son v. Superior Court of San Francisco, 228 Cal.App.4th 1094 (2014)

- **Attorney may disclose client confidential information to her own counsel to obtain legal advice regarding employment claims, even where the employer at issue is a private law firm, and third party client confidential information is implicated. Attorney must continue to protect client confidences beyond that limited disclosure and continue to refrain from impermissible public disclosure**

Chubb was an employment case in which an attorney sued her law firm employer, as well as Chubb & Son, a division of Federal Insurance Company, whose insureds she represented while at the law firm. Chubb withheld or redacted documents on privilege/confidentiality grounds, asserting the attorney client privilege between the Chubb’s third-party insured clients and attorney’s law firm employer. Chubb further insisted that the parties could not even reveal any of that third-party information to their own attorneys on the same basis.

Starting with the importance of an attorney’s duty of confidentiality under California law, the *Chubb* court agreed with the rationale of *General Dynamics Corp. v. Superior Court.*, 7 Cal. 4th 1164 (1994) and *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294 (2001), which declined to apply the attorney client privilege to block litigation between in house counsel and their former client employers, provided that the litigation did not result in a breach of the attorney client privilege. *General Dynamics* suggested ways a lawyer might be able to prove their case without disclosing client confidences through aggressive management by the Court, and maintained that a former in-house counsel could use privileged information so long as there was careful control against inappropriate disclosure, to pursue a wrongful termination claim against the former employer. *Fox*, in turn, relied on *General Dynamics* to find that in-house counsel could disclose client confidences of her former client employer to her own attorney to facilitate the preparation of her wrongful termination case, so long as the disclosures were limited to information reasonably

necessary to prepare and prosecute her case, and again, so long as safeguards were employed against inappropriate public disclosure.

Turning to the facts before it, the *Chubb* court noted that permitting disclosure to an attorney's own counsel would assist the plaintiff in avoiding impermissible public disclosure. Declining to distinguish *General Dynamics* and *Fox* on the basis that *Chubb* involved third-party client records (as opposed to the client-employer in *General Dynamics* and *Fox*), the *Chubb* court further relied upon the rationale of California State Bar Formal Ethics Opinion 2012-183, and found its analysis to be persuasive to permit the parties to disclose privileged/confidential information to their counsel so counsel could advise the attorney plaintiff on her obligations in the case. The *Chubb* court found no distinction between a party's confidences and a nonparty's confidences in this scenario, and the *Chubb* attorney had as much of a right to pursue her claims as the *Fox* plaintiff.

***Palmer v. Superior Court of Los Angeles*, 231 Cal.App.4th 1214 (2014)**

- **Consultation between a law firm handling attorney and law firm's in house counsel about a current client is protected by the attorney client privilege if *Palmer* factors are met**

In *Palmer*, the law firm represented real party in an invasion of privacy lawsuit. The law firm and real party had a short and contentious relationship, with real party expressing dissatisfaction to relating to the bills and the quality of the representation. The firm's handling attorney communicated with two of law firm's in-house counsel regarding real party's assertions during the time firm continued to represent real party.

In a subsequent legal malpractice suit, the law firm asserted the attorney client privilege over handling attorney's communications with law firm's in-house counsel. Real party moved to compel, arguing that the privilege was inapplicable when a law firm acted as an attorney to both an outside client and to itself because the firm's fiduciary duty to the outside client trumped the privilege. In opposition, the law firm's two in house counsel submitted declarations that they shared responsibilities on claims handling and loss prevention issues for the law firm, and that they gave advice to Attorney in that capacity. They also argued they deputized a third attorney to supervise preparation of pleadings being prepared for real party. Law firm did not bill real party for the consultation time. The trial court granted the motion to compel.

On appeal, the *Palmer* court focused on the California Evidence Code, noting the attorney-client privilege has been a "hallmark of Anglo-American jurisprudence for almost 400 years" and fosters full communications between an attorney and client by protecting them. *Id.* at 1225 (internal citations omitted.) The Court further noted that the Evidence Code further sets forth eight recognized exceptions to the attorney client privilege, and where none of those privileges apply, the attorney client privilege will stand. Disclosure could not be ordered, without regard to relevance, necessity or any particular circumstances particular to the case.

The Court noted that a law firm's in-house counsel enjoys a standard attorney-client relationship with its client, the law firm, giving rise to a privilege. The question was whether the fact the law firm was a fiduciary to the outside client at the time of the handling attorney's consultation with law firm's in-house counsel worked to abrogate the privilege. After reviewing existing law, the court concluded "we are not at liberty to adopt the fiduciary or current client exceptions to the attorney-client privilege." *Id.* at 1230. The Court noted that it is well established in California that the privilege is a legislative creation and courts have no power to limit it by recognizing implied exceptions. The eight enumerated exceptions to the privilege in the California evidence code do not contain a "fiduciary" or "current client" exception.

The Court noted that while a law firm's representation of itself concurrently with representation of an outside client might raise "thorny ethical issues," "it does not follow that looming specter of ethical issues mandates the extinguishment of the attorney-client privilege." *Id.* at 1233. The Court noted that an attorney's duty to communicate under Business & Professions Code §6068(m) and California Rule of Professional Conduct 3-500 requires an attorney to keep a client informed of significant developments. This duty would require the firm to disclose to the client the underlying facts and circumstances which would form the acts of malpractice, circumstances that occurred independent of subsequent consultation with law firm in house counsel.

For the privilege to apply, an actual attorney-client relationship with a firm attorney and the law firm in house counsel must exist. Persuasive factors in that determination are whether the in house counsel is actually designated as the firm's formal in house counsel, in-house counsel cannot have performed work on either the outside client matter at issue or any substantially related matter, the in house consultation cannot have been billed to the outside client, and the communications must have been made in confidence and kept confidential.

Turning to the case at bar, the court held in house counsel's communications with the handling attorney was protected, but that handling attorney's communications with the deputized counsel were not, as deputized counsel had no formal role as in house counsel, and had also worked on real party's case. The matter was remanded to the trial court for further proceedings consistent with the opinion.

ATTORNEY DISCIPLINE

In the Matter of Guzman, 5 Cal. State Bar Ct. Rptr. 308, 2014 WL 1979258 (2014)

- **State Bar Review Department recommended disbarment for attorney based on acts including settling matters without client consent, failure to notify clients of receipt of settlement funds, failure to communicate with clients, misappropriation and lack of competence.**

Attorney was charged with twenty four counts of misconduct arising from his handling of three personal injury matters. The State Bar Court hearing department had recommended a one-year suspension; after appeal by the Office of the Chief Trial Counsel, the Review Department recommended disbarment for reasons that included the attorney's indifference towards the consequences of his misconduct.

Four underlying matters were involved. In the first, a car accident case, the attorney agreed to a settlement with the driver's insurance company without the client's knowledge or consent, and did not notify her of the receipt of the settlement funds. When the client tried to contact him, the attorney did not respond. The attorney was unable to prove that he had ever paid the client her share of the settlement funds.

The second case arose from a car accident. A photographer appeared at the scene of the accident, took photos, and gave the accident victims the attorney's card. The next day the victims called the attorney, who confirmed he had the photos and would represent them. The attorney settled the case without notice to the clients and without telling them. When the clients thereafter tried to contact the attorney, he failed to return their calls. The clients finally received their share of the settlement funds almost two years after the attorney had received them.

In the third case, also arising from a car accident, the attorney agreed to represent a husband, wife and child without obtaining conflict waivers. He then transferred the case without their knowledge or consent to a different lawyer, and the clients never received any money, despite being informed by the insurance company that the case had settled.

The fourth case involved a client who had been involved in a bus accident. The attorney failed to communicate with the client, despite numerous inquiries, and dismissed the case without notifying the client.

The Review Department found that the attorney had committed moral turpitude; violated professional rules and statutes including Bus. & Prof. Code §§ 6068(m), Rule 3-100, 3-110, 4-100, and 3-700. The Review Department found factors in aggravation including multiple acts of misconduct, significant client harm, and indifference by the attorney. The Review Department gave little weight to mitigating factors. On this basis, the Review Department recommended disbarment

In the Matter of Sangary, State Bar Ct. Case No. 13-O-13838-DFM (Order dated September 11, 2014)

- **State Bar Court suspends attorney for six months for false advertising.**

The State Bar Court hearing department found that an attorney had willfully violated rules including Rule 1-400 by engaging in deceptive advertising, along with other acts of misconduct.

The notable aspect of this matter is the conduct that subjected her to the 1-400 charge: she had published photos on her website that appeared to show her with celebrities or political figures, including Bill Clinton, Barack Obama, Hillary Clinton, Al Gore, Arnold Schwarzenegger, and others. The State Bar Court found that “many, and perhaps all” of the photos had been doctored to add the attorney’s photo to the original. The court found that the photos were part of an advertisement and solicitation for future work, since they appeared on her law firm web site, and that they were “false, deceptive, and intended to confuse, deceive and mislead the public.”

For the various offenses, the hearing department recommended a suspension of two years, with all but six months stayed, and other conditions

In the Matter of Smithwick, 5 Cal. State Bar Ct. Rptr. 320, 2014 WL 2093484 (2014)

- **Attorney suspended for sixty days for sharing fees with nonlawyer entity, failing to act with competence, failing to refund unearned fees, and failing to notify eth State Bar when he hired a resigned attorney.**

This decision by the Review department follows the parties’ stipulation as to facts, conclusions of law and disposition, which was returned by the Supreme Court for further consideration “in light of the applicable attorney discipline standards” (*Id.* at *1) in June 2012. Thereafter, the matter proceeded to a hearing before the Hearing Department and thereafter to review when the Office of the Chief Trial Counsel appealed. The Review Department affirmed the Hearing Department’s disposition, but added a condition that the attorney remain suspended until he submits full restitution.

An attorney who had been practicing thirty years agreed upon a friend’s referral to accept cases from a company that specialized in predatory lending lawsuits. The company agreed to provide necessary staffing and support to the attorney to help prosecute the cases. The attorney took the cases on a contingency basis but understood that if the client paid the company costs, the company would advance those funds to the attorney.

The attorney hired a former law school classmate to work in his office. He was aware that the classmate had resigned from the State Bar, but believed he was petitioning for reinstatement. The attorney failed to notify the State Bar of his hiring the resigned attorney, as is required under Rule 1-311.

At some point in the course of his handling these matters, the attorney began to receive monthly payments from the company on certain of the cases. The attorney did not perform any work of value on these cases. The attorney decided to end his relationship with the company because he was not receiving the necessary support, and substituted out of all but one case.

The attorney stipulated to violating four Rules of Professional Conduct: Rule 1-320(A) by splitting fees with the company, a non-attorney entity; Rule 3-110(A) by failing to perform any work of value on the client matters; Rule 3-700(D)(2) by failing to return unearned fees; and Rule 1-311 by failing to notify the State Bar in writing that he employed a resigned attorney.

The court found significant factors in mitigation, including no prior record of discipline, candor and cooperation, good character, and remorse. The court affirmed the Hearing Department's recommendation of a sixty-day actual suspension, a one-year stayed suspension, probation and restitution.

In the Matter of Yee, 5 State Bar Ct. Rptr. 330, 2014 WL 3748590 (2014)

- **Attorney given public reproof for failing to accurately report MCLE compliance.**

In this case, the Review Department reduced the recommendation by the Hearing Department that an attorney who had mistakenly reported compliance with MCLE. The Hearing Department found that the attorney's actions constituted gross negligence amounting to moral turpitude, and recommended a two-year stayed suspension, based on significant mitigation. The Review Department agreed with the findings on moral turpitude but held that the significant mitigating circumstances supported a reduction of the discipline to a public reproof.

The attorney in this matter had affirmed MCLE compliance to the State Bar without verifying that she had in fact met her MRACLE requirements. She testified that she had a good faith belief that she had in fact complied at the time she submitted her compliance certificates. Later, when she was audited, she was unable to show completion of any hours.

The court found that while the attorney did not intentionally misreport her MCLE compliance, the attorney's failure to verify her MCLE compliance before affirming compliance to the State Bar constituted gross negligence amounting to moral turpitude. While a moral turpitude violation would normally result in actual suspension, the court found significant factors in mitigation, including no prior record of discipline, candor and cooperation, extraordinary good character, remorse, and pro bono and community service. As a result, the Review Department recommended a public reproof and denied the State Bar's request for a thirty-day actual suspension. Two years stayed suspension.

ATTORNEYS' FEES

Hernandez v. Siegel, 230 Cal. App. 4th 165 (2014)

- **Postjudgment interest on an attorneys' fees award belongs to the attorney, and not the client, absent an express contrary agreement between the parties.**

Attorney Siegel represented Hernandez in an employment discrimination lawsuit brought under California's Fair Employment and Housing Act ("FEHA"). FEHA provides that a plaintiff prevailing in an action brought under that statute can recover his or her attorneys' fees. After a jury trial, Hernandez obtained a favorable verdict with an award of damages of \$266,347. The court then awarded attorneys' fees of \$623,908 and costs of \$26,933. The defendant in the underlying lawsuit paid the judgment by check to Hernandez and Siegel, which Siegel deposited in a client trust account. The check also included postjudgment interest – \$34,699 of which was postjudgment interest on the attorneys' fees award.

Hernandez demanded that Siegel disburse not only the judgment amount, but also the postjudgment interest accrued on the fees award. Siegel refused, and Hernandez filed a lawsuit. Hernandez argued that, because the parties' fee agreement did not expressly specify that Siegel would be entitled to interest on the fees award, by default the interest should go to the client, Hernandez.

The trial court found in favor of Siegel, and the court of appeal affirmed. The court concluded that the fee award was owned by the attorney, and not by the client, and therefore interest on the fee award also was owned by the attorney. The court relied on the Supreme Court case of *Flannery v. Prentice*, 26 Cal. 4th 572 (2001), which held that attorneys' fees by default belonged to the attorney, and not the client, and that the fees only belonged to the client if the fee agreement so specified. Although *Flannery* did not address the issue of interest on attorneys' fees, the *Hernandez* court nonetheless concluded that *Flannery* compelled the result that interest on fees also belongs to the attorney, absent a contrary agreement. The court noted that the purpose of postjudgment interest is to compensate the judgment creditor for the time value of money. In the case of attorneys' fees, the attorney is the judgment creditor.

Ryan v. Editions Ltd. West, Inc., 786 F. 3d 754 (9th Cir. 2015)

- **The federal Copyright Act, which does not permit the recovery of attorneys' fees by the prevailing party in a copyright infringement action, does not preempt the parties' fee-shifting agreement. In addition, the district court erred in reducing the prevailing party's fees without adequate explanation of its basis.**

An artist named Victoria Ryan sued the publisher of her artwork, Editions Limited West, Inc. ("ELW"), for copyright infringement when it learned that ELW had granted permission for another entity to sell her derivative artwork. Ryan sued under the Copyright Act of 1976 as well as under her publishing contract with ELW. Ryan prevailed at trial on her contributory infringement claim,

but obtained only an injunction and no damages. She then sought recovery of \$328,077 in attorneys' fees under the fee-shifting provision of the publishing contract. The district court found that Ryan was the prevailing party, but awarded only \$51,363 in fees. Both parties appealed the ruling. Specifically, ELW argued that the federal Copyright Act, which did not allow for the recovery of attorneys' fees, preempted the parties' contract such that Ryan was not entitled to recover her fees. Ryan appealed the district court's reduction in the amount of fees awarded.

On the issue of preemption, the Ninth Circuit held that The Copyright Act did not preempt the parties' fee-shifting agreement. Although the Copyright Act does preempt state law claims for copyright infringement, the Act did not "preempt the field." The Ninth Circuit explained that its decision followed those of other circuits who had "long recognized that a contractually-based claim generally possesses the extra element necessary to remove it from the ambit of the Copyright Act's express preemption provision." *Id.* at 760-61. It also held that "California law permitting enforcement of the Agreement's fee-shifting provision does not 'stand[] as an obstacle to the . . . full purposes and objectives of Congress in enacting the Copyright Act. . . ." *Id.* at 762.

Regarding the amount of fees the district court awarded, the Ninth Circuit found that the court abused its discretion by not providing an adequate explanation for its calculations. It further chastised the court for what it described as "a mechanical approach" to reducing the fees, as the district court awarded only 25 percent of certain fees based on the Ryan's prevailing on only one of her four claims, and reduced Ryan's award by 20 percent as a result of her attorneys' use of block billing. *Id.* at 765. While the Ninth Circuit noted that a reduction for block billing may be appropriate, the district court had to explain its basis for determining its percentage reductions. The Ninth Circuit remanded the fees issues to the district court.

ATTORNEY LIENS

Mojtahedi v. Vargas, 228 Cal. App. 4th 974 (2014)

- **Attorney may not enforce lien against a client's recovery without first bringing a separate independent action against the client to establish the existence, the amount, and the enforceability of the lien**

Plaintiff attorney was the first of two attorneys to represent two clients in a personal injury matter under a fee contract that permitted him to assert a lien against all claims or causes of action that were subject to the Plaintiff's representation under the contract. He was terminated after 8 months, and Defendant attorney substituted in as new counsel. Plaintiff asserted a lien on future payments and requested that any payment to his former clients include him as a payee. The case settled, and Defendant deposited the settlement checks into his client trust fund account, each check having been made out to the clients, Plaintiff's firm, and Defendant's firm as payees. Plaintiff then sent a log of his time spent and demanded payment from Defendant (\$4,407 of the \$14,500 total). Negotiations failed, and Plaintiff sued Defendant, asserting he was owed a portion of the settlement.

The trial court sustained Defendant's demurrer without leave because Plaintiff failed to establish the existence, amount, and enforceability of his attorney fee lien as an independent action against his former clients prior to the present suit. The Court of Appeal affirmed. Unlike other liens, an attorney's lien is not created by the mere fact an attorney has performed services in a case – it is only created by an attorney fee contract with an express provision regarding the lien, or by implication in a retainer agreement that provides the attorney will be paid for services rendered from the judgment. Existing law is well settled that after a client obtains a judgment, the attorney must bring a separate independent action against the client to establish the existence, the amount, and the enforceability of the lien before being able to enforce that lien.

The Court found it would be irrelevant if the clients did not dispute the amount owed to attorney, because the rationale of the cases requiring an independent action was not limited to attorney-client disputes. Without first establishing a right to any portion of his client's settlement proceeds, Plaintiff lacked any basis to assert Defendant improperly withheld money from him.

The Court rejected the argument that requiring an independent lawsuit against former clients would chill the attorney-client relationship. The lawsuit required was not one sounding in breach of contract - the lack of any controversy between attorney and client would permit a declaratory relief action, seeking a declaration of the attorney's rights with respect to his former client, without subjecting his former clients to damages. The declaratory relief suit would also permit a court to evaluate the value and quantity of Plaintiff's services. Because Plaintiff had not met this requirement, the trial court properly sustained the demurrer without leave to amend

ATTORNEY SANCTIONS

United States v. Tillman, 756 F.3d 1144 (9th Cir. 2014)

- **Court-appointed defense counsel’s critique of delayed payments of his CJA vouchers was not cause to remove him and refer him to the State Bar of California for discipline for ethical violations; writ of mandamus issued vacating order.**

In *Tillman*, Client had been charged with a RICO conspiracy, and Attorney was appointed *pro hac vice* capital defense counsel. Five years into the representation, in an exchange with the court financial specialist on the issue of the court's delayed payments of multiple of Attorney's Criminal Justice Act ("CJA") vouchers, Attorney indicated an intent to withdraw so he could work on paying matters and meet his financial obligations. The district court judge, on reviewing the email, reminded Attorney that he needed court approval and good cause to withdraw, and of his ethical obligations. Attorney responded he would give notice and ask to appear before any withdrawal, and sought to bring the court's attention to his delayed vouchers. The trial court eventually called a status conference, during which the trial court's concerns about Attorney's bills and the effectiveness of his representation in light of the billing dispute were discussed. The trial court demanded assurance from Attorney that he would continue to represent Client effectively despite the budget and delay issues; Attorney expressed the difficulties for him and his ability to defend the case if the CJAs remained unpaid but stated he would do his best for Client. Thereafter, the trial court issued an order finding Attorney was "attempting to extort the court by delay or withdraw[al] of representation into prioritizing the signature of his vouchers and the approval of extraordinary and inappropriate budget requests and voucher requests..." was in violation of this ethical obligations to Client, was attempting to manufacture an ineffective assistance of counsel claim for Client, and refused to give assurance of his effective and competent representation. *Id.* at 1148. The Court removed Attorney from the case and directed a copy of his order be referred to the State Bar of California for discipline proceedings. The State Bar of California dismissed the referral at the investigatory stage. Attorney and client appealed. Client was assigned a different counsel, the district court judge recused himself and the matter was reassigned. At the time of the issuance of the Ninth Circuit's opinion, trial was pending.

The Ninth Circuit Court of Appeal first noted that it lacked jurisdiction over the appeal of the removal as it was not a final order. The Court then turned to analyzing whether the trial court's factual findings was a sanctions matter that would permit it to exercise mandamus jurisdiction over the sanctions portion of the appeal. Addressing the four factors in exercising mandamus jurisdiction, the Court found the first and second factors were met, as there was no other avenue of relief from the immediate and ongoing harm to Attorney's professional reputation resulting from the nature of the trial court order, and that such harm was ongoing affecting his ability to be hired on other matters. The Court noted:

Lawyers do not have a ready “toolkit” for their profession. Instead, their professional reputations are the essence of their livelihood. Reputations matter – to the court, to clients, to colleagues, and to the public. In a specialized area, such as criminal defense, the professional circle is even more circumscribed. Appointed lawyers representing indigent clients in federal cases rely on public funds which, in turn, are controlled in part by the judiciary. To be sure, the judiciary and lawyers have an obligation to be stewards of CJA funds. But this oversight should not trade off with the rights of clients. Nor should such supervision ignore the practical reality that inordinate delays in processing CJA vouchers stretch lawyers to their economic limits. *Id.* at 1151.

On the third factor, whether the order was clearly erroneous, the Court found that the district court improperly removed Attorney for highlighting a problem with the CJA payments, after he had represented Client for many years, all without notice or opportunity to be heard to Attorney. Attorney’s statements which amounted to criticism of the administration of the CJA is not a cause for discipline or suspension under Supreme Court precedent, and did not constitute extortion, whether the critique was justified or not. The hearing that gave rise to the post-hearing findings and order was a status hearing; there was no notice that it would evolve into a hearing on ethics, extortion, and charges of manufacturing an ineffective assistance of counsel claim.

The Court noted that tensions between judges and CJA attorneys was longstanding, and that frustration with the circumstances could not be justification for “a harsh attack on court-appointed defense attorneys.” *Id.* at 1153. Finding the trial court’s actions were directed [“hopefully”] only at one individual attorney and was thus not likely to be “an oft-repeated error” nor was it novel, the final mandamus factor was satisfied. *Id.* As the four factors favored granting mandamus, the court exercised jurisdiction and granted to the writ vacating the order.

CONFLICTS/DISQUALIFICATION

Acacia Patent Acquisition, LLC v. Superior Court of Orange County, 234 Cal. App. 4th 1091 (2015)

- **Law firm disqualified from being adverse to entity, where it had obtained access to entity's privileged information through representation of that entity's former counsel in a prior fee dispute.**

This novel disqualification matter involved two underlying matters. In Matter No. 1, a company called Shared Memory Graphics LLC (SM Graphics) retained a law firm, Floyd & Buss, to represent it in patent infringement litigation. That matter ended in a settlement paid to SM Graphics. Matter No. 2 was a fee dispute between Floyd & Buss and SM Graphics, in which Floyd & Buss hired AlvaradoSmith to represent it. Floyd & Buss claimed in that matter that SM Graphics had improperly undervalued the part of the settlement that formed the basis for the law firm's contingent fee. Matter No. 2 also resulted in settlement.

In Matter No. 3, the lawsuit in which the disqualification motion arose, an expert named Chitranjan Reddy sued SM Graphics for unpaid consulting fees earned in connection with two of the patents at issue in Matter No. 1. Reddy claimed that SM Graphics (and a corporate affiliate of the company) manipulated the settlement from Matter No. 1 to deprive the expert of part of his contingent fee. Significantly, Reddy hired AlvaradoSmith to represent him in the action. SM Graphics moved to disqualify the law firm, claiming that its access to the company's privileged communications with its former counsel, which AlvaradoSmith obtained in the course of its representation of that former counsel in Matter No. 2, created a substantial relationship between the two matters that should disqualify AlvaradoSmith from representing Reddy. The trial court denied the motion, and SM Graphics appealed.

The Court of Appeal held that the trial court erred, and that AlvaradoSmith should be disqualified from Matter No. 3. The court's decision was based on the "unique circumstances inherent to the representation of attorneys against their former clients" (Matter No. 2) and the substantial relationship between that matter and Matter No. 3. *Id.* at 1097.

First, the court cited the substantial relationship rule, which mandates that a lawyer may not be adverse to a former client where there is a substantial relationship between the two matters. The court noted that in Matter No. 2, Floyd & Buss was entitled to share privileged information belonging to SM Graphics with its counsel, AlvaradoSmith, and analyzed whether that access to information created a duty owed by AlvaradoSmith to SM Graphics. Noting that there were no cases directly on point, the court analyzed two matters in which lawyers were disqualified from being adverse to nonclients. In *Kennedy v. Eldridge*, 201 Cal.App.4th 1197 (2011), a lawyer was disqualified from representing his son (the father of the child involved) in a custody dispute, even though the lawyer had never represented the mother of the child. The basis of that decision was the "potential misuse of the mother's confidential information, which the paternal grandparents 'may

have acquired' during the course of representing the mother's father in a divorce proceeding." *Acacia*, 234 Cal. App. 4th at 1100. The court there applied the substantial relationship test to find there was a likelihood that the lawyer had acquired confidential information belonging to the mother in the prior dispute.

The court also cited *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, 69 Cal. App. 4th 223 (1999), and a Wisconsin case, *Burkes v. Hales*, 165 Wis.2d 585 (Wis. Ct. App. 1991). In *Morrison*, a law firm was disqualified from being adverse to a corporate entity due to its access to confidential information belonging to the company through the law firm's role as monitoring counsel for the company's insurer. In *Burke*, a lawyer represented the Fox law firm in a dispute with lawyers who had left the firm. That same lawyer was later appointed counsel for a public agency in an action in which the Fox firm had originally represented the adverse party, an action which was involved in the law firm partner dispute.

The court cited all three of these cases to hold that "disqualifying conflicts with nonclients can arise as a result of an attorney-client relationship," if the prior representation created a duty of confidentiality owed to the nonclient. *Acacia* at 1102. However, the court rejected the notion that a lawyer representing a law firm in a fee dispute is automatically disqualified from opposing the defendant in future litigation that has a factual nexus with the fee dispute. Rather, a court must examine: (1) whether the first representation resulted in abroad disclosure of the non-client's privileged information; and (2) whether a substantial relationship exists between the two matters. *Id.* at 1104.

Applying those two factors to the instant matter, the court held that AlvaradoSmith should be disqualified. In Matter No. 2, the law firm obtained wide access to SM Graphics' confidential and privileged information. Second, Matters 2 and 3 had "essential similarities" which created a substantial relationship between them, not least the fact in both, plaintiffs claimed that SM Graphics had manipulated a settlement to deprive them of contingent fees.

The court cautioned that its holding should not be interpreted to create broad duty of confidentiality owed to opposing parties, a duty that would be antithetical to our adversary system. "In the limited realm of cases featuring attorneys as parties opposed to their former clients, lawyers representing the attorney party must avoid participation in substantially related matters, whereby their access to privileged information in the former action would potentially serve as an advantage in the latter." *Id.* at 1107-08.

Castaneda v. Superior Court of Los Angeles County, 237 Cal. App. 4th 1434 (2015)

- **Law firm disqualified from representing defendant where an attorney in the law firm had previously served as a settlement officer in the case as part of a mandatory settlement conference.**

In this wrongful termination matter, the plaintiff filed a petition for writ of mandate after the trial court denied a motion to disqualify the law firm that substituted in to represent the defendant employer. Five months earlier, another lawyer at that firm had served as a settlement officer at a mandatory settlement conference in the matter, along with another attorney panelist and a judge.

In the motion to disqualify, plaintiff's counsel provided declarations that established that plaintiffs had shared confidential information with the settlement officer as part of the settlement conference, including information about strategy, legal analysis and bottom-line settlement figures. Plaintiff's counsel stated that this information was shared privately with the settlement officer, outside the presence of defendant's counsel, and that counsel would not have provided such information had they not understood the conference was confidential.

The law firm opposed the motion on behalf of defendant, and submitted a declaration from the lawyer at the firm who had acted as settlement counsel. The settlement officer stated that she did not recall details of the case, that the entire conference with plaintiff's counsel took place in the presence of plaintiff's counsel and others, and that the plaintiff did not reveal any confidential strategy or settlement evaluations, or the plaintiff's bottom-line settlement position. The law firm also provided evidence that it had established an ethical wall screening the settlement officer from the lawyers at the firm working on the matter on behalf of defendant.

The trial court denied the motion on the basis that disqualification was not required because of the presence of the ethical wall.

On appeal, the court stated that the case presented a "pure question of law subject to de novo review." *Id.* at 1443. The court first looked to *Cho v. Superior Court*, 39 Cal. App. 4th 113 (1995), in which the court disqualified a law firm from handling a case in which one of its partners, a former judge, had presided over a settlement conference before joining the firm. Because the former judge had a conflict, *Cho* held, that conflict was imputed to the other lawyers in the firm, with the result that the entire firm was disqualified.

Here, the court found that *Cho* was indistinguishable from this matter, despite the fact that the lawyer involved here served as a settlement officer rather than a judge, and was involved only in the one settlement conference proceeding, as opposed to other matters in the case, as had the former judge in *Cho*. The court pointed to the California Code of Judicial Ethics, which applies to lawyers serving in a quasi-judicial capacity. The Code prevents a lawyer who has been a temporary judge or referee in a matter from accepting any representation relating to the matter without the parties' informed written consent. Canon 6D(11). A second provision prohibits a lawyer from accepting

any representation in the same matter where he or she has obtained confidential information. Canon 6D(12). “[T]hese canons confirm that there is no line of demarcation to be drawn between judicial officers and attorneys who may assist them in settlement conferences.”

The court rejected defendant’s argument that the law firm should not be vicariously disqualified because of the presence of the ethical wall. The court distinguished the present matter from *Kirk v. First American Title Ins. Co.*, 183 Cal. App. 4th 776 (2010), on the grounds that here, the lawyer at issue had previously been involved in the same matter. The court noted, “[N]o ethical wall could overcome the imputation of shared knowledge when an attorney who formerly represented – and therefore possessed confidential information regarding- a party switched sides in the same case.”

The Court of Appeal remanded the matter to the lower court to determine whether the settlement officer had in fact obtained confidential information from the plaintiff.

***Coldren, v. Hart, King & Coldren, Inc.*, 239 Cal. App. 4th, 237 (2015)**

- **Order disqualifying law firm reversed where basis of order was an alleged conflict between the interests of entity defendant and individual shareholder defendant; because plaintiff, a 50 percent shareholder, was suing both the entity and the other partner, law firm did not owe any duty to plaintiff shareholder and could represent both defendants.**

Here two lawyers, each owning fifty percent of their Orange County law firm, agreed to a departure agreement whereby one would leave the firm. Departing lawyer then sued the law corporation and the other lawyer, alleging causes of action arising out of his departure. Another law firm appeared on behalf of both defendant law firm and defendant lawyer, and plaintiff moved to disqualify the firm from representing the entity defendant on the grounds that there was a conflict between the individual defendant and the entity, since plaintiff had a fifty percent stake in the entity. The trial court granted the motion.

The Court of Appeal reversed. First it found that plaintiff had no standing to move to disqualify the law firm. He was never a client of the firm’s. The court rejected the argument that this situation was analogous to a shareholder derivative matter, where it is well-established that an attorney may not represent both a company and company insiders. *See Blue Water Sunset, LLC v. Markowitz*, 192 Cal. App. 4th 477 (2011). The court found that this action was not a derivative one, in which corporate insiders are accused of mismanagement or other misconduct, and thus have interests that differ from the corporation’s. Rather, this action, seeking involuntary dissolution among other claims, “does not necessarily pit the corporation against the defendant owner.” *Coldren*, 239 Cal. App. 4th at 248.

The court also found that no actual conflict existed between the defendant law firm and the defendant shareholder, citing State Bar of California Formal Opinion No. 1999-153. In that opinion, the Committee on Professional Responsibility and Conduct considered a fact situation very

similar to the one before the court here: an attorney is asked to represent both a corporation and a defendant shareholder in an action brought by another shareholder. The opinion notes that corporate counsel owes a duty to the corporation, and is not prohibited from taking action on behalf of the corporation that negatively impacts the interests of another shareholder. The opinion concluded that a lawyer may jointly represent the corporation and a shareholder as long as two conditions are met: 1) the corporation and the individual defendant do not have opposing interest in the lawsuit; and 2) the lawyer meets the provisions of Rule 3-600.

Applying that reasoning to the current matter, the court found that one law firm could represent both defendants. There was no conflict between them. In fact, because plaintiff sued both defendants on the same claims, their interests were aligned. The individual defendant had the authority to consent on behalf of the corporation, as provided in Rule 3-600. On that basis, the court reversed the disqualification order.

Kim v. The True Church Members of Holy Hill Community Church, 236 Cal. App. 4th 1435 (2015)

- **Law firm barred from cross-examining witness where firm had previously represented witness' employer as a joint client in the same matter.**

This case involved an appeal (in part) of a trial court's order, during trial, barring plaintiff's counsel from cross-examining a witness for defendants on ground

As that counsel had previously represented the witness through its representation of the entity for which the witness was employed and testified. The dispute here involved a church, its presbytery, the former pastor, and current and former church members. In brief, a church and its governing organization, the Western California Presbytery ("WCP"), sued the church's excommunicated former pastor and church members alleging various claims, and seeking declaratory relief, an accounting, an audit and injunctive relief. One law firm represented both the church and the WCP. By the time the case was tried, the WCP had dismissed its claims, and the only issue before the court was the claim for declaratory relief. At trial, a representative of WCP was called to testify for the defendants, who claimed that the presbytery had joined their side of the dispute. Defendants moved to disqualify plaintiff's counsel from cross-examining the witness, on the basis of the prior attorney-client relationship between plaintiff's counsel and WCP. The court granted the motion, and the Court of Appeal upheld the judgment.

On appeal, the attorneys argued that there was no actual conflict requiring disqualification for several reasons: 1) No one at WCP ever communicated directly with any of the lawyers, and therefore there was no risk that the attorneys would use WCP's privileged communications against the witness; 2) The joint-representation agreement between WCP and plaintiffs meant that none of WCP's communications could be considered confidential as against plaintiffs; and 3) Cross-examination would not create an actual conflict between the lawyers and the former client, absent

misuse of confidential information. The lawyers also argued that the court should have imposed lesser sanctions. The Court of Appeal rejected each of these arguments.

First, the court found there to be a presumption that WCP had communicated confidential information to its attorneys in the course of the matter based on the substantial relationship test. Next, the court rejected the notion that the joint representation agreement or the joint client exception to the privilege applied, on the grounds that the “mere fact of joint representation does not preclude disqualifying an attorney when two jointly represented clients’ interests diverge.” *Id.* at 1455. Because there was no evidence of an advance waiver by WCP consenting to continued representation of the other plaintiff should their interests diverge, the court found cases cited by plaintiff inapplicable, including *Cornish v. Superior Court*, 209 Cal. App. 3d 467 (1989).

With regard to the argument that cross-examination would not create an actual conflict, absent misuse of confidential information, the court held that the duty of loyalty owed to a former client prohibited both the attorney’s use against the former client of information or knowledge obtained in the prior relationship, as well as the performance of any act that would “injuriously affect his former client in any matter in which he formerly represented him . . .” *Kim* at 1456, citing *People ex rel. Deukmejian v. Brown*, 29 Cal.3d 150, 155-156 (1981). The court rejected the argument that cross-examination could be limited to events occurring after the attorneys ceased their representation of WCP. “[C]ross-examining a former client results in an ‘actual conflict’ prohibited under rule 3-310.” *Kim* at 1457.

Lastly, the Court of Appeal held that the court had properly exercised its discretion in disqualifying counsel. It declined “to second-guess the appropriate balance struck by the trial court in this case between appellants’ right to retain counsel of their choice and the law firm’s duty of loyalty to its former client.” *Id.* at 1458.

***Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 2015 WL 1540631 (E.D. Cal. April 7, 2015)**

- **Law firm disqualified from representing insurance company adverse to a subsidiary of a current corporate client of the firm; court declined to enforce advance waiver.**

In this environmental coverage matter in the United States district court for the Eastern district, counsel for one of the plaintiff entities moved to disqualify the law firm representing the defendant insurer on the grounds that the law firm also represented the plaintiff’s parent corporation. The defendant opposed the motion on the grounds that there was insufficient evidence to show a unity of interest between the parent and the subsidiary to establish a conflict; and that the parent corporation had in any event executed an advance waiver upon the commencement of the representation years earlier. The defendant also argued that plaintiff’s delay in bringing the motion served as a waiver. The court rejected the defendant’s arguments and disqualified the law firm.

The factual background of this motion to disqualify is that the law firm representing defendant insurer represented and had represented for a number of years the corporate parent of one of the

plaintiff entities (“Parent”). In the motion to disqualify, the plaintiff alleged that the law firm advised the Parent on corporate board governance and fiduciary issues; capital markets strategy; SEC issues; and other corporate matters, and said that the Parent considered the law firm to be the Parent’s “top strategic law firm.” When, partway through the present matter, the law firm was approached by the defendant insurer for possible representation in the matter, one of the lawyers at the law firm had contacted in-house counsel at the Parent to inform him about the possible representation. The court’s opinion states that the lawyer told in-house counsel that the Parent had executed an advance waiver in its original representation agreement with the law firm’s predecessor firm. As the opinion notes, the lawyer stated in her declaration that in-house counsel told her in that call that parent would not move to disqualify law firm.

In August 2014, law firm substituted in to represent defendant. Initially, neither plaintiff nor Parent objected. Then, in December 2014, counsel for defendant contacted plaintiff’s counsel to seek a stipulation to file an amended counterclaim against plaintiff. Several weeks after defendant filed a motion to amend the counterclaim, in-house counsel for Parent contacted law firm and raised concern about law firm’s representation of defendant. Thereafter, plaintiff filed a motion to disqualify.

The district court analyzed several issues in deciding the motion. First, the court considered whether law firm’s representation of the Parent created a conflict that prevented it from being adverse to plaintiff, a corporate subsidiary of Parent. Citing California State Bar Formal Opinion 1989-113 and ABA Formal Ethics Opinion 95-390, the court noted that representation of a corporate affiliate does not always create a conflict precluding adverse representation of a subsidiary, but that circumstances could create a situation where a law firm would have a conflict. The court then looked to *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, 69 Cal. App. 4th 223 (1999), which holds that a parent and subsidiary may be considered the same for conflicts purposes if they share a unity of interests, including shared corporate management, shared legal department, close supervision of the subsidiary by the parent, and other factors. However, the court distinguished *Morrison Knudsen* from the present action because the conflict there was a successive one, while the instant matter involved a concurrent conflict. Applying the various factors, the court found that the Parent and the subsidiary should be considered the same for conflicts purposes.

The court then analyzed the effect of the advance waiver. California Rule of Professional Conduct 3-310(C) allows waiver of concurrent conflicts by “informed written consent.” *Morrison* at 230. The court cited several cases in considering whether the advance waiver executed by Parent was sufficient to waive the conflict, including *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003), and *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796 (N.D. Cal. 2004). Based on those two opinions, the court found that the advance waiver executed here was not sufficient to waive the present conflict. The court found that the waiver was “broad, general and indefinite,” and its scope “essentially unlimited.” The court recognized that “[b]road advance waivers are a logical outgrowth of large law firms and the spiderwebs of affiliates, subsidiaries, and

parents they represent.” However, the court pointed to the more defined waiver in *Visa* “as a model on which firms can rely.”

Lastly, the court rejected the argument that plaintiff’s delay in bringing the motion served to waive its rights to seek disqualification and unduly prejudiced defendant. For all these reasons, the court disqualified the law firm.

Lynn v. Gateway Unified School District, 771 F.3d 1135 (9th Cir. 2014)

- **Ninth Circuit held that it lacked jurisdiction to review an appeal from a district court’s sanctions order finding that an attorney had committed ethical violations and disqualifying attorney.**

Attorney appealed to the Ninth Circuit after trial court disqualified him from representing the plaintiff in an employment action against a school district. The trial court found that “at least eight violations of professional conduct” had been raised against the attorney based on his continued use of information obtained from emails that a state court had enjoined both the attorney and his client from using, on the grounds that the emails had been improperly obtained. *Id.* at 1139. The trial court found that the client had stolen 39,312 emails, and that the attorney, instead of advising his client of the legal implications of such misconduct, went ahead and used the stolen emails in the federal matter. As a result, the judge disqualified the lawyer and his firm from further participation. The lawyer appealed the order to the Ninth Circuit.

The Ninth Circuit noted that it has jurisdiction only over final judgments or collateral orders. Case law makes clear that disqualification orders are not collateral orders. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440-41 (1985). The court then cited *Cunningham v. Hamilton Cnty.*, Ohio, 527 U.S. 198 (1999) which held that the collateral order doctrine does not apply to a sanctions order coupled with a disqualification order.

The court concluded that the sanctions and disqualification order were intertwined, and as a result, they lacked jurisdiction.

McElroy v. Pacific Autism Center for Education, 2015 WL 2251057 (N.D. Cal. May 13, 2015)

- **Attorney Who Formerly Served as Executive Director of Defendant Entity Not Disqualified from Representing Plaintiff Where No Substantial Relationship Between Current matter and Former Relationship With Defendant.**

In this matter, an attorney sued a group of defendants including the Pacific Autism Center for Education (the “Center”) on behalf of a former student, alleging that the plaintiff was mistreated and abused while in defendants’ care. Defendants moved to disqualify on the grounds that attorney had previously served as the school’s Executive Director for three years, and a board member prior to that. The United States district court for the Northern District declined to disqualify the attorney

on the grounds that there was no substantial relationship between his prior work with defendant and the present matter.

The court first looked to whether the attorney should be disqualified based upon a “substantial relationship” between his former employment with the Center and the current matter. The substantial relationship test is the test that governs whether a conflict exists under California Rule of Professional Conduct 3-310(E). Because the attorney had never acted as an attorney for the Center, but had instead served in a management role, the court held that Rule 3-310(E) did not apply.

The second issue the court addressed was whether the attorney’s prior fiduciary relationship as executive director created a continuing duty to maintain the Center’s confidential information sufficient to create a conflict under Rule 3-310(E). The court found the defendants had not met their burden to show that the prior relationship creates a conflict. The court pointed to the fact that attorney’s employment relationship with the Center had ended in 2005, five years before the plaintiff student enrolled at the Center. The attorney while at the Center had not been responsible for any policy decisions relevant to the issues in the case, and there was no allegation he was involved in any way in the events at issue in the lawsuit. “While Mr. Tollner was intimately involved with [the Center] a decade ago, the Court finds that his prior employment bears no factual or legal relationship to the present dispute.” *Id.* at *7.

***In re McIntosh*, 2015 WL 241130 (Bankr. N.D. Cal. Jan. 16, 2015)**

- **Bankruptcy court ordered lawyer to disgorge all fees paid by former client because of attorney’s flagrant breach of ethical duty where attorney took position adverse to client after representation ended that was inconsistent with position he had advanced on client’s behalf.**

This matter deserves a quick mention because it illustrates potential consequences of a conflict violation by an attorney. Here, the attorney represented a debtor in a Chapter 13 case. As part of that representation, attorney argued that a specific lien was not preserved, and obtained an order eliminating the lien. After being discharged from the matter, attorney then sought to recover fees, this time arguing that in fact the lien had been preserved, and should be used (in part) to pay his fees.

The court found the attorney’s actions amounted to a “flagrant” breach of Rule 3-310 and denied the fees motion. The court further ordered the attorney to disgorge the fees had had been paid, as a result of the “stark” violation of his duty to his former client. “Although the question whether the CMITH lien was preserved may appear technical and confusing to an attorney who does not regularly practice bankruptcy law, [the attorney] specializes in bankruptcy law and understood the meaning of everything he did.” *Id.* at *6.

Western Sugar Coop. v. Archer-Daniels-Midland Co., 2015 WL 690306 (C.D. Cal. Feb. 13, 2015)

- **Law firm disqualified due to simultaneous representation of one defendant and plaintiffs as the result of law firm merger, and advance waiver was not sufficient to waive conflict; law firm additionally subject to disqualification based on prior representation of another defendant in a substantially related matter.**

This matter involves several interesting conflicts issues in the context of a lawsuit alleging false advertising claims relating to the marketing of high fructose corn syrup. Squire Sanders represented the plaintiffs in the matter from when the case was first filed in 2011. In 2014, Squire Sanders merged with Patton Boggs, which gave rise to the conflicts at issue in this disqualification decision by the United States District Court for the Central District of California.

At the time the law firms merged, Patton Boggs was counsel to several of the defendants (the “Tate & Lyle” defendants), for which the firm had served as long-standing outside counsel on a “wide range of [legal] matters.” *Id.* at 2. The clients brought the conflict to the attention of a partner at the law firm, who then determined that the conflict checks done prior to the merger had failed to identify the conflict due to those clients having been inexplicably left off the client list that was used to check conflicts. During a call between the clients and the law firm to discuss the matter, the law firm asked for a waiver and explained that a de facto ethical wall was in place due to the fact that the two firm’s computer systems had not been merged. The clients declined to provide the waiver and requested that the firm withdraw from representing plaintiffs in the litigation. At that point, the law firm notified the clients that they had executed advance waivers at the time the representation had commenced in 1998, and shortly thereafter terminated the relationship with the clients.

The second conflict involved another defendant (Ingredion), a company that had retained Patton Boggs in a number of prior matters, most recently in a matter that ended in September 2013.

In deciding the motion to disqualify brought by both sets of defendants, the court first analyzed the conflict arising from the concurrent representation of plaintiffs in the litigation and the Tate & Lyle defendants in corporate matters. The court analyzed whether the 1998 waiver was sufficient to waive the present conflict and concluded that it was not. Citing *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003) and *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796 (N.D. Cal 2004), the court held that Tate & Lyle had not made an informed waiver of the present conflict. The court characterized the waiver as “open-ended”: “[It] purports to waive conflicts in any matter not substantially related indefinitely. The waiver also lacks specificity. It does not identify a potentially adverse client, the types of potential conflicts, or the nature of the representative matters.” *Id.* at *5. On that basis, the court found that the waiver “did not amount to a full and reasonable disclosure of the potential conflict.” *Id.* at *7.

The court also found that the firm's withdrawal did not cure the conflict, citing the "hot potato" rule. The court rejected the law firm's argument that the rule did not apply, finding that the rule applies "regardless of the attorney's reasons for terminating the relationship." *Id.* On that basis, the court disqualified the firm.

The second conflict concerned the prior representation of Ingredion in various matters, including FDA matters involving high fructose corn syrup. The court analyzed that conflict using the substantial relationship test and found factual and legal similarities between the firm's prior work for the client and the current litigation in which it was representing parties adverse to the former client. Because the matters were substantially related, the court found that a presumption was created that the law firm had obtained confidential information from its former client that was material to the new matter. The court further found that the law firm did not overcome that presumption, primarily because of evidence that the lawyer who had formerly represented Ingredion had consulted with the plaintiffs' lawyers shortly after the merger was effected.

Lastly, the court rejected alternatives to disqualification that the firm proposed, including ethical walls and the removal of records to preserve confidentiality. The court found that the wall could not rebut the presumption of shared confidential information, and "cannot restore Tate & Lyle's legitimate expectation of loyalty, which is the 'essential basis for trust and security in the attorney-client relationship.'" *Id.* at *13.

LEGAL MALPRACTICE

Bergstein et al., v. Strook & Strook & Lavan LLP, 236 Cal. App. 4th 793 (2015)

- **Court granted anti-SLAPP motion against a plaintiff who sued his adversary’s lawyers for accepting in litigation certain confidential information that the plaintiff’s own lawyer had wrongfully provided to them.**

After a lawyer had a falling out with her client over the non-payment of fees, the lawyer decided to seek revenge by, among other things, providing confidential, privileged, and proprietary information to her client’s adversary’s law firm, Strook & Strook & Lavan (“Strook”), in an ongoing litigation. Not surprisingly, the client filed a lawsuit against his lawyer, alleging breach of fiduciary duty and negligence. Also not surprisingly, the client obtained a multimillion dollar verdict and punitive damages.

The client then filed a complaint against Strook for, among other things, aiding and abetting his own lawyer’s breach of fiduciary duty. Strook’s alleged wrongful conduct included receiving the client’s confidential information. Strook filed a special motion to strike under the anti-SLAPP statute, California Civil Procedure Code section 425.16. The trial court granted the motion, and the court of appeal affirmed.

The court first discussed the procedure for analyzing a special motion to strike brought under the anti-SLAPP statute. A court is to apply a two step process. First, the court must decide whether the moving party has made a threshold showing that the challenged conduct arises from protected activity. If the moving party meets this threshold showing, then the burden shifts to the non-moving party to demonstrate a probability of prevailing on its claims.

In opposing the motion, the plaintiff (Strook’s client’s adversary) first argued that Strook’s conduct was not protected activity because it was not in connection with litigation and because it was unlawful. The court rejected both arguments. First, in concluding that Strook’s conduct arose in connection with protected activity, it referenced the “expansive view” courts have taken of this element, concluding that the activity in question indeed was in connection with Strook’s representation of its client in the pending litigation, described as “defendants’ conduct in receiving and using confidential information to prepare for and prosecute litigation against plaintiffs.” *Id.* at 803, 813. Next, the court concluded that the plaintiff had not met its burden of demonstrating that Strook’s conduct was illegal and thus not subject to anti-SLAPP protection, pursuant to *Flatley v. Mauro*, 39 Cal. 4th 299 (2006). The court’s conclusion was based on its finding that *Flatley* applies only to criminal conduct, and not to conduct that is illegal because it is in violation of a statute or common law, and further because plaintiff failed to provide Strook notice of the statute it was alleged to have violated.

Having concluded that Strook’s conduct was protected activity, the court then turned to the second prong – that is, whether plaintiff could establish a likelihood of prevailing on his claim. The court

again found in favor of Strook, on two independent bases. First, the court found that Strook’s alleged conduct was protected by the litigation privilege of Civil Code section 47(b), which “precludes liability arising from a publication or broadcast made in a judicial proceeding or other official proceeding.” *Bergstein*, 236 Cal. App. 4th at 814. Second, the court found that plaintiff’s claim was barred by the applicable statute of limitations, Civil Procedure Code section 340.6. In ruling on the statute of limitations, the court rejected plaintiff’s argument that the four-year statute of limitations of Section 343 should apply, instead following recent decisions more broadly interpreting Section 340.6 as applying not only to actions for legal malpractice brought by a former client.

***Britton v. Girardi*, 235 Cal. App. 4th 721 (2015)**

- **Former clients were on inquiry notice to discover alleged acts forming basis of claims arising out of the circumstances of a settlement fifteen years prior to the filing of the present action. Action barred by statute of limitations.**

Britton arose from an underlying action against an insurer arising out of the 1994 Northridge earthquake. Court appointed retired judges had presided over a 1997 aggregate settlement on behalf of the plaintiffs. In 2012, one of the parties to that insurance settlement conducted a random sampling of other plaintiffs’ awards in the action, which they contend revealed that the defendant law firms had not properly disbursed or accounted for the settlement funds, and that they had concealed that conduct from Plaintiffs. Former clients then sued attorney for fraud and breach of fiduciary duty alleging that attorney’s failed to obtain informed consent to an aggregate settlement, and for alleged misappropriation of and failure to account for settlement funds. The trial court sustained defendants’ demurrer to the Second Amended Complaint without leave to amend in part due to the expiration of the statute of limitations.

The Court of Appeal affirmed. The Court rejected plaintiffs’ argument that under *Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105 (2014), the statute of limitations had not run because they had no notice of wrongdoing. The Court noted that *Prakashpalan* held that Probate Code §16460 applied to make plaintiff’s fraud claims timely when an attorney-fiduciary failed to provide an accounting of an aggregate settlement and where Plaintiffs did not allege they had signed a settlement agreement, and accordingly, Plaintiffs had no source of information that would have put them on inquiry notice to ascertain any wrongdoing.

By contrast, in the *Britton* matter, the court found that notwithstanding their allegations, Plaintiffs own pleading established they were on inquiry notice, thereby starting the running of the statute of limitations. First, under plaintiffs’ allegations, they knew they did not have a copy of the master settlement agreement and master release at the time they signed the settlement, and they knew they were told not to talk to each other under a confidentiality agreement they did not have. They further did not inquire about the retired judge making the settlement allocation, although they knew the Judge had made the allocations – allocations which could not be distributed unless plaintiffs signed

the signature pages of the settlement agreements they knew they did not have. They were told that the settlement would foreclose them from bringing claims against the insurer. If they had questions, they had sufficient information to put them on notice to inquire about the process. The same analysis Plaintiffs did in 2012 could have been done in 1997.

The Court cited with approval *Miller v. Bechtel Corp.*, 33 Cal.3d 868 (1993), which rejected an argument that reliance on an attorney would abrogate a plaintiff from being on inquiry notice for purposes of the running of a fraud statute of limitations.

The statute of limitations in this matter started at the latest in 1998, when Plaintiffs were on inquiry notice to investigate why they were being asked to accept a check about a settlement they claim they knew nothing about, and where they had access to a settlement allocation process in which to object. Plaintiffs admitted to signing an agreement knowing that they would not receive information in connection with the settlement.

***Kasem v. Dion-Kindem*, 230 Cal.App.4th 1395 (2014)**

- **Demurrer to complaint alleging legal malpractice for failure to designate expert testimony properly sustained without leave to amend when cause of Plaintiff's damages was trial court error in failing to take judicial notice of statutes which would have resulted in a finding in her favor, a legal error she failed to appeal.**

Kasem arose from an underlying commercial landlord tenant dispute, arising out of landlord's refusal to pay for damage incurred by tenant as a result of water and sewage flow. The matter was tried to the court, who found in favor of the landlord.

Tenant did not appeal but instead sued her attorneys for legal malpractice, alleging attorney failed to designate and call an expert witness at trial on the issue of whether sewage qualified as hazardous material under the sublease. The trial court sustained Firm's demurrer without leave to amend.

The Court of Appeal affirmed. Law firm correctly sought judicial notice of the relevant statutes, which would have established as a matter of law that sewage was hazardous material within the meaning of the sublease. Under Evidence Code §451, the court was required to have taken judicial notice of the statutes when the case was tried. The underlying court's refusal to do so was error, and that error caused the adverse result at trial. Despite the underlying court's criticism of law firm for failing to call an expert witness on the issue of whether sewage was hazardous waste, the question was readily resolved had the court taken judicial notice, as it was required to. Expert testimony is limited to an opinion that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Consideration of statutes that expressly include sewage as a pollutant and listed with the statutory scheme referenced by the lease at issue was not a matter outside the trial court's common experience. To the extent statutory interpretation was an issue, such was a question of law to be determined by the court. The failure to call an expert on the question was thus not below the standard of care.

Judicial error by the underlying trial court can negate elements of a legal malpractice claim (citing *Church v. Jamison*, 143 Cal. App. 4th 1568, 1584-85 (2006)). While there were portions of the issues in the underlying trial which might have required expert testimony, such testimony would not have been necessary for Plaintiff to have prevailed based on the sewage.

Plaintiff's claim that law firm was negligent in failing to retain an expert in commercial lease interpretation and practice in how environmental clauses are applied in a commercial lease was also not well taken, as expert testimony is generally not admissible on the legal interpretation of contracts. Because Plaintiff had not alleged a relevant breach of duty by law firm, despite opportunities to amend her complaint, the demurrer was properly sustained without leave to amend.

***Klotz, v. Milbank, Tweed, Hadley & McCloy*, 238 Cal. App. 4th, 1339 (2015)**

- **Civil Code §1714.10 motion to strike conspiracy claim brought by individual plaintiffs properly granted as a purported conflict of interest was insufficient to raise an independent duty from the rendering of legal services within the meaning of exception to §1714.10; similarly, alleged receipt of increased fees as a result of the conflict was not “financial gain” within the meaning of exception.**

A, B and C were partners in a partnership founded in 2009, which evolved into them becoming the sole managers of a limited liability company in August, 2011. LLC was governed by an operating agreement which provided a member could not withdraw without the consent of LLC's managers, and prohibited the managers from engaging in a competitive business. Attorney had represented the partnership while at another law firm in late 2010. She also represented B individually prior to taking on the representation of the partnership.

In about late 2010, Attorney consulted with all A, B and C regarding partnership business, with indications the firm was representing the partnership. Communications in early 2011 reflect Attorney's questions about the status of the formation of the LLC by A, B and C, and the operation of all parties under the firm's engagement letter with B. A spoke with Attorney, and indicated A, B and C would not need law firm's assistance with LLC's formation, and suggested the firm continue to provide services to the business, deferring billing until after the LLC generated revenue. Attorney did not thereafter send a formal engagement agreement and continued to represent the partnership without one. Attorney also never sent a joint representation conflict letter.

Attorney joined new firm in early 2012, and brought the business, now LLC, with her. In mid-2012, LLC developed a new business opportunity. In mid-2012, B sent the LLC operating agreement to Attorney seeking advice in his personal capacity. Attorney provided advice that was adverse to LLC, A and B, and prepared the termination agreement, without their knowledge or informed written consent. The potential opportunity did not materialize and B emailed A and C, and presented them with a termination agreement and release. A, C and LLC allege the new

opportunity did not materialize because B breached his fiduciary duties to A, C and LLC, and sought to usurp the opportunity for himself.

A, C and LLC asserted Attorney and new firm were in conflict with them. Attorney and the new firm defended themselves by arguing they were never counsel to the LLC, A or C, and even if she had been, such representation were over a year before, and they were just former clients.

Attorney then commenced communications with B about an individual engagement, and sought conflict waivers from A, C and LLC. A few days later, Attorney F agreed to withdraw as counsel to B in the matter of his withdrawal from the partnership. Notwithstanding this agreement, Attorney and firm continued to represent B adverse to LLC, A and C, and continued to represent B in his negotiations over the new business opportunity that would exclude A and C.

A, C and LLC alleged Attorney and new firm aided and abetted B's breach of fiduciary duty to them.

Attorney and new firm filed a motion to strike the conspiracy cause of action, under Civil Code §1714.10 as to the claims by A and C only, which requires parties to obtain pre-filing approval before asserting a conspiracy claim against an attorney. The trial court initially granted the motion, but after an amended complaint was filed, denied it on the amended pleading.

The court of appeal noted that failing to obtain pre-filing approval of conspiracy claims does not warrant dismissal of other claims not requiring the pre-filing approval, citing *Alden v. Hindin*, 110 Cal. App. 4th 1502, 1508 (2003). Although the denial of a §1714.10 motion was immediately appealable, rulings relating to the non-conspiracy claims were not. Thus, the appeal was limited to the §1714.10 appeal.

Reviewing the requirements of §1714.10, and the recognized exceptions to its application, the Court of Appeal found Plaintiffs' claim did not qualify and the motion to strike was properly granted. Individual plaintiffs A and C did not allege any individual duty owed by Attorney or new firm beyond duties inherent in the rendition of legal services. The assertion of a conflict of interest is not a duty independent of an attorney client relationship, but instead is one that arises in connection with the provision of services in connection with settlement of a claim or dispute. Second, individual plaintiffs A and C did not plead any financial gain sufficient to get around §1714.10 – the fact Attorney and new firm would obtain more fees by representing B as an individual client does not constitute financial gain within the meaning of §1714.10's exceptions. The motion to strike was properly granted.

***Kumaraperu v. Feldsted*, 237 Cal. App. 4th 60 (2015)**

- **Plaintiff's ability to allege only that Attorneys' erroneous advice was the cause in fact of her alleged injury - being criminally prosecuted after allegedly following Attorneys' advice, was fatal to her malpractice claims. Attorneys could not reasonably foresee that Plaintiff would be criminally prosecuted for following their advice, as Plaintiff should not have been criminally prosecuted for exercising authority over her own funds, abrogating any intent to defraud. There was no legal causation.**

In *Kumaraperu*, Plaintiff and her husband owned a private daycare and preschool, which had been transferred to CoupleN, but then reverted Plaintiff and her husband when CoupleN defaulted on payments.

The school maintained a checking account and the operating account. Plaintiff's husband and CoupleN were the only signatories on the checking account, even after CoupleN's interest reverted to Plaintiff and her husband. Plaintiff was only a signatory on the operating account.

After Plaintiff's husband passed away, plaintiff was the sole owner and operator of the school. CoupleN expressly disclaimed interest in the money in the checking account.

Plaintiff discovered the school director inadvertently deposited funds from tuition payments into the checking out, instead of the operating account. The funds were needed immediately to pay the school's expenses. Without access to the checking account, Plaintiff sought legal advice from Attorneys, who told her to draw a check on the checking account payable to herself, signing it with Mr. N's name and deposit the check into the operating account. Plaintiff did so, and used the funds to operate the school. The district attorney then charged her with forgery, after which Attorneys denied advising her to make the transfer and who said they would neither assist nor provide testimony in plaintiff's criminal defense.

Plaintiff sued Attorneys for professional negligence, breach of contract, and fraud. Defendants' demurred, arguing unclean hands/*in pari dilecto* barred plaintiff's claims, plaintiff failed to allege actual innocence, and the fraud action was uncertain. The trial court sustained without leave to amend, and Plaintiff filed an appeal.

Plaintiff then had a preliminary hearing in the criminal matter, which was dismissed for insufficient evidence.

The Court of Appeal affirmed, but on different grounds. It noted that poor legal advice resulting in otherwise avoidable litigation is actionable malpractice, for which the plaintiff could recover as damages attorneys fees incurred in that litigation. In that scenario, a plaintiff would be required to allege a causal connection between the alleged breach of duty, and the claimed injury. Where

pleaded facts do not naturally give rise to an inference of causation, the plaintiff must plead specific facts affording the inference.

While Plaintiff adequately alleged negligent advice (upon death of a signatory, the proper course is to update the account card, not pose as another signatory), she failed to allege legal causation because signing another's name on a check drawn on one's own account would not subject the owner to criminal or civil liability absent intent to defraud. While prior instructions to a bank will state which signatories are valid to invoke the bank's duty to pay, so long as the signer intends to effect a transaction, a valid signature may be made by penning any name. It is the act of signing the instrument, not the name signed, that creates the transaction.

Simple imposture may constitute a breach of the account owner's agreement with the bank, but it is not a crime. Imposture requires intent to defraud. Plaintiff, however, alleged she owned the school, which meant she owned the funds in its checking account. Transferring funds that one exclusively owns, without obligation to third parties, from one account to another, does not by itself constitute fraud, even if the transfer is effected by an imposture that violates the account agreement. Assuming the facts were as plaintiff alleged, Attorneys could not have reasonably foreseen she would be prosecuted for forgery – as a depositor cannot intend to defraud herself.

To establish a legal malpractice action, plaintiff must establish causation under the substantial factor test. An event is a substantial factor in bringing about harm if it is recognizable as having an appreciable effect in bringing it about. (Rest. 2d Torts, §433, com. (d)). An event that enables harm ultimately to occur need not necessarily be a substantial factor in bringing about the harm.

[C]are must be taken to avoid confusing two elements which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former the defendant may be liable, but for the latter he may not; that is to say, in order to make a defendant liable his wrongful act must be the *causa causans* [immediate cause], and not merely the *causa sine qua non* [necessary antecedent]. [citation]. *Johnson v. Union Furniture Co.*, 31 Cal. App. 2d 234, 237 (1939)... As a matter of practical necessity, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in making the defendant pay.

Kumaraperu, 237 Cal. App. 4th at 68. The question of proximate cause involves an element of foreseeability, and a defendant owes no duty to prevent a harm that was not a reasonably foreseeable result of his negligent conduct. The court's task is not to determine whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed.

Foreseeability is measured not by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in

guiding practical conduct. Ordinarily, this is a question of fact, unless the undisputed facts leave no room for a reasonable difference of opinion.

Because Attorneys could not reasonably foresee that the district attorney would prosecute a depositor for manipulating her own accounts containing her own money to which no one else had any claim, plaintiff failed to allege Attorneys' conduct was a substantial factor in bringing about her injury. The fact plaintiff was prosecuted only explains but for causation – i.e. that criminal prosecution would not have occurred absent defendant's negligence. This is insufficient to establish whether defendants caused the prosecution in the first instance. It also does not matter that Plaintiff alleges Attorneys refused to aid in her criminal defense. It was speculation whether Attorneys refusal would have been helpful in any material way, since she had already represented to the prosecutor she acted on advice of counsel, and under the prosecution's theory (i.e. that the money did not belong to her), advice of counsel was not an excuse. Therefore, the demurrer was properly sustained without leave to amend.

Lee v. Hanley, Cal.4th --; 2015 WL 4938308 (Aug. 20, 2015)

- **Code of Civil Procedure §340.6 applies to claims that necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services unless the claim is for action fraud; Plaintiff's conversion claim may not necessarily come within that structure and therefore, the trial court's order sustaining the demurrer was in error.**

In *Lee*, plaintiff alleged she advanced attorney funds to be used in her litigation, as well as costs for expert witness fees. After the matter settled, attorney sent client an invoice reflecting a credit balance. When plaintiff requested a final billing and a refund of the final credit balance, attorney refused, saying she had no credit balance. Plaintiff terminated attorney, and hired a new lawyer. Both again demanded a refund. Attorney refunded the majority of the expert witness fees, but refused to return any of the rest of the unearned fees.

Over a year after she made her demand for a refund, plaintiff filed suit against attorney for breach of contract, breach of fiduciary duty, unjust enrichment, money had and received and an equitable right to the return of unused funds. Attorney demurred, arguing the action was barred by the 1 year statute of limitations set forth in Code of Civil Procedure §340.6. The trial court sustained the demurrer with leave to amend, and upon plaintiff's declination to amend, dismissed the action. The Court of Appeal reversed the trial court's order sustaining the demurrer, and the California Supreme Court affirmed.

The Supreme Court analyzed the breadth of Code of Civil Procedure §340.6. Section 340.6 provides that a one year statute applies to actions seeking recovery for “a wrongful act or omission, other than for actual fraud, arising in the performance of professional services.” Reviewing the legislative history of §340.6, the Court drew two conclusions. First, the Legislature sought to eliminate the former limitations scheme's dependence on the way a claim was pled, and instead,

sought to focus on the conduct alleged and ultimately proven. Second, the statute was meant to have broader application than to just actions for professional negligence, but was intended to apply to any action arising from wrongful conduct, other than actual fraud, arising in the performance of professional services. On the other hand, it was not meant to apply to claims that do not depend on proof that an attorney violated a professional obligation.

Thus, §340.6 applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. “Professional obligation” is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied by the Rules of Professional Conduct.

Section 340.6 does not apply to claims for wrongdoing that do not require proof that the attorney has violated a professional obligation, even if the act occurs during in the course of the professional relationship, such as garden variety theft. Further, §340.6 does not bar a claim arising from an attorney’s performance of services that are not “professional services.” “Professional services” means services performed by an attorney that can be judged against the skill, prudence, and diligence commonly possessed by other attorneys.

Noting that attorney could be disciplined as an attorney for actions that go beyond just the duty of competence, the Court stated its construction means that §340.6 is not limited merely to actions alleging breach of legal services, but rather encompasses the broader category of professional services, even if there are non-legal professional services being provided attendant to the attorney client relationship, such as accounting, bookkeeping, and holding property in trust.

On the other hand, misconduct does not “arise” in the performance of professional services under §340.6 merely because it occurs during the period of legal representation or simply because the representation brought parties together and thus provided the attorney with an opportunity to engage in the misconduct. To hold otherwise would imply that §340.6 would reach claims unrelated to the Legislature's purpose in enacting §340.6 even where the allegations, if true, would also constitute a violation of an attorney's professional obligations – i.e. sexual battery against a client, theft from a client, while an attorney was providing legal advice.

The question is not whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that the attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation. In other words, “Section 340.6(a) applies to claims that necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services unless the claim is for action fraud.”

In reaching its decision, the Supreme Court disapproved *Roger Cleveland Golf Co. Inc. v. Krane & Smith*, APC, 225 Cal. App. 4th 660 (2014) (reading §340.6 as a professional negligence statute, and

not applicable to malicious prosecution claim), and *David Welch Co. v. Erskine & Tulley*, 203 Cal. App.3d 884, 893 (1988) (finding of four year statute in breach of fiduciary duty claim).

Noting the case reached the Court after a demurrer, the Supreme Court found that a conversion claim was not necessarily barred by §340.6, as the complaint could be construed to allege that attorney was liable for conversion for simply refusing to return an identifiable sum of client's money – i.e. the claim would not necessarily depend on proof that attorney violated a professional obligation in the course of providing legal services, even if such proof would also establish that attorney violated a rule of professional conduct or the duty of loyalty. On the other hand, plaintiff's claim could turn out to hinge on proof that attorney kept the money pursuant to an unconscionable fee agreement or that he did not properly preserve client funds – which would render her claim barred by §340.6. But at the early stage of the litigation, without any development of the facts, the Court was unable to conclude that §340.6 necessarily barred Plaintiff's claim.

The Court affirmed the Court of Appeal's reversal of the trial court's judgment sustaining the demurrer.

***Moua v. Pittullo, Howington, Barker, Abernathy, LLP*, 228 Cal. App. 4th 107 (2014)**

- **Plaintiff's failure to follow Law Firm's advice to accept a settlement offer was the cause of her alleged damage in recovering, notwithstanding her argument she relied on law firm's statement that she had a 50/50 change of prevailing when rejecting the settlement. Summary judgment properly granted.**

Plaintiff and Ng participated in a traditional Hmong marriage ceremony and lived together as man and wife. Ng signed many formal documents and filed tax returns indicating he was married. They had two children. Plaintiff believed she was married to Ng; he promised to take care of papers needed relating to the marriage. No marriage license was ever obtained.

Plaintiff hired Law Firm to assist her in obtaining a property settlement and child support, and Attorney P and Attorney Z worked on the matter. A few weeks later, she filed for divorce. Attorney P told her there was a 50 percent chance the court would find her to be a putative spouse, and that she could win \$1.5-\$2 million if she was determined to be the putative spouse. He also stated that if she did not prevail on the putative spouse claim, she could file a civil *Marvin* claim along with a paternity action.

Five months later, Plaintiff instructed Law Firm to stop work because she and Ng were negotiating a settlement. Plaintiff later told Law Firm she had reached an agreement, including a one-time payment, and Ng offered to enter into a stipulated settlement.

Two months after that, Attorney Z advised Plaintiff there was significant risks with trying the putative spouse issue, and told her if she were to lose, she could walk away with nothing. Attorney

P also strongly recommended Plaintiff accept Ng's settlement offer, again, stating she had a 50% of losing.

Plaintiff did not accept Ng's settlement offer. Plaintiff instructed Law Firm to stop working on the settlement because she was not interested in settling. Attorney P reminded her she had expressly agreed to a judgment in court, and that the court could have issues with her changing her mind. Ng's attorney sent Law Firm the negotiated attachment to the judgment, signed by Ng, providing for payments totaling \$605,000, which Law Firm forwarded to Plaintiff. Plaintiff also asked Law Firm to postpone all court dates on the case.

A few days later, Plaintiff substituted in a new attorney, and Law Firm forwarded the negotiated attachment to him. Law Firm also signed the substitution of attorney. Plaintiff did not enter into a settlement agreement while represented by Law Firm. New counsel also advised Plaintiff to accept the settlement offer, and told her the chances of prevailing on the putative spouse claim was less than 50%. She wanted \$750,000, which Ng declined. Ng's motion to dismiss the family law case was ultimately granted on the basis Plaintiff was not a putative spouse. Plaintiff received nothing from Ng.

Plaintiff sued her attorneys, alleging single count of legal malpractice. Law firm moved for summary judgment, arguing a lack of causation, that new counsel came into the case, and that the matter was barred by the statute of limitations. The trial court granted the motion.

The Court of Appeal affirmed. Plaintiff disregarded Law Firm's advice to settle the case, and she retained new counsel while Ng's offer was still pending. New counsel also urged her to accept Ng's offer. It was her own decision, against the advice of her counsel, to decline. There was no causation between any alleged malpractice and her loss as a matter of law. Plaintiff's bare insistence that she relied on Law Firm's representation that she had a 50% chance of success did not create a triable issue of fact. "A 50 percent chance is just that: you might win, you might lose." *Id.* at 116. Appellants did not deny Law Firm urged her to accept Ng's offer. She simply ignored the advice. She was not relying on her attorney's advice to reject the settlement, as their advice was to accept it. Her conclusory assertion to the contrary did not create a triable issue.

The court rejected Plaintiff's assertion that *Cline v. Watkins*, 66 Cal. App. 3d 174 (1977) would save her case. *Cline* was a case involving a claim of superseding negligence by successor counsel, where both attorneys were alleged to have committed the same negligence. Because the issue was one of foreseeability, the *Cline* court found a triable issue.

By contrast, in *Moua*, Plaintiff was not arguing superseding negligence – in fact, successor counsel tagged her chances of success at even lower than Law Firm. Still further, Law Firm was not alleging successor counsel engaged in any negligence, and indeed, Law Firm argued successor counsel advised her that the chances of success were not good, and also encouraged her to accept Ng's settlement. The trial court's order granting the motion was correct.

Because the Court affirmed the granting of the summary judgment on the question of causation, it did not address the statute of limitations issue.

***Paul v. Patton*, 235 Cal. App. 4th 1088 (2015)**

- **Attorney who drafted Trust Amendment erroneously for specifically identified trust beneficiaries could be liable to those beneficiaries in a subsequent legal malpractice action. The demurrer was erroneously sustained without leave to amend.**

Decedent retained Attorney to draft an amendment to his revocable living trust. The “Trust Amendment” was signed by decedent, naming his wife, and children as beneficiaries. Two of the Children were named successor trustees. After Decedent’s death, they petitioned the probate court to modify the Trust Amendment, alleging it failed to conform to Decedent’s intentions by erroneously granting wife an interest in Decedent’s brokerage accounts and personal and real property. In that proceeding, Attorney admitted the Trust Amendment did not reflect Decedent’s intention that his brokerage accounts and personal and real property to be divided amongst his children. Successor trustees settled the probate action with wife.

Subsequently, Decedent’s children filed a malpractice action against Attorney. The trial court sustained Attorney’s demurrer without leave to amend. The Court of Appeal reversed.

The Court noted that an attorney can be liable to non-client intended beneficiaries of testamentary instructions because the attorney’s acts and/or omissions foreseeably could injury a beneficiary if the services are not handled correctly – as after death, a failure in a decedent’s testamentary scheme works no practice effect other than to deprive the intended beneficiaries of the intended bequests – only the beneficiaries suffer the real loss.

However, attorneys are not automatically liable to all testamentary beneficiaries not in privity with an attorney. A court must balance the *Biakanja/Lucas* factors, namely 1) the extent to which the transaction was intended to affect plaintiff beneficiary; 2) the foreseeability of harm to plaintiff; 3) the degree of certainty plaintiff suffered injury, 4) the closeness of connection between attorney’s conduct and the injury; 5) the policy of preventing future harm, and 6) whether recognition of liability would impose an undue burden on the profession. *Lucas v. Hamm*, 56 Cal.2d 583 (1961); *Biakanja v. Irving*, 49 Cal.2d 647 (1958). Attorneys may also be liable to successor trustees, even though the attorney was hired by the original trustee as a matter of Probate Code, which gives the successor fiduciaries, but not the beneficiaries, the same rights as predecessor fiduciaries, including the power to sue for malpractice causing loss to the estate.

The trial court should have granted leave to amend for Plaintiffs to allege that Attorney owed them a duty as beneficiaries. Where there is doubt that exists as to whether the plaintiff was an intended beneficiary, an attorney owes no duty to that beneficiary. However, where the executed testamentary documents reflect the testator’s undisputed intent that plaintiff receive a specific

benefit, a duty could be owed by Attorney to those specifically identified beneficiaries. As alleged in the operative pleading, Decedent intended to give plaintiffs a particular bequest, instructed Attorney to draft the amendment to effectuate his bequest, and signed the resulting document thinking it did so. The allegation was that a drafting error resulting in the Trust Amendment that did not reflect that intent. These allegations fall within the line of authority permitting a right of action. Indeed, Plaintiffs alleged that Attorney admitted his error in the probate action. All six *Biakanja/Lucas* were met. Leave to amend should have been granted to plaintiffs.

On the other hand, plaintiffs could not maintain an action as successor trustees. There are no alleged injuries to the estate or the trust. The alleged injuries are that the Plaintiffs, individually, received a smaller portion of the trust assets than they should have.

***Shaoxing City Maolong Wuzhong Down Products Ltd., v. Keehn & Associates, APC, et al.*, 238 Cal. App. 4th 1031 (2015)**

- **Actual injury occurred when the bankruptcy court ruled Plaintiffs had lost the right to enforce a lien. In the absence of actual legal services, mere assistance and/or oversight in transitioning a matter to successor counsel is not continuous representation so as to toll the statute of limitations. Because this lawsuit was filed over a year after actual injury occurred, it was barred by the statute of limitations and summary judgment was properly granted.**

In *Shiaoxing*, an arbitrator determined that Plaintiffs were entitled to \$5.35 million from Debtors. After the arbitrator issued its tentative ruling but before Plaintiffs obtained a judgment confirming the award, Debtors entered into a security agreement with the Zhejiang entitles, and Zhejiang filed a blanket lien attaching Debtors' assets. Soon after Plaintiffs obtained a judgment, Debtors filed for bankruptcy.

Plaintiffs hired Attorney to obtain discovery and challenge Zhejiang's lien as a fraudulent transfer. The bankruptcy court set an investigation termination date, which expired before Attorney completed discovery or filing any challenge to the Zhejiang lien. The bankruptcy court denied Attorney's post-deadline request to retroactively extend the deadline.

Within weeks, Plaintiffs retained new counsel and substituted Attorney out of the case. With new counsel, plaintiffs engaged in mediation with debtors, and settled the case for \$1.6 million less than the arbitration award. Plaintiffs then sued Attorney and successor counsel for malpractice. Attorney filed a motion for summary judgment, which the trial court granted, finding that the lawsuit was barred by the one year statute of limitations under Code of Civil Procedure §340.6.

The Court of Appeal affirmed. First, the Court of Appeal rejected Plaintiffs' argument that the statute of limitations was tolled because they were not actually injured until the mediation concluded that they would recover \$1.6 million less than the arbitration award. Because "actual injury" occurs when a client suffers any non-nominal legally cognizable damages based on the

asserted act or omission, it does not matter if client has yet to sustain all or even the greater part of the damages as a result of an attorney's negligence, nor does it matter if client will have difficulty in proving damages. It also does not matter if the damages might be mitigated or eliminated by a future event. By contrast, actual injury does not include speculative or contingent injuries that do not yet exist.

The Court identified its task as distinguishing between an actual existing injury that might be remedied or reduced in the future and a speculative or contingent injury that might not arise in the future.

In the case at bar, Plaintiffs were actually injured when the bankruptcy court definitively confirmed that Plaintiffs had lost their right to challenge the Zhejiang lien and the bankruptcy court denied their motion to extend the deadline to challenge that lien. Further, the absence of any challenge to that lien weakened Plaintiffs' negotiating position in the ensuing mediation. Loss of settlement value can also be actual injury. The trial court could make this determination as a matter of law because the material facts were undisputed. The Court of Appeal rejected Plaintiff's argument they did not subjectively believe they had suffered actual injury. The fact of injury or damage need not be recognized or notice by a plaintiff for actual injury to be found to have occurred.

Next, the Court of Appeal rejected Plaintiffs' argument that the statute of limitations was tolled because Attorney continued to represent them within the meaning of §340.6, where Attorney's agent said Attorney would "oversee" transition of the case to new counsel, and would assist new counsel with his work. In analyzing continuous representation, a court does not focus on a client's subjective belief, but rather examines evidence of an ongoing mutual relationship and activities in furtherance of that relationship. A formal substitution of attorney ordinarily ends an attorney client relationship.

Here, Attorney's relationship with Plaintiffs ended with the substitution of new counsel – the sole evidence of continuous representation after that point was the statement of Attorney's agent of Attorney's intent to provide oversight and assistance. But assisting the transition from one attorney to another is not providing assistance on the same subject matter within the meaning of "continuous representation" under 340.6. Attorney provided no legal services or representation after he substituted out – he provided no advice to Plaintiffs or successor counsel, performed no work, sent no bills, did not appear, did not negotiate on plaintiffs' behalf, and never spoke to successor counsel or plaintiff's regarding the pending bankruptcy matter. In light thereof, an isolated statement of Attorney's agent is insufficient as a matter of law to constitute continued representation. Summary judgment was properly granted, as the statute of limitations expired before Plaintiffs filed suit.

***Stine v. Dell’Osso*, 230 Cal. App. 4th 834 (2014)**

- **Successor conservator could maintain legal malpractice action against attorneys for former conservator. Further, former conservator’s malfeasance against the estate was not imputed to successor trustee and the unclean hands doctrine did not apply to bar the action.**

In *Stine*, client hired attorneys to represent him individually to file a petition for appointment of probate conservator for his mother, “to establish a conservator proceeding for [mother] in order to preserve [her] property and to ensure that [her] interests could be adequately protected in a family law action pending at the time in Alameda County.” *Id.* at 838. The petition represented that there were no assets as they were all held in trust, and thus, no bond was required. Mother, however, owned significant assets not in her trust. In 2003, the probate court issued letters of conservatorship and appointed client as the conservator of mother's estate and body. Attorneys continued to represent client after his conservatorship appointment, in his conservator capacity. Client subsequently misappropriated over one million dollars of conservatorship assets.

In 2010, the court removed client as conservator and successor conservator brought suit against attorneys for legal malpractice, alleging that during his conservatorship, attorneys were aware there were assets, but did not inform the probate court of their existence, and never petitioned the court to require or increase the bond despite statutory obligation. Successor conservator did not sue for actions predating client's appointment as conservator, acknowledging she lacked standing to sue attorneys for actions when client was represented in his individual capacity.

At issue was whether a successor conservator could maintain an action for legal malpractice against attorneys who represented a prior conservator. The Court of Appeal answered yes. The general rule is that an attorney is only liable to the client with whom a client stands in privity, and not to third parties. However, the fiduciary exception to the privity rule applied in the instant matter. The probate code provides that a successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had, which include the power to commence and maintain actions on behalf of the estate. Probate Code §8524(c), §9820(a). If the fiduciary who hired the attorney is replaced, the successor acquires the same powers the predecessor had in respect to the trust or estate administration. The successor assumes all the powers of the predecessor, including the power to assert the attorney-client privilege as to confidential communications on the subject of trust administration. Accordingly, a successor personal representative may bring suit against a predecessor's attorney for malpractice causing loss to the estate. *Borissoft v. Taylor & Faust*, 33 Cal.4th 523, 529 (2004). The *Stine* court rejected attorneys’ argument that *Borissoft* only applies where an attorney fails to follow a predecessor fiduciary's direct instruction, finding attorneys' interpretation to be too narrow. The court noted the Supreme Court’s holding was grounded on the statutory provisions ensuring a successor fiduciary could seamlessly take over the fiduciary role and protect the interest of the

estate, including recovering for losses caused by legal malpractice occurring during the tenure of a prior fiduciary.

The *Stine* court further rejected attorneys' argument that they were unable to defend themselves against "third party/non-client" assertions of malpractice, mandating dismissal of the action against them due to the duty of confidentiality owed to client. The court found that there was no non-party client – as the successor fiduciary held the attorney client privilege as to all communications by and between the fiduciary and counsel, whenever they occurred. Successor fiduciary could and did waive the attorney client privilege.

The *Stine* court finally rejected attorneys' assertion that former fiduciary's malfeasance was imputed to successor fiduciary, and therefore, the action was barred by unclean hands. Finding the unclean hands doctrine to be an equitable remedy, and not a legal or technical one, principles of fairness applied in determining whether to apply or reject it. Though it would be unfair for a former fiduciary to personally profit from his own malfeasance and thereafter sue his attorneys, it was "entirely fair" for the blameless successor trustee to pursue a malpractice claim against attorneys. Still further, the court noted the Probate Code itself rejected the notion of imputation of malfeasance amongst fiduciaries, and also distinguished between actions of a fiduciary taken within their representative capacity, and actions taken in their personal capacity. An attorney hired by a fiduciary represents the fiduciary in his fiduciary capacity, such that such lawyer would have no conflict of interest in representing another client adverse to fiduciary in his individual capacity. In the case before them, Client's actions were taken in his personal capacity and in breach of his fiduciary obligations; successor trustee therefore did not step into "the morass created by his personal malfeasance." *Stine*, 230 Cal. App. 4th at 846. Such a result would be antithetical to the protective purposes for establishing the conservatorship in the first place. The Court reversed the trial court's decision sustaining attorneys' demurrer without leave to amend.

MEDIATION PRIVILEGE

Amis v. Greenberg Traurig LLP, 235 Cal. App. 4th 331 (2015)

- **Mediation confidentiality statutes preclude malpractice plaintiff from proving directly or by inference negligence by attorneys in the course of mediation that purportedly caused him to execute a settlement agreement that failed to protect his interests.**

Plaintiff was a minority shareholder in a company involved in litigation with another company. During the litigation, the company entered into an agreement for acquisition by another company. Of the proposed deal terms required the “favorable settlement or resolution” of the litigation. Several months after they entered into the acquisition deal, the law firm that had represented the acquiring company in the transaction, Greenberg Traurig, began representing plaintiff in the ongoing litigation, with fees paid for by the acquiring company. After Greenberg took over the representation, the parties participated in mediation, eventually settling the litigation. However, shortly thereafter, the acquiring company decided not to complete the acquisition. This left plaintiff and the other shareholders without sufficient funds to pay the settlement obligations.

Plaintiff then sued Greenberg Traurig for legal malpractice in connection with the negotiation and execution of the settlement agreement. The law firm obtained summary judgment on the grounds that the mediation confidentiality statutes (Evidence Code §1115 et seq.) precluded plaintiff from introducing any evidence of the parties’ communications during or related to the mediation, citing *Cassel v. Superior Court*, 51 Cal.4th 113, 117 (2011). In *Cassel*, the California Supreme Court broadly applied the mediation confidentiality statutes to bar a legal malpractice claim by a plaintiff who claimed that his attorneys had induced him to settle for an amount that was less than the case was worth. 51 Cal.4th at 118. The court held that even the client’s conversations with his attorneys were barred from disclosure under the mediation confidentiality statutes.

Applying *Cassel* to these facts, the Court of Appeal held that plaintiff’s claims were barred. “Amis cannot prove that any act or omission by GT caused him to enter the settlement agreement and, hence, to suffer the alleged injuries, because all communications he had with GT regarding the settlement occurred in the context of mediation.” 253 Cal. App. 4th at 340. The court further held that the mediation confidentiality statutes bar a plaintiff from asking the jury to draw an inference as to the attorneys’ conduct during mediation.

UNFINISHED BUSINESS DOCTRINE

Hogan Lovells US LLP v. Howrey LLP, 531 B.R. 814 (N.D. Cal. 2015)

- **In case arising from Howrey bankruptcy, District Court overturned bankruptcy court and rejected trustee's claim that it was entitled to clawback fees from the law firms that employed former Howrey partners, rejecting application of the Jewel v.Boxer unfinished business rule.**

This matter is the latest in a long line of bankruptcy cases in Northern California and around the country involving law firms that declared bankruptcy and dissolved. The bankruptcy trustee of the former Howrey law firm sought to recover fees paid to law firms that employed former Howrey partners and took over representation of former Howrey clients on the grounds that those client matters constituted the Howrey firm's "unfinished business." Here, the bankruptcy court had held that the trustee could pursue profits associated with the partners who left the firm both pre- and post-dissolution. The district court disagreed and overturned the bankruptcy court's finding.

The court framed the issue succinctly: "When a client decides to discharge a firm and hire a competing firm, does the old firm have a right to profit from the new firm's work?" *Id.* at 821. The district court held that the dissolve law firm does not "own" client matters, and rejected the notion that the new firm that commences representation is completing the old firm's "unfinished business." "The lawyers working on these new matters are not engaged in 'winding up' unfinished business, because any unfinished business was wound up when the clients terminated their former firm and the firm's lawyers finished 'filing motions for continuances, noticing parties and courts that [they were] withdrawing as counsel, packing up and shipping client files back to the clients or to new counsel, and getting new counsel up to speed on pending matters,' to the extent those activities were necessary." *Id.* at 823.

With regard to claims against firms where former Howrey partners joined post-dissolution, the court noted that the trustee here did not allege any continuity of representation agreements. To the contrary, the law firm defendants all signed new fee agreements with Howrey's former clients. Because these firms are not "remnants" of Howrey, the trustee has no claim to the profits for the work done by those firms.

With regard to claims against firms where Howrey partners joined prior to the firm's dissolution, the court found that the trustee had no right to profits. "The fact that Howrey does not own substantively new representations undertaken by third-party firms is a definitive bar to the pre-dissolution claims because those claims depend on a property right that does not exist." *Id.* at 826. The court rejected the trustee's unjust enrichment claims. "[T]here is no allegation that Howrey conferred any benefit on the defendant law firms. At most, any benefit they received would necessarily have come from third-parties who are not plaintiffs in this case." *Id.* at 827. The court

found that the trustee's argument that the prior law firm "owns" the case for its lifetime "goes too far, and loses all tether to the purposes of unjust enrichment law." *Id.* at 828.

The court dismissed all claims with prejudice.

MISCELLANEOUS

People v. Anderson, 234 Cal. App. 4th 1411 (2015)

- **Defendant deprived of his right to competent counsel at preliminary hearing where his lawyer had been suspended for practice not entitled to have information set aside absent a showing of prejudice.**

This matter involves a criminal defendant who, after conviction for first degree murder, appealed from the trial court's order denying his motion to set aside the information following his preliminary hearing. Defendant had learned that the attorney who represented him at the preliminary hearing had been placed on "inactive status" by the Bar several months earlier and was not eligible to practice law.

The Court of Appeal found that the defendant was deprived of his right to representation by competent counsel at his preliminary hearing and arraignment. This finding was based not on the fact that counsel was on inactive status at the time of the hearing as the result of a failure to pay bar dues, but because at that same time he was under discipline for a failure to perform with competence. However, because defendant could not show that he had suffered any prejudice arising from his representation by the lawyer, the court refused to set aside the information.

Pope v. Babick, 229 Cal.App.4th 1238 (2014)

- **Attorneys' conduct in disregarding a court order and questioning patrol officer about cause of automobile accident was not so prejudicial as to require mistrial I negligence case arising from motor vehicle accident.**

In a negligence case arising from a motor vehicle accident, the court before trial determined that a patrol officer witness lacked the necessary training or qualifications to testify as to the cause of the accident, and instructed counsel not to ask the witness questions about his opinions. At trial, counsel for one of the defendants got "carried away" and asked the witness for his conclusions as to the cause of the accident. The judge instructed the jury to disregard that testimony. After defendant was found not negligent, plaintiff requested new trial, which the court denied. Plaintiffs appealed.

The Court of Appeal held that the standard for determining whether substantial evidence supports the verdict, the court must look to the evidence offered in support of the verdict and determine whether it was sufficient. The court found that plaintiffs had not met their burden to prove there was insufficient evidence. The court also rejected the argument that defendant's attorney's misconduct required a finding of mistrial on the grounds that no prejudice was shown. "The jury was told in no uncertain terms that Earl's testimony on this point was excluded and to be disregarded. The instruction fashioned was strong and clear on this point, and we find it was sufficient to remedy [the lawyer's] single, though nonetheless inexcusable, instance of misconduct." *Id.* at 1250.

***Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057 (9th Cir. 2014)**

- **Order declaring attorney a vexatious litigant and imposing pre-filing conditions held to be an abuse of discretion.**

This case involved an attorney who challenged her removal as a trustee of a family trust. She was declared a vexatious litigant in state court, and then filed in federal court. The district court dismissed her claims, then declared her and her co-plaintiff to be vexatious litigants, imposing pre-filing conditions requiring court permission before filing any action. She appealed.

The Ninth Circuit recognized the right of federal courts to regulate the activities of vexatious litigants, but also acknowledged the constitutional right to access to the courts. Before courts may impose pre-filing conditions, they must give litigants notice, compile an adequate record for appellate review, make substantive findings of frivolousness or harassment, and tailor the order narrowly.

The court found that the lower court had met the first two requirements, but had failed to meet the last two. Specifically, the court had made a finding of frivolousness based on only two matters: the current matter and an earlier federal case. The court found that insufficient. Additionally, the court's order was not narrowly tailored to curb what the court viewed as the plaintiff's abusive practices. The order provided that the court would not allow a new action to be filed unless it was "meritorious," which the Ninth Circuit said was overbroad.

***Zapata v. Vasquez*, 788 F.3d 1106 (9th Cir. 2015)**

- **Trial counsel's failure to object to egregious prosecutorial misconduct during closing argument constituted ineffective assistance of counsel substantially affecting the outcome of his trial.**

In closing argument of a murder trial of an alleged gang member defendant, the prosecutor on rebuttal ascribed to the defendant "several despicable, inflammatory ethnic slurs" in a fictional account of the last words the murder victim purportedly heard. *Id.* at 1110. Defense counsel failed to object and did not ask the court to make a curative instruction. The jury found the defendant guilty of first degree murder.

The Ninth Circuit found that the "inflammatory, fabricated and ethnically charged epithets" constituted prosecutorial misconduct, and that defense counsel's failure to object constituted ineffective assistance. *Id.* at 1123-24. First, the court found that the suggestion that defendant had uttered those words was completely speculative and "pure fiction." The effect on the jury though was inflammatory and improper, as the statements were designed to appeal to the passions of the jury.

The court found that counsel's failure to object amounted to ineffective assistance of counsel, particularly since counsel had no further opportunity to address the comments, delivered in rebuttal. The court noted that nothing in the record suggested a strategic failure to object. Lastly, the court concluded the misconduct and failure to object prejudiced defendant, since there were weaknesses in the evidence, the timing of the comments made them particularly prominent, they were not a reasonable inference from the record, and no specific limiting instruction was given. The court reversed the judgment and remanded.

ETHICS OPINIONS

California State Bar Formal Opinion 2015-192 Motions to Withdraw

- **A lawyer who files a motion to withdraw must take all reasonable steps to protect her client’s confidences, even where the court orders her to disclose those confidences. The Opinion does not reach the ultimate conclusion of whether “reasonable steps” include disobeying the court order**

The State Bar’s Committee on Professional Responsibility and Conduct addressed a hypothetical motion to withdraw filed by a lawyer who learns that her client has improper motives for pursuing a trade secret misappropriation claim against a competitor. After concluding that withdrawal is mandatory under Rule of Professional Conduct 3-700(B), the lawyer files her motion to withdraw, providing the court with only a vague statement to the effect that she had an irreconcilable conflict of interest that precluded her continuing representation. Not satisfied, the court ordered the lawyer to provide in camera a detailed declaration explaining the need to withdraw.

The Opinion discusses a lawyer’s obligations upon withdrawing from a case, which includes her duties under Rule 3-700(A)(2) to “not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. . . .” It then discusses the duty of confidentiality, concluding that the lawyer’s obligations under that duty cannot be met even by submitting confidential information in camera.

The meat of the Opinion is a discussion of what the lawyer can and must do if the court orders her to disclose her client’s confidences, notwithstanding her duty not to. Although the Opinion does not reach the ultimate conclusion of whether the lawyer should prioritize her competing obligations to obey the court order or to abide by her duty of confidentiality, it does provide guidance to lawyers finding themselves in this situation. Most significantly, the Opinion concludes that the lawyer must take all reasonable steps to challenge the order (e.g., by filing a writ petition) before complying with it. It further concludes that, if the lawyer determines she must comply with the court order, she must take all reasonable steps to minimize the damage to her client caused by the consequent disclosure of confidences.

California State Bar Formal Opinion 2015-193 ESI

- **Handling discovery of electronic information.**

An attorney’s obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information (“ESI”). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI.

Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality.

California State Bar Formal Opinion 2014-191 Representation in No-Asset Chapter 7 Bankruptcies

- **No adversity triggered by representation of debtor and creditors in no-asset Chapter 7 bankruptcies.**

Simultaneous representation of a debtor in a simple, no-asset Chapter 7 bankruptcy filing and debtor's creditors in unrelated matters does not create adversity triggering the informed written consent requirement of Rule 3-310(C)(3), provided that the engagement is limited and certain intake procedures are employed to ensure that the Chapter 7 proceeding in which the attorney is involved is an in rem proceeding that focuses on the orderly distribution of the debtor's assets and the discharge of debts

Los Angeles County Bar Association Ethics Opinion No. 526 Contingency Lawyers' Right to Negotiate Fee Agreement

- **Contingency Lawyer's Right to Negotiate Fee Agreement that Gives First Proceeds to the Lawyer and Shifts to the Client the Risk of Nonpayment.**

A lawyer may enter into a binding and enforceable contingency fee agreement that provides to the lawyer some or all of the first proceeds of suit so as to impose on the client greater risk that the defendant's financial condition will limit the amount recovered from a settlement agreement or judgment. Any such risk-shifting agreement requires the client's informed consent based on the lawyer's full and fair disclosure of pertinent information known to the lawyer.

Los Angeles County Bar Association Ethics Opinion No. 527 Marijuana

- **Lawyer may advise a client in connection with a medical marijuana business as long as she does not advise the client to violate federal marijuana law or to assist in the violation of federal marijuana law**

Los Angeles County Bar Association Ethics Opinion No. 527 is similar to San Francisco County Bar Association Ethics Opinion 2015-1, discussed above. As with the San Francisco opinion, the Los Angeles County Bar Association ("LACBA") opinion concludes that it is not a violation of California ethics rules, including Rule of Professional Conduct 3-120 and Business and Professions Code section 6068(a), to advise a client in connection with a medical marijuana business in California, notwithstanding the federal law making it a crime to possess, grow, or sell marijuana.

LACBA refers to Model Rule 1-2(d) as well as the Restatement (Third) of the Law Governing Lawyers and concludes that these sources support its conclusion. According to LACBA, the Model Rules and Restatement prohibit a lawyer from advising a client to commit a crime, but do not preclude the lawyer from advising about how to commit an act that otherwise is illegal under federal law in a way that does not violate state law.

One thing the LACBA opinion emphasizes is that a lawyer advising about compliance with California's marijuana laws must not advise the client to violate the federal law or to assist the client in violating the federal law.

San Francisco Bar Association Ethics Opinion 2014-1 Attorney Response to Negative On-Line Review

- **An attorney may respond to a negative on-line review posted by a former client, as long as he does so without disclosing confidential information, but he may not be allowed to respond at all to a negative on-line review posted by a current client.**

San Francisco Bar Association Ethics Opinion 2014-1 posits a hypothetical on-line attorney review, where a client criticizes a lawyer's competence, and asks whether the attorney may respond on the website. The Opinion concludes the attorney may not respond by disclosing the client's confidential information, but may be able to respond in a more general way, depending on whether the client remains a current client.

The Opinion discusses both the duty of loyalty and the duty of confidentiality. The duty of loyalty primarily applies to current clients, although, as the Opinion points out, "an attorney continues to owe a residual duty of loyalty to a former client, which is narrow in scope." Accordingly, even where the on-line review was posted by a former client, the attorney's permitted response is limited in that it may not include confidential information of the client. Where the attorney continues to represent the client, however, the attorney likely may not respond at all to the review to the extent the response would be construed as being negative or adverse to the client – even if the attorney could respond without disclosing confidential information.

Whether the client is a current or former client, the attorney may not disclose client confidences – including, but not limited to, attorney-client communications – in responding to the review. That is because the duty of confidentiality survives the termination of the attorney-client relationship.

The Opinion analyzes whether any exceptions exist to the duty of confidentiality or the attorney-client privilege that would permit the attorney to disclose even confidential information in order to defend against the on-line attack. The Opinion specifically addresses California Evidence Code section 958, which provides, "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." The Committee concludes, however, that this so-called self-defense exception must be construed narrowly, and likely only applies when the negative statements about the

attorney are made in the context of a judicial proceeding. Disclosure outside of the judicial context would not be reasonably necessary and thus would not be permitted under Section 958 or related case law. The Committee also noted that, even where disclosure of confidential information may be permitted under the self-defense exception, that disclosure must be narrowly tailored to respond to the specific facts raised.

San Francisco Bar Association Ethics Opinion 2015-1 Marijuana

- **Notwithstanding federal law making it illegal to grow, sell, or possess marijuana, a lawyer can ethically advise a client in connection with a medical marijuana business in California.**

The question posed by San Francisco Bar Association Ethics Opinion 2015-1 is whether a California lawyer may ethically represent a client in connection with a medical marijuana business in California. The problem arises because federal law – the Controlled Substance Act – makes it a crime to grow, sell, or possess marijuana, as well as to aid and abet a violation of federal marijuana laws. By contrast, California law, and in particular the Compassionate Use Act of 1996, provides that the state will not punish certain marijuana offenses under state law if a physician has recommended its use to treat a serious medical condition. These federal and state statutes are in conflict with each other. Thus, by counseling a client on how best to comply with the Compassionate Use Act, a lawyer arguably would be counseling that same client on the violation of a federal law.

The San Francisco County Bar Association concluded that a lawyer could ethically counsel her client about running a marijuana business consistent with state law, provided she also explained the relevant federal law and the risks of being prosecuted for violating that federal law. The Opinion acknowledges that Rule of Professional Conduct 3-120 precludes a California lawyer from advising the violation of any law, but then concludes that advising about compliance with state marijuana law would not violate Rule 3-120 because Rule 3-120 “did not anticipate” this “unique” situation where a California law permits conduct that is forbidden by federal law. The Opinion contrasted Rule 3-120 with Model Rule 1-2(d), which expressly precludes advising a client “to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . .”

The Opinion also relied on the fact that the California law did not legalize medical marijuana – which would directly conflict with the federal law – but rather provided that the state would not punish certain marijuana offenses.

Finally, the Opinion emphasized the need for lawyers counseling clients regarding medical marijuana to also advise about the risks of violating federal law, as well as the risks that otherwise attorney-client privileged communications could be subject to attack under the crime-fraud exception.

SPEAKER BIOGRAPHIES

MERRI BALDWIN

Merri Baldwin is a shareholder in the San Francisco office of Rogers Joseph O'Donnell, P.C. Ms. Baldwin's practice focuses on business litigation and attorney liability and conduct. She is vice-chair of the State Bar's Standing Committee on Professional Responsibility and Conduct and is a certified legal specialist in Legal Malpractice Law, California Board of Legal Specialization. Ms. Baldwin is a member of the executive committee of the Bar Association of San Francisco's Legal Malpractice section and is a vice-chair of the American Bar Association Litigation Section's Professional Services Litigation Committee. She is an adjunct professor at the University of California, Berkeley School of Law and speaks and writes frequently on legal ethics and professional responsibility matters. She co-edited *The Law of Lawyers' Liability* (2012, First Chair Press.) Ms. Baldwin received her law degree from the UC Berkeley School of Law, where she was co-editor-in-chief of the *Berkeley Women's Law Journal*. She graduated magna cum laude from Smith College, and was a Fulbright Scholar at the London School of Economics. Ms. Baldwin is the Treasurer of the Bar Association of San Francisco for 2015.

WENDY CHANG

Wendy Wen Yun Chang, Partner, Hinshaw & Culbertson LLP, Los Angeles, represents businesses in all types of business 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 the law, including risk management counseling, ethics, crises management, fee related issues, discipline defense, and litigation defense. Ms. Chang is the immediate past Chair of, and the current Advisor to, the State Bar of California Standing Committee on Professional Responsibility & Conduct (COPRAC). Ms. Chang is also an Advisor to the State Bar of California's Commission for the Revisions of the Rules of Professional Conduct, and a member of the American Bar Association's Standing Committee on Ethics and Professional Responsibility. 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 and Executive Nominations and Appointments Committee for the National Asian Pacific American Bar Association. In addition, Ms. Chang serves on the Professional Responsibility and Ethics Committee (PREC) and the State Appellate Judicial Evaluation Committee for the Los Angeles County Bar Association. Ms. Chang received her J.D. from Loyola Law School, Los Angeles, and her B.A. from the University of California, at Los Angeles.

SCOTT GARNER

Scott Garner is a partner in the Irvine office of Morgan, Lewis & Bockius LLP. He serves as a deputy leader of the Southern California Litigation Group and as one of the firm's loss prevention partners. His practice focuses on complex business litigation, with an emphasis on attorney liability defense. He also has significant experience in the areas of securities litigation, intellectual property litigation, corporate governance, and hospital and health care law. Mr. Garner currently serves as 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 Vice President of the Orange County Chapter of the Association of Business Trial Lawyers. He is a frequent author of ethics-related articles. Mr. Garner graduated cum laude from Harvard Law School in 1991, and received his B.A. degree with distinction from Stanford University in 1988.