WATER LAW & ETHICS: SINKING AND SWIMMING WITH LITIGATION, WATER DISTRICTS, AND AGENCIES

Presented by

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INTRODUCTION

Benjamin Franklin is credited with having written, "When the well's dry, we know the worth of water." He could have added, "And once we know the worth of water, we'll all lawyer up."

We live in an age when ever increasing demand for water has combined with chronic shortage of supply to cause an exponential increase in water-related transactions and litigation over a multi-state region in the American West. Lawyers who practice water law may find themselves asked to represent clients in contexts or under conditions where the ethical implications are not immediately apparent to them. We intend by this presentation to alert you to situations that present ethical issues and to discuss the ways in which you might address them.

The following hypothetical situations illustrate issues related to the unauthorized practice of law, business/ financial relationships with your clients, privilege and the duty to protect a client's confidential information, professional competence problems, and conflicts of interest. [2]

[2] These hypotheticals are offered as part of an educational presentation. None is intended to be, and should not be relied upon as, advice to be followed in an actual situation. The presenters are admitted to practice only in the State of California. The Supreme Court of the State of California adopted a complete revision of its Rules of Professional Conduct ("CRPC") on May 10, 2018. California's new CRPC are modeled after the ABA's Model Rules of Professional Conduct but have several significant variations. You should consult the law and professional rules of the applicable jurisdiction to properly determine your ethical obligations in any situation you may encounter.

HYPOTHETICAL A
Unauthorized Practice of Law

You practice in a small firm located in central California. You attended law school in the Bay Area. Your best friend from law school, Paula, was one of the smartest students in your class; graduating Order of the Coif. Paula got married during your third year and moved to Idaho with her husband soon after graduation. She never took the California Bar examination. She took the Idaho Bar instead, passed with the highest score that year, and joined a very good firm located in Boise. Paula is only admitted to practice law in Idaho. She is a very experienced water litigator. She also teaches water law at the University of Idaho College of Law. Although she practices in Idaho, she has published a text on the water law of several states, including California. She has also published several articles on federal reclamation law.

You practice general business and corporate law. You have a general understanding of California water law and can handle routine water rights issues as they come up in transactions, but you don't consider yourself to be a water law specialist and there are no water law specialists in your firm. Your biggest client is Mega Ag Resources LLC. Mega Ag is, as the name suggests, a heavy hitter in California agriculture. It obtains water for its various farms from a variety of sources including riparian rights, federal reclamation projects and contractual arrangements that are expressly governed by California law. Over the past few years Mega's president, John, has begun to ask you more and more questions about water law. Circumstances have progressed to the point that John believes Mega may have to engage in litigation to protect its rights against infringing neighbors. John likes and trusts you, but knows you and your firm don't feel fully equipped to represent him in what could become a water war to be fought on several fronts. John has told you he wants you to stay involved with Mega's water program, but has authorized you to engage on Mega's behalf the best lawyer you can find with whom to consult and, if you feel appropriate, to take the lead on various water matters. You immediately think of Paula primarily because you know she's very competent, but also because you don't want to introduce local competitors to Mega.

Within a few days a problem pops up. Mega has a ranch located on Wet River. An upstream neighbor has started diverting water from the river in amounts far in excess of historical diversions. Under which of the following alternatives may Paula assist you?

Situation #1: You ask Paula to analyze certain historical information you have collected for her and to communicate directly with the diverter's attorney regarding Mega's rights. Your plan is to have Paula negotiate an out-of-court settlement alone; minimizing your involvement in order to manage the fees charged to your client. Paula performs all her research and analysis in Idaho but travels to California and holds several meetings with the client and opposing counsel here. Is this permissible?

Authorities: *California Business & Professions Code ("CB&PC")* § 6125; *Birbrower, Montalbano, Condon & Frank P.C. et al., v. Superior Court of Santa Clara County (Esq. Business Services, Inc. RPI) (1998) 17 Cal. 4th 119.* [holding the New York-based firm violated Bus. & Prof. Code § 6125 by engaging in extensive unauthorized practice of law in California]; *California Rule of Court 9.48.*

Situation #2: Same situation as #1 but Paula never comes to California. She performs her research in Idaho and communicates with California client and opposing counsel by phone and email exclusively.

Authorities: *CB&PC § 6125; Birbrower, Montalbano, Condon & Frank P.C. et al., v. Superior Court of Santa Clara County (Esq. Business Services, Inc.) (1998) 17 Cal. 4th 119.*

Situation #3: You ask Paula to analyze certain historical information you have collected for her and to prepare analyses and legal memoranda that you will use to negotiate with the diverter's attorney. You conduct the negotiations relying upon Paula's research and advice. Is this permissible?

Authorities: *Los Angeles County Bar Ass'n Formal Opinion 518 (2006).*) [An attorney may outsource legal work so long the attorney competently reviews the work, remains ultimately responsible for the final work product, the attorney does not charge an unconscionable fee, client confidences and secrets are protected, and there is no conflict of interest between the client and the contracting entity].

Situation #4: The diverter agrees to arbitrate the dispute. You ask Paula to prepare and conduct the arbitration in California. Is this permissible?

Authorities: *California Code of Civil Procedure ("CCP") § 1282.4; California Rule of Court 9.43.*

Situation #5: Your firm files suit in state court with Paula named as co-counsel. You have Paula admitted *pro hac vice*. Her firm prepares all the pleadings and she conducts oral argument. Is this permissible?

Authorities: *California Rule of Court 9.40.*

Situation #6. The neighbor is a natural person who lives in Nevada. You decide to sue in federal court. You ask Paula to take the lead. Is this permissible?

Authorities: *In re Mendez (9th Cir. BAP) 231 B.R. 86**;** FRCP 83; Local Rules for the U.S. District Court, Eastern District California (Effective March 1, 2022), Rule 180.*

HYPOTHETICAL B
Business Transactions with Clients

You grew up on a family farm in the Central Valley of California. You and your siblings inherited the farm which is located near the town where you now practice law. Your firm represents numerous irrigation districts as general counsel including one, Hometown Irrigation District ("HID"), in which your family's farm is located.

Situation #1: HID wants to condemn a small portion of your ranch for a canal right-of-way. Your brothers negotiate with HID's land agent concerning the terms of sale. You do not participate in the negotiations on behalf of your family other than to tell your brothers what you are willing to accept. Your law partner who represents HID does not participate on behalf of HID. HID makes an offer, your brothers counter, HID accepts. You are asked to sign the contract of sale. Is this permissible?

Authorities: *California Rules of Professional Conduct ("CRPC") 1.8.1.*

Situation #2: HID's board has adopted a budget for the canal project. Your family has lived within HID's boundaries for over seventy years. You do not own any land located along the proposed right of way but know many of the people who do. You believe you can through negotiation acquire the entire right of way for less than the total amount HID has committed to land acquisition. You offer to negotiate the acquisition of the right of way on a contingency; you will be paid thirty percent of the difference between HID's budget and actual cost. The district's board thinks it might be helpful for you to become involved and wants to take you up on your offer. Is this permissible?

Authorities: *CB&PC § 6147; CRPC 1.5 (b); Arnall v. Super Court (Liker) (2010) 190 CA4th 360, 368.* [Section 6147 applies to contingent fee arrangements outside of the litigation context]. *County of Santa Clara v. Superior Court (Atlantic Richfield) (2010) 50 Cal.4th 35 [cert denied 131 S.Ct. 920, sub nom. Atlantic Richfield Company v. Santa Clara County, California, et al.]* [Public entities were not categorically barred from engaging private counsel under contingent fee arrangements].

Situation #3: The canal's prime contractor completes the project almost a year after the final construction deadline. HID was forced to pay the several easement grantors a total of approximately $250,000.00 as consideration to extend temporary construction easements. HID is also entitled to about $130,000.00 in construction delay payments from the contractor. HID's board is aware that litigation costs can balloon in even what seem to be straightforward cases. HID would like to retain your firm to handle litigation against the contractor on a contingency. Is this permissible?

Authorities: *CB&PC § 6147; CRPC 1.5 (b); Arnall v. Super Court (Liker) (2010) 190 CA4th 360, 368. County of Santa Clara v. Superior Court (Atlantic Richfield) (2010) 50 Cal.4th 35 [cert denied 131 S.Ct. 920]*

HYPOTHETICAL C
Attorney's Duty to Protect Confidential and Privileged Information

You represent a local landowner, Agnes. Local Irrigation District's ("LID") manager has recently called Agnes to tell her that LID is interested in acquiring 320 acres of land she owns in a certain low-lying area of the district to build a recharge basin. You have represented Agnes for many years. You also represent her neighbor, Ben. Ben is getting out of farming and already has a potential buyer; although they haven't agreed on the price. He has engaged you to handle the sale of his land from negotiation through preparation of documents.

Situation #1: LID's manager told Agnes when he called her that LID might be willing to pay Agnes as much as $19,000.00/ acre for her land. Agnes relayed that to you. May you tell Ben what Agnes told you about the price LID offered her for her land to help Ben prepare his opening offer for the sale of his property?

Authorities: *CB&PC § 6068(e); CRPC 1.6; California Evidence Code ("CEv.C") § 954; CEv.C § 955; Wells Fargo Bank, N.A. v. Sup. Ct. (Boltwood) (2000) 22 Cal 4th 201, 209* [privilege applies even where litigation is not threatened]. Note impact of CRPC 1.4.

Situation #2: Agnes told LID's manager to call you about the recharge basin transaction because she wants you to represent her. LID's manager told you the district is willing to pay Agnes $19,000.00/ acre for her land. May you tell Ben what LID's manager told you?

Authorities: *CB&PC § 6068(e); CRPC 1.8.2; California State Bar Formal Opinion 2016-195.* [A lawyer may not disclose confidential information or publicly available information that the lawyer obtained during representation when the client has requested it be kept secret or where disclosure would be likely be embarrassing or detrimental to the client]; Also consider *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 (attorney owns client a "duty of undivided loyalty")].

Situation #3: You receive a call from a person whom you have never represented. That person would like you to represent him in a negotiation with LID for (guess what) the sale of 320 acres to build a re-charge basin. LID's manager told the prospective client that the district might be willing to pay as much as $22,000.00 an acre. You immediately decline the case because you already represent Agnes in her efforts to sell her land to LID at the best price she can get. It occurs to you that Agnes might improve her position by counter-offering to sell her land to LID for $20,500.00 an acre. Can you tell Agnes about the information you obtained from the person you declined to represent to help Agnes formulate a competitive bid?

Authorities: *CRCP 1.4 ; CRPC 1.18(b).*

Situation #4. Same situation as 3 but you are careful not to tell Agnes how you came up with the offer number. May you use the information without disclosing it to Agnes?

Authorities: *In re Soale (1916) 31 Cal. App. 144, 153. [*Attorney under duty to "preserve the secrets of [the] client."]

Situation #5. Same situation as 3 but you learn that the prospective client is no longer interested in selling land to LID. May you disclose the information to Agnes? May you use it without disclosing it to her?

Authorities: *In re Soale (1916) 31 Cal. App. 144, 154.* [Accusation in disbarment proceeding does not require a showing of actual harm suffered by the client, as would be required in an action for alleged deceit].

Situation #6: The negotiations progress between Agnes and LID. Agnes is busy during the day. She would like to meet in your office after the dinner hour to go over draft sale documents. Can you tell your wife you are going to your office to meet with Agnes about legal matters? Can you tell your wife you are going to your office to review sale documents with Agnes?

Authorities: *CB&PC § 6068(e); CEv.C§ 955. CRCP 1.6.*

HYPOTHETICAL D
Professional Competence

You have a general business practice. You handle purchase and sale transactions. You often perform due diligence for your clients in connection with those transactions. One of your major clients enters into a letter of intent to acquire approximately 3,500 acres of row crop land. You do not consider yourself to be an expert on water rights.

Situation #1: The source of irrigation water for that land is a series of deep wells. You have represented clients in the purchase and sale of land irrigated by wells before. Can you competently represent the client in this transaction even though you are not a water lawyer?

Authorities: *CRPC § 1.1(a) (b).*

Situation #2: Your state has passed a comprehensive statute mandating the sustainable management of underground aquifers. Can you still competently represent your client in the purchase of row crop land irrigated by a series of deep wells?

Authorities: *CRPC § 1.1(a) (b). Wright v. Williams* (1975) 47 Cal.App.3d 802, 809 ["The duty [of competence] encompasses both a knowledge of law and an obligation of diligent research and informed judgment."]

Situation #3: The land in question is largely dependent upon riparian rights. Can you handle the transaction?

Authorities: *CRPC § 1.1(a) (b). Lewis v. State Bar* (1981) 28 Cal.3d 683 [holding that negligently and improperly conducting administration of an estate without any previous probate experience and without associating or consulting a sufficiently experienced attorney warrants suspension for 30 days, with suspension stayed and placement on probation for one year.].

Situation #4: Can you handle the transaction if you associate a specialist to conduct water rights due diligence to prepare a written opinion regarding the availability of water to the property?

Authorities: *CRPC 1.1(c); Cole v. Patricia A. Meyer & Assocs., APC (2012) 206 Cal. App. 4th 1095, 1115-1116.* [Trial counsel who were constantly identified as counsel of record for the plaintiffs have a duty to ascertain merits of claim even when they do not personally work on early stages of the case.]

HYPOTHETICAL E
Conflicts of Interest

Mega Ag has engaged you to litigate a major water rights case against a company called Lost Ranch. Lost Ranch will be represented by another local firm, Jones & Jones. The action will be a declaratory relief action to determine the relative rights of the two landowners to stream flows from a deep creek that forms the border between their two ranches.

Situation #1: Your firm represents Lost Ranch in connection with the registration and renewal of its packing house trademarks. Your firm provides no other legal services to Lost Ranch and never has. Your intellectual property partner talks with Lost Ranch personnel on an infrequent, irregular basis when they call to ask for help and has not spoken with them for at least ten months. The long lapse in communication is not atypical for the relationship. There is no disengagement letter in the file. May your firm take the case?

Authorities: *CRPC 1.7 (a).* Consider CRCP 1.10 Imputation of Conflicts of Interest.

Situation #2. Same facts as Situation #1 but your partner sends Lost Ranch a disengagement letter after he learns of your firm's opportunity to represent Mega Ag against Lost Ranch. May your firm now take the case with Lost Ranch's informed written consent?

Authorities: *Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1059.* [Reasoning the parties knew they were undertaking concurrent adverse representation and doing it without consent of the conflicting party]

Situation #3: Your firm has no current relationship with Lost Ranch but it represented Lost Ranch five years ago in the acquisition of the land that lies across the creek from Mega Ag. Your firm performed water due diligence at the time. It has not represented Lost Ranch since then. May your firm take the case?

Authorities: *CRPC 1.9 (a).*

Situation #4. Your firm represented Lost Ranch in the acquisition of the land that lies across the creek from Mega Ag, but the partner who represented Lost Ranch at the time left the firm and took his files with him. May your firm take the case for Mega Ag?

Authorities: *CRPC 1.10 (b).*

Situation #5: You take the case for Mega Ag and then hire a lawyer from Jones & Jones. Will your firm now be disqualified?

Authorities: *CRPC 1.9 (b); Adams v. Aerojet-General Corp (2001) 86 Cal. App. 4th 1324, 1338-1339.* ["'Preserving confidentiality' is the touchstone of the disqualification rule"].; Consider CRCP 1.10(a)(2) Imputation of Conflicts of Interest; Consider Or. State. Bar. R. Regul. and Polic. 1.9(d). Consider *Analytica, Inc. v. NPD Research, Inc.* (7th Cir. 1983) 708 F.2d 1263, 1266 ("'substantially related,'…means: if the lawyer *could have* obtained confidential

information in the first representation that would have been relevant in the second. It is irrelevant whether he *actually* obtained such information and used it against his former client, or whether—if the lawyer is a firm rather than an individual practitioner—different people in the firm handled the two matters and scrupulously avoided discussing them.") (Emphasis added).

Situation #6. You take the case and then hire a new admittee who worked on the same case at Jones & Jones as a summer clerk before she passed the bar. Will you now be disqualified?

Authorities: *In re Complex Asbestos Litigation (1991) 232 Cal.App.3d 572, 596.*

APPENDIX OF AUTHORITIES

To Accompany

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HYPOTHETICAL A
Unauthorized Practice of Law

California Business & Professions Code ("CB&PC") § *6125*

California Code of Civil Procedure ("CCP") § 1282.4

California Rule of Court 9.40

California Rule of Court 9.43

California Rule of Court 9.48

FRCP 83

Local Rules for the U.S. District Court, Eastern District California (Effective March 1, 2022), Rule 180.

Birbrower, Montalbano, Condon & Frank P.C. et al., v. Superior Court of Santa Clara County (Esq. Business Services, Inc. RPI) (1998) 17 Cal. 4th 119

In re Mendez (9th Cir. BAP) 231 B.R. 86

Los Angeles County Bar Ass'n Formal Opinion 518 (2006)

West's Ann.Cal.Bus. & Prof.Code § 6125

§ 6125. Necessity of active licensee status

Effective: January 1, 2019

Currentness

No person shall practice law in California unless the person is an active licensee of the State Bar.

Credits

(Added by Stats.1939, c. 34, p. 359, § 1. Amended by Stats.1990, c. 1639 (A.B.3991), § 8; Stats.2018, c. 659 (A.B.3249), § 89, eff. Jan. 1, 2019.)

West's Ann. Cal. Bus. & Prof. Code § 6125, CA BUS & PROF § 6125
Current with urgency legislation through Ch. 1 of 2023 Reg.Sess. Some statute sections may be more current, see credits for details.

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West's Ann.Cal.C.C.P. § 1282.4

§ 1282.4. Representation by counsel

Effective: January 1, 2015

Currentness

(a) A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title. A waiver of this right may be revoked; but if a party revokes that waiver, the other party is entitled to a reasonable continuance for the purpose of procuring an attorney.

(b) Notwithstanding any other law, including Section 6125 of the Business and Professions Code, an attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that the attorney, if not admitted to the State Bar of California, satisfies all of the following:

(1) He or she timely serves the certificate described in subdivision (c).

(2) The attorney's appearance is approved in writing on that certificate by the arbitrator, the arbitrators, or the arbitral forum.

(3) The certificate bearing approval of the attorney's appearance is filed with the State Bar of California and served on the parties as described in this section.

(c) Within a reasonable period of time after the attorney described in subdivision (b) indicates an intention to appear in the arbitration, the attorney shall serve a certificate in a form prescribed by the State Bar of California on the arbitrator, arbitrators, or arbitral forum, the State Bar of California, and all other parties and counsel in the arbitration whose addresses are known to the attorney. The certificate shall state all of the following:

(1) The case name and number, and the name of the arbitrator, arbitrators, or arbitral forum assigned to the proceeding in which the attorney seeks to appear.

(2) The attorney's residence and office address.

(3) The courts before which the attorney has been admitted to practice and the dates of admission.

(4) That the attorney is currently a member in good standing of, and eligible to practice law before, the bar of those courts.

(5) That the attorney is not currently on suspension or disbarred from the practice of law before the bar of any court.

(6) That the attorney is not a resident of the State of California.

(7) That the attorney is not regularly employed in the State of California.

(8) That the attorney is not regularly engaged in substantial business, professional, or other activities in the State of California.

(9) That the attorney agrees to be subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California.

(10) The title of the court and the cause in which the attorney has filed an application to appear as counsel pro hac vice in this state or filed a certificate pursuant to this section in the preceding two years, the date of each application or certificate, and whether or not it was granted. If the attorney has made repeated appearances, the certificate shall reflect the special circumstances that warrant the approval of the attorney's appearance in the arbitration.

(11) The name, address, and telephone number of the active member of the State Bar of California who is the attorney of record.

(d) The arbitrator, arbitrators, or arbitral forum may approve the attorney's appearance if the attorney has complied with subdivision (c). Failure to timely file and serve the certificate described in subdivision (c) shall be grounds for disapproval of the appearance and disqualification from serving as an attorney in the arbitration in which the certificate was filed. In the absence of special circumstances, repeated appearances shall be grounds for disapproval of the appearance and disqualification from serving as an attorney in the arbitration in which the certificate was filed.

(e) Within a reasonable period of time after the arbitrator, arbitrators, or arbitral forum approves the certificate, the attorney shall file the certificate with the State Bar of California and serve the certificate as described in Section 1013a on all parties and counsel in the arbitration whose addresses are known to the attorney.

(f) An attorney who fails to file or serve the certificate required by this section or files or serves a certificate containing false information or who otherwise fails to comply with the standards of professional conduct required of members of the State Bar of California shall be subject to the disciplinary jurisdiction of the State Bar with respect to that certificate or any of his or her acts occurring in the course of the arbitration.

(g) Notwithstanding any other law, including Section 6125 of the Business and Professions Code, an attorney who is a member in good standing of the bar of any state may represent the parties in connection with rendering legal services in this state in the course of and in connection with an arbitration pending in another state.

(h) Notwithstanding any other law, including Section 6125 of the Business and Professions Code, any party to an arbitration arising under collective bargaining agreements in industries and provisions subject to either state or federal law may be represented in the course of, and in connection with, those proceedings by any person, regardless of whether that person is licensed to practice law in this state.

(i) Nothing in this section shall apply to Division 4 (commencing with Section 3200) of the Labor Code.

(j)(1) In enacting the amendments to this section made by Assembly Bill 2086 of the 1997-98 Regular Session, it is the intent of the Legislature to respond to the holding in Birbrower v. Superior Court (1998) 17 Cal.4th 119, to provide a procedure for nonresident attorneys who are not licensed in this state to appear in California arbitration proceedings.

(2) In enacting subdivision (h), it is the intent of the Legislature to make clear that any party to an arbitration arising under a collective bargaining agreement governed by the laws of this state may be represented in the course of and in connection with those proceedings by any person regardless of whether that person is licensed to practice law in this state.

(3) Except as otherwise specifically provided in this section, in enacting the amendments to this section made by Assembly Bill 2086 of the 1997-98 Regular Session, it is the Legislature’s intent that nothing in this section is intended to expand or restrict the ability of a party prior to the decision in Birbrower to elect to be represented by any person in a nonjudicial arbitration proceeding, to the extent those rights or abilities existed prior to that decision. To the extent that Birbrower is interpreted to expand or restrict that right or ability pursuant to the laws of this state, it is hereby abrogated except as specifically provided in this section.

(4) In enacting subdivision (i), it is the intent of the Legislature to make clear that nothing in this section shall affect those provisions of law governing the right of injured workers to elect to be represented by any person, regardless of whether that person is licensed to practice law in this state, as set forth in Division 4 (commencing with Section 3200) of the Labor Code.

Credits

(Added by Stats.1961, c. 461, p. 1543, § 2. Amended by Stats.1998, c. 915 (A.B.2086), § 1; Stats.2000, c. 1011 (S.B.2153), § 2; Stats.2005, c. 607 (A.B.415), § 1, eff. Oct. 6, 2005; Stats.2006, c. 357 (A.B.2482), § 1; Stats.2010, c. 277 (S.B.877), § 1; Stats.2012, c. 53 (A.B.1631), § 1; Stats.2013, c. 76 (A.B.383), § 24; Stats.2014, c. 71 (S.B.1304), § 20, eff. Jan. 1, 2015.)

West's Ann. Cal. C.C.P. § 1282.4, CA CIV PRO § 1282.4
Current with urgency legislation through Ch. 1 of 2023 Reg.Sess. Some statute sections may be more current, see credits for details.

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Cal.Rules of Court, Rule 9.40
Formerly cited as CA ST MISC Rule 983

Rule 9.40. Counsel *pro hac vice*

Currentness

(a) Eligibility

A person who is not a licensee of the State Bar of California but who is an attorney in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel *pro hac vice*, provided that an active licensee of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel *pro hac vice* under this rule if the person is:

(1) A resident of the State of California;

(2) Regularly employed in the State of California; or

(3) Regularly engaged in substantial business, professional, or other activities in the State of California.

(b) Repeated appearances as a cause for denial

Absent special circumstances, repeated appearances by any person under this rule is a cause for denial of an application.

(c) Application

(1) *Application in superior court*

A person desiring to appear as counsel *pro hac vice* in a superior court must file with the court a verified application together with proof of service by mail in accordance with Code of Civil Procedure section 1013a of a copy of the application and of the notice of hearing of the application on all parties who have appeared in the cause and on the State Bar of California at its San Francisco office. The notice of hearing must be given at the time prescribed in Code of Civil Procedure section 1005 unless the court has prescribed a shorter period.

(2) *Application in Supreme Court or Court of Appeal*

An application to appear as counsel *pro hac vice* in the Supreme Court or a Court of Appeal must be made as provided in rule 8.54, with proof of service on all parties who have appeared in the cause and on the State Bar of California at its San Francisco office.

(d) Contents of application

The application must state:

(1) The applicant's residence and office address;

(2) The courts to which the applicant has been admitted to practice and the dates of admission;

(3) That the applicant is a licensee in good standing in those courts;

(4) That the applicant is not currently suspended or disbarred in any court;

(5) The title of each court and cause in which the applicant has filed an application to appear as counsel *pro hac vice* in this state in the preceding two years, the date of each application, and whether or not it was granted; and

(6) The name, address, and telephone number of the active licensee of the State Bar of California who is attorney of record.

(e) Fee for application

An applicant for permission to appear as counsel *pro hac vice* under this rule must pay a reasonable fee not exceeding $50 to

the State Bar of California with the copy of the application and the notice of hearing that is served on the State Bar. The Board of Trustees of the State Bar of California will fix the amount of the fee:

(1) To defray the expenses of administering the provisions of this rule that are applicable to the State Bar and the incidental consequences resulting from such provisions; and

(2) Partially to defray the expenses of administering the Board's other responsibilities to enforce the provisions of the State Bar Act relating to the competent delivery of legal services and the incidental consequences resulting therefrom.

(f) Counsel *pro hac vice* subject to jurisdiction of courts and State Bar

A person permitted to appear as counsel *pro hac vice* under this rule is subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a licensee of the State Bar of California. The counsel *pro hac vice* must familiarize himself or herself and comply with the standards of professional conduct required of licensees of the State Bar of California and will be subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of such appearance. Article 5 of chapter 4, division 3. of the Business and Professions Code and the Rules of Procedure of the State Bar govern in any investigation or proceeding conducted by the State Bar under this rule.

(g) Representation in cases governed by the Indian Child Welfare Act (25 U.S.C. § 1903 et seq.)

(1) The requirement in (a) that the applicant associate with an active licensee of the State Bar of California does not apply to an applicant seeking to appear in a California court to represent an Indian tribe in a child custody proceeding governed by the Indian Child Welfare Act; and

(2) An applicant seeking to appear in a California court to represent an Indian tribe in a child custody proceeding governed by the Indian Child Welfare Act constitutes a special circumstance for the purposes of the restriction in (b) that an application may be denied because of repeated appearances.

(h) Supreme Court and Court of Appeal not precluded from permitting argument in a particular case

This rule does not preclude the Supreme Court or a Court of Appeal from permitting argument in a particular case from a person who is not a licensee of the State Bar, but who is licensed to practice in another jurisdiction and who possesses special expertise in the particular field affected by the proceeding.

Credits

(Formerly Rule 983, adopted, eff. Sept. 13, 1972. As amended, eff. Oct. 3, 1973; Sept. 3, 1986; Jan. 17, 1991; March 15,

1991. Renumbered Rule 9.40 and amended, eff. Jan. 1, 2007. As amended, eff. Jan. 1, 2019.)

Cal. Rules of Court, Rule 9.40, CA ST PRACTICE Rule 9.40
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

Cal.Rules of Court, Rule 9.43
Formerly cited as CA ST MISC Rule 983.4

Rule 9.43. Out-of-state attorney arbitration counsel

Currentness

(a) Definition

An "out-of-state attorney arbitration counsel" is an attorney who is:

(1) Not a licensee of the State Bar of California but who is an attorney in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in the course of, or in connection with, an arbitration proceeding in this state;

(2) Has served a certificate in accordance with the requirements of Code of Civil Procedure section 1282.4 on the arbitrator, the arbitrators, or the arbitral forum, the State Bar of California, and all other parties and counsel in the arbitration whose addresses are known to the attorney; and

(3) Whose appearance has been approved by the arbitrator, the arbitrators, or the arbitral forum.

(b) State Bar out-of-state attorney arbitration counsel program

The State Bar of California must establish and administer a program to implement the State Bar of California's responsibilities under Code of Civil Procedure section 1282.4. The State Bar of California's program may be operative only as long as the applicable provisions of Code of Civil Procedure section 1282.4 remain in effect.

(c) Eligibility to appear as an out-of-state attorney arbitration counsel

To be eligible to appear as an out-of-state attorney arbitration counsel, an attorney must comply with all of the applicable provisions of Code of Civil Procedure section 1282.4 and the requirements of this rule and the related rules and regulations adopted by the State Bar of California.

(d) Discipline

An out-of-state attorney arbitration counsel who files a certificate containing false information or who otherwise fails to comply with the standards of professional conduct required of licensees of the State Bar of California is subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of the arbitration.

(e) Disqualification

Failure to timely file and serve a certificate or, absent special circumstances, appearances in multiple separate arbitration matters are grounds for disqualification from serving in the arbitration in which the certificate was filed.

(f) Fee

Out-of-state attorney arbitration counsel must pay a reasonable fee not exceeding $50 to the State Bar of California with the copy of the certificate that is served on the State Bar.

(g) Inherent power of Supreme Court

Nothing in these rules may be construed as affecting the power of the Supreme Court to exercise its inherent jurisdiction over the practice of law in California.

Credits

(Formerly Rule 983.4, adopted, eff. July 1, 1999. Renumbered Rule 9.43 and amended, eff. Jan. 1, 2007. As amended, eff. Jan. 1, 2019.)

Cal. Rules of Court, Rule 9.43, CA ST PRACTICE Rule 9.43
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

West's Annotated California Codes
California Rules of Court (Refs & Annos)
Title 9. Rules on Law Practice, Attorneys, and Judges (Refs & Annos)
Division 4. Appearances and Practice by Individuals Who Are Not Licensees of the State Bar of California (Refs & Annos)

Cal.Rules of Court, Rule 9.48
Formerly cited as CA ST MISC Rule 967

Rule 9.48. Nonlitigating attorneys temporarily in California to provide legal services

Currentness

(a) Definitions

The following definitions apply to terms used in this rule:

(1) "A transaction or other nonlitigation matter" includes any legal matter other than litigation, arbitration, mediation, or a legal action before an administrative decision-maker.

(2) "Active attorney in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency" means an attorney who meets all of the following criteria:

(A) Is a licensee in good standing of the entity governing the practice of law in each jurisdiction in which the attorney is licensed to practice law;

(B) Remains an active attorney in good standing of the entity governing the practice of law in at least one United States state, jurisdiction, possession, territory, or dependency other than California while practicing law under this rule; and

(C) Has not been disbarred, has not resigned with charges pending, or is not suspended from practicing law in any other jurisdiction.

(b) Requirements

For an attorney to practice law under this rule, the attorney must:

(1) Maintain an office in a United States jurisdiction other than California and in which the attorney is licensed to practice law;

(2) Already be retained by a client in the matter for which the attorney is providing legal services in California, except that the attorney may provide legal advice to a potential client, at the potential client's request, to assist the client in deciding whether to retain the attorney;

(3) Indicate on any Web site or other advertisement that is accessible in California either that the attorney is not a licensee of the State Bar of California or that the attorney is admitted to practice law only in the states listed; and

(4) Be an active attorney in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

(c) Permissible activities

An attorney who meets the requirements of this rule and who complies with all applicable rules, regulations, and statutes is not engaging in the unauthorized practice of law in California if the attorney:

(1) Provides legal assistance or legal advice in California to a client concerning a transaction or other nonlitigation matter, a material aspect of which is taking place in a jurisdiction other than California and in which the attorney is licensed to provide legal services;

(2) Provides legal assistance or legal advice in California on an issue of federal law or of the law of a jurisdiction other than California to attorneys licensed to practice law in California; or

(3) Is an employee of a client and provides legal assistance or legal advice in California to the client or to the client's subsidiaries or organizational affiliates.

(d) Restrictions

To qualify to practice law in California under this rule, an attorney must not:

(1) Hold out to the public or otherwise represent that he or she is admitted to practice law in California;

(2) Establish or maintain a resident office or other systematic or continuous presence in California for the practice of law;

(3) Be a resident of California;

(4) Be regularly employed in California;

(5) Regularly engage in substantial business or professional activities in California; or

(6) Have been disbarred, have resigned with charges pending, or be suspended from practicing law in any other jurisdiction.

(e) Conditions

By practicing law in California under this rule, an attorney agrees that he or she is providing legal services in California subject to:

(1) The jurisdiction of the State Bar of California;

(2) The jurisdiction of the courts of this state to the same extent as is a licensee of the State Bar of California; and

(3) The laws of the State of California relating to the practice of law, the State Bar Rules of Professional Conduct, the rules and regulations of the State Bar of California, and these rules.

(f) Scope of practice

An attorney is permitted by this rule to provide legal assistance or legal services concerning only a transaction or other nonlitigation matter.

(g) Inherent power of Supreme Court

Nothing in this rule may be construed as affecting the power of the Supreme Court of California to exercise its inherent jurisdiction over the practice of law in California.

(h) Effect of rule on multijurisdictional practice

Nothing in this rule limits the scope of activities permissible under existing law by attorneys who are not licensees of the State Bar of California.

Credits

(Formerly Rule 967, adopted, eff. Nov. 15, 2004. Renumbered Rule 9.48 and amended, eff. Jan. 1, 2007. As amended, eff. Jan. 1, 2019.)

Cal. Rules of Court, Rule 9.48, CA ST PRACTICE Rule 9.48
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

Federal Rules of Civil Procedure Rule 83

Rule 83. Rules by District Courts; Judge's Directives

Currentness

(a) Local Rules.

(1) ***In General.*** After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with--but not duplicate--federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) ***Requirement of Form.*** A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

CREDIT(S)

(Amended April 29, 1985, effective August 1, 1985; April 27, 1995, effective December 1, 1995; April 30, 2007, effective December 1, 2007.)

Fed. Rules Civ. Proc. Rule 83, 28 U.S.C.A., FRCP Rule 83
Including Amendments Received Through 3-1-23

End of Document

RULE 180 (Fed. R. Civ. P. 83)

ATTORNEYS

(a) Admission to the Bar of this Court. Admission to and continuing membership in the Bar of this Court are limited to attorneys who are active members in good standing of the State Bar of California.

(1) Petition for Admission. Each applicant for admission shall present to the Clerk an affidavit petitioning for admission, stating both residence and office addresses, the courts in which the applicant has been admitted to practice, the respective dates of admissions to those courts, whether the applicant is active and in good standing in each, and whether the applicant has been or is being subjected to any disciplinary proceedings. Forms will be furnished by the Clerk and shall be available on the Court's website.

(2) Proof of Bar Membership. The petition shall be accompanied by a certificate of standing from the State Bar of California or a printout from the State Bar of California website that provides that the applicant is an active member of the State Bar of California and shall include the State Bar number.

(3) Oath and Prescribed Fee. Upon qualification the applicant may be admitted, upon oral motion or without appearing, by signing the prescribed oath and paying the prescribed fee, together with any required assessment, which the Clerk shall place as directed by law with any excess credited to the Court's Nonappropriated Fund.

(b) Practice in this Court. Except as otherwise provided herein, only members of the Bar of this Court shall practice in this Court.

(1) Attorneys for the United States. An attorney who is not eligible for admission under (a), but who is a member in good standing of and eligible to practice before, the Bar of any United States Court or of the highest Court of any State, or of any Territory or Insular Possession of the United States, may practice in this Court in any matter in which the attorney is employed or retained by the United States or its agencies. Attorneys so permitted to practice in this Court are subject to the jurisdiction of this Court with respect to their conduct to the same extent as members of the Bar of this Court.

(2) Attorneys Pro Hac Vice. An attorney who is a member in good standing of, and eligible to practice before, the Bar of any United States Court or of the highest Court of any State, or of any Territory or Insular Possession of the United States, and who has been retained to appear in this Court may, upon application and in the discretion of the Court, be permitted to appear and participate in a particular case. Unless authorized by the Constitution of the United States or an Act of Congress, an attorney is not eligible to practice pursuant to (b)(2) if any one or more of the following apply: (i) the

attorney resides in California, (ii) the attorney is regularly employed in California, or (iii) the attorney is regularly engaged in professional activities in California.

(i) Application. The pro hac vice application shall be electronically presented to the Clerk and shall state under penalty of perjury (i) the attorney's residence and office addresses, (ii) by what courts the attorney has been admitted to practice and the dates of admissions, (iii) a certificate of good standing from the court in the attorney's state of primary practice, (iv) that the attorney is not currently suspended or disbarred in any court, and (v) if the attorney has concurrently or within the year preceding the current application made any other pro hac vice applications to this Court, the title and number of each action in which such application was made, the date of each application, and whether each application was granted.

(ii) Designee. The attorney shall also designate in the application a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding that attorney's conduct of the action and upon whom service shall be made. The attorney shall submit with such application the name, address, telephone number, and consent of such designee.

(iii) Prescribed Fee. The pro hac vice application shall also be accompanied by payment to the Clerk of any prescribed fee, together with any required assessment which the Clerk shall place as directed by law with any excess credited to the Court's Nonappropriated Fund. If the pro hac vice application is denied, the Court may refund any or all of the fee or assessment paid by the attorney.

(iv) Subject to Jurisdiction. If the application is granted, the attorney is subject to the jurisdiction of the Court with respect to conduct to the same extent as a member of the Bar of this Court.

(3) Certified Students. See L.R. 181.

(4) Designated Officers, Agents or Employees.

(A) An officer, agent or employee of a federal agency or department may practice before the Magistrate Judges on criminal matters in this Court, whether or not that officer, agent, or employee is an attorney, if that officer, agent or employee:

(i) has been assigned by the employing federal agency or department to appear as a prosecutor on its behalf;

(ii) has received four or more hours training from the United States Attorney's Office in the preceding twenty-four (24) months;

(iii) has filed a designation in accordance with (B); and

(iv) is supervised by the United States Attorney's Office. Supervision by the United States Attorney's Office means that employees of that Office are available to answer questions of any such officer, agent, or employee.

(B) Designations shall be filed on a form provided by the Clerk that shall include a verification that the officer, agent, or employee has satisfied the requirements of this Rule. A designation is effective for twenty-four (24) months. The officer, agent, or employee shall file the designation either in Fresno, if the officer, agent, or employee anticipates appearing only before Magistrate Judges at locations in the counties specifically enumerated in L.R. 120(b), or in Sacramento in all other circumstances. After filing the designation in any calendar year, the officer, agent, or employee shall not appear before any particular Magistrate Judge without providing a copy of the designation to that Magistrate Judge.

(C) Officers, agents and employees so permitted to practice in this Court are subject to the jurisdiction of this Court with respect to their conduct to the same extent as members of the Bar of this Court.

(5) RIHC and RLSA Attorneys. An attorney who is currently designated by the State Bar of California as Registered In-House Counsel (RIHC) or as a Registered Legal Services Attorney (RLSA) may petition the Court to practice by completing the petition for admission, supplying the proof of bar membership, and providing the oath and prescribed fee under (a). Any attorney allowed to practice in the Eastern District of California under this section may only practice as long as the attorney is designated as an RIHC or RLSA by the State Bar of California.

(c) Notice of Change in Status. An attorney who is a member of the Bar of this Court or who has been permitted to practice in this Court under (b) shall promptly notify the Court of any change in status in any other jurisdiction that would make the attorney ineligible for membership in the Bar of this Court or ineligible to practice in this Court. In the event an attorney appearing in this Court under (b) is no longer eligible to practice in any other jurisdiction by reason of suspension for nonpayment of fees or enrollment as an inactive member, the attorney shall forthwith be suspended from practice before this Court without any order of Court until becoming eligible to practice in another jurisdiction.

(d) Penalty for Unauthorized Practice. The Court may order any person who practices before it in violation of this Rule to pay an appropriate penalty that the Clerk shall credit to the Court's Nonappropriated Fund. Payment of such sum shall be an additional condition of admission or reinstatement to the Bar of this Court or to practice in this Court.

(e) Standards of Professional Conduct. Every member of the Bar of this Court, and any attorney permitted to practice in this Court under (b), shall become familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and court decisions applicable thereto, which are hereby adopted as standards of professional conduct in this Court. In the absence of an applicable standard therein, the Model Rules of Professional Conduct of the American Bar Association may be considered guidance. No attorney admitted to practice before this Court shall engage in any conduct that degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice.

(f) Attorney Registration for Electronic Filing. All attorneys who wish to file documents in the Eastern District of California must be admitted to practice or admitted to appear pro hac vice. They must also complete an e-filing registration as prescribed in L.R. 135.

17 Cal.4th 119, 949 P.2d 1, 70 Cal.Rptr.2d 304, 97 Cal. Daily Op. Serv. 51, 98 Daily Journal D.A.R. 107
Supreme Court of California

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., et al., Petitioners,
v.
THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; ESQ BUSINESS SERVICES, INC., Real Party in Interest.

No. S057125.
Jan. 5, 1998.

SUMMARY

A California corporation sued its New York law firm for legal malpractice, and the firm filed a counterclaim for attorney fees earned for work performed in both California and New York in the firm's efforts to resolve a dispute between the corporation and a third party. The trial court granted the corporation's motion for summary adjudication of the counterclaim, finding that the parties' fee agreement, which stipulated that California law governed all matters in the representation, was unenforceable, since the firm and its attorneys were not licensed to practice law in California as required by Bus. & Prof. Code, § 6125. (Superior Court of Santa Clara County, No. CV737595, John F. Herlihy, Judge.) The Court of Appeal, Sixth Dist., No. H014880, denied the firm's petition for a writ of mandate, concluding that the firm had violated § 6125 and that therefore the firm was barred from recovering its fees under the agreement for work performed in either California or New York.

The Supreme Court affirmed the judgment of the Court of Appeal to the extent it concluded that the firm's representation in California violated Bus. & Prof. Code, § 6125, and that the firm was not entitled to recover fees under the fee agreement for its services in California, reversed the judgment of the Court of Appeal to the extent it did not allow the firm to argue in favor of a severance of the illegal portion of the consideration (the California fees) from the rest of the fee agreement, and remanded for further proceedings. The court held that the firm violated Bus. & Prof. Code, § 6125, by engaging in extensive unauthorized law practice in California. The court therefore held that the fee agreement was invalid to the extent it authorized payment for the substantial legal services the firm performed in California. However, the court held that the agreement might be valid to the extent it authorized payment for limited services the firm performed in New York. Remand was required to allow the firm to present evidence justifying its ***120** recovery of fees for those New York services, and for the client to produce contrary evidence. (Opinion by Chin, J., with George, C. J., Mosk, Baxter, Werdegar, and Brown, JJ., concurring. Dissenting opinion by Kennard, J.)

HEADNOTES

Classified to California Digest of Official Reports

([1])
Attorneys at Law § 6--Right to Practice--Unauthorized Practice of Law-- Unlicensed Practice in California--Association of California Counsel.
No statutory exception to Bus. & Prof. Code, § 6125 (no person shall practice law in California unless that person is active member of State Bar), allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.

([2])
Attorneys at Law § 5--Right to Practice--State Bar Act.
The California Legislature enacted Bus. & Prof. Code, § 6125, which provides that no person shall practice law in California unless the person is an active member of the State Bar, in 1927 as part of the State Bar Act, a comprehensive scheme regulating the practice of law in the state. Since the passage of the act, the general rule has been that, although persons may represent themselves and their own interests regardless of State Bar membership, no one but an active member of the State Bar may practice law for another person in California. The prohibition against unauthorized law practice is within the state's police power and is designed to ensure that those performing legal services do so competently. A violation of Bus. & Prof. Code, § 6125, is a misdemeanor (Bus. & Prof. Code, § 6126). Moreover, no one may recover compensation for services as an attorney at law in this

state unless that person was at the time the services were performed a member of the State Bar.

([3])
Attorneys at Law § 6--Right to Practice--Unauthorized Practice of Law-- Unlicensed Practice in California--What Constitutes Practice in California:Words, Phrases, and Maxims--Practice of Law.
Under Bus. & Prof. Code, § 6125 (no person shall practice law in California unless that person is active member of State Bar), the term "practice law" means the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure. This includes legal advice and legal instrument and contract preparation, whether or not rendered in the course of litigation. The practice of law "in California" entails sufficient contact with the California client to render the ***121** nature of the legal service a clear legal representation. In addition to a quantitative analysis, a court determining whether a person has violated § 6125 must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts is not sufficient. The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state or created a continuing relationship with the California client that included legal duties and obligations. The unlicensed lawyer's physical presence in the state is one factor, but it is not exclusive. For example, one may practice law in the state in violation of § 6125 although not physically present in California by communicating by modern technological means, but a person does not automatically practice law "in California" whenever that person "virtually" enters the state by electronic communication. Each case must be decided on its individual facts. (Disapproving to the extent it is inconsistent: *People v. Ring* (1937) 26 Cal.App.2d Supp. 768 [70 P.2d 281].)

([4])
Attorneys at Law § 6--Right to Practice--Unauthorized Practice of Law-- Unlicensed Practice in California--Exceptions to Prohibition.
There are exceptions to Bus. & Prof. Code, § 6125, of the State Bar Act, which prohibits the practice of law in California unless the person practicing law is a member of the State Bar, but these exceptions are generally limited to allowing out-of-state attorneys to make brief appearances before a state court or tribunal. They are narrowly drawn and strictly interpreted. For example, an out-of-state attorney not licensed to practice in California may be permitted, by consent of a trial judge, to appear in California in a particular pending action. In addition, the California Rules of Court set forth procedures for allowing out-of-state attorneys to perform certain activities, and the Legislature has recognized an exception to Bus. & Prof. Code, § 6125, in international disputes resolved in California under the state's rules for arbitration and conciliation of international commercial disputes (Code Civ. Proc., § 1297.351). Furthermore, the act does not regulate practice before federal courts or apply to the preparation of or participation in labor negotiations and arbitrations arising under collective bargaining agreements.

([5a], [5b])
Attorneys at Law § 6--Right to Practice--Unauthorized Practice of Law--Unlicensed Practice in California--Out-of-state Attorneys Not Licensed to Practice in California.
A New York law firm whose attorneys were not licensed to practice law in California violated Bus. & Prof. Code, § 6125 (no person shall practice law in California unless that person is active member of State Bar), in its ***122** efforts to resolve a dispute between its California corporate client and a third party. The firm engaged in extensive unauthorized law practice in California. Its attorneys traveled to California to discuss with the client and others various matters pertaining to the dispute, discussed strategy for resolving the dispute and advised the client on this strategy, made a settlement demand to the third party, and traveled to California to initiate arbitration proceedings before the matter was ultimately settled. By its plain terms, § 6125 applies to attorneys licensed in other states; it is not limited to nonattorneys. Since other states' laws may differ substantially from California's, barring out-of-state attorneys from practicing in California furthers the statute's goal of assuring competence of all attorneys practicing in California. Also, there is no exception to § 6125 for attorneys' work incidental to private arbitration or other alternative dispute resolution proceedings, and the Federal Arbitration Act did not preempt § 6125 in this case.

[See 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 402. See also Right of attorney admitted in one state to recover compensation for services rendered in another state where he was not admitted to the bar, note, 11 A.L.R.3d 907.]

([6])
Statutes § 30--Construction--Language--Plain Meaning.

In determining the meaning of a statute, the court looks to its words and give them their usual and ordinary meaning. If statutory language is clear and unambiguous, there is no need for construction, and courts should not indulge in it.

([7a], [7b])
Attorneys at Law § 27--Attorney-client Relationship--Compensation of Attorneys--Out-of-state Attorneys Not Licensed to Practice in California--Severability of Work Performed in Other State.
A fee arrangement between a New York law firm and a California corporate client was invalid, where the firm violated Bus. & Prof. Code, § 6125 (no person shall practice law in California unless that person is active member of State Bar), in its efforts to resolve a dispute between the client and a third party. A person who violates § 6125 is not entitled to compensation for legal services performed, and no exception applied to this case. The exception for work performed in federal court did not apply, since none of the firm's work related to federal court practice. Furthermore, California does not recognize exceptions to § 6125 for services not involving courtroom appearances or where the attorney makes full disclosure to the client. Thus, allowing the firm to recover its fees under the arrangement for work performed ***123** in California would constitute the enforcement of an illegal contract. However, the firm was entitled to seek recovery for work performed under the agreement in New York that was severable from its work performed in California. The object of the agreement might not have been entirely illegal; the illegality arose from any amount to be paid the firm that included payment for services rendered in violation of § 6125. The portion of the fee agreement might be enforceable to the extent that the illegal compensation could be severed from the rest of the agreement.

([8])
Contracts § 13--Illegal Contracts--Enforceability--Severability.
Courts will not ordinarily aid in enforcing an agreement that is either illegal or against public policy. Illegal contracts, however, will be enforced under certain circumstances, such as when only a part of the consideration given for the contract involves illegality. In other words, notwithstanding an illegal consideration, courts may sever the illegal portion of the contract from the rest of the agreement. When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the courts will make the distinction, for the law divides according to common reason, and having made void that which is against the law, lets the rest stand. If the court is unable to distinguish between the lawful and unlawful parts of the agreement, the illegality taints the entire contract, and the entire transaction is illegal and unenforceable.

COUNSEL
Halley, Cornel & Lynch, Roger C. Peters, Hoge, Fenton, Jones & Appel, David P. Eby, William J. Elfving and Scott R. Mosko for Petitioners.
Latham & Watkins, Joseph A. Wheelock, Jr., and Julie V. King as Amici Curiae on behalf of Petitioners.
No appearance for Respondent.
Hopkins & Carley, Jon Michaelson, Denise Y. Yamamoto and Robert W. Ricketson for Real Party in Interest.
Diane C. Yu, Lawrence C. Yee, Mark Torres-Gil and Robert M. Sweet as Amici Curiae on behalf of Real Party in Interest. ***124**

CHIN, J.

Business and Professions Code section 6125 states: "No person shall practice law in California unless the person is an active member of the State Bar."[1] We must decide whether an out-of-state law firm, not licensed to practice law in this state, violated section 6125 when it performed legal services in California for a California-based client under a fee agreement stipulating that California law would govern all matters in the representation.

1 All further statutory references are to the Business and Professions Code unless otherwise specified.

Although we are aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states, we do not believe these facts excuse law firms from complying with section 6125. Contrary to the Court of Appeal, however, we do not believe the Legislature intended section 6125 to apply to those services an out-of-state firm renders in its home state. We therefore conclude that, to the extent defendant law firm Birbrower, Montalbano, Condon & Frank, P.C. (Birbrower), practiced law in California without a license, it engaged in the unauthorized practice of law in this state. (§ 6125.) We also conclude that Birbrower's fee agreement with real party in interest ESQ Business Services, Inc. (ESQ), is invalid to the extent it authorizes payment for the substantial legal services Birbrower performed in California. If, however, Birbrower can show it generated fees under its agreement for limited services it performed in New York, and it earned those fees under the otherwise invalid fee agreement, it may, on remand, present to the trial court evidence justifying its recovery of fees for those New York services. Conversely, ESQ will have an

opportunity to produce contrary evidence. Accordingly, we affirm the Court of Appeal judgment in part and reverse it in part, remanding for further proceedings consistent with this opinion.

I. Background

The facts with respect to the unauthorized practice of law question are essentially undisputed. Birbrower is a professional law corporation incorporated in New York, with its principal place of business in New York. During 1992 and 1993, Birbrower attorneys, defendants Kevin F. Hobbs and Thomas A. Condon (Hobbs and Condon), performed substantial work in California relating to the law firm's representation of ESQ. Neither Hobbs nor Condon has ever been licensed to practice law in California. None of Birbrower's attorneys were licensed to practice law in California during Birbrower's ESQ representation.

ESQ is a California corporation with its principal place of business in Santa Clara County. In July 1992, the parties negotiated and executed the fee ***125** agreement in New York, providing that Birbrower would perform legal services for ESQ, including "All matters pertaining to the investigation of and prosecution of all claims and causes of action against Tandem Computers Incorporated [Tandem]." The "claims and causes of action" against Tandem, a Delaware corporation with its principal place of business in Santa Clara County, California, related to a software development and marketing contract between Tandem and ESQ dated March 16, 1990 (Tandem Agreement). The Tandem Agreement stated that "The internal laws of the State of California (irrespective of its choice of law principles) shall govern the validity of this Agreement, the construction of its terms, and the interpretation and enforcement of the rights and duties of the parties hereto." Birbrower asserts, and ESQ disputes, that ESQ knew Birbrower was not licensed to practice law in California.

While representing ESQ, Hobbs and Condon traveled to California on several occasions. In August 1992, they met in California with ESQ and its accountants. During these meetings, Hobbs and Condon discussed various matters related to ESQ's dispute with Tandem and strategy for resolving the dispute. They made recommendations and gave advice. During this California trip, Hobbs and Condon also met with Tandem representatives on four or five occasions during a two-day period. At the meetings, Hobbs and Condon spoke on ESQ's behalf. Hobbs demanded that Tandem pay ESQ $15 million. Condon told Tandem he believed that damages would exceed $15 million if the parties litigated the dispute.

Around March or April 1993, Hobbs, Condon, and another Birbrower attorney visited California to interview potential arbitrators and to meet again with ESQ and its accountants. Birbrower had previously filed a demand for arbitration against Tandem with the San Francisco offices of the American Arbitration Association (AAA). In August 1993, Hobbs returned to California to assist ESQ in settling the Tandem matter. While in California, Hobbs met with ESQ and its accountants to discuss a proposed settlement agreement Tandem authored. Hobbs also met with Tandem representatives to discuss possible changes in the proposed agreement. Hobbs gave ESQ legal advice during this trip, including his opinion that ESQ should not settle with Tandem on the terms proposed.

ESQ eventually settled the Tandem dispute, and the matter never went to arbitration. But before the settlement, ESQ and Birbrower modified the contingency fee agreement.[2] The modification changed the fee arrangement from contingency to fixed fee, providing that ESQ would pay Birbrower ***126** over $1 million. The original contingency fee arrangement had called for Birbrower to receive "one-third (1/3) of all sums received for the benefit of the Clients ... whether obtained through settlement, motion practice, hearing, arbitration, or trial by way of judgment, award, settlement, or otherwise ...."

2 Birbrower's brief refers to the "Fee Agreement" without specifying whether it means the original contingency agreement or the later modified fixed fee agreement. The operative fee agreement that would be enforced is in dispute, and, as explained below, is subject to clarification on remand. To avoid confusion, we simply refer to one "fee agreement" for purposes of our analysis.

In January 1994, ESQ sued Birbrower for legal malpractice and related claims in Santa Clara County Superior Court. Birbrower removed the matter to federal court and filed a counterclaim, which included a claim for attorney fees for the work it performed in both California and New York. The matter was then remanded to the superior court. There ESQ moved for summary judgment and/or adjudication on the first through fourth causes of action of Birbrower's counterclaim, which asserted ESQ and its representatives breached the fee agreement. ESQ argued that by practicing law without a license in California and by failing to associate legal counsel while doing so, Birbrower violated section 6125, rendering the fee agreement unenforceable. Based on these undisputed facts, the Santa Clara Superior Court granted ESQ's motion for summary adjudication of the first through

fourth causes of action in Birbrower's counterclaim. The court also granted summary adjudication in favor of ESQ's third and fourth causes of action in its second amended complaint, seeking declaratory relief as to the validity of the fee agreement and its modification. ([1])**(See fn. 3)**The court concluded that: (1) Birbrower was "not admitted to the practice of law in California"; (2) Birbrower "did not associate California counsel";[3] (3) Birbrower "provided legal services in this state"; and (4) "The law is clear that no one may recover compensation for services as an attorney in this state unless he or she was a member of the state bar at the time those services were performed."

3 Contrary to the trial court's implied assumption, no statutory exception to section 6125 allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.

Although the trial court's order stated that the fee agreements were unenforceable, at the hearing on the summary adjudication motion, the trial court also observed: "It seems to me that those are some of the issues that this Court has to struggle with, and then it becomes a question of if they aren't allowed to collect their attorney's fees here, I don't think that puts the attorneys in a position from being precluded from collecting all of their attorney's fees, only those fees probably that were generated by virtue of work that they performed in California and not that work that was performed in New York." ***127**

In granting limited summary adjudication, the trial court left open the following issues for resolution: ESQ's malpractice action against Birbrower, and the remaining causes of action in Birbrower's counterclaim, including Birbrower's fifth cause of action for quantum meruit (seeking the reasonable value of legal services provided).

Birbrower petitioned the Court of Appeal for a writ of mandate directing the trial court to vacate the summary adjudication order. The Court of Appeal denied Birbrower's petition and affirmed the trial court's order, holding that Birbrower violated section 6125. The Court of Appeal also concluded that Birbrower's violation barred the firm from recovering its legal fees under the written fee agreement, including fees generated in New York by the attorneys when they were physically present in New York, because the agreement included payment for California or "local" services for a California client in California. The Court of Appeal agreed with the trial court, however, in deciding that Birbrower could pursue its remaining claims against ESQ, including its equitable claim for recovery of its fees in quantum meruit.

We granted review to determine whether Birbrower's actions and services performed while representing ESQ in California constituted the unauthorized practice of law under section 6125 and, if so, whether a section 6125 violation rendered the fee agreement wholly unenforceable.

II. Discussion

A. *The Unauthorized Practice of Law*

([2]) The California Legislature enacted section 6125 in 1927 as part of the State Bar Act (the Act), a comprehensive scheme regulating the practice of law in the state. (*J.W. v. Superior Court* (1993) 17 Cal.App.4th 958, 965 [22 Cal.Rptr.2d 527] (*J.W.*).) Since the Act's passage, the general rule has been that, although persons may represent themselves and their own interests regardless of State Bar membership, no one but an active member of the State Bar may practice law for another person in California. (*Ibid.*) The prohibition against unauthorized law practice is within the state's police power and is designed to ensure that those performing legal services do so competently. (*Id.* at p. 969.)

A violation of section 6125 is a misdemeanor. (§ 6126.) Moreover, "No one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of The State Bar." (*Hardy v. San Fernando Valley C. of C.* (1950) 99 Cal.App.2d 572, 576 [222 P.2d 314] (*Hardy*).) ***128**

([3]) Although the Act did not define the term "practice law," case law explained it as " 'the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.' " (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535 [209 P. 363] (*Merchants*).) *Merchants* included in its definition legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation. (*Ibid.*; see *People v. Ring* (1937) 26 Cal.App.2d. Supp. 768, 772-773 [70 P.2d 281] (*Ring*) [holding that single incident of practicing law in state without a license violates § 6125]; see also *Mickel v. Murphy* (1957) 147 Cal.App.2d 718, 721 [305 P.2d 993] [giving of legal advice on matter not pending before state

court violates § 6125], disapproved on other grounds in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 651 [320 P.2d 16, 65 A.L.R.2d 1358].) *Ring* later determined that the Legislature "accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court [in *Merchants*] that it had a sufficiently definite meaning to need no further definition. The definition ... must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term 'practice law.' " (*Ring*, *supra*, 26 Cal.App.2d at p. Supp. 772.)

In addition to not defining the term "practice law," the Act also did not define the meaning of "in California." In today's legal practice, questions often arise concerning whether the phrase refers to the nature of the legal services, or restricts the Act's application to those out-of-state attorneys who are physically present in the state.

Section 6125 has generated numerous opinions on the meaning of "practice law" but none on the meaning of "in California." In our view, the practice of law "in California" entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law "in California." The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a ***129** California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person *automatically* practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite. (See e.g., *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543 [86 Cal.Rptr. 673, 469 P.2d 353, 42 A.L.R.3d 1036] (*Baron*) ["practice law" does not encompass all professional activities].) Indeed, we disapprove *Ring*, *supra*, 26 Cal.App.2d Supp. 768, and its progeny to the extent the cases are inconsistent with our discussion. We must decide each case on its individual facts.

This interpretation acknowledges the tension that exists between interjurisdictional practice and the need to have a state-regulated bar. As stated in the American Bar Association Model Code of Professional Responsibility, Ethical Consideration EC 3-9, "Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice." (Fns. omitted.) *Baron* implicitly agrees with this canon. (*Baron*, *supra*, 2 Cal.3d at p. 543.)

If we were to carry the dissent's narrow interpretation of the term "practice law" to its logical conclusion, we would effectively limit section 6125's application to those cases in which nonlicensed out-of-state lawyers appeared in a California courtroom without permission. (Dis. opn., *post*, at pp. 142-144.) Clearly, neither *Merchants*, *supra*, 189 Cal. at page 535, nor *Baron*, *supra*, 22 Cal.3d at page 543, supports the dissent's fanciful interpretation of the thoughtful guidelines announced in those cases. Indeed, the dissent's definition of "practice law" ignores *Merchants* altogether, and, in so doing, substantially undermines the Legislature's intent to protect the public from those giving unauthorized legal advice and counsel.

([4]) Exceptions to section 6125 do exist, but are generally limited to allowing out-of-state attorneys to make brief appearances before a state court ***130** or tribunal. They are narrowly drawn and strictly interpreted. For example, an out-of-state attorney not licensed to practice in California may be permitted, *by consent of a trial judge*, to appear in California in a particular pending action. (See *In re McCue* (1930) 211 Cal. 57, 67 [293 P. 47]; 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 402, p. 493.)

In addition, with the permission of the California court in which a particular cause is pending, out-of-state counsel may appear before a court as counsel pro hac vice. (Cal. Rules of Court, rule 983.) A court will approve a pro hac vice application only if the out-of-state attorney is a member in good standing of another state bar and is eligible to practice in any United States court or the highest court in another jurisdiction. (Cal. Rules of Court, rule 983(a).) The out-of-state attorney must also associate an active member of the California Bar as attorney of record and is subject to the Rules of Professional Conduct of the State Bar. (Cal. Rules of Court, rules 983(a), (d); see Rules Prof. Conduct, rule 1-100(D)(2) [includes lawyers from other jurisdictions authorized to practice in this state].)

The Act does not regulate practice before United States courts. Thus, an out-of-state attorney engaged to render services in bankruptcy proceedings was entitled to collect his fee. (*Cowen v. Calabrese* (1964) 230 Cal.App.2d 870, 872 [41 Cal.Rptr. 441, 11 A.L.R.3d 903] (*Cowen*); but see U.S. Dist. Ct. Local Rules, Northern Dist. Cal., rule 11-1(b); Eastern Dist. Cal., rule 83-180; Central Dist. Cal., rule 2.2.1; Southern Dist. Cal., rule 83.3 c.1.a. [today conditioning admission to their respective bars (with certain exceptions for some federal government employees) on active membership in good standing in California State Bar].)

Finally, California Rules of Court, rule 988, permits the State Bar to issue registration certificates to foreign legal consultants who may advise on the law of the foreign jurisdiction where they are admitted. These consultants may not, however, appear as attorneys before a California court or judicial officer or otherwise prepare pleadings and instruments in California or give advice on the law of California or any other state or jurisdiction except those where they are admitted.

The Legislature has recognized an exception to section 6125 in international disputes resolved in California under the state's rules for arbitration and conciliation of international commercial disputes. (Code Civ. Proc., § 1297.11 et seq.) This exception states that in a commercial conciliation in California involving international commercial disputes, "The parties may appear in person or be represented or assisted by any person of their choice. A person assisting or representing a party need not be a member of the legal ***131** profession or licensed to practice law in California." (Code Civ. Proc., § 1297.351.) Likewise, the Act does not apply to the preparation of or participation in labor negotiations and arbitrations arising under collective bargaining agreements in industries subject to federal law. (See e.g., *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 103 [82 S.Ct. 571, 576-577, 7 L.Ed.2d 593]; see also Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a).)

B. *The Present Case*

([5a]) The undisputed facts here show that neither *Baron*'s definition (*Baron, supra,* 2 Cal.3d at p. 543) nor our "sufficient contact" definition of "practice law in California" (*ante,* at pp. 128-129) would excuse Birbrower's extensive practice in this state. Nor would any of the limited statutory exceptions to section 6125 apply to Birbrower's California practice. As the Court of Appeal observed, Birbrower engaged in unauthorized law practice *in California* on more than a limited basis, and no firm attorney engaged in that practice was an active member of the California State Bar. As noted (*ante,* at p. 125), in 1992 and 1993, Birbrower attorneys traveled to California to discuss with ESQ and others various matters pertaining to the dispute between ESQ and Tandem. Hobbs and Condon discussed strategy for resolving the dispute and advised ESQ on this strategy. Furthermore, during California meetings with Tandem representatives in August 1992, Hobbs demanded Tandem pay $15 million, and Condon told Tandem he believed damages in the matter would exceed that amount if the parties proceeded to litigation. Also in California, Hobbs met with ESQ for the stated purpose of helping to reach a settlement agreement and to discuss the agreement that was eventually proposed. Birbrower attorneys also traveled to California to initiate arbitration proceedings before the matter was settled. As the Court of Appeal concluded, "... the Birbrower firm's in-state activities clearly constituted the [unauthorized] practice of law" *in California*.

Birbrower contends, however, that section 6125 is not meant to apply to *any* out-of-state *attorneys*. Instead, it argues that the statute is intended solely to prevent nonattorneys from practicing law. This contention is without merit because it contravenes the plain language of the statute. Section 6125 clearly states that *no person* shall practice law in California unless that person is a member of the State Bar. The statute does not differentiate between attorneys or nonattorneys, nor does it excuse a person who is a member of another state bar. ([6]) It is well-settled that, in determining the meaning of a statute, we look to its words and give them their usual and ordinary meaning. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [7 Cal.Rptr.2d 238, 828 P.2d 140]; *Kimmel v. Goland* (1990) 51 Cal.3d 202, 208-209 [271

Cal.Rptr. 191, 793 P.2d 524].) "[I]f statutory language is 'clear ***132** and unambiguous there is no need for construction, and courts should not indulge in it.' [Citation.]" (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 218 [188 Cal.Rptr. 115, 655 P.2d 317].) ([5b]) The plain meaning controls our interpretation of the statute here because Birbrower has not shown "that the natural and customary import of the statute's language is either 'repugnant to the general purview of the act' or for some other compelling reason, should be disregarded ...." (*Id.* at pp. 218-219.)

Birbrower next argues that we do not further the statute's intent and purpose—to protect California citizens from incompetent attorneys—by enforcing it against out-of-state attorneys. Birbrower argues that because out-of-state attorneys have been licensed to practice in other jurisdictions, they have already demonstrated sufficient competence to protect California clients. But Birbrower's argument overlooks the obvious fact that other states' laws may differ substantially from California law. Competence in one jurisdiction does not necessarily guarantee competence in another. By applying section 6125 to out-of-state attorneys who engage in the extensive practice of law in California without becoming licensed in our state, we serve the statute's goal of assuring the competence of all attorneys practicing law in this state. (*J.W., supra,* 17 Cal.App.4th at p. 969.)

California is not alone in regulating who practices law in its jurisdiction. Many states have substantially similar statutes that serve to protect their citizens from unlicensed attorneys who engage in unauthorized legal practice. Like section 6125, these other state statutes protect local citizens "against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." (*Spivak v. Sachs* (1965) 16 N.Y.2d 163 [263 N.Y.S.2d 953, 211 N.E.2d 329, 331].) Whether an attorney is duly admitted in another state and is, in fact, competent to practice in California is irrelevant in the face of section 6125's language and purpose. (See *Ranta v. McCarney* (N.D. 1986) 391 N.W.2d 161, 163 (*Ranta*) [noting that out-of-state attorney's competence is irrelevant because purpose of North Dakota law against unauthorized law practice is to assure competence *before* attorney practices in state].) Moreover, as the North Dakota Supreme Court pointed out in *Ranta*: "It may be that such an [out-of-state attorney] exception is warranted, but such a plea is more properly made to a legislative committee considering a bill enacting such an exception or to this court in its rule-making function than it is in a judicial decision." (*Id.* at p. 165.) Similarly, a decision to except out-of-state attorneys licensed in their own jurisdictions from section 6125 is more appropriately left to the California Legislature. ***133**

Assuming that section 6125 does apply to out-of-state attorneys not licensed here, Birbrower alternatively asks us to create an exception to section 6125 for work incidental to private arbitration or other alternative dispute resolution proceedings. Birbrower points to fundamental differences between private arbitration and legal proceedings, including procedural differences relating to discovery, rules of evidence, compulsory process, cross-examination of witnesses, and other areas. (See *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 57-58 [94 S.Ct. 1011, 1024-1025, 39 L.Ed.2d 147] [illustrating differences between arbitration and court proceedings].) As Birbrower observes, in light of these differences, at least one court has decided that an out-of-state attorney could recover fees for services rendered in an arbitration proceeding. (See *Williamson v. John D. Quinn Const. Corp.* (S.D.N.Y. 1982) 537 F.Supp. 613, 616 (*Williamson*).)

In *Williamson,* a New Jersey law firm was employed by a client's New York law firm to defend a construction contract arbitration in New York. It sought to recover fees solely related to the arbitration proceedings, even though the attorney who did the work was not licensed in New York, nor was the firm authorized to practice in the state. (*Williamson, supra,* 537 F.Supp. at p. 616.) In allowing the New Jersey firm to recover its arbitration fees, the federal district court concluded that an arbitration tribunal is not a court of record, and its fact-finding process is not similar to a court's process. (*Ibid.*) The court relied on a local state bar report concluding that representing a client in an arbitration was not the unauthorized practice of law. (*Ibid.*; see Com. Rep., Labor Arbitration and the Unauthorized Practice of Law (May/June 1975) 30 Record of the Association of the Bar of the City of New York, No. 5/6, p. 422 et seq.) But as amicus curiae the State Bar of California observes, "While in *Williamson* the federal district court did allow the New Jersey attorneys to recover their fees, that decision clearly is distinguishable on its facts.... [¶] In the instant case, it is undisputed that none of the time that the New York attorneys spent in California was" spent in arbitration; *Williamson* thus carries limited weight. (See also *Moore v. Conliffe* (1994) 7 Cal.4th 634, 637-638 [29 Cal.Rptr.2d 152, 871 P.2d 204] [private AAA arbitration functionally equivalent to judicial proceeding to which litigation privilege applies].) Birbrower also relies on California's rules for arbitration and conciliation of international commercial disputes for support. (Code Civ. Proc., § 1297.11 et seq.) As noted (*ante,* at pp. 130-131), these

rules specify that, in an international commercial conciliation or arbitration proceeding, the person representing a party to the conciliation or arbitration is not required to be a licensed member of the State Bar. (Code Civ. Proc., § 1297.351.)

We decline Birbrower's invitation to craft an arbitration exception to section 6125's prohibition of the unlicensed practice of law in this state. Any ***134** exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law. (*Baron, supra,* 2 Cal.3d at pp. 540-541; see also *Eagle Indem. Co. v. Industrial Acc. Com.* (1933) 217 Cal. 244, 247 [18 P.2d 341].) Even though the Legislature has spoken with respect to *international* arbitration and conciliation, it has not enacted a similar rule for private arbitration proceedings. Of course, private arbitration and other alternative dispute resolution practices are important aspects of our justice system. (See *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 [10 Cal.Rptr.2d 183, 832 P.2d 899] [noting a strong public policy in favor of arbitration].) Section 6125, however, articulates a strong public policy favoring the practice of law in California by licensed State Bar members. In the face of the Legislature's silence, we will not create an arbitration exception under the facts presented. (See *Baron, supra,* 2 Cal.3d at pp. 540-541 [membership, character, and conduct of attorneys is proper subject of state legislative regulation and control].)[4]

4 The dissent focuses on an arbitrator's powers in an attempt to justify its conclusion that an out-of-state attorney may engage in the unlicensed representation of a client in an arbitration proceeding. (See dis. opn., *post,* at pp. 144-145.) This narrow focus confuses the issue here. An arbitrator's powers to enforce a contract or "award an essentially unlimited range of remedies" has no bearing on the question whether unlicensed out-of-state attorneys may represent California clients in an arbitration proceeding. (Dis. opn., *post,* at p. 145.) Moreover, any discussion of the practice of law in an arbitration proceeding is irrelevant here because the parties settled the underlying case before arbitration proceedings became necessary. Nonetheless, we emphasize that, in the absence of clear legislative direction, we decline to create an exception allowing unlicensed legal practice in arbitration in violation of section 6125.

In its reply brief to the State Bar's amicus curiae brief, Birbrower raises for the first time the additional argument that the Federal Arbitration Act (FAA) preempted the rules governing the AAA proposed arbitration and section 6125. The FAA regulates arbitration that deals with maritime transactions and contracts involving the transportation of goods through interstate or foreign commerce. (9 U.S.C. § 1 et seq.) Although we need not address the question under California Rules of Court, rule 29(b)(1), and note the parties' settlement agreement rendered the arbitration unnecessary, we reject the argument for its lack of merit. First, the parties incorporated a California choice-of-law provision in the Tandem Agreement, indicating they intended to apply California law in any necessary arbitration, and they have not shown that California law in any way conflicts with the FAA. Moreover, in interpreting the California Arbitration Act stay provisions (Code Civ. Proc., § 1281.2, subd. (c)), the high court observed that the FAA does not contain an express preemptive provision, nor does it "reflect a congressional intent to occupy the entire field of arbitration." (*Volt Info. Sciences v. Leland* ***135** *Stanford Jr. U.* (1989) 489 U.S. 468, 477 [109 S.Ct. 1248, 1255, 103 L.Ed.2d 488].)

Finally, Birbrower urges us to adopt an exception to section 6125 based on the unique circumstances of this case. Birbrower notes that "Multistate relationships are a common part of today's society and are to be dealt with in commonsense fashion." (*In re Estate of Waring* (1966) 47 N.J. 367 [221 A.2d 193, 197].) In many situations, strict adherence to rules prohibiting the unauthorized practice of law by out-of-state attorneys would be " 'grossly impractical and inefficient.' " (*Ibid.*; see also *Appell v. Reiner* (1964) 43 N.J. 313 [204 A.2d 146, 148] [strict adherence to rule barring out-of-state lawyers from representing New Jersey residents on New Jersey matters may run against the public interest when case involves inseparable multistate transactions].)

Although, as discussed (*ante,* at pp. 129-130), we recognize the need to acknowledge and, in certain cases, to accommodate the multistate nature of law practice, the facts here show that Birbrower's extensive activities within California amounted to considerably more than any of our state's recognized exceptions to section 6125 would allow. Accordingly, we reject Birbrower's suggestion that we except the firm from section 6125's rule under the circumstances here.

C. *Compensation for Legal Services*

([7a]) Because Birbrower violated section 6125 when it engaged in the unlawful practice of law in California, the Court of Appeal found its fee agreement with ESQ unenforceable in its entirety. Without crediting Birbrower for some services performed in New York, for which fees were generated under the fee agreement, the court

reasoned that the agreement was void and unenforceable because it included payment for services rendered to a California client in the state by an unlicensed out-of-state lawyer. The court opined that "When New York counsel decided to accept [the] representation, it should have researched California law, including the law governing the practice of law in this state." The Court of Appeal let stand, however, the trial court's decision to allow Birbrower to pursue its fifth cause of action in quantum meruit.[5] We agree with the Court of Appeal to the extent it barred Birbrower from recovering fees generated under the fee agreement for the unauthorized legal services it performed in California. We disagree with the same court to the extent it implicitly barred Birbrower ***136** from recovering fees generated under the fee agreement for the limited legal services the firm performed in New York.

5 We observe that ESQ did not seek (and thus the court did not grant) summary adjudication on the Birbrower firm's quantum meruit claim for the reasonable value of services rendered. Birbrower thus still has a cause of action pending in quantum meruit.

It is a general rule that an attorney is barred from recovering compensation for services rendered in another state where the attorney was not admitted to the bar. (Annot., Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar (1967) 11 A.L.R.3d 907; *Hardy, supra,* 99 Cal.App.2d at p. 576.) The general rule, however, has some recognized exceptions.

Initially, Birbrower seeks enforcement of the entire fee agreement, relying first on the federal court exception discussed *ante,* at page 130. (*Cowen, supra,* 230 Cal.App.2d at p. 872; *In re McCue, supra,* 211 Cal. at p. 66; see Annot., *supra,* 11 A.L.R.3d at pp. 912-913 [citing *Cowen* as an exception to general rule of nonrecovery].) This exception does not apply in this case; none of Birbrower's activities related to federal court practice.

A second exception on which Birbrower relies to enforce its entire fee agreement relates to "Services not involving courtroom appearance." (Annot., *supra,* 11 A.L.R.3d at p. 911 [citing *Wescott v. Baker* (1912) 83 N.J.L. 460 [85 A. 315]].) California has implicitly rejected this broad exception through its comprehensive definition of what it means to "practice law." Thus, the exception Birbrower seeks for all services performed outside the courtroom in our state is too broad under section 6125.

Some jurisdictions have adopted a third exception to the general rule of nonrecovery for in-state services, if an out-of-state attorney "makes a full disclosure to his client of his lack of local license and does not conceal or misrepresent the true facts." (Annot., *supra,* 11 A.L.R.3d at p. 910.) For example, in *Freeling v. Tucker* (1930) 49 Idaho 475 [289 P. 85], the court allowed an Oklahoma attorney to recover for services rendered in an Idaho probate court. Even though an Idaho statute prohibited the unlicensed practice of law, the court excused the Oklahoma attorney's unlicensed representation because he had not falsely represented himself nor deceptively held himself out to the client as qualified to practice in the jurisdiction. (*Id.* at p. 86.) In this case, Birbrower alleges that ESQ at all times knew that the firm was not licensed to practice law in California. Even assuming that is true, however, we reject the full disclosure exception for the same reasons we reject the argument that section 6125 is not meant to apply to nonattorneys. Recognizing these exceptions would contravene not only the plain language of section 6125 but the underlying policy of assuring the competence of those practicing law in California. ***137**

Therefore, as the Court of Appeal held, none of the exceptions to the general rule prohibiting recovery of fees generated by the unauthorized practice of law apply to Birbrower's activities in California. Because Birbrower practiced substantial law in this state in violation of section 6125, it cannot receive compensation under the fee agreement for any of the services it performed in California. Enforcing the fee agreement in its entirety would include payment for the unauthorized practice of law in California and would allow Birbrower to enforce an illegal contract. (*See Hardy, supra,* 99 Cal.App.2d at p. 576.)

Birbrower asserts that even if we agree with the Court of Appeal and find that none of the above exceptions allowing fees for unauthorized California services apply to the firm, it should be permitted to recover fees for those limited services it performed exclusively *in New York* under the agreement. In short, Birbrower seeks to recover under its contract for those services it performed for ESQ in New York that did not involve the practice of law in California, including fee contract negotiations and some corporate case research. Birbrower thus alternatively seeks reversal of the Court of Appeal's judgment to the extent it implicitly precluded the firm from seeking fees generated in New York under the fee agreement.

We agree with Birbrower that it may be able to recover fees under the fee agreement for the limited legal services it performed for ESQ in New York to the extent they did not constitute practicing law in California, even though those services were performed for a California client. Because section 6125 applies to the practice of law in

California, it does not, in general, regulate law practice in other states. (See *ante*, at pp. 128-131.) Thus, although the general rule against compensation to out-of-state attorneys precludes Birbrower's recovery under the fee agreement for its actions in California, the severability doctrine may allow it to receive its New York fees generated under the fee agreement, if we conclude the illegal portions of the agreement pertaining to the practice of law in California may be severed from those parts regarding services Birbrower performed in New York. (See Annot., *supra*, 11 A.L.R.3d at pp. 908-909, and cases cited [bar on recovery by out-of-state attorney extends only to compensation for *local* services]; see also *Ranta*, *supra*, 391 N.W.2d at p. 166 [remanding case to determine which fees related to practice locally and which related to attorney's work in state where he was licensed].)

The law of contract severability is stated in Civil Code section 1599, which defines partially void contracts: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." In ***138** *Calvert v. Stoner* (1948) 33 Cal.2d 97 [199 P.2d 297] (*Calvert*), we considered whether a contingent fee contract containing a provision restricting a party's right to compromise a suit without her attorney's consent was void entirely or severable in part. (*Id.* at p. 103.) We observed that "It is unnecessary ... to determine whether the particular provision is invalid as against public policy. It is sufficient to observe, assuming such invalidity, that in this state ... the compensation features of the contract are not thereby deemed affected if in other respects the contract is lawful." (*Id.* at p. 104.) *Calvert* concluded that the invalid provision preventing the client from compromising the suit could be severed from the valid provision for attorney fees. (*Ibid.*)

The fee agreement between Birbrower and ESQ became illegal when Birbrower performed legal services in violation of section 6125. ([8]) It is true that courts will not ordinarily aid in enforcing an agreement that is either illegal or against public policy. (*Asdourian v. Araj* (1985) 38 Cal.3d 276, 291 [211 Cal.Rptr. 703, 696 P.2d 95]; *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109-1110 [260 Cal.Rptr. 6].) Illegal contracts, however, will be enforced under certain circumstances, such as when only a part of the consideration given for the contract involves illegality. In other words, notwithstanding an illegal consideration, courts may sever the illegal portion of the contract from the rest of the agreement. (*Keene v. Harling* (1964) 61 Cal.2d 318, 320 [38 Cal.Rptr. 513, 392 P.2d 273] (*Keene*).) " ' "When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction, for the ... law ... [divides] according to common reason; and having made that void that is against law, lets the rest stand...." ' " (*Id.* at pp. 320-321, quoting *Jackson v. Shawl* (1865) 29 Cal. 267, 272.) If the court is unable to distinguish between the lawful and unlawful parts of the agreement, "the illegality taints the entire contract, and the entire transaction is illegal and unenforceable." (*Keene*, *supra*, 61 Cal.2d at p. 321.)

In *Keene*, the defendant agreed to pay the plaintiffs $50,000 in exchange for their business involving coin-operated machines. The defendant defaulted on his payments, and the plaintiffs sued. The defendant argued that the sales agreement was void because part of the sale involved machines that were illegal under a California penal statute. The court affirmed the lower court's determination that the price of the illegal machines could be deducted from the amount due on the original contract. "Since the consideration on the buyer's side was money, the court properly construed the contract by equating the established market price of the illegal machines to a portion of the money consideration." (*Keene*, *supra*, 61 Cal.2d at p. 323.) Thus, even though the entire contract was for a fixed sum, the court was able ***139** to value the illegal portion of the contract and separate it from the rest of the amount due under the agreement.

([7b]) In this case, the parties entered into a contingency fee agreement followed by a fixed fee agreement.[6] ESQ was to pay money to Birbrower in exchange for Birbrower's legal services. The object of their agreement may not have been entirely illegal, assuming ESQ was to pay Birbrower compensation based in part on work Birbrower performed in New York that did not amount to the practice of law in California. The illegality arises, instead, out of the amount to be paid to Birbrower, which, if paid fully, would include payment for services rendered in California in violation of section 6125.

6 The parties apparently do not dispute that they modified the original contingency fee arrangement to call for a fixed fee payment of over $1 million. They dispute, however, whether the original contingency fee arrangement became operative once again when ESQ failed to make a payment to Birbrower under the fixed fee arrangement. Because the trial court and the Court of Appeal believed the fee agreements to be unenforceable in their entirety, neither court addressed issues relating to the fee agreements themselves or the parties' disputes surrounding those agreements. We agree with the Court of Appeal that issues surrounding the two fee agreements and the applicability of either section 6147 (regulating contents of contingency fee agreements) or the State Bar Rules of Professional

Conduct, rules 3-300 and 4-200 (governing fees for legal services), are best resolved by the trial court on remand.

Therefore, we conclude the Court of Appeal erred in determining that the fee agreement between the parties was entirely unenforceable because Birbrower violated section 6125's prohibition against the unauthorized practice of law in California. Birbrower's statutory violation may require exclusion of the portion of the fee attributable to the substantial illegal services, but that violation does not necessarily entirely preclude its recovery under the fee agreement for the limited services it performed outside California. (*Calvert, supra,* 33 Cal.2d at pp. 104-105.)

Thus, the portion of the fee agreement between Birbrower and ESQ that includes payment for services rendered in New York may be enforceable to the extent that the illegal compensation can be severed from the rest of the agreement. On remand, therefore, the trial court must first resolve the dispute surrounding the parties' fee agreement and determine whether their agreement conforms to California law. If the parties and the court resolve the fee dispute and determine that one fee agreement is operable and does not violate any state drafting rules, the court may sever the illegal portion of the consideration (the value of the California services) from the rest of the fee agreement. Whether the trial court finds the contingent fee agreement or the fixed fee agreement to be valid, it will determine whether some amount is due under the valid agreement. The trial court must then determine, on ***140** evidence the parties present, how much of this sum is attributable to services Birbrower rendered in New York. The parties may then pursue their remaining claims.

III. Disposition

We conclude that Birbrower violated section 6125 by practicing law in California. To the extent the fee agreement allows payment for those illegal local services, it is void, and Birbrower is not entitled to recover fees under the agreement for those services. The fee agreement is enforceable, however, to the extent it is possible to sever the portions of the consideration attributable to Birbrower's services illegally rendered in California from those attributable to Birbrower's New York services. Accordingly, we affirm the Court of Appeal judgment to the extent it concluded that Birbrower's representation of ESQ in California violated section 6125, and that Birbrower is not entitled to recover fees under the fee agreement for its local services. We reverse the judgment to the extent the court did not allow Birbrower to argue in favor of a severance of the illegal portion of the consideration (for the California fees) from the rest of the fee agreement, and remand for further proceedings consistent with this decision.

George, C. J., Mosk, J., Baxter, J., Werdegar, J., and Brown, J., concurred.

KENNARD, J.,

Dissenting.—In California, it is a misdemeanor to practice law when one is not a member of the State Bar. (Bus. & Prof. Code, §§ 6125, 6126, subd. (a).) In this case, New York lawyers who were not members of the California Bar traveled to this state on several occasions, attempting to resolve a contract dispute between their clients and another corporation through negotiation and private arbitration. Their clients included a New York corporation and a sister corporation incorporated in California; the lawyers had in previous years represented the principal owners of these corporations. The majority holds that the New York lawyers' activities in California constituted the unauthorized practice of law. I disagree.

The majority focuses its attention on the question of whether the New York lawyers had engaged in the practice of law *in California*, giving scant consideration to a decisive preliminary inquiry: whether, through their activities here, the New York lawyers had engaged in the practice of law *at all*. In my view, the record does not show that they did. In reaching a contrary conclusion, the majority relies on an overbroad definition of the term "practice of law." I would adhere to this court's decision in *Baron v. City of* ***141** *Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673, 469 P.2d 353, 42 A.L.R.3d 1036], more narrowly defining the practice of law as the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind. Under this definition, this case presents a triable issue of material fact as to whether the New York lawyers' California activities constituted the practice of law.

I

Defendant Birbrower, Montalbano, Condon & Frank, P.C. (hereafter Birbrower) is a New York law firm. Its lawyers are not licensed to practice law in California.

Kamal Sandhu was the sole shareholder of ESQ Business Services Inc., a New York corporation (hereafter ESQ-NY), of which his brother Iqbal Sandhu was the vice-president. Beginning in 1986, Birbrower lawyers represented the Sandhu family in various business matters. In 1990, Kamal Sandhu asked Birbrower lawyer Kevin Hobbs to review a proposed software development and marketing agreement between ESQ-NY and Tandem Computers Incorporated (hereafter Tandem). The agreement granted Tandem worldwide distribution rights to computer software created by ESQ-NY. The agreement also provided that it would be governed by California law and that, according to Birbrower's undisputed assertion, disputes were to be resolved by arbitration under the rules of the American Arbitration Association. ESQ-NY and Tandem signed the agreement.

Thereafter, a second corporation, also named ESQ Business Services, Inc. (hereafter ESQ-CAL), was incorporated in California, with Iqbal Sandhu as a principal shareholder. In 1991, ESQ-CAL consulted Birbrower lawyers concerning Tandem's performance under the agreement. In 1992, ESQ-NY and ESQ-CAL jointly hired Birbrower to resolve the dispute with Tandem, including the investigation and prosecution of claims against Tandem if necessary. ESQ-NY and ESQ-CAL entered into a contingency fee agreement with Birbrower; this agreement was executed in New York but was later modified to a fixed fee agreement in California.

The efforts of the Birbrower lawyers to resolve the dispute with Tandem included several brief trips to California. On these trips, Birbrower lawyers met with officers of both ESQ-NY and ESQ-CAL and with representatives of Tandem; they also interviewed arbitrators and participated in negotiating the settlement of the dispute with Tandem. (Maj. opn., *ante*, at p. 125.) On February 12, 1993, Birbrower initiated an arbitration proceeding against ***142** Tandem, on behalf of both ESQ-NY and ESQ-CAL, by filing a claim with the American Arbitration Association in San Francisco, California. Before an arbitration hearing was held, the dispute with Tandem was settled.

In January 1994, ESQ-CAL and Iqbal Sandhu, the principal shareholder, sued Birbrower for malpractice. Birbrower cross-complained to recover its fees under the fee agreement. Plaintiffs ESQ-CAL and Iqbal Sandhu thereafter amended their complaint to add ESQ-NY as a plaintiff. Plaintiffs moved for summary adjudication, asserting the fee agreement was unenforceable because the Birbrower lawyers had engaged in the unauthorized practice of law in California. The trial court agreed, and granted plaintiffs' motion. The Court of Appeal upheld the trial court's ruling, as does a majority of this court today.

II

Business and Professions Code section 6125 states: "No person shall practice law in California unless the person is an active member of the State Bar." The Legislature, however, has not defined what constitutes the practice of law.

Pursuant to its inherent authority to define and regulate the practice of law (see, e.g., *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 728 [147 Cal.Rptr. 631, 581 P.2d 636]; *In re Lavine* (1935) 2 Cal.2d 324, 328; *People v. Turner* (1850) 1 Cal. 143, 150), this court in 1922 defined the practice of law as follows: " '[A]s the term is generally understood, the practice of the law is the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which the legal rights are secured although such matter may or may not be depending in a court.' " (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535 [209 P. 363] (*Merchants*).) The *Merchants* court adopted this definition verbatim from a decision by the Indiana Court of Appeals, *Eley v. Miller* (1893) 7 Ind.App. 529 [34 N.E. 836, 837-838]. (*Merchants, supra,* at p. 535.)

In 1970, in *Baron v. City of Los Angeles, supra,* 2 Cal.3d 535, 542 (*Baron*), this court reiterated the *Merchants* court's definition of the term "practice of law." We were quick to point out in *Baron*, however, that "ascertaining whether a particular activity falls within this general definition may be a formidable endeavor." (*Id.* at p. 543.) *Baron* emphasized "that it is not the whole spectrum of professional services of lawyers with which the State Bar ***143** Act is most concerned, but rather it is the smaller area of activities defined as the 'practice of law.' " (*Ibid.*) It then observed: "In close cases, the courts have determined that the resolution of legal questions for another by advice and action is practicing law 'if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application

of a *trained legal mind.*' [Citations.]" (*Ibid.*, italics added.) *Baron* added that "if the application of legal knowledge and technique is *required*, the activity constitutes the practice of law ...." (*Ibid.*, italics added.) This definition is quite similar to that proposed by Cornell Law School Professor Charles Wolfram, the chief reporter for the American Law Institute's Restatement of the Law Governing Lawyers: "The correct form of the test [for the practice of law] should inquire whether the matter handled was of such complexity that only a person trained as a lawyer should be permitted to deal with it." (Wolfram, Modern Legal Ethics (1986) p. 836.)

The majority asserts that the definition of practice of law I have stated above misreads this court's opinion in *Baron*. (Maj. opn., *ante*, at p. 129.) But what the majority characterizes as "the dissent's fanciful interpretation of the [*Baron* court's] thoughtful guidelines" (*ibid.*) consists of language I have quoted directly from *Baron*.

The majority also charges that the narrowing construction of the term "practice of law" that this court adopted in *Baron* "effectively limit[s] section 6125's application to those cases in which nonlicensed out-of-state lawyers appeared in a California courtroom without permission." (Maj. opn., *ante*, at p. 129.) Fiddlesticks. Because the *Baron* definition encompasses all activities that " 'reasonably demand application of a trained legal mind' " (*Baron, supra*, 2 Cal.3d at p. 543), the majority's assertion would be true only if there were no activities, apart from court appearances, requiring application of a trained legal mind. Many attorneys would no doubt be surprised to learn that, for example, drafting testamentary documents for large estates, preparing merger agreements for multinational corporations, or researching complex legal issues are not activities that require a trained legal mind.

According to the majority, use of the *Baron* definition I have quoted would undermine protection of the public from incompetent legal practitioners. (Maj. opn., *ante*, at p. 129.) The *Baron* definition provides ample protection from incompetent legal practitioners without infringing upon the public's interest in obtaining advice and representation from other professionals, such as accountants and real estate brokers, whose skills in specialized areas may overlap with those of lawyers. This allows the public the freedom to choose professionals who may be able to provide the public with ***144** needed services at a more affordable cost. (See Wolfram, Modern Legal Ethics, *supra*, at p. 831; Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions* (1981) 34 Stan.L.Rev. 1, 97-98; Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 Utah L.Rev. 649, 650.) As this court has recognized, there are proceedings in which nonattorneys "are competent" to represent others without undermining the protection of the public interest. (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 913-914 [160 Cal.Rptr. 124, 603 P.2d 41].)

The majority, too, purports to apply the definition of the practice of law as articulated in *Baron, supra*, 2 Cal.3d 535. The majority, however, focuses only on *Baron*'s quotation of the general definition of the practice of law set forth in *Merchants, supra*, 189 Cal. 531, 535. The majority ignores both the ambiguity in the *Merchants* definition and the manner in which *Baron* resolved that ambiguity. The majority apparently views the practice of law as encompassing *any* "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation." (Maj. opn., *ante*, at p. 128.)

The majority's overbroad definition would affect a host of common commercial activities. On point here are comments that Professor Deborah Rhode made in a 1981 article published in the Stanford Law Review: "For many individuals, most obviously accountants, bankers, real estate brokers, and insurance agents, it would be impossible to give intelligent counsel without reference to legal concerns that such statutes reserve as the exclusive province of attorneys. As one [American Bar Association] official active in unauthorized practice areas recently acknowledged, there is growing recognition that ' "all kinds of other professional people are practicing law almost out of necessity." ' Moreover, since most legislation does not exempt gratuitous activity, much advice commonly imparted by friends, employers, political organizers, and newspaper commentators constitutes unauthorized practice. For example, although the organized bar has not yet evinced any inclination to drag [nationally syndicated advice columnist] Ann Landers through the courts, she is plainly fair game under extant statutes [proscribing the unauthorized practice of law]." (Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, supra*, 34 Stan.L.Rev. at p. 47, fns. omitted.)

Unlike the majority, I would for the reasons given above adhere to the more narrowly drawn definition of the practice of law that this court articulated in *Baron, supra*, 2 Cal.3d 535, 543: the representation of another in a judicial proceeding or an activity requiring the application of that degree ***145** of legal knowledge and technique possessed only by a trained legal mind. Applying that

definition here, I conclude that the trial court should not have granted summary adjudication for plaintiffs based on the Birbrower lawyers' California activities. That some or all of those activities related to arbitration does not necessarily establish that they constituted the practice of law, as I shall explain.

III

As I mentioned earlier, Birbrower's clients had a software development and marketing agreement with Tandem. The agreement provided that its validity, interpretation, and enforcement were to be governed by California law. It also contained an arbitration provision. After a dispute arose pertaining to Tandem's performance under the agreement, Birbrower initiated an arbitration on behalf of its clients by filing a claim with the American Arbitration Association in San Francisco, and held meetings in California to prepare for an arbitration hearing. Because the dispute with Tandem was settled, the arbitration hearing was never held.

As I explained in part II, *ante*, this court in *Baron, supra,* 2 Cal.3d 535, 543, defined the term "practice of law" in narrower terms than the court had done earlier in *Merchants, supra,* 189 Cal. 531, 535, which simply adopted verbatim the general definition set forth in an 1893 decision of the Indiana Court of Appeals. Under the narrower definition articulated in *Baron*, the practice of law is the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind.

Representing another in an arbitration proceeding does not invariably present difficult or doubtful legal questions that require a trained legal mind for their resolution. Under California law, arbitrators are "not ordinarily constrained to decide according to the rule of law ...." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 [10 Cal.Rptr.2d 183, 832 P.2d 899].) Thus, arbitrators, " 'unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.' [Citations.]" (*Id.* at pp. 10-11.) They " 'are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].' [Citation.]" (*Id.* at p. 11, original brackets.) For this reason, "the existence of an *error of law* apparent on the face of the [arbitration] award *that causes substantial injustice* does not provide grounds for judicial review." (*Id.* at p. 33, italics added; contra, *id.* at pp. 33-40 (conc. and dis. opn. of Kennard, J.).) ***146**

Moreover, an arbitrator in California can award any remedy "arguably based" on "the contract's general subject matter, framework or intent." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 381 [36 Cal.Rptr.2d 581, 885 P.2d 994].) This means that "an arbitrator in a commercial contract dispute may award an essentially unlimited range of remedies, whether or not a court could award them if it decided the same dispute, so long as it can be said that the relief draws its 'essence' from the contract and not some other source." (*Id.* at p. 391 (dis. opn. of Kennard, J.).)

To summarize, under this court's decisions, arbitration proceedings are not governed or constrained by the rule of law; therefore, representation of another in an arbitration proceeding, including the activities necessary to prepare for the arbitration hearing, does not necessarily require a trained legal mind.

Commonly used arbitration rules further demonstrate that legal training is not essential to represent another in an arbitration proceeding. Here, for example, Birbrower's clients agreed to resolve any dispute arising under their contract with Tandem using the American Arbitration Association's rules, which allow any party to be "represented by counsel *or other authorized representative*." (Am. Arbitration Assn., Com. Arbitration Rules (July 1, 1996) § 22, italics added.) Rules of other arbitration organizations also allow for representation by nonattorneys. For instance, the Rules of Procedure of the Inter-American Commercial Arbitration Commission, article IV provides: "The parties may be represented or assisted by persons of their choice." By federal law, this rule applies in all arbitrations between a United States citizen and a citizen of another signatory to the Inter-American Convention on International Commercial Arbitration, unless the arbitrating parties have expressly provided otherwise. (9 U.S.C. § 303(b); Inter-Am. Convention on International Com. Arbitration, art. 3.)

The American Arbitration Association and other major arbitration associations thus recognize that nonattorneys are often better suited than attorneys to represent parties in arbitration. The history of arbitration also reflects this reality, for in its beginnings arbitration was a dispute-resolution mechanism principally used in a few specific trades (such as construction, textiles, ship chartering, and international sales of goods) to resolve disputes among businesses that turned on factual issues

uniquely within the expertise of members of the trade. In fact, "rules of a few trade associations forbid representation by counsel in arbitration proceedings, because of their belief that it would complicate what might otherwise be simple proceedings." (Grenig, Alternative Dispute Resolution (1997) § 5.2, p. 81.) The majority gives no adequate justification for its decision to deprive parties of their ***147** freedom of contract and to make it a crime for anyone but California lawyers to represent others in arbitrations in California.

In addressing an issue similar to that presented here, a federal court held that a firm of New Jersey lawyers not licensed to practice law in New York was entitled to recover payment for legal services rendered in a New York arbitration proceeding. (*Williamson v. John D. Quinn Const. Corp.* (S.D.N.Y. 1982) 537 F.Supp. 613 (*Williamson*).) In allowing recovery of fees, the court cited a report by the Association of the Bar of The City of New York: "The report states, 'it should be noted that no support has to date been found in judicial decision, statute or ethical code for the proposition that representation of a party in any kind of arbitration amounts to the practice of law.' The report concludes '[t]he Committee is of the opinion that representation of a party in an arbitration proceeding by a nonlawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.' " (*Id.* at p. 616, quoting Com. Rep., Labor Arbitration and the Unauthorized Practice of Law (May/June 1975) 30 Record of the Association of the Bar of The City of New York, No. 5/6, at pp. 422, 428.)

The majority's attempt to distinguish *Williamson, supra,* 537 F.Supp. 613, from this case is unpersuasive. The majority points out that in *Williamson*, the lawyers of the New Jersey firm actually rendered services at the New York arbitration hearing, whereas here the New York lawyers never actually appeared at an arbitration hearing in California. (Maj. opn., *ante,* at pp. 133, 134, fn. 4.) The majority distinguishes *Williamson* on the ground that in this case no arbitration hearing occurred. Does the majority mean that an actual appearance at an arbitration hearing is not the practice of law, but that preparation for arbitration proceedings is?

In this case, plaintiffs have not identified any specific California activities by the New York lawyers of the Birbrower firm that meet the narrow definition of the term "practice of law" as articulated by this court in *Baron, supra,* 2 Cal.3d 535, 543. Accordingly, I would reverse the judgment of the Court of Appeal and direct it to remand the matter to the trial court with directions to vacate its order granting plaintiff's motion for summary adjudication and to enter a new order denying that motion.

On February 25, 1998, the opinion was modified to read as printed above. ***148**

231 B.R. 86
United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Enrique MENDEZ, Debtor.
Russell A. Brown, Chapter 13 Trustee, Appellant,
v.
Michael T. Smith, Appellee.

BAP No. AZ–98–1672–RRyMe.
|
Bankruptcy No. 98–01248–PHX–RTB.
|
Argued and Submitted Feb. 19, 1999.
|
Decided March 3, 1999.

Synopsis
Chapter 13 trustee objected to debtor's plan, which indicated that debtor had paid his attorney $750 for legal services and $160 for a filing fee and proposed to pay him an additional $500 as an administrative expense, and moved for disgorgement of counsel's $750 fee on the ground that attorney, who was not licensed to practice in Arizona but was admitted to practice in federal courts there, was not an "attorney" under the Bankruptcy Code. The United States Bankruptcy Court for the District of Arizona, Redfield T. Baum, J., entered order overruling trustee's objections, allowing compensation to debtors' counsel, and denying the disgorgement motion. Trustee appealed. The Bankruptcy Appellate Panel, Russell, J., held that because attorney was admitted by the district court to practice as a "non-resident attorney" in Arizona federal and bankruptcy courts, the bankruptcy court properly allowed his fees.

Affirmed.

West Headnotes (2)

[1] Bankruptcy🔑Power and Authority

As unit of the district court, bankruptcy court is a federal court with power to control admission to its bar. 28 U.S.C.A. § 151.

1 Case that cites this headnote

[2] Bankruptcy🔑Power and Authority
Bankruptcy🔑Persons Entitled; Members and Associates

Chapter 13 debtor's counsel's admission to practice before federal courts in Arizona as a "non-resident attorney" entitled him to practice before the bankruptcy court and receive compensation as an "attorney" under the Bankruptcy Code, even though he was not licensed to practice in Arizona; counsel was licensed to practice in Illinois and maintained an office there, there was no evidence to support trustee's assertions that counsel maintained a primary office in Arizona, that he solicited Arizona residents for bankruptcy business, or that he engaged in the general practice of law in Arizona, and bankruptcy court lacked authority to vacate counsel's certification to practice in Arizona federal courts. Bankr.Code, 11 U.S.C.A. §§ 101(4), 329, 330; U.S.Dist.Ct.Rules D.Ariz., 1.5(c); U.S.Bankr.Ct.Rules D.Ariz., Rule 2090–1.

3 Cases that cite this headnote

Attorneys and Law Firms

***87** Russell A. Brown (Trustee), Phoenix, AZ, for appellant pro se.

Michael T. Smith, George Mothershed, Scottsdale, AZ, for Enrique Mendez.

Before: RUSSELL, RYAN, and MEYERS, Bankruptcy Judges.

OPINION

RUSSELL, Bankruptcy Judge.

The bankruptcy court entered an order overruling the chapter 13[1] trustee's objections to the debtor's plan, allowing compensation to the debtor's counsel, and denying the trustee's motion for disgorgement of counsel's attorneys' fees. The trustee appeals. We AFFIRM.

[1] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001–9036.

I. FACTS

Enrique Mendez (the "debtor") filed a chapter 13 petition on February 4, 1998. The petition identified appellee Michael T. Smith as his attorney. The debtor filed a plan on February 13, 1998, which stated, *inter alia*, that he had paid Smith a total of $910 ($750 for legal services and $160 for the filing fee) prior to bankruptcy, and would pay him an additional $500 under the plan as an administrative expense. Smith filed a Rule 2016(b) disclosure statement, acknowledging the prepetition payment and stating that no further funds were due.

On May 13, 1998, appellee Russell A. Brown, the chapter 13 trustee ("trustee"), filed a preliminary Recommendation which objected, *inter alia*, to Smith's fees:

> The Plan provides that $500.00 will be paid to Michael T. Smith as an administrative expense. Moreover, the attorney's Rule 2026(b) [sic] Statement discloses that the Debtor paid Smith $750.00. Trustee objects to the payment of any administrative expense to Smith and moves for an Order requiring Smith to disgorge the $750.00 the Debtor paid him. The reasons for the Trustee's request are set forth in his Opening Brief.

Trustee's Preliminary Recommendation and Objection to Confirmation of Plan, Etc., p. 1.

The court set a preliminary hearing on the objections for May 20, 1998, and denied Smith's motion to vacate the hearing.

The trustee's brief in support of the plan objections alleged that Smith maintained offices both in Illinois, where he was licensed to practice, and in Arizona, where he was not licensed by the State Bar but was admitted to practice in the United States District Court for the District of Arizona. Relying primarily on *In re Peterson*, 163 B.R. 665 (Bankr.D.Conn.1994), the trustee argued that Arizona state law was the relevant applicable law for purposes of determining whether Smith was an attorney under the Code, and that state law required Smith to be licensed by the State Bar of Arizona. The trustee further argued that the local United States District Court rule under which Smith was admitted to practice before the District Court did not preempt the applicable Arizona state laws, and that Smith must therefore be ordered to disgorge his attorneys' fees to the trustee.

Smith did not appear at the hearing on May 20, 1998. The court scheduled oral argument for July 7, 1998, and set a briefing schedule. Smith filed a timely responsive brief, arguing that he was not required under ***88** Arizona state law to be licensed to practice in Arizona because he was not soliciting clients on state issues and not attempting to represent clients in state court. He further argued that his admission as a nonresident attorney to practice before the United States District Court permitted him to appear before any federal court in the district, including the bankruptcy court, and entitled him to retain his attorneys' fees in the bankruptcy cases.

In support of his claim of non-resident attorney status, Smith asserted that his primary residence, primary practice, and staff were in Illinois; that he traveled to Arizona when he needed to see clients and held meetings in a location rented on an hourly basis; that the forwarding of mail and telephone messages to his Illinois office was the only service provided to Arizona clients; and that he maintained a toll free telephone number for clients to contact him or his staff in Illinois.

The trustee filed his full Recommendation on June 17, 1998, which objected to Smith's fees as follows:

> (e) Counsel for the Debtor(s) is unlicensed by the State Bar of Arizona and, therefore, not an attorney for compensation purposes. *See* 11 U.S.C. § 101(4). The Trustee objects to the payment of any administrative expenses as requested in the Plan. The Trustee may request that the Court enter an Order requiring counsel to disgorge all fees received and to accept no further compensation from debtors. Trustee has previously objected, oral argument on the point is scheduled for July 7, 1998.

Trustee's Recommendation, p. 2.

At the plan objection hearing on July 7, 1998,[2] the court orally ruled that Smith must disgorge his attorneys' fees and directed the trustee to file an order to show cause ("OSC") regarding Smith's standing to practice law before the bankruptcy courts in Arizona.

[2] Smith did not appear at the hearing on July 7, 1998, having filed a motion to continue the previous day. The court denied the motion.

On July 15, 1998, the court entered the trustee's Order Requiring Michael T. Smith To Disgorge Fees ("disgorgement order"). Smith objected to the disgorgement order, complaining that the trustee had misrepresented facts concerning, *inter alia*, Smith's purported failure to file a responsive brief before the July 7 hearing, and his admission to practice in Arizona. Smith provided a copy of the docket to show that he had filed a response, and a copy of a Certificate of Good Standing issued by the United States District Court for the District of Arizona to evidence his admission in 1991 to practice in the Arizona federal courts. Smith also moved to vacate the July 7 ruling regarding his attorneys' fees as an improperly entered default judgment.

At the OSC hearing on August 20, 1998,[3] the bankruptcy court orally ruled that Smith's admission to practice before the United States District Court for the District of Arizona entitled him to also practice in the bankruptcy court, and quashed the OSC. On September 21, 1998, the court entered an order vacating the disgorgement order. On September 22, 1998, the court entered an order overruling the plan objections, allowing the attorneys' fees, and denying the disgorgement motion. The trustee appeals the latter order.

[3] Smith again did not appear, having filed a motion to continue one day before the hearing due to a conflict with a state court hearing in Illinois. The court denied the continuance and ruled on the merits of the trustee's objection to Smith's fees. In its subsequently-entered order, the bankruptcy court noted with displeasure Smith's failure to appear at three separate hearings on the attorneys' fees issue.

II. STANDARD OF REVIEW

A trial court's interpretation and application of a local rule is reviewed for an abuse of discretion. *In re Crayton*, 192 B.R. 970, 975 (9th Cir. BAP 1996). A bankruptcy court's orders regarding fees are also reviewed for an abuse of discretion. *In re Fraga*, 210 B.R. 812, 816 (9th Cir. BAP 1997); *Crayton*, 192 B.R. at 975. Discretion is abused when a reviewing court has a definite and firm conviction that the trial court committed a clear ***89** error of judgment in reaching its conclusion. *Id.*

III. ISSUE

Whether the debtor's counsel's admission to practice before the United States District Court for the District of Arizona entitled him to practice before the bankruptcy court and receive compensation under the Code.

IV. DISCUSSION

The trustee argues that Arizona Supreme Court Rules 31(a)(3)[4] and 33(c),[5] which require that attorneys be licensed by the State Bar of Arizona in order to practice law in Arizona, are the "applicable law" used to determine whether Smith is an "attorney" under § 101(4)[6] for purposes of compensation under the Code. He contends that Smith is required by the state rules to be licensed by the State Bar of Arizona because he maintains a principal office in Arizona, solicits Arizona residents for bankruptcy business, and practices law in Arizona.

[4] Arizona Supreme Court Rule 31(a)(3) provides:
> *Privilege to Practice.* Except as hereinafter provided in subsection 4 of this section (a), no person shall practice law in this state or hold himself out as one who may practice law in this state unless he is an active member of the state bar, and no member shall practice law in this state or hold himself out as one who may practice law in this state while suspended, disbarred, or on disability inactive status.

[5] Arizona Supreme Court Rule 33(c) provides:
> **(c) Practice in Courts.** No person shall practice law in the State of Arizona without being admitted to the bar by compliance with the following rules, provided that an attorney practicing in another state or territory or insular possession of the United States or the District of Columbia may be permitted by any court to appear in a matter pro hac vice, in accordance with the procedures set forth in subpart (d) of this Rule.

[6] 11 U.S.C. § 101(4) provides:
(4) "attorney" means attorney, professional law association, corporation, or partnership, authorized *under applicable law* to practice law;
(Emphasis added).

The trustee further argues that the district court rule under which Smith is certified to appear in the district and bankruptcy courts in Arizona does not preempt the application of the state rules. He contends that the bankruptcy court erroneously failed to recognize that Smith is actively practicing law in Arizona, not merely appearing in bankruptcy court.

Finally, the trustee argues that Smith's failure to qualify as an "attorney" under the Code requires disgorgement of his attorneys' fees under § 329.[7] We disagree.

[7] 11 U.S.C. § 329 provides in pertinent part:
§ 329. Debtor's transactions with attorneys
(a) Any attorney representing a debtor in a case under this title ... shall file with the court a statement of the compensation paid or agreed to be paid, ...
(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—
(1) the estate, if the property transferred—
....
(B) was to be paid by ... the debtor under a plan under chapter ... 13 of this title;....

[1] As a unit of the district court pursuant to 28 U.S.C. § 151,[8] a bankruptcy court is a federal court. *Crayton*, 192 B.R. at 976 (citing *In re Goldberg*, 168 B.R. 382, 384 (9th Cir. BAP 1994)). A federal court has the power to control admission to its bar. *Crayton*, 192 B.R. at 976 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). Rule 1.5 of the United States District Court for the District of Arizona ("Rule 1.5")[9] regulates the admission ***90** of attorneys to practice in the federal courts of the District of Arizona. Rule 1.5(c) specifically authorizes "non-resident" attorneys, *i.e.*, attorneys who are members in good standing of the bar of any federal court and who neither reside nor maintain an office for the practice of law in Arizona, to be admitted to practice in the District of Arizona upon an appropriate application. Local Bankruptcy Rule 2090–1 of the United States Bankruptcy Court for the District of Arizona ("L.R.B.P.2090–1")[10] in turn authorizes attorneys admitted to practice before the district court to practice before the bankruptcy court.

[8] 28 U.S.C. 151 provides:
§ 151. Designation of bankruptcy courts
In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district....

[9] Rule 1.5 provides in pertinent part:
RULE 1.5 ATTORNEYS
(a) Motion/Application for Admission. Attorneys admitted to practice in Arizona, or any Federal Court, and in good standing as active practitioners in that Court may be admitted to practice in this District upon appropriate motion and/or application, as set forth in these Rules.
(b) Resident Attorneys. Attorneys residing in Arizona or whose principal office or practice is in Arizona must be admitted to practice in Arizona to be admitted to the bar of this Court. These attorneys may be admitted to practice in this District upon application and motion made in their behalf by a member of the bar of this Court.
(c) Non-resident Attorneys. Any member in good standing of the bar of any Federal Court, and who neither resides nor maintains an office for the practice of law in the District of Arizona, may be admitted to practice in this District upon appropriate application, completion of the oath upon admission, and payment of an admission fee of fifty dollars ($50) to the Clerk, U.S. District Court. The Clerk will issue and mail the certificate of admission. If the applicant becomes an Arizona resident and/or intends to maintain a principal office or practice in Arizona, he or she must reapply under paragraph (b) of this Rule.

[10] L.R.B.P.2090–1 provides in relevant part:
RULE 2090–1. ATTORNEYS—ADMISSION TO PRACTICE
(a) Any attorney admitted to practice before the United States District Court, District of Arizona, may practice before the bankruptcy court.

The bankruptcy court in this case recognized the district court's authority to regulate appearances in the bankruptcy courts, stating:

> [I]t seems to me since [Smith is] admitted into [sic] the district court, and that's controlled at the district court level, not the bankruptcy court level, then he's authorized to practice in this court. And I don't know if he's one of those individuals, I assume he is from the facts that have been set forth, that was admitted under

> what I call the prior rule, i.e. not—he's not one who holds a license to practice law in the state of Arizona. But it's up to the district court.

Transcript of August 20, 1998 hearing on OSC, p. 2.

The bankruptcy court's order on the OSC correctly explained that Smith's district court certification entitled him to practice in bankruptcy court and receive compensation:

> [S]o long as Smith is admitted to practice before the United States District Court for the District of Arizona, he is entitled to practice in the Bankruptcy Court as well. Local Rule provides that "(a)ny attorney admitted to practice before the United States District Court, District of Arizona, may practice before the bankruptcy court." At this time it is undisputed that Smith is admitted in the District Court. It is the District Court that determines the requirements for practice before the District Court and the Bankruptcy Court. Therefore,
>
> ....
>
> IT IS FURTHER ORDERED that in that Michael T. Smith is admitted to practice in the United States District Court of Arizona, he is entitled to practice before the Bankruptcy Court and therefore entitled to compensation as an attorney.

Order On Trustee's Motion For Order To Show Cause And Objection To Plan, pp. 2–3.

The trustee relies heavily, as he did in the proceedings below, on *In re Peterson*, 163 B.R. 665 (Bankr.D.Conn.1994), for the proposition that an attorney is engaged in the unauthorized practice of law if he practices in bankruptcy court without being licensed by the State Bar of the state in which the bankruptcy court is located, notwithstanding his admission to practice in the federal courts of the district. The trustee's reliance on *Peterson* is misplaced, however, due to the factual distinctions between *Peterson* and this case, and *Peterson* 's express limitation of its holding to its facts.

In *Peterson*, the attorney in question, Peter Betsos ("Betsos"), was licensed to practice in New York and admitted to practice in the federal district courts for the Southern and Eastern Districts of New York, and the District of Connecticut. He was not, however, licensed to practice in the State of Connecticut. As of 1994, he had not had a law ***91** office in New York for over ten years, but had a law office in Connecticut where he provided legal services by telephone in bankruptcy matters. Betsos prepared pleadings in his Connecticut office for filing in bankruptcy court. He did not meet with clients at his office, but met with them at other locations in Connecticut. His stationery listed his Connecticut office address, and his occupation as an attorney. 165 B.R. at 667.

Betsos met with the *Peterson* debtors at their home in Connecticut to discuss their legal options, and advised them to file bankruptcy. His legal services included telephone calls from his office on bankruptcy and state court foreclosure matters; preparation and filing of their petition, schedules, statements, and other bankruptcy documents; settlement negotiations with creditors' attorneys; correspondence with a state court receiver regarding the receiver's duties under Connecticut law; bankruptcy court appearances; and attendance at § 341(a) meetings. *Id.* at 667–68.

Betsos failed to seek a bankruptcy court order authorizing his employment as the debtors' counsel under § 327 and Rule 2014(a). His Rule 2016(b) disclosure statement failed to disclose a relationship with a financial services company that had attempted to assist the debtors in forestalling foreclosure on their residence before bankruptcy, and failed to accurately disclose the nature, amount and timing of the attorneys' fees he had received in the case. *Id.* at 668.

The debtors eventually obtained permission to employ new counsel, and thereafter sought disgorgement of Betsos' attorneys' fees. The court ordered disgorgement, based primarily on Betsos' failure to obtain court approval of his employment under § 327 and Rule 2014(a), his failure to disclose requisite information on his Rule 2016(b) statement, and his failure to obtain court approval of his fees under § 330. *Id.* at 668–71.

As an additional basis for disgorgement, the court held that Betsos was not entitled to attorneys' fees on the ground that his representation of the debtors constituted the unauthorized practice of law in Connecticut by an attorney not licensed by the State Bar of Connecticut.[11] This aspect of the *Peterson* court's decision focused on the extent to which Betsos' practice occurred in Connecticut, the extent to which Connecticut state law issues intertwined with the specific bankruptcy law issues on which he provided legal advice to the debtors, and the fact that he did not maintain an office in any other state. *Id.* at 672, 675. In addition, the court strictly limited its holding on the "unauthorized practice of law" issue to the unusual facts of its case, stating:

[11] Betsos was admitted to practice before the district court for the District of Connecticut under a local rule similar to the one in the case before us. Unlike Smith in our case, however, Betsos did not rely on the subsection pertaining to visiting (*i.e.*, "non-resident") lawyers. 165

B.R. at 672 n. 5.

> *Under the facts of this case—to which my holding is strictly limited* —I conclude that Betsos engaged in the unauthorized practice of law.
>
> 165 B.R. at 675 (emphasis added).

[2] In the case before us, by contrast, issues of non-compliance with §§ 327 and 330 are not present, and the type of facts which the *Peterson* court found compelling on the "unauthorized practice of law" issue are absent. There is no evidence whatsoever in the record in this case to support the trustee's assertion that Smith maintained a primary office in Arizona, solicited Arizona residents for bankruptcy business, or engaged in the general practice of law in Arizona, and Smith flatly denied those allegations. There is also no evidence regarding the scope and nature of Smith's legal activities in Arizona in general, or the extent to which Arizona state law issues and bankruptcy issues may have been interwoven in the proceedings below. On the other hand, Smith's certification by the district court as a "non-resident attorney" under Rule 1.5(c) and his maintenance of an office in Illinois are undisputed, and the record contains no evidence to contradict any of his factual assertions underlying his "non-resident attorney" status.

In any event, the ultimate issue before the bankruptcy court in this case was not Smith's purported general practice of law, but his ***92** entitlement to compensation under the Code. Smith was admitted by the district court to practice in the Arizona federal courts, and the bankruptcy court lacked the authority to vacate that certification. The bankruptcy court recognized this fact,[12] stating:

> It's my understanding the district court is going through those people who were admitted under that rule and taking whatever action they think is appropriate. I don't know that I can enjoin him from practicing in this court or collecting fees for practicing in this court since he's admitted here.
>
> Transcript of August 20, 1998 hearing on OSC, pp. 2–3.

Thus, the district court, not the bankruptcy court, was the proper forum for the trustee's objection to Smith's conduct. The bankruptcy court's order was a proper exercise of its discretion.

[12] Interestingly, the trustee had previously indicated at the July 7, 1998 hearing on plan objections that he recognized the district court role's in controlling attorney admission, but preferred not to address the issue with that court:

> THE COURT: ... And I don't know, it's really up to the district court to deal with that. I know they're dealing with some and I know there's others—I'm not sure where they're at, but I know assume [sic] they're looking at all of this.
>
> MR. BROWN [THE TRUSTEE]: I tried calling Ronnie Honey at the district court who I've worked with in the past on these matters and the line was busy, so I don't know where Mr. Smith falls in. But again, I think that I would rather not get into that because what it does is removes it to the district court. And I don't think that is relevant. I'm going beyond that and saying I acknowledge the district court admission, but I believe that it is irrelevant as to whether—maybe not irrelevant. I believe that district court admission does not give Mr. Smith or other attorneys the power and privilege to practice law in this state without being properly licensed by the Supreme Court of Arizona.
>
> So I'd rather not get bogged down, I think, into that. That shifts it over there to district court. And if that's the issue, I'd rather have a ruling on that and just go a different route at it.
>
> Transcript of July 7, 1998 Oral Argument In Re: Objection To Plan Filed By Trustee, pp. 11–12.

V. CONCLUSION

Because the debtor's counsel was admitted by the United States District Court for the District Court of Arizona to practice in the federal and bankruptcy courts in that district, the bankruptcy court properly allowed his attorneys' fees. The bankruptcy court's order overruling the trustee's objections to the attorneys' fees provision of the debtor's plan, allowing compensation to the debtor's counsel, and denying the trustee's disgorgement motion is AFFIRMED.

All Citations

231 B.R. 86, 99 Cal. Daily Op. Serv. 2083, 1999 Daily Journal D.A.R. 2764

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LOS ANGELES COUNTY BAR ASSOCIATION

PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 518

June 19, 2006

ETHICAL CONSIDERATIONS IN OUTSOURCING OF LEGAL SERVICES

SUMMARY

An attorney in a civil case who charges an hourly rate may contract with an out-of-state company to draft a brief provided the attorney is competent to review the work, remains ultimately responsible for the final work product filed with the court by the attorney on behalf of the client, the attorney does not charge an unconscionable fee, client confidences and secrets are protected, and there is no conflict of interest between the client and the contracting entity. The attorney may be required to inform the client of the nature and scope of the contract between attorney and out-of-state company if the brief provided is a significant development in the representation or if the work is a cost which must be disclosed to the client under California law. Any refund of charges by the out-of-state company to the attorney should be passed through to the client if the client was separately charged for the service.

AUTHORITIES CITED

Statutes:

California Business and Professions Code § 6068

California Business and Professions Code § 6125

California Business and Professions Code § 6126

Cases:

Bushman v. State Bar (1974) 11 Cal.3d 558

Crawford v. State Bar (1960) 54 Cal.2d 659

Farnham v. State Bar (1976) 17 Cal.3d 605

Jones v. State Bar (1989) 49 Cal.3d 273

Simmons v. State Bar (1970) 2 Cal.3d 719

California Rules of Professional Conduct:

Rule 1-100

Rule 1-120

Rule 1-310

Rule 1-320

Rule 1-400

Rule 2-200

Rule 3-110

Rule 3-310

Rule 3-500

Rule 5-200

Opinions:

COPRAC Formal Opinions 1994-138

COPRAC Formal Opinions 2004-165

LACBA Formal Opinions 374

LACBA Formal Opinions 423

LACBA Formal Opinions 473

FACTS

An attorney licensed to practice law in California has filed a notice of appeal in a civil case on the client's behalf. The attorney charges an hourly rate for the appellate services. Shortly thereafter, the attorney receives a solicitation from a legal research and brief writing company to draft the appellant's opening brief for a comparatively low hourly fee. The legal research and brief writing company ("Company") is not located in California, and employs both lawyers (none of whom are licensed to practice law in California) and non-lawyers. Company promises to deliver a ready to file brief, to be signed by the California attorney. Company also promises to refund all fees paid to Company for the brief if the appeal is unsuccessful.

The attorney decides to hire Company to write the brief, but has not decided yet whether to pass the charge through to the client, or to treat payment for the work as an internal cost.

DISCUSSION

In this opinion, we address two fundamental issues. First, is it ethically permissible for a California attorney, in a civil case, to hire an out-of-state legal research and brief writing company to conduct legal research and/or draft legal briefs for the attorney's use in connection with the attorney's representation of the client? Second, if such arrangements are permissible, what must the attorney do to comply with the ethical issues presented by such arrangements? This opinion is not intended to apply to criminal cases, nor does it apply to any case or any matter where the attorney has been appointed by the court.

We conclude that such arrangements may be ethically permissible, with some limitations depending on the specific terms and conditions of the arrangement, and provided that the attorney complies with several ethical requirements. Specifically, the Committee is of the

opinion that the attorney may ethically enter into the arrangement with Company provided that the attorney at all times retains and exercises independent professional judgment in connection with the performance of the attorney's legal services for the client. The attorney must sign the brief and in so doing adopts the work and is ultimately responsible for the accuracy of brief to both the court and to the client. Depending on the facts and circumstances, the attorney may have a duty to disclose to the client the nature and specifics of the contract with Company. The attorney is responsible for determining, and for ensuring, that there is no violation of client confidences or secrets, and that there is no conflict of interest created for the client by the attorney's contracting with Company. Finally, any refund of costs paid by Company to the attorney should be refunded to the client if the client is charged for the cost of the service.

Ethical Issues Involving Financial Arrangements With Company

Several rules address financial arrangements among lawyers, and between members and non-members of the State Bar of California.

California Rule of Professional Conduct [hereinafter "Rule" or "rule"] 1-310 states that a "member[1] shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership constitute the practice of law." A partnership generally involves a joint ownership and can be evidenced by firm name, declarations of co-ownership, or sharing of profits. (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 667.) In this instance, the attorney has not formed a partnership with Company since the attorney has merely purchased services at a specified rate. Therefore, the restrictions contained in rule 1-310 are inapplicable.

Rule 2-200 prohibits the division of "a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member" unless the client has consented in

[1] A "member" for purposes of the California Rules of Professional Conduct "means a member of the State Bar of California." (Rule 1-100 (B)(2).)

writing after full disclosure, and the total fee charged by all lawyers is not increased by reason of the provision for division of the fees, and is not unconscionable as defined in rule 4-200. Rule 2-200 is inapplicable here because Company charges the attorney a specific amount for its service and the contract between Company and the attorney does not involve the division of a legal fee paid by the client.[2]

The work being performed by Company is indistinguishable from other types of services that an attorney might purchase, such as hourly paralegal assistance, research clerk assistance, computer research, graphics illustrations, or other services. Thus, even if the attorney passes the cost directly on to the Client, the arrangement does not violate Rule 2-200.

Rule 1-320 provides that "[n]either a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer." This rule is also inapplicable to the facts presented in this inquiry since the attorney has contracted for services, at an hourly rate, from Company.

Aiding and Abetting in the Unlawful Practice of Law

Business and Professions Code section 6125, which is part of the State Bar Act, states that "[n]o person shall practice law in California unless the person is an active member of the State Bar."[3] Rule 1-120 states that "[a] member shall not knowingly assist in, solicit, or induce any violation of these rules [of Professional Conduct] or the State Bar Act." The practice of law includes giving legal advice and counsel and the preparation of legal instruments. (*Farnham v.*

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[2] Several ethics opinions discuss when a payment constitutes a division of a fee. *See, e.g.*, LACBA Formal Opinion 457 (discussing fee arrangements with non-lawyers) and State Bar of California Standing Committee on Professional Responsibility and Conduct ["COPRAC"] Formal Opinion 1994-138. COPRAC Formal Opinion 1994-138 concluded that the criteria to determine whether there is a division of fees is whether: (1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If all three criteria are met, there is no division of fees. See also *Chambers v. Kay* (2002) 29 Cal.4th 142, 154.

State Bar (1976) 17 Cal.3d 605, 612; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 667-668.) The Committee is of the opinion that attorneys who contract for services which assist the attorneys in representation of their clients do not assist in a violation of Bus. and Prof. Code § 6125, so long as the attorney remains ultimately responsible for the final work product provided to or on behalf of the client.[4]

Duty to Inform the Client

Both Rule 3-500 and Business and Professions Code section 6068, subdivision (m), require that an attorney keep the client reasonably informed of significant developments relating to the employment or the representation.[5] COPRAC Formal Opinion 2004-165 states that a member of the State Bar of California who uses an outside contract lawyer to make appearances on behalf of the member's client must disclose to the client the fact of the arrangement between the member and the outside lawyer when the use of the outside lawyer constitutes a significant development. Whether use of an outside lawyer constitutes a "significant development" is based upon the circumstances of each case. The opinion states that if, at the outset of the engagement, the member anticipates using outside lawyers to make appearances on the member's behalf for the client, that situation should be addressed in the written fee agreement which would also

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[3] It a misdemeanor to hold oneself out as practicing or entitled to practice law or otherwise practicing law when not an active member of the State Bar of California. (Bus. and Prof. Code § 6126.)

[4] Attorneys continually contract for assistance in legal research, preparation of documents, and expertise, be it from lawyers or non-lawyers, in furtherance of the representation of the client. It is the opinion of the Committee that where an attorney contracts for these types of services, it does not involve the unlawful practice of law. The same would apply under this inquiry.

[5] The language of rule 3-500, and the language of Business and Professions Code section 6068, subdivision (m), are slightly different. However, the disclosure requirements to the client under both provisions are the same. Rule 3-500 states: "[a] member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." Business and Professions Code section 6068, subdivision (m), states that it is the duty of an attorney "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

include specifying any costs of the appearance relationship which are billed to the client. That COPRAC opinion quotes relevant language in COPRAC Formal Opinion, 1994-138:

> Depending on the circumstances, rule 3-500 and Business and Professions Code section 6068 (m) will generally require the law office to inform the client that an outside lawyer is involved in the client's representation if the outside lawyer's involvement is a significant development. In general, a client is entitled to know who or what entity is handing the client's representation. However, whether use of an outside lawyer constitutes a significant development for purposes of rule 3-500 and Business and Professions Code section 6068 (m) depends on the circumstances of the particular case. Relevant factors, any of which may be sufficient to require disclosure, include the following: (i) whether responsibility for overseeing the client's matter is being changed, (ii) whether the new attorney will be performing a significant portion or aspect of the work, or (iii) whether staffing of the matter has been changed from what was specifically represented to or agreed with the client. (See L.A. Cty. Bar Assn. Formal Opn. No. 473.) The listed factors are not intended to be exhaustive, but are identified to provide guidance.

The relationship with Company may be a "significant development" within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m), and, if a "significant development," the client must be informed of the specifics of the agreement between the attorney and Company.[6] If possible, and where disclosure is required, disclosure of the nature and extent of the attorney/Company relationship should be made in the written retainer

[6] In most instances, the filing of an appellate brief will be a "significant development."

agreement. (COPRAC Formal Opinion 2004-265.[7] See also LACBA Formal Opinion 473 which requires disclosure to the client where the expectation of the client is that the retained attorney alone will be acting as attorney for the client.)

Duty of Competence and Duty to Exercise Independent Judgment

An attorney has a duty to act competently in any representation. Rule 3-110 (A) - (C). "If the member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Rule 3-110 (C). Since the instant arrangement does not involve associating with or professionally consulting another lawyer, this arrangement cannot be the basis of the member's competence in this representation.

The discussion to rule 3-110 states that compliance with that rule "include[s] the duty to supervise the work of subordinate attorney and non-attorney agents. [Citations omitted.]"[8] Therefore, the attorney must review the brief or other work provided by Company and

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[7] The following language, found in COPRAC Formal Opinion 2004-165, is applicable to this inquiry:

> ["[T]he attorney bears the responsibility to be reasonably aware of the client's expectations regarding counsel working on client's matter because the responsibility can be readily discharged by the attorney through a standard written retainer agreement or disclosure before or during the course of the representation."]; compare Cal. State Bar Formal Opn. No 1994-138 at fn.8 ["it would be prudent for the law firm to include the disclosure to the client in the attorney's initial retainer letter or make that disclosure as soon thereafter as the decision to hire is made."]. If Lawyer charges [contract lawyer's] fees and costs to the client as a disbursement, Business and Professions Code sections 6147 and 6148 require Lawyer to state the client's obligations for those charges in the written fee agreement, if contemplated at the time of the initial fee agreement, to the same extent as other costs charged to the client."]

[8] Rule 1-100, subdivision (C), states with respect to the purpose of "Discussions" to the rules: "Because it is a practical impossibility to convey in black letter form all of the nuances of the disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them."

independently verify that it is accurate, relevant, and complete, and the attorney must revise the brief, if necessary, before submitting it to the appellate court.

In addition to being competent, an attorney must also exercise independent professional judgment on behalf of the client at all times. (*Beck v. Wecht* (2002) 28 Cal.4th 289, 295 (fundamental duty of undivided loyalty cannot be diluted by a duty owed to some other person, which would be inconsistent with lawyer's duty to exercise independent professional judgment); *Dynamic Concepts Inc. v. Truck Insurance Exchange* (1998) 61 Cal.App.4th 999, 1009 (imposition of restrictions by third party on attorney's decisions may interfere with lawyer's duty to exercise independent professional judgment); *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 (holding that "[a]n attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority").) Therefore, in performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to Company any authority over legal strategy, questions of judgment, or the final content of any product delivered to the client or filed with the court.

It follows that if a term of the agreement between the attorney and Company delegates to Company a decision-making function that is non-delegable, then the attorney may be assisting Company in the unauthorized practice of law or violating the ethical duties of competence and obligation to exercise independent professional judgment. An improper delegation might also affect the application of rule 1-310 (prohibition against forming partnerships with non-lawyers), rule 1-320 (sharing of legal fees with a non-lawyer) and rule 2-200 (division of legal fees). For example, if Company contractually required the attorney to accept and use any work product delivered "as is" and without change, then the attorney might be improperly delegating the attorney's fundamental obligation to exercise independent professional judgment on behalf of the

client. In this case, Company has promised a full refund of its fees if the appeal is unsuccessful. If a condition of that guarantee is that the attorney must accept and use the work product (for example, a legal brief) as written, or obtain Company's approval of any changes to the work product, then the attorney might be put into the position of having to elect between employing independent professional judgment on behalf of the client and losing a contractual guaranteed right which the attorney values. The Committee is of the view that provisions of a guarantee which have the possibility of creating such a dilemma for the attorney could be considered a violation of the duty to exercise independent professional judgment on behalf of the client. Thus, the attorney should ensure that no contractual provision in the agreement gives Company control over the final work product produced for the client.

Ethical Duties to the Court

An attorney is responsible for all of the attorney's submissions to the court. Any inaccuracies in the materials submitted to the court could not only be a violation of rule 3-110, but also could be a violation of rule 5-200(A) and (B),[9] and a violation of Business and Professions Code section 6068, subdivision (d).[10]

Charging the Cost to the Client

The attorney may elect simply to pay Company for the cost of the legal research or brief without passing on any of the cost to the client. In such a case, the Committee believes that the attorney could keep any refund that might be received from Company under any otherwise

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[9] Rule 5-200(A) and (B) state: "In presenting a matter to a tribunal, a member

(A) Shall employ, for the purposes of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."

[10] Business and Professions Code section 6068, subdivision (d), states that it is the duty of an attorney "[t]o employ, for maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

ethical guarantee provision. However, the attorney may also elect to: (a) pass the cost directly on to the client for payment; (b) mark up the cost and pass the marked up cost on to the client or (c) charge the client a flat fee. These scenarios have different consequences.

Sections of the California Business and Professions Code address an attorney's duty to advise a client about costs. Section 6147(a)(2) requires an attorney with a contingency fee agreement to disclose how disbursements and costs incurred in connection with the prosecution or settlement of the client will affect the contingency fee and the client's recovery. Section 6148 addresses many fee agreements not coming within the scope of section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars. Under section 6148(a)(1), the attorney must disclose any basis of compensation, including standard rates, fees, and charges applicable to the case. The attorney must also render bills that clearly identify the costs and expenses incurred and the amount of the costs and expenses. (See Bus. and Prof. Code §6148(b).)

Whether or not there is a written fee agreement between the attorney and the client, disclosure of the arrangement with Company may be required. See rule 3-500 and Bus. and Prof. Code § 6068, subdivision (m), which require that the client be kept reasonably informed about significant developments relating to the representation and in regard to which the attorney has agreed to provide legal services. The Committee is of the opinion that if the client pays both the attorney's fees and costs of the contract with Company, the contract is a "significant development" within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m), since the client has hired the attorney to prepare and submit the appellate brief.

The Committee believes that the attorney must accurately disclose the basis upon which any cost is passed on to the client. If the cost of Company's services is simply passed through to the client, the client should be so informed. The client should also be informed of the possibility of a refund of the cost if offered by the Company. If the attorney marks up the cost of Company's services, the attorney must disclose the mark-up. (Rule 3-500, Bus. and Prof. Code § 6068 (m).)

Illegal or Unconscionable Fee

Rule 4-200 subdivision (A) states that "[a] member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." Rule 4-200 explains that "[u]nconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events." Factors relevant to this inquiry in determining the conscionability of a fee include, but are not limited to:

"(1) The amount of the fee in proportion to the value of the services performed.

(10) The time and labor required.

(11) The informed consent of the client to the fee."[11]

A fee which "shocks the conscience" is unconscionable. (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 564.) Charging a fee and not providing substantial services has been determined to be grounds for discipline. (*Jones v. State Bar* (1989) 49 Cal.3d 273, 284.) Therefore, whether there is a violation of rule 4-200 depends on the facts and circumstance of each specific situation as determined at the time the fee agreement is initiated. (Rule 4-200(A) and (B).)

[11] See rule 4-200(B) for the entire list of eleven "factors to be considered, where appropriate, in determining the conscionability of a fee . . . ."

The ethical issue presented here is whether the attorney's fee to the client could be deemed unconscionable because of the attorney's reliance on the work of the Company. The Committee believes that the amount paid by the attorney for Company's work is not determinative on the question of whether a fee is unconscionable. (*Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993 (in legal malpractice action, the amount of money paid to a contract attorney by a law firm was found irrelevant to the question of whether law firm had charged client an unconscionable fee; nothing in rule 4-200 suggests that the attorney's profit margin is relevant to the issue. What is relevant to the issue of conscionability is the fee which the client paid to the law firm as measured by the factors listed in rule 4-200).)

Duty to Preserve Client Confidences and Secrets

COPRAC Formal Opinion 2004-165 explains the duty to preserve inviolate client confidences and secrets:

> Business and Professions Code section 6068(e) states: "It is the duty of an attorney [t]o . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The scope of the protection of client confidential information under Section 6068(e) has been liberally applied. (See *People v. Singh* (1932) 123 Cal.App. 365 [11 P.2d 73].) The duty to preserve a client's confidential information is broader than the protection afforded by the lawyer-client privilege. Confidential information for purpose of section 6068 (e) includes any information gained in the engagement which the client does not want disclosed or the disclosure of which is likely to be embarrassing or detrimental to the client. (Cal. State Bar Formal Opn. No. 1993-133.) The duty has been applied

even when the facts are already part of the public record or where there are other sources of information. (See L.A. Cty. Bar Assn. Formal Opn. Nos. 267 & 386.)

Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate. (See LACBA Formal Opinions 374, 423 (use of centralized computer billing requires compliance with Business and Professions Code section 6068, subdivision (e)).) It is incumbent upon the attorney to ensure that client confidences and secrets are protected, both by the attorney and by Company, throughout and subsequent to the attorney's contract relationship with Company. (Rule 3-310, "Discussion"; LACBA Formal Opinion 374.)

Conflicts of Interest

Company may be working on other matters which conflict with and are potentially or actually adverse to the attorney's client. Rule 3-110, subdivision (A), imposes upon an attorney a duty to supervise the work of legal assistants, which includes the duty to "'give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment. . . .'" (*Hu v. Fang* (2002) 104 Cal.App.4th 61, 64, quoting ABA Model Rules Prof. Conduct, rule 5.3, com.) Therefore, the attorney should satisfy himself that no conflicts exist that would preclude the representation. See, e.g., Rule 3-310. The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company.

Rule 1-400 and Standard (1)

Rule 1-400 is directed to disciplinary restrictions on attorney advertising and solicitation.[12] Standard (1) of the rule creates a presumption of a violation of rule 1-400 where a "communication" contains a guarantee or warranty regarding the result of the representation.[13] A "communication" within the meaning of rule 1-400 is "[a]ny unsolicited correspondence from a member [of the State Bar of California] or law firm directed to any person or entity." (Rule 1-400 (A)(4).) Company offers to refund to the attorney all its charges if the appeal is not successful. Since the representation of a contingent refund is made by Company to the attorney, it is not a "communication" within the meaning of rule 1-400 (A)(4) as defined above since Company is not a member of the State Bar of California, nor is Company a law firm.[14] However, the attorney must consider the unconscionability of accepting any refund from Company which is not paid over to the client. (See discussion of rule 4-200, supra.)

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinion is based on the facts set forth in the inquiry submitted.

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[12] "The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline." (Rule 1-100, "Discussion.")

[13] Standard (1) of rule 1-400, for which there is a presumption of impropriety in violation of that rule, "Advertising and Solicitation," states: "[a] 'communication' which contains guarantees, warranties, or predictions regarding the result of the representation."

[14] Were Company a "law firm," then the Standard would apply if the communication respecting the refund was deemed to be a guarantee or warranty regarding the result of the representation. However, that would be a concern of Company, and not the attorney to whom the communication was made unless the attorney was also to communicate the same representation to the client. It is assumed that is not the case under the facts of this inquiry. Since the focus of this opinion is solely upon the ethical obligations of the attorney, the application of the Standard to Company is not addressed.

HYPOTHETICAL B
Business Transactions with Clients

CB&PC § 6147

California Rules of Professional Conduct ("CRPC") 1.5

CRPC 1.8.1

Arnall v. Super Court (Liker) (2010) 190 CA4th 360, 368

County of Santa Clara v. Superior Court (Atlantic Richfield) (2010) 50 Cal.4th 35 [cert denied 131 S.Ct. 920]

West's Annotated California Codes
Business and Professions Code (Refs & Annos)
Division 3. Professions and Vocations Generally (Refs & Annos)
Chapter 4. Attorneys (Refs & Annos)
Article 8.5. Fee Agreements (Refs & Annos)

West's Ann.Cal.Bus. & Prof.Code § 6147

§ 6147. Contingency fee contracts; duplicate copy; contents; effect of noncompliance; recovery of workers' compensation benefits

Effective: January 1, 2000

Currentness

(a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

(1) A statement of the contingency fee rate that the client and attorney have agreed upon.

(2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.

(3) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney.

(4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.

(5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

(c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.

(d) This section shall become operative on January 1, 2000.

Credits

(Added by Stats.1993, c. 982 (S.B.645), § 5, operative Jan. 1, 1997. Amended by Stats.1994, c. 479 (A.B.3219), § 3, operative Jan. 1, 1997; Stats.1996, c. 1104 (A.B.2787), § 9, operative Jan. 1, 2000.)

West's Ann. Cal. Bus. & Prof. Code § 6147, CA BUS & PROF § 6147
Current with urgency legislation through Ch. 1 of 2023 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Rules of the State Bar of California (Refs & Annos)
California Rules of Professional Conduct (Refs & Annos)
Chapter 1. Lawyer-Client Relationship

Prof.Conduct, Rule 1.5
Formerly cited as CA ST RPC Rule 4-200

Rule 1.5. Fees for Legal Services

Currentness

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.

(b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:

(1) whether the lawyer engaged in fraud[1] or overreaching in negotiating or setting the fee;

(2) whether the lawyer has failed to disclose material facts;

(3) the amount of the fee in proportion to the value of the services performed;

(4) the relative sophistication of the lawyer and the client;

(5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(7) the amount involved and the results obtained;

(8) the time limitations imposed by the client or by the circumstances;

(9) the nature and length of the professional relationship with the client;

(10) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(11) whether the fee is fixed or contingent;

(12) the time and labor required; and

(13) whether the client gave informed consent* to the fee.

(c) A lawyer shall not make an agreement for, charge, or collect:

(1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.

(e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.

Credits

(Adopted, eff. Nov. 1, 2018.)

Footnotes

[1] An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.5, CA ST RPC Rule 1.5
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

Prof.Conduct, Rule 1.8.1
Formerly cited as CA ST RPC Rule 3-300

Rule 1.8.1. Business Transactions with a Client and Pecuniary Interests Adverse to a Client

Currentness

A lawyer shall not enter into a business transaction with a client, or knowingly[1] acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(a) the transaction or acquisition and its terms are fair and reasonable* to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing* to the client in a manner that should reasonably* have been understood by the client;

(b) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing* to seek the advice of an independent lawyer of the client's choice and is given a reasonable* opportunity to seek that advice; and

(c) the client thereafter provides informed written consent* to the terms of the transaction or acquisition, and to the lawyer's role in it.

Credits

(Adopted, eff. Nov. 1, 2018.)

Footnotes

1 An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.8.1, CA ST RPC Rule 1.8.1

Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

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190 Cal.App.4th 360
Court of Appeal, Second District, Division 4, California.

Dawn ARNALL et al., Petitioners,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
Alan D. Liker, Real Party in Interest.

No. B225264.
|
Nov. 22, 2010.

Synopsis
Background: Attorney who specialized in taxation matters and complex business transactions brought action to recover fees under service contracts with clients. The Superior Court, Los Angeles County, No. BC419835, Yvette M. Palazuelos, J., denied clients' motion for summary adjudication. Clients petitioned for writ of mandate.

Holdings: The Court of Appeal, Manella, J., held that:

[1] statute providing that a contingency fee agreement must contain "a statement that the fee is not set by law but is negotiable between attorney and client" applies outside the litigation context;

[2] failure of a contingency fee agreement to contain "a statement that the fee is not set by law but is negotiable between attorney and client" renders the agreement voidable; and

[3] as a matter of first impression, hybrid fee agreement was a "contingency fee agreement" subject to statutory requirements.

Petition granted.

West Headnotes (9)

[1] Attorneys and Legal Services Making, requisites, and validity

Statute providing that a contingency fee agreement must contain "a statement that the fee is not set by law but is negotiable between attorney and client" applies outside the litigation context. West's Ann.Cal.Bus. & Prof.Code § 6147(a)(4).

10 Cases that cite this headnote

[2] Statutes Presumptions

Generally, when the Legislature undertakes to amend a statute which has been the subject of judicial construction, it is presumed that the Legislature was fully cognizant of such construction, and when substantial changes are made in the statutory language, it is usually inferred that the lawmakers intended to alter the law in those particulars affected by such changes.

[3] Statutes Plain, literal, or clear meaning; ambiguity
Statutes Relation to plain, literal, or clear meaning; ambiguity

The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute's legislative history, appear from its provisions considered as a whole.

1 Case that cites this headnote

[4] **Attorneys and Legal Services** Making, requisites, and validity

Failure of a contingency fee agreement to contain "a statement that the fee is not set by law but is negotiable between attorney and client," as required by statute, renders the agreement voidable. West's Ann.Cal.Bus. & Prof.Code § 6147(a)(4), (b).

9 Cases that cite this headnote

[5] **Attorneys and Legal Services** Compensation based on amount saved; reverse contingency fees

Hybrid fee agreement between attorney and clients regarding taxation and business consulting services, which called for payment of fixed $20,000 monthly fee plus a "success fee" calculated as a small percentage of specified recoveries and reductions, was a contingency fee agreement subject to statutory requirements, including that such agreements contain "a statement that the fee is not set by law but is negotiable between attorney and client" or else the agreement is voidable. West's Ann.Cal.Bus. & Prof.Code § 6147.

See Cal. Jur. 3d, Attorneys at Law, § 223; Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2010) ¶¶ 5:362, 5:695 (CAPROFR Ch. 5-C, 5-F); 1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, § 180.

9 Cases that cite this headnote

[6] **Attorneys and Legal Services** Making, requisites, and validity

The term "contingency fee contract" is ordinarily understood to encompass any arrangement that ties the attorney's fee to successful performance, including those which incorporate a noncontingent fee based on a fixed rate of payment. West's Ann.Cal.Bus. & Prof.Code § 6147.

4 Cases that cite this headnote

[7] **Attorneys and Legal Services** Making, requisites, and validity

Requirements on contingency fee agreements, as imposed by statute, apply to hybrid agreements. West's Ann.Cal.Bus. & Prof.Code § 6147.

2 Cases that cite this headnote

[8] **Statutes** Statutes concerning duties and liabilities

When a statute protects the public by denying compensation to parties who fail to meet regulatory demands, the statute constitutes a legislative determination that the need for compliance outweighs any resulting harshness, unless Legislature's intent in enacting the statute is uncertain.

1 Case that cites this headnote

[9] **Appeal and Error** Sufficiency and scope of motion

Attorney failed to oppose summary adjudication in trial court on grounds that voidable contingent fee agreements involved nonlegal professional services and that certain equitable doctrines applied, nor did attorney identify evidence supporting them in connection with his separate statement, and thus attorney forfeited the arguments on appeal. West's Ann.Cal.Bus. & Prof.Code § 6147.

6 Cases that cite this headnote

Attorneys and Law Firms

****380** Reed Smith, Margaret M. Grignon, Peter J. Kennedy and Judith E. Posner, Los Angeles, for Petitioners Dawn Arnall and RoDa Drilling.

Buchalter Nemer, Kalley R. Aman, Los Angeles, and Efrat M. Cogan for Petitioner Ameriquest Mortgage Company.

No appearance for Respondent.

Baker & Hostetler, Peter W. James, Thomas D. Warren and Lisa I. Carteen, Los Angeles, for Real Party in Interest Alan D. Liker.

Opinion

MANELLA, J.

***363** In real party in interest Alan D. Liker's action to recover his fees under his service contracts with petitioners, the trial court denied petitioners' motion for summary adjudication. Petitioners seek a writ directing the trial court to vacate the denial of summary adjudication and to enter a new order granting the motion. We grant the petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

There are no material disputes regarding the following facts: Liker is an attorney who specializes in taxation matters and complex business transactions. In December 2005, Liker entered into a service agreement with petitioners Dawn Arnall and Ameriquest Mortgage Company (Ameriquest agreement). The agreement obliged Liker to provide advisory services aimed at minimizing "the adverse economic impact" arising from specified taxable income. Under the fee provisions, Liker was to receive a stipend of $20,000 per month for nine months, and a "[s]uccess [f]ee" amounting to two percent of specified reductions in "adverse economic impact" and other "economic savings." In January 2007, the parties modified the Ameriquest agreement. As modified, the agreement acknowledged that Liker had provided services after the original nine-month period; extended the agreement's effective period to December 31, 2009; and permitted Ameriquest and Arnall to end ****381** Liker's monthly stipend when he became entitled to a $2 million success fee.

In March 2007, Liker entered into a second service agreement with Arnall and petitioner RoDa Drilling, L.P. (RoDa agreement).[1] Under the agreement, Liker was to provide advisory services in connection with certain oil and gas investments. The agreement provided that Liker was to receive a $20,000 monthly stipend until December 31, 2009 (subject to conditions not relevant here), and a success fee amounting to one percent of specified recoveries and sales proceeds.

[1] Also party to the agreement was Roland Arnall, who is deceased.

In June 2009, petitioners terminated Liker's services and averred that the service agreements were void under Business and Professions Code section 6147.[2] On January 28, 2010, Liker filed his first amended complaint against ***364** petitioners, asserting a claim for breach of the RoDa agreement, and claims for breach of the implied covenant of good faith and fair dealing, recovery in quantum meruit, and declaratory relief regarding the Ameriquest and RoDa agreements. The complaint alleged that when Liker requested his success fees under the agreements, petitioners improperly contended that the agreements were void.

[2] All further statutory citations are to the Business and Professions Code, unless otherwise indicated.

Petitioners sought summary adjudication on Liker's claims, with the exception of his claims for recovery in quantum meruit. They maintained that the agreements were void under section 6147 for want of a statutorily required statement, namely, that the success fees were "not set by law but [were] negotiable between attorney and client" (§ 6147, subd. (a)(4)). In denying summary adjudication, the trial court relied on *Franklin v. Appel* (1992) 8 Cal.App.4th 875, 892, 10 Cal.Rptr.2d 759 (*Franklin*), in which the appellate court concluded that the then-effective version of section 6147 was inapplicable to "contingency fee agreements outside the litigation context." On June 23, 2010, petitioners filed their petition for writ of mandate, prohibition, or other appropriate relief. We issued an alternative writ of mandate and temporary stay on September 1, 2010.

DISCUSSION

Petitioners contend that the trial court erred in denying summary adjudication. We agree.

A. *Governing Principles*

"An order denying a motion for summary adjudication may be reviewed by way of a petition for writ of mandate. [Citation.] Where the trial court's denial of a motion for summary judgment will result in trial on non-actionable claims, a writ of mandate will issue. [Citations.] Likewise, a writ of mandate may issue to prevent trial of non-actionable claims after the erroneous denial of a motion for summary adjudication. [¶] Since a motion for summary judgment or summary adjudication 'involves pure matters of law,' we review a ruling on the motion de novo to determine whether the moving and opposing papers show a triable issue of material fact. [Citations.] Thus, the appellate court need not defer to the trial court's decision. ' "We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale." ' [Citations.]" (*Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450, 75 Cal.Rptr.2d 54, fn. omitted.)

****382** As the material facts are undisputed, the key issues before us concern the application of section 6147. To the extent we must construe section 6147 ***365** and related provisions, established principles guide our inquiry. "The objective of statutory interpretation is to ascertain and effectuate legislative intent. To accomplish that objective, courts must look first to the words of the statute, giving effect to their plain meaning." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437, 35 Cal.Rptr.2d 155.) However, "the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.]" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299.) In addition, "[b]oth the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387, 241 Cal.Rptr. 67, 743 P.2d 1323.)

B. *Section 6147*

Section 6147 belongs to a trio of related statutes governing fee contracts between lawyers and their clients.[3] In 1975, the Legislature enacted section 6146, which limits contingency fee agreements in medical malpractice actions.[4] (Historical and Statutory Notes, 3B, Pt. 3 West's Ann. Bus. & Prof.Code (2003 ed.) foll. § 6146, pp. 335–336; *Franklin, supra,* 8 Cal.App.4th at p. 886, 10 Cal.Rptr.2d 759.) In 1982, the Legislature enacted section 6147 to regulate the form and content of contingency fee agreements outside the medical malpractice context. (*Franklin, supra,* 8 Cal.App.4th at p. 887, 10 Cal.Rptr.2d 759.) Four years later, the Legislature enacted section 6148, which applies to "any case not coming within [s]ection 6147" (§ 6148, subd. (a)), with exceptions not relevant here (e.g., §§ 6148, subd. (d), 6147.5).[5]

[3] In opposing summary adjudication, Liker did not purport to dispute any of the facts identified in petitioners' separate statements, although he challenged some of the items as irrelevant. The trial court overruled Liker's objections. As explained below, the undisputed facts enumerated in the separate statements mandate summary adjudication in petitioners' favor.

[4] Subdivision (a) of section 6146 provides: "An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits: [¶] (1) Forty percent of the first fifty thousand dollars ($50,000) recovered. [¶] (2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered. [¶] (3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered. [¶] (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars ($600,000). [¶] The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind."

[5] Subdivision (a) of section 6148 provides: "In any case not coming within Section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000), the contract for services in the case shall be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative. The written contract shall contain all of the following: [¶] (1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other

> standard rates, fees, and charges applicable to the case. [¶] (2) The general nature of the legal services to be provided to the client. [¶] (3) The respective responsibilities of the attorney and the client as to the performance of the contract."
> Subdivision (c) of section 6148 provides: "Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee."

****383 *366** Our focus is on section 6147, which specifies in subdivision (a) that "[a]n attorney who contracts to represent a client on a contingency fee basis" is obliged to ensure that the contract is "in writing" and meets other requirements.[6] Pertinent here is subdivision (a)(4), which mandates that a contingency fee contract outside the scope of section 6146 must contain "a statement that the fee is not set by law but is negotiable between attorney and client." Subdivision (b) of section 6147 further provides: "Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee."

> 6 Section 6147 provides: "(a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following: [¶] (1) A statement of the contingency fee rate that the client and attorney have agreed upon. [¶] (2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery. [¶] (3) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney. [¶] (4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client. [¶] (5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate. [¶] (b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee. [¶] (c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits. [¶] (d) This section shall become operative on January 1, 2000."

C. *Trial Court's Ruling*

[1] We begin by examining the trial court's ruling. In seeking summary adjudication, petitioners argued that both fee agreements were voidable at their option under section 6147, subdivision (b), because the agreements lacked the statement mandated in section 6147, subdivision (a)(4). The trial court denied summary adjudication on a ground neither raised nor briefed by the parties, reasoning that the fee agreements fell outside section 6147 because they "contemplate[ ] payment for savings from tax-related services." ***367** In so concluding, the court relied on the holding in *Franklin*, namely, that the version of section 6147 operative when *Franklin* was decided did not apply to contingency fee agreements "outside the litigation context" (*Franklin, supra,* 8 Cal.App.4th at p. 892, 10 Cal.Rptr.2d 759).

The denial of summary adjudication cannot be affirmed on the basis of *Franklin.* As then effective, section 6147 stated in subdivision (a) that it applied when "[a]n attorney who contracts to represent a *plaintiff* on a contingency fee basis" (italics added); in addition, section 6147 contained numerous references to the client as a "plaintiff."[7] (****384** *Franklin, supra,* 8 Cal.App.4th at p. 885, fn. 4, 10 Cal.Rptr.2d 759.) In *Franklin,* a married couple engaged an attorney to assist them in some real estate transactions. (*Id.* at pp. 880–881, 10 Cal.Rptr.2d 759.) Their agreement contained a contingency fee provision, but lacked the statement regarding the fee's negotiability required in section 6147, subdivision (a)(4). (*Franklin,* at p. 883, 10 Cal.Rptr.2d 759.)

> 7 The version of section 6147 at issue in *Franklin* provided: "(a) An attorney who contracts to represent a *plaintiff* on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the plaintiff, or his guardian or representative, to the *plaintiff,* ... The contract shall be in writing and shall include ...: [¶] (1) A statement of the contingency fee rate which the client and the attorney have agreed upon. [¶] (2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery. [¶] (3) A statement as to what extent, if any, the *plaintiff* could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for

> the *plaintiff* by the attorney. [¶] (4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client. [¶] (5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate. [¶] (b) Failure to comply with any provision of this section renders the agreement voidable at the option of the *plaintiff*, and the attorney shall thereupon be entitled to collect a reasonable fee. [¶] (c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits." (*Franklin, supra,* 8 Cal.App.4th at p. 885, fn. 4, 10 Cal.Rptr.2d 759, italics added and deleted.)

Despite the statement's absence, the appellate court determined that the agreement was not voidable because it fell outside former section 6147. (*Franklin, supra,* 8 Cal.App.4th at pp. 890–892, 10 Cal.Rptr.2d 759.) Applying the canons of statutory interpretation, the court reasoned that the occurrence of the term "plaintiff" in former section 6147 limited the provision to contingency fee agreements "involving plaintiffs in litigation matters." (*Franklin,* at pp. 879, 890–892, 10 Cal.Rptr.2d 759, italics deleted.) Nonetheless, recognizing that the provision's language might not reflect the Legislature's goal in enacting it, the court stated: "Should the Legislature intend section 6147 to apply to all contingency fee arrangements between attorneys and clients generally, irrespective of whether the representation contemplates litigation or transactional matters, a simple amendment to that effect will suffice; client or person may be substituted for ***368** plaintiff." (*Id.* at p. 891, 10 Cal.Rptr.2d 759, italics deleted.) After the decision in *Franklin,* the Legislature amended subdivision (a) of section 6147 by replacing several occurrences of "plaintiff" with "client," thereby establishing the current language of subdivision (a). (Stats.1994, ch. 479, §§ 2–3, pp. 2630–2631.)

[2] In view of these amendments, we conclude that section 6147 encompasses contingent fee arrangements regarding litigation and transactional matters, including the fee agreements before us. Generally, "when ... the Legislature undertakes to amend a statute which has been the subject of judicial construction[,] ... it is presumed that the Legislature was fully cognizant of such construction, and when substantial changes are made in the statutory language[,] it is usually inferred that the lawmakers intended to alter the law in those particulars affected by such changes." (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 659, 147 Cal.Rptr. 359, 580 P.2d 1155.) Here, the Legislature's response to *Franklin* establishes that its intent was to apply section 6147 to contingent fee arrangements outside the litigation context.

****385** [3] Liker suggests that the Ameriquest and RoDa fee agreements are not voidable under section 6147 because the Legislature, in amending the statute, did not uniformly replace "plaintiff" with "client." Noting that subdivision (b) of section 6147, in its current form, provides that a noncompliant agreement is "voidable at the option of the *plaintiff* " (italics added), Liker argues that subdivision (b) is inapplicable to the Ameriquest and RoDa agreements. We disagree. " 'The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute's legislative history, appear from its provisions considered as a whole.' " (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1334, fn. 7, 283 Cal.Rptr. 893, 813 P.2d 240, quoting *Silver v. Brown* (1966) 63 Cal.2d 841, 845, 48 Cal.Rptr. 609, 409 P.2d 689.)

Here, the Legislature's intent in amending section 6147 is clearly established by the changes it made to subdivision (a) of the statute, especially those to the first sentence of the subdivision, which now begins, "An attorney who contracts to represent a *client* on a contingency fee basis shall...." (Italics added.) As the Legislature subjected contingent fee agreements outside the litigation context to the requirements stated in subdivision (a), the Legislature cannot reasonably be viewed as having intended to exempt these agreements from subdivision (b), which functions as the enforcement provision of section 6147. Because the Legislature's failure to replace "plaintiff" with "client" in subdivision (b) appears to be an oversight or drafting error, we reject Liker's contention. (*Bonner v. County of San Diego* (2006) 139 Cal.App.4th 1336, 1346, fn. 9, 44 Cal.Rptr.3d 116 [when drafting error in statute is clear and correction will best carry out the Legislature's intent, courts may disregard the error in interpreting statute].)

***369** D. *Propriety of Summary Adjudication*

We turn to whether the denial of summary adjudication can be affirmed on another ground. In resolving this question, we may properly examine the merits of petitioners' motion, even though the trial court did not do so in ruling on the motion. (See *Travelers Casualty & Surety Co. v. Superior Court, supra,* 63 Cal.App.4th at pp. 1450–1452, 75 Cal.Rptr.2d 54.) As explained below, petitioners are entitled to summary adjudication.

[4] Subdivision (b) of section 6147 states that "[f]ailure to comply with *any* provision" (italics added) of the statute renders the agreement voidable. Here, it is undisputed that the Ameriquest and RoDa agreements lack the statement regarding the negotiability of the contingent fee mandated in section 6147, subdivision (a)(4). Several courts have concluded that contingency fee agreements displaying this defect are voidable. (*Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 382, 72 Cal.Rptr.3d 756 [agreement was unsigned and lacked statement regarding contingency fee's negotiability, as well as other required recitals]; *Fergus v. Songer* (2007) 150 Cal.App.4th 552, 570, 59 Cal.Rptr.3d 273 [agreement was unsigned and lacked statement regarding contingent fee's negotiability]; *Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037–1038, 252 Cal.Rptr. 845 [agreement lacked statement regarding contingent fee's negotiability and other required recitals].) Although none of these courts confronted an agreement whose sole deficiency was the absence of the fee negotiability statement, we conclude that section 6147, subdivision (b), encompasses such agreements.[8]

[8] To the extent Liker suggests that the fee negotiability statement was not required in the Ameriquest and RoDa agreements because the parties negotiated the fee provisions, he is mistaken. (See *Fergus v. Songer, supra,* 150 Cal.App.4th at p. 572, 59 Cal.Rptr.3d 273 ["[E]ven if it were undisputed that [the client] knew that contingent fees are negotiable when he signed the [ ] contingency fee agreement, that agreement still would have been voidable."].)

****386** [5] Liker contends that section 6147 is inapplicable to the Ameriquest and RoDa agreements because they are not contingency fee contracts. His principal argument is that section 6147 does not apply to "hybrid" fee arrangements of the type established in the Ameriquest and RoDa agreements, which combine fixed monthly payments with a variable success fee. In addition, he argues that the percentage rates determining the success fees are too low to render them contingency fees.

[6] Liker's contentions present questions of first impression regarding the interpretation of section 6147.[9] As section 6147 does not define "contingent fee," we look first to the term's "plain meaning" for guidance on these ***370** questions. (*In re Jerry R., supra,* 29 Cal.App.4th at p. 1437, 35 Cal.Rptr.2d 155.) The term "contingency fee contract" is ordinarily understood to encompass any arrangement that ties the attorney's fee to successful performance, including those which incorporate a noncontingent fee based on a fixed rate of payment. As Witkin explains, the term refers to a contract " 'providing for a fee the size or payment of which is conditioned on some measure of the client's success.' " (1 Witkin, Cal. Proc. (5th ed. 2008) Attorneys, § 176, p. 245.) The Restatement Third of the Law Governing Lawyers, from which Witkin draws his definition, elaborates: "Examples include ... a contract that the lawyer will be paid by the hour but receive a bonus should a stated favorable result occur." (Rest.3d Law Governing Lawyers, § 35, com. a, p. 257.) Our Supreme Court has characterized at least one contract of this type as "a contingent fee contract." (*Estate of Kerr* (1966) 63 Cal.2d 875, 878–879, 48 Cal.Rptr. 707, 409 P.2d 931 [addressing contract that paid fixed fee of $200 plus one-half of recovery in specified estate proceedings].)

[9] Although at least two courts have applied section 6147 to arguably "hybrid" fee contracts (see *Stroud v. Tunzi, supra,* 160 Cal.App.4th at pp. 379–385, 72 Cal.Rptr.3d 756; *Alderman v. Hamilton, supra,* 205 Cal.App.3d at pp. 1036–1038, 252 Cal.Rptr. 845), no court has expressly examined whether section 6147 properly encompasses such fee arrangements.

We find additional guidance on Liker's contentions from *Yates v. Law Offices of Samuel Shore* (1991) 229 Cal.App.3d 583, 591, 280 Cal.Rptr. 316 (*Yates*), which discussed whether the limits on contingency fee contracts in section 6146 apply to hybrid fee arrangements. There, the attorney's fee agreement entitled him to a share of his clients' recovery in a medical malpractice action, and otherwise provided that his fee did not include services he might render in an appeal. (*Yates,* at pp. 585–586, 280 Cal.Rptr. 316.) After the attorney secured a monetary judgment in his clients' favor, he engaged a second attorney at an hourly rate to represent his clients on appeal. (*Id.* at pp. 586–587, 280 Cal.Rptr. 316.) When the attorney asserted that the second attorney's fee was exempt from the limits in section 6146, his clients commenced an action against him. (*Yates,* at p. 587, 280 Cal.Rptr. 316.) The trial court concluded that section 6146 prohibited charging such a fee in addition to the maximum contingent fee allowed under the statute. (*Yates,* at p. 591, 280 Cal.Rptr. 316.)

****387** In affirming, the appellate court stated: "The primary rationale of the trial court's holding was that section 6146 fixes the maximum allowable contingent fee for a medical malpractice action as a whole, including an appeal after judgment, and *the limitation may not be avoided* by charging separate fees for segments of the case or *by charging both contingent and hourly fees.* This construction is strongly supported by the statute's language.... It thus plainly appears that [the attorney] was limited to the section 6146 contingent fee for the entire

case. He could not enhance that fee by truncating his contingent representation at the appellate threshold and charging additional, ostensibly noncontingent amounts for the appeal." (*Yates, supra,* 229 Cal.App.3d at p. 591, 280 Cal.Rptr. 316, italics added.)

[7] ***371** We conclude that the requirements on contingency fee contracts in section 6147, like the related requirements in section 6146, apply to hybrid agreements. This conclusion comports with the language of section 6147, and promotes the Legislature's evident goals in enacting it, namely, to protect clients by ensuring that contingency fee agreements are fair and understood (see *Alderman v. Hamilton, supra,* 205 Cal.App.3d at p. 1037, 252 Cal.Rptr. 845). To hold otherwise would gut section 6147, as it would permit attorneys to avoid the statute's requirements by requiring a noncontingent payment in addition to the contingent portion of their fee.

For similar reasons, we also conclude that section 6147 encompasses contingency fee contracts which, like those before us, entitle the attorney to a relatively small percentage of the client's potential recovery. As ordinarily understood, the term "contingent fee" applies to such arrangements, as the amount of the resulting fee is " 'conditioned on *some measure* of the client's success.' " (1 Witkin, Cal. Proc., *supra,* Attorneys, § 176, p. 245, italics added.) Although arrangements of this type may be uncommon, the agreements before us illustrate that they can implicate substantial fees: Liker's complaint seeks at least $903,936.43 under the RoDa agreement's success fee provision, which entitled Liker to one percent of specified recoveries and sales proceeds. Nothing in section 6147 suggests that the Legislature intended to exempt clients involved in such arrangements from the statute's protections.

In an effort to show that the term "contingency fee contract" applies only to agreements in which the fee hinges exclusively on success, Liker directs us to the definition of "contingent fee" in Black's Law Dictionary, namely, "[a] fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court." (Black's Law Dict. (8th ed.2004) p. 338, col. 2.) However, the entry for "contingent fee" in Black's Law Dictionary expressly recognizes a "reverse" contingent fee, which is described as "[a] fee in which a defense lawyer's compensation depends *in whole or in part* on how much money the lawyer saves the client, given the client's potential liability." (*Ibid.,* italics added.) Accordingly, the entry does not limit the term "contingent fee" to fees predicated exclusively on favorable outcomes.

Liker's reliance on *Estate of Stevenson* (2006) 141 Cal.App.4th 1074, 46 Cal.Rptr.3d 573 (*Stevenson*) and several other cases is misplaced. In *Stevenson,* the administrator of a decedent's estate hired an attorney to represent the estate in the probate proceedings. (*Id.* at pp. 1078–1079, 46 Cal.Rptr.3d 573.) Under the fee contract, the attorney was to receive twice his ordinary hourly rate unless the estate's assets were insufficient to pay this fee, in which case the attorney was to receive the ****388** greater of (1) the estate's assets or (2) a fee calculated at the attorney's ordinary hourly rate. (*Id.* at p. 1080, 46 Cal.Rptr.3d 573.) After the probate proceedings ended, the attorney's fee request exceeded the estate's net worth. (*Id.* at p. 1081, 46 Cal.Rptr.3d 573.)

***372** When the probate court declined to enforce the fee contract, the attorney contended on appeal that it constituted a valid contingency fee agreement under Probate Code section 10811, subdivision (c).[10] (*Stevenson, supra,* 141 Cal.App.4th at p. 1083, 46 Cal.Rptr.3d 573.) The appellate court concluded that it was not a contingency fee agreement, stating: "Contingency fee agreements *typically* provide that counsel shall recover a flat or sliding-scale percentage of 'any' recovery, that is, if there is a recovery. [Citations.] Fees under a contingency fee agreement are not a sure thing. No recovery means no fees. [Citations]. But here the agreement provided for an award of fees once [counsel] started work on the matter regardless of the outcome. The existence and value of assets in the estate determined only whether the fee award would be based on normal hourly rates or double those rates." (*Id.* at pp. 1084–1086, 46 Cal.Rptr.3d 573, italics deleted and added.)

[10] Subdivision (c) of Probate Code section 10811 provides: "An attorney for the personal representative may agree to perform extraordinary service on a contingent fee basis subject to the following conditions: [¶] (1) The agreement is written and complies with all the requirements of Section 6147 of the Business and Professions Code. [¶] (2) The agreement is approved by the court following a hearing noticed as provided in Section 10812. [¶] (3) The court determines that the compensation provided in the agreement is just and reasonable and the agreement is to the advantage of the estate and in the best interests of the persons who are interested in the estate."

Liker contends that these remarks establish that a contingency fee agreement invariably predicates the fee solely on the client's outcome or recovery. We disagree. The *Stevenson* court held only that the fee contract before it was not a contingency fee agreement, as it guaranteed the attorney a fee based on the estate's assets and the attorney's hourly rate, "regardless of the [action's] outcome." (*Stevenson, supra,* 141 Cal.App.4th at p. 1084,

46 Cal.Rptr.3d 573.) Although the court noted that contingency fee agreements "typically" predicate the fee on a successful outcome or recovery, the court did not define them in these terms; on the contrary, the court *expressly* declined to decide whether hybrid agreements "that use[ ] both hourly rates and percentages" are contingency fee agreements. (*Id.* at p. 1086, fn. 2, 46 Cal.Rptr.3d 573.) The court thus did not resolve the question presented here.

The other cases upon which Liker relies are also inapposite, as none examined whether the term "contingency fee contract," as used in section 6147, encompasses hybrid agreements involving both (1) a fee based on a fixed rate of payment and (2) a fee based on a stated percentage of a favorable outcome. The California cases that Liker cites do not address such agreements. (*Fletcher v. Davis* (2004) 33 Cal.4th 61, 64, fn. 3, 14 Cal.Rptr.3d 58, 90 P.3d 1216 [agreement based on hourly rate, but providing for possibility of a " 'bonus' " consisting of unspecified percentage of judgment if recovery was " 'large,' " is not a contingency fee contract]; *In re County of Orange* (Bankr.C.D.Cal.1999) 241 B.R. 212, 215, 221 [agreement ***373** using hourly rate as "benchmark," but permitting law firm to adjust fee in indeterminate manner after consideration of "factors," including complexity of problems, amounts at issue, skills exercised, and "results accomplished," is not contingency fee contract]; *Eaton v.* ****389** *Thieme* (1936) 15 Cal.App.2d 458, 462–463, 59 P.2d 638 [noting that fee agreement entitling lawyer to one-third of potential recovery in payment for his services is "one of a very common variety entered into by attorneys"].) In the remaining out-of state cases, the courts distinguished hybrid agreements from "traditional" contingency fee agreements and "standard" agreements based on a hourly rate, but did not examine whether they are "contingency fee contracts," within the broad terms of section 6147. (*Marshall v. Alpha Zenith Media, Inc.* (N.Y.Sup.Ct., Feb. 28, 2008, No. 114522/06) 2008 WL 660427, *4 [hybrid agreement is not "traditional" contingency fee agreement]; *Arnold & Baker Farms* (Bankr.D.Ariz.) 44 Bankr.Ct. Dec. 219, 2005 WL 1213818, *3 [distinguishing contingency fee agreements and hybrid agreements from "standard lodestar agreement[s] (hours times rate)," for purposes of fee payment in bankruptcy case].)

[8] Liker suggests that under the principles of statutory interpretation, we are obliged to construe section 6147 in a manner that avoids the nonpayment of his success fees, which he characterizes as a forfeiture. We disagree. Under subdivision (b) of section 6147, Liker may collect "a reasonable fee," notwithstanding petitioners' decision to render the success fee provisions void. Furthermore, when a statute protects the public by denying compensation to parties who fail to meet regulatory demands, the statute constitutes a legislative determination that the need for compliance outweighs any resulting harshness, unless Legislature's intent in enacting the statute is uncertain. (See *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995, 277 Cal.Rptr. 517, 803 P.2d 370.) As explained above, section 6147 clearly encompasses hybrid fee agreements of the type before us.

[9] Finally, Liker maintains there are triable issues precluding summary adjudication. He suggests that the Ameriquest and RoDa agreements involved nonlegal professional services; in addition, he argues that certain equitable doctrines, including estoppel and laches, bar petitioners from seeking the protection of section 6147.[11] As Liker neither opposed summary adjudication on these grounds before the trial court nor identified evidence supporting them in connection with his separate statement, he has forfeited them.[12] (*City* ***374** *of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1492–1493, 55 Cal.Rptr.2d 422.) In sum, the trial court erred in denying petitioner's motion for summary adjudication.

11 Liker has asked us to take judicial notice of his answer to petitioners' cross-complaint, in which he asserted defenses based on estoppel, laches, and other principles. We hereby grant his request.

12 At oral argument, Liker's counsel argued that the service agreements required him to provide substantial accounting and business-related professional services outside his role as an attorney. However, Liker raised no triable issues on this matter before the trial court. His separate statement admitted as undisputed that he was an attorney with "special expertise" in taxation and business matters, and that he provided legal services under the Ameriquest and RoDa agreements.

DISPOSITION

Let a peremptory writ of mandate issue directing that respondent trial court vacate its order denying petitioners' motion for summary adjudication, and enter a new order granting summary adjudication. The alternative writ, having served its purpose, is discharged, and the temporary stay is vacated effective upon the issuance ****390** of remittitur. Petitioners are awarded their costs.

We concur: EPSTEIN, P.J., and SUZUKAWA, J.

All Citations

190 Cal.App.4th 360, 118 Cal.Rptr.3d 379, 10 Cal. Daily Op. Serv. 14,599, 2010 Daily Journal D.A.R. 17,619

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Orange County Water Dist. v. The Arnold Engineering Co., Cal.App. 4 Dist., May 24, 2011

50 Cal.4th 35
Supreme Court of California

COUNTY OF SANTA CLARA et al., Petitioners,
v.
The SUPERIOR COURT of Santa Clara County, Respondent;
Atlantic Richfield Company et al., Real Parties in Interest.

No. S163681.
|
July 26, 2010.
|
Certiorari Denied Jan. 10, 2011.
|
See 131 S.Ct. 920.

Synopsis
Background: Public entities brought representative public nuisance action against lead paint manufacturers, seeking abatement as sole remedy. Manufacturers filed motion to bar public entities from compensating private counsel by means of contingent fees. The Superior Court, Santa Clara County, No. CV788657, Jack Komar, J., granted the motion, and public entities filed petition for writ of mandate. The Court of Appeal granted the petition. Manufacturers petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, George, C.J., held that:

[1] public entities were not categorically barred from engaging private counsel under contingent fee arrangements; but

[2] retainer agreements were required to specify matters that contingent-fee counsel must present to government attorneys for decision.

Reversed and remanded.

Werdegar, J., filed concurring opinion, in which Rivera, J., joined.

Opinion, 74 Cal.Rptr.3d 842, superseded.

West Headnotes (18)

[1] Attorneys and Legal Services Making, requisites, and validity
District and Prosecuting Attorneys Compensation and Fees

It would appear that under most, if not all, circumstances, compensation of public prosecutors pursuant to a contingent-fee arrangement would be categorically barred, because giving a public prosecutor a direct pecuniary interest in the outcome of a case that he or she is prosecuting would render it unlikely that the defendant would receive a fair trial. West's Ann.Cal.Penal Code § 1424(a)(1).

1 Case that cites this headnote

[2] Constitutional Law Appointment, qualifications, and removal

It seems beyond dispute that due process would not allow for a criminal prosecutor to employ private cocounsel pursuant to a contingent-fee arrangement that conditions the private attorney's compensation on the outcome of the criminal prosecution. U.S.C.A. Const.Amend. 14.

[3] Attorneys and Legal Services Making, requisites, and validity

Public entities were not categorically barred from engaging private counsel under a

contingent fee arrangement to assist in civil public nuisance actions against manufacturers of lead paint, where the remedy would not require enjoining ongoing business activity because manufacturing lead paint was already illegal, the statute of limitations for a criminal prosecution based on the challenged activity had already run, the remedy would not involve enjoining current or future speech, and the manufacturers were large corporations with access to abundant monetary and legal resources. West's Ann.Cal.Civ.Code § 3494.

See Cal. Jur. 3d, District and Municipal Attorneys, § 13; 1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, §§ 146, 177; Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2009) ¶ 5:153.1 (CAPROFR Ch. 5-B).

2 Cases that cite this headnote

[4] **Nuisance** Acts authorized or prohibited by public authority

Under California law, the continued operation of an established, lawful business is subject to heightened protections.

1 Case that cites this headnote

[5] **Attorneys and Legal Services** Government or public entity as client

In ordinary civil cases, courts do not require neutrality from an attorney representing the government when the government acts as an ordinary party to a controversy, simply enforcing its own contract and property rights against individuals and entities that allegedly have infringed upon those interests.

[6] **Attorneys and Legal Services** Making, requisites, and validity

Public entities may employ private counsel on a contingent-fee basis to litigate a tort action involving damage to government property, or to prosecute other actions in which the governmental entity's interests in the litigation are those of an ordinary party, rather than those of the public.

[7] **Judges** Liabilities for official acts
Public Employment Ethics and conflicts of interest in general

The disqualification rules applicable to adjudicators are more stringent than those that govern the conduct of prosecutors and other government attorneys. West's Ann.Cal.C.C.P. § 170.1.

[8] **Attorneys and Legal Services** Duties and Liabilities to Non-Clients

A government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done.

3 Cases that cite this headnote

[9] **Attorneys and Legal Services** Government or public entity as client

A heightened standard of neutrality is required for attorneys prosecuting public-nuisance cases on behalf of the government.

13 Cases that cite this headnote

4 Cases that cite this headnote

[10] **Attorneys and Legal Services**Making, requisites, and validity

In public nuisance cases when fundamental constitutional rights and the right to continue operation of an existing business are not implicated, retention of private counsel on a contingent-fee basis is permissible if neutral, conflict-free government attorneys retain the power to control and supervise the litigation.

7 Cases that cite this headnote

[11] **Attorneys and Legal Services**Government or public entity as client

The circumstance that public attorneys' decisionmaking conceivably could be influenced by their professional reliance upon private attorneys' expertise, and a concomitant sense of obligation to those attorneys to ensure that they receive payment for their many hours of work on the case, is not the type of personal conflict of interest that requires disqualification of the public attorneys.

[12] **Attorneys and Legal Services**Making, requisites, and validity

To ensure that the heightened standard of neutrality is maintained for attorneys prosecuting public nuisance cases on behalf of the government, contingent-fee agreements between public entities and private counsel must contain specific provisions delineating the proper division of responsibility between the public and private attorneys, and specifically providing explicitly that all critical discretionary decisions will be made by public attorneys—most notably, any decision regarding the ultimate disposition of the case.

[13] **Attorneys and Legal Services**Character and Conduct in General

Attorneys are presumed to comport themselves with ethical integrity and to abide by all rules of professional conduct.

2 Cases that cite this headnote

[14] **District and Prosecuting Attorneys**Discretion in general
District and Prosecuting Attorneys Charging discretion

A public prosecutor has broad discretion over the entire course of the criminal proceedings, from the investigation and gathering of evidence, through the decisions of whom to charge and what charges to bring, to the numerous choices at trial to accept, oppose, or challenge judicial rulings.

[15] **Attorneys and Legal Services**Government or public entity as client

In the context of public nuisance abatement proceedings, critical discretionary decisions may not be delegated to private counsel possessing an interest in the case, but instead must be made by neutral government attorneys.

[16] **Attorneys and Legal Services**Making, requisites, and validity
Attorneys and Legal Services Settlements, Compromises, and Releases

To ensure that the heightened standard of neutrality is maintained for attorneys prosecuting public nuisance cases on behalf of the government, in a case in which any remedy will be primarily monetary in nature, contingent-fee retention agreements between public entities and private counsel must specifically provide that decisions regarding settlement of the case are reserved exclusively to the discretion of the public entity's own attorneys.

[17] **Attorneys and Legal Services** Making, requisites, and validity

To ensure that the heightened standard of neutrality is maintained for attorneys prosecuting public nuisance cases on behalf of the government, contingent-fee retention agreements between public entities and private counsel must specify that any defendant that is the subject of such litigation may contact the lead government attorneys directly, without having to confer with contingent-fee counsel.

13 Cases that cite this headnote

[18] **Attorneys and Legal Services** Making, requisites, and validity

To ensure that the heightened standard of neutrality is maintained for attorneys prosecuting public nuisance cases on behalf of the government, contingent-fee retention agreements between public entities and private counsel must specify that the public-entity attorneys will retain complete control over the course and conduct of the case, that government attorneys retain a veto power over any decisions made by outside counsel, and that a government attorney with supervisory authority must be personally involved in overseeing the litigation.

15 Cases that cite this headnote

Attorneys and Law Firms

*****699** Ann Miller Ravel and Miguel Márquez, County Counsel (Santa Clara), Cheryl A. Stevens, Aryn P. Harris, Winifred Botha, Orry Korb, Tamara Lange and Anne O. Decker, Deputy County Counsel; Dennis J. Herrera, City Attorney (San Francisco), Owen J. Clements, Chief of Special Litigation, Danny Chou and Erin Bernstein, *****700** Deputy City Attorneys; Michael J. Aguirre and Jan Goldsmith, City Attorneys (San Diego), Sim von Kalinowski, Chief Deputy City Attorney, Daniel F. Bamberg, Deputy City Attorney; Richard E. Winnie, County Counsel (Alameda), Raymond L. MacKay and Andrea L. Weddle, Deputy County Counsel; Dennis Bunting, County Counsel (Solano); Thomas F. Casey III and Michael P. Murphy, County Counsel (San Mateo), Brenda Carlson, Chief Deputy County Counsel, Rebecca M. Archer, Deputy County Counsel; Raymond G. Fortner, Jr., and Andrea Sheridan Ordin, County Counsel (Los Angeles), Donovan M. Main, Richard K. Mason and Robert E. Ragland, Deputy County Counsel; Rockard J. Delgadillo, City Attorney (Los Angeles), Jeffrey B. Isaacs, Chief of Criminal and Special Litigation, Patricia Bilgin and Elise Ruden, Deputy City Attorneys; John A. Russo, City Attorney (Oakland), Christopher Kee, Deputy City Attorney; Charles J. McKee, County Counsel (Monterey), William M. Litt, Deputy County Counsel; Cotchett, Pitre & McCarthy, Frank M. Pitre, Nancy L. Fineman, Ara Jabagchourian, Douglas Y. Park; Thornton & Naumes, Michael P. Thornton, Neil T. Leifer; Motley Rice, Fidelma Fitzpatrick, Aileen Sprague; Mary Alexander & Associates, Mary Alexander and Jennifer L. Fiore for Petitioners.

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Jennifer B. Henning for California State Association of Counties and League of California Cities as Amici Curiae on behalf of Petitioners.

Waters Kraus & Paul, Ingrid M. Evans, David L. Cheng, San Francisco; Waters Kraus, Charles S. Siegel and Loren Jacobson for Healthy Children Organizing Project, Western Center on Law and Poverty, Inner City Law Center, Public Advocates, Inc., Public Health Institute, Law Foundation of Silicon Valley, California Conference

of Local Health Officers, Prevention Institute, Alliance for Healthy Homes, American Academy of Pediatrics, California Center for Public Health Advocacy, Equal Justice Society and Worksafe Law Center as Amici Curiae on behalf of Petitioners.

Rosen, Bien & Galvan, Sanford Jay Rosen, Kenneth W. Walczak, Elizabeth H. Eng, San Francisco; Law Offices of Richard M. Pearl and Richard M. Pearl, Berkeley, for Legal Ethics Professors Erwin Chemerinsky, Stephen Gillers, Nathaniel E. Gozansky, Matthew I. Hall, Carol M. Langford, Deborah L. Rhode, Mark L. Tuft and W. Bradley Wendel as Amici Curiae on behalf of Petitioners.

Gardere Wynne Sewell, Richard O. Faulk, John S. Gray; Steptoe & Johnson and Jay E. Smith, Los Angeles, for Public Nuisance Fairness Coalition, American Chemistry Council, Property Casualty Insurers Association of America and National Association of Manufacturers as Amici Curiae on behalf of Petitioners.

Sher Leff and Victor M. Sher, San Francisco, for Association of California Water Agencies as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

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*****701** Horvitz & Levy, David M. Axelrad and Lisa Perrochet, Encino, for Real Party in Interest Millennium Inorganic Chemicals, Inc.

Orrick, Herrington & Sutcliffe, Richard W. Mark, Elyse D. Echtman; Filice Brown Eassa & McLeod, Peter A. Strotz, William E. Steimle, Oakland, and Daniel J. Nichols, San Francisco, for Real Party in Interest American Cyanamid Company.

Greve, Clifford, Wengel & Paras, Lawrence A. Wengel, Bradley W. Kragel, Sacramento; Ruby & Schofield, Law Office of Allen Ruby, Allen J. Ruby, Glen W. Schofield, San Jose; McGrath, North, Mullin & Kratz, James P. Fitzgerald and James J. Frost for Real Party in Interest ConAgra Grocery Products Company.

McGuire Woods, Steven R. Williams, Collin J. Hite; Glynn & Finley, Clement L. Glynn and Patricia L. Bonheyo Real, Walnut Creek, Party in Interest E. I. du Pont de Nemours and Company.

Halleland, Lewis, Nilan & Johnson, Michael T. Nilan; Ropers, Majeski, Kohn & Bentley and James C. Hyde, San Jose, for Real Party in Interest Millennium Holdings LLP.

Crowley, Barrett & Karaba, Paul F. Markoff; Robinson & Wood and Archie S. Robinson, San Jose, for Real Party in Interest the O'Brien Corporation.

Timothy Hardy; McManis, Faulkner & Morgan, McManis Faulkner, James H. McManis, William W. Faulkner, Matthew Schechter, San Jose; Bartlit, Beck, Herman, Palenchar & Scott and Donald T. Scott for Real Party in Interest NL Industries, Inc.

Jones Day, John W. Edwards II, Palo Alto, Elwood Lui, Brian J. O'Neill, Frederick D. Friedman, Los Angeles, Paul M. Pohl, Charles H. Moellenberg, Jr., and Leon F. DeJulius, Jr., for Real Party in Interest the Sherwin–Williams Company.

Elizabeth Milito; Carlton DiSante & Freudenberger and Nancy G. Berner for National Federation of Independent Business Small Business Legal Center as Amicus Curiae on behalf of Real Party in Interest Atlantic Richfield Company.

Shook, Hardy & Bacon, Kevin Underhill, San Francisco, Victor E. Schwartz, Cary Silverman; Natinal Chamber Litigation Center, Inc., Robin S. Conrad, Amar Sarwal; and Sherman Joyce for Chamber of Commerce of the United States of America and the American Tort Reform Association as Amici Curiae on behalf of Real Party in Interest Atlantic Richfield Company.

Latham & Watkins and Paul N. Singarella, Costa Mesa, for Orange County Business Council as Amicus Curiae on behalf of Real Party in Interest Atlantic Richfield Company.

Thomas J. Graves; Spriggs & Hollingsworth, Eric G. Lasker and Marc S. Mayerson for National Paint & Coatings Association, Inc., as Amicus Curiae on behalf of Real Parties in Interest.

Fred J. Hiestand, Sacramento, for the Civil Justice Association of California as Amicus Curiae on behalf of Real Parties in Interest.

Ronald D. Rotunda; Akin Gump Strauss Hauer & Feld, Rex S. Heinke and Jessica M. Weisel, Los Angeles, for National Organization of African Americans in Housing as Amicus Curiae on behalf of Real Parties in Interest.

Maureen Martin for The Heartland Institute as Amicus Curiae on behalf of Real Parties in Interest.

Hugh F. Young, Jr.; Dechert, James M. Beck; Drinker

Biddle & Reath and Alan J. Lazarus, San Francisco, for the Product Liability Advisory Council, Inc., as Amicus Curiae on behalf of Real Parties in Interest.

*****702** W. Scott Thorpe for California District Attorneys Association as Amicus Curiae.

Coughlin Stoia Geller Rudman & Robbins, Timothy G. Blood, Pamela M. Parker, Sand Diego; Eugene G. Iredale, San Diego; Law Offices of Arthur F. Tait III & Associates, Arthur F. Tait III; Sullivan, Hill, Lewin, Rez & Engel, Brian L. Burchett, San Diego; Wingert Grebing Brubaker & Goodwin, Charles R. Grebing, Eric R. Deitz, San Diego; Michael Fremont Law Office and Michael J. Fremont for C.L. Trustees, Patricia Yates, Christine Stankus, Jerrold Cook, Richard Yells, Mark L. Glickman, Heather Buys and Christine Ballon as Amici Curiae.

Opinion

GEORGE, C.J.

***43 **25** A group of public entities composed of various California counties and cities (collectively referred to as the public entities) are prosecuting a public-nuisance action against numerous businesses that manufactured lead paint (collectively referred to as defendants). The public entities are represented both by their own government attorneys and by several private law firms. The private law firms are retained by the public entities on a contingent-fee basis. After summary judgment was granted in favor of defendants on various tort causes of action initially advanced by the public entities, the complaint eventually was amended to leave the public-nuisance action as the sole claim, and abatement as the sole remedy.

Defendants moved to bar the public entities from compensating their privately retained counsel by means of contingent fees. The superior court, relying upon this court's decision in *People ex rel. Clancy v. Superior* ****26** *Court* (1985) 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*), ordered the public entities barred from compensating their private counsel by means of any contingent-fee agreement, reasoning that under *Clancy*, all attorneys prosecuting public-nuisance actions must be "absolutely neutral." The superior court concluded that *Clancy* therefore precluded any arrangement in which private counsel has a financial stake in the outcome of a case brought on behalf of the public. On petition of the public entities seeking a writ of mandate, the Court of Appeal held that *Clancy* does not bar *all* contingent-fee agreements with private counsel in public-nuisance abatement actions, but only those in which private attorneys appear *in place of*, rather than *with and under the supervision of*, government attorneys.

We must decide whether the Court of Appeal correctly construed our opinion in *Clancy*, or if that case instead broadly prohibits all contingent-fee agreements between public entities and private counsel in any public-nuisance action prosecuted on behalf of the public. *Clancy* arguably supports defendants' position favoring a bright-line rule barring any attorney with a financial interest in the outcome of a case from representing the interests of the public in a public-nuisance abatement action. As set forth below, however, a reexamination of our opinion in *Clancy* suggests that our decision in ***44** that case should be narrowed, in recognition of both (1) the wide array of public-nuisance actions (and the corresponding diversity in the types of interests implicated by various prosecutions), and (2) the different means by which prosecutorial duties may be delegated to private attorneys without compromising either the integrity of the prosecution or the public's faith in the judicial process.

I

The procedural history of this case is not in dispute. The public entities' claims against defendants originally included *****703** causes of action for fraud, strict liability, negligence, unfair business practices, and public nuisance.[1] (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 300, 40 Cal.Rptr.3d 313 (*Santa Clara*).) The superior court granted defendants' motion for summary judgment on all causes of action. The Court of Appeal reversed the superior court's judgment of dismissal and ordered the lower court to reinstate the public-nuisance, negligence, strict liability, and fraud causes of action. (*Id.* at p. 333, 40 Cal.Rptr.3d 313.) Thereafter, the public entities filed a fourth amended complaint that alleged a single cause of action, for public nuisance, and sought only abatement. Throughout this litigation, the public entities have been represented both by their government counsel and by private counsel.

[1] The plaintiffs in this case are County of Santa Clara (Santa Clara), County of San Mateo (San Mateo), County of Monterey (Monterey), County of Solano (Solano), County of Los Angeles, County of Alameda (Alameda), City and County of San Francisco (San Francisco), City of Oakland (Oakland), City of Los

Angeles, and City of San Diego (San Diego).
As a result of corporate acquisition and merger, the names of the defendants in the action below are Atlantic Richfield Company, Millennium Inorganic Chemicals, Inc., Millennium Holdings LLC, American Cyanamid Company, ConAgra Grocery Products Company, E.I. du Pont de Nemours and Company, NL Industries, Inc., Sherwin–Williams Company, The O'Brien Corporation, and Does Nos. 1–50, inclusive.

Upon remand following *Santa Clara, supra,* 137 Cal.App.4th 292, 40 Cal.Rptr.3d 313, defendants filed a "motion to bar payment of contingent fees to private attorneys," asserting that "the government cannot retain a private attorney on a contingent fee basis to litigate a public nuisance claim." Defendants sought "an order that precludes plaintiffs from retaining outside counsel under any agreement in which payment of fees and costs is contingent on the outcome of the litigation."

Defendants attached to their motion a number of fee agreements between the public entities and their private counsel, and the public entities filed opposition to which they attached their fee agreements and declarations of their government attorneys and private counsel. The fee agreements and declarations disclose that the public entities and private counsel agreed that, ***45** other than $150,000 that would be forwarded by Santa ****27** Clara to cover initial costs, private counsel would incur all further costs and would not receive any legal fees unless the action were successful. If the action succeeded, private counsel would be entitled to recover any unreimbursed costs from the "recovery" and a fee of 17 percent of the "net recovery."

Some of the contingent-fee agreements in the present case specify the respective authority of both private counsel and public counsel to control the conduct of the pending litigation. The fee agreements between private counsel and San Francisco, Santa Clara, Alameda, Monterey, and San Diego explicitly provide that the public entities' government counsel "retain final authority over all aspects of the Litigation."[2] Private counsel for those five public entities submitted declarations confirming that their clients' government *****704** counsel retain "complete control" over the litigation.[3] The two remaining fee agreements contained in the record—those involving Solano and Oakland—purport to grant private counsel "absolute discretion in the decision of who to sue and who not to sue, if anyone, and what theories to plead and what evidence to present." During proceedings in the trial court, Oakland disclaimed this fee agreement and asserted that its government counsel had retained "complete control" of the litigation and intended to revise the agreement to reflect this circumstance.[4] Solano's private counsel asserts that its public counsel have "maintained and continue [s] to maintain complete control over all aspects of the litigation" and "all decision making authority ***46** and responsibility." The record before us does not contain the fee agreements between the three other public-entity petitioners and their respective private counsel.[5]

2 Four of these five public entities submitted declarations of government counsel stating that they had "retained and continue[d] to retain complete control of the litigation," were "actively involved in and direct[ed] all decisions related to the litigation," and have "direct oversight over the work of outside counsel." San Francisco's submission declared that "[t]he San Francisco City Attorney's Office has in fact retained control over all significant decisions" in this case.

3 Private counsel Cotchett, Pitre & McCarthy submitted a declaration in which it stated it had been retained by Santa Clara, Solano, Alameda, Oakland, Monterey, San Mateo, and San Diego. This law firm asserted that these public entities' government counsel "have maintained and continue to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." Private counsel Thornton & Naumes, private counsel Motley, Rice, and private counsel Mary E. Alexander submitted declarations asserting that they had been retained by San Francisco to assist in this litigation, and that San Francisco's city attorney "has retained complete control over this litigation" and has "exercised full decision-making authority and responsibility."

4 Oakland submitted a declaration by one of its deputy city attorneys stating that "Notwithstanding any documents suggesting the contrary, the Office of the City Attorney has retained complete control over the prosecution of the public nuisance cause of action in this case as it relates to the interests of the People of the City of Oakland." Oakland asserted it was "in the process of revising" its fee agreement "so that it reflects the reality of the relationship" between Oakland and its private counsel.

5 Seven separate fee agreements between the various public entities and their private counsel were before the lower courts and are part of the record before this court. These fee agreements are between private counsel and Santa Clara, Monterey, San Francisco, Solano, Oakland, Alameda, and San Diego. The record does not contain the fee agreements between private counsel and San Mateo, County of Los Angeles, and City of Los

> Angeles, respectively, although these three entities are and remain plaintiffs in the underlying case and petitioners here.

The various fee agreements provide different definitions of "recovery." Some of the agreements define the term "recovery" as "moneys other than civil penalties," whereas others define this term as the "amount recovered, by way of judgment, settlement, or other resolution." Some of the agreements include the phrase "both monetary and non-monetary" in their definitions of "recovery." The San Diego agreement defines "net recovery" as "the payment of money, stock, and/or ... the value of the abatement remedy after the deduction of the costs paid or to be paid." The Santa Clara fee agreement provides that, "[i]n the event that the Litigation is resolved by settlement under terms involving the provision of goods, services or any other 'in-kind' payment, the Santa Clara County Counsel agrees to seek, as part of any such ****28** settlement, a mutually agreeable monetary settlement of attorneys' fees and expenses."

In April 2007, the superior court heard defendants' motion "to bar payment" as well as the public entities' motion for leave to file a fourth amended complaint. The court granted the public entities' motion and ordered that the pleading be filed within 30 days.

*****705** Although some preliminary issues were raised concerning the ripeness of defendants' motion, the superior court resolved the motion on its merits. The court rejected the public entities' claim that *Clancy, supra*, 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347, was distinguishable, concluding instead that under *Clancy*, "outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys." The court granted defendants' motion and entered an order "preclud[ing] Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation...." But the court allowed the public entities "30 days to file with the court new fee agreements" or "declarations detailing the fee arrangements with outside counsel."

***47** The public entities sought a writ of mandate in the Court of Appeal. After issuing an order to show cause, the appellate court ultimately set aside the superior court's ruling and issued a writ commanding the lower court to (1) set aside its order granting defendants' motion, and (2) enter a new order denying defendants' motion. Although acknowledging that *Clancy* purported to bar the participation of private counsel on a contingent-fee basis in public-nuisance abatement lawsuits brought in the name of a public entity, the Court of Appeal held that the rule set forth in *Clancy* is not categorical and does not bar the fee agreements made in the present case, because those agreements specified that the government attorneys would maintain full control over the litigation. The appellate court, briefly noting that the suit being prosecuted did not seek to impose criminal liability or infringe upon fundamental constitutional rights, reasoned that the circumstance that the private attorneys are being supervised by public lawyers vitiates any concern regarding the neutrality of outside counsel. We granted defendants' petition for review.

II

A

We begin our inquiry with this court's decision in *Clancy*. In that case, the City of Corona (Corona) hired James Clancy, a private attorney, to bring nuisance abatement actions against a business (the Book Store), which sold adult materials. (*Clancy, supra*, 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The hiring of Clancy followed several attempts by Corona to terminate the operations of this establishment. Specifically, several months after the Book Store opened, Corona adopted two ordinances that purported to regulate adult bookstores, one defining "sex oriented material" and the other restricting the sale of such material to certain zones in Corona. (*Ibid.*) After the owner of the Book Store, Helen Ebel, filed an action in federal court, the United States Court of Appeals for the Ninth Circuit ultimately held both ordinances to be unconstitutional. (*Ebel v. City of Corona* (9th Cir.1985) 767 F.2d 635.)

Corona subsequently retained the services of Clancy to abate nuisances under the authority of a new ordinance, proposed on the same day Clancy was hired and seemingly targeted specifically at the Book Store. (*Clancy, supra*, 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The ordinance defined a public nuisance as " '[a]ny and every place of business in the City ... in which obscene publications constitute all of the stock in trade, or a principal part thereof....' " (*Ibid.*) The employment

contract between Corona and Clancy, who was an independent contractor rather than ***706** an employee (*id.* at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347), provided that he was to be paid $60 per hour for his work in bringing public-nuisance actions, except that he would be paid only $30 per hour for his work in any **48 **29** public-nuisance action in which Corona did not prevail or in which Corona prevailed but did not recover attorney fees. (*Id.* at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.)

Two weeks after the public-nuisance ordinance was enacted, Corona passed a resolution declaring the Book Store to be a public nuisance and revoking its business license. Thereafter, Corona and Clancy (as the city's " 'special attorney' ") filed a complaint against Ebel, her son Thomas Ebel, another individual, and the Book Store, seeking abatement of a public nuisance, declaratory judgment, and an injunction. (*Clancy, supra*, 39 Cal.3d at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.)[6] The Ebels unsuccessfully attempted to disqualify Clancy as the attorney for Corona. (*Clancy*, at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) The Ebels then sought writ relief, contending it was "improper for an attorney representing the government to have a financial stake in the outcome of an action to abate a public nuisance," and asserting that "a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case." (*Id.* at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.) This court generally agreed, finding the arrangement between Corona and Clancy "inappropriate under the circumstances." (*Id.* at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.)

[6] During proceedings instituted to quash a subpoena issued after the filing of the lawsuit, the court allowed Corona to amend its complaint to substitute the term "City Attorney of Corona" as Clancy's title. (*Clancy, supra*, 39 Cal.3d at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) Clancy appeared in the action in place of, and with no supervision by, Corona's city attorney.

We observe as a threshold matter that our decision to disqualify Clancy from representing Corona in the public-nuisance action was founded not upon any specific statutory provision or rule governing the conduct of attorneys, but rather upon the courts' general authority "to disqualify counsel when necessary in the furtherance of justice." (*Clancy, supra*, 39 Cal.3d at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.) Invoking that authority, this court stated that it "may order that Clancy be dismissed from the case if we find the contingent fee arrangement prejudices the Ebels." (*Ibid.*)

We concluded that for purposes of evaluating the propriety of a contingent-fee agreement between a public entity and a private attorney, the neutrality rules applicable to criminal prosecutors were equally applicable to government attorneys prosecuting certain civil cases. (*Clancy, supra*, 39 Cal.3d at pp. 746–747, 218 Cal.Rptr. 24, 705 P.2d 347.) Accordingly, our decision set forth the responsibilities associated with the prosecution of a criminal case, noting that a prosecutor does not represent merely an ordinary party to a controversy, but instead is the representative of a " ' "sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." ' " (*Clancy, supra*, 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347; see *People v. Superior Court* (1977) 19 Cal.3d 255, 266, 137 Cal.Rptr. 476, 561 P.2d 1164 (*Greer*).) We noted that a prosecutor's duty of neutrality stems from two **49** fundamental aspects of his or her employment. As a representative of the government, a prosecutor must act with the impartiality required of those who govern. ***707** Moreover, because a prosecutor has as a resource the vast power of the government, he or she must refrain from abusing that power by failing to act evenhandedly. (*Clancy, supra*, 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347.) With these principles in mind, we declared that not only is a government lawyer's neutrality "essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole." (*Ibid.*)

Recognizing that a city attorney is a public official, we noted that "the rigorous ethical duties imposed on a criminal prosecutor also apply to government lawyers generally." (*Clancy, supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) Thus, pursuant to the American Bar Association's then Model Code of Professional Responsibility, a lawyer who is a public officer " 'should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.' " **30** (*Clancy, supra*, 39 Cal.3d at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347, quoting former ABA Model Code Prof. Responsibility, EC 8–8.) " '[An] attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests.' " (*Clancy, supra*, 39 Cal.3d at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347, quoting ABA Com. on Prof. Ethics, opn. No. 192 (1939).) Notably, we held that because public lawyers handling noncriminal matters are subject to the same ethical conflict-of-interest rules applicable to public prosecutors, "there is a class of civil actions that demands the representative of the government

to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement." (*Clancy, supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

We further held that public-nuisance abatement actions belong to the class of civil cases in which counsel representing the government must be absolutely neutral. (*Clancy, supra,* 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) We came to this conclusion by analogizing a public-nuisance abatement action to an eminent domain action—a type of proceeding in which we already had concluded that government attorneys must be unaffected by personal interest. (*Id.* at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347, citing *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871, 135 Cal.Rptr. 647, 558 P.2d 545.)

We explained: "[T]he abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is added to the balance: not only does the landowner have a First ***50** Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase. Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Clancy, supra,* 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) Moreover, "[a] suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney." (*Ibid.*)

We concluded that James Clancy—although he was an independent contractor *****708** and not an employee of the City of Corona—nonetheless was subject to the same neutrality guidelines applicable to Corona's public lawyers, because "a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." (*Clancy, supra,* 39 Cal.3d at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347.)

Finally, we held that because Clancy's hourly rate would double in the event Corona were successful in the litigation against the Ebels and the Book Store, it was evident that Clancy had an interest extraneous to his official function in the actions he was prosecuting on behalf of Corona. Accordingly, "the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy disqualified from representing the City in the pending abatement action." (*Clancy, supra,* 39 Cal.3d at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.) We expressly noted that Corona was not precluded from rehiring Clancy to represent it on other terms. (*Id.* at p. 750, fn. 5, 218 Cal.Rptr. 24, 705 P.2d 347.)

Importantly, we also noted that "[n]othing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a ****31** government may hire an attorney on a contingent fee to try a civil case." (*Clancy, supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) As an example of such a permissible instance of representation, we cited *Denio v. City of Huntington Beach* (1943) 22 Cal.2d 580, 140 P.2d 392, a case in which we had approved a contingent-fee arrangement between the City of Huntington Beach and a law firm hired to represent it in all matters relating to protection of the city's oil rights. Thus, we recognized that contingent-fee arrangements in ordinary civil cases generally are permitted. (*Clancy, supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

***51 B**

As is evident from the preceding discussion, our decision in *Clancy, supra,* 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347, was guided, in large part, by the circumstance that the public-nuisance action pursued by Corona implicated interests akin to those inherent in a criminal prosecution. In light of this similarity, we found it appropriate to invoke directly the disqualification rules applicable to criminal prosecutors—rules that categorically bar contingent-fee agreements in all instances. As we observed in *Clancy*, contingent-fee "contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional, but there is virtually no law on the subject." (*Clancy, supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) Nonetheless, we noted it is generally accepted that any

type of arrangement conditioning a public prosecutor's remuneration upon the outcome of a case is widely condemned. (*Ibid.*, citing ABA Stds. for Criminal Justice, Prosecution Function, com. to former Std. 2.3(e) [" 'it is clear that [case-by-case] fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, are totally unacceptable under modern conditions, and should be abolished promptly' "].)

[1] [2] Accordingly, although there are virtually no cases considering the propriety ***709** of compensation of public prosecutors pursuant to a contingent-fee arrangement, it would appear that under most, if not all, circumstances, such a method of compensation would be categorically barred. This is so because giving a public prosecutor a direct pecuniary interest in the outcome of a case that he or she is prosecuting "would render it unlikely that the defendant would receive a fair trial." (Pen.Code, § 1424, subd. (a)(1); see *Greer, supra,* 19 Cal.3d at p. 266, 137 Cal.Rptr. 476, 561 P.2d 1164 [explaining that disqualification was required in order to protect the defendant's fundamental due process right not to be deprived of liberty without a fair trial, and to enforce the prosecutor's obligation "to respect this mandate"].)[7]

[7] It also seems beyond dispute that due process would not allow for a criminal prosecutor to employ private cocounsel pursuant to a contingent-fee arrangement that conditioned the private attorney's compensation on the outcome of the criminal prosecution. (See *State of Rhode Island v. Lead Industries Assn., Inc.* (R.I.2008) 951 A.2d 428, 475, fn. 48 (*State of Rhode Island*) [explicitly refraining from allowing contingent-fee arrangement in the criminal context, because the court was "unable to envision a criminal case where contingent fees would ever be appropriate—even if they were not explicitly barred, as is the case in this jurisdiction"]; cf. *People v. Eubanks* (1996) 14 Cal.4th 580, 596, 598, 59 Cal.Rptr.2d 200, 927 P.2d 310 [finding cognizable conflict of interest because of the circumstance that the corporate crime victim paid the " 'substantial' " debts and expenses incurred by the district attorney investigating the case, and that such payment evidenced a " 'reasonable possibility' the prosecutor might not exercise his discretionary functions in an evenhanded manner"].)

Our opinion in *Clancy* recognized that the interests invoked in that case were akin to the vital interests implicated in a criminal prosecution, and thus ***52** invocation of the disqualification rules applicable to criminal prosecutors was justified. And if those rules are found to be equally applicable in the case now before us, disqualification of the private attorneys hired to assist the public entities similarly would be required.

[3] As explained below, however, to the extent our decision in *Clancy* suggested that public-nuisance prosecutions *always* invoke the same constitutional and institutional interests present in a criminal case, our analysis was unnecessarily broad and failed to take into account the wide spectrum of cases ****32** that fall within the public-nuisance rubric. In the present case, both the types of remedies sought and the types of interests implicated differ significantly from those involved in *Clancy* and, accordingly, invocation of the strict rules requiring the automatic disqualification of criminal prosecutors is unwarranted.

The broad spectrum of public-nuisance law may implicate both civil and criminal liability.[8] Indeed, public-nuisance actions vary widely, as evidenced by Penal Code section 370, which broadly defines a public nuisance as "[a]nything which is injurious ***710** to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street or highway...."[9]

[8] As explained by the authors of a recent law review article, public-nuisance law over the course of its development has become increasingly more civil in nature than criminal. The precepts of public-nuisance law migrated to colonial America from the English common law virtually unchanged, and at that time were primarily criminal. (Faulk and Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation* (2007) 2007 Mich. St. L.Rev. 941, 951 (Faulk and Gray).) Eventually, however, violation of public-nuisance law came to be considered as a tort, and its criminal enforcement was invoked much less frequently. As state legislators began to enact statutes prohibiting particular conduct and setting specific criminal penalties for such conduct, there was little need for the broad and somewhat vague crime of nuisance. (*Ibid.;* Rest.2d Torts, § 821B, com. c, p. 88.)

[9] From its earliest incarnation in the common law, public-nuisance law proscribed an "interference with the interests of the community at large—interests that were recognized as rights of the general public entitled to protection." (Rest.2d Torts, § 821B, com. b, p. 88; see also Faulk and Gray, *supra,* 2007 Mich. St. L.Rev. at p. 951; Gifford, *Public Nuisance as a Mass Products Liability Tort* (2003) 71 U. Cin. L.Rev. 741, 790–791, 794.)

Although in *Clancy* we spoke generally of a "balancing of interests" and a "delicate weighing of values" (*Clancy, supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347), our concerns regarding neutrality, fairness, and a possible abuse of the judicial process by an interested party appear to have been highly influenced by the circumstances of the case then before us—a long-running attempt by the City ***53** of Corona to shut down a single adult bookstore. As set forth above, when Corona's first attempts at legislating the bookstore out of business were ruled unconstitutional, it hired a private attorney with a personal and pecuniary interest in the case to file a nuisance action against the bookstore pursuant to a newly enacted ordinance that clearly was intended to specifically target that business.

[4] The history of Corona's efforts to shut down the bookstore revealed a profound imbalance between the institutional power and resources of the government and the limited means and influence of the defendants—whose vital property rights were threatened. Under California law, the continued operation of an established, lawful business is subject to heightened protections. (*See Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1529, 8 Cal.Rptr.2d 385 [continued operation of 35–year business that was making recent substantial improvements was recognized as a vested right]; *Livingston Rock & Gravel Co. v. County of L.A.* (1954) 43 Cal.2d 121, 127, 272 P.2d 4 [noting that businesses generally cannot be immediately terminated due to nonconformance with rezoning ordinances, because of the "hardship and doubtful constitutionality" of such discontinuance].) It was in this factual setting that we noted that the abatement of a public nuisance involves a "balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes." (*Clancy, supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

The case also implicated both the defendants' and the public's constitutional free-speech rights. As we recognized in *Clancy*, the operation of the adult bookstore involved speech that arguably was protected in part, ****33** and thus curtailment of the right to disseminate the books in question could significantly infringe upon the Ebels' liberty interest in free speech. Again, our focus upon the critical "balancing of interests" was guided by the circumstance that Corona was attempting to abate a public nuisance created by an adult bookstore—thus adding something more "to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase." (*Clancy, supra*, *****711** 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)[10]

10 Moreover, we also found it significant that "[a] suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney." (*Clancy, supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)
As we explained, public-nuisance "actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.) A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen.Code, § 372.) 'A public or common nuisance ... is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.... As in the case of other crimes, the normal remedy is in the hands of the state.' " (*Clancy, supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347, fn. omitted, quoting Prosser and Keeton, The Law of Torts (5th ed. 1984) p. 618.)

***54** It is evident that the nature of the particular nuisance action involved in *Clancy* was an important factor in leading us to conclude the rules governing the disqualification of criminal prosecutors properly should be invoked to disqualify James Clancy.[11] The direct application of those rules was warranted because the public-nuisance abatement action at issue implicated important constitutional concerns, threatened ongoing business activity, and carried the threat of criminal liability. In light of these interests, the case required the same "balancing of interests" and "delicate weighing of values" on the part of the government's attorney prosecuting the case as would be required in a criminal prosecution. Because of this strong correlation, the disqualification of a private attorney with a pecuniary interest in the outcome of the case was mandated.

11 The disqualification of public prosecutors is governed by Penal Code section 1424, which provides that a motion to recuse a prosecutor "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen.Code, § 1424, subd. (a)(1); see *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711, 76 Cal.Rptr.3d 250, 182 P.3d 579 (*Haraguchi*) [noting that Pen.Code, § 1424 " 'articulates a two-part test: "(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?" ' "].)
Although Penal Code section 1424 does not, by its terms, govern the conduct of civil government attorneys, we held in *Clancy* that certain government attorneys—because of the nature of the action they are

> prosecuting—must, like a criminal prosecutor, be free of any conflict of interest that might compromise a fair trial for the defendant. Although we did not invoke section 1424 in *Clancy* and instead analyzed the case under principles of neutrality—by considering whether an attorney's extraneous interest in a case would prejudice a defendant—the rule we applied unquestionably was derived from, and was substantially similar to, the conflict-of-interest rule applicable to criminal prosecutors. (See *Haraguchi, supra,* 43 Cal.4th at p. 711, 76 Cal.Rptr.3d 250, 182 P.3d 579.)

[5] [6] The public-nuisance action in the present case, by contrast, involves a qualitatively different set of interests—interests that are not substantially similar to the fundamental rights at stake in a criminal prosecution. We find this distinguishing circumstance to be dispositive. As set forth above, neutrality is a critical concern in criminal prosecutions because of the important constitutional liberty interests at stake. On the other hand, in ordinary civil cases, we do not require neutrality when the government acts as an ordinary party to a controversy, simply enforcing its own contract and property rights against individuals and entities that allegedly have infringed upon those interests. Indeed, as discussed above, we specifically observed in *Clancy* that the government was not precluded from engaging private counsel ***712** on a contingent-fee basis in an ordinary civil case. Thus, for example, public entities may employ private counsel on such a basis to litigate a tort action involving damage to government property, or to prosecute other actions in **55** which the governmental entity's **34** interests in the litigation are those of an ordinary party, rather than those of the public. (*Clancy, supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

The present case falls between these two extremes on the spectrum of neutrality required of a government attorney. The present matter is not an "ordinary" civil case in that the public entities' attorneys are appearing as representatives of the public and not as counsel for the government acting as an ordinary party in a civil controversy. A public-nuisance abatement action must be prosecuted by a governmental entity and may not be initiated by a private party unless the nuisance is personally injurious to that private party. (Civ.Code, § 3493 ["A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise"]; *id.,* § 3494 ["[a] public nuisance may be abated by any public body or officer authorized thereto by law"].) There can be no question, therefore, that the present case is being prosecuted on behalf of the public, and that accordingly the concerns we identified in *Clancy* as being inherent in a public prosecution are, indeed, implicated in the case now before us.

Yet, neither are the interests affected in this case similar in character to those invoked by a criminal prosecution or the nuisance action in *Clancy.* Although the remedy for the successful prosecution of the present case is unclear, we can confidently deduce what the remedy will *not be.* This case will not result in an injunction that prevents the defendants from continuing their current business operations. The challenged conduct (the production and distribution of lead paint) has been illegal since 1978. Accordingly, whatever the outcome of the litigation, no ongoing business activity will be enjoined. Nor will the case prevent defendants from exercising any First Amendment right or any other liberty interest. Although liability may be based in part on prior commercial speech, the *remedy* will not involve enjoining current or future speech. Finally, because the challenged conduct has long since ceased, the statute of limitations on any criminal prosecution has run and there is neither a threat nor a possibility of criminal liability being imposed upon defendants.

The adjudication of this action will involve at least some balancing of interests, such as the social utility of defendants' product against the harm it has caused, and may implicate the free-speech rights exercised by defendants when they marketed their products and petitioned the government to oppose regulations. Nevertheless, that balancing process and those constitutional rights involve only past acts—not ongoing marketing, petitioning, or property/business interests. Instead, the trial court will be asked to determine whether defendants should be held liable for creating a nuisance and, if so, how the nuisance should be abated. This case will result, at most, in **56** defendants' having to expend resources to abate the lead-paint nuisance they allegedly created, either by paying into a fund dedicated to that abatement purpose or by undertaking the abatement themselves. The expenditure of resources to abate a hazardous substance affecting the environment is the type of remedy one might find in an ordinary civil case and does not threaten the continued operation of an existing business.

***713** Of course, because this is a public-nuisance action, and the public entities are not merely pursuing abatement on government property but on private property located within their jurisdictions, defendants' potential exposure may be very substantial. The possibility of such a substantial judgment, however, does not affect the type of fundamental rights implicated in criminal prosecutions or in *Clancy, supra,* 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347. There is no indication

that the contingent-fee arrangements in the present case have created a danger of governmental overreaching or economic coercion. Defendants are large corporations with access to abundant monetary and legal resources. Accordingly, the concern we expressed in *Clancy* about the misuse of governmental resources against an outmatched individual defendant is not implicated in the present case.

[7] Thus, because—in contrast to the situation in *Clancy*—neither a liberty interest nor the right of an existing business to continued ****35** operation is threatened by the present prosecution, this case is closer on the spectrum to an ordinary civil case than it is to a criminal prosecution. The role played in the current setting both by the government attorneys and by the private attorneys differs significantly from that played by the private attorney in *Clancy*. Accordingly, the absolute prohibition on contingent-fee arrangements imported in *Clancy* from the context of criminal proceedings is unwarranted in the circumstances of the present civil public-nuisance action.[12]

12 Nor is the applicable standard that which governs the disqualification of judges and other adjudicators. It is well established that the disqualification rules applicable to adjudicators are more stringent than those that govern the conduct of prosecutors and other government attorneys. (*People v. Freeman* (2010) 47 Cal.4th 993, 996, 103 Cal.Rptr.3d 723, 222 P.3d 177 [holding that for purposes of judicial disqualification, the constitutional standard is whether " ' "the probability of actual bias on the part of the judge or decisionmaker ... is too high to be constitutionally tolerable" ' " (citing *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868 [129 S.Ct. 2252, 173 L.Ed.2d 1208]; Code Civ. Proc. § 170.1 [setting forth statutory grounds for disqualification of judges]; *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 243 [100 S.Ct. 1610, 64 L.Ed.2d 182] [noting that "the strict requirements of *Tumey* [*v. Ohio* (1927)] 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] and *Ward* [*v. Village of Monroeville* (1972) 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267] are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge"].)

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Nevertheless, as set forth above, because the public-nuisance abatement action is being prosecuted on behalf of the public, the attorneys prosecuting this action, although not subject to the same stringent conflict-of-interest rules governing the conduct of criminal prosecutors or adjudicators, are subject to a heightened standard of ethical conduct applicable to public officials acting in the name of the public—standards that would not be invoked in an ordinary civil case.

[8] The underlying principle that guided our decision in *Clancy* was that a civil attorney acting on behalf of a public entity, in prosecuting a civil case such as a public-nuisance abatement action, is entrusted with the unique power of the government and therefore must refrain from abusing that power by failing to act in an evenhanded manner. (*Clancy, supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347; see also *Greer, supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164 [a prosecuting attorney " ' "is the representative of the public in whom is lodged a discretion which is not to be controlled by *****714** the courts, or by an interested individual" ' " (italics omitted)]; *City of Los Angeles v. Decker, supra*, 18 Cal.3d at p. 871, 135 Cal.Rptr. 647, 558 P.2d 545 [a " 'government lawyer in a civil action ... should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results' "].) Indeed, it is a bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done. (*Greer, supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164.)

[9] These principles of heightened neutrality remain valid and necessary in the context of the situation presented by the case before us. A fair prosecution and outcome in a proceeding brought in the name of the public is a matter of vital concern both for defendants and for the public, whose interests are represented by the government and to whom a duty is owed to ensure that the judicial process remains fair and untainted by an improper motivation on the part of attorneys representing the government. Accordingly, to ensure that an attorney representing the government acts evenhandedly and does not abuse the unique power entrusted in him or her in that capacity—and that public confidence in the integrity of the judicial system is not thereby undermined—a heightened standard of neutrality is required for attorneys prosecuting public-nuisance cases on behalf of the government.

[10] We must determine whether this heightened standard of neutrality is compromised by the hiring of contingent-fee counsel to assist government attorneys in the prosecution of a public-nuisance abatement action

****36** of the type involved in the present proceedings. For the reasons that follow, we conclude that this standard is not compromised. Because private counsel who are ***58** remunerated on a contingent-fee basis have a direct pecuniary interest in the outcome of the case, they have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest. This conflict, however, does not necessarily mandate disqualification in public-nuisance cases when fundamental constitutional rights and the right to continue operation of an existing business are not implicated. Instead, retention of private counsel on a contingent-fee basis is permissible in such cases if neutral, conflict-free government attorneys retain the power to control and supervise the litigation. As explained below, because public counsel are themselves neutral, and because these neutral attorneys retain control over critical discretionary decisions involved in the litigation, the heightened standard of neutrality is maintained and the integrity of the government's position is safeguarded. Thus, in a case where the government's action poses no threat to fundamental constitutional interests and does not threaten the continued operation of an ongoing business, concerns about neutrality are assuaged if the litigation is controlled by neutral attorneys, even if some of the attorneys involved in the case in a subsidiary role have a conflict of interest that might—if present in a public attorney—mandate disqualification.

This reasoning recently was embraced by the Supreme Court of Rhode Island, which approved the state attorney general's employment of private counsel on a contingent-fee basis to prosecute public-nuisance abatement actions against lead paint manufacturers—a case identical in *****715** all material respects to the underlying action here. (*State of Rhode Island, supra*, 951 A.2d 428.) That court considered the propriety of the contingent-fee agreements in light of the state attorney general's status as a public servant, and his attendant responsibility to seek justice rather than prevail at all costs. (*Id.* at p. 472.) The state high court noted that the attorney general was bound by the ethical standards governing the conduct of public prosecutors. (*Ibid.*) Ultimately, citing the underlying decision of the Court of Appeal in the present case, the court in *State of Rhode Island* concluded that "there is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain *non-criminal* matters. Indeed, it is our view that the ability of the Attorney General to enter into such contractual relationships may well, in some circumstances, lead to results that will be beneficial to society—results which otherwise might not have been attainable. However, due to the special duty of attorneys general to 'seek justice' and their wide discretion with respect to same, such contractual relationships must be accompanied by exacting limitations.... [I]t is our view that the Attorney General is not precluded from engaging private counsel pursuant to a contingent fee agreement in order to assist in certain civil litigation, so long ***59** as the Office of Attorney General retains *absolute and total control over all critical decision-making* in any case in which such agreements have been entered into." (*State of Rhode Island*, at p. 475, original italics, boldface and fns. omitted.)

We generally agree with the Supreme Court of Rhode Island and the Court of Appeal in the present case that there is a critical distinction between an employment arrangement that fully delegates governmental authority to a private party possessing a personal interest in the case, and an arrangement specifying that private counsel remain subject to the supervision and control of government attorneys. Private counsel serving in a subordinate role do not supplant a public entity's government attorneys, who have no personal or pecuniary interest in a case and therefore remain free of a conflict of interest that might require disqualification. Accordingly, in a case in which private counsel are subject to the supervision and control of government attorneys, the discretionary decisions vital to an impartial prosecution are made by neutral attorneys and the prosecution may proceed with the assistance of private ****37** counsel, even though the latter have a pecuniary interest in the case.

[11] [12] It is true that the public attorneys' decisionmaking conceivably could be influenced by their professional reliance upon the private attorneys' expertise and a concomitant sense of obligation to those attorneys to ensure that they receive payment for their many hours of work on the case. This circumstance may fairly be viewed as being somewhat akin to having a personal interest in the case. Nevertheless, this is not the type of personal conflict of interest that requires disqualification of the public attorneys. As this court has stated: " ' "[A]lmost any fee arrangement between attorney and client may give rise to a conflict ... The contingent fee contract so common in civil litigation creates a 'conflict' when either the attorney or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of 'conflict' are infinite. Fortunately most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying the client's interest." ' " *****716**

(*People v. Doolin* (2009) 45 Cal.4th 390, 416, 87 Cal.Rptr.3d 209, 198 P.3d 11.)[13]

[13] In furtherance of their contention that the retention of private counsel on a contingent-fee basis is impermissible in public-nuisance-abatement actions because such financial arrangements create a sense of obligation toward private counsel on the part of public counsel, defendants and their amici cite to our discussion of the obligation incurred by a criminal prosecutor toward the victim who provided substantial financial assistance to the district attorney's office in *People v. Eubanks, supra,* 14 Cal.4th 580, 59 Cal.Rptr.2d 200, 927 P.2d 310, in which we held that the financial arrangement resulted in a disqualifying conflict of interest on behalf of the public prosecutor. (*Id.* at p. 596, 59 Cal.Rptr.2d 200, 927 P.2d 310.) This reliance upon *Eubanks* is misplaced.

As a threshold matter, as we explained above, public-nuisance-abatement actions that do not implicate fundamental constitutional rights or threaten the operation of an existing business do not invoke the same concerns regarding neutrality as those present in a criminal prosecution, and therefore attorneys pursuing such claims are not subject to the strict disqualification rules applicable to criminal prosecutors that we invoked to disqualify the public attorneys in *Eubanks.* Moreover, even under the disqualification standard applied in *Eubanks,* the retention of private counsel on a contingent-fee basis in public-nuisance actions is distinguishable from the financial arrangement we found impermissible in that case. In *Eubanks, supra,* we reasoned that because criminal defendants have "no right to expect that crimes should go unpunished for lack of public funds," the mere fact that the victim's financial assistance enables the prosecutor to proceed further or more quickly "would not, by itself, constitute unfair treatment." (14 Cal.4th at p. 599, 59 Cal.Rptr.2d 200, 927 P.2d 310.) Instead, a disabling conflict is established "in this factual context[ ] only by a showing that the private financial contributions are of a nature and magnitude likely to put the prosecutor's discretionary decisionmaking within the influence or control of an interested party." (*Ibid;* see also *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 836, 118 Cal.Rptr.2d 725, 44 P.3d 102 [recusal is not required simply because victim pays for expense the district attorney's office otherwise would have incurred].) Applying that reasoning to the retention of contingent-fee counsel by public entities pursuing public-nuisance-abatement actions, it is evident that individuals and business entities that create public nuisances similarly have no right to expect that abatement actions will not be brought "for lack of public funds." Thus, the mere circumstance that contingent-fee counsel enable public attorneys to prosecute the case does not, by itself, constitute unfair treatment.

Nor are the financial contributions of private counsel of a nature or magnitude likely to put the public attorneys' discretionary decisionmaking within the influence or control of an interested party. Unlike the financial assistance provided by the victim in *Eubanks*—a party with a strong personal interest in the outcome of the case and an expectation that the provision of financial assistance would incentivize the public attorneys to pursue the victim's desired outcome even if justice demanded a contrary course of action—the financial assistance in a public-nuisance case pursued with the assistance of contingent-fee counsel is provided by a group of sophisticated legal experts who have calculated the financial risk against the possible reward, and who are charged with the knowledge that public counsel's obligation to place justice above their desire to win a case may result in governmental decisions that do not maximize monetary recovery for the private attorneys.

This factual distinction is especially important in light of the specific contractual provisions we discuss, *supra.* As we explain below, to ensure that the heightened standard of neutrality is maintained in the prosecution of a public-nuisance-abatement action, contingent-fee agreements between public entities and private counsel must contain specific provisions delineating the proper division of responsibility between the public and private attorneys. Specifically, those contractual provisions must provide explicitly that all critical discretionary decisions will be made by public attorneys—most notably, any decision regarding the ultimate disposition of the case. These contractual provisions reinforce the principle that the financial assistance provided by contingent-fee counsel is conditioned on the understanding that public counsel will retain full control over the litigation and, in exercising that control, must and will place their duty to serve the public interest in ensuring a fair and just proceeding above their sense of any obligation to maximize a monetary recovery for the private attorneys.

*****717 **38** [13] ***60** As recognized by the American Bar Association, attorneys are expected to resolve conflicts between their personal interests and their ethical and professional responsibilities "through the exercise of sensitive professionalism and moral judgment." (ABA Model Rules Prof. Conduct, Preamble, par. 9.) In other words, attorneys are presumed to comport themselves with ethical integrity and to abide by all rules of professional conduct. In light of the supervisory role played by government counsel in the litigation—and ***61** their inherent duty to serve the public's interest in any type of prosecution pursued on behalf of the public—we presume that government attorneys will honor their obligation to place the interests of their client above the personal, pecuniary interest of the subordinate private counsel they have hired.

[14] As we have explained above, in the type of public-nuisance abatement action being prosecuted in the present case, disqualification of counsel need not be governed by the stringent disqualification rules applicable to criminal prosecutors. Nevertheless, the role of the prosecutor provides useful guidance concerning the type of discretionary decisions that must remain with neutral government attorneys to ensure that the litigation is conducted in a conflict-free manner. A public prosecutor "has broad discretion over the entire course of the criminal proceedings, from the investigation and gathering of evidence, through the decisions of whom to charge and what charges to bring, to the numerous choices at trial to accept, oppose, or challenge judicial rulings." (*Hambarian, supra,* 27 Cal.4th at p. 840, 118 Cal.Rptr.2d 725, 44 P.3d 102.) In *Greer,* we emphasized that it is "because the prosecutor enjoys such broad discretion that the public he serves and those he accuses may justifiably demand that he perform his functions with the highest degree of integrity and impartiality, and with the appearance thereof." (*Greer, supra,* 19 Cal.3d at pp. 266–267, 137 Cal.Rptr. 476, 561 P.2d 1164.) Accordingly, "the advantage of public prosecution is lost if those exercising the discretionary duties of the district attorney are subject to conflicting personal interests which might tend to compromise their impartiality." (*Id.* at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164; see also *Hambarian, supra,* 27 Cal.4th at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102 [holding that proper test for a disqualifying conflict of interest under Pen.Code section § 1424 is whether "the prosecutor's *discretionary decisionmaking* has been placed within the influence or control of an interested party"].)

[15] A prosecutor's authority to make critical discretionary decisions in criminal cases is vital to ensuring the neutrality we require of attorneys entrusted with that position. This is so because such discretionary decisions provide the greatest opportunity to abuse the judicial process by placing personal gain above the interests of the public in a fair and just prosecution and outcome. For the same reason, in the context of public-nuisance abatement proceedings, critical discretionary decisions similarly may not be delegated to private counsel possessing an interest in the case, but instead must be made by neutral government attorneys.

Accordingly, although the principles of heightened neutrality do not categorically bar the retention of contingent-fee counsel to assist public entities in the prosecution of public-nuisance abatement actions, those principles do mandate that all critical discretionary decisions ultimately must be made by the public entities' government attorneys rather than by private counsel—***718** in other words, neutral government attorneys must retain and exercise the ***62** requisite control and supervision over both the conduct of private attorneys and the overall prosecution of the case. Such control of the litigation by neutral attorneys provides a safeguard against the possibility that private attorneys unilaterally will engage in inappropriate prosecutorial ****39** strategy and tactics geared to maximize their monetary reward. Accordingly, when public entities have retained the requisite authority in appropriate civil actions to control the litigation and to make all critical discretionary decisions, the impartiality required of government attorneys prosecuting the case on behalf of the public has been maintained.

Defendants assert that even if the control of private counsel by government attorneys is viable in theory, it fails in application because private counsel in such cases are hired based upon their expertise and experience, and therefore always will assume a primary and controlling role in guiding the course of the litigation, rendering illusory the notion of government "control". To the extent defendants assert that no contractual provision delegating the division of responsibility will or can be adhered to, we decline to assume that private counsel intentionally or negligently will violate the terms of their retention agreements by acting independently and without consultation with the public-entity attorneys or that public attorneys will delegate their fundamental obligations.[14]

14 We also decline the suggestion of defendants and their amici curiae to view all contingent-fee agreements as inherently suspect because of an alleged "appearance of impropriety" created by such arrangements. Contingent-fee arrangements are deeply entrenched as a legitimate and sometimes prudent method of delegating risk in the context of civil litigation, and in the absence of evidence of wrongdoing or unethical conduct we decline to impugn this means of compensating counsel in the context of civil litigation.

Defendants also contend that the concept of "control" is unworkable as a standard to govern future cases, because it will be difficult (if not impossible) for a trial court to monitor whether government counsel for a public entity is adequately fulfilling his or her supervisory role and controlling all important aspects of the litigation, including procedural tactics, the gathering and presentation of evidence, the consideration and resolution of settlement negotiations, and other discretionary matters. Defendants assert that short of egregious actions on the part of private counsel or the supervising government attorney, violations of the "control" exception would be difficult to detect.[15]

[15] In the present case, the evidence of the public entities' control consists of the fee arrangements as well as the declarations submitted by the public entities and their private attorneys. (See *ante*, 112 Cal.Rptr.3d at pp. 703–705, and fns. 2, 3 & 4, 235 P.3d at pp. 26–28, and fns. 2, 3 & 4.) Defendants assert in their briefing that they further attempted to obtain discovery regarding the actual control being exercised by the public entities, but that those entities refused to disclose any such additional documents, citing the attorney-client privilege.

***63** These practical concerns do not require the barring of contingent-fee arrangements in all public prosecutions. Instead, to ensure that public attorneys exercise real rather than illusory control over contingent-fee counsel, retainer agreements providing for contingent-fee retention should encompass more than boilerplate language regarding "control" or "supervision," by identifying certain critical matters regarding the litigation that contingent-fee counsel must present to government attorneys for decision. The requisite specific provisions, described *****719** below, are not comprehensive panaceas and may not all operate perfectly in the context of every contingent-fee situation, but each of them will assist parties and the court in assessing whether private counsel are abusing their prosecutorial office. Moreover, adherence to these provisions is subject to objective verification both by defendants and by the court without the need for engaging in discovery that might intrude upon the attorney-client privilege or attorney work product protections.

[16] [17] In a case such as the present one, in which any remedy will be primarily monetary in nature, the authority to settle the case involves a paramount discretionary decision and is an important factor in ensuring that defendants' constitutional right to a fair trial is not compromised by overzealous actions of an attorney with a pecuniary stake in the outcome. Accordingly, retention agreements between public entities and private counsel must specifically provide that decisions regarding settlement of the case are reserved exclusively to the discretion of the public entity's own attorneys. Similarly, such agreements must specify that any defendant ****40** that is the subject of such litigation may contact the lead government attorneys directly, without having to confer with contingent-fee counsel. (Cf. ABA Formal Ethics Opn. No. 06–443 (Aug. 5, 2006) ["Model Rule of Professional Conduct 4.2 generally does not prohibit a lawyer who represents a client in a matter involving an organization from communicating with the organization's inside counsel about the subject of the representation without obtaining the prior consent of the entity's outside counsel"].)[16]

[16] The primacy of the discretionary authority to settle a case recently was invoked by a federal court in Ohio that considered Sherwin–Williams Company's challenge, on unspecified unconstitutional grounds, to the contingent-fee agreements between three Ohio cities and private counsel in a lead paint public-nuisance abatement action very similar to the underlying action in the present case. (*Sherwin–Williams Co. v. City of Columbus* (S.D.Ohio, July 18, 2007, No. C2–06–829) 2007 WL 2079774, 2007 U.S. Dist. Lexis 51945.) The court originally had barred the private attorneys from providing legal representation, because "the contingency fee agreements between private counsel and the three cities were unconstitutional insofar as the agreements reposed an impermissible degree of public authority upon retained counsel, who have a financial incentive not necessarily consistent with the interests of the public body." (2007 WL 2079774 at p. *1, 2007 U.S. Dist. Lexis 51945 at pp. *3–*4.) In a subsequent ruling, the court approved the two contingent-fee agreements that had been amended to expressly vest in the city attorney "control over the litigation and the sole authority to authorize any settlement of any claim or complaint." (*Id.* at p. *2, 2007 U.S. Dist. Lexis 51945 at p. *6.) The third agreement, however, still was deficient, because it provided that neither private counsel nor the city could settle or dismiss the case without the consent of the other. (*Id.* at p. *3, 2007 U.S. Dist. Lexis 51945 at p. *10.) The court stated that it had made it "abundantly clear" in its previous ruling that a contingent-fee agreement "between a municipality and private counsel in a public nuisance action which purports to vest in private counsel authority to prevent a settlement or dismissal of a suit is unconstitutional." (*Ibid.*)

[18] ***64** Additionally, we adopt, in slightly modified form, the specific guidelines set forth by the Supreme Court of Rhode Island in *State of Rhode Island*, *supra*, 951 A.2d at page 477, footnote 52. Specifically, contingent-fee agreements between public entities and private counsel must provide: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with *****720** supervisory authority must be personally involved in overseeing the litigation.

These specific provisions are not exhaustive. The unique circumstances of each prosecution may require a different set of guidelines for effective supervision and control of the case, and public entities may find it useful to specify other discretionary decisions that will remain vested in government attorneys. Nevertheless, the aforementioned provisions comprise the minimum requirements for a

retention agreement between a public entity and private counsel adequate to ensure that critical governmental authority is not improperly delegated to an attorney possessing a personal pecuniary interest in the case.

III

In the present case, five of the seven contingent-fee agreements between the public entities and private counsel contained in the record provide that the public entities' government counsel "retain final authority over all aspects of the Litigation."[17] Declarations of public counsel for these five public entities confirm that these individuals "retained and continue to retain complete control of the litigation," have been "actively involved in and direct all decisions related to the litigation," and have "direct oversight over the work of outside counsel." Private counsel submitted declarations confirming that the government counsel for the five public entities retain "complete control" over the litigation.[18] The references in these agreements to "final authority ***65** over all aspects of the ****41** litigation" fairly can be read to mandate that the government attorneys will supervise the work of the private attorneys, and will retain authority to control all critical decisionmaking in the case. The declarations establish that such general control and supervision have been exercised and are, in fact, being exercised.

[17] These five agreements are those of San Francisco, Santa Clara, Alameda, Monterey, and San Diego.

[18] As noted above, Oakland and Solano County have submitted declarations of their public counsel asserting that government attorneys retain full "control" over all aspects of the litigation. Nonetheless, those two entities' fee agreements in the record do not reflect this arrangement, make no provision for the retention of "final authority over all aspects" of the litigation, and do not otherwise specify that the private attorneys are subject to the supervision of public counsel. As noted above, the fee agreements for the County of Los Angeles, the City of Los Angeles, and San Mateo are not contained in the record before us.

Nevertheless, although five of the 10 fee agreements between the respective public entities and private counsel contain language specifying that control and supervision will be retained by the government attorneys, none of the ten fee agreements in the present case contain the other specific provisions regarding retention of control and division of responsibility that we conclude are required to safeguard against abuse of the judicial process. Accordingly, because the seven agreements that are in the record are deficient under the standard we set forth above, and because we cannot assess the sufficiency of the three remaining agreements that are not contained in the record, we reverse the judgment rendered by the Court of Appeal and remand the matter for further proceedings consistent with this opinion. Assuming the public entities contemplate pursuing this litigation assisted by private counsel on a contingent-fee basis, we conclude they may do so after revising the respective retention agreements to conform with the requirements set forth in this opinion.

WE CONCUR: KENNARD, CHIN, MORENO, JJ., and RICHMAN, J.[*]

[*] Associate Justice of the Court of Appeal, First Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

*****721** Concurring opinion by WERDEGAR, J.

I concur in the judgment insofar as it vacates the superior court's order barring the plaintiff public entities from paying their private counsel under contingent fee agreements.

Although I do not agree with every aspect of the majority's reasoning, I do agree this court spoke too broadly in 1985 when it prohibited contingent fee agreements in all public nuisance cases. (See *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 748–750, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*).) As the majority explains, public nuisance cases comprise a wide range of factual situations, some of which do not necessarily entail a conflict of interest between public-entity plaintiffs and private attorneys retained under contingent fee agreements. To limit *Clancy* is thus appropriate, as the majority concludes.

In this case, however, at least a possible conflict of interest arises from the combination of two circumstances: The public entities assert they cannot afford to pay private counsel other than a contingent fee, and some of the fee ***66** agreements at issue give private counsel a share of the value of any abatement ordered by the court. Given the hypothetical choice between an abatement order of great public value and a less valuable

cash settlement,[1] both the public and the private attorneys have an incentive to advocate the less valuable cash settlement, as it provides funds from which private counsel can be paid without an appropriation of public money representing the private attorneys' share of the value of abatement. Certainly this incentive does not amount to a personal conflict of interest requiring the public attorneys' recusal, as the majority explains (maj. opn., *ante,* 112 Cal.Rptr.3d at p. 715, 235 P.3d at p. 36–37), but it does lead me to question whether public attorneys under all foreseeable circumstances will be able to exercise the independent supervisory judgment the majority concludes is essential if private counsel are to be retained under contingent fee agreements. Here, however, the parties' briefing on the subject of possible remedies is so vague, any such conflict is merely speculative.

[1] The government cannot recover damages in public nuisance cases. (*People ex rel. Van de Kamp v. American Art Enterprises, Inc.* (1983) 33 Cal.3d 328, 333, fn. 11, 188 Cal.Rptr. 740, 656 P.2d 1170.)

In concurring in the judgment, I am also influenced by the concern that to grant defendants' motion might encourage parties in future cases to bring belated motions seeking ****42** to interfere with their opposing parties' attorney-client relationships for tactical reasons. Although plaintiffs commenced this action in 2000, and although defendants do not assert they learned of the contingent fee agreements only recently,[2] defendants did not challenge those agreements until 2007, after losing pretrial dispositive motions on appeal.[3] (See *County of Santa Clara v. Atlantic* *****722** *Richfield Co.* (2006) 137 Cal.App.4th 292, 40 Cal.Rptr.3d 313.) In ruling on a motion to disqualify counsel, the court may properly consider the possibility that the motion is a tactical device (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371; *Comden v. Superior Court* (1978) 20 Cal.3d 906, 915, 145 Cal.Rptr. 9, 576 P.2d 971) and deny the motion when unreasonable delay has caused great prejudice (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 599–600, 283 Cal.Rptr. 732; *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1313, 234 Cal.Rptr. 33). To grant defendants' motion in this case could as a practical matter force plaintiffs to abandon their lawsuit after nearly a decade of pretrial litigation and discovery. While defendants have asked the court not to *disqualify* plaintiffs' counsel but instead simply to bar plaintiffs from *compensating* counsel on a contingent basis, the only authority for defendants' motion is ***67** the body of law concerning disqualification. Because there is evidence indicating that an order prohibiting contingent fees would as a practical matter preclude private counsel's participation—in effect disqualifying them—the rule requiring timely presentation of the motion would logically apply.

[2] Plaintiff City and County of San Francisco's contingent fee agreement, for example, has been public knowledge since 2001, when the Board of Supervisors authorized the City Attorney to enter into it. (S.F. Res. No. 190–01, as amended Feb. 13, 2001.)

[3] I recognize that until 2007 the complaint included additional causes of action that did not implicate contingent fee concerns, but this would not have precluded an earlier motion to prohibit contingent fee arrangements with respect to the public nuisance cause of action.

I CONCUR: RIVERA, J.[*]

[*] Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

All Citations

50 Cal.4th 35, 235 P.3d 21, 112 Cal.Rptr.3d 697, 10 Cal. Daily Op. Serv. 9422, 2010 Daily Journal D.A.R. 11,498

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HYPOTHETICAL C

Attorney's Duty to Protect Confidential and Privileged Information

California Business & Professions Code § 6068

California Evidence Code ("CEv.C") § 954

California Evidence Code ("CEv.C") § 955

CRPC 1.4

CRPC 1.6

CRPC 1.8.2

CRPC 1.18

Wells Fargo Bank, N.A. v. Sup. Ct. (Boltwood) (2000) 22 C4th 201, 209

City and County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839, 846

In re Soale (1916) 31 Cal. App. 144, 153

California State Bar Formal Opinion 2016-195

West's Ann.Cal.Bus. & Prof.Code § 6068

§ 6068. Duties of attorney

Effective: January 1, 2019

Currentness

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(*l*) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(*o*) To report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, “against the attorney” includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney’s knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

Credits

(Added by Stats.1939, c. 34, p. 355, § 1. Amended by Stats.1985, c. 453, § 11; Stats.1986, c. 475, § 2; Stats.1988, c. 1159, § 5; Stats.1990, c. 1639 (A.B.3991), § 4; Stats.1999, c. 221 (S.B.143), § 1; Stats.1999, c. 342 (S.B.144), § 2; Stats.2001, c. 24 (S.B.352), § 4; Stats.2003, c. 765 (A.B.1101), § 1, operative July 1, 2004; Stats.2018, c. 659 (A.B.3249), § 50, eff. Jan. 1, 2019.)

West’s Ann. Cal. Bus. & Prof. Code § 6068, CA BUS & PROF § 6068

Current with urgency legislation through Ch. 1 of 2023 Reg.Sess. Some statute sections may be more current, see credits for details.

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West's Annotated California Codes
Evidence Code (Refs & Annos)
Division 8. Privileges (Refs & Annos)
Chapter 4. Particular Privileges (Refs & Annos)
Article 3. Lawyer-Client Privilege (Refs & Annos)

West's Ann.Cal.Evid.Code § 954

§ 954. Lawyer-client privilege

Currentness

Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

Credits

(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1968, c. 1375, p. 2695, § 2; Stats.1994, c. 1010 (S.B.2053), § 104.)

West's Ann. Cal. Evid. Code § 954, CA EVID § 954
Current with urgency legislation through Ch. 1 of 2023 Reg.Sess. Some statute sections may be more current, see credits for details.

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West's Ann.Cal.Evid.Code § 955

§ 955. When lawyer required to claim privilege

Currentness

The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.

Credits

(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

West's Ann. Cal. Evid. Code § 955, CA EVID § 955
Current with urgency legislation through Ch. 1 of 2023 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Rules of the State Bar of California (Refs & Annos)
California Rules of Professional Conduct (Refs & Annos)
Chapter 1. Lawyer-Client Relationship

Prof.Conduct, Rule 1.4
Formerly cited as CA ST RPC Rule 3-500

Rule 1.4. Communication with Clients

Effective: January 1, 2023

Currentness

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;

(2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

(4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order,

non-disclosure agreement, or limitation under statutory or decisional law.

Credits

(Adopted, eff. Nov. 1, 2018.)

Footnotes

[*]

An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.4, CA ST RPC Rule 1.4
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

West's Annotated California Codes
Rules of the State Bar of California (Refs & Annos)
California Rules of Professional Conduct (Refs & Annos)
Chapter 1. Lawyer-Client Relationship

Prof.Conduct, Rule 1.5
Formerly cited as CA ST RPC Rule 4-200

Rule 1.5. Fees for Legal Services

Currentness

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.

(b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:

(1) whether the lawyer engaged in fraud[1] or overreaching in negotiating or setting the fee;

(2) whether the lawyer has failed to disclose material facts;

(3) the amount of the fee in proportion to the value of the services performed;

(4) the relative sophistication of the lawyer and the client;

(5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(7) the amount involved and the results obtained;

(8) the time limitations imposed by the client or by the circumstances;

(9) the nature and length of the professional relationship with the client;

(10) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(11) whether the fee is fixed or contingent;

(12) the time and labor required; and

(13) whether the client gave informed consent* to the fee.

(c) A lawyer shall not make an agreement for, charge, or collect:

(1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.

(e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.

Credits

(Adopted, eff. Nov. 1, 2018.)

Footnotes

[1] An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.5, CA ST RPC Rule 1.5
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

Prof.Conduct, Rule 1.6
Formerly cited as CA ST RPC Rule 3-100

Rule 1.6. Confidential Information of a Client

Currentness

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,[1] or the disclosure is permitted by paragraph (b) of this rule.

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).

(c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable* under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).

(d) In revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

Credits

(Adopted, eff. Nov. 1, 2018.)

Footnotes

[1] An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.6, CA ST RPC Rule 1.6
Current with amendments received through March 15, 2024. Some rules may be more current, see credits for details.

Validity

There are no Validity results for this citation.

Prof.Conduct, Rule 1.8.2

Rule 1.8.2. Use of Current Client's Information

Currentness

A lawyer shall not use a client's information protected by Business and Professions Code section 6068, subdivision (e)(1) to the disadvantage of the client unless the client gives informed consent,[1] except as permitted by these rules or the State Bar Act.

Credits

(Adopted, eff. Nov. 1, 2018.)

Footnotes

1 An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.8.2, CA ST RPC Rule 1.8.2
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

Prof.Conduct, Rule 1.18

Rule 1.18. Duties To Prospective Client

Currentness

(a) A person[1] who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that the lawyer learned as a result of the consultation, except as rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received information that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:

(1) both the affected client and the prospective client have given informed written consent,* or

(2) the lawyer who received the information took reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client; and

(i) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written* notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.

Credits

(Adopted, eff. Nov. 1, 2018.)

Footnotes

[1] An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.18, CA ST RPC Rule 1.18
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

22 Cal.4th 201, 990 P.2d 591, 91 Cal.Rptr.2d 716, 00 Cal. Daily Op. Serv. 362, 200 Daily Journal D.A.R. 479
Supreme Court of California

WELLS FARGO BANK, N.A., Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
VICKIE BOLTWOOD et al., Real Parties in Interest. O'MELVENY & MYERS LLP, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
VICKIE BOLTWOOD et al., Real Parties in Interest.

No. S057324.
Jan. 13, 2000.

SUMMARY

A bank, which was the trustee of a trust, petitioned the trial court to settle its accounts and to approve its resignation as cotrustee. Some of the trust beneficiaries alleged trustee misconduct by the bank and sought production of documents related to the trust. The bank asserted the attorney-client privilege as to documents reflecting confidential communications with its attorneys about the beneficiaries' claims of misconduct. The bank's counsel claimed the protection of the work product doctrine for other documents. The beneficiaries moved to compel production of the withheld documents, and the trial court granted the motion. (Superior Court of Los Angeles County, No. BP18213, Robert M. Letteau, Judge.) The Court of Appeal, Second Dist., Div. Four, Nos. B102332 and B102399, granted the petitions of the bank and counsel for a writ of mandate, vacating the trial court's order compelling production of documents subject to the attorney-client privilege and directing the trial court to examine in camera the documents for which counsel had claimed the protection of the work product doctrine.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that the bank properly asserted the attorney-client privilege against the beneficiaries as to documents reflecting confidential communications with its attorneys about the beneficiaries' claims of misconduct and as to any undisclosed documents reflecting confidential communications with attorneys on the subject of trust administration. The bank's duty to disclose information to the beneficiaries did not take precedence over the attorney-client privilege. Further, although the bank had already disclosed to the beneficiaries some confidential communications with attorneys on the subject of trust administration, it had no obligation to do so, and the bank's disclosure of these privileged communications did not waive its privilege as ***202** to the remaining undisclosed communications. The court also held that, under the work product doctrine, the beneficiaries were not entitled to discovery of counsel's work product that was not communicated to the bank. As to work product documents communicated to the bank, the trial court was required to hold an in camera review to determine whether they were protected from disclosure. (Opinion by Werdegar, J., with George, C. J., Kennard, Chin, Brown, JJ., and Haerle, J.,* concurring. Concurring and dissenting opinion by Mosk, J. (see p. 215).)

* Associate Justice of the Court of Appeal, First District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

Classified to California Digest of Official Reports

([1a], [1b], [1c])
Discovery and Depositions § 34.2--Protections Against Improper Discovery--Attorney-client Privilege--Communications Between Trustee and Counsel Regarding Claims of Trustee Misconduct and Subject of Trust Administration--Duty to Disclose.
In an action against a bank, which acted as trustee of a trust, brought by some of the trust beneficiaries alleging trustee misconduct, the bank properly asserted the attorney-client privilege against the beneficiaries as to documents reflecting confidential communications with its attorneys about the beneficiaries' claims of misconduct and as to any undisclosed documents reflecting confidential communications with attorneys on the subject of trust administration, even though the bank had

produced some documents reflecting confidential communications with its attorneys on the subject of trust administration. There is no authority for requiring a trustee to produce communications protected by the attorney-client privilege, regardless of their subject matter. In this case, the bank's duty to disclose information to the beneficiaries did not take precedence over the attorney-client privilege. Further, although the bank had already disclosed to the beneficiaries confidential communications with attorneys, it had no obligation to do so, and the bank's disclosure under a good-faith mistake of law did not waive its privilege as to the remaining undisclosed communications.

[See 2 Witkin, Cal. Evidence (3d ed. 1986) § 1107 et seq.]

([2])
Evidence § 1--Statutory Privileges--Power of Courts.
The privileges set out in the Evidence Code are legislative creations. The courts have no power to expand them or to recognize implied exceptions. ***203**

([3])
Attorneys at Law § 10--Attorney-client Relationship--Attorney for Trustee.
The attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust. The attorney represents only the trustee.

([4])
Discovery and Depositions § 34.2--Protections Against Improper Discovery--Attorney-client Privilege--Scope of Privilege.
Knowledge that is not otherwise privileged does not become so merely by being communicated to an attorney. A client may be examined on deposition or at trial as to facts of the case, whether or not he or she has communicated them to his or her attorney. Moreover, the forwarding to counsel of nonprivileged records, in the guise of reports, will not create a privilege with respect to such records and their contents where none existed before.

([5])
Estoppel and Waiver § 18--Waiver--Definition.
A waiver is the intentional relinquishment of a known right.

([6])
Estoppel and Waiver § 18--Waiver--Honest Mistake of Law--As Precluding Finding of Waiver.
An honest mistake of law, where the law is unsettled and debatable, both militates against a finding of waiver and offers a possible basis for relief from actions taken in connection with pretrial discovery.

([7])
Discovery and Depositions § 34.2--Protections Against Improper Discovery--Attorney-client Privilege--Ownership of Privilege--Payment of Fees.
Payment of fees to an attorney does not determine ownership of the attorney-client privilege. The privilege belongs to the client. To the extent the source of a payment has any significance, it is but one factor in determining the existence of an attorney-client relationship and, thus, who holds the privilege.

([8a], [8b])
Discovery and Depositions § 35--Protections Against Improper Discovery--Privileges--Work Product Rule--Trusts--Communications Between Trustee and Counsel Regarding Claims of Trustee Misconduct--In Camera Review.
In litigation brought by certain trust beneficiaries alleging trustee misconduct by a bank, which acted as trustee, the bank's outside trust administration counsel properly claimed the protection of the work product doctrine for certain documents under the work product doctrine, which excludes from discovery any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories. The beneficiaries were not entitled to discovery of counsel's work product that was not communicated to the bank. As to work product documents communicated to the ***204** bank, the trial court was required to hold an in camera review to determine whether they were communicated in confidence so as to be protected from disclosure.

[See 2 Witkin, Cal. Evidence (3d ed. 1986) § 1145 et seq.]

([9])
Discovery and Depositions § 35--Protections Against Improper Discovery--Privileges--Work Product Rule--Scope--Exception.
Under the work product doctrine, codified in Code Civ. Proc., § 2018, any writing that reflects an attorney's

impressions, conclusions, opinions, or legal research or theories is not discoverable. The sole exception to the literal wording of the statute is under the waiver doctrine, which applies to the work product rule as well as the attorney-client privilege. The attorney's absolute work product protection, however, continues as to the contents of a writing delivered to a client in confidence. This is because the client has an interest in the confidentiality of the work product. So, too, do other attorneys representing that client. The work product doctrine precludes third parties not representing the client from discovery of protected writings.

COUNSEL
White & Case, John A. Sturgeon, James R. Cairns and Carole C. Peterson for Petitioner Wells Fargo Bank, N.A.
O'Melveny & Myers, Robert M. Schwartz, Craig A. Corman, Nancy E. Sussman, Richard D. Beller and Russell G. Allen for Petitioner O'Melveny & Myers.
Christopher Chenoweth; Steefel, Levitt & Weiss, Stephen S. Mayne, Lisa M. Carvalho and Mark Fogelman for California Bankers Association as Amicus Curiae on behalf of Petitioners.
No appearance for Respondent.
Goldstein & Phillips, Goldstein & Musto, Alvin H. Goldstein, Jr., Mark L. Musto and Kelly J. Snowden for Real Parties in Interest.

WERDEGAR, J.

In this action for an accounting, the beneficiaries of a private express trust seek to compel the trustee to disclose its privileged ***205** communications with attorneys. We conclude the trustee may assert the attorney-client privilege against the beneficiaries.

I. Facts and Procedural History

William A. Couch established the Couch Living Trust in October 1991. He served as the sole trustee until his death in March 1992. At that time, William's surviving spouse, Rosa Couch, and petitioner Wells Fargo Bank, N.A. (Wells Fargo) became cotrustees pursuant to the trust instrument. The beneficiaries of the trust are William's spouse, children and grandchildren. William's daughter, Vickie Boltwood, and her children (collectively the Boltwoods) are the real parties in interest.

In November 1994, the Boltwoods accused the trustees of a variety of misconduct. The Boltwoods' claims center around allegations that the trustees distributed less money to the Boltwoods than they requested, and that the trustees, over the Boltwoods' objection, decided not to sell certain real property in Anaheim. The Boltwoods also allege that Rosa Couch, shortly after her husband's death, removed money and jewelry from a safe deposit box. The other beneficiaries have not joined in the Boltwoods' claims.

In December 1994, Wells Fargo commenced this action by petitioning the probate court to settle its accounts and to approve its resignation as cotrustee. The Boltwoods filed objections to Wells Fargo's accounts and petitioned for removal of Rosa Couch as cotrustee, and for surcharge and damages.

In the course of the litigation, the Boltwoods requested that Wells Fargo produce documents related to the trust. Wells Fargo produced documents reflecting confidential communications with its attorneys on the subject of trust administration. Wells Fargo asserted the attorney-client privilege, however, as to documents reflecting communications with its attorneys about the Boltwoods' claims of misconduct. Wells Fargo's outside trust administration counsel, O'Melveny & Myers (O'Melveny), claimed the protection of the work product doctrine for other documents. For the documents not produced, Wells Fargo and O'Melveny provided a privilege log setting out for each document the privilege asserted and the document's sequential number, general nature, date, author and recipients. According to the log, the documents not produced include communications between Wells Fargo's employees and its attorneys, either in-house or at O'Melveny, and work product of O'Melveny.

The Boltwoods moved to compel production. The superior court granted the motion and ordered Wells Fargo to produce the remaining documents ***206** within 30 days. The court did not announce findings of fact or conclusions of law, either orally or in writing. Wells Fargo petitioned the Court of Appeal for a writ of mandate or prohibition and sought a stay of the superior court's order. O'Melveny also sought a stay and extraordinary relief. The Court of Appeal considered the petitions together and granted relief. Specifically, the court vacated the superior court's order compelling production of documents subject to the attorney-client privilege and directed the superior court to examine in camera the documents as to which O'Melveny had claimed the protection of the work product doctrine.

We granted the Boltwoods' petition for review and held the case for *Moeller v. Superior Court* (1997) 16 Cal.4th 1124 [69 Cal.Rptr.2d 317, 947 P.2d 279] (*Moeller*). We

now affirm.

II. Discussion

A. *The Attorney-client Privilege*

([1a]) Wells Fargo has already produced to the Boltwoods documents reflecting privileged communications with attorneys on the subject of trust administration. The Boltwoods contend that Wells Fargo must produce additional privileged documents of that type, as well as privileged documents concerning the Boltwoods' claims of misconduct. As will appear, there is no authority in California law for requiring a trustee to produce communications protected by the attorney-client privilege, regardless of their subject matter.

The Boltwoods contend Wells Fargo must produce privileged communications to fulfill its statutory and common law duties as a trustee to report to the beneficiaries about the trust and its administration. (See Prob. Code, §§ 16060, 16061; *Strauss v. Superior Court* (1950) 36 Cal.2d 396, 401 [224 P.2d 726]; *Union Trust Co. v. Superior Court* (1938) 11 Cal.2d 449, 460-462 [81 P.2d 150, 118 A.L.R. 259].) Wells Fargo's duties as a trustee, the Boltwoods argue, take precedence over its privilege as the client of an attorney. (Evid. Code, § 954.) The argument lacks merit. ([2]) The privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 [20 Cal.Rptr.2d 330, 853 P.2d 496]; see also *Moeller, supra*, 16 Cal.4th at p. 1129.) The Boltwoods' argument is nothing more than a plea for an implied exception.

If the relevant sections of the Probate Code imposed duties a trustee literally could not perform without disclosing privileged communications, ***207** one might have reason to ask whether the Legislature had, in fact, created an exception to the attorney-client privilege. But the relevant statutes cannot fairly be read to require disclosure of privileged communications. Probate Code section 16060 provides simply that "[t]he trustee has a duty to keep the beneficiaries of the trust *reasonably informed* of the trust and its administration." (Italics added.) Probate Code section 16061 in pertinent part says only that, "[e]xcept as provided in Section 16064, on reasonable request by a beneficiary, the trustee shall provide the beneficiary with *a report of information* about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust ...." (Italics added.) Certainly a trustee can keep beneficiaries "reasonably informed" (*id.*, § 16060) and provide "a report of information" (*id.*, § 16061) without necessarily having to disclose privileged communications. The attorney-client privilege is commonly regarded as "fundamental to ... the proper functioning of our judicial system" (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 611 [208 Cal.Rptr. 886, 691 P.2d 642]) and thought to "promote broader public interests in the observance of law and administration of justice" (*Upjohn Co. v. United States* (1981) 449 U.S. 383, 389 [101 S.Ct. 677, 682, 66 L.Ed.2d 584]). If the Legislature had intended to restrict a privilege of this importance, it would likely have declared that intention unmistakably, rather than leaving it to courts to find the restriction by inference and guesswork in the interstices of the Probate Code.

Nor does the Boltwoods' argument for limiting the attorney-client privilege find support in *Strauss v. Superior Court, supra*, 36 Cal.2d 396. In that decision, we acknowledged the trustee's common law duty to report to beneficiaries, a duty later codified in Probate Code sections 16060 and 16061.[1] More specifically, we held that "[a] trustee has the duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information relative to the administration of the trust" (*Strauss v. Superior Court, supra*, at p. 401) and that "the trustee's records as to the administration of the trust are deemed a part of the trust estate, and the right of the beneficiaries to an inspection of them stems from their common interest in the property along with the trustee" (*id.* at p. 402). Our earlier decision in *Union Trust Co. v. Superior Court, supra*, 11 Cal.2d at pages 460-462, is to the same effect. In neither *Strauss* nor *Union Trust Co.*, however, did we address any question concerning the attorney-client privilege. To attempt to use those decisions as the foundation for an implied ***208** exception to the attorney-client privilege would, moreover, be inconsistent with the rule that we have no power to create such exceptions. (See *Roberts v. City of Palmdale, supra*, 5 Cal.4th at p. 373.)

1 See the California Law Revision Commission's comment to Probate Code section 16060: "The section is drawn from the first sentence of Section 7-303 of the Uniform Probate Code (1987) and is consistent with the duty stated in prior California case law to give beneficiaries complete and accurate information relative to the administration of a trust when requested at reasonable times. See Strauss v. Superior Court ...." (Cal. Law Revision Com. com., 54A West's Ann. Prob. Code (1991 ed.) foll. § 16060, p. 51.)

In most of the other jurisdictions in which this question has arisen, courts have given the trustee's reporting duties precedence over the attorney-client privilege. (See, e.g., *Hoopes v. Carota* (1988) 142 A.D. 906 [531 N.Y.S.2d 407, 409], affd. (1989) 74 N.Y.2d 716 [544 N.Y.S.2d 808, 543 N.E.2d 73]; *Riggs Nat. Bank of Washington, D. C. v. Zimmer* (Del.Ch. 1976) 355 A.2d 709, 712-714; *United States v. Evans* (9th Cir. 1986) 796 F.2d 264, 265-266; *Washington-Baltimore, etc. v. Washington Star Co.* (D.D.C. 1982) 543 F.Supp. 906, 908-909.) But those courts consider themselves free, in a way we do not, to create exceptions to the privilege. New York's attorney-client privilege, while statutory, is "not absolute." (*Hoopes v. Carota, supra*, 531 N.Y.S.2d at p. 409.) Instead, the courts of that state consider the privilege an " ' "obstacle" to the truth-finding process' " that may "yield to a strong public policy requiring disclosure ...." (*Ibid.*) The law in Delaware evolved at a time when that state recognized the attorney-client privilege solely as a matter of common law. As such, Delaware courts have considered the privilege to be "an exception to the usual rules requiring full disclosure" and have held that "its scope can be limited where circumstances so justify." (*Riggs Nat. Bank of Washington, D. C. v. Zimmer, supra*, 355 A.2d at p. 713.) The federal courts, interpreting their own common law attorney-client privilege (see generally *Upjohn Co. v. United States, supra*, 449 U.S. at p. 389 [101 S.Ct. at p. 682]; *Hunt v. Blackburn* (1888) 128 U.S. 464, 470 [9 S.Ct. 125, 127, 32 L.Ed. 488]), have largely followed *Riggs*. (E.g., *U.S. v. Mett* (9th Cir. 1999) 178 F.3d 1058, 1062-1064; *United States v. Evans, supra*, 796 F.2d at pp. 265-266; *Washington-Baltimore, etc. v. Washington Star Co., supra*, 543 F.Supp. at pp. 908-909.)

Typical of the federal decisions is *U.S. v. Mett, supra*, 178 F.3d 1058. In *Mett*, the Ninth Circuit held that a trustee can invoke the federal common law attorney-client privilege against beneficiaries when the trustee "retains counsel in order to defend herself against the ... beneficiaries," but not when the "trustee seeks an attorney's advice on a matter of [trust] administration and where the advice clearly does not implicate the trustee in any personal capacity ...." (*Id.* at p. 1064.) Neither of the two reasons the court gave for this conclusion has any validity under California law. ([3]) The court's suggestion that the trustee " 'is not the real client' " (*id.* at p. 1063) of the attorney retained by the trustee directly contradicts California law, under which "[t]he attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust. The attorney represents only the trustee." (***209** *Fletcher v. Superior Court* (1996) 44 Cal.App.4th 773, 777 [52 Cal.Rptr.2d 65]; accord, *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 282 [218 Cal.Rptr. 205]; cf. *Moeller, supra*, 16 Cal.4th at p. 1130.) Nor, under California law, could a "fiduciary exception [to the attorney-client privilege] ... be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle." (*U.S. v. Mett, supra*, at p. 1063.) What courts in other jurisdictions give as common law privileges they may take away as exceptions. We, in contrast, do not enjoy the freedom to restrict California's statutory attorney-client privilege based on notions of policy or ad hoc justification. (*Roberts v. City of Palmdale, supra*, 5 Cal.4th at p. 373.) Furthermore, under California law, the attorney-client privilege "applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened." (*Id.* at p. 371.)

The Boltwoods argue that our recent decision in *Moeller, supra*, 16 Cal.4th 1124, compels a different result. It does not. In *Moeller*, we held that a successor trustee, unless the trust instrument otherwise provides, assumes the power to assert the attorney-client privilege as to confidential communications between an attorney and a predecessor trustee on the subject of trust administration, so long as the predecessor was acting in the official capacity of trustee rather than in a personal capacity. (*Id.* at pp. 1130-1135.) The Boltwoods describe *Moeller* as creating "rights of inspection" that should be extended to beneficiaries. This is simply incorrect. In *Moeller*, we did not suggest that anyone other than the current holder of the privilege might be entitled to inspect privileged communications. Nor did we create or recognize any exceptions to the privilege. Instead, without questioning that the communications at issue were privileged, we merely identified the current holder of the privilege.

The Boltwoods also contend that, even if the trustee's communications with attorneys about its potential liability are privileged, a trustee still should enjoy no privilege as against the beneficiary for communications about trust administration. In support of the argument, the Boltwoods again cite *Moeller, supra*, 16 Cal.4th 1124, and also *Talbot v. Marshfield* (Ch. 1865) 62 Eng.Rep. 728. Neither decision, however, could justify limiting the attorney-client privilege in the manner the Boltwoods propose. Although in *Moeller* we did distinguish between communications about potential liability and communications about trust administration, we did not draw the distinction in order to narrow the privilege. Instead, our purpose was to determine, as between a successor trustee and a predecessor, which trustee was the current holder of the privilege as to any given

communication. More specifically, we explained that "the successor trustee inherits the power to assert the ***210** privilege only as to those confidential communications that occurred when the predecessor, in its fiduciary capacity, sought the attorney's advice for guidance in administering the trust. If a predecessor trustee seeks legal advice in its personal capacity out of a genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds." (*Moeller, supra,* 16 Cal.4th at p. 1134, italics omitted.) In this passage we did not suggest that confidential communications about trust administration might not be privileged. We simply determined who, as between the predecessor trustee and the successor, would be the holder of the privilege under the circumstances posited.

Nor would the decision in *Talbot v. Marshfield*, *supra*, 62 Eng.Rep. 728, justify a California court in limiting the trustee's attorney-client privilege to communications about the trustee's personal liability. We have already explained that courts interpreting common law evidentiary privileges are free, in a way we are not, to recognize exceptions. *Talbot* was such a case. In it, the Court of Chancery required the trustees of a testamentary trust to produce to the beneficiaries an opinion of counsel concerning trust administration that had been prepared before litigation between the trustee and the beneficiaries had commenced. The court did not, however, require the trustees to produce an opinion of counsel prepared after litigation had commenced advising the trustees how to defend themselves. We cited *Talbot* in *Moeller* simply to "articulate[] the distinction between a trustee consulting an attorney as trustee to further the beneficiaries' interests, and a trustee consulting an attorney in his personal capacity to defend against a claim by the beneficiaries ...." (*Moeller, supra,* 16 Cal.4th at p. 1134, fn. 5.) We expressly disclaimed any intention of addressing a trustee's privilege vis-a-vis the beneficiaries. (*Ibid.*)

The Boltwoods suggest that enforcing the trustee's right to assert the attorney-client privilege will permit trustees to shield all deliberations about trust administration, thus entirely frustrating the trustee's statutory reporting duties. (Prob. Code, §§ 16060, 16061.) We discern no good reason to fear such a result. ([4]) Knowledge that is not otherwise privileged does not become so merely by being communicated to an attorney. " ' "Obviously, a client may be examined on deposition or at trial as to facts of the case, whether or not he has communicated them to his attorney." ' " (*People ex rel. Dept. of Public Works v. Donovan* (1962) 57 Cal.2d 346, 355 [19 Cal.Rptr. 473, 369 P.2d 1].) Moreover, "the forwarding to counsel of nonprivileged records, in the guise of reports, will not create a privilege with respect to ***211** such records and their contents where none existed theretofore." (*S.F. Unified Sch. Dist. v. Superior Court* (1961) 55 Cal.2d 451, 457 [11 Cal.Rptr. 373, 359 P.2d 925, 82 A.L.R.2d 1156].)[2]

2 "This distinction may be illustrated by the following hypothetical example: Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information." (*Huie v. DeShazo* (Tex. 1996) 922 S.W.2d 920, 923.)

([1b]) As we noted at the outset, Wells Fargo has already disclosed to the Boltwoods confidential communications with attorneys on the subject of trust administration. From the preceding discussion, however, it follows that Wells Fargo had no obligation to do so. This conclusion renders moot the Boltwoods' further contention that the superior court may review in camera the documents Wells Fargo has withheld in order to determine whether they relate to trust administration or to the trustee's personal liability. The Boltwoods are entitled to neither category of documents. We have, therefore, no occasion to discuss their claim that the superior court might properly conduct such a review despite Evidence Code section 915, which provides that "the presiding officer may not require disclosure of information claimed to be privileged ... in order to rule on the claim of privilege ...."

The Boltwoods argue that Wells Fargo, through disclosures it has already made in discovery, has waived the attorney-client privilege as to the remaining communications not yet disclosed. The argument lacks merit. ([5]) "[A] waiver is the intentional relinquishment of a known right." (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1252 [245 Cal.Rptr. 682].) ([1c]) Wells Fargo, in honoring the Boltwoods' demand for privileged communications regarding trust administration, apparently believed in good faith that the law required the disclosures. Although we conclude the trustee's reporting duties do not trump the attorney-client

privilege, no controlling authority on point existed at the time Wells Fargo responded to the Boltwoods' discovery request. Decisions in other jurisdictions had gone both ways. (Compare the cases cited *ante*, at p. 208, with *Huie v. DeShazo, supra*, 922 S.W.2d 920 [permitting a trustee to assert the attorney-client privilege against a beneficiary].) ([6]) An honest mistake of law, where the law is unsettled and debatable, both militates against a finding of waiver (*BP Alaska Exploration, Inc. v. Superior Court*, *supra*, at p. 1252) and offers a possible basis for relief from actions taken in connection ***212** with pretrial discovery (*Brochtrup v. INTEP* (1987) 190 Cal.App.3d 323, 329 [235 Cal.Rptr. 390]).[3]

3 The Boltwoods also contend that Wells Fargo waived the attorney-client privilege by failing to maintain the confidentiality of its communications with counsel about its potential liability. The argument lacks merit. Assuming for the sake of argument, as the Boltwoods claim, that Wells Fargo kept communications with counsel about potential liability in the same file as communications with counsel about trust administration, and consulted one of its in-house attorneys on both subjects, still no basis would exist for finding a lack of confidentiality. Wells Fargo's communications with its attorneys on both subjects were presumptively privileged and confidential.

As an independent argument for obtaining access to Wells Fargo's privileged communications, the Boltwoods contend they are joint clients of Wells Fargo's attorneys and, thus, entitled to inspect any privileged communications. The general rule, as already noted, is to the contrary. "The attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust. The attorney represents only the trustee." (*Fletcher v. Superior Court, supra*, 44 Cal.App.4th at p. 777; accord, *Lasky, Haas, Cohler & Munter v. Superior Court, supra*, 172 Cal.App.3d at p. 278; cf. *Moeller, supra*, 16 Cal.4th at p. 1130 [when a trustee exercises his statutory power under Probate Code section 16247 to consult an attorney, "the trustee, *qua* trustee, becomes the attorney's client"].)

This is not to say that trustees and beneficiaries could not possibly become joint clients. Because no such relationship is implied in law (*Lasky, Haas, Cohler & Munter v. Superior Court, supra*, 172 Cal.App.3d at p. 278), however, the existence of such a relationship (and its propriety under the rules prohibiting conflicts of interest) would have to be determined on the facts of each individual case. In this case, the Boltwoods assert that a partner of O'Melveny, the firm retained by Wells Fargo to give advice on trust administration, did enter into an attorney-client relationship with the Boltwoods. The record does not support the assertion. The Boltwoods' argument is based on a single sentence in Vickie Boltwood's declaration in support of her motion to compel production of privileged documents: Attorney Leah Bishop, Boltwood avers, "stated to me on one occasion that she represented me as a beneficiary of the [t]rust, and I did not need an attorney ...." Even were it possible to infer from this evidence alone the existence of an attorney-client relationship, Ms. Boltwood's own declaration negates any such inference with the plain statement that "Ms. Bishop did not deal with me as a lawyer in these instances, but rather as a substitute for and liaison for Ms. Hydar (or Ms. Palumbo) [i.e., Wells Fargo's trust officers] ...."

The Boltwoods contend they are entitled to inspect Wells Fargo's privileged communications with attorneys for the additional reason that the trust ***213** paid for the attorney's advice. Wells Fargo concedes the trust paid for O'Melveny's legal services related to trust administration, but asserts it did not pay for the services either of Wells Fargo's in-house attorneys or White & Case, the firm that represents Wells Fargo in this litigation. It does not matter. ([7]) Payment of fees does not determine ownership of the attorney-client privilege. The privilege belongs to the holder, which in this context is the attorney's client. (Evid. Code, § 954, subd. (a).) As discussed above, the *trustee*, rather than the beneficiary, is the client of an attorney who gives legal advice to the trustee, whether on the subject of trust administration (*Moeller, supra*, 16 Cal.4th at pp. 1129-1130; *Fletcher v. Superior Court, supra*, 44 Cal.App.4th at p. 777; *Lasky, Haas, Cohler & Munter v. Superior Court, supra*, 172 Cal.App.3d at p. 278) or of the trustee's own potential liability (cf. *Moeller*, *supra*, at p. 1135). To the extent the source of payment has any significance, it is but one indicium in determining the existence of an attorney-client relationship (*Lasky, Haas, Cohler & Munter v. Superior Court*, *supra*, at p. 285) and, thus, who holds the privilege. In any event, the assumption that payment of legal fees by the trust is equivalent to direct payments by beneficiaries is of dubious validity. (See *id.* at pp. 284-285.) Under California law, a trustee may use trust funds to pay for legal advice regarding trust administration (Prob. Code, § 16247) and may recover attorney fees and costs incurred in successfully defending against claims by beneficiaries (*Estate of Beach* (1975) 15 Cal.3d 623, 644 [125 Cal.Rptr. 570, 542 P.2d 994]; *Estate of Ivy* (1994) 22 Cal.App.4th 873, 883 [28 Cal.Rptr.2d 16]; *Conley v. Waite* (1933) 134 Cal.App. 505, 506-507 [25 P.2d 496]; see Prob. Code, § 15684). When the law gives the trustee a right to use trust funds, or to reimbursement, the funds do not in law belong to the beneficiaries. Conversely, if the trustee's expenditures

turn out to have been unauthorized, the beneficiaries may ask the probate court to surcharge the trustee. But this question of cost allocation does not affect ownership of the attorney-client privilege.[4] ***214**

4 The same principles dispose of the Boltwoods' contention that Wells Fargo's attorney-client privilege has been destroyed by Evidence Code section 956, under which "[t]here is no privilege ... if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." The Boltwoods cryptically suggest that Wells Fargo may have committed fraud by seeking legal advice on its liability to the Boltwoods and paying for that advice with trust funds. The argument lacks merit. As discussed in the accompanying text, a trustee has a right to charge the trust for the cost of successfully defending against claims by beneficiaries. The better practice may be for a trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining separate counsel with personal funds. (Cf. *Moeller, supra*, 16 Cal.4th at pp. 1134-1135.) In any event, Wells Fargo has done substantially that. Of the 126 documents withheld as privileged, only 16 reflect communications by trust administration counsel (O'Melveny) about potential claims that were apparently paid for with trust funds. Once the Boltwoods made clear their intention to assert claims, Wells Fargo retained separate litigation counsel (White & Case). These facts do not amount to the prima facie showing of fraud a litigant must make to invoke Evidence Code section 956. (See generally *State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 643 [62 Cal.Rptr.2d 834]; *BP Alaska Exploration, Inc. v. Superior Court, supra*, 199 Cal.App.3d at p. 1262.)

B. *Attorney Work Product Doctrine*

([8a]) The Boltwoods have also moved to compel disclosure of documents as to which O'Melveny, Wells Fargo's trust administration counsel, has asserted the protection of the work product doctrine. Here, as in the lower courts, the Boltwoods argue that the documents in question lost their protection when O'Melveny transmitted them to their real client, Wells Fargo, or on Wells Fargo's behalf to White & Case, the trustee's litigation counsel.

([9]) The work product doctrine is codified in Code of Civil Procedure section 2018. Subdivision (c) of the statute, on which O'Melveny relies, provides: "Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." (Code Civ. Proc., § 2018, subd. (c).) "The sole exception to the literal wording of the statute which the cases have recognized is under the waiver doctrine[,] which has been held applicable to the work product rule as well as the attorney-client privilege." (*BP Alaska Exploration, Inc. v. Superior Court, supra*, 199 Cal.App.3d at p. 1254, italics omitted; see 2 Jefferson, Cal. Evidence Benchbook (3d ed. 1997) § 41.14, p. 894 (2 Jefferson).) "[T]he attorney's absolute work product protection," however, "continues as to the contents of a writing delivered to a client in confidence." (*BP Alaska Exploration, Inc. v. Superior Court*, *supra*, at p. 1260; see 2 Jefferson, *supra*, § 41.15, p. 894].) This is because "the client has an interest in the confidentiality of the work product ...." (2 Jefferson, *supra*, § 41.15, p. 894.) So, too, do other attorneys representing the client, such as Wells Fargo's litigation counsel, White & Case. "The protection [of the work product doctrine] precludes third parties not representing the client from discovery of [protected] writing[s]." (*BP Alaska Exploration, Inc. v. Superior Court*, *supra*, at p. 1260.)

([8b]) The superior court granted the Boltwoods' motion to compel production of O'Melveny's work product without articulating its reasoning. The Court of Appeal reversed as to all work product documents that O'Melveny did not communicate to its client, Wells Fargo. As to work product documents that O'Melveny did communicate to Wells Fargo, the Court of Appeal directed the superior court "to hold an in camera review ... to determine whether they are protected from disclosure because they were communicated in confidence."

The Court of Appeal ruled correctly. The Boltwoods offered no conceivably valid reason for compelling production of O'Melveny's work product ***215** except the claim of waiver through nonconfidential disclosure.[5] As O'Melveny recognizes, for the superior court to examine the documents in camera is an appropriate way to determine whether they were, in fact, disclosed in confidence. While a court "may not require disclosure of information claimed to be privileged under [division 8 of the Evidence Code] in order to rule on the claim of privilege" (Evid. Code, § 915, subd. (a)), the work product doctrine is codified in Code of Civil Procedure section 2018. Thus, Evidence Code section 915 does not apply. For this reason, courts have recognized that inspection in camera is an appropriate way of determining whether documents are entitled to protection as work product. (*BP Alaska Exploration, Inc. v. Superior Court, supra*, 199 Cal.App.3d at p. 1261; *Lasky, Haas, Cohler & Munter v. Superior Court, supra*, 172 Cal.App.3d at p. 286.)

5 The Boltwoods also contended they were entitled to O'Melveny's work product because they, as

> beneficiaries, are the true clients of the trustee's attorneys. The attorney, however, rather than the client, is the holder of the work product privilege. (*Lasky, Haas, Cohler & Munter v. Superior Court, supra*, 172 Cal.App.3d at p. 271.) In any event, as shown above, the Boltwoods are not O'Melveny's client.

III. Disposition

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Chin, J., Brown, J., and Haerle, J.,* concurred.

* Associate Justice of the Court of Appeal, First District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

MOSK, J.,

Concurring and Dissenting.-I concur in the result, but disagree with the reasoning of the majority that an absolute privilege shields communications between the trustee and the attorney it consulted in its fiduciary capacity on the subject of trust administration.

Wells Fargo Bank, N.A. (Wells Fargo) brought this action for an accounting and approval of its resignation as a trustee of the Couch Living Trust. In response to discovery requests by real parties in interest Vickie Boltwood and her children, as trust beneficiaries, Wells Fargo disclosed attorney-client communications on the subject of administration of the trust; it withheld attorney-client communications regarding claims by the Boltwoods of trustee misconduct. The superior court ordered Wells Fargo to produce the withheld documents; the Court of Appeal vacated the order on the basis that the documents were privileged.

I agree with the majority that the Court of Appeal was correct in holding that communications involving Wells Fargo's potential liability for misconduct were subject to the attorney-client privilege. But I am not persuaded by ***216** the majority's conclusion that Wells Fargo was also entitled to assert the privilege with regard to attorney-client communications on the subject of trust administration, which it obtained *on behalf of the beneficiaries and at their expense*.

In my view, the Probate Code required disclosure of those documents, consistent with the fiduciary duties of the trustee, specifically the duty under Probate Code section 16060 to keep the beneficiaries reasonably informed concerning the trust and its administration by providing complete and accurate information with regard to the administration of the trust. On that basis, I would affirm the judgment of the Court of Appeal.

I

Wells Fargo did not doubt that it had an obligation to produce all documents, including attorney-client communications, relating to its administration of the trust. Nor did the Court of Appeal. Adopting the suggestion of amicus curiae California Bankers Association, however, the majority conclude that such documents, too, were subject to the attorney-client privilege. They assert that there is no authority in California law for requiring a trustee to produce communications protected by the attorney-client privilege, regardless of their subject matter. I disagree. In my view, "the relevant sections of the Probate Code" impose duties "a trustee literally could not perform without disclosing privileged communications." (Maj. opn., *ante*, at p. 206.)

The Probate Code invests the trustee with the power to hire attorneys precisely "to advise or assist the trustee in performance of administrative duties" undertaken subject to its fiduciary duties. (Prob. Code, § 16247.) Exercise of such power is intrinsic to the trustee's general duty of loyalty to the beneficiaries. (See *id.*, § 16202 [trustee's exercise of power is subject to its fiduciary duties].) Moreover, any advice regarding trust administration that was obtained from counsel by the trustee was paid for out of trust funds, i.e., at the beneficiaries' expense. Beneficiaries have an unquestionable interest in such advice obtained by the trustee acting in its fiduciary capacity on their behalf.

Probate Code section 16060 provides: "The trustee has a duty to keep the beneficiaries of the trust *reasonably informed* of the trust and its administration." (Italics added.) Probate Code section 16061 requires the trustee, "on reasonable request," to provide the beneficiary with a report of information about finances of the trusts, acts of the trustee, and "the particulars relating to the administration of the trust relevant to the beneficiary's

interest." ***217**

The Law Revision Commission comment to the 1990 enactment of Probate Code section 16060 explains that the provision "is consistent with the duty stated in prior California case law to give beneficiaries *complete and accurate information relative to the administration of the trust* when requested at reasonable times. [Citation.] ... The trustee is under a duty to communicate to the beneficiary information that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust." (Cal. Law Revision Com. com., 54A West's Ann. Prob. Code (1991 ed.) foll. § 16060, p. 51, italics added.) It cites our holding in *Strauss v. Superior Court* (1950) 36 Cal.2d 396, 401-402 [224 P.2d 726], that "a trustee has the duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information relative to the administration of the trust."

The "complete and accurate information" required under Probate Code section 16060 necessarily includes attorney-client communications concerning administration of the trust. I disagree with the majority that trustees may, under the Probate Code provisions, keep beneficiaries only partly informed. Moreover, I fail to see how a report by the trustee systematically excluding all attorney-client communications and legal advice could be said to meet the requirement under Probate Code section 16061 that it inform beneficiaries about "the acts of the trustee" and "particulars relating to the administration of the trust."

Unlike the majority's, my view of the requirement under Probate Code section 16060 is also consistent with the prevailing rule in most jurisdictions that the trustee's fiduciary duty of full disclosure to the trust beneficiaries extends to *all* contents of the trustee's file concerning trust administration matters affecting the trust interests of the beneficiaries, including legal advice. Thus, Professor Scott summarizes the general law as follows: "The trustee is under a duty to the beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it.... [ ] A beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust." (2A Scott & Fratcher, The Law of Trusts (4th ed. 1987) § 173, pp. 462-465, fn. omitted; see also Bogert, The Law of Trusts and Trustees (2d rev. ed. 1983) ch. 46, § 961, p. 11 ["The beneficiary ... has a right to obtain and review legal opinions given to the trustee to enable the trustee to carry out the trust, except for such opinions as the trustee has obtained on his own account to protect himself against charges of misconduct"]; IA Nossaman et al., Trust Administration and Taxation (1999) § 27.27[1], pp. 27-149 to 27-151 [describing the right of the beneficiary to obtain "all the information as to the trust and its execution for which he has ***218** any reasonable use" as including the right to inspect an opinion of counsel obtained by the trustees concerning their powers in administering the trust]; cf. Rest.2d Trusts, § 173 & com. (b), p. 378 [as an exception to the duty of the trustee to furnish "complete and accurate information as to the nature and amount of trust property," the trustee is "privileged to refrain from communicating to the beneficiary opinions of counsel obtained by him at his own expense and for his own protection"].)

The doctrine is of long standing, finding its roots in the seminal decision in *Talbot v. Marshfield* (1865 Ch.) 62 Eng.Rep. 728, which we cited with approval in *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1134, footnote 5 [69 Cal.Rptr.2d 317, 947 P.2d 279]. As the Court of Chancery in *Talbot* explained: "[T]he *cestuis que trust* have an interest in the due administration of the trust, and in that sense, it was for the benefit of all, as it was for the guidance of the trustees in their execution of the trust. Besides, if a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any *cestuis que trust* a right to see the case and opinion [obtained from counsel]." (*Talbot v. Marshfield*, *supra*, 62 Eng.Rep. at p. 729.)

The majority concede that the overwhelming authority in point is in agreement that beneficiaries are entitled to obtain information concerning attorney advice to the trustee about trust administration. They nonetheless conclude that we are not free to follow such a rule because the attorney-client privilege is a "legislative creation" that must be deemed absolute in this area. (Maj. opn., *ante*, at p. 206.)

I disagree that the Legislature intended by implication to exclude attorney communications from the scope of the duty to furnish information under Probate Code section 16060. It is doubtful that it would have created so detrimental an exception to the trustee's duty under the statute sub silentio; if it had intended to carve out a special rule that attorney-client communications with regard to trust administration are not part of the *complete and accurate information* owed a beneficiary, it would have done so expressly. In stating that there can be no "implied exception" to the attorney-client privilege under Evidence Code section 952 for communications involving trust administration (maj. opn., *ante*, at p. 206), the

majority turn the question on its head. This case does not involve the beneficiaries' right to invoke an *exception* to the Evidence Code provision; rather, because the Probate Code provides that the trustee has a duty to produce all such information, the privilege never adhered to those communications in the first place. ***219**

Nor does the decision in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 [20 Cal.Rptr.2d 330, 853 P.2d 496], which I authored, require a different result. In *Roberts* we addressed the question whether the Public Records Act (Gov. Code, § 6250 et seq.) required public disclosure of a legal opinion of the city attorney distributed to members of the city counsel. (5 Cal.4th at pp. 369-373.) We stressed that although the Public Records Act provides that "every person has a right to inspect any public record," it expressly exempts certain public records from disclosure, including records subject to the attorney-client privilege. (5 Cal.4th at p. 368.) The Probate Code includes no similar exception to the requirement of disclosure under its section 16060.

The majority's rule will permit trustees to conceal deliberations about trust administration, to the detriment of beneficiaries' statutory rights to information. Unlike the majority, I am not sanguine about the implications of such a result. While it is true, as they note, that knowledge not otherwise privileged does not become so merely by being communicated *to* an attorney (maj. opn., *ante*, at p. 210), their holding will privilege all information concerning the nature of advice sought and obtained *from* an attorney on the subject of trust administration. Such undue extension of the attorney-client privilege will operate at the expense of the beneficiaries in a literal as well as legal sense: they must pay for the legal advice that they are barred from reviewing.

II

As we emphasized in *Moeller v. Superior Court*, *supra*, 16 Cal.4th 1124, 1133, a trustee has the equitable obligation to manage property *for the benefit of another*; it acts not in a personal capacity, but as fiduciary for the interests of the beneficiaries. The distinction the Court of Appeal—and Wells Fargo itself—drew between communications regarding administration of the trust on behalf of the beneficiaries and those affecting its own liability was correct. It is consistent with *Moeller* and with the authority cited therein. (See, e.g., *id.* at pp. 1134-1135.) The majority's conclusion is not.

For these reasons I would affirm the judgment of the Court of Appeal solely on the grounds stated therein. ***220**

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38 Cal.4th 839
Supreme Court of California

CITY AND COUNTY OF SAN FRANCISCO et al., Plaintiffs and Appellants,
v.
COBRA SOLUTIONS, INC., et al., Defendants and Respondents.

No. S126397.
|
June 5, 2006.

Synopsis

Background: Technology company which had been represented by city attorney while he was in private practice was added as a defendant in city's action alleging fraud and statutory violations in the execution of certain city contracts. Defendant moved to disqualify entire city attorney's office. The Superior Court, City and County of San Francisco, No. 417218, Donald S. Mitchell, J., granted motion. City appealed. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

[Holding:] The Supreme Court, Kennard, J., held that city attorney's personal conflict was properly imputed to city attorney's office, warranting vicarious disqualification.

Affirmed.

Corrigan, J., filed dissenting opinion, in which George, C.J., joined.

Opinion, 14 Cal.Rptr.3d 400, superseded.

West Headnotes (9)

[1] Attorneys and Legal Services Inherent power or jurisdiction

The authority of a trial court to disqualify an attorney derives from the power inherent in every court to control, in furtherance of justice, the conduct of its ministerial officers. West's Ann.Cal.C.C.P. § 128(a)(5).

37 Cases that cite this headnote

[2] Attorneys and Legal Services Concurrent clients

An attorney who seeks to simultaneously represent clients with directly adverse interests in the same litigation will be automatically disqualified. Prof.Conduct Rule 3–310(C, E).

21 Cases that cite this headnote

[3] Attorneys and Legal Services Current and Former Clients

An attorney may not switch sides during pending litigation representing first one side and then the other, because the statutory duty to preserve client confidences survives the termination of the attorney's representation. West's Ann.Cal.Bus. & Prof.Code § 6068(e); Prof.Conduct Rule 3–310(C, E).

45 Cases that cite this headnote

[4] Attorneys and Legal Services Current and Former Clients
Attorneys and Legal Services Conflicts as grounds for disqualification
Attorneys and Legal Services Proof of Grounds for Disqualification; Evidence

Where an attorney successively represents

clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation, even absent proof that the attorney possesses actual confidential information, where the subject of the prior representation was such that it was likely the attorney acquired confidential information that was relevant and material to the present representation. West's Ann.Cal.Bus. & Prof.Code § 6068(e); Prof.Conduct Rule 3–310(C, E).

123 Cases that cite this headnote

[5] **Attorneys and Legal Services**👉Partners and associates; law firms

An attorney's conflict of interest is imputed to the law firm as a whole, warranting vicarious disqualification of the entire firm, on the rationale that attorneys, working together and practicing law in a professional association, share each other's and their clients' confidential information. West's Ann.Cal.Bus. & Prof.Code § 6068(e); Prof.Conduct Rule 3–310(C, E).

29 Cases that cite this headnote

[6] **Appeal and Error**👉Disqualification

Generally, a trial court's decision on a motion for disqualification of an attorney is reviewed for abuse of discretion.

26 Cases that cite this headnote

[7] **Appeal and Error**👉Disqualification

If the trial court resolved disputed factual issues when ruling on a motion for disqualification of an attorney, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence, and the conclusions based on those findings are reviewed for abuse of discretion.

21 Cases that cite this headnote

[8] **Appeal and Error**👉Disqualification

Where there are no material disputed factual issues, the appellate court reviews the trial court's determination on a motion for disqualification of an attorney as a question of law.

24 Cases that cite this headnote

[9] **Attorneys and Legal Services**👉Government attorneys

City attorney's personal conflict of interest was properly imputed to city attorney's office, warranting vicarious disqualification of entire office in city's suit alleging fraud and statutory violations in execution of certain city contracts, after city attorney's former client was added as a defendant; while he was in private practice, city attorney had represented client by providing advice on its execution of contracts with city, so that there was undisputed conflict which, given city attorney's supervisory and policymaking role in office, rendered efforts to ethically screen him from personal involvement in the suit inadequate to protect client confidentiality. West's Ann.Cal.Bus. & Prof.Code § 6068(e); Prof.Conduct Rule 3–310(C, E).

See 1 Witkin, Cal. Procedure (4th ed. 1997) Attorneys, § 172A; Cal. Jur. 3d, District and Municipal Attorneys, § 13; Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2006) ¶ 4:204.3 et seq. (CAPROFR Ch. 4-C); Annot., Disqualification of Member of Law Firm as Requiring Disqualification of Entire Firm--State Cases, 6 A.L.R.5th 242.

34 Cases that cite this headnote

Attorneys and Law Firms

*****773** Dennis J. Herrera, City Attorney, Jesse C. Smith, Chief Assistant City Attorney, Therese M. Stewart, Chief Deputy City Attorney, Claire Sylvia and Ellen Forman, Deputy City Attorneys, for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Jacob Appelsmith, Assistant Attorney General, Barbara J. Seidman and Kenneth L. Swenson, Deputy Attorneys General, as Amici Curiae on behalf of Plaintiffs and Appellants.

Ann Miller Ravel, County Counsel (Santa Clara) and Lizanne Reynolds, Deputy County Counsel, for County of Santa Clara, California State Association of Counties and League of California Cities as Amici Curiae on behalf of Plaintiffs and Appellants.

Steven M. Woodside, County Counsel (Sonoma) for California State Association of Counties and League of California Cities as Amici Curiae on behalf of Plaintiffs and Appellants.

Akin Gump Strauss Hauer & Feld, Rex S. Heinke, Edward P. Lazarus and Seth M.M. Stodder, Los Angeles, for Children's Law Center of Los Angeles as Amicus Curiae on behalf of Plaintiffs and Appellants.

Keker & Van Nest, Gonzalez & Leigh, Ethan A. Balogh, G. Whitney Leigh, Nima Nami, Bryan W. Vereschagin, Rita A. Hao, Juan Enrique Pearce, San Francisco, and Eumi K. Lee, for Defendants and Respondents.

David C. Coleman, Public Defender (Contra Costa) and Ron Boyer, Deputy Public Defender, for California Public Defenders Association as Amici Curiae.

Opinion

KENNARD, J.

***843 **22** A company seeking contracts for information technology services to a city retained a small private law firm. Two attorneys in the firm provided various services to the company, advising it about doing business with the city. Fifteen months later, one of those attorneys successfully won election as the city attorney. Before taking office, the new city attorney announced he would personally not participate in any case involving a client of his former law firm.

Fifteen months after the new city attorney was sworn in, his office named the company as a defendant in a complaint seeking damages for the city on allegations of fraud, statutory violations, and breach of contract. The company sought to disqualify the city attorney's entire office, arguing that as its former attorney he had obtained confidential information about it that precluded him, and the public office he now headed, from representing the city against it in a matter substantially related to the city attorney's former representation of the company. The trial court disqualified the city attorney and his office. The Court of Appeal upheld that ruling in a two-to-one decision. We affirm the Court of Appeal.

I. Background

The facts and dates recited here are drawn from declarations and exhibits submitted on the motion to disqualify and from a written contract between the City and County of San Francisco (hereafter City) and Cobra Solutions Inc., and TeleCon Ltd., two California corporations. Cobra Solutions is in the business of providing "computer products, accessories and related professional services." On October 1, 1998, the related entities of Cobra Solutions and TeleCon Ltd. entered into a contract with the City—the so-called City Store Contract—which qualified them to bid on contracts for technology goods and *****774** services provided to various City departments, ****23** including the Department of Building Inspection.

In September 2000, Cobra Solutions retained the law firm of Kelly, Gill, Sherburne and Herrera, seeking advice on difficulties the company had encountered in performing a City contract with the Department of Building Inspection (Department). According to James Brady, the president and chief executive officer of Cobra Solutions, the law firm continued to represent it "in all matters" until December 2001, and it also provided legal services for TeleCon "on several occasions."

In September of 2001, then City Attorney Louise Renne began investigating contracts for computer services entered into by the Department. The investigation revealed irregularities in payments made to Marcus Armstrong, a Department employee.

***844** On December 11, 2001, Dennis Herrera, a named partner in Kelly, Gill, Sherburne and Herrera, was elected San Francisco City Attorney (City Attorney). Herrera was sworn into office on January 8, 2002, and he adopted a blanket policy of not participating in any matter involving his former law firm or any of its clients regardless of whether he had a conflict in any particular matter. When Herrera assumed office, the City Attorney's investigation of Marcus Armstrong was already underway; results of that investigation led the City Attorney's Office to file a civil complaint on February 10, 2003, naming various defendants, including Armstrong, and alleging causes of action arising from what was characterized as a kickback scheme by which Armstrong received payments from computer service providers for services they never performed.

On the same day the complaint was filed the City Attorney's office issued a press release under the heading, "HERRERA NAMES TOP BUILDING DEPARTMENT OFFICIAL, TECHNOLOGY VENDORS IN MAJOR PUBLIC CORRUPTION SUIT." In that press release, City Attorney Herrera denounced "Mr. Armstrong and his cronies" for betraying "a public trust," and asserted that "[p]ublic corruption diminishes the confidence of our citizens in their government." According to the press release, the lawsuit was the product of "a yearlong investigation by the City Attorney's Public Integrity Task Force," which Herrera created on taking office and which he described as a "vehicle for civil law enforcement enabling us to aggressively pursue those who would violate the public trust."

Because the allegations in the City's lawsuit implicated Armstrong in possible criminal misconduct, the City Attorney's Office referred the matter to the United States Attorney for the Northern District of California. The federal prosecutor filed criminal charges against Armstrong, who later pleaded guilty to federal charges of mail fraud, wire fraud, and obstruction of justice.

In March 2003, the City's investigators discovered that Armstrong had deposited more than $240,000 in checks from Cobra Solutions into the bank account of a fictitious business entity he created. When City Attorney Herrera learned that the investigation implicated his former client Cobra Solutions in the kickback scheme, he took measures to screen himself from the case to the extent that it could involve the former client. To maintain the ethical screen, attorneys working on the case were directed to report to Chief Assistant City Attorney Jesse Smith and not to discuss the case with Herrera. Those attorneys maintained locked files and computerized records that were inaccessible to Herrera.

*****775** On April 21, 2003, the City filed an amended complaint adding Cobra Solutions and TeleCon Ltd. as defendants. In addition to causes of action for ***845** fraud, unfair competition, and false claims that the complaint alleged against all defendants, it also alleged causes of action against Cobra Solutions and TeleCon Ltd.[1] for negligent misrepresentation and contractual claims arising from breach of the City Store contract.

[1] Cobra Solutions and TeleCon Ltd. are apparently related entities, both were represented by Herrera's law firm, and both brought the motion to disqualify; for convenience we refer to them collectively as Cobra.

Cobra moved to disqualify from the litigation its former counsel Herrera and the City ****24** Attorney's Office he heads. In support of the motion, Cobra submitted a bill dated April 13, 2001, showing a charge of four-tenths of an hour attributable to Herrera's "[r]eview of City Store contract document." Cobra's president asserted that he and his employees disclosed to Gill and to Herrera "confidential aspects of Cobra's business" in the course of a representation that was "broad" enough to include "advocacy with City officials," review of contracts, advice on corporate structure, and drafting of standard agreements, forms, and policies. After a hearing, the trial court granted Cobra's disqualification motion, finding that City Attorney Herrera, while in private practice, had personally represented defendants, and that during that representation he had "obtained confidential information" regarding "matters related substantially to the issues raised against defendants in this litigation." The trial court concluded that Herrera's conflict must be imputed to the entire City Attorney's Office because "the personally-conflicted counsel is the head" of that office, and "each of his deputies serves at his pleasure," subjecting them "necessarily to his oversight and influence." Accordingly, the trial court ordered the City to "retain outside independent counsel to litigate this matter." The City Attorney appealed.

In a two-to-one decision, the Court of Appeal upheld the trial court's ruling. It concluded that when "an attorney leaves private practice to become the *head* of a public law office" the "vicarious disqualification of the entire public law office generally is required in all matters substantially related to the head of the office's earlier private representations." The dissenting justice saw no need to recuse the entire government law office as long as the personally conflicted City Attorney had been shielded by an "effective ethical screen." The majority rejected that view, but it acknowledged the existence of "sound reasons" against automatically imputing the conflict of

one attorney to an entire government law office. Because it was unnecessary to reach the issue, the majority expressly refrained from deciding whether an ethical screen might suffice to avoid office-wide disqualification when a conflicted attorney comes from private practice into a government law office to assume a *subordinate* post, but it held that when, as here, the conflicted attorney ***846** serves as chief executive of the government law office, disqualification of the entire office is necessary. Given the importance of these issues, we granted review.

II. Relevant Law

[1] The authority of a trial court "to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers.' " *****776** (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371 (*SpeeDee*), quoting Code Civ. Proc., § 128, subd. (a)(5).) "Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility." (*SpeeDee*, at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371.) As we have explained, however, "[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." (*Ibid.*)

When disqualification is sought because of an attorney's successive representation of clients with adverse interests, the trial court must balance the current client's right to the counsel of its choosing against the former client's right to ensure that its confidential information will not be divulged or used by its former counsel.

Two ethical duties are entwined in any attorney-client relationship. First is the attorney's duty of confidentiality, which fosters full and open communication between client and counsel, based on the client's understanding that the attorney is statutorily obligated (Bus. & Prof.Code, § 6068, subd. (e)) to maintain the client's confidences. (*SpeeDee, supra*, 20 Cal.4th at p. 1146, 86 Cal.Rptr.2d 816, 980 P.2d 371.) The second is the attorney's duty of undivided loyalty to the client. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282, 36 Cal.Rptr.2d 537, 885 P.2d 950 (*Flatt*).) These ethical duties are mandated by the California Rules of Professional ****25** Conduct. (Rules Prof. Conduct, rule 3–310(C) & (E).)

[2] [3] The interplay of the duties of confidentiality and loyalty affects the conflict of interest rules that govern attorneys. An attorney who seeks to simultaneously represent clients with directly adverse interests in the same litigation will be automatically disqualified. (*Flatt, supra*, 9 Cal.4th at p. 284, fn. 3, 36 Cal.Rptr.2d 537, 885 P.2d 950.) Moreover, an attorney may not switch sides during pending litigation representing first one side and then the other. (*City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23, 18 Cal.Rptr.3d 403.) That is true because the duty to preserve client confidences (Bus. & Prof.Code, § 6068, subd. (e)) survives the termination of the attorney's representation. (*SpeeDee, supra*, 20 Cal.4th at p. 1147, 86 Cal.Rptr.2d 816, 980 P.2d 371.)

[4] ***847** That enduring duty to preserve client confidences precludes an attorney from later agreeing to represent an adversary of the attorney's former client unless the former client provides an "informed written consent" waiving the conflict. (Rules Prof. Conduct, rule 3–310(E).) If the attorney fails to obtain such consent and undertakes to represent the adversary, the former client may disqualify the attorney by showing a " 'substantial relationship' " between the subjects of the prior and the current representations. (*Flatt, supra*, 9 Cal.4th at p. 283, 36 Cal.Rptr.2d 537, 885 P.2d 950.) To determine whether there is a substantial relationship between successive representations, a court must first determine whether the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation. (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 710–711, 3 Cal.Rptr.3d 877.) If the former representation involved such a direct relationship with the client, the former client need not prove that the attorney possesses actual confidential information. (*Id.* at p. 709, 3 Cal.Rptr.3d 877.) Instead, the attorney is presumed to possess confidential information if the subject of the prior representation put the attorney in a position in which confidences material to the current *****777** representation would normally have been imparted to counsel. (*Flatt, supra*, 9 Cal.4th at p. 283, 36 Cal.Rptr.2d 537, 885 P.2d 950; *Adams v. Aerojet–General Corp.* (2001) 86 Cal.App.4th 1324, 1332, 104 Cal.Rptr.2d 116; *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1453–1454, 280 Cal.Rptr. 614.) When the attorney's contact with the prior client was not direct, then the court examines both the attorney's relationship to the prior client and the relationship between the prior and the present representation. If the subjects of the prior representation are such as to "make it likely the attorney acquired confidential information" that is relevant and material to the present representation, then the two representations are substantially related. (*Jessen*

v. Hartford Casualty Ins. Co., supra, 111 Cal.App.4th at p. 711, 3 Cal.Rptr.3d 877; see *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 680, 14 Cal.Rptr.3d 618 [material confidential information is that which is "directly at issue in" or has "some critical importance to, the second representation"].) When a substantial relationship between the two representations is established, the attorney is automatically disqualified from representing the second client. (*Flatt, supra,* 9 Cal.4th at p. 283, 36 Cal.Rptr.2d 537, 885 P.2d 950; see Hazard and Hodes, The Art of Lawyering (3d ed.2000 & 2005–2 supp.) § 13.5, pp. 13–12—13–13.)

[5] Although the rules governing the ethical duties that an attorney owes to clients are set out in the California Rules of Professional Conduct, those rules do not address when an attorney's personal conflict will be imputed to the attorney's law firm resulting in its vicarious disqualification. Vicarious disqualification rules are a product of decisional law. (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 114, 14 Cal.Rptr.2d 184.) Normally, an attorney's conflict is imputed to the law firm as a whole ***848** on the rationale "that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information." (*SpeeDee, supra,* 20 Cal.4th at pp. 1153–1154, 86 Cal.Rptr.2d 816, 980 P.2d 371, fn. omitted.) ****26** Here we consider whether the judicially created rule requiring vicarious disqualification of an entire law firm should apply to a government law office when the head of that office has a conflict because that attorney previously, while in private practice, represented a client that is now being sued by the government entity in a matter substantially related to the attorney's prior representation.

III. Analysis

The trial court found, and it is undisputed here, that City Attorney Herrera had a conflict based on his having previously represented, in private practice, the Cobra defendants "during which representation he obtained confidential information" from them "in matters related substantially to the issues raised against [them] in this litigation." The trial court further found that each of the City Attorney's deputies "serves at [the] pleasure" of the City Attorney and thus "is subject necessarily to his oversight and influence."

[6] [7] [8] "Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion *****778** is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.]" (*SpeeDee, supra,* 20 Cal.4th at pp. 1143–1144, 86 Cal.Rptr.2d 816, 980 P.2d 371.) Here there is no factual dispute, and we review independently the Court of Appeal's legal conclusion that the City Attorney's personal conflict is properly imputed to the Office of the City Attorney and requires its disqualification.

[9] The City contends that the vicarious disqualification of its entire city attorney's office is neither compelled nor justified by prior court decisions involving government law offices. It relies on *People v. Christian* (1996) 41 Cal.App.4th 986, 48 Cal.Rptr.2d 867 (*Christian*). There the Court of Appeal held there was no actual conflict when two attorneys, both supervised by the Contra Costa County Public Defender, in a joint trial represented two criminal codefendants who had potentially conflicting interests. (*Id.* at p. 1001, 48 Cal.Rptr.2d 867.) The public defender oversaw two independent government law offices—the public defender's office and an alternate defender's office. ***849** (*Id.* at p. 992, 48 Cal.Rptr.2d 867.) Although the public defender was the titular head of the alternate defender's office, he did not supervise or evaluate alternate defender attorneys, did not initiate their promotion or discipline, and he had no access to its client files or confidences. (*Id.* at pp. 992–993, 999, 48 Cal.Rptr.2d 867.) Concluding that the organization and operation of the two defenders' offices made them, in effect, separate law firms (see Rules Prof. Conduct, rule 1–100(B)(1)(d) ["law firm" includes "a publicly funded entity which employs more than one lawyer to perform legal services"]), the Court of Appeal rejected the view that the simultaneous representation of codefendants by the public defender and the alternate defender created a conflict, because the county public defender was also the titular head of the alternate defender's office. (*Christian, supra,* at p. 1000, 48 Cal.Rptr.2d 867.) Given the public defender's limited control of the alternate defender's office in *Christian,* we reject the City's argument that the attorneys in *Christian* were "attorneys within the *same* government office."

In an analogous case, *Castro v. Los Angeles County Bd. of Supervisors* (1991) 232 Cal.App.3d 1432, 284 Cal.Rptr.

154 (*Castro*), a single executive director headed a nonprofit corporation with three separate public law units providing service to parents and children in dependency proceedings. The Court of Appeal in *Castro* concluded that there would be no conflict if attorneys from each unit were to simultaneously represent clients from a single family whose interests were divergent. (*Id.* at pp. 1439, 1441–1444, 284 Cal.Rptr. 154.) In *Castro* the autonomy of ****27** each law unit was ensured because the chief attorney in each unit initiated hiring, firing, and salary changes for that unit's attorneys. (*Id.* at p. 1438, 284 Cal.Rptr. 154.) In both *Castro* and *Christian, supra,* 41 Cal.App.4th 986, 48 Cal.Rptr.2d 867, the separate law units under a single governmental umbrella operated as separate law firms independent of parallel units also sheltered under that umbrella. Both *Castro* and *Christian* addressed conflicts arising from simultaneous representation, unlike the *successive* representation conflict before us. But both cases were decided in the wake of the Court of Appeal's decision in *Younger v. Superior Court* (1978) 77 Cal.App.3d 892, 144 Cal.Rptr. 34 (*Younger*).

Younger was a successive representation case in which the Court of Appeal upheld the disqualification of the entire Los Angeles *****779** County District Attorney's Office in the prosecution of a criminal defendant. (*Younger, supra,* 77 Cal.App.3d at pp. 896–897, 144 Cal.Rptr. 34.) The defendant had been represented by the law firm of Johnnie L. Cochran, Jr., who was later appointed assistant district attorney, making him one of "three top executives" supervising "more than 550" deputy attorneys. (*Id.* at pp. 894–895, 144 Cal.Rptr. 34.) When Cochran assumed his new post, the district attorney's office adopted procedures designed to screen ***850** Cochran from making crucial decisions, such as whether to settle a case, or whether to seek the death penalty in a capital case, whenever it involved a defendant formerly represented by the Cochran law firm. (*Id.* at p. 895, fn. 3, 144 Cal.Rptr. 34.)

Notwithstanding the ethical screen erected between Cochran and the prosecution of defendants formerly represented by his law firm, the Court of Appeal upheld the vicarious disqualification of the entire Los Angeles County District Attorney's Office. It noted that Cochran's "presence" in a job "near the top" of the office's hierarchy "could possibly affect" the office's prosecution of his firm's former clients. (*Younger, supra,* 77 Cal.App.3d at p. 897, 144 Cal.Rptr. 34.) Pointing specifically to Cochran's role in formulating prosecutorial policies, it expressed concern that even seemingly unrelated policy decisions could impact the prosecution of these cases. (*Ibid.*) In addition, Cochran's role in the appraisal and promotion of deputies necessarily required him to evaluate the performance of deputies prosecuting his firm's former clients. The Court of Appeal explained: "A deputy handling one or more of such cases would not in all probability forget Cochran's former professional association" with the defense of those cases. (*Ibid.*) Even absent any impropriety, the Court of Appeal cautioned, public perception of the prosecutor's integrity and impartiality would be at risk unless the entire office was disqualified. (*Ibid.*)

The disqualification standard that the Court of Appeal applied in *Younger* no longer controls *criminal* prosecutions because the Legislature in 1980 enacted Penal Code section 1424 (Stats.1980, ch. 780, § 1, p. 2373), which provides for the recusal of local prosecuting agencies only when "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen.Code, § 1424, subds. (a)(1) & (b)(1).) Section 1424 is inapplicable to this case, which is a civil action. Although the statute, which triggers disqualification of a prosecutor from a criminal proceeding "only if" the conflict is " 'so grave as to render it unlikely that [the] defendant will receive fair treatment' " (*People v. Griffin* (2004) 33 Cal.4th 536, 569, 15 Cal.Rptr.3d 743, 93 P.3d 344), has superseded *Younger's* holding (see *People v. Conner* (1983) 34 Cal.3d 141, 147, 193 Cal.Rptr. 148, 666 P.2d 5), the concerns that the Court of Appeal in *Younger* expressed about conflicted heads of public law offices, whose policymaking and supervisory duties are such as to preclude them from being effectively screened, have not lost their relevance.[2]

[2] We do not decide, because the issue is not before us, whether ethical screening might suffice to shield a senior supervisory attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney's supervision. In ruling on such a motion, the trial court should undertake a factual inquiry into the actual duties of the supervisor with respect to those attorneys who will be ethically screened and to the supervisor's responsibility for setting policies that might bear on the subordinate attorneys' handling of the litigation. In addition, the trial court should consider whether public awareness of the case, or the conflicted attorney's role in the litigation, or another circumstance is likely to cast doubt on the integrity of the governmental law office's continued participation in the matter.

*****780 *851 **28** As this court has explained in the past, there are both societal and personal interests at stake when an attorney and the attorney's private or public law firm is disqualified. (*SpeeDee, supra,* 20 Cal.4th at p.

1145, 86 Cal.Rptr.2d 816, 980 P.2d 371.) The societal interests at stake include preserving high ethical standards for every attorney, each of whom is obliged to preserve client confidences and whose failure to do so undermines public confidence in the judicial system. (*Ibid.*) Attorneys who head public law offices shoulder additional ethical obligations assumed when they become public servants. They possess "such broad discretion" that the public "may justifiably demand" that they exercise their duties consistent "with the highest degree of integrity and impartiality, and with the appearance thereof." (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266–267, 137 Cal.Rptr. 476, 561 P.2d 1164 [disqualification of conflicted district attorney].)

Vicarious disqualification also has an impact on the personal interests of a conflicted attorney's current and former clients. Current clients have a right to retain their chosen counsel, and they will bear the financial burden when their chosen counsel is disqualified—a burden that an opponent may desire in order to gain a tactical advantage in the litigation. (*SpeeDee, supra*, 20 Cal.4th at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371.) With respect to former clients, they have an overwhelming interest in preserving the confidentiality of information they imparted to counsel during a prior representation. That interest is imperiled when counsel later undertakes representation of an adversary in a matter substantially related to counsel's prior representation of the former client.

The burdens of disqualification are heavy both for private sector and public sector clients. When an entire government law office is disqualified, the government inevitably incurs the added cost of retaining private counsel (*In re Lee G.* (1991) 1 Cal.App.4th 17, 28, 1 Cal.Rptr.2d 375), the delay such substitution entails, and in certain types of litigation it may also lose the specialized expertise of its in-house attorneys, hampering its ability to protect the public's interest. (See e.g., *City of Santa Barbara v. Superior Court, supra*, 122 Cal.App.4th at p. 23, fn. 1, 18 Cal.Rptr.3d 403 [city attorney's office possessed specialized expertise in the law of sewer construction and maintenance].) Greater legal costs caused by hiring private sector attorneys raise the specter "that litigation decisions will be driven by financial considerations," not by the public interest. (*Id.* at p. 25, 18 Cal.Rptr.3d 403.) And when a government law office is disqualified, the expense of that disqualification is ultimately paid by the taxpayers.

***852** Other burdens caused by vicarious disqualification are cited by the Attorney General, appearing as amicus curiae on behalf of the City.[3] He argues that office-wide disqualification hampers recruiting by government law offices of " 'the most promising class of young lawyers.' " (*Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 900, 175 Cal.Rptr. 575.) He further asserts that vicarious disqualification impugns the integrity of government attorneys by implicitly assuming *****781** they will violate the confidences of former clients.

[3] The Attorney General argues in favor of screening with "ethical walls to avoid conflicts" within government offices in general, but he expressly has taken no position on the ethical screening the City Attorney's Office in this case used to screen the City Attorney from his deputies.

Citing these burdens on government, both the City and its amicus, the Attorney General, urge us to hold that whenever a conflicted attorney enters government service, that attorney's conflict should not result in vicarious disqualification of the government law office the attorney joins. Instead, they argue, screening the conflicted attorney from matters involving the attorney's former clients—such as the screening of the City Attorney that occurred here—will suffice to protect client confidentiality.

Ethical screening is the approach adopted by the American Bar Association (ABA), whose Model Rules of Professional Conduct ****29** require "a lawyer currently serving as a public officer or employee" not to "participate in a matter in which the lawyer participated personally and substantially while in private practice." (ABA Model Rules Prof. Conduct, rule 1.11(d)(2)(i).) Indeed, the ABA Model Rules have long included rules specifically directed to government lawyers and to their conflicts arising from successive representation. As the comment to rule 1.11(d) explains, "[b]ecause of the special problems raised by imputation within a government agency," the rule " does not impute the conflicts of a lawyer currently" in government service "to other associated government" lawyers, "although ordinarily it will be prudent to screen such lawyers." (*Id.*, com. [2].) Thus, under the ABA Model Rules the taint of a conflicted attorney who moves into government employment is not imputed to the government law office in which the attorney now practices. (See Hazard & Hodes, The Art of Lawyering, *supra*, § 14.5, p. 14–13; *id.*, § 15.3, p. 15–10 ["[W]oodenly applying the automatic imputation rule that usually governs private law firms would be impractical and against the public interest."].)

California has not adopted the ABA Model Rules (*General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1190, fn. 6, 32 Cal.Rptr.2d 1, 876 P.2d

487), although they may serve as guidelines absent on-point California authority or a conflicting state public policy (*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656, 82 Cal.Rptr.2d 799). ***853** California, in contrast to the ABA, has not adopted separate Rules of Professional Conduct applicable to government lawyers, but it has addressed government law office conflict problems through judicial decisions.

When an attorney leaves private practice for a government law office, California courts have upheld the ethical screening of that attorney within the government office to protect confidences the attorney obtained from the former client in a prior representation. For example, in *City of Santa Barbara v. Superior Court*, *supra*, 122 Cal.App.4th 17, 18 Cal.Rptr.3d 403, an attorney while in private practice represented a homeowner until the attorney left her law firm to join a municipal law office that was litigating the same case against the attorney's former client. The Court of Appeal upheld an ethical screen isolating the incoming attorney and permitting the municipal law office to continue representing the city. (*Id.* at pp. 26–27, 18 Cal.Rptr.3d 403.) And in *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, 164 Cal.Rptr. 864, an attorney in a county public defender's office left to join the local district attorney's office, where he was ethically screened from any involvement with his prior cases. The Court of Appeal concluded that the attorney's personal conflict should not be imputed to disqualify the entire district attorney's office. (*Id.* at pp. 116–119, 164 Cal.Rptr. 864.) In both these *****782** cases, however, the attorney who was subject to ethical screening was simply one of the attorneys in the government office, not, as here, the City Attorney under whom and at whose pleasure all deputy city attorneys serve.

Justifications that the City here advances for ethical screening instead of disqualification of the entire City Attorney's office appear overstated. Like the Court of Appeal majority, we are not persuaded that competent attorneys in private practice will be discouraged from running for or seeking appointment to posts such as city attorney because their prior private representations might result in disqualification of the entire city attorney's office. Moreover, it is possible that a specific candidate's potential for causing vicarious disqualification of the city attorney's office could legitimately become a campaign issue. If so, the city's citizens who will pay for hiring outside counsel will be able to make an informed choice at the polls. Typically such government law offices litigate many cases, and office-wide disqualification from one case is unlikely to significantly impair the office's overall operations. That is certainly so here, where the City Attorney's role in advising City agencies is at least as great as his role in litigating on behalf of the City.

Individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts will be used. Moreover, ****30** the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns ***854** as to what their boss wants. The power to review, hire, and fire is a potent one. Thus, a former client may legitimately question whether a government law office, now headed by the client's former counsel, has the unfair advantage of knowing the former client's confidential information when it litigates against the client in a matter substantially related to the attorney's prior representation of that client.

There is another reason to require the disqualification of the conflicted head of a government law office. That reason arises from a compelling societal interest in preserving the integrity of the office of a city attorney. It is beyond dispute that the citizens of a city are entitled to a city attorney's office that unreservedly represents the city's best interests when it undertakes litigation. Public perception that a city attorney and his deputies might be influenced by the city attorney's previous representation of the client, at the expense of the best interests of the city, would insidiously undermine public confidence in the integrity of municipal government and its city attorney's office.

It was a cruel irony that City Attorney Herrera, who on assuming office avowedly undertook to fight public corruption, later learned that a client that he had represented while in private practice was an apparent participant in a kickback scheme designed to defraud the City. We have no reason whatsoever to believe that City Attorney Herrera knew of or suspected his former client Cobra's possible involvement in the scheme as of February 10, 2003, when the City filed its original complaint. Nonetheless, for the reasons explained in this opinion, not only the City Attorney but his entire office must in this case be disqualified.

Disposition

The judgment of the Court of Appeal upholding the disqualification of the Office *****783** of the City Attorney of San Francisco is affirmed.

BAXTER, CHIN, MORENO, JJ., and EPSTEIN, J.*, concur.

* Presiding Justice, Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

Dissenting Opinion by CORRIGAN, J.

Must an entire government law office be disqualified whenever the office head has a conflict because he or she previously represented a client in private practice? Disqualification would certainly be appropriate in some circumstances, but I do not agree it should be automatic. In my view, such a rigid rule needlessly burdens the public. Sound public policy considerations weigh against automatic disqualification. ***855** These considerations include the cost of employing outside counsel, which may cause some government law offices to forgo meritorious cases; the concern that similar cases reflecting a general policy could be handled inconsistently; and the disincentive for top-level private practitioners to seek, and for voters to elect them to, positions as leaders of government law offices. I would allow the trial court to determine on a case-by-case basis the adequacy of the screening procedures undertaken by the government law office. In exercising its discretionary review, the trial court should consider all relevant factors, including the degree of involvement of the office head with the former client,[1] the size of the government law office, and the nature of the current suit.

1 The fact that Mr. Herrera billed Cobra Solutions, Inc. for only 24 minutes of his time (maj. opn., *ante*, 43 Cal.Rptr.3d at p. 775, 135 P.3d at p. 24) suggests that his degree of involvement with the "City Store" contract was minimal.

The automatic disqualification rule arose in the context of private practice, at a time when it was relatively uncommon for attorneys to move from one firm to another. Thus, the rule's burdens were relatively light. Now, however, attorney mobility and firm mergers have increased exponentially. Accordingly, the automatic disqualification rule is being questioned even in the private practice context. "The vicarious disqualification of an entire firm can work harsh and unjust results, particularly in today's ****31** legal world where lawyers change associations more freely than in the past. A rule that automatically disqualifies a firm in all cases substantially related to the tainted lawyer's former representation could work a serious hardship for the lawyer, the firm and the firm's clients.... [¶] ... [¶] We would nevertheless accept the costs of automatic disqualification, if it were the only way to ensure that lawyers honor their duties of confidentiality and loyalty. But it is not. A client's confidences can also be kept inviolate by adopting measures to quarantine the tainted lawyer. An ethical wall, when implemented in a timely and effective way, can rebut the presumption that a lawyer has contaminated the entire firm.... [¶] ... [¶] The changing realities of law practice call for a more functional approach to disqualification than in the past." (*In re County of Los Angeles* (9th Cir.2000) 223 F.3d 990, 996 (maj. opn. by Kozinski, J.).)

The question whether the disqualification of an attorney should be imputed to the entire government legal office that lawyer joins has been addressed by the American Bar Association (ABA) in a formal ethics opinion. The ABA declined to extend the automatic disqualification rule because "the government's ability to function would be unreasonably impaired." (ABA, Com. on Ethics & Prof. Responsibility, Formal Opn. No. 342 1975.) The *****784** ABA explained, "The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of ***856** departmental representation that is inherent in private practice. The important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates.... Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by those rules." (*Ibid.*)

The majority correctly observes that California has not adopted the ABA Model Rules of Professional Conduct. (Maj. opn., *ante*, 43 Cal.Rptr.3d at p. 781, 135 P.3d at p. 29.) However, the public policy considerations relied upon by the ABA are persuasive, and a leading text confirms that the ABA's position is well accepted throughout the country. "[ABA] Model Rule 1.10(a) and most comparable state rules do *not* impute an individual *government* lawyer's disqualification to all other members of this special kind of 'firm.' ... [¶] ... [W]oodenly

applying the automatic imputation rule that usually governs private law firms would be impractical and against the public interest. A government legal department—unlike a private firm—cannot simply forgo litigating certain cases. Thus, if the ordinary imputation rules applied, the department would either have to select lawyer-employees with limited prior legal experience, or expend money hiring special counsel to litigate the affected cases" (1 Hazard & Hodes, The Law of Lawyering (3d ed.2005 supp.) § 15.3, p. 15–10, fn. omitted.)

In California, case law extending the automatic disqualification rule to prosecutors' offices was nullified by the Legislature. In *Younger v. Superior Court* (1978) 77 Cal.App.3d 892, 144 Cal.Rptr. 34, the Court of Appeal disqualified an entire district attorney's office because of an *appearance of impropriety* created by the fact that a newly appointed supervising district attorney had once been a member of the firm representing the defendant. In response to *Younger* and other cases, the Legislature enacted Penal Code section 1424. (*People v. Eubanks* (1996) 14 Cal.4th 580, 591, 59 Cal.Rptr.2d 200, 927 P.2d 310.) Under that provision, a district attorney or a city attorney may not be disqualified unless the evidence establishes a conflict of interest that would render a fair trial unlikely. The majority correctly notes that section 1424 does not apply in a ****32** civil action. (Maj. opn., *ante*, 43 Cal.Rptr.3d at p. 779, 135 P.3d at p. 27.) However, as we attempt to balance competing public policies we should not ***857** ignore the balance struck by the Legislature in section 1424. Certainly, the interest in evenhanded administration of justice is at least as weighty in a criminal case, where life or liberty is at stake, as it is in a civil action for monetary damages.

For the reasons stated, I would reverse the judgment of the Court of Appeal upholding the disqualification of the Office of the City Attorney of San Francisco.

GEORGE, C.J., concurs.

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31 Cal.App. 144, 159 P. 1065

In the Matter of the Application for the Disbarment of WILSON H. SOALE, an Attorney at Law.

Civ. No. 2032.
Court of Appeal, Second District, California.
July 24, 1916.

ATTORNEY AT LAW--DISBARMENT PROCEEDING--VIOLATION OF CONFIDENCE OF CLIENT-- SUFFICIENCY OF EVIDENCE.
In this proceeding for the disbarment of an attorney at law for violating his oath in certain transactions involving the property of a client, it is held that on the record the court was justified in determining that the accused violated such oath, that the client reposed confidence in him, and that he abused such confidence.

ID.--JUDGMENT OF SUSPENSION--TIME--CONTINGENT UPON PAYMENT OF CLAIM OF ACCUSER.
A judgment suspending an attorney at law for one year "and thereafter until the claim of the accuser is fully paid," is warranted, if the amount is ascertained, but is too uncertain to be enforced, except as to the stated period of one year, where the corporate stock wrongfully purchased by the attorney with the money of his client is not shown to be wholly worthless, and the amount lost thereby is not determined.

ID.--SUSPENSION OF ATTORNEY FOR UNLIMITED PERIOD.
In a disbarment proceeding an attorney may be suspended for a period not necessarily limited as a fixed and determinate period of time, but for an uncertain time, subject to the right of the accused to relieve himself therefrom by making restitution of a stated amount of money which he had improperly obtained by means of his misconduct.

APPEAL from a judgment of the Superior Court of Los Angeles County disbarring an attorney at law from practice. Fred H. Taft, Judge.

The facts are stated in the opinion of the court.

***144** Gray, Barker & Bowen, Wheaton A. Gray, and Bennett & Carey, for Appellant.
Schweitzer & Hutton, for Respondent.

CONREY, P. J.

The Los Angeles Bar Association filed in the superior court of Los Angeles County an accusation verified by the oath of one Grace A. Hilborn, charging that Wilson H. Soale had violated his oath as an attorney and counselor at law by the commission of certain acts therein described. An answer was filed denying the facts alleged as showing defendant's misconduct. After trial of the issues thus presented the court found that all of the allegations of the accusation***145** are true, and it was ordered "that the accused, Wilson H. Soale, be deprived of the right to practice as an attorney at law in the state of California for one year from date hereof, and thereafter until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid." From this judgment he appeals.

In September, 1909, and thereafter during the occurrence of the transactions involved in this case, Mr. Soale, as a member of the firm of Soale & Crump, was engaged in practice as an attorney and counselor at law in the city of Pasadena, California. At the beginning of these transactions the lady now known as Grace A. Hilborn was Grace Hilborn Jenkins, the wife of one Jenkins. In September, 1909, Mrs. Jenkins went into the office of Soale & Crump and entered into a discussion with Mr. Soale concerning her business affairs and her property. As a result of that discussion, as she was expecting to be absent from Los Angeles County for some time, Mrs. Jenkins executed to Mr. Soale and Mr. Crump, as copartners, a general power of attorney, which, among other things, authorized them to convey real property for her and in her name. According to her testimony this was done pursuant to a suggestion by Mr. Soale that she would do well to let them care for the property and look out for it for her. Acting under this employment and authority, an exchange of property was negotiated by which, in return for five acres of land owned by Mrs. Jenkins near Alhambra, she acquired one thousand dollars and a house and lot in Pasadena, which we will designate as the Summit Avenue property. The matters complained of in this proceeding relate to an additional transaction in which Mrs. Jenkins received four thousand shares of stock of a corporation called the Automatic Car Coupler

Company, in exchange for the Summit Avenue property.

In January, 1910, Mrs. Jenkins consulted Mr. Soale about obtaining a divorce from her husband, and an agreement was made as to the amount of the fee to be paid to Soale & Crump for their services in that matter. Such is the effect of the testimony of Mrs. Jenkins. The complaint in the divorce action was not filed until some months after the first consultation, and it was during that interval that the transactions occurred which are the subject of the complaint herein.

The Automatic Car Coupler Company appears to have been incorporated in the early part of the year 1909, with a capital ***146** stock of fifty thousand shares of the par value of one dollar each. It was organized in Pasadena, and its principal business grew out of an automatic car coupler invention which was transferred to the corporation in return for certain shares of the stock. At the same time shares of treasury stock were sold at ten cents per share, and from time to time during the year 1909 the price was advanced by resolution of the directors of the corporation until they had raised it to par for sales by the company. Mr. Soale was one of the early stockholders. He owned four thousand shares of stock acquired at ten cents per share. Soale & Crump also owned one thousand shares of stock. The four thousand shares belonging to Mr. Soale are the same shares that were transferred to Mrs. Jenkins in exchange for the Summit Avenue property, and under the circumstances to which we shall refer. In November, 1909, Mr. Soale caused the four thousand shares to be transferred to his son-in-law, Lewis Sprague, and left the new certificate with Mrs. Sprague for her husband. Soale received no consideration for this transfer.

Dr. D. T. Bentley, a retired physician residing in Pasadena, was engaged in the real estate business. He was acquainted with Mr. Soale and occasionally consulted him in regard to legal matters. Mr. Soale informed him that Mrs. Jenkins wanted to trade her Summit Avenue property for stock. Thereupon Dr. Bentley called upon Mrs. Jenkins and entered into negotiations with her for the transfer of her property to Sprague in exchange for the four thousand shares which were represented as the property of Sprague. Thereupon Mrs. Jenkins called upon Mr. Soale and told him of Dr. Bentley's proposition, and that she had told Dr. Bentley that she would do just exactly as Mr. Soale said, and asked him if he knew anything about the automatic car coupler stock. Soale replied that he had stock in the company; that he was surprised that any stock had been offered for sale; that it was a splendid company, had five hundred dollars in the treasury, and that she would be very lucky to get it. He said: "I have stock in it myself, so I can watch and care for it for you just exactly and take care of it for you. You leave it to me." A few days later she called at the office and Mr. Soale told her that the deed was made out and ready for her to sign and the certificate of stock ordered. She signed the deed and he handed her the certificate. The ***147** terms of the transaction were that in exchange for the stock, received at a valuation of four thousand dollars, Mrs. Jenkins transferred the Summit Avenue property at a valuation of five thousand dollars, but subject to a two thousand dollar mortgage, and in addition thereto paid one thousand dollars. This one thousand dollars was paid by checks to the order of Sprague, indorsed by him, and the proceeds received by Soale. The only way in which Mr. Soale paid over the money to Sprague was by using it in payment of bills incurred for the support of Sprague and his family. It seems that Sprague had never been able to support his family, and that Mr. Soale was in the habit of contributing largely to the support of that family by paying its bills along with his own.

During these negotiations Mr. Soale stated to Mrs. Jenkins that he had been looking this thing up, and Lewis Sprague was a man about town who wanted a home and was willing to trade, but did not tell her, and she did not know until long afterward, that Sprague was Soale's son-in-law, or that any financial or business relations existed between Soale and Sprague. Immediately after the Summit Avenue property was conveyed to Sprague, Mr. Soale placed that property in the hands of real estate agents for sale. In placing the property with B. O. Kendall Company, as agents, he gave a price of five thousand dollars, and stated that "it is a snap and will not be on the market long until it is sold." The deed by which Mrs. Jenkins conveyed the Summit Avenue property to Lewis Sprague was executed on the second day of March, 1910, and recorded July 28, 1910. On the same day, and immediately following the record of that deed, there was recorded another conveyance executed July 26, 1910, whereby Lewis Sprague and his wife conveyed the same property to Wilson H. Soale. A few months later Mr. Soale conveyed the Summit Avenue property to a purchaser subject to the existing two thousand dollar mortgage, and received a further consideration of two thousand dollars. He testified that this two thousand dollars went to Sprague, his son-in-law; but he further stated that this was done by paying bills amounting to two thousand dollars and a great deal more for the sustenance of his son-in-law and his family. They were paid with Soale's checks. "That is the way the business was carried on most of the time they were married. I ***148** was disbursing agent for the whole family and they brought the bills to me."

Dr. Bentley claimed a commission for negotiating the trade in which he acted as agent. When Mrs. Jenkins informed Mr. Soale that Bentley wanted to charge her a commission, Mr. Soale said: "Never mind; you leave it all to me. I will see Bentley and see what can be done. You leave it all for me." Later he told her that he had managed to get Dr. Bentley down to $50, and she paid that amount through Soale to Bentley. Soale paid Bentley an additional sum of $150 out of the one thousand dollars obtained from Mrs. Jenkins in the trade, but did not inform Mrs. Jenkins, and she did not know that anything was being paid to Bentley other that the $50 paid as above stated.

Many of the facts given in the foregoing statement were denied by appellant in his testimony, but are supported by other evidence. We give them as the facts in the case because the court found that all of the allegations stated in the accusation are true, and it is necessarily implied that the court found these facts in accordance with the testimony of the accusing witness and against the testimony of appellant. Under the well-established rule, a court of appeal must assume the facts to be as found by the trial court when those facts find support in the evidence, notwithstanding other evidence to the contrary.

Aside from their contention that some of the facts above stated are not supported by the evidence, counsel for appellant insist that there is no evidence to support the implied finding that the shares of stock transferred to Mrs. Jenkins were not substantially worth four thousand dollars, or one dollar per share, as they were assumed to be in making the exchange. They further contend that, even if appellant defrauded Mrs. Jenkins in the transaction, he was not in that transaction acting as an attorney at law, and could not be said to have violated his oath and duty as an attorney at law by anything that he did therein. Finally they say that the court exceeded its authority in rendering the judgment, which not only ordered that the accused be deprived of the right to practice as an attorney at law in the state of California for one year from the date thereof, but further deprived him of that right "until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid."

149** Aside from the patent rights transferred to it and possibly a small sum of money in the treasury, the only asset of the Automatic Car Coupler Company in March, 1910, seems to have been a certain contract dated November 1, 1909, made between that corporation and the Electric Traction Supply Company, a Missouri corporation, by which the latter company was given the exclusive right to manufacture and sell the said patented automatic couplings within the United States of America. Certain obligations were entered into by the Missouri company for the payment of royalties, and a minimum amount was named for a series of years commencing with the year beginning November 1, 1910. It was not shown that any business has ever been transacted under that contract or any income received therefrom. Prior to March, 1910, the Automatic Car Coupler Company had manufactured a limited number of car couplers, which had been given or loaned to certain railway corporations, evidently for advertising purposes. It is stated in the testimony of Mrs. Jenkins that when she consulted Mr. Soale about the proposed exchange involved in this case, he said that the Automatic Car Coupler Company stock was well worth a dollar per share, and perhaps more. He also told her of the contract with the Electric Traction Supply Company, and said that on account of this contract the stock would be as good as six per cent from the 1st of November, 1910; but he also gave her a copy of the contract and she took it away with her. On behalf of the accuser only one witness was questioned about the value of the Automatic Car Coupler Company's stock, and he did not claim to know anything about its value. Over defendant's objection this witness, J. W. Dubbs, was permitted to say that when he bought stock in the company about one year before March, 1910, he bought it from the company and paid ten cents a share. At the close of the case for the prosecution, defendant's counsel moved for a nonsuit, but as it was in general terms and did not specify any particular defect in the evidence, that motion should be disregarded. (*Coffey v. Greenfield*, 62 Cal. 602, 608; *Schroeder v. Mauzy*, 16 Cal. App. 443, 450, [118 Pac. 459].) The defendant introduced much evidence to support his claim that the market value of stock in this company was equal to or in excess of the par value, and it is our duty to consider all of the evidence and determine whether as a whole the evidence is sufficient to sustain150** the implied finding against defendant on this branch of the case; for notwithstanding testimony to the contrary, the finding must be sustained if the record contains evidence which by itself would be sufficient to support such finding. We will refer to defendant's witnesses in the order of the references to their testimony in the brief of his counsel. Karl Elliott was the secretary of the corporation. He knew of sales made early in 1910 at one dollar per share, and one sale at one dollar and twenty-five cents per share. The first stock sold by the company was at ten cents a share, the next price was twenty-five cents a share, next fifty cents a share, and late in 1909, eighty cents a share. After that the asked price was one dollar, but no sales made by the company at that price.

Frank R. Bonny was president of the corporation. His regular occupation was that of a conductor in the freight

department of an electric railroad. He said that he knew the value of the Automatic stock in March, 1910, and that it was one dollar and twelve and one-half cents per share. He sold two hundred shares of his stock at that time and at that price. It was much sought after, and still worth one dollar per share even down to the date of the trial in April, 1913. He knew of other sales as follows: one thousand shares sold in August, 1909, by the corporation, at eighty cents; four hundred shares sold in August, 1909, by the corporation, at eighty cents; two hundred shares sold in December, 1909, at one dollar, by the witness to Mr. Heiss; five hundred shares sold by the witness in November, 1909, at one dollar per share; two hundred and fifty shares bought by the witness July 15, 1910, at one dollar and twenty-five cents per share; three thousand eight hundred shares bought July 1, 1910, by Mr. Goode, at one dollar per share; three thousand four hundred shares bought in March, 1911, by Mr. Goode at one dollar per share. The principal part of Mr. Bonny's stock consisted of ten thousand shares issued to him by the company in return for the patent rights which he transferred to it in March, 1909. He had a few other small transactions in the stock besides those above noted. The following occurred on his cross-examination: "Q. Did you ever place any of this on the public market for sale? A. No, sir. Q. Do you know whether any of it ever was placed on the market for sale? A. I don't know. Q. All the sales were among your own people and your associates, ***151** were they not? A. It was. Q. Officers of the corporation and their associates; all of it was made that way? A. Yes."

E. S. Goode became a stockholder in this corporation in April, 1910, when he purchased between eleven thousand and twelve thousand shares at one dollar per share. While he asserted that he would not now take less than that amount for his stock, he did not claim that he knew at any time what the stock was worth in the market. On cross-examination this witness admitted that after purchasing the stock in question he made an assignment for the benefit of his creditors and did not list this property as part of his assets. "I bought the stock in my name and transferred it to my wife and nephew, except fifty shares stood in my name. … I was trying to buy a controlling interest in the company. Would do it to-day if I could get it."

The defendant, Wilson H. Soale, testifying about the stock transferred to Mrs. Jenkins, was asked: "Is that stock worth any money now?" to which he replied: "Certainly; it is worth more than it was traded for." C. M. Gruell, a shipping clerk, testified that the stock was quoted at from one dollar to one dollar and thirteen cents in the early part of 1910. Cross-examination developed that he had very little actual knowledge of the subject. C. H. Wills testified that the market value of the stock in the early part of 1910 was eighty cents per share. He had bought some of the stock from the company when it was ten cents per share, and later sold some to Mr. Bonny at one dollar per share. F. H. Norwood, the original patentee of the automatic car coupler, testified that the value of the stock in March, 1910, was eighty cents per share; that shortly before that time he sold some stock to Mr. Bonny at one dollar per share. Norwood also testified that he received ten thousand shares of the stock in consideration of the transfer of his patent rights to the company. Whether he and Bonny received ten thousand shares each for the transfer of separate patents, or received that number of shares jointly for a joint transfer of patents, does not clearly appear. Frank L. Heiss, clothing merchant, testified that the value of this stock on the market in February and March, 1910, was one dollar per share. He bought his stock from Bonny at that price and knew of other sales at the same price.

***152** On this record was the court justified in determining that the accused violated his oath and his duties as an attorney and counselor at law? One of the stipulations in the statutory oath is that the person admitted will faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability. One of these duties requires the attorney and counselor "to maintain inviolate the confidence … of his client." (Code Civ. Proc., sec. 282, subd. 5.) In order to support the charges here, it must have appeared that Mrs. Jenkins was Mr. Soale's client, that she reposed confidence in him as a counselor at law, and that he violated that confidence. On behalf of the accused it is contended that in connection with the exchange of Mrs. Jenkins' Summit Avenue property for corporation stock, he was not acting in his capacity as an attorney, "because in its nature the act complained of was a personal business transaction requiring no skill of attorney and no knowledge or understanding of law." The causes for which an attorney may be removed or suspended are stated in section 287 of the Code of Civil Procedure. Under that section as amended in 1911 this defense could not be maintained; but if the nature of the facts is such as claimed by the accused, that would be a good defense against charges based, as these are, upon transactions occurring in the year 1910. Thus, in the case of *In re Collins*, 147 Cal. 8, 12, [81 Pac. 220], where it clearly appeared that the acts complained of were not done by the respondent in his professional capacity or in connection with any matters in which his duties as an attorney were involved, it was held that "to the extent that an attorney may be disbarred for causes which affect his moral integrity in dealings with others of a purely personal character, and transacted in his

private capacity, the statute has provided that it shall be done by the court only when he has been convicted of a felony, or of a misdemeanor involving moral turpitude." It is our opinion, however, that in these transactions Mrs. Jenkins reposed confidence in Mr. Soale as a counselor at law. The evidence does not indicate that he was engaged in business as an agent or broker or maintained his office for any purpose other than in the course of his profession as an attorney and counselor. She went to him in that office and called upon him for advice and assistance in the conduct of her business affairs, without any notice or suggestion that in accepting the employment he was ***153** representing her in any way other than in his professional capacity. The occupation of a lawyer is not confined to appearances for parties in actions in courts of justice. A very large part of the professional work done by them consists in advice given to clients for the general purpose of aiding them in the conduct of their business affairs. At the time of these transactions Mrs. Jenkins was consulting Mr. Soale concerning a proposed action at law, and it appears that she consulted him about her other business affairs indiscriminately and without any attempted classification of the transactions as being partly within and partly without the scope of his professional business. She was entitled to believe that she was under his care as a counselor employed by her. The fact that in this particular transaction he did not enter any fee charges against her does not change the situation at all, for he was entitled to charge such fees if he so desired. We conclude, therefore, that she did repose confidence in him as her counselor at law, and the only remaining question is as to whether or not he maintained inviolate that confidence. The phrase, "maintain inviolate the confidence," as contained in section 282 of the Code of Civil Procedure, is not confined merely to noncommunication of facts learned in the course of professional employment; for the section separately imposes the duty to "preserve the secrets of his client."

Appellant contends that under the evidence in this case it appears that he did not intend to wrong Mrs. Jenkins or to defraud her in any way in the trade, and that even if false representations and concealments occurred which are chargeable against him, no cause of action has been established, since the stock was in fact worth the four thousand dollars which it cost her. Some of the circumstances involved, to which we have referred, tend to show that the accused secretly treated as his own property which, by his advice and pursuant to a plan conceived by him, she was induced to transfer to a third person without knowledge of the fact that in reality her property was passing into appellant's hands. The court was entitled to believe, and did believe, these to be the facts; and this being so, the conclusion is clearly warranted that he considered the transaction as one favorable to himself, and to which he believed that she would not consent if she had known his real interest therein. Under these circumstances, it should be determined that a lawyer is violating ***154** the confidence of his client, even though in its ultimate result the transaction does not lead to a substantial financial loss on the part of the client. In order to sustain an accusation in a disbarment proceeding in a case of this character, it is not necessary to establish all of the facts with reference to the ultimate loss on the part of the client which might be necessary in an action brought by her against him for damages on account of the alleged deceit.

Our conclusions, as above stated, are sufficient to require us to sustain a judgment removing or suspending the accused from the right to practice his profession. We have to consider further only the claim that the court exceeded its authority by rendering an indefinite and uncertain judgment suspending the accused not only for one year from the date of the judgment, but also "thereafter until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid." The court found that all of the allegations of the accusation are true. One of those allegations was that the four thousand shares of stock were worthless. It was also alleged, and the evidence shows without question, that the value parted with by the accuser amounted to four thousand dollars. It was held by the supreme court of California in the only decision which covers the question that in a disbarment proceeding the accused might be suspended for a period not necessarily limited as a fixed and determinate period of time, but could be for an uncertain time, subject to the right of the accused to relieve himself therefrom by making restitution of a stated amount of money which he had improperly obtained by means of his professional misconduct. (*In re Tyler*, 78 Cal. 307, [12 Am. St. Rep. 55, 20 Pac. 674].) In that case the record showed the amount as established by another judgment, and the judgment of suspension was not subject to attack by reason of any uncertainty in the amount which the accused was required to restore. Following that decision, we think the judgment in the case at bar should be sustained in the form in which it was entered, unless it requires to be modified on account of uncertainty in its statement of the amount of the claim of the accuser. If the evidence is sufficient to show that the stock was worthless, that amount would be four thousand dollars, with interest. The record herein shows that at some time the accuser obtained a judgment against Soale by reason of these same transactions, but that judgment ***155** is not before the court and we do not know either its date or the amount to be recovered as specified therein. We think that the evidence in this case is insufficient to prove that the

stock was worthless. That being so, the amount of the claim referred to in the judgment is not ascertained, and the above-quoted final clause thereof is too uncertain to be capable of enforcement.

It is ordered that the judgment herein be modified by striking therefrom the words, "and thereafter until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid." As thus modified the judgment is affirmed.

James, J., and Shaw, J., concurred.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2016-195

ISSUE: What duties does a lawyer owe to current and former clients to refrain from disclosing potentially embarrassing or detrimental information about the client, including publicly available information the lawyer learned during the course of his representation?

DIGEST: A lawyer may not disclose his client's secrets, which include not only confidential information communicated between the client and the lawyer, but also publicly available information that the lawyer obtained during the professional relationship which the client has requested to be kept secret or the disclosure of which is likely to be embarrassing or detrimental to the client. Even after termination of the attorney-client relationship, the lawyer may not disclose potentially embarrassing or detrimental information about the former client if that information was acquired by virtue of the lawyer's prior representation.

AUTHORITIES INTERPRETED: Business and Professions Code section 6068(e)(1).

Evidence Code sections 952 and 954.

Rule 3-100 of the Rules of Professional Conduct of the State Bar of California.[1/]

STATEMENT OF FACTS

Lawyer is hired by Hedge Fund Manager to defend him against a fraud claim brought by several of his investors. The investors alleged that Hedge Fund Manager was operating a Ponzi scheme or similar financial fraud. During the representation, Hedge Fund Manager acknowledged in confidence to Lawyer that earlier in his career he had taken certain liberties with his investors' money, but assured Lawyer he had been completely above board in his dealings with the investors who now were suing him.

While the lawsuit was pending, Lawyer interviewed several former investors in Hedge Fund Manager's fund, including Former Investor. Former Investor told Lawyer that, several years earlier, she had accused Hedge Fund Manager of fraud in connection with the fund, and that Hedge Fund Manager paid her $100,000 to resolve their dispute before she filed a lawsuit. After they spoke, Former Investor forwarded Lawyer a link to a blog post she had written about her accusations against Hedge Fund Manager. Lawyer forwarded the link to several friends, saying only "interesting reading."

After exchanging a limited amount of discovery, Hedge Fund Manager settled the lawsuit by paying each of the 16 investor plaintiffs $250,000. The parties documented the settlement in a non-confidential settlement agreement, which was submitted to the court in connection with a motion for determination of good faith settlement. After the court granted the motion, the lawsuit was dismissed, and Lawyer's representation of Hedge Fund Manager concluded. The settlement was reported in a small article in a local newspaper, but not picked up by the national press.

Several months after the settlement and the conclusion of Lawyer's representation, Lawyer read an interview with Former Investor in the Wall Street Journal in which Former Investor recited the details of her prior dispute with Hedge Fund Manager. In response, Lawyer wrote a letter to the editor of the Journal, noting he represented Hedge

[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

Fund Manager in connection with the recent investor lawsuit, and stating, "I did a great job of getting Hedge Fund Manager out of the lawsuit for only a seven-figure settlement."

Several years after the second investor lawsuit settled, Hedge Fund Manager was arrested for driving under the influence of alcohol. Lawyer commented on the arrest on his Facebook page, stating, "Drinking and driving is irresponsible."

DISCUSSION

1. The Duty of Confidentiality and the Attorney-Client Privilege

One of the most important duties of an attorney is to preserve the secrets of his client. "No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one." (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 572 [15 P.2d 505] ("*Wutchumna*").) "A member's duty to preserve the confidentiality of client information involves public policies of paramount importance." (*In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship." (Rule 3-100, Discussion paragraph [1].)

Business and Professions Code section 6068, subdivision (e)(1) states that it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code § 6068(e)(1).)[2/] As this Committee has explained, "Client secrets means any information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client." (Cal. State Bar Formal Opn. No. 1993-133.)

As noted above, the duty of confidentiality – that is, the duty to maintain client secrets – is set forth in the State Bar Act and included as an express ethical obligation. By contrast, the attorney-client privilege is a statutorily created evidentiary rule that protects from disclosure a "confidential communication" between a lawyer and his or her client. (Cal. Evid. Code § 954; see also *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 456-57 [107 Cal.Rptr.2d 456].) For purposes of the attorney-client privilege, "confidential communication" is defined in the Evidence Code to be "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence. . . ." (Cal. Evid. Code § 952; see also *In re Jordan* (1972) 7 Cal.3d 930, 939-40 [103 Cal.Rptr. 849].) The attorney-client privilege has been described as necessary to "safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599 [208 Cal.Rptr. 886].) While the ethical duty of confidentiality applies to *information* about the client, whatever its source, the attorney-client privilege is expressly limited to confidential *communications* between a lawyer and his or her client.

Thus, "client secrets" covers a broader category of information than do confidential attorney-client communications; confidential communications are merely a subset of what are considered client secrets. Indeed, "client secrets"

[2/] This opinion focuses on the "secrets" aspect of Business and Professions Code section 6068(e)(1). Much has been written about the word "confidence" as used in section 6068(e)(1), and this Committee previously has noted that "confidence" in the context of this statute means "trust," as separate and distinct from "secrets" or even "confidence***s***" (plural). (See, e.g., Cal. State Bar Formal Opn. No. 1996-146 ["[T]he preservation of the client's 'confidence' means that a lawyer must maintain the trust reposed in the lawyer by the client."]; Cal. State Bar Formal Opn. No. 1987-93 ["The concept of confidence as trust is firmly embedded in the decisional law of California."]; see also *In the Matter of Soale* (1916) 31 Cal.App. 144, 153 [159 P. 1065] ["The phrase, 'maintain inviolate the confidence,' as contained in section 282 of the Code of Civil Procedure [the predecessor to Section 6068(e)(1)], is not confined merely to noncommunication of facts learned in the course of professional employment; for the section separately imposes the duty to 'preserve the secrets of his client.'"]; but see *City and County. of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 [43 Cal.Rptr.3d 771] [discussing "confidences" (plural) as shorthand for "secrets" and implicating the duty of confidentiality, while also noting the separate duty of loyalty].)

include not only confidential attorney-client communications, but also information about the client that may not have been obtained through a confidential communication. Yet rule 3-100(A), which provides, "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client . . .", recognizes no such distinction and applies to both the broad category of client secrets and the subset of confidential attorney-client communications. As stated in rule 3-100, Discussion paragraph [2]:

> The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under the ethical standards of confidentiality, all as established in law, rule and policy.

See also *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189 ("*Matter of Johnson*") [The ethical duty of confidentiality "prohibits an attorney from disclosing facts and even allegations that might cause a client or a former client public embarrassment"]; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 786 [99 Cal.Rptr.3d 464] ["The duty of confidentiality is broader than the attorney-client privilege."], citing *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].)[3/] Thus, information protected by the ethical duty of confidentiality is broader than what is protected as attorney-client privileged under the Evidence Code. (See *Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 189.)

In *Matter of Johnson*, an attorney had told one of his clients, in the presence of others, about another client's previous felony conviction. That conviction was a matter of public record, but, as indicated by the state bar court, it was not easily discovered. The court found that the disclosure of the client's publicly available conviction constituted a violation of the lawyer's duty of confidentiality.[4] "The ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the evidentiary attorney-client privilege." (*Id*. at p. 189; see also Cal. State Bar Formal Opn. No. 2004-165 ["The duty [of confidentiality] has been applied even when the facts are already part of the public record or where there are other sources of information."]; Los Angeles County Bar Association Formal Opn. No. 386 [finding duty of confidentiality applies "even where the facts

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[3/] The ABA Model Rules provide a similar rule: "[T]he confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." (Comment [3] to ABA Model Rule 1.6.) Courts in other states also have ruled similarly. (See, e.g., *In re Gonzalez* (D.C. 2001) 773 A.2d 1026, 1031 [the duty of confidentiality, "unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge"]; *Lawyer Disciplinary Board v. McGraw* (1995) 194 W.Va. 788, 798 [461 S.E.2d 850] [relying on Model Rule 1.6, the court stated that confidentiality of client information "is not nullified by the fact that the circumstances to be disclosed are part of the public record, or that there are other available sources of such information, or by the fact that the lawyer received the same information from other sources"].)

[4/] Client information may be "publicly available" in that the information is available to those outside the attorney-client relationship, although it must be searched for (e.g., in an internet search, a search of a public court file, or something similar), or it can be "generally known" such that most people already know the information without having to look for it. ABA Model Rule 1.9(c)(1) provides that information that is so generally known or widely disseminated (as opposed to publicly available) ceases to be a client secret. (See ABA Model Rule 1.9(c)(1) ["A lawyer who has formerly represented a client in a matter . . . shall not thereafter (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or *when the information has become generally known* . . ."], emphasis added; Restatement of the Law Governing Lawyers § 59 & Comment d (discussing ABA Model Rule 1.9).) California does not have an analogous rule addressing "generally known" information, although *Matter of Johnson*'s reliance on the fact the confidential information at issue was not "easily discovered" may be argued as supporting the idea that generally known information – that is, information which either is easily discovered or does not even need to be discovered to become known – should not be considered a client secret. This Committee takes no position on this issue, and this opinion goes only as far as finding that client information does not lose its confidential nature merely because it is publicly available.

are already part of the public record or where there are other sources of information"]; see also Cal. State Bar Formal Opn. Nos. 2004-165; 2003-161; 1993-133; 1976-37.)

2. Disclosures During Representation

During Lawyer's representation of Hedge Fund Manager, Hedge Fund Manager told Lawyer in confidence that he had taken certain liberties with previous investors' money. Such information is protected both by Lawyer's ethical duty to maintain client secrets and by the attorney-client privilege because it was confidentially communicated by Hedge Fund Manager to Lawyer during the course of the representation.

Lawyer also learned information about Hedge Fund Manager from Former Investor. That information was not learned through a confidential communication with Hedge Fund Manager, so the information is not protected by the attorney-client privilege. (See Cal. Evid. Code § 954; see also Cal. Evid. Code § 952 [defining "confidential communication" as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence . . ."]; *Solin v. O'Melveny & Myers, supra,* 89 Cal.App.4th at pp. 456-57.) It was obtained, however, in the course of Lawyer's representation of Hedge Fund Manager, and disclosure likely would be embarrassing or detrimental to Hedge Fund Manager. Thus, this information constitutes a client "secret" that must be protected by Lawyer under his duty of confidentiality.[5/] Even though Former Investor made her information publicly available by writing a blog post about it, Lawyer had a duty to protect that information as a client secret, and not disseminate or further publicize it by forwarding the blog post to friends. Just as the state bar court concluded in *Matter of Johnson*, Lawyer's disseminating or commenting on information he learned from Former Investor during his representation of Hedge Fund Manager – including forwarding the blog post to several friends – violates his ethical duty of confidentiality.

3. Post-Termination Disclosures about Alleged Fraudulent Scheme

After the termination of his representation, Lawyer wrote a letter to the Wall Street Journal commenting on the interview with Former Investor and discussing the lawsuit he handled for Hedge Fund Manager concerning similar allegations, including the settlement of that matter. Even though Hedge Fund Manager was a *former* client at the time Lawyer made those comments, we conclude that Lawyer violated the duty of confidentiality, as discussed below.

Although most of an attorney's duties to his client terminate at the conclusion of the representation, the duty of confidentiality does not. As the California Supreme Court stated, "[A]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (*Wutchumna*, *supra*, 216 Cal. at pp. 573-74; see also *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822-23 [124 Cal.Rptr.3d 256] ["It is well established that the duties of loyalty and confidentiality bar an attorney . . . from using a former client's confidential information . . . ."]; *City Nat'l Bank v. Adams* (2002) 96 Cal.App.4th 315, 324 [117 Cal.Rptr.2d 125] [attorney may not use information to former client's detriment]; Cal. State Bar Formal Opn. 1993-133 ["The obligation to protect client confidences continues notwithstanding the termination of the attorney-client relationship."].[6/] The Los Angeles County Bar Association stated in its Formal Opinion No. 409 that the duty to a former client forbids "'use against the former client of any information acquired during such relationship.'" (quoting *Yorn v. Superior Court* (1979) 90 Cal.App.3d 669, 675 [90 Cal.App.3d 669]). That opinion concluded that a public defender representing an entertainment industry client charged with a felony in a high-profile trial could not disclose to the media confidential information he had learned about his client, even *after* termination of the attorney-client relationship.

[5/] See also Cal. State Bar Formal Opn. No. 1996-146 ["Under section 6068(e), the fact that the lawyer received the information from a non-client . . . makes no difference."].

[6/] California's approach is consistent with the approach of the ABA Model Rule on this point. See ABA Model Rule 1.6, Comment [20] ["The duty of confidentiality continues after the client-lawyer relationship has terminated."].)

Here, Lawyer's letter to the newspaper, which included discussion about the settlement Lawyer obtained for Hedge Fund Manager, constituted a disclosure of a client secret because it likely caused Hedge Fund Manager harm or embarrassment. Although Hedge Fund Manager's settlement agreement resides in the court file (as it was an exhibit to the motion for determination of good faith settlement) and, thus, is publicly available, Lawyer's statements nonetheless could be considered a disclosure of a client "secret," as was the disclosure in *Matter of Johnson*, where the lawyer disclosed publicly available information about the client's prior conviction. Moreover, not only did Lawyer disclose facts about the settlement (and, by necessity, the existence of the lawsuit), but he also suggested he was privy to bad facts about Hedge Fund Manager's defense such that a "seven-figure settlement" was a good one. Under these facts, we conclude that Lawyer's disclosures would cause Hedge Fund Manager harm or embarrassment and, thus, Lawyer breached his duty of confidentiality.

The fact that Lawyer made the comments after termination of the attorney-client relationship does not change the result because Lawyer learned about the lawsuit and settlement through his representation of Hedge Fund Manager; thus, the information was "acquired by virtue of the previous relationship." (*Wutchumna*, *supra*, 216 Cal. at pp. 573-74.) In *Wutchumna*, discussed above, the Supreme Court found a lawyer owed a duty to his former client to preserve secrets he had "acquired in the course of the earlier employment" and to refrain from doing anything "which will injuriously affect his former client in any matter in which he formerly represented him." (*Id.* at pp. 571-72.) Here, Lawyer knew the details, including the amount, of Hedge Fund Manager's settlement by virtue of his representation of Hedge Fund Manager. Comments on that settlement are likely to cause Hedge Fund Manager embarrassment or harm and, consequently, are considered a client secret. Thus, Lawyer should not have made the comments in his letter.

4. Disclosures about Arrest for Driving under the Influence

In addition to writing a letter to the editor commenting on Hedge Fund Manager's alleged fraud against Former Investor, several years later Lawyer posted a comment about Hedge Fund Manager's drunk driving arrest. Unlike the letter to the editor about Hedge Fund Manager's alleged financial fraud, a comment about Hedge Fund Manager's drunk driving arrest bears no relationship to Lawyer's prior representation of Hedge Fund Manager. Because drunk driving is unrelated to the prior representation, and Lawyer learned nothing about that issue in the course of his representation of Hedge Fund Manager, Lawyer owes no duty to Hedge Fund Manager to maintain in confidence anything he thereafter learns about Hedge Fund Manager's arrest. Neither the duty of confidentiality nor any other duty that may survive termination of the attorney-client relationship would preclude posting of or commenting on such a story.[7/]

CONCLUSION

A lawyer's duty of confidentiality is broader than the attorney-client privilege, and embarrassing or detrimental information learned by a lawyer during the course of his representation of a client must be protected as a client secret even if the information is publicly available. A lawyer's duty to preserve his client's secrets survives the termination of the representation. If, however, otherwise embarrassing or detrimental information was not learned by the lawyer by virtue of his representation of the client, it is not a client secret, and the lawyer is not bound to preserve it in confidence.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[7/] By contrast, had Lawyer learned this information during his representation of Hedge Fund Manager, rather than after termination of the representation, Lawyer's duty of loyalty likely would have precluded Lawyer from publicly discussing even the drunk driving arrest. (See *Flatt,* 9 Cal.4th at p. 284.)

HYPOTHETICAL D
Professional Competence

CRPC § 1.1

Cole v. Patricia A. Meyer & Assocs., APC (2012) 206 Cal. App. 4th 1095, 1115-111

Wright v. Williams (1975) 47 Cal.App.3d 802, 809

Lewis v. State Bar (1981) 28 Cal.3d 683

Prof.Conduct, Rule 1.1
Formerly cited as CA ST RPC Rule 3-110

Rule 1.1. Competence

Effective: March 22, 2021

Currentness

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably[1] necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Credits

(Adopted, eff. Nov. 1, 2018. As amended, eff. March 22, 2021.)

Footnotes

[1] An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.1, CA ST RPC Rule 1.1
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

End of Document

206 Cal.App.4th 1095
Court of Appeal, Second District, Division 4, California.

Christopher A. COLE, Plaintiff and Appellant,
v.
PATRICIA A. MEYER & ASSOCIATES, APC, et al., Defendants and Appellants.
Christopher A. Cole, Plaintiff and Appellant,
v.
Kiesel, Boucher, & Larson et al., Defendants and Respondents.

Nos. B227712, B230271
|
June 8, 2012.
|
Rehearing Denied June 26, 2012.
|
Review Denied Aug. 29, 2012.

Synopsis

Background: After underlying litigation between shareholders and director of software company, 172 Cal.App.4th 445, 91 Cal.Rptr.3d 309, director brought action against shareholders' counsel for malicious prosecution and defamation. The Superior Court, Los Angeles County, No. BC436506, Richard Fruin, J., granted shareholders' standby counsel's anti-strategic lawsuit against public participation (SLAPP) motion but partially denied shareholders' lead counsel's anti-SLAPP motion. Director appealed and lead counsel cross-appealed.

Holdings: The Court of Appeal, Epstein, P.J., held that:

[1] director made prima facie showing that underlying fraud allegations lacked probable cause;

[2] director made prima facie showing that underlying fraud allegations were malicious;

[3] associated counsel could not avoid malicious prosecution liability by claiming ignorance of merits of allegations made by lead counsel;

[4] attorneys' act of republishing complaint on law firm website was not protected by litigation privilege; and

[5] director was not a public figure for purpose of the fraud allegations in shareholders' complaint.

Affirmed in part, reversed in part, and remanded with directions.

West Headnotes (33)

[1] Appeal and Error Anti-SLAPP laws

In its de novo review of an order granting an anti-strategic lawsuit against public participation (SLAPP) motion, Court of Appeal looks at the pleadings and declarations, accepting as true the evidence that favors the plaintiff and evaluating the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law. West's Ann.Cal.C.C.P. § 425.16.

32 Cases that cite this headnote

[2] Pleading Frivolous pleading

The plaintiff's cause of action needs to have only minimal merit to survive an anti-strategic lawsuit against public participation (SLAPP) motion. West's Ann.Cal.C.C.P. § 425.16.

18 Cases that cite this headnote

[3] Malicious Prosecution Civil Actions and Proceedings

"Probable cause," as would preclude malicious prosecution, exists when a lawsuit is based on facts reasonably believed to be true, and all asserted theories are legally tenable under the known facts.

14 Cases that cite this headnote

[4] **Malicious Prosecution**Civil Actions and Proceedings

This objective standard of review to establish that a lawsuit lacked probable cause, as would support malicious prosecution, is similar to the standard for determining whether a lawsuit is frivolous: whether "any reasonable attorney would have thought the claim tenable."

8 Cases that cite this headnote

[5] **Fraud**Elements of Actual Fraud

A common law fraud cause of action requires: (1) misrepresentation, i.e., false representation, concealment or nondisclosure; (2) knowledge of falsity, i.e., scienter; (3) intent to defraud, i.e., intent to induce reliance; (4) justifiable reliance; and (5) resulting damage.

[6] **Securities Regulation**Fraudulent or other prohibited practices

Scienter is necessary for liability under the Corporations Code securities fraud statutes, which together require "an intent to defraud through a knowingly false statement" designed to manipulate the securities markets. West's Ann.Cal.Corp.Code §§ 25400, 25500.

[7] **Conspiracy**Intent to commit act or engage in conduct

Actual knowledge and concurrence in a planned tortious scheme are required for civil conspiracy.

[8] **Torts**Aiding and abetting

Aiding and abetting a tort requires knowingly assisting the wrongful act.

4 Cases that cite this headnote

[9] **Malicious Prosecution**Probable cause and malice

Evidence is not insufficient to establish probable cause in a malicious prosecution action merely because it is circumstantial.

8 Cases that cite this headnote

[10] **Pleading**Frivolous pleading

Outside director of software company made a prima facie showing that shareholders' allegation that director was aware of accounting fraud lacked probable cause, thus requiring denial of shareholders' attorneys' anti-strategic lawsuit against public participation (SLAPP) motion in director's malicious prosecution action based on shareholders' underlying fraud claim, even though other shareholder suits had been filed against director based on different causes of action, where director's sales of stock while the fraud was going on were consistent with his earlier sales, absent evidence that director knew the sell-in method of accounting would be used fraudulently when he approved its use, or that director was aware at the time of his sale of stock that an acquisition the company

had recently approved was a disguised write off of uncollectible receivables. West's Ann.Cal.C.C.P. § 425.16.

[11] **Securities Regulation** Persons liable

Outside director of software company could not be held vicariously liable for the company's fraudulent financial statements on the basis that he approved the reports as a member of the board of directors. West's Ann.Cal.Corp.Code §§ 25400, 25500.

[12] **Malicious Prosecution** Probable cause and malice

Former employees' declarations that director of software company had manipulated software prices and backbooked later acquired contracts to earlier fiscal quarters during his earlier tenure in management could not provide probable cause for shareholders to initiate fraud action against director based on accounting fraud over a decade later, and thus they did not defeat director's malicious prosecution claim, where the declarations were first offered in opposition to director's summary judgment motion in the fraud action three years after shareholders initiated the case, absent evidence that the practice of backdating sales was so unusual that it could be traced back only to the director.

[13] **Malicious Prosecution** Probable cause and malice

In a malicious prosecution case where the issue is the insufficiency of the facts known to the defendant, probable cause requires evidence sufficient to prevail in the action or at least information reasonably warranting an inference there is such evidence.

4 Cases that cite this headnote

[14] **Malicious Prosecution** Motive of prosecution

The malice element of malicious prosecution goes to the defendants' subjective intent for instituting the prior case.

14 Cases that cite this headnote

[15] **Malicious Prosecution** Nature and elements
Malicious Prosecution Express malice

The malice element of malicious prosecution does not require that the defendants harbor actual ill will toward the plaintiff in the malicious prosecution case, and liability attaches to attitudes that range from open hostility to indifference.

7 Cases that cite this headnote

[16] **Malicious Prosecution** Inference from want of probable cause
Malicious Prosecution Probable cause and malice

The malice element of malicious prosecution may be inferred from circumstantial evidence, such as the defendants' lack of probable cause, supplemented with proof that the prior case was instituted largely for an improper purpose, which may consist of evidence that the prior case was knowingly brought without probable cause or was brought to force a settlement unrelated to its merits.

24 Cases that cite this headnote

[17] **Malicious Prosecution** Acts and conduct evidence of malice

A defendant attorney's investigation and research may be relevant to whether the attorney acted with malice, as required for malicious prosecution.

2 Cases that cite this headnote

[18] **Pleading** Frivolous pleading

Outside director of software company made a prima facie showing that shareholders' attorneys acted with malice in filing underlying fraud action, thus requiring denial of attorneys' anti-strategic lawsuit against public participation (SLAPP) motion in director's malicious prosecution action, where the allegations in the fraud action for the most part consisted of inferences from circumstantial evidence couched as statements of ultimate fact, and shareholders' attorneys' heavy reliance on another shareholder action against director supported the inference that director was named as a defendant in the underlying case by analogy to the other shareholder action but without regard for the difference in the legal theories advanced in each case. West's Ann.Cal.C.C.P. § 425.16.

1 Case that cites this headnote

[19] **Attorneys and Legal Services** Litigation

As counsel of record for plaintiffs in shareholder derivative action, standby counsel who intended to participate only if the case went to trial had a duty of care to their clients that encompassed both a knowledge of the law and an obligation of diligent research and informed judgment.

2 Cases that cite this headnote

[20] **Attorneys and Legal Services** Standard of Care; Breach of Duty

Even when work on a case is performed by an experienced attorney, competent representation by other attorneys representing the client in the same case still requires knowing enough about the subject matter to be able to judge the quality of the attorney's work. Cal.Rules of Court, Rule 3–110(C).

1 Case that cites this headnote

[21] **Attorneys and Legal Services** Delegation of attorney's authority

California law generally allows an attorney of record to associate another attorney and to divide the duties of conducting the case.

[22] **Malicious Prosecution** Persons liable

An associated attorney whose name appears on all filings should not be able to avoid liability by intentionally failing to learn anything about a case that may turn out to have been maliciously prosecuted in whole or in part.

2 Cases that cite this headnote

[23] **Attorneys and Legal Services** Duties and Liabilities to Non-Clients

An attorney has a responsibility to avoid frivolous or vexatious litigation. West's Ann.Cal.C.C.P. § 128.7(b).

[24] **Malicious Prosecution** Persons liable

Associated counsel who intended to participate only if the case went to trial could not avoid liability for malicious prosecution by claiming to have been ignorant of the merits of the allegations made by lead counsel, in shareholder derivative action against director for fraud, where associated counsel did not advise the court and opposing counsel of their limited involvement in the case.

3 Cases that cite this headnote

[25] **Malicious Prosecution** Persons liable

Attorneys may avoid liability for malicious prosecution without having to engage in premature work on a case if they refrain from formally associating in it until their role is triggered.

4 Cases that cite this headnote

[26] **Libel and Slander** Judicial Proceedings
Torts Litigation privilege; witness immunity

The litigation privilege does not apply to republications of privileged statements to nonparticipants in the action. West's Ann.Cal.Civ.Code § 47(b).

[27] **Pleading** Frivolous pleading

Attorneys failed to establish that their republication of the complaint from one of their firm's cases on the firm's website was a "writing made before a judicial proceeding" or a "writing made in connection with an issue under consideration or review by a judicial body" within the protection of the anti-strategic lawsuit against public participation (SLAPP) statute, where the complaint remained accessible on the website after the judgment became final and the case was no longer pending, absent evidence of when the firm uploaded the complaint to its website. West's Ann.Cal.C.C.P. § 425.16(e).

2 Cases that cite this headnote

[28] **Pleading** Frivolous pleading

An Internet website that is accessible to the general public is a "public forum" under anti-strategic lawsuit against public participation (SLAPP) statute. West's Ann.Cal.C.C.P. § 425.16(e)(3).

4 Cases that cite this headnote

[29] **Libel and Slander** By same person

The single publication rule applies to Internet publication regardless of how many people actually see it, and under that rule, publication occurs when the allegedly defamatory statement is first made available to the public.

5 Cases that cite this headnote

[30] **Libel and Slander** Complaints, affidavits, or motions

Law firm's act of republishing a complaint on the firm's website was not protected by the litigation privilege, since the act was a republication of the firm's statements to nonparticipants in the action. West's Ann.Cal.Civ.Code § 47(b).

[31] **Libel and Slander** Criticism and Comment on Public Matters; Public Figures

PleadingFrivolous pleading

A director and former president of a software company that declared bankruptcy after engaging in massive accounting fraud was not a public figure for the limited purpose of the fraud allegations in shareholders' complaint against director, and thus director was not required to show malice to establish a likelihood of success under anti-strategic lawsuit against public participation (SLAPP) statute in director's defamation action against the shareholders' attorneys based on their republication of the complaint on their firm's website, absent evidence of director's prominence in the controversy surrounding the company's collapse or his media access as a result. West's Ann.Cal.C.C.P. § 425.16.

[32] **Costs, Fees, and Sanctions**Anti-SLAPP laws

Where a defendant's anti-strategic lawsuit against public participation (SLAPP) motion is partially successful, the question in determining whether the defendant is entitled to recover his or her attorney fees and costs is whether the results obtained are insignificant and of no practical benefit to the moving party. West's Ann.Cal.C.C.P. § 425.16(c)(1).

7 Cases that cite this headnote

[33] **Costs, Fees, and Sanctions**Anti-SLAPP laws

A court awarding fees and costs for a partially successful anti-strategic lawsuit against public participation (SLAPP) motion must exercise its discretion in determining their amount in light of the moving party's relative success in achieving his or her litigation objectives. West's Ann.Cal.C.C.P. § 425.16(c)(1).

6 Cases that cite this headnote

Attorneys and Law Firms

****650** Bewley, Lassleben & Miller, Leighton M. Anderson, Los Angeles, and David A. Brady, Whittier, for Plaintiff and Appellant.

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Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer and Frances Ma, Sherman Oaks, for Defendants and Respondents Kiesel, Boucher & Larson and Raymond P. Boucher.

****651** Reback, McAndrews, Kjar, Warford & Stockalper, James J. Kjar and Albert E. Cressey III, Manhattan Beach, for Defendant and Respondent Robert P. Ottilie.

Opinion

EPSTEIN, P.J.

***1100** This case involves causes of action for malicious prosecution and defamation against attorneys of record in a prior case. As to the causes of action for malicious prosecution, we hold, among other things, that the attorneys' anti-SLAPP[1] special motions to strike (Code Civ. Proc., § 425.16.) were improperly granted, and that attorneys who appear on all of the pleadings and papers filed for the plaintiffs in the underlying case cannot avoid liability for malicious prosecution merely by showing that they took a passive role in that case as standby counsel who would try the case in the event it went to trial.

[1] "SLAPP is an acronym for 'strategic lawsuit against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1, 3 Cal.Rptr.3d 636, 74 P.3d 737 (*Jarrow*).)

Christopher A. Cole filed a complaint for malicious prosecution and defamation against the following defendants: Patricia A. Meyer & Associates, APC (formerly known as Aguirre & Meyer, hereafter Meyer & Associates), Patricia A. Meyer and Michael Aguirre (collectively the Meyer defendants); ***1101** Kiesel, Boucher, & Larson, and Raymond P. Boucher (collectively the Boucher defendants); and Robert P. Ottilie. Defendants were the attorneys of record for plaintiffs in a prior shareholder action against Cole and other directors of Peregrine Systems, Inc. (Peregrine), a

software company that declared bankruptcy after engaging in massive accounting fraud.

The trial court granted the anti-SLAPP motions by the Boucher defendants and Ottilie to strike Cole's complaint. The court denied the Meyer defendants' anti-SLAPP motion, except as to the defamation claim against Aguirre. Cole appeals the striking of his malicious prosecution claims against the Boucher defendants and Ottilie. The Meyer defendants cross-appeal from the partial denial of their anti-SLAPP motion.

We find that Cole has shown the requisite likelihood that he will prevail on his malicious prosecution claims against all defendants, and on his defamation claim against Meyer and Meyer & Associates. We reverse the court's September 9, 2010 order to the extent it struck the malicious prosecution claims against the Boucher defendants and Ottilie and awarded Ottilie attorney fees and costs. We affirm the order in all other respects.

Cole also appeals from the separate order awarding the Boucher defendants attorney fees and costs for their anti-SLAPP motion. We reverse this award and remand the matter for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL SUMMARY

Cole founded Peregrine in San Diego, California, in 1981.[2] Throughout the 1980's, he held management positions and served as the company's president before resigning in 1989. His subsequent involvement with the company was largely as a shareholder and outside director.

[2] The trial court overruled defendants' general objections to the comprehensive declarations of Cole and his attorney, and it sustained only some of the many evidentiary objections to specific portions of these declarations. No party has challenged these evidentiary rulings on appeal. To the extent that we rely on the two declarations, we draw only on statements of fact to which specific objections were either overruled or not made at all.

****652** Peregrine became a publicly traded company in 1997. Some of its revenue growth was due to software sales to resellers, known as "channel sales." In 1999, the company began recognizing revenue at the time of the original sale to a reseller, known as a "sale in" to the channel, rather than at the time of sale to the end user, known as a "sale through" the channel. It improperly ***1102** recognized revenue from "sales in" to a channel without an end user's firm commitment to buy or with side agreements. These and other contingencies made revenue collection highly uncertain. To cover uncollectible receivables, the company sold them to banks with recourse and disguised large writeoffs as acquisition costs. It also engaged in inflated "barter transactions" with other software companies, structured so that both companies could recognize revenue.

After improper transactions came to light in 2002, the Peregrine board of directors commissioned an independent investigation into the company's practices. The investigation resulted in a report by the law firm Latham & Watkins (the Latham report). This report was based on approximately 86 interviews, 897,000 e-mail messages generated between 1996 and 2002, and analysis of 170 suspect transactions. The Latham report found no evidence that the outside directors knew of management's improper business and accounting practices. It also found that Cole had sold Peregrine stock whenever trading was allowed in order to fund his other software startup companies. During the investigation, Peregrine announced that it would restate its earnings since 2000. It then filed for bankruptcy and in 2005 was acquired by Hewlett–Packard.

In 2003, defendants sued Cole and other Peregrine directors on behalf of individual Peregrine shareholders. The action was filed in San Diego County Superior Court. The first amended complaint was the first charging pleading actually served on Cole. It included eight common law and statutory fraud and fraud-related causes of action: fraud and deceit by active concealment, fraud and deceit based upon omission and misrepresentations of material facts, violations of the Corporate Securities Law of 1968 (Corp.Code, § 25000 et seq.), aiding and abetting, and conspiracy. Four causes of action were for negligent misrepresentation, breach of fiduciary duty, aiding and abetting that breach, and violation of the unfair competition law (Bus. & Prof.Code, § 17200 et seq.). The same 12 state law causes of action were carried over into subsequent amendments of the complaint.[3]

[3] The original complaint and the third amended complaint are not in the record.

The first amended complaint alleged that Cole was actively involved in the day-to-day operations of Peregrine and advised management about the company's operations; he set aggressive financial goals for the company by encouraging false or misleading revenue recognition reporting; he attended 38 board meetings

from 1999 through 2002, at which false or misleading revenue recognition was discussed; and in the same period, he sold 1.2 million shares of stock for a total of over $28.8 million, thus becoming one of the principal beneficiaries of the fraud. In 2004, the second amended complaint expanded these allegations in several directions: it alleged that the ***1103** board of directors encouraged channel sales in 1997, approved a sell-in rather than sell-through recognition of revenue from such sales in April 1999, and was aware of the increase of unsold inventory in the channel in October 1999. Cole was alleged to have been instrumental in developing Peregrine's business model and ****653** in establishing its revenue recognition policy. He was alleged to have shredded materials distributed at board meetings and approved "doctoring" the minutes to eliminate any incriminating information. Cole was specifically alleged to have engaged in insider trading with respect to Peregrine's acquisition of the Harbinger Corporation in April 2000 and the Department of Justice's investigation of Peregrine's business partner Critical Path in February 2002.

The fourth amended complaint, filed at the end of 2005, restated these allegations against Cole without a significant substantive change. Since Aguirre had left private practice, his name did not appear on this complaint or subsequent filings, and his former law firm appeared under the name Meyer & Associates. Cole's motion for summary judgment was tentatively granted in 2006, but a final decision did not issue until the end of 2007 because the matter was repeatedly continued upon the request of plaintiffs' attorneys. The court concluded that plaintiffs had failed to raise a triable issue of material fact that, between 1999 and 2001, Cole knew of the fraud at Peregrine, had day-to-day control over its operations, or had a special relationship with the company. In ruling on the motion, the court specifically rejected as irrelevant the declarations of two former Peregrine employees who claimed Cole engaged in dishonest business practices when he managed Peregrine in the 1980's.

The summary judgment in favor of Cole and two other outside directors was affirmed in *Bains v. Moores* (2009) 172 Cal.App.4th 445, 91 Cal.Rptr.3d 309 (*Bains*). The appellate court concluded that the plaintiffs had failed to raise a genuine issue of material fact on any fraud or fraud-related claim. (*Id.* at p. 454, 91 Cal.Rptr.3d 309.) Specifically, the court found that Cole's sale of stock in February 2000 was not suspicious and therefore was not evidence of scienter for the purpose of establishing fraud. (*Id.* at pp. 464–465, 91 Cal.Rptr.3d 309.) The court found that, at most, the plaintiffs had shown the Peregrine board of directors had been advised about concerns over the company's prospects and its method of recognizing revenue for channel sales, but not of any discrete piece of information material to the company's share price. (*Id.* at p. 461, 91 Cal.Rptr.3d 309.) The court noted that even the plaintiffs' expert did not conclude the outside directors knew of the fraud at Peregrine. (*Id.* at p. 468, 91 Cal.Rptr.3d 309.) The court deemed speculative the plaintiffs' argument that they had been hampered in discovery because 28 key witnesses had exercised their privilege against self-incrimination. (*Id.* at pp. 480, 486, 91 Cal.Rptr.3d 309.)

***1104** In April 2010, Cole sued the attorneys of record in *Bains* for malicious prosecution and defamation. On September 9, 2010, the trial court granted the Boucher defendants' and Ottilie's anti-SLAPP motions based on their representation that they did not participate in *Bains*, having been associated in the case only for purposes of trial. The court denied Cole's request for limited discovery into these defendants' actual participation in the case. It granted the motion to strike the defamation claim as to the Boucher defendants, Ottilie, and Aguirre because they were not liable for the posting of the fourth amended complaint on the Web site of Meyer & Associates, where it could be accessed even after *Bains* was no longer pending. The court ruled that the Boucher defendants and Ottilie were entitled to attorney fees for their anti-SLAPP motions and awarded Ottilie $7,895 in fees. The court concluded that Cole was likely to prevail on his malicious prosecution claim against the Meyer defendants (including Aguirre). ****654** Cole timely appealed and the Meyer defendants cross-appealed.

On November 15, 2010, the court granted the Boucher defendants' and Aguirre's motions for attorney fees and costs. Cole submitted on the court's tentative award of fees and costs to Aguirre, which was limited to the defamation claim. Cole then noticed an appeal from the minute order. The signed order awarding attorney fees to the Boucher defendants was filed on November 22, 2010.

DISCUSSION

I

Code of Civil Procedure section 425.16 provides that a cause of action arising from a defendant's act in furtherance of a constitutionally protected right of free speech may be stricken unless the plaintiff is likely to prevail on the merits. (Code Civ. Proc., § 425.16, subd.

(b)(1).) The analysis of an anti-SLAPP motion under this section is two-fold: the trial court decides first " 'whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.... If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.]" (*Jarrow, supra,* 31 Cal.4th at 733, 3 Cal.Rptr.3d 636, 74 P.3d 737.)

To meet his burden, the plaintiff " 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility ***1105** or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19, 50 P.3d 733, superseded by statute on other grounds as noted in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547, 59 Cal.Rptr.3d 109.)

[1] [2] We review an order granting an anti-SLAPP motion de novo, applying the same two-step procedure as the trial court. (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 663, 132 Cal.Rptr.3d 781.) We look at the pleadings and declarations, accepting as true the evidence that favors the plaintiff and evaluating the defendant's evidence " 'only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3, 46 Cal.Rptr.3d 638, 139 P.3d 30 (*Soukup*).) The plaintiff's cause of action needs to have only " 'minimal merit' [citation]" to survive an anti-SLAPP motion. (*Id.* at p. 291, 46 Cal.Rptr.3d 638, 139 P.3d 30.)

II

Cole concedes that a cause of action for malicious prosecution is subject to an anti-SLAPP motion. (See *Jarrow, supra,* 31 Cal.4th at p. 735, 3 Cal.Rptr.3d 636, 74 P.3d 737.) His complaint contains two such causes of action: one based on the filing of the *Bains* case and another based on plaintiffs' opposition to his summary judgment motion in *Bains.* The question is whether he has made a prima facie evidentiary showing of a probability of prevailing ****655** on one or both of these causes of action.

To prevail, Cole must demonstrate that, as to him, the *Bains* case "(1) was commenced by or at the direction of the defendant[s] and was pursued to a legal termination favorable to [Cole]; (2) was brought without probable cause; and (3) was initiated with malice. [Citation.]" (*Soukup, supra,* 39 Cal.4th at p. 292, 46 Cal.Rptr.3d 638, 139 P.3d 30.) He also may prevail by showing that defendants maliciously continued to prosecute the case against him, in the trial court and on appeal, without probable cause. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 969, 973, 12 Cal.Rptr.3d 54, 87 P.3d 802 (*Zamos*).)

There is no dispute that *Bains* was favorably terminated as to Cole, but the Meyer defendants have cross-appealed from the trial court's finding that they instituted and continued to prosecute the case against Cole without probable cause and with malice. The Boucher defendants and Ottilie argue they cannot be liable for malicious prosecution because they did not take an active part in *Bains* and reasonably relied on the Meyer defendants' decision to sue Cole. ***1106** We conclude that Cole has shown the requisite likelihood of prevailing on his malicious prosecution claims against all defendants.

A. Probable Cause

[3] [4] Probable cause exists when a lawsuit is based on facts reasonably believed to be true, and all asserted theories are legally tenable under the known facts. (*Soukup, supra,* 39 Cal.4th at p. 292, 46 Cal.Rptr.3d 638, 139 P.3d 30.) Thus, Cole may prevail by making a prima facie showing that any one of the theories in *Bains* was legally untenable or based on facts not reasonably believed to be true. (See *ibid.*) This objective standard of review is similar to the standard for determining whether a lawsuit is frivolous: whether "any reasonable attorney would have thought the claim tenable." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885–886, 254 Cal.Rptr. 336, 765 P.2d 498 (*Sheldon Appel*).)

[5] [6] [7] [8] The parties' dispute focuses on the fraud and fraud-related claims in *Bains.* Specifically, the parties disagree whether the attorneys in that case had probable cause to believe that Cole knew of, encouraged, or participated in the fraud at Peregrine. A common law fraud cause of action requires: " ' "(a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud,

i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." ' [Citations.]" (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363, 64 Cal.Rptr.3d 504.) Scienter also is necessary for liability under Corporations Code sections 25400 and 25500, which together require "an intent to defraud through a knowingly false statement" designed to manipulate the securities markets. (*California Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102, 108, 112, 113 Cal.Rptr.2d 915.) Actual knowledge and concurrence in a planned tortious scheme are required for civil conspiracy. (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823, 32 Cal.Rptr.3d 325.) Aiding and abetting a tort requires knowingly assisting the wrongful act. (*Id.* at p. 823, fn. 10, 32 Cal.Rptr.3d 325.)

[9] In both *Bains* and this case, Cole has maintained that he was sued only because he attended board meetings and sold stock during the relevant period, and the specific allegations of fraud against him were concocted in bad faith to take the case against him past the demurrer stage. The Meyer defendants' declarations in support of the anti-SLAPP motions indicate ****656** that, indeed, there was no direct evidence of Cole's involvement in Peregrine's fraudulent operation, and the allegations against him were strictly circumstantial. Evidence is not insufficient merely because it is circumstantial. The question is whether it was sufficient in this case.

Meyer, the lead attorney in *Bains*, explains that "Cole was named a defendant in *Bains* because of his long-standing role as a founder, officer and ***1107** director of Peregrine; his intimate knowledge of the company's operations; his attendance at a critical meeting of the Peregrine board of directors in April of 1999; his approval of erroneous, false and fraudulent reports as a member of the company's board of directors; and the suspicious timing of his sale of large blocks of Peregrine stock before the public disclosure of negative financial results for the corporation." Both Meyer and Aguirre conclusorily declare that they relied on "the reasonable inferences" drawn from "information acquired through investigation and discovery." Their declarations fail to demonstrate that the fraud allegations against Cole were supported by probable cause at any time. They demonstrate, rather, that the attorneys drew logically flawed inferences from known facts or stretched those facts to fit their fraud-based theories.

1. Insider Trading

[10] While Cole's trading of stock was an easy target, defendants have been unable to pinpoint what makes it suspicious. Cole declared that he regularly sold stock between 1999 and 2002 to raise money for his other business ventures, but only when he had a clearance from the Peregrine's legal department. To the extent that the Peregrine stock price was fraudulently inflated during that period, he benefited from it, but that does not automatically establish he had knowledge of the fraud.

As noted in *Bains*, no California authority makes insider trading relevant to scienter. (*Bains, supra*, 172 Cal.App.4th at p. 456, 91 Cal.Rptr.3d 309.) The *Bains* court assumed, based on federal authority, that suspicious or unusual insider trading may be probative on the issue, depending on the amount and percentage of shares sold, the timing of the sales, and the insider's trading history. (*Bains, supra*, 172 Cal.App.4th at pp. 456, 458, 91 Cal.Rptr.3d 309, citing *Zucco Partners, LLC v. Digimarc Corp.* (9th Cir.2009) 552 F.3d 981, 1005 (*Zucco Partners*).) To be suspicious, the sales must have been " ' "calculated to maximize the personal benefit from undisclosed inside information." ' " (*Zucco Partners*, at p. 1005.)

The *Bains* complaint did not allege Cole's trading history between 1997, when Peregrine's stock became publicly traded, and 1999, the first year of allegedly suspicious trading. This precludes a meaningful comparison with his early trading. In 1999, Cole sold approximately 270,000 shares. The sales were spread over three months (Feb., July, and Aug.), and the price per share ranged from $23.68 to $34.72. In February 2000, Cole sold another 270,000 shares at $44.22 to $50.33 per share. He sold no more stock that year even though the price per share was as high as $79.50 in March 2000. Cole sold 99,000 shares at $30.03 to $30.56 per share in February 2001, and 112,000 shares at $18.14 to $18.58 per share in November 2001—a total of 211,000 ***1108** shares that year. Between February 5 and 14, 2002, he sold 500,000 shares in five increments at $7.05 to $7.62 per share. He was left holding over a million shares of Peregrine stock.

Cole's February 2000 sale of 270,000 shares garnered the highest price per share of all his sales, but the Meyer defendants have been unable to tie it to any ****657** material undisclosed information that would implicate Cole in the fraud scheme underway at Peregrine at the time. The complaint alleged that the sales were based on undisclosed information about Peregrine's planned acquisition of the Harbinger Corporation, which was publicly announced in April 2000 and negatively received by investors. The complaint did not allege the Harbinger acquisition was contemplated for fraudulent purposes. On appeal from the summary judgment in *Bains*, the focus

shifted from this acquisition to concerns about Peregrine's health and its accounting method that had been brought to the board's attention in January 2000. (*Bains, supra*, 172 Cal.App.4th at pp. 462–463, 91 Cal.Rptr.3d 309.) In her declaration in this case, Meyer shifted the focus again, this time tying the February 2000 sale of stock to Peregrine's acquisition of the Barnhill Management Group, which the board allegedly approved in January 2000. According to Meyer, Douglas Powanda, Peregrine's executive vice–president of worldwide sales, admitted he and unidentified others intended to conceal more than $8 million in uncollectible receivables through this acquisition. But even accepting Meyer's representation of the substance of Powanda's guilty plea agreement, there still is no evidence that the board was apprised of management's true basis for the acquisition. Moreover, as the *Bains* court noted, Cole's sale of stock in February 2000 was not out of line with his trading during the previous year. (*Bains, supra*, 172 Cal.App.4th at p. 464, 91 Cal.Rptr.3d 309.) Nor can it be said that Cole maximized his personal benefit from any undisclosed information since the price per share almost doubled in the month after he traded, reaching its peak in March 2000.

The *Bains* complaint alleged that Cole's February 2002 sale of 500,000 shares was based on material information—the Department of Justice's press release about its investigation of Peregrine's trade partner Critical Path, which implicated Peregrine in a "software swap." Although the complaint alleged that Cole was trading on material nonpublic information, the Department of Justice's press release was publicly available.

Cole's total trades between 1999 and 2001 disposed of roughly one-third of his stock, and his substantial trades in February 2002 occurred after publicly available information already had depressed the value of the stock. He held almost half of his original shares when the company's stock collapsed. His trading patterns and overall trading history are not per se suspicious under the federal authorities on which the *Bains* plaintiffs relied. ***1109** See *Metzler Inv. GMBH v. Corinthian Colleges, Inc.* (9th Cir.2008) 540 F.3d 1049, 1067 ["[Defendant] sold only 37 [percent] of his total stock holdings during the Class Period. We typically require larger sales amounts ... to allow insider trading to support scienter"]; *Provenz v. Miller* (9th Cir.1996) 102 F.3d 1478, 1481 [president traded six times more shares than in year before company disclosed it had overstated its revenue]; *Kaplan v. Rose* (9th Cir.1994) 49 F.3d 1363, 1379–1380 [president and CEO disposed of all or substantially all of their stock before release of negative test results of company's medical product].)

When they initiated *Bains*, the Meyer defendants had information about Cole's trading history that did not reasonably support an inference of scienter under federal or state authority. They point to the other shareholders' actions filed against Cole in the same time period to justify naming Cole as a defendant in *Bains*. Principally, they rely on *Peregrine Litigation Trust v. Moores*, consolidated case No. GIC788659 (*Litigation Trust*), another ****658** case filed in San Diego County Superior Court. That case stemmed from Peregrine's earlier bankruptcy and included claims of insider trading and gross mismanagement against Cole and other directors. Most claims were directed against John J. Moores, an outside director and the largest Peregrine shareholder, who directly or indirectly sold or transferred close to 20 million shares during the relevant period. The *Litigation Trust* complaint made no direct allegations of fraud against Cole, nor did it include fraud claims of the kind at issue here. It eventually was settled without admission of liability, along with a consolidated federal class action, *In re Peregrine Systems, Inc. Securities Litigation*, case No. 02 CV 0870–BEN (RBB), about which the Meyer defendants provide no information.

Although they argue generally that all cases against Cole stemmed from the same set of facts, the Meyer defendants do not meaningfully compare the causes of action in *Bains* with those in other cases. The fact that other attorneys named Cole as a defendant in other causes of action, which were settled before final adjudication, does not demonstrate that the fraud and fraud-based causes of action the Meyer defendants chose to allege against him in *Bains* were factually or legally tenable. (See *Soukup, supra*, 39 Cal.4th at pp. 294–295, 46 Cal.Rptr.3d 638, 139 P.3d 30 [deeming irrelevant rulings on causes of action in prior suit without collateral estoppel effect on issue of probable cause].)

2. Group Published Information Doctrine

[11] According to Meyer, Cole was named as a defendant in *Bains* because he approved false financial reports as a member of Peregrine's board of directors. In *Kamen v. Lindly* (2001) 94 Cal.App.4th 197, 207–208, 114 Cal.Rptr.2d 127, the court reasoned by analogy to federal securities law that outside ***1110** directors are not liable for false or misleading corporate statements under Corporations Code sections 25400 and 25500 just because they reviewed, approved or signed them. Thus, under existing law, Cole could not be held vicariously liable for the company's fraudulent financial statements.

The Ninth Circuit applies a group published information presumption at the pleading stage. It presumes outside directors are liable for publicly released false corporate statements if they "either participated in the day-to-day corporate activities, or had a special relationship with the corporation, such as participation in preparing or communicating group information at particular times." (*In re GlenFed, Inc. Securities Litigation* (9th Cir.1995) 60 F.3d 591, 593.) The *Bains* court recognized that the validity of this presumption is unclear since the Private Securities Litigation Reform Act of 1995 (15 U.S.C. § 78u–4) heightened the pleading standards for securities class action lawsuits. (*Bains, supra,* 172 Cal.App.4th at p. 474, 91 Cal.Rptr.3d 309.) Assuming that the presumption would apply to fraud claims under California law, the court concluded that it did not apply past the pleading stage. (*Id.* at p. 476, 91 Cal.Rptr.3d 309.)

As the *Bains* court noted repeatedly, the plaintiffs in that case were in uncharted territory since there was no California authority on the subject. The unclear validity and applicability of the group published information presumption turned the lawsuit against the outside directors into a legal gamble. But even assuming, as the *Bains* court did, that the presumption applied at the pleading stage, the question is whether the attorneys in the *Bains* case could allege in good faith that Cole participated in the day-to-day corporate activities, or in preparing or communicating the ****659** company's publicly released information at particular times.

The Meyer defendants make no such showing. Instead, they maintain conclusorily that Cole was named in the *Bains* complaint because he attended a critical board meeting in April 1999, without explaining what made this meeting critical. The *Bains* complaint alleged that at a meeting on April 22, 1999, the board was advised that Peregrine would not meet its financial goals for the final quarter of 1999, the fiscal year that had ended three weeks earlier, unless it changed from a sell-through to a sell-in method of accounting for channel sales. The board was advised that the sell-in method was not "preferred." The *Bains* complaint assumed incorrectly that the sell-in method of revenue recognition violates generally accepted accounting principles (GAAP) per se rather than as fraudulently used by Peregrine's management. But the method violates GAAP only if used to book revenue in the absence of a binding contract, product delivery, fixed or determinable payment, and ***1111** probable collection. The complaint alleged, again in conclusory terms, that the board approved the sell-in method knowing that Peregrine's channel sales were contingent, without specifically alleging that anyone had brought this fact to the board's attention.

Because the Meyer defendants do not present any evidence about what was actually said at the April 1999 board meeting, it is impossible to judge the reasonableness of the allegations in the complaint. For instance, it is unclear whether the board approved the sell-in method for future quarters or only for the last quarter of the 1999 fiscal year, which is outside the 2000 to 2002 period for which revenue eventually had to be restated. It also is unclear whether the board was advised that the method would be applied to contingent or other improper transactions disguised as sales. Cole has denied that he approved the sell-in method knowing that it would be used to fraudulently book revenue. The conclusory allegations in the *Bains* complaint do not establish that the attorneys had probable cause to believe otherwise.

***1112** The Meyer defendants maintain that they sued Cole because he founded Peregrine and was involved in its management until 1989, some 10 years before the fraudulent practices at issue in *Bains* began. Cole has consistently denied all allegations that he was involved in Peregrine's management, day-to-day operations, or preparation of public statements in the relevant period.[4] The complaints filed in *Bains* variously alleged that, in that period, he lived in San Diego and California, whereas he actually lived in Newport Beach, California, and then in Massachusetts, making it much less likely that he was physically present at the corporate headquarters in San Diego on a daily basis. He did not have an office at Peregrine, did not advise the company's CEO, was not a member of the audit committee, and only attended board meetings. He did not prepare financial documents or press releases. He relied on management's assurances that Peregrine's financial statements had been prepared in accordance with accepted accounting principles and had been approved by the company's auditors. He first ****660** learned of any impropriety on February 13, 2002, when he read a news report about the "software swap" between Peregrine and Critical Path and was told the same day that the audit committee had launched an internal investigation.

[4] Cole was deposed on January 30, 2003, in relation to Peregrine's bankruptcy. The trial court in this case did not allow Cole to lodge a copy of his deposition taken in the bankruptcy case, but it overruled defendants' objections to the portion of his declaration summarizing his deposition testimony. Since the relevant information is in the record, we do not consider Cole's contention that the trial court abused its discretion in not accepting the copy of the entire deposition.

The Meyer defendants offer no contrary evidence. They

rely instead on the declarations of two former Peregrine employees to argue that during his tenure in management in the 1980's, Cole engaged in various improper business practices: he allegedly manipulated software prices and backbooked later acquired contracts to earlier fiscal quarters. They then insinuate that the practices he instituted in the 1980's continued in the late 1990's. Purporting to summarize Powanda's guilty plea agreement, Meyer states that Powanda "admitted that he and others engaged in a practice originated by, *inter alia*, Mr. Cole, that involved improperly keeping Peregrine's books 'open' past the end of the quarter, then back-dating later-acquired contracts to make it appear they were executed before the end of the prior quarter in order to bolster quarterly revenues."

[12] There are several problems with this evidence. First, it is unclear when the former employees' declarations were obtained. Dated in 2006, they were first offered in support of the opposition to Cole's summary judgment motion in *Bains* and thus cannot provide probable cause for initiating the case against Cole three years earlier.[5] Second, it is unclear when Powanda pled guilty and, if his plea agreement was available, why it was not used in *Bains*. Third, Meyer fails to provide the actual language of Powanda's admission, and the briefs on appeal indicate that Powanda did not directly implicate Cole. Rather, Meyer appears to have editorialized to supply a link between Cole's alleged improper practices in the 1980's and Peregrine management's improper practices a decade later.

5 Although not determinative of the reasonableness of defendants' beliefs, Cole has denied that he ever engaged in the improper practices attributed to him.

The trial court in *Bains* rejected the declarations as too remote and irrelevant. This evidentiary ruling was not challenged on appeal. (*Bains, supra*, 172 Cal.App.4th at pp. 449–486, 91 Cal.Rptr.3d 309.) Even so, the Meyer defendants argue that based on these declarations they could reasonably expect to uncover admissible evidence about Cole's involvement in the fraud at Peregrine. The declarations give rise to a speculative inference that because Cole engaged in an improper accounting practice when he managed the company in the 1980's, he must have known of the accounting fraud at Peregrine between 1999 and 2002. Keeping the books open past the end of a quarter was only one part of the large-scale fraudulent scheme in the latter period. There is no evidence that the practice of backdating sales was so unusual that it could be traced back only to Cole, or that it survived unchanged over the decade during which Cole was not involved in managing the company while it grew, diversified, and became publicly traded.

[13] ***1113** In a malicious prosecution case where the issue is the insufficiency of the facts known to the defendant, "probable cause requires evidence sufficient to prevail in the action or at least information reasonably warranting an inference there is such evidence." (*Puryear v. Golden Bear Ins. Co.* (1998) 66 Cal.App.4th 1188, 1195, 78 Cal.Rptr.2d 507.)[6] To be reasonable, ****661** an inference " ' "cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork." ' " (*Shandralina G. v. Homonchuk* (2007) 147 Cal.App.4th 395, 411, 54 Cal.Rptr.3d 207.)

6 Code of Civil Procedure section 128.7, subdivision (b)(3) requires that allegations lacking evidentiary support be "specifically so identified" if the pleader reasonably believes that such support would be developed through additional investigation or discovery. (See generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶¶ 9:1169 to 9:1171, p. 9(III)–20 (rev. # 1, 2007).) Although the Meyer defendants urge us not to discount the difficulties they encountered in developing evidentiary support for their claims from key witnesses who exercised their privilege against self-incrimination, the amended versions of the *Bains* complaint did not specifically identify the factual allegations for which support was reasonably expected to develop through additional discovery. Rather, the vast majority of the allegations against Cole were pled as ultimate facts for which, presumably, support already existed.

Cole has made a prima facie showing that the Meyer defendants had no evidence implicating him in the fraud scheme at Peregrine. Defendants have failed to show that they had any information that reasonably led them to believe that there was such evidence. They have not shown that they had a plausible reason to believe Cole was involved in Peregrine's day-to-day operations or that he participated in preparing Peregrine's publicly released statements. An examination of his trading history should have made it clear that he traded regularly in numbers that were not suspicious under federal securities law. Defendants have not shown that any other lawsuit against Cole was based on such sweeping allegations of fraudulent activity against him as was theirs. Nor does the information they rely on reasonably support the specific allegations of fraud against Cole. On the parties' respective showings, we conclude that Cole has made the requisite prima facie showing that the fraud and fraud-related causes of action against him in *Bains* were not supported by probable cause.

B. Malice

[14] [15] [16] [17] The malice element of malicious prosecution goes to the defendants' subjective intent for instituting the prior case. (*Soukup, supra,* 39 Cal.4th at p. 292, 46 Cal.Rptr.3d 638, 139 P.3d 30.) Malice does not require that the defendants harbor actual ill will toward the plaintiff in the malicious prosecution case, and liability attaches to ***1114** attitudes that range " 'from open hostility to indifference. [Citations.]' " (*Ibid.*) Malice may be inferred from circumstantial evidence, such as the defendants' lack of probable cause, supplemented with proof that the prior case was instituted largely for an improper purpose. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 225, 105 Cal.Rptr.3d 683 (*Daniels*).) This additional proof may consist of evidence that the prior case was knowingly brought without probable cause or was brought to force a settlement unrelated to its merits. (*Id.* at pp. 226, 228, 105 Cal.Rptr.3d 683) A defendant attorney's investigation and research also may be relevant to whether the attorney acted with malice. (*Sheldon Appel, supra,* 47 Cal.3d at p. 883, 254 Cal.Rptr. 336, 765 P.2d 498.)

[18] Cole argues that there was no evidence supporting the many specific allegations of fraud against him in *Bains.* As we have discussed, the allegations for the most part consisted of inferences from circumstantial evidence couched as statements of ultimate fact. Among the more serious were allegations that Cole was actively involved in the day-to-day operations of Peregrine, worked closely with the company's CEO to establish its business model, attended operational meetings, and was instrumental in establishing sales and revenue forecasts. The *Bains* complaint also alleged that Cole destroyed evidence.

****662** Cole points to the considerable information developed during the internal investigation at Peregrine, the 200 boxes of documents produced to governmental authorities that were made available to the plaintiffs in the *Litigation Trust* case, the depositions taken in the Peregrine bankruptcy case and in other civil cases (including his own depositions), his responses to discovery in *Bains,* and the guilty plea agreements by four of the eight indicted Peregrine employees. He notes that the Latham report concluded there was no evidence the outside directors were involved in Peregrine's daily operations or knew of management's fraudulent practices.

In opposition, the Meyer defendants rely on *Daniels, supra,* 182 Cal.App.4th at p. 227, 105 Cal.Rptr.3d 683, to argue that an attorney's "sustained inability to provide any support for [a client's] allegations, on its own, does not allow an inference that [the attorney] knew there was no probable cause for continuing to prosecute the underlying action." The complaint in *Daniels* alleged that the defendant in that case had slandered the plaintiff by telling various individuals he had kidnapped her son and forced him into a sexual relationship. (*Id.* at p. 211, 105 Cal.Rptr.3d 683.) After the plaintiff repeatedly refused to be deposed and answer discovery requests, the trial court dismissed the slander case as a discovery sanction. (*Ibid.*) The appellate court assumed that the plaintiff must have told his attorneys something about the alleged slanderous statements. (*Id.* at p. 223, 105 Cal.Rptr.3d 683.) The attorneys were entitled to believe his version of events or to believe that they would obtain admissible evidence from other witnesses who ***1115** heard the statements. (*Id.* at p. 224, 105 Cal.Rptr.3d 683.) The court concluded that the attorneys' failure to conduct a factual investigation and develop evidentiary support for the client's allegations was insufficient to establish that they knew the slander claim lacked probable cause. (*Id.* at p. 226–227, 105 Cal.Rptr.3d 683.)

The holding in *Daniels* was premised on the assumption that the slander claim was based on the plaintiff's allegations, which the attorneys were entitled to believe. In contrast, the Meyer defendants have offered no evidence that the allegations in *Bains* represented what their clients told them. In fact, the shareholders in *Bains* were in no better position than their attorneys to know the details of the fraudulent scheme at Peregrine. The Meyer defendants provide very little evidence beyond the conclusory averment that they relied on information developed through investigation and discovery and drew reasonable inferences from it. Although Meyer claims to have developed "a considerable body of proof in support of the claims ... advanced in *Bains,* including various percipient and expert declarations," the only actual declarations she points to are the two declarations about Cole's management of Peregrine in the 1980's.

The Meyer defendants argue that there is no evidence they had the Latham report or Cole bankruptcy deposition before filing *Bains.* Alternatively, they cite the Latham report's disclaimer that it did not make ultimate determinations of individual liability, and its comment that board meeting minutes were "cryptic." But these disclaimers do not support an inference that Cole participated in the fraud that harmed Peregrine investors or in any destruction of evidence. Additionally, Meyer's heavy reliance on the *Litigation Trust* case supports the inference that Cole was named in *Bains* by analogy to that case but without regard for the difference in the legal theories advanced in each case.

In short, the Meyer defendants have not rebutted Cole's showing that they alleged ****663** the fraud and

fraud-related claims against him without direct or circumstantial evidence to support them. This, coupled with the dearth of evidence about their actual investigation and their apparent tendency to exaggerate, is sufficient to overcome their anti-SLAPP motion as to Cole's malicious prosecution claims.

C. Liability of the Boucher Defendants and Ottilie

Cole argues the Boucher defendants and Ottilie should not avoid liability for malicious prosecution on the ground that they did no actual work on *Bains* despite being identified as counsel of record throughout the case. On the parties' respective showings, we cannot conclude as a matter of law that these attorneys may avoid liability for malicious prosecution by learning ***1116** nothing or close to nothing about the *Bains* case, throughout which they allowed themselves to be consistently identified as counsel of record for the plaintiffs.

Ottilie and the Boucher defendants were identified in the pleadings in *Bains* as "[a]ttorneys for [p]laintiffs" along with the Meyer defendants. They apparently were listed as counsel for the plaintiffs on all filings in *Bains*, including the appellate briefs filed after the summary judgment. (*Bains, supra,* 172 Cal.App.4th at p. 448, 91 Cal.Rptr.3d 309.) According to Cole's attorney, defense filings in *Bains* were served on all counsel of record. There is no evidence that Ottilie and the Boucher defendants objected to service or notified the court or opposing counsel that they did not actually represent the *Bains* plaintiffs.

In support of the anti-SLAPP motion, Boucher declared that his law firm had a working relationship with the Meyer defendants, in which one firm initiated and developed a case and the other firm tried it. A similar relationship existed in *Bains*, where the Meyer defendants undertook all pretrial work and the role of the Boucher firm was limited to participating at trial, should there be a trial. According to the declaration, the Boucher defendants did not sign, draft, prepare, review, serve, approve, or discuss the contents of any pleading in *Bains* or participate in the case in any way. Boucher's declaration did not indicate whether he or his law firm knew anything about the *Bains* case.

Ottilie declared that he discussed the case with Aguirre and saw a drafted complaint. He relied on Aguirre's assessment of probable cause against Cole since Aguirre was the expert securities litigator, and Ottilie's role was limited to assisting with trial. He was not involved in "determining whether probable cause existed to sue" Cole or in any decision made in *Bains.* He billed no attorney time on the case.

The Boucher defendants argue that "their duty to make an independent probable cause determination never arose because their specific role in the action was never triggered." Ottilie argues that, because he was not a securities expert, he "had no ability to see through the esoteric securities concepts and theories" alleged in *Bains* to determine whether those against Cole had merit.

[19] [20] As counsel of record, the Boucher defendants and Ottilie had a duty of care to their clients that encompassed "both a knowledge of the law and an obligation of diligent research and informed judgment." (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 809, 121 Cal.Rptr. 194.) They contend they relied in good faith on the Meyer defendants' investigation of the claims in *Bains,* insisting that this reliance was reasonable because of their prior ***1117** business relationships with Aguirre and Meyer and the Meyer defendants' competence and expertise. They cite ****664** California Rules of Professional Conduct, rule 3–110(C), which allows an attorney who lacks sufficient learning and skill necessary to provide competent representation to associate with or consult another lawyer reasonably believed to be competent. But even when work on a case is performed by an experienced attorney, competent representation still requires knowing enough about the subject matter to be able to judge the quality of the attorney's work. (See Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2011) ¶ 6:76, p. 6–18 (rev. # 1, 2011).) From their declarations, it can be inferred that the Boucher defendants knew nothing about the merits of the *Bains* case and that Ottilie, despite his discussions with Aguirre, did not understand the theories asserted in the case sufficiently to be able to judge their merit.

[21] [22] California law generally allows an attorney of record to associate with another attorney and to divide the duties of conducting the case. (*Wells Fargo & Co. v. City etc. S.F.* (1944) 25 Cal.2d 37, 42, 152 P.2d 625; see also *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 445–446, 98 Cal.Rptr.2d 193.) This does not mean, however, that an associated attorney whose name appears on all filings in a case and who is served with all documents filed by the other side need not know anything about the case with which he or she is associated. Nor should an associated attorney whose name appears on all filings be able to avoid liability by intentionally failing to learn anything about a case that may turn out to have been maliciously prosecuted in whole or in part.

[23] Aside from the duty to the client, an attorney has a responsibility to avoid frivolous or vexatious litigation. (See Code Civ. Pro., § 128.7, subd. (b) [attorney who "present[s]" pleading, motion or similar paper to court impliedly certifies its legal and factual merit].) In *In re Girardi* (9th Cir.2010) 611 F.3d 1027, in the context of imposing sanctions under 28 U.S.C. § 1927 for recklessly or intentionally misleading the court through frivolous filings, a special master appointed by the Ninth Circuit explained that the "willful ignorance" of the plaintiffs' cocounsel of record in the underlying case was not a defense. (*Id.* at pp. 1061–1062, citing *In re Mitchell* (3d Cir.1990) 901 F.2d 1179, 1188 [division of labor among counsel does not diminish attorney's personal responsibility for complying with court rules].) The special master recommended that the attorney be sanctioned despite his claim to have been unaware of the false positions propagated in briefs to which his signature was affixed by another counsel of record. (*Id.* at p. 1062 & fn. 47.) Based on the special master's recommendations, the attorney and his law firm were held liable for a portion of the attorney fees and costs incurred by the defendants in the underlying case. (*Id.* at p. 1067.)

[24] ***1118** While the filings in *Bains* were not personally signed by Ottilie or anyone at Boucher's law firm, the Boucher defendants and Ottilie lent their names to all filings in that case, supporting an inference that they "presented" these filings to the court and thus initiated and prosecuted *Bains* along with the Meyer defendants. (See Code Civ. Pro., § 128.7, subd. (b) ["presenting" pleadings, motions, and other similar papers to court includes "signing, filing, submitting ..." these papers].) The Boucher defendants and Ottilie cannot avoid liability for malicious prosecution by claiming to have been ignorant of the merits of the allegations made against Cole in *Bains.*

The Boucher defendants argue that there is no authority for holding them liable for maliciously initiating or prosecuting the case against Cole just because their names appeared on filings in *Bains* ****665** because they did not actively participate in the case. Cole relies on *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 69 Cal.Rptr.3d 561 (*Sycamore Ridge*). *Sycamore Ridge* was a malicious prosecution case brought by a landlord against the attorneys who represented a tenant in a prior case. The prior case was brought on behalf of 45 tenants and alleged 18 causes of action based on poor living conditions and unfair business practices. (*Id.* at pp. 1392–1393, 69 Cal.Rptr.3d 561.) One tenant's response to interrogatories indicated that she suffered no personal injury or property damage. (*Id.* at p. 1403, 69 Cal.Rptr.3d 561.) In a two to one decision, the *Sycamore Ridge* court denied an anti-SLAPP motion filed by the LaFave attorney defendants, who had entered the prior case as cocounsel a month before the tenant's claims were dismissed at her request. (*Id.* at p. 1394, 1410, 69 Cal.Rptr.3d 561.)

The court reasoned that "[b]efore agreeing to become attorney of record in a pending case, an attorney should, at a minimum, be familiar with the client's claims and should have made a preliminary determination whether probable cause exists to support the asserted claims or defenses. By associating into the case as cocounsel, the LaFave defendants became the proponents of all of [the tenant's] claims, which included a large number of claims that were untenable on their face." (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1407, 69 Cal.Rptr.3d 561.) The court reasoned further that "[m]aintaining a case one knows, or should know, is untenable continues to harm the defendant as long as the case remains open, since the defendant must continue to prepare a defense to the case as long as the case appears to be moving forward. An attorney who associates into a case that is being maliciously prosecuted participates in harming the defendant for the time period that the attorney allows the untenable claims to remain alive." (*Id.* at p. 1410, 69 Cal.Rptr.3d 561.) The court rejected the LaFave defendants' claims that their role was limited to one part of the case, " 'the mold exposure aspect of the litigation' "; that they were not involved in selecting the plaintiffs or causes of action; and that they believed the lawsuit against the landlord was supported by probable cause. (*Ibid.*)

***1119** The Boucher defendants and Ottilie argue that *Sycamore Ridge* is distinguishable and should be limited to its facts. But their arguments are not substantively different from those made by the LaFave defendants, and the evidence presented in relation to the anti-SLAPP motions does not require us to expand the holding of *Sycamore Ridge.*

The LaFave defendants did nothing beyond associating as counsel. (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1396, 69 Cal.Rptr.3d 561.) Their contemplated role was limited to the mold exposure aspect of the case and apparently was not triggered in the month after they associated into the case and before the tenant's claims were dismissed. (*Id.* at pp. 1396, 1410, 69 Cal.Rptr.3d 561.) Thus, *Sycamore Ridge* provides authority for holding an attorney liable for the very act of associating into a case containing frivolous claims.

The LaFave defendants were associated as experts in a particular area of law, mold exposure liability. (*Sycamore*

Ridge, supra, 157 Cal.App.4th at p. 1410, 69 Cal.Rptr.3d 561.) The Boucher defendants and Ottilie claim to have been associated as trial counsel in *Bains*, and thus presumably would have had to be proficient in all aspects of the case in order to try it, had the case gone to trial. Also, unlike the LaFave defendants, whose association into a partially frivolous case was for a brief ****666** one month before the unmeritorious claims were dismissed (*id.* at pp. 1394, 1410, 69 Cal.Rptr.3d 561), the Boucher defendants and Ottilie were associated with the *Bains* case for years. The circumstances of the Boucher defendants and Ottilie's association in this case appear to be more egregious than those of the LaFave defendants in *Sycamore Ridge*.

No explanation has been offered as to why the Boucher defendants and Ottilie needed to associate in *Bains* from the very beginning, why they allowed their names to appear as counsel for the plaintiffs on filings in *Bains* over several years, or why they did not advise the court and opposing counsel of their limited involvement in the case. The Boucher defendants argue that there is no evidence they associated with the case for an improper purpose, such as to "show more power." But their premature association supports that inference.

[25] It also undercuts the public policy argument that attorneys should not be required to create a record of diligence before their role as cocounsel is triggered. Attorneys may easily avoid liability for malicious prosecution without having to engage in premature work on a case if they refrain from formally associating in it until their role is triggered. Attorneys may also avoid liability if they refrain from lending their names to pleadings or motions about which they know next to nothing.

Although they argue that their relationship with the Meyer defendants justified their association in the case, the Boucher defendants and Ottilie have ***1120** not shown they had any knowledge of the claims asserted against Cole in *Bains* or made any effort to independently investigate and research the validity of these claims. The failure to make such a showing supports the conclusion that they lent their names to the case with indifference to its actual merit. Cole has thus made the minimum showing required to survive the Boucher defendants' and Ottilie's anti-SLAPP motions.[7]

[7] Because we hold that Cole has made a prima facie showing of probability of prevailing on his malicious prosecution claims against the Boucher defendants and Ottilie, we do not reach his argument that the trial court abused its discretion in not allowing him to conduct discovery into these defendants' participation in *Bains*.

III

Cole's defamation claim is based on the publication of the fourth amended complaint on the Internet. The evidence he provided in support of his opposition to the anti-SLAPP motions established that, as late as August 2009, the complaint could be accessed through a hyperlink under "Recent Cases" on the Meyer & Associates Web site.

Initially, Cole disputes that the online publication of the complaint is an activity protected by the anti-SLAPP statute. The Meyer defendants argue without any analysis that it is protected by Code of Civil Procedure section 425.16, subdivision (e)(1) as a "writing made before a ... judicial proceeding," and by subdivision (e)(2) as a "writing made in connection with an issue under consideration or review by a ... judicial body." They fail to distinguish the filing of the complaint in the *Bains* case from its republication on the Internet.

[26] [27] The litigation privilege in Civil Code section 47, subdivision (b) had been used to determine whether a statement is protected by Code of Civil Procedure section 425.16, subdivisions (e)(1) and (2). (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323, 46 Cal.Rptr.3d 606, 139 P.3d 2.) It does not apply to republications of privileged statements to nonparticipants in the ****667** action. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 219, 266 Cal.Rptr. 638, 786 P.2d 365.) The scope of Code of Civil Procedure section 425.16, subdivision (e)(2) is somewhat broader. (See *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055, 61 Cal.Rptr.3d 434 [e-mail litigation update protected].) Here, the record does not establish exactly when the complaint was uploaded on the law firm's Web site. By August 2009 the *Bains* case was no longer pending in any court since the Supreme Court had denied the plaintiffs' petition for review in July 2009. The Meyer defendants have not shown that the complaint was published on the Internet before a judicial proceeding or in connection with an issue under consideration by a judicial body.

[28] [29] ***1121** The Meyer defendants alternatively assert that publishing the complaint on the Internet is protected by Code of Civil Procedure section 425.16, subdivisions (e)(3) and (4) as a statement "made in ... a public forum in connection with an issue of public interest" or made "in connection with a public issue or an issue of public

interest." An Internet Web site that is accessible to the general public is a public forum.[8] (*Kronemyer v. Internet Movie Database, Inc.* (2007) 150 Cal.App.4th 941, 950, 59 Cal.Rptr.3d 48.) Whether posting the complaint on the law firm's Web site was in connection with an issue of public interest presents a closer question.

[8] The single publication rule applies to Internet publication regardless of how many people actually see it. (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 395, 399, 13 Cal.Rptr.3d 353.) Under that rule, publication occurs when the allegedly defamatory statement is first made available to the public. (*Id.* at p. 401, 13 Cal.Rptr.3d 353.)

The Meyer defendants rely on cases holding that corporate activity is an issue of public interest if the company is publicly traded, has many investors, and has promoted itself through press releases. (See *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576, 27 Cal.Rptr.3d 863 [postings on message board spurred by company's press release]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010–1011, 113 Cal.Rptr.2d 625 [posting of complaint filed with Securities and Exchange Commission about possible securities law violations].) These cases involve postings about existing companies, whose financial health and management are a concern to the investing public.

In contrast, the *Bains* complaint contained allegations of corporate fraud at a defunct company. It is unclear from the record whether the fraud at Peregrine was still an issue of widespread public interest at the time the complaint was posted on the firm's Web site. Nor have the Meyer defendants shown that the complaint contributed to the debate as opposed to reporting "some earlier conduct or proceeding." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898, 17 Cal.Rptr.3d 497.) We are therefore inclined to agree with Cole that the Meyer defendants have not met their burden of proof on the threshold issue whether the anti-SLAPP statute applied to the defamation claim. (See *Jarrow, supra*, 31 Cal.4th at p. 733, 3 Cal.Rptr.3d 636, 74 P.3d 737.)

[30] Even assuming that the burden shifted to Cole to show a likelihood of prevailing on the merits, the only challenge to the defamation claim in the trial court was that the complaint was absolutely privileged under Civil Code section 47, subdivision (b). As we have explained, the litigation privilege does not apply to the republication of privileged statements to nonparticipants in the action. (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 219, 266 Cal.Rptr. 638, 786 P.2d 365.) Republications ****668** may be protected by other privileges, such as the fair reporting privilege under Civil Code section 47, subdivision (d)(1), which protects "a fair and ***1122** true report in, or a communication to, a public journal, of (A) a judicial ... proceeding." But the Meyer defendants have not identified any privilege that would apply to posting the complaint on the law firm's Web site.

[31] For the first time on appeal, the Meyer defendants argue that Cole is a limited purpose public figure and that he cannot show by clear and convincing evidence that the allegations in the complaint were made with malice. They claim that the facts needed to decide these issues are in the record. We disagree.

In *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 265, 79 Cal.Rptr.2d 178, 965 P.2d 696, the court explained that "assuming a person may ever be accurately characterized as an *involuntary* public figure," this characterization is reserved "for an individual who, despite never having *voluntarily* engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements." There is no evidence in the record about Cole's prominence in the controversy surrounding Peregrine's collapse or his media access as a result. The Meyer defendants propose that he became a limited purpose public figure by virtue of his position at the company and the ensuing lawsuits and investigations. They present no authority for the proposition that legal actions by themselves may turn an individual into a limited purpose public figure. The authority appears to be to the contrary. (See *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 254, 208 Cal.Rptr. 137, 690 P.2d 610 ["a person or group should not be considered a 'public figure' solely because that person or group is a criminal defendant [citation]; has sought certain relief through the courts [citation]; or merely happens to be involved in a controversy that is newsworthy [citation]"].)

We conclude that the Meyer defendants' anti-SLAPP motion did not adequately challenge the defamation claim against Meyer and Meyer & Associates.

IV

The trial court struck Cole's defamation claim against all defendants except Meyer and Meyer & Associates. Cole's opening brief on appeal did not raise any issue with regard to this ruling, and in response to the cross-appeal,

he argued that the ruling must be affirmed. From this, we conclude that he has ***1123** not challenged the striking of the defamation claim as to Aguirre, Ottilie and the Boucher defendants. Our conclusions about the defamation claim against Meyer and Meyer & Associates do not affect the trial court's ruling as to the other defendants.

[32] [33] A defendant prevailing on a special motion to strike is entitled to recover his or her attorney fees and costs for the motion. (Code Civ. Proc., § 425.16, subd. (c)(1).) Where the motion is partially successful, the question is whether the results obtained are insignificant and of no practical benefit to the moving party. (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1177, 131 Cal.Rptr.3d 478.) A court awarding fees and costs for a partially successful anti-SLAPP motion must exercise its discretion in determining their amount in light of the moving party's relative success in achieving his or her litigation objectives. (*Ibid.*)

The trial court granted the Boucher defendants' and Ottilie's anti-SLAPP motions ****669** in full and awarded attorney fees and costs for the motions without allocating the awards between the defamation and the malicious prosecution claims. Because we partially reverse the order granting these defendants' anti-SLAPP motions with regard to the malicious prosecution claims against them, the award of attorney fees and costs to Ottilie in the September 9, 2010 order and to the Boucher defendants in the November 15, 2010[9] order also must be reversed. On remand, the trial court must exercise its discretion in determining the appropriate amount of fees and costs, if any, to which these defendants are entitled.

9 The entry date of an appealable order is the date it is entered in the minutes unless the minute order directs that a written order be prepared. (Cal. Rules of Court, rule 8.104(c)(2).) The November 15, 2010 minute order did not direct the preparation of a written order, even though written orders were later filed. On appeal from the minute order, Cole challenges only the award of fees and costs to the Boucher defendants and not the contemporaneous award of fees and costs to Aguirre. Thus, the November 15, 2010 minute order is reversed only in part. The partial reversal necessarily affects also the November 22, 2010 written order confirming the award of fees and costs to the Boucher defendants.

DISPOSITION

The September 9, 2010 order granting the special motions to strike is reversed as to the malicious prosecution claims against the Boucher defendants and Ottilie and as to the award of attorney fees and costs to Ottilie. In all other respects the order is affirmed. The November 15, 2010 order is reversed to the extent it awarded attorney fees and costs to the Boucher defendants. It is affirmed in all other respects. The case is remanded to the trial court with directions to determine whether the Boucher defendants and Ottilie are ***1124** entitled to an award of attorney fees and costs for their partially successful anti-SLAPP motions and the reasonable amount of such an award. The trial court is to conduct further proceedings consistent with this decision.

Cole is entitled to recover his costs on appeal.

We concur: WILLHITE and MANELLA, JJ.

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47 Cal.App.3d 802, 121 Cal.Rptr. 194

ROGERS H. WRIGHT et al., Plaintiffs and Appellants,
v.
REED M. WILLIAMS, Defendant and Respondent

Civ. No. 45020.
Court of Appeal, Second District, Division 1, California.
April 30, 1975.

SUMMARY

The trial court entered judgment for defendant specialist in maritime law at the conclusion of plaintiff's case in chief, to the effect that plaintiffs had not established negligence on the part of defendant in advising and assisting them in the purchase of a vessel which, ultimately, was of no use to plaintiffs since the contemplated use involved "coastwise trade," for which purpose the vessel could not be legally used. (Superior Court of Los Angeles County, No. SOC25326, Max Z. Wisot, Judge.)

The Court of Appeal affirmed, holding that, while in some circumstances the failure of an attorney to perform professionally may be so clear that a trier of fact may find professional negligence unaided by the testimony of experts, when a malpractice action is brought against an attorney holding himself out as a legal specialist, and the claim against him is related to his expertise as such specialist, then only a person knowledgeable in the specialty can adequately define the applicable duty of care and provide testimony whether it was met. (Opinion by Thompson, J., with Wood, P. J., and Hanson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

([1])

Attorneys at Law § 25--Liability of Attorneys--Trial of Malpractice Actions--Necessity of Expert Testimony.
Plaintiffs in a malpractice action against a legal specialist must offer expert testimony ***803** defining the standard of care owed by defendant in the performance by him of a highly specialized legal service, or must show that defendant failed to perform as a reasonably prudent specialist in his field, to sustain their burden of proof.

([2])

Attorneys at Law § 11--Attorney-Client Relationship--Duties of Attorney to Client.
Generally the creation of the attorney-client relationship imposes on the lawyer the obligation to represent his client with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of tasks that they undertake. The standard is that of members of the profession in the same or a similar locality under similar circumstances.

([3])

Attorneys at Law § 11--Attorney-Client Relationship--Duties of Attorney to Client.
Duties of an attorney to his client encompass both a knowledge of law and an obligation of diligent research and informed judgment.

([4])

Attorneys at Law § 11--Attorney-Client Relationship--Duties of Attorney to Client--Duties of Specialist.
A lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field.

([5])

Attorneys at Law § 25--Liability of Attorneys--Trial of Malpractice Actions--Proof of Professional Negligence.
In some situations expert testimony is not required in a malpractice action against an attorney, as where the failure of the attorney to perform may be so clear that a trier of fact may find professional negligence unaided by the testimony of experts; when, however, the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise in this speciality, then only a person knowledgeable in the specialty can define the applicable duty of care and provide proof whether the duty of care

was met. Thus, in a malpractice action against a specialist in maritime law, the trial court properly entered judgment for defendant at the conclusion of plaintiffs' case in chief where, while the attorney failed to call plaintiffs' attention to a problem in the documentation of a vessel they were interested in purchasing, no expert testimony was offered by plaintiffs that a reasonably ***804** prudent specialist in admiralty law would have acted differently under the facts.

[Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney, note, 17 **A.L.R.3d** 1442; attorney's liability for negligence in preparing or recording security document, note, 87 **A.L.R.2d** 991. See also **Cal.Jur.3d,** Attorneys at Law, § 279; **Am.Jur.2d,** Attorneys at Law, §§ 168, 173.]

COUNSEL
Baltaxe, Rutkin, Kaplan & Klein and George Baltaxe for Plaintiffs and Appellants.
Dunne, Shallcross & Kane, Russell E. Shallcross and Roy E. Harper for Defendant and Respondent.

THOMPSON, J.

In this appeal from a judgment on respondent's-defendant's motion pursuant to Code of Civil Procedure section 631.8 entered in plaintiffs'-appellants' action for legal malpractice, appellants contend that the trial court applied an overly restricted standard of duty owed by respondent to appellants. ([1]) We conclude that appellants having failed to offer expert testimony defining the standard of duty owed by respondent in the performance by him of a highly specialized legal service or that respondent failed to perform as a reasonably prudent specialist in his field, appellants' did not sustain their burden of proof in the trial court. Accordingly, we affirm the judgment.

We recite the record in the light most favorable to the findings of fact of the trial court, accepting its resolution of conflicts in the evidence.[1] In that light, the record discloses the following. Early in 1969, appellants Dr. Rogers H. Wright and Dr. Alan J. Glasser, both practicing psychologists, and Samuel Lecocq, the owner of a chain of skin diving ***805** supply houses, decided to form a business offering cruises in Southern California waters to skin divers. They sought a vessel adequate for that purpose. In September of 1969, appellants tentatively agreed to purchase *Kona Sea*, an 83-foot converted Coast Guard vessel, for a price of $43,000 intending to refurbish her and use her in their contemplated business venture. *Kona Sea* was hauled from the water for the purpose of a survey. The survey revealed hull damage requiring extensive correction. Accordingly, the purchase was renegotiated to a price of $37,000, and a written agreement reached for a sale at that price on December 15, 1969. Concerned about the possible existence of liens for past repairs on the vessel, questions concerning its ownership and the matter of a mortgage upon the boat, appellants consulted Richard G. Wilson, Dr. Wright's attorney. Wilson concluded that the matter was not one within his field of expertise and, with appellants' consent, referred the matter to respondent, a specialist in maritime law. Wilson informed respondent that appellants were concerned about acquiring title to *Kona Sea* free of liens and mortgages.

1 Appellants concede that the matter was appropriate for disposition pursuant to Code of Civil Procedure section 631.8.

Appellants consulted respondent on December 16. They did not inform him that they intended to use *Kona Sea* in a business venture and, when asked the purpose for which the vessel would be used, replied, "Pleasure." Appellants stated that they wished respondent to see that they obtained a clear title and that their purchase was properly documented. Respondent arranged for the transfer of title of the vessel in a manner removing an existing mortgage and providing for an indemnity against liens. The documents of title examined by him included a statement on a bill of sale to the seller: "As amended by section 27 of the Merchant Marine Act of June 5th, 1920, as amended, this vessel shall not engage in the coastwise trade." The provision was incorporated in a bill of sale from the seller to appellants prepared by respondent. As amended, section 27 of the Merchant Marine Act of 1920 prohibits the use of a vessel in coastwide trade if the vessel has, at some time in its history, been owned by an alien. Coastwide trade is defined by applicable federal regulations as including the hauling of freight or passengers for hire between ports in the United States. As so interpreted, the Merchant Marine Act of 1920 precluded the use of *Kona Sea* for appellants' intended purpose since the vessel had once been owned by a Mexican national.

The purchase of *Kona Sea* was consummated. Two checks from appellants, one for $7,000 and the other for $30,000, were delivered through respondent to the seller and mortgagee, and the documents of ***806** title were delivered to appellants and recorded with the Coast

Guard. Subsequently, appellants were cited by the Coast Guard for using *Kona Sea* in violation of the Merchant Marine Act of 1920. Aware that they could not use *Kona Sea* in their commercial diving venture, appellants sued respondent for malpractice claiming that by reason of his negligence in representing them in the transaction appellants had been damaged by the "stigma" in the title of the vessel.

The case was tried to a judge sitting without a jury. The issue of liability was tried prior to that of damages. Appellants' theory was twofold: (1) they produced evidence that respondent knew of the purpose for which they intended to use the vessel; and (2) they argued that the standard of care applicable to respondent as a specialist in maritime law required that, irrespective of lack of knowledge of the intended purpose, he have notified appellants of the legal effect of the restriction appearing in the documents of title. The testimony on the issue of respondent's knowledge of their intended purpose was conflicting, there being substantial evidence that the only statement of purpose made by appellants was that *Kona Sea* was being purchased as a yacht to be used for pleasure. Appellants offered no expert testimony relevant to their claim that respondent failed in the performance of his duty of due care.

At the conclusion of appellants' case in chief, respondent moved for judgment pursuant to Code of Civil Procedure section 631.8. The trial court granted the motion. It entered findings of fact: (1) prior to consulting respondent, appellants had agreed in writing to purchase *Kona Sea* and the agreement was not contingent upon any use of the vessel; (2) appellants had not engaged respondent to advise and assist them in the purchase but had consulted him to document the change of title to the vessel and to clear the title of any liens; (3) appellants did not inform respondent of their intended use of the vessel beyond random conversation that it would be used for skin diving; (4) appellants received a clear title to *Kona Sea* free of any liens or mortgage; and (5) respondent "did not have full knowledge of the full legal meaning of the term 'coastwide trade"' at his first conference with appellants. The trial court concluded that appellants had not carried their burden of proof, that respondent had fulfilled the obligation for which he was retained, and that he was not negligent. Judgment was entered accordingly, and this appeal followed.

Appellants concede that the trial court's findings of fact are supported by substantial evidence. They contend, however, that the record compels ***807** the conclusion that respondent was negligent as a matter of law, arguing that a reasonably prudent specialist in maritime law would have informed his client of the effect of the coastwide trade endorsement on the documents of title irrespective of his having been told by his clients that they intended to use the vessel for a purpose not proscribed by the endorsement. Appellants' contention fails for lack of evidence defining the standard of care applicable to respondent.

Issues

The threshold issue of the case at bench is categorization of the question of attorney negligence as one of law or of fact. Subsidiary to that issue is the further question of the admissibility of evidence establishing the standard of care required of the lawyer. If the issue is categorized as one of law, this court must make its independent decision of the issue limited in its function only by the trial court's resolution of conflicts in the evidence of what was required by the client of the lawyer and what was disclosed by the client to him. If the issue is categorized as one of fact, our role is limited to an examination of the record to determine if it supports the trial court's findings of fact and conclusions of law.

Attorney Negligence—Question of Law or of Fact

After a shaky start, the California law has evolved the proposition that the issue of attorney malpractice is in essence a question of fact similar to that involved in other professional negligence.

Something over 100 years ago, the California law was to the contrary. In *Gambert v. Hart*, 44 Cal. 542, 552, our Supreme Court declared that once the facts underlying an action for attorney malpractice were established the question of the attorney's negligence was one of law to be determined by the court. The court in *Gambert* thus applied its personal expertise to take judicial notice of what it perceived to be reasonable care by an attorney on underlying circumstances determined by the trier of fact. Although widely criticized (see e.g., *Ishmael v. Millington*, 241 Cal.App.2d 520, 525, fn. 1 [50 Cal.Rptr. 592]; *Floro* v. *Lawton*, 187 Cal.App.2d 657, 675—676 [10 Cal.Rptr. 98]; Abbott, *Use of Expert Testimony in Attorney Malpractice Cases*, 15 Hastings L.J. 584), *Gambert* continued unoverruled. Its scope was limited, however, by decisions accepting the propriety of expert testimony on the question of ***808** whether the attorney's conduct was or was not negligent—testimony which is

irrelevant if the issue of attorney malpractice is a true question of law. (See e.g., *Martin v. Hall*, 20 Cal.App.3d 414, 423 [97 Cal.Rptr. 730, 53 A.L.R.3d 719]; *Starr v. Mooslin*, 14 Cal.App.3d 988, 996—999 [92 Cal.Rptr. 583.)

Gambert's remaining vitality was severely limited by the enactment of the Evidence Code which undercut its foundation. Section 450 of the code permits judicial notice to be taken only as authorized or required by law. Sections 451 and 452, specifying matter that must or may be judicially noticed, are silent on a court's right to determine the negligent or nonnegligent manner of lawyer conduct by resort to its own experience, subject to the single right and requirement that the court take judicial notice of the "... Rules of professional conduct for members of the bar ...." (Evid. Code, § 451, subd. (c).)

Gambert was laid to rest, albeit silently, in *Smith* v. *Lewis*, 13 Cal.3d 349 [118 Cal.Rptr. 621, 530 P.2d 589]. In affirming a judgment on a jury verdict finding an attorney guilty of malpractice for failing to recognize the possibility of community property rights in retirement benefits, our Supreme Court approved trial court action instructing the jury that an attorney is obligated to possess skill and learning of attorneys in good standing practicing in the same or similar localities under similar circumstances, and to use the care and skill ordinarily exercised by reputable members of the profession in the same or similar locality under similar circumstances. It approved, also, an instruction that the failure to perform those duties is negligence. (*Smith v. Lewis, supra*, 13 Cal.3d 349, 355 fn. 3, 360.) While approving those instructions, the high court upheld the trial court's refusal of the lawyer's tendered instruction that he was "'not liable for being in error as to a question of law on which reasonable doubt may be entertained by well informed lawyers."' (*Smith v. Lewis, supra*, 13 Cal.3d 349, 360.) By approving the trial court's action in instructing the jury in a fashion which left to it the determination of whether the attorney's conduct was under the facts negligent or not, our Supreme Court impliedly disapproved of *Gambert's* inflexible proposition that judges apply, in all instances, their own experience to decide whether attorney conduct is negligent or satisfies the duty of due care.

Smith v. Lewis teaches that attorney malpractice is to be determined by the rules that apply to professional negligence generally, subject to the necessary qualification that the court must determine legal questions ***809** which underlies the ultimate decision. There are cases involving the question of attorney malpractice where reasonable minds cannot differ on the ultimate result that the conduct does or does not satisfy the duty of care. In those, the question is treated as one of law and not of fact, as it is in any negligence action. (See *Moser v. Western Harness Racing Assn.*, 89 Cal.App.2d 1, 9 [200 P.2d 7], failure to apply elementary principle of corporate law involving preincorporation subscription agreement negligence as a matter of law; *Lucas* v. *Hamm*, 56 Cal.2d 583, 592 [15 Cal.Rptr. 821, 364 P.2d 685], failure of attorney to recognize an esoteric problem (see *Smith v. Lewis, supra*, 13 Cal.3d 349, 359) and consequently drawing an instrument which violated the rule against perpetuities is, as a matter of law, not negligence.)[2] There are cases where regardless of the attorney's negligence his advice or action was correct because of a governing legal principle so that the negligence does not proximately cause harm. (*Martin v. Hall*, 20 Cal.App.3d 414, 420 [97 Cal.Rptr. 730, 53 A.L.R.3d 719]; *Banerian v. O'Malley*, 42 Cal.App.3d 604, 615 [116 Cal.Rptr. 919].) Except in those situations, the issue is one of fact. The case at bench does not involve special circumstances. Hence, we must examine the record to determine the support for the trial court's determinations of fact. That examination requires analysis of the standard of care governing respondent's performance of legal services and the presence or absence of evidence defining the specifics of the standard, and establishing failure of performance to it.

2 There is reason to doubt that the ultimate conclusion of *Lucas* v. *Hamm* is valid in today's state of the art. Draftsmanship to avoid the rule against perpetuities seems no longer esoteric. (See e.g., Cal. Will Drafting (Cont.Ed.Bar 1965) §§ 15.43—15.71; Bowman, Ogden's Revised Cal. Real Property Law (Cont.Ed.Bar 1974) §§ 2.44-2.45.)

Standard of Care

([2]) Generally, the creation of the attorney-client relationship imposes upon the lawyer the obligation to represent his client with "'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."' (*Ishmael v. Millington*, 241 Cal.App.2d 520, 523 [50 Cal.Rptr. 592]; *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176 [98 Cal.Rptr. 837, 491 P.2d 421].) The standard is that of members of the profession "in the same or a similar locality under similar circumstances" (see *Smith* v. *Lewis, supra*, 13 Cal.3d 349, 355 fn. 3, 360, approving jury instructions to that effect). ([3]) The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment. (*Smith* v. *Lewis, supra*, 13

Cal.3d 349, 358—359.) ***810**

We have found no California decision dealing with the standard of care applicable to a legal specialist such as respondent. While analytical legal writing is strongly persuasive that the standard of care in such situations should be that of legal specialists and not lawyers in general (Levit & Mallen, Syllabus Legal Malpractice (Cont.Ed.Bar 1974) 13; Fletcher, *Standard of Care in Legal Malpractice*, 43 Ind.L.J. 771, 787—789; Note, *Attorney Malpractice*, 63 Colum.L.Rev. 1292, 1302—1304), cases in other jurisdictions seem similarly silent. (Levit & Mallen, *supra*, 11.)

Smith v. Lewis, supra, 13 Cal.3d 349, indicates, however, that what thinking legal analysts conclude should be the standard of care applicable to legal specialists is the law of California. Our Supreme Court has approved a jury instruction phrasing the lawyer's duty as that of members of the profession under similar circumstances (13 Cal.3d pp. 355 fn. 3, 360). One who holds himself out as a legal specialist performs in similar circumstances to other specialists but not to general practitioners of the law. ([4]) We thus conclude that a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field.

Proof of the Standard and Performance to It

While California law holds that expert testimony is admissible to establish the standard of care applicable to a lawyer in the performance of an engagement and whether he has performed to the standard (*Starr* v. *Mooslin*, 14 Cal.App.3d 988 [92 Cal.Rptr. 583], it by no means clearly establishes the parameters of the necessity of expert testimony to the plaintiff's burden of proof. ([5]) In some situations, at least, expert testimony is not required. (Levit and Mallen, Syllabus Legal Malpractice (Cont.Ed.Bar 1974) 30—33; cf. *Brown v. Gitlin*, 19 Ill.App.3d 1018 [313 N.E.2d 180]; *Kohler v. Woollen, Brown & Hawkins*, 15 Ill.App.3d 455 [304 N.E.2d 677].) The case at bench is not one of them. In some circumstances, the failure of attorney performance may be so clear that a trier of fact may find professional negligence unaided by the testimony of experts.[3] Where, however, the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether ***811** it was met. (Levit & Mallen, Syllabus Legal Malpractice (Cont.Ed.Bar 1974) 12.)

3 We do not here reach the issue of the applicability of res ipsa loquitur to attorney malpractice.

The case at bench illustrates the need for the aid of experts. Respondent was engaged to perform a service in the highly specialized area of admiralty law. He failed to call his clients' attention to a problem in the documentation of *Kona Sea*, the significance of which cannot be determined by reference to general knowledge. Without expert testimony that a reasonably prudent specialist in admiralty law would, under the facts as the trial court found them, have acted differently than did respondent, there is no basis to attach legal fault to his conduct.

Appellants not having produced evidence of the standard of care applicable to respondent's performance of specialized legal services or that his performance was inadequate, the trial court's determination that appellants failed in their burden of proof is sustained by the record.

Disposition

The judgment is affirmed.

Wood, P. J., and Hanson, J., concurred.

A petition for a rehearing was denied May 28, 1975, and appellants' petition for a hearing by the Supreme Court was denied June 26, 1975. ***812**

28 Cal.3d 683, 621 P.2d 258, 170 Cal.Rptr. 634
Supreme Court of California

RIDER REYNOLDS LEWIS, Petitioner,
v.
THE STATE BAR OF CALIFORNIA, Respondent

L.A. No. 31290.
Jan 12, 1981.

SUMMARY

An attorney was found to have violated his oath and duties as an attorney (Bus. & Prof. Code, § 6067) in that he negligently and improperly conducted the administration of an estate without any previous probate experience and without associating or consulting a sufficiently experienced attorney (Rules Prof. Conduct, rule 6-101), obtained a loan from a client without appropriate disclosure and without the client's written consent (Rules Prof. Conduct, rule 5-101), and failed to maintain complete and accurate records of funds belonging to a client (Rules Prof. Conduct, rule 8- 101 (B)(3)). The attorney stipulated to the disciplinary board's findings of fact. The board recommended that the attorney be suspended from the practice of law for a period of 30 days, but that such suspension be stayed and the attorney placed on probation for 1 year.

The Supreme Court adopted the disciplinary board's recommendation. The court held that the recommendation was appropriate discipline, since there was no showing that any of the attorney's actions were motivated by bad faith or a desire to benefit himself at the expense of his client, since rule 6-101 only became effective some 13 months after he was retained to handle the probate of the estate at issue, and since the other rule violations were technical violations which resulted in no permanent loss to the client or the estate. (Opinion by The Court. Separate concurring opinion by Bird, C. J.)

HEADNOTES

Classified to California Digest of Official Reports

([1])
Attorneys at Law § 59--Discipline of Attorneys--Review of Disciplinary Proceedings by Supreme Court--Appropriateness of Discipline ***684** Imposed--Suspension.
Suspension from the practice of law for 30 days, with such suspension to be stayed and the attorney placed on probation for 1 year, was appropriate discipline for an attorney who negligently and improperly conducted the administration of an estate without any previous probate experience and without associating or consulting a sufficiently experienced attorney (Rules Prof. Conduct, rule 6-101), who obtained a loan from a client without appropriate disclosure and without the client's written consent (Rules Prof. Conduct, rule 5-101), and who failed to keep accurate account of estate proceeds (Rules Prof. Conduct, rule 8-101(B)(3)), where there was no showing that any of the attorney's actions were motivated by bad faith or a desire to benefit himself at the expense of his client, where rule 6-101 only became effective some 13 months after he was retained to handle the probate of the estate at issue, and where the other 2 rule violations were technical violations which resulted in no permanent loss to the client or the estate.

[See **Cal.Jur.3d,** Attorneys at Law, § 138; **Am.Jur.2d,** Attorneys at Law, § 25 et seq.]

COUNSEL
Rider Reynolds Lewis, in pro. per., for Petitioner.
Herbert M. Rosenthal, Truitt A. Richey, Jr., and Scott J. Drexel for Respondent.

THE COURT

This is a proceeding to review a recommendation of the Disciplinary Board of the State Bar (disciplinary board) that petitioner be suspended from the practice of law for a period of thirty days, but that such suspension be stayed and petitioner placed on probation for a period of one year.

I.

Petitioner was admitted to the practice of law in California in June of 1972 and has no prior disciplinary record. He was a solo practitioner at ***685** all times relevant to this inquiry. He is charged with violating his oath and duties as an attorney (Bus. & Prof. Code, § 6067) in that he (1) negligently and improperly conducted the administration of an estate without any previous probate experience and without associating or consulting a sufficiently experienced attorney (Rules Prof. Conduct, rule 6-101[1]); (2) obtained a loan from a client without appropriate disclosure and without the client's written consent (rule 5-101[2]); and (3) failed to maintain complete and accurate records of funds belonging to a client (rule 8-101(B)(3)[3]).[4]

1 Rule 6-101 became effective on January 1, 1975, and provides as follows: "A member of the State Bar shall not wilfully or habitually (1) Perform legal services for a client or clients if he knows or reasonably should know that he does not possess the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services practicing in the same or similar locality and under similar circumstances unless he associates or, where appropriate, professionally consults another lawyer who he reasonably believes does possess the requisite learning and skill;
"(2) Fail to use reasonable diligence and his best judgment in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose for which he is employed.
"The good faith of an attorney is a matter to be considered in determining whether acts done through ignorance or mistake warrant imposition of discipline under Rule 6-101."
All subsequent rule references are to the Rules of Professional Conduct.

2 Rule 5-101 provides as follows: "A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto." Rule 5-101 became effective on January 1, 1975, replacing former rule 4 which stated: "A member of the State Bar shall not acquire an interest adverse to a client."

3 Rule 8-101(B) provides in relevant part: "A member of the State Bar shall:
"
. . . . .
"(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his client regarding them ...."

4 Petitioner was also charged with a violation of former rule 9 based on the fact that he withdrew from estate funds and paid to himself a $20,000 fee which he had earned from the decedent's husband on an unrelated matter. Since it appears that this action was occasioned by petitioner's total lack of familiarity with probate law, it will be considered in the context of petitioner's asserted violation of rule 6-101, rather than being treated separately as a misappropriation of client funds.

The facts of this matter are not in dispute.[5] In November of 1973, petitioner was retained by Edward Vacha, an inmate at the state prison in ***686** Chino, to handle the administration of Vacha's deceased wife's estate. The estate was valued at approximately $100,000 and consisted primarily of some securities and a note secured by a deed of trust. Shortly thereafter, petitioner also agreed to make some contacts aimed at securing Vacha's release on parole.

5 The petitioner has stipulated to the disciplinary board's findings of fact with minor exceptions not relevant here.

In January of 1974, petitioner had himself appointed as administrator of the estate of Joan Cullinane Vacha. Having no previous experience in probate matters, he selected Thomas Middleton, an attorney familiar with probate practice, to serve as the attorney for the estate. Middleton prepared the petition to the probate court requesting petitioner's appointment as administrator. He also caused to be published the required notice to creditors of the estate. Thereafter, however, petitioner did not consult Middleton, who rendered no further services to the estate.

Over the following six months, petitioner made various contacts which resulted in a parole hearing for Vacha in July of 1974. At that hearing, it was determined that Vacha should be released on parole in October. Petitioner and Vacha then met at Chino to discuss petitioner's fee for securing Vacha's release. Petitioner requested and

Vacha agreed to a fee of $20,000.[6] Vacha informed petitioner that he did not have sufficient funds to pay the fee, but that petitioner could withdraw the $20,000 from the estate proceeds since Vacha was the sole heir.

6 Petitioner was originally charged by respondent State Bar with having "wilfully charged and collected an unconscionable fee" in violation of rule 2-107. The disciplinary board, however, found to the contrary and this court does not address the issue.

In September, petitioner, as administrator of Joan Vacha's estate, obtained an order from the probate court authorizing the sale of certain securities belonging to the estate having an approximate value of $38,000. Although the petition to the probate court did not so state, one of petitioner's purposes in selling the securities was to obtain sufficient funds with which to pay himself the $20,000 fee which had been agreed upon.[7] Following the sale, petitioner did not place the proceeds in an interest-bearing account or any account bearing the name of the estate or himself as the administrator of the estate. Instead, he deposited the entire amount in his clients' trust fund checking account. Over the next two months, he disbursed to himself a total of $20,000 from the account in satisfaction of the fee previously agreed to by Vacha. He also disbursed ***687** approximately $14,000 to Vacha over a seven-month period for a variety of living expenses and a new automobile.[8] At no time did petitioner seek probate court approval for any of these disbursements.

7 The petition to the probate court stated that the authorization to sell was necessary due to the declining value of the securities. The truth of this assertion is not disputed.

In November of 1974, Vacha orally authorized petitioner to borrow up to $10,000 from the estate proceeds at 10 percent interest. That same month, petitioner actually borrowed $4,000 from the estate proceeds. Petitioner did not borrow the previously discussed amount of $10,000 because the estate proceeds left in the client's trust account were insufficient. The loan was unsecured. Vacha never gave written consent for the loan, nor did petitioner encourage Vacha to seek independent counsel on the matter. A promissory note evidencing the debt was not executed by petitioner until approximately one month after the $4,000 was withdrawn. Petitioner kept the note in the estate files in his possession rather than delivering it to Vacha.[9]

9 There is no contention in this case that petitioner failed or refused to repay the loan. It appears from the record that most of the loan had been repaid by the time of the disciplinary hearing and that petitioner continued to make payments as required under the terms of the note.

Petitioner also failed to keep an accurate record of the estate proceeds which he was holding in his client's trust fund account. As a result, in April of 1975, petitioner issued a $500 check to Vacha for living expenses which the bank refused to honor due to insufficient funds in the account.

In August of 1975, Vacha sought and received a probate court order removing petitioner as the administrator of Joan Vacha's estate. It was then discovered that during the 18-month period during which petitioner served as administrator of the estate, he had failed to prepare an inventory of the estate's assets and in addition failed to file any of the required state or federal income, estate, or inheritance tax returns.[10] In fact, petitioner performed no services for the estate after he obtained the probate court approval for the sale of the estate's securities.

10 Petitioner contended that he did not file any tax returns because he believed that the estate had no net tax liability. It is not disputed that he was correct in this conclusion; he was, however, still required to file appropriate returns.

The disciplinary board hearing panel found that petitioner's performance in administering the estate of Joan Vacha constituted a violation ***688** of rule 6-101 in that, knowing that he did not possess sufficient skill in probate matters, he failed to associate or consult another lawyer who did possess the requisite learning and skill, and that he willfully failed and refused to perform all of the services for which he was retained. The panel further concluded that the manner in which petitioner obtained a personal loan from the estate violated rule 5-101 and that his failure to keep accurate account of the estate proceeds violated rule 8-101(B)(3).

II.

([1]) The sole issue presented by this petition is the propriety of the discipline recommended by respondent State Bar. After being notified of the disciplinary recommendation, this court informed petitioner by letter that it would consider imposing discipline in excess of that recommended by the disciplinary board. Petitioner responded in his petition for review, arguing that the recommended discipline was appropriate and adequate under the circumstances.

A review of the record in this case reveals one major area of concern: petitioner's violation of rule 6-101.[11] Since petitioner does not challenge the disciplinary board's finding that he violated the rule,[12] the only issue before the court is the nature of the discipline which should be imposed for the violation based on the facts and circumstances of the case.

11 See footnote 1, *ante*, page 685.

12 As noted previously, rule 6-101 became effective on January 1, 1975. Petitioner was retained to handle the probate administration of Joan Vacha's estate in November of 1973, some 13 months before rule 6-101 went into effect. However, petitioner's handling of the case continued for eight months after the effective date of the rule. Prior to the rule's enactment, the only basis on which an attorney could be disciplined for incompetence or a lack of legal skill was the general catch-all statute, Business and Professions Code section 6067, which required every attorney to "faithfully discharge [his] duties ... to the best of his knowledge and ability." It is unclear whether that section alone could have supported an action for discipline based on petitioner's conduct in this case.

This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge. (See, e.g., *Call v. State Bar* (1955) 45 Cal.2d 104, 110-111 [287 P.2d 761]; *Friday v. State Bar* (1943) 23 Cal.2d 501, 505-508 [144 P.2d 564].) In *Friday*, ***689** however, much of the court's expressed concern dealt with the absence of any statute or disciplinary rule permitting the imposition of discipline for "mere ignorance of the law." (*Id.*, at p. 505.) In the case at bar, such authorization is present in the form of rule 6-101.

There is no showing in the instant case that any of petitioner's actions were motivated by bad faith or a desire to benefit himself at the expense of his client.[13] Nearly all of his problems appear to be a direct or indirect result of his complete lack of familiarity with probate law.

13 Each of the other rule violations with which petitioner is charged (rule 5-101; rule 8-101(B)(3)) appears to have been a technical violation of the disciplinary rules which resulted in no permanent loss to client Vacha or his wife's estate. When petitioner actually obtained the $4,000 loan from estate funds in November of 1974, rule 5-101 had not yet become effective. Its predecessor, however, former rule 4, was considerably stricter in that it totally prohibited an attorney from acquiring an interest adverse to his client. (See fn. 2, *ante*, page 685.) While not technically correct, then, the State Bar has quite rightly only charged petitioner with a violation of the more flexible rule 5-101. With respect to the asserted violation of rule 8-101(B)(3), the rule was in effect in April of 1975 when petitioner wrote the check to Vacha which the bank refused to honor.

Based on petitioner's demonstrated good faith as well as the fact that rule 6-101 only became effective some 13 months after he was retained to handle the probate of the estate,[14] this court adopts the disciplinary board's recommendation that petitioner be suspended for thirty days, but that such suspension be stayed and petitioner placed on probation for one year under the terms and conditions as specified by the State Bar.

14 Additional factors in mitigation which appear from the record include the fact that petitioner has admitted his responsibility and appears remorseful, and that this is his first disciplinary proceeding.

BIRD, C. J.

I fully concur with the court's opinion in this case. I only wish to note some additional concerns which I have regarding rule 6-101 of the Rules of Professional Conduct.[1]

1 See footnote 1 of the court's opinion, *ante*, page 685.

Rule 6-101 seems to provide for the discipline of careless, negligent, or incompetent attorneys. Its interpretation, however, has never been an issue before this court since the rule's enactment in 1975. As a result, the applicability of the rule to specific fact situations is far from clear.

The burden of this rule unfortunately appears to fall disproportionately on younger members of the legal profession who begin their ***690** careers as solo practitioners. It is they who are most likely to lack "the learning and skill ordinarily possessed by lawyers ... who perform ... similar services ...," yet be unable to easily "associate" or "professionally consult" another lawyer possessing the requisite learning and skill. It has been suggested that rule 6-101 may implicitly mandate an apprenticeship system for beginning lawyers. (See Schwartz, Lawyers and the Legal Profession (1979) p. 389.)

Despite recent trends in legal education, graduates of law

schools in this state or in other parts of the country are seldom prepared to begin the practice of law on their own. Law schools have traditionally emphasized training in legal reasoning as opposed to legal practice: "how to think" rather than "how to do." While this may be a necessary predicate to the practice of law, it places increasingly severe burdens on law school graduates who are unable to secure employment with large law firms or government agencies where they have access to advice from experienced colleagues.

Another major problem with rule 6-101 lies in determining what mental state is necessary for a violation. Specifically, I am unclear as to whether and under what circumstances "mere negligence" is punishable under the rule.

When paraphrased subdivision (1) states that an attorney "shall not *wilfully* or *habitually*" perform legal services "if he *knows* or *reasonably should know*" he is not competent to do so. (Italics added.) Taken literally, the rule suggests that the performance of incompetent legal services is not subject to discipline if the attorney did not intend the performance in the first place, or at least if the accidental performance of incompetent services is not "habitual." Since it is hard to imagine a situation where an attorney would accidentally perform a legal service, the use of the phrase "wilfully or habitually" appears to be redundant. Alternatively, the State Bar[2] may have intended that only "habitual" negligence be punishable under the rule. Unfortunately, I can see no accepted way of reading the English language to derive that meaning.

2 I recognize that since this court has the ultimate authority to approve or reject the State Bar Disciplinary Rules (Bus. & Prof. Code, § 6076), it must accept at least part of the blame for adopting the confusing language of this rule.

In the instant case, it seems clear that petitioner was aware that he lacked the requisite skill and training to handle the probate of the estate ***691** since he initially consulted an experienced probate attorney. It is therefore unnecessary for this court to address the issue as to whether or not rule 6-101 would apply if it had only been shown that petitioner "should have known" he was not competent to handle the case. It is my hope that before a case raising that issue comes before this court, the State Bar will consider an appropriate clarification of the rule. ***692**

Footnotes

FN8 The probate court in San Diego which presided over the administration of Joan Vacha's estate eventually approved these disbursements as being reasonably necessary for Edward Vacha's support.

End of Document

HYPOTHETICAL E
Conflicts of Interest

CRPC 1.7

CRPC 1.9

CRPC 1.10

Adams v. Aerojet-General Corp (2001) 86 Cal. App. 4th 1324, 1338.

Analytica, Inc., v. NPD Research, Inc. (7th Cir. 1983) 708 F. 2d 1263, 1266

In re Complex Asbestos Litigation (1991) 232 Cal.App.3d 572, 596.

Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1059

Prof.Conduct, Rule 1.7
Formerly cited as CA ST RPC Rule 3-310; CA ST RPC Rule 3-320

Rule 1.7. Conflict of Interest: Current Clients

Currentness

(a) A lawyer shall not, without informed written consent[1] from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

(e) For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons,* or a discrete and identifiable class of persons.*

Credits

(Adopted, eff. Nov. 1, 2018.)

Footnotes

[1] An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.7, CA ST RPC Rule 1.7
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

West's Annotated California Codes
Rules of the State Bar of California (Refs & Annos)
California Rules of Professional Conduct (Refs & Annos)
Chapter 1. Lawyer-Client Relationship

Prof.Conduct, Rule 1.9

Rule 1.9. Duties to Former Clients

Currentness

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person[1] in the same or a substantially related matter in which that person's* interests are materially adverse to the interests of the former client unless the former client gives informed written consent.*

(b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person;* and

(2) about whom the lawyer had acquired information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.*

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:

(1) use information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;* or

(2) reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client except as these rules or the State Bar Act permit with respect to a current client.

Credits

(Adopted, eff. Nov. 1, 2018.)

Footnotes

1 An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.9, CA ST RPC Rule 1.9
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

Prof.Conduct, Rule 1.10

Rule 1.10. Imputation Of Conflicts Of Interest: General Rule

Currentness

(a) While lawyers are associated in a firm,[1] none of them shall knowingly* represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm;* or

(2) the prohibition is based upon rule 1.9(a) or (b) and arises out of the prohibited lawyer's association with a prior firm,* and

(i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;

(ii) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) written* notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule, which shall include a description of the screening* procedures employed; and an agreement by the firm* to respond promptly to any written* inquiries or objections by the former client about the screening* procedures.

(b) When a lawyer has terminated an association with a firm,* the firm* is not prohibited from thereafter representing a person* with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm,* unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm* has information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter.

(c) A prohibition under this rule may be waived by each affected client under the conditions stated in rule 1.7.

(d) The imputation of a conflict of interest to lawyers associated in a firm* with former or current government lawyers is governed by rule 1.11.

Credits

(Adopted, eff. Nov. 1, 2018.)

Footnotes

[1] An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.10, CA ST RPC Rule 1.10
Current with amendments received through March 1, 2023. Some rules may be more current, see credits for details.

86 Cal.App.4th 1324, 104 Cal.Rptr.2d 116, 01 Cal. Daily Op. Serv. 1196, 2001 Daily Journal D.A.R. 1475

DAPHNE ADAMS et al., Plaintiffs and Appellants,
v.
AEROJET-GENERAL CORPORATION, Defendant and Respondent.

No. C031323.
Court of Appeal, Third District, California.
Feb. 7, 2001.

SUMMARY

The trial court, in a toxic waste disposal action filed by property owners against a corporation, granted defendant's motion to disqualify plaintiffs' attorney on the ground that, while he was a member, his former law firm had represented defendant in a similar action (Rules Prof. Conduct, rule 3-310(E)). Invoking the rule that knowledge acquired by one member of a firm of lawyers is imputed to all members of the firm, the trial court ruled that the knowledge acquired by the attorney's former partners about defendant must be imputed to him. The trial court also found there was a substantial relationship between the subject matter of the prior representation and the present suit, and it ruled that there was a conclusive presumption that confidential information passed to the attorney as a partner in his former form. (Superior Court of Sacramento County, No. 98AS01025, John R. Lewis, Judge.)

The Court of Appeal reversed and remanded for further proceedings. The court held that the trial court abused its discretion in disqualifying plaintiff's attorney, since disqualification was based not on a particularized analysis of the attorney's relationship to defendant while at his former firm, but on a conclusive presumption derived from the attorney's mere membership in the former firm. On remand, the trial court should focus not only on the relationship between the attorney and the former firm's representation of defendant, but on whether the attorney's responsibilities as partner and principal, as well as his relationship with other members of the firm, placed him in a position where he was reasonably likely to have obtained confidential information relating to the current case. The court also held that a rule that disqualifies an attorney based on imputed knowledge derived solely from his or her membership in the former firm and without inquiry into his or her actual exposure to the former client's secrets is inconsistent with the language and core purpose of Rules Prof. Conduct, rule 3-310(E), and unnecessarily restricts both the client's right to chosen counsel and the attorney's freedom of association. (Opinion by Callahan, J., with Kolkey, J., concurring. Concurring and dissenting opinion by Scotland, P. J. (see p. 1342).) ***1325**

HEADNOTES

Classified to California Digest of Official Reports

([1])
Attorneys at Law § 15.3--Attorney-client Relationship--Conflict of Interest--Disqualification--Review.
Generally, a trial court's decision on a motion to disqualify an attorney is reviewed for abuse of discretion. If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. However, the trial court's discretion is limited by the applicable legal principles. Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion.

([2])
Attorneys at Law § 15.3--Attorney-client Relationship--Conflict of Interest--Representation Adverse to Former Client--Disqualification.
A former client may seek to disqualify an attorney from representing an adverse party by showing that the attorney possesses confidential information adverse to the former client (Rules Prof. Conduct, rule 3-310(E)). Disqualification of an attorney from undertaking representation adverse to a former client does not require proof that the attorney actually possesses confidential information. When a substantial relationship has been

shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client confidential information material to the current dispute would normally have been imparted to the attorney or to subordinates for whose legal work he was responsible, the attorney's knowledge of confidential information is presumed. This is the rule by necessity, for it is not within the power of the former client to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which he or she acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent representation.

([3])
Attorneys at Law § 15.3--Attorney-client Relationship--Conflict of Interest--Representation Adverse to Former Client--Disqualification.
In applying the substantial relationship test to a motion by a former client to disqualify an attorney from representing an adverse ***1326** party by showing that the attorney possesses confidential information adverse to the former client (Rules Prof. Conduct, rule 3-310(E)), a court focuses less on the meaning of the words "substantial" and "relationship" and look instead at the practical consequences of the attorney's representation of the former client. The court asks whether confidential information material to the current dispute would normally have been imparted to the attorney by virtue of the nature of the former representation. There are three factors the court should consider in applying the test: (1) factual similarities between the two representations, (2) similarities in legal issues, and (3) the nature and extent of the attorney's involvement with the case and whether he or she was in a position to learn of the client's policy or strategy.

([4])
Attorneys at Law § 14--Attorney-client Relationship--Imputation of Knowledge to Firm--Representation Adverse to Former Client.
On a motion by a former client to disqualify an attorney from representing an adverse party by showing that the attorney possesses confidential information adverse to the former client (Rules Prof. Conduct, rule 3-310(E)), once the attorney is shown to have had probable access to former client confidences, the court will impute such knowledge to the attorney's entire firm, prohibiting all members of the firm from participating in the case.

([5])
Attorneys at Law § 15.3--Attorney-client Relationship--Conflict of Interest--Representation Adverse to Former Client--Former Law Firm--Disqualification.
Rules Prof. Conduct, rule 3-310(E), which provides for the disqualification of an attorney representing an adverse party in an action by a former client on a showing that the attorney possesses confidential information adverse to the former client, addresses the individual attorney, not the law firm. Its purpose is to ensure permanent confidentiality of matters disclosed to the attorney in the course of the prior representation. The primary concern is whether and to what extent the attorney acquired confidential information. As written, rule 3-310(E) refers to a member and not to the member's law firm. A rule that disqualifies an attorney based on imputed knowledge derived solely from his or her membership in the former firm and without inquiry into his or her actual exposure to the former client's secrets sweeps too broadly, is inconsistent with the language and core purpose of rule 3-310(E), and unnecessarily restricts both the client's right to chosen counsel and the attorney's freedom of association.

([6])
Attorneys at Law § 15.3--Attorney-client Relationship--Conflict of Interest--Representation Adverse to Former Client of Former ***1327** Firm--Disqualification.
Under Rules Prof. Conduct, rule 3-310(E), which provides for the disqualification of an attorney representing an adverse party in an action by a former client on a showing that the attorney possesses confidential information adverse to the former client, disqualification should not be ordered where there is no reasonable probability an attorney, who changes law firms, had access to confidential information while at his or her former firm that is related to the current representation. Where there is a substantial relationship between the current case and the matters handled by the attorney's former firm, but the attorney did not personally represent the former client who now seeks to remove him or her from the case, the court's task is to determine whether confidential information material to the current representation would normally have been imparted to the attorney during his or her tenure at the old firm, considering all relevant factors. Where a substantial relationship between the former firm's representation of the client and the current lawsuit has been shown, the attorney whose disqualification is sought must carry the burden of proving that he or she had no exposure to confidential information relevant to the current action while a member of the former firm.

([7])
Attorneys at Law § 15.3--Attorney-client Relationship--Conflict of Interest--Representation Adverse to Former Client of Former Firm--Disqualification.
The trial court, in a toxic waste disposal action filed by property owners against a corporation, abused its discretion in disqualifying plaintiffs' attorney on the ground that his former law firm had represented defendant in a similar action (Rules Prof. Conduct, rule 3-310(E)), where disqualification was based not on a particularized analysis of the attorney's relationship to defendant while at his former firm, but on a conclusive presumption derived from the attorney's mere membership in the former firm. A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand. The court should have focused not only on the relationship between the attorney and the former firm's representation of defendant, but on whether the attorney's responsibilities as partner and principal, as well as his relationship with other members of the firm, placed him in a position where he was reasonably likely to have obtained confidential information relating to the current case. Prior to ruling on the disqualification motion the court, in its discretion, may allow further limited discovery reasonably calculated to produce admissible evidence with respect to these issues.

[See 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 157 et seq.] ***1328**
COUNSEL
Hackard, Holt & Heller, Theodore J. Holt, Eric L. Graves, Jenny M. Fickel; Zelle & Larson, Byran M. Barber, Eric Berg; Sherman, Dan, Petoyan, Salkow & Weber, Sherman, Dan & Portugal, Arthur Sherman; Eisen & Johnston Law Corporation, Jay-Allen Eisen and Marian M. Johnston for Plaintiffs and Appellants.
Nossaman, Guthner, Knox & Elliott, Scott P. DeVries, Patrick J. Richard, Elaine M. O'Neil, Alison S. Hightower; Goldsberry, Freeman & Swanson, Francis M. Goldsberry II; Heller, Ehrman, White & McAuliffe, Lawrence A. Hobel; and Jose N. Uranga for Defendant and Respondent.

CALLAHAN, J.

This case poses the following hypothetical question concerning the propriety of attorney disqualification in the context of successive representation: Lawyer's former law firm, "Firm A", advises "Client" on matters pertaining to land use and toxic waste disposal at its manufacturing site. Lawyer does not personally render any such advice and, in fact, spends no time rendering legal services to Client while at Firm A. Years later, having left Firm A and started a new law firm, "Firm B," Lawyer files suit on behalf of a number of plaintiffs against Client alleging that Client's use and disposal of toxic chemicals at the site caused groundwater contamination and that Client concealed it from the public. Client then brings a motion to disqualify Lawyer and Firm B from participating in the lawsuit, supported by a showing that Firm A's earlier representation of Client has a substantial relationship to the present action. Does Firm A's earlier representation of Client in matters pertaining to the current litigation automatically disqualify Lawyer and his current firm from representing plaintiffs?

No state appellate decision has yet answered this question. We will decide that the lawyer who leaves Firm A is not automatically disqualified in this situation. Instead, disqualification depends on a fact-based examination of the nature and extent of Lawyer's involvement with and exposure to Firm A's earlier representation of Client and specifically whether confidential information material to the current lawsuit would normally have been imparted to Lawyer while at Firm A. Because the trial court did not undertake such inquiry, but ordered disqualification based on a conclusive presumption of imputed knowledge, we will reverse and remand with directions. ***1329**

Background

The essential facts are undisputed. In the mid-1980's, defendant Aerojet General Corporation (Aerojet) retained the Sacramento law firm of Holliman, Hackard & Taylor (Holliman Hackard) for advice on land use issues. Attorney Michael Hackard was a partner in Holliman Hackard during that time. Included among the subjects on which Holliman Hackard provided legal advice were (1) whether Aerojet's existing hazardous waste treatment, storage and disposal facilities were in compliance with local ordinances, (2) the installation of a contamination treatment facility to remove chemicals from groundwater serving the certain wells; (3) replacing a disposal practice whereby ammonium perchlorate was disposed of by way of open controlled burning from a waste incinerator; and (4) the closure of an on-site landfill on Aerojet's property, which involved drawing groundwater samples to determine whether any environmental contamination had resulted from the landfill use. During the course of this representation, Aerojet provided Holliman Hackard with confidential information regarding chemical

contamination on Aerojet property and surrounding areas, Aerojet's litigation strategy with respect to environmental contamination issues, and Aerojet's strategy for addressing the concerns of the public regarding contamination on the site.

Although Hackard was a principal at the firm, the billing records of Holliman Hackard reveal that he did not perform any work on Aerojet matters. Moreover, according to the declarations before the trial court, Hackard had no discussions with the attorneys at Holliman Hackard regarding Aerojet matters and was not made privy to any information, confidential or otherwise, about Aerojet. According to his declaration, Hackard departed the Holliman Hackard firm in 1989, without taking any files or written materials about Aerojet with him.

In March of 1998, numerous residents and occupants of the area surrounding Aerojet's disposal site filed the current suit against Aerojet and other defendants, alleging negligence, strict liability, trespass, nuisance, fraudulent concealment, unfair business practice, and intentional infliction of emotional distress. The plaintiffs were represented by three law firms, one of which was Hackard's new law firm of Hackard, Holt & Heller (Hackard Holt).

The first amended complaint in the underlying suit alleges that since 1951, defendants have released and improperly used and disposed of toxic chemicals, resulting in contamination of the groundwater and surrounding soils. It further alleges that defendants contaminated the soil with perchlorate and other toxic chemicals; that moreover, defendants knew of the hazardous conditions they had created and nevertheless subjected plaintiffs to the ***1330** danger of exposure to these substances without warning them of the health dangers, thereby willfully and intentionally concealing knowledge of the contamination.

Within days after the suit was filed, attorneys for Aerojet wrote to Hackard and requested that he and his firm disqualify themselves as counsel for plaintiffs, because the substantial relationship between Holliman Hackard's former representation of Aerojet and the present suit placed Hackard in a position adverse to a former client. Hackard declined, asserting that he had no personal involvement in the representation of Aerojet or possession of confidential information relevant to the present lawsuit. Aerojet then brought this motion to disqualify Hackard Holt from this litigation.

The court ordered Hackard and the Hackard Holt firm disqualified from the case. Invoking the "imputed knowledge" rule, i.e., that knowledge acquired by one member of a firm of lawyers is imputed to all members of the firm (*Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 573 [286 Cal.Rptr. 609]), the court ruled that the knowledge acquired by Hackard's former partners about Aerojet must be imputed to Hackard. The court also found there was a substantial relationship between the subject matter of Holliman Hackard firm's prior representation and the present suit. "Therefore, there is a conclusive presumption that confidential information passed to Michael Hackard, as a partner in [Holliman Hackard], and he and his present firm must be disqualified." Plaintiffs filed this appeal from the order.

Appeal

I. *Principles of Review*

([1]) The standard of review for disqualification orders was spelled out recently in *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144 [86 Cal.Rptr.2d 816, 980 P.2d 371] (*SpeeDee Oil*): "Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [Citation.] ***1331** Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion. [Citation.]"

II. *Rule 3-310 and the Substantial Relationship Test*

Disqualification in the present case turns upon application of rule 3-310(E) of the Rules of Professional Conduct of the State Bar of California (rule 3-310(E)), which provides, in pertinent part: "A member shall not, without

the informed written consent of the ... former client, accept employment adverse to the ... former client where, by reason of the representation of the ... former client, the member has obtained confidential information material to the employment."

([2]) "Where an attorney's conflict arises from successive representation of clients with potentially adverse interests, 'the chief fiduciary value jeopardized is that of client *confidentiality*.' [Citation.]" (*Forrest v. Baeza* (1997) 58 Cal.App.4th 65, 73 [67 Cal.Rptr.2d 857], quoting *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283 [36 Cal.Rptr.2d 537, 885 P.2d 950], italics in *Flatt*.) Therefore, "a former client may seek to disqualify a former attorney from representing an adverse party by showing that the former attorney possesses confidential information adverse to the former client. [Citation.]" (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 113 [14 Cal.Rptr.2d 184].)

Disqualification of an attorney from undertaking representation adverse to a former client does not require proof that the attorney *actually* possesses confidential information. Rather, in applying rule 3-310(E) our courts have utilized the "substantial relationship" test: " 'When a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney or to subordinates for whose legal work he was responsible, the attorney's knowledge of confidential information is presumed. [Citation.]' " (*Rosenfeld Construction Co. v. Superior Court, supra,* 235 Cal.App.3d at p. 574, citing *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483, 489 [192 Cal.Rptr. 609] (*Global*).)

As explained in *Global*, "[t]his is the rule by necessity, for it is not within the power of the former client to prove what is in the mind of the attorney. ***1332** Nor should the attorney have to 'engage in a subtle evaluation of the extent to which he acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent representation.' [Citations.]" (*Global, supra,* 144 Cal.App.3d at p. 489.)

([3]) The substantial relationship test was given refinement and specificity in *H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445 [280 Cal.Rptr. 614]. *Ahmanson* first observed that "[u]nder the *Global Van Lines* formulation of the test, the courts focus less on the meaning of the words 'substantial' and 'relationship' and look instead at the practical consequences of the attorney's representation of the former client. The courts ask whether confidential information material to the current dispute would normally have been imparted to the attorney by virtue of the nature of the former representation. [Citation.]" (*Id.* at p. 1454.) Noting that the test "is 'intended to protect the confidences of former clients *when an attorney has been in a position to learn them*'" (*id.* at p. 1455, citing *Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp.* (2d Cir. 1975) 518 F.2d 751, 757, italics added), the court in *Ahmanson* identified three factors the court should consider in applying the test: (1) factual similarities between the two representations, (2) similarities in legal issues, and (3) the nature and extent of the attorney's involvement with the case and whether he was in a position to learn of the client's policy or strategy. (229 Cal.App.3d at p. 1455, citing *Silver Chrysler*, *supra*, at p. 760 (conc. opn. of Adams, J.).)

If Hackard himself had been personally involved with the Holliman Hackard firm's work on Aerojet matters during his tenure with the firm in the 1980's, this appeal would be easily resolved. Holliman Hackard's former representation of Aerojet clearly has a substantial relationship to the present lawsuit under the *Ahmanson* test: factual issues are similar if not identical (disposal of waste and chemical contamination in and around the Aerojet site); legal issues are related (toxic tort liability and the duty to warn the public); and Hackard's prior work on the case would have placed him in a position to be exposed to confidential information belonging to Aerojet. Viewing the evidence in the light most favorable to the trial court's ruling, we would be duty-bound to affirm the disqualification order. " 'If a substantial relationship is established, the discussion should ordinarily end. The rights and interests of the former client will prevail. Conflict would be presumed; disqualification will be ordered.' " (*Rosenfeld Construction Co. v. Superior Court, supra,* 235 Cal.App.3d at p. 575, citing *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1308-1309 [234 Cal.Rptr. 33].)

Here, however, there is no indication of Hackard's personal involvement in Aerojet matters, nor any direct evidence that he was exposed to client ***1333** secrets during the time his former firm rendered services to Aerojet. Did the Aerojet work performed by Hackard's colleagues in the former firm stain him irretrievably with the taint of conflict, requiring his automatic disqualification? The answer depends on how far we extend the doctrine of imputed knowledge.

III. *Imputed Knowledge and Vicarious Disqualification*

It is now firmly established that where the attorney is disqualified from representation due to an ethical conflict, the disqualification extends to the entire firm (*Flatt v. Superior Court, supra,* 9 Cal.4th at p. 283; *Henriksen v. Great American Savings & Loan, supra,* 11 Cal.App.4th at p. 114) at least where an effective ethical screen has not been established (see *SpeeDee Oil, supra,* 20 Cal.4th at p. 1151). The rule of vicarious disqualification is based upon the doctrine of imputed knowledge: " 'The imputed knowledge theory holds that knowledge by any member of a law firm is knowledge by all of the attorneys in the firm, partners as well as associates.' " (*Rosenfeld Construction Co. v. Superior Court, supra,* 235 Cal.App.3d at p. 573, quoting *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, 116 [164 Cal.Rptr. 864].) Courts have based this rule on the practical impossibility of a private law firm creating an "ethical wall" around an attorney who has been exposed to confidential information about the former client by screening him off from the firm's representation of the former client's adversary. (See *Henriksen, supra,* 11 Cal.App.4th at pp. 115-116.) ([4]) Therefore, once the attorney is shown to have had probable access to former client confidences, the court will impute such knowledge to the entire firm, prohibiting all members of the firm from participating in the case. (E.g., *Henriksen, supra,* at p. 117; *Dill v. Superior* Court (1984) 158 Cal.App.3d 301, 305-306 [205 Cal.Rptr. 671]; *Galbraith v. The State Bar* (1933) 218 Cal. 329, 332-333 [23 P.2d 291].)

This case does not present a standard application of the imputed knowledge doctrine, however, because here the court applied the concept in reverse: instead of imputation from attorney to the remainder of the firm, the court here ruled that, once a connection was shown between the *former firm*'s representation and the issues involved in the current lawsuit, the knowledge acquired by the former firm was "imputed" back to the attorney, mandating his automatic disqualification even after his departure from the firm, without inquiry as to whether the attorney was reasonably likely to have obtained confidential information.

To burden an attorney with such presumptive knowledge based solely on his former membership in a law firm which represented the former client, as ***1334** Aerojet urges, would require a significant extension of the doctrine of imputed knowledge beyond that recognized by any existing case law. For the reasons which follow, we conclude such an extension would be inconsistent with both the policy objectives behind rule 3-310(E) and the *Ahmanson* test. Further, it would ignore certain undeniable realities regarding today's practice of law.

IV. Applying Rule 3-310(E) to Successive Representation

Our starting point is the text of rule 3-310(E): "A *member* shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, *the member* has obtained confidential information material to the employment." (Italics added.) The rule implements the ethical imperative of Business and Professions Code section 6068, subdivision (e), which states that it is the obligation of every attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

([5]) Rule 3-310(E) addresses the individual attorney, not the law firm. Its purpose is to ensure "permanent confidentiality of matters disclosed *to the attorney* in the course of the prior representation, ..." (*Flatt v. Superior Court, supra,* 9 Cal.4th at p. 283, italics added.) "The primary concern is whether and to what extent *the attorney* acquired confidential information." (*SpeeDee Oil, supra,* 20 Cal.4th at p. 1148, italics added.) We therefore agree with the conclusion of the State Bar Committee on Professional Responsibility that, "[a]s written, rule 3-310(E)) *refers to a 'member' and not to the member's law firm*. Rule 1-100(B)(2) defines the term 'member' as 'a member of the State Bar of California.' " (Cal. Compendium on Prof. Responsibility, State Bar Formal Opn. No. 1998-152, p. IIA-415, italics added (Formal Opn. No. 1998-152).) Both rule 3-310(E) and Business and Professions Code section 6068 thus presuppose that attorney-client confidences are acquired by *individual attorneys*, not by law firms in general.

The vicarious disqualification rule has been established as a prophylactic device to protect the sanctity of former client confidences where a law firm with a member attorney who has acquired knowledge of confidential information material to the current controversy would otherwise be permitted to represent the former client's adversary. "No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage.... No one ***1335** could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent." (*Cho v.*

Superior Court (1995) 39 Cal.App.4th 113, 125 [45 Cal.Rptr.2d 863], fn. omitted.) As the State Bar Committee observes: "the absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn the public's trust, in a legal system that would permit such a situation to exist without the former client's consent." (Formal Opn. No. 1998-152, *supra*, at p. IIA-418.)

Once an attorney departs the firm, however, a blanket rule to prevent future breaches of confidentiality is not necessary because the departed attorney no longer has presumptive access to the secrets possessed by the former firm. The court need no longer rely on the fiction of imputed knowledge to safeguard client confidentiality. Instead, the court may undertake a dispassionate assessment of whether and to what extent the attorney, during his tenure with the former firm, was reasonably likely to have obtained confidential information material to the current lawsuit.

Disqualification based solely on the presumptive taint of imputed knowledge from membership in the former law firm, without regard for the member-attorney's personal involvement in, or exposure to, the former client's representation, would produce some odd results. For example, under current case law, even prior direct contact between an attorney and the former client does not necessarily result in disqualification when the attorney subsequently represents an adverse party, as long as the contact was not substantially likely to have compromised client confidences. In *Ahmanson*, the court affirmed the denial of a motion for disqualification where the attorney for the former client provided legal services which were only peripherally related to the subject matter of the current litigation. (229 Cal.App.3d at p. 1454.) And in *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132], the court upheld the denial of a disqualification motion brought by a wife against her ex-husband's dissolution lawyer, where the wife previously had a 20-minute phone consultation with the lawyer's former partner about the case. (*Id.* at pp. 560-561.) While conceding the "substantiality of the relationship between the former and current aspects of this litigation ..." (*id.* at p. 563), the *Zimmerman* court held disqualification was not required where the relationship was "brief and insubstantial," and unlikely to result in the imparting of confidential information material to the current lawsuit. (*Id.* at p. 565.)

A rule of automatic disqualification such as that applied by the trial court would mean that an attorney who has had direct, personal contact with the ***1336** former client may switch sides in subsequent litigation without adverse consequence if the court finds that his prior involvement was "minimal," yet an attorney who had *no contact whatever* with the former client can be disqualified if the court finds his *former firm's* relationship with the same client was substantially related to the new litigation, regardless of whether he personally acquired any material confidential information. We do not believe rule 3-310(E) was intended to produce such an anomaly.[1]

1 In *SpeeDee Oil, supra*, 20 Cal.4th 1135, the California Supreme Court held that an attorney who was "of counsel" to a law firm should be deemed to have the same status as a member of the firm for purposes of vicarious disqualification in applying rule 3-310. That case does not assist our inquiry here, for two reasons. First, *SpeeDee Oil* was a case of simultaneous, not successive, representation. Second, the plaintiff made a convincing evidentiary showing that the attorney whose firm was sought to be disqualified had *actually* obtained material information pertaining to the suit. (20 Cal.4th at p. 1139.) Hackard's disqualification in this case was based not on evidence, but on a conclusive presumption.

Disqualification based on a conclusive presumption of imputed knowledge derived from a lawyer's past association with a law firm is out of touch with the present day practice of law. Gone are the days when attorneys (like star athletes) typically stay with one organization throughout their entire careers. Partners with one law firm may join a competing firm or splinter off and form their own rival firm; former defense lawyers may become the plaintiffs' specialists and vice versa; law firms (like marriages) dissolve, often acrimoniously, its members striking off on their own, and taking divergent paths. We have seen the dawn of the era of the "mega-firm." Large law firms (like banks) are becoming ever larger, opening branch offices nationwide or internationally, and merging with other large firms. Individual attorneys today can work for a law firm and not even know, let alone have contact with, members of the same firm working in a different department of the same firm across the hall or a different branch across the globe.

A rule under which a nonrebuttable presumption of imputed knowledge from an attorney's former firm follows him to whichever firm he subsequently joins would also pose insurmountable practical problems in screening for conflicts. When an attorney joins a new law firm, he normally discloses the names of former clients who will create a conflict for the new firm if it takes the opposing side in future litigation. But there is no way,

when an attorney joins a new firm, that he or she can provide that new firm with notice of "imputed knowledge"—that is, names of clients and the nature of their matters the attorney never knew about or worked on while at the former firm. Application of the imputed knowledge doctrine under these circumstances would mean that the attorney's association with the new firm would automatically subject him and the new firm to disqualification without anyone knowing it. ***1337**

Any construction of rule 3-310(E) which would create an ethical conflict based on that which is unknown to both the attorney and his new firm would not only impair the attorney's freedom to change firms but would have far-ranging disruptive repercussions on the client as well. Consider, for example, the impact of such a rule on a client who selects a law firm to handle major litigation, only to learn well into the progress of the suit that the hiring of a new attorney has resulted in the firm's summary disqualification because of a matter the new hiree's former firm handled of which he personally was not even aware.

We conclude that a rule which disqualifies an attorney based on imputed knowledge derived solely from his membership in the former firm and without inquiry into his actual exposure to the former client's secrets sweeps with too broad a brush, is inconsistent with the language and core purpose of rule 3-310(E), and unnecessarily restricts both the client's right to chosen counsel and the attorney's freedom of association. It also clashes with the principle that applying the remedy of disqualification " 'when there is no realistic chance that confidences were disclosed [to counsel] would go far beyond the purpose' of the substantial relationship test." (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra,* 229 Cal.App.3d at p. 1455.)

V. *The Appropriate Test*

In crafting a standard applicable to a situation such as that posed here, we find helpful guidance in the American Bar Association Model Rules of Professional Conduct (ABA Model Rules). (See *Cho v. Superior Court, supra,* 39 Cal.App.4th at p. 121, fn. 2.) Model rule 1.9 prohibits an attorney whose firm represented a client on the same or substantially related matter from subsequently taking a position adverse to that client, but only *if* the lawyer had acquired confidential information "material to the matter." (ABA Model Rules Prof. Conduct, rule 1.9(b).) The comment to rule 1.9 explains that while "the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised [,] ... the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel." Furthermore, "the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers ... move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice ***1338** setting to another and of the opportunity of clients to change counsel." (ABA Model Rules Prof. Conduct, rule 1.9, com. [3].)

ABA Model Rules, rule 1.9 resolves these competing considerations by making disqualification turn on a fact-based inquiry into the access the lawyer had to confidential client information while at the former firm. (*Id.*, com. [6].) This approach was utilized in *Dieter v. Regents of University of Cal.* (E.D.Cal. 1997) 963 F.Supp. 908, a case which applies rule 3-310(E) and which shares many similarities with the present one.

In *Dieter*, the University of California Regents filed patent infringement claims against Dieter, USPCI and others. Three partners from the law firm representing the Regents (the Arnold firm) had formerly practiced with Townsend and Townsend, a large patent firm. During that time the Townsend firm served as intellectual property counsel to USPCI and was given "full access to ... USPCI's personnel, business, and scientific records." However, the declarations before the court showed that only attorneys operating from a different branch office at Townsend worked on the USPCI account; the three partners in question did not work on USPCI-related matters. (963 F.Supp. at pp. 909-910.)

District Court Judge Levi, applying California law, denied the defendants' motion to disqualify the three Arnold attorneys and the Arnold firm from representing the Regents based on an asserted conflict under rule 3-310(E).

The court first observed that the substantial relationship test was straightforward when the attorney was directly involved in the first representation, since it was simply a matter of comparing the attorney's work on the first matter with the subject of the second representation. (*Dieter v. Regents of University of Cal., supra,* 963 F.Supp. at pp. 910-911.) "But it is much less clear under the California rules and case law whether an attorney who was not personally involved in the prior representation

would be barred from the subsequent representation if the attorney has left the firm that handled the prior representation and joined a new firm. The consequences of barring the attorney in this situation are substantial since the attorney's new firm would also be barred by imputation." (*Id.* at p. 911, italics omitted.)

The court looked to ABA Model Rules, rule 1.9 for the answer. Because "preserving confidentiality" is the touchstone of the disqualification rule, the result mandated by rule 1.9 is that " 'if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in ***1339** the same or a related matter even though the interests of the two clients conflict.' " (*Dieter v. Regents of University of Cal., supra,* 963 F.Supp. at p. 911, quoting ABA Model Rules, rule 1.9, com.)

As noted in *Dieter,* the Restatement Third of Law Governing Lawyers takes a similar approach: " 'When a lawyer leaves a firm ... whose lawyers were subject to imputed prohibition owing to presence in the firm of another lawyer, the *departed lawyer becomes free of imputation so long as that lawyer obtained no material confidential information relevant to the matter.* Similarly, lawyers in the new affiliation are free of imputed prohibition if they can carry the burden of persuading the finder of fact that the arriving lawyer did not obtain confidential client information about a questioned representation by another lawyer in the former affiliation. (*Restatement (Third) of the Law Governing Lawyers*[,] § 204[,] cmt. c(ii) (Proposed Final Draft No. 1, 1996))' " (*Dieter v. Regents of University of Cal., supra,* 963 F.Supp. at p. 911.)

The *Dieter* court found these two sets of rules to be consonant with the *Ahmanson* test as applied in California, wherein the court makes a particularized inquiry into the nature and extent of the attorney's personal involvement in the prior matter and determines "whether 'confidential information material to the current dispute would normally have been imparted to the attorney by virtue of the nature of the former representation.' " (*Dieter v. Regents of University of Cal., supra,* 963 F.Supp. at p. 911, quoting *H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra,* 229 Cal.App.3d at p. 1454.) It refused to impute knowledge of client confidences to the attorneys merely because they were members of the same firm which had represented USPCI. Since the evidence showed that the attorneys had no contact whatsoever with USPCI matters while at the Townsend firm, the court denied the motion to disqualify them. (*Dieter, supra,* at pp. 911-912; accord, *San Gabriel Basin Water v. Aerojet-General Corp.* (C.D.Cal. 2000) 105 F.Supp.2d 1095, 1104-1105.)

Our courts have recognized that disqualification usually imposes a substantial hardship on the attorney's innocent client, who has been deprived of chosen counsel and must bear the monetary expense and other burdens associated with finding a replacement. (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 581 [70 Cal.Rptr.2d 507], citing *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300 [254 Cal.Rptr. 853].) "Additionally, as courts are increasingly aware, motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent. [Citation.] Such motions can be misused to harass opposing counsel [citation], to delay the litigation [citation], or to intimidate ***1340** an adversary into accepting settlement on terms that would not otherwise be acceptable. [Citations.] In short, it is widely understood by judges that 'attorneys now commonly use disqualification motions for purely strategic purposes ....' [Citations.]" (*Gregori, supra,* at pp. 300-301, fns. omitted.) On the other hand, rule 3-310(E) must be vigorously applied to protect a former client's legitimate expectations of loyalty and trust.

([6]) We conclude that disqualification should not be ordered where there is no reasonable probability the firm-switching attorney had access to confidential information while at his or her former firm that is related to the current representation. We therefore hold that where there is a substantial relationship between the current case and the matters handled by the firm-switching attorney's former firm, but the attorney did not personally represent the former client who now seeks to remove him from the case, the trial court should apply a modified version of the "substantial relationship" test as described in *Ahmanson.* The court's task, under these circumstances, is to determine whether confidential information material to the current representation would normally have been imparted to the attorney during his tenure at the old firm. In answering this question, the court should focus on the relationship, if any, between the attorney and the former client's representation. It should consider any time spent by the attorney working on behalf of the former client and "the attorney's possible exposure to formulation of policy or strategy" in matters relating to the current dispute. (*H. F. Ahmanson & Co. v. Salomon Grothers, Inc., supra,* 229 Cal.App.3d at p. 1455.) The court should also take into account whether the attorney worked out of the same branch office that handled the former litigation, and/or whether his administrative or management duties may have placed him in a position

where he would have been exposed to matters relevant to the current dispute.

The trial court's discretion is broad. It may not only consider the declarations and other evidence before it, but may apply "inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together." (ABA Model Rules Prof. Conduct, rule 1.9, com. [6].)[2]

2 As with any other evidentiary inquiry, resolution of this issue is a question of fact unless reasonable minds could come to only one conclusion, in which case it becomes a question of law. (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 433 [88 Cal.Rptr.2d 118].)

Finally, in light of the paramount importance of maintaining the inviolability of client confidences, where a substantial relationship between the former firm's representation of the client and the current lawsuit has been shown (as is the case here), the attorney whose disqualification is sought ***1341** should carry the burden of proving that he had no exposure to confidential information relevant to the current action while he was a member of the former firm. (See ABA Model Rules Prof. Conduct, rule 1.9, com. [7].) That burden requires an affirmative showing and is not satisfied by a cursory denial.

VI. *Application to the Trial Court's Ruling*

([7]) The trial court, while finding the reasoning in *Dieter* "persuasive," believed disqualification was mandatory because a substantial relationship existed between the work done by Hackard's *former firm* and his representation of plaintiffs in this suit. In other words, disqualification was based not on a particularized analysis of Hackard's relationship to Aerojet matters while at Holliman Hackard, but on a conclusive presumption derived from Hackard's mere *membership* in the former firm. "A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand. [Citations.]" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 85 [87 Cal.Rptr.2d 754].) Since the trial court employed the wrong test, an abuse of discretion has been shown. (*Zador Corp.* v. *Kwan* (1995) 31 Cal.App.4th 1285, 1303 [37 Cal.Rptr.2d 754].)

We shall remand to the trial court with directions to reconsider the motion by applying the proper standard. (*Rosenfeld Construction Co. v. Superior Court, supra,* 235 Cal.App.3d at p. 578.) On remand, the court should focus not only on the relationship between Hackard and the Holliman Hackard firm's representation of Aerojet, but whether Hackard's responsibilities as partner and principal, as well as his relationship with other members of the Holliman Hackard firm, placed him in a position where he was reasonably likely to have obtained confidential information relating to the current case. Prior to ruling on the disqualification motion the court, in its discretion, and with an eye toward avoiding satellite litigation and unwarranted annoyance, embarrassment, burden, or expense (Code Civ. Proc., § 2023, subd. (a)(3)), may allow further limited discovery reasonably calculated to produce admissible evidence with respect to these issues.

Disposition

The order of disqualification is reversed. The cause is remanded to the trial court to reconsider Aerojet's motion in a manner consistent with this opinion. Plaintiffs shall recover costs on appeal.

Kolkey, J., concurred. ***1342**

SCOTLAND, P. J., Concurring and Dissenting.

I agree with much of the majority's analysis, but disagree with the result.

In the context of an attorney-client relationship, the doctrine of imputed knowledge is a product of public policy and pragmatism. As a matter of public policy, it is presumed that an attorney has knowledge of confidential information adverse to the opposing party in a lawsuit when the former representation of that party by the attorney or the attorney's firm had a substantial relationship to the matters at issue in the current lawsuit and when the nature of the former relationship between the attorney or the attorney's firm and the party was such that confidential information material to the current dispute normally would have been imparted to the attorney. (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1452, 1453, 1454 [280 Cal.Rptr. 614].)

A former client's legitimate expectations of loyalty, trust, and security in the attorney-client relationship, and the need for public confidence in the scrupulous administration of justice and the integrity of the bar, require such a presumption. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999)

20 Cal.4th 1135, 1145, 1147 [86 Cal.Rptr.2d 816, 980 P.2d 371]; *H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra,* 229 Cal.App.3d at p. 1453.)

This also is a "rule of necessity" in that it ordinarily is not within the power of the opposing party to prove what is in the mind of the attorney who formerly was affiliated with the law firm that represented the opposing party on matters substantially related to the current lawsuit. (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra,* 229 Cal.App.3d at p. 1453.)

As emphasized by the majority in this case, disqualification of an attorney from undertaking representation adverse to a client of the attorney's former law firm does not require proof that the attorney *actually* possesses confidential information about that client which is material to the current dispute. It merely must appear from the nature of the relationship between the attorney's former law firm and the client that confidential information material to the current dispute against the client " 'would normally have been imparted to the attorney ....' " (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra,* 229 Cal.App.3d at p. 1454, citation omitted.)

The fact this rule is overinclusive, may impose significant hardship on the attorney's current client, and may unfairly limit the attorney's employment opportunities (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra,* 229 Cal.App.3d at p. 1453) is immaterial because the importance of the public ***1343** policy at stake is paramount. (See *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra,* 20 Cal.4th at pp. 1145-1147.)

As the majority properly points out, this rule does not mean an attorney always is disqualified from representing a new client in an action brought against a party that had been represented by a law firm to which the attorney previously was a member. If the attorney can establish, to the trial court's satisfaction, that information about the opposing party substantially related to the matter at issue in the new lawsuit would *not* normally have been imparted to the attorney while he or she was a member of the law firm that had represented the opposing party, there is no basis to impute that information to the attorney and, thus, no basis to disqualify the attorney.

That an attorney should be able to rebut the presumption of knowledge imputed as a result of the attorney's former affiliation with a law firm that represented the opposing party is important for the reasons stated by the majority. However, we must recognize that allowing the attorney to do so—rather than applying a conclusive presumption of knowledge—creates practical problems.

Depending on the circumstances, discovery may be necessary in order to present the trial court with facts essential to determine whether the attorney was in a position with the former law firm such that confidential information about the former law firm's client that is material to the current dispute against that client normally would have been imparted to the attorney. This means that, assuming the former law firm still exists, the parties may have to engage in problematic and expensive discovery regarding the inner workings of the firm (e.g., how it assigned and handled the case; how litigation strategy was formed and discussed among partners and associates; whether members of the firm chat about cases in the hallway where their discussions could be overheard by others in the firm who are not directly involved in the litigation; whether billing records show the attorney charged any time to the client, etc.). In addition, such discovery would draw into this controversy a law firm that otherwise is not involved in the litigation, causing it to expend time and suffer the burden of responding to litigation in which it has no interest and will gain no benefit.

For this reason, I conclude that the attorney seeking to avoid disqualification should have a formidable burden to present a compelling prima facie showing that either (1) the prior representation of the opposing party by the attorney's former law firm did not have a substantial relationship to the matters at issue in the current lawsuit, or (2) the nature of the former relationship between the law firm and the opposing party was such that ***1344** confidential information material to the current dispute normally would not have been imparted to the attorney.

I also conclude that the attorney cannot make such a prima facie showing merely by declaring that he or she does not recall having any discussions regarding confidential information about the opposing party while affiliated with the former law firm or that the attorney has never received such information. Allowing such a conclusory declaration to rebut the presumption of imputed knowledge would run counter to the commonsense notion that the opposing party seldom will be in a position to counter the attorney's claim of ignorance, and would run afoul of the purpose of the presumption, i.e., the need to fulfill a former client's legitimate expectations of loyalty, trust, and security in the attorney-client relationship, and to promote public confidence in the scrupulous administration of justice and the integrity of the bar. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.,*

supra, 20 Cal.4th at pp. 1145, 1147; *H. F. Ahmanson & Co. v. Salomon Brothers, Inc., supra*, 229 Cal.App.3d at p. 1453.)

Moreover, because of its problematic nature, I conclude that discovery should be permitted only after the attorney makes the aforesaid prima facie showing.

In this case, plaintiff's attorney, Michael Hackard, did not dispute that there was a substantial relationship between the matters at issue in this lawsuit against defendant Aerojet-General Corporation (Aerojet) and the matters upon which legal work was done for Aerojet by Hackard's former law firm. Hence, the trial court applied a conclusive presumption of imputed knowledge and ruled that Hackard's disqualification as counsel for plaintiff was required as a matter of law. The majority correctly finds that the trial court erred in applying a conclusive presumption of imputed knowledge.

Nevertheless, unlike the majority, I conclude that remand is inappropriate because, as I shall explain, Hackard failed to make a prima facie showing that the nature of the relationship between Hackard's former law firm and Aerojet was such that confidential information material to the current dispute normally would not have been imparted to Hackard.

Contrary to the large, multi-office firm at question in *Dieter v. Regents of University of Cal.* (E.D.Cal. 1997) 963 F.Supp. 908, cited by the majority, Hackard's former law firm was a small office of seven to ten attorneys, of which Hackard was a name partner and Aerojet was a major client. It is inconceivable that, in such a small firm with only three partners, there would not have been discussions among all the attorneys, particularly the partners, ***1345** about material matters relating to the representation of a major, sustaining client like Aerojet. It takes no imagination to recognize that confidential information which would be useful to someone later suing Aerojet normally would be imparted during discussions about billing matters or billing rates, during casual conversations at social occasions with Aerojet principals, or in the many other types of contacts among attorneys in the firm that would not constitute direct representation and would not show up on billing records. The client was too big, the firm too small, and the matters at issue too closely related to say there is no conflict. (See *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra*, 20 Cal.4th at pp. 1153-1154 [It is an "everyday reality that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information"; in fact, it is this "close, personal, continuous, and regular relationship between a law firm and the attorneys affiliated with it" and "its attendant exchanges of information, advice, and opinions" that justify "the conflict imputation rule"].)

In light of the important public policy at stake in this dispute, Hackard's declaration that he did not recall having "any" discussions with attorneys at his former law firm regarding Aerojet and that, while a shareholder of his former law firm, he never performed any work on Aerojet files, never met with Aerojet representatives, and "never received any information" about Aerojet's practices and procedures was too conclusory to rebut the presumption of imputed knowledge derived from the commonsense conclusion that, in light of the size of Hackard's former law firm and his status as one of three named partners, confidential information about its major client, Aerojet, material to the current dispute normally would have been imparted to Hackard. Likewise, declarations of his partners in the former law firm stating that they "do not recall" discussing with Hackard any matters relating to Aerojet are insufficient to rebut the presumption of imputed knowledge.

Consequently, I would affirm the order of disqualification. ***1346**

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708 F.2d 1263
United States Court of Appeals,
Seventh Circuit.

ANALYTICA, INCORPORATED,
Plaintiff,
v.
NPD RESEARCH, INC.,
Defendant-Cross-Appellant-Cross-Appellee.
Appeals of SCHWARTZ & FREEMAN and Pressman and Hartunian Chtd.

Nos. 81–2437, 82–1273 and 82–1390.
|
Argued Sept. 17, 1982.
|
Decided May 31, 1983.
|
Rehearing and Rehearing En Banc Denied Aug. 24, 1983.

Synopsis
Two law firms appealed from orders of the United District Court for the Northern District of Illinois, Eastern Division, John F. Grady, J., disqualifying them from representing the corporate plaintiff in an antitrust suit. One firm also appealed from an order directing it to pay defendant $25,000 in fees and expenses incurred prosecuting the disqualification motion, and defendant cross-appealed from that order, contending that it should have got more. The Court of Appeals, Posner, Circuit Judge, held that: (1) regardless whether defendant or its officer had retained law firm, now representing plaintiff, in a prior stock transfer proceeding, defendant nevertheless supplied the firm with just the kind of confidential data that it would have furnished a lawyer it retained, and it had a right not to see that law firm reappear within months on the opposite side of litigation to which such data might be highly pertinent; (2) district judge was entitled to find that law firm for plaintiff had acted in bad faith in opposing defendant's motion to disqualify, and therefore award defendant $25,000 in fees and expenses incurred in prosecuting the disqualification motion; and (3) district judge's finding that defense counsel had put in excessive, and excessively remunerated, time on motion to disqualify law firm representing plaintiff was not clearly erroneous, and he therefore properly refused to award the full amount sought by defendant as fees and expenses incurred in prosecuting the disqualification motion.

Affirmed.

Coffey, Circuit Judge, filed a dissenting opinion.

West Headnotes (14)

[1] **Federal Courts**Persons Entitled to Seek Review or Assert Arguments; Parties; Standing
Federal Courts Counsel

A client has standing to appeal an order disqualifying counsel, and such an order, though interlocutory, is appealable.

3 Cases that cite this headnote

[2] **Federal Courts**Persons Entitled to Seek Review or Assert Arguments; Parties; Standing

If client wants to keep lawyer, the lawyer's standing to appeal a disqualification order seems plain, since if the order stands he will lose the fees he would have made from the case.

2 Cases that cite this headnote

[3] **Federal Courts**Counsel

Since law firm had standing to appeal from order directing it to pay $25,000 to defendant for resisting order of disqualification, and since the order to pay was invalid if the firm should not have been disqualified, the appeal of the firm from that order of payment required the Court of Appeals to consider the validity of the

disqualification order.

3 Cases that cite this headnote

[4] **Attorneys and Legal Services** Current and Former Clients

A lawyer is prohibited from using confidential information that he has obtained from a client against that client on behalf of another one.

28 Cases that cite this headnote

[5] **Attorneys and Legal Services** Current and Former Clients

A lawyer may not represent an adversary of his former client if the subject matter of the two representations is "substantially related," that is, if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second; it is irrelevant whether he actually obtained such information and used it against his former client, or whether, if the lawyer is a firm rather than an individual practitioner, different people in the firm handled the two matters and scrupulously avoided discussing them.

111 Cases that cite this headnote

[6] **Attorneys and Legal Services** Partners and associates; law firms
Attorneys and Legal Services Government attorneys

In situation where a member or associate of a law firm, or government legal department, changes jobs, and later he or his new firm is retained by an adversary of a client of his former firm, the lawyer may, even if there is a substantial relationship between the two matters, avoid disqualification by showing that effective measures were taken to prevent confidences from being received by whichever lawyers in the new firm are handling the new matter.

66 Cases that cite this headnote

[7] **Attorneys and Legal Services** Current and Former Clients

A law firm is not permitted to switch sides if its former representation was substantially related to its new representation, no matter what screens it sets up.

49 Cases that cite this headnote

[8] **Attorneys and Legal Services** Corporations and business organizations

Argument of law firm, now representing plaintiff, that an officer of the defendant, rather than defendant itself, had previously retained the firm to structure a stock transfer, was both erroneous and irrelevant in regard to defendant's motion to disqualify the firm from representing plaintiff; not only did the defendant, rather than its officer, pay the firm's bills, but neither the defendant nor its coowners were represented by counsel other than that firm.

8 Cases that cite this headnote

[9] **Attorneys and Legal Services** Corporations and business organizations

Regardless whether defendant or its officer had retained law firm, now representing plaintiff, in a prior stock-transfer proceeding, defendant nevertheless supplied the firm with just the kind of confidential data that it would have furnished a lawyer it retained, and it had a right not to see that law firm reappear within months on the opposite side of the litigation to which such data might be highly pertinent.

29 Cases that cite this headnote

[10] **Attorneys and Legal Services**🔑Current and Former Clients

For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public, or for that matter the bench and bar, by the filing of affidavits, difficult to verify objectively, denying that improper communication has taken place or will take place between the lawyers in the firm handling the two sides.

34 Cases that cite this headnote

[11] **Attorneys and Legal Services**🔑Tactical use of remedy; harassment

"Bad faith," in regard to a law firm's insistence on litigating the question of its disqualification, means without at least a colorable basis in law—what in a malicious prosecution case would be called "probable cause."—

32 Cases that cite this headnote

[12] **Attorneys and Legal Services**🔑Factors and Considerations in General

A law firm's stubbornness in resisting disqualification is less forgivable than if it were a lay client.

2 Cases that cite this headnote

[13] **Costs, Fees, and Sanctions**🔑Motions and orders in general
Costs, Fees, and Sanctions🔑Meritless or Bad-Faith Litigation
Costs, Fees, and Sanctions🔑Disqualification and recusal

District judge was entitled to find that law firm for plaintiff had acted in bad faith in opposing defendant's motion to disqualify, and therefore award defendant $25,000 in fees and expenses incurred in prosecuting the disqualification motion.

9 Cases that cite this headnote

[14] **Costs, Fees, and Sanctions**🔑Hearing and Determination
Costs, Fees, and Sanctions🔑Findings, conclusions, and order

District judge's finding that defense counsel had put in excessive, and excessively remunerated, time on motion to disqualify law firm representing plaintiff was not clearly erroneous, and he therefore properly refused to award the full amount sought by defendant as fees and expenses incurred in prosecuting the disqualification motion.

2 Cases that cite this headnote

Attorneys and Law Firms

***1264** Alex Elson, Rosenthal & Schanfield, Chicago, Ill., for defendant-cross-appellant-cross-appellee.

John R. Fornaciari, Howrey & Simon, Washington, D.C., for plaintiff.

***1265** Before POSNER and COFFEY, Circuit Judges, and CAMPBELL, Senior District Judge.*

* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, sitting by designation.
This opinion has been circulated to the full court, pursuant to Circuit Rule 16(e), because of the view expressed in the dissenting opinion that the majority opinion is inconsistent with previous decisions of the circuit. A majority of the circuit judges in regular active

service have voted not to hear the case *en banc*. Judge Pell and Judge Coffey, however, have voted to hear the case *en banc*. And Judge Wood has not voted, preferring to have the benefit of the parties' arguments made on petition for rehearing with suggestion for rehearing *en banc*, should such a petition be filed after they have had an opportunity to study the majority and dissenting opinions, before he votes on whether the case should be heard *en banc*.

Opinion

POSNER, Circuit Judge.

Two law firms, Schwartz & Freeman and Pressman and Hartunian, appeal from orders disqualifying them from representing Analytica, Inc. in an antitrust suit against NPD, Inc. Schwartz & Freeman also appeals from an order directing it to pay NPD some $25,000 in fees and expenses incurred in prosecuting the disqualification motion; and NPD cross-appeals from this order, contending it should have got more.

John Malec went to work for NPD, a closely held corporation engaged in market research, in 1972. His employment agreement allowed him to, and he did, buy two shares of NPD stock, which made him a 10 percent owner. It also gave him an option to buy two more shares. He allowed the option to expire in 1975, but his two co-owners, in recognition of Malec's substantial contributions to the firm (as executive vice-president and manager of the firm's Chicago office), decided to give him the two additional shares—another 10 percent of the company—anyway and they told Malec to find a lawyer who would structure the transaction in the least costly way. He turned to Richard Fine, a partner in Schwartz & Freeman. Fine devised a plan whereby the other co-owners would each transfer one share of stock back to the corporation, which would then issue the stock to Malec together with a cash bonus. Because the stock and the cash bonus were to be deemed compensation for Malec's services to the corporation, the value of the stock, plus the cash, would be taxable income to Malec (the purpose of the cash bonus was to help him pay the income tax that would be due on the value of the stock), and a deductible business expense to the corporation. A value had therefore to be put on the stock. NPD gave Fine the information he needed to estimate that value—information on NPD's financial condition, sales trends, and management—and Fine fixed a value which the corporation adopted. Fine billed NPD for his services and NPD paid the bill, which came to about $850, for 11 ½ hours of Fine's time plus minor expenses.

While the negotiations over the stock transfer were proceeding, relations between Malec and his co-owners were deteriorating, and in May 1977 he left the company and sold his stock to them. His wife, who also had been working for NPD since 1972, left NPD at the same time and within a month had incorporated Analytica to compete with NPD in the market-research business. She has since left Analytica; Mr. Malec apparently never had a position with it.

In October 1977, several months after the Malecs had left NPD and Analytica had been formed, Analytica retained Schwartz & Freeman as its counsel. Schwartz & Freeman forthwith complained on Analytica's behalf to the Federal Trade Commission, charging that NPD was engaged in anticompetitive behavior that was preventing Analytica from establishing itself in the market. When the FTC would do nothing, Analytica decided to bring its own suit against NPD, and it authorized Schwartz & Freeman to engage Pressman and Hartunian as trial counsel. The suit was filed in June 1979 and charges NPD with various antitrust offenses, including abuse of a monopoly position that NPD is alleged to have obtained before June 1977.

***1266** In January 1980 NPD moved to disqualify both of Analytica's law firms. Evidentiary hearings on the motion were held intermittently between April 1980 and May 1981. At one stage the law firms voluntarily withdrew, but when the judge told them that he was minded to make them pay the fees and expenses that NPD had incurred in prosecuting the motion they moved to vacate the order granting their motion to withdraw. The motion to vacate was granted and the hearings resumed. In June 1981 the judge disqualified both firms and ordered Schwartz & Freeman to pay NPD's fees and expenses. Analytica has not appealed the orders of disqualification, having retained substitute counsel to prosecute its suit against NPD.

[1] [2] We first consider, on our own initiative as we must, whether Pressman and Hartunian has standing to appeal the order disqualifying it. Orders disqualifying counsel usually are appealed by clients upset by the prospect of losing the services of the lawyer of their choice and by the added expense of bringing substitute counsel up to speed. The client's standing to appeal is plain enough and an order disqualifying counsel, though interlocutory, is appealable, at least in this circuit. *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 717–20 (7th Cir.1982). If the client wants to keep the lawyer, the lawyer's standing also seems plain, since if the

disqualification order stands he will lose the fees he would have made from the case. But in this case the client has not appealed. Analytica appears content with whatever substitute counsel it has procured. We therefore cannot see what tangible object Pressman and Hartunian has in seeking reversal of the order disqualifying it. It has presented no evidence that it will be rehired and we have no reason to assume it will be, since that would require Analytica to replace the trial counsel it has hired in place of Pressman and Hartunian.

Nor need we decide whether an interest in reputation alone could give a lawyer standing to appeal a disqualification. Pressman and Hartunian was disqualified not for anything it did or failed to do but simply because as Schwartz & Freeman's co-counsel it had access, actual or potential, to whatever confidential information Schwartz & Freeman had obtained while representing NPD. It appears that Pressman and Hartunian did not even know about that prior representation and so was innocent in thought as well as deed. That is why the district judge did not require it to pay any of the fees or expenses incurred by NPD in prosecuting the motion to disqualify. The judge thought Pressman and Hartunian had to be disqualified to protect NPD but since the firm's conduct was not blameworthy it need not fear for its reputation.

[3] Although Schwartz & Freeman has a stronger argument that it has an interest in reputation at stake in this appeal, we need not decide whether that interest is enough to confer standing either. Since Schwartz & Freeman has standing to appeal from the order directing it to pay $25,000 to NPD for resisting the order of disqualification, and since the order to pay is invalid if Schwartz & Freeman should not have been disqualified, the appeal from that order requires us to consider the validity of the disqualification order in any event.

[4] [5] For rather obvious reasons a lawyer is prohibited from using confidential information that he has obtained from a client against that client on behalf of another one. But this prohibition has not seemed enough by itself to make clients feel secure about reposing confidences in lawyers, so a further prohibition has evolved: a lawyer may not represent an adversary of his former client if the subject matter of the two representations is "substantially related," which means: if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client, or whether—if the lawyer is a firm rather than an individual practitioner—different people in the firm handled the two matters and scrupulously avoided discussing them. ***1267** See, e.g., *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 570–71 (2d Cir.1973); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir.1976); *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir.1980); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1028 (5th Cir.1981), and in this circuit *Cannon v. U.S. Acoustics Corp.*, 532 F.2d 1118, 1119 (7th Cir.1976) (per curiam), aff'g 398 F.Supp. 209, 223–24 (N.D.Ill.1975); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir.1976); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 223–25 (7th Cir.1978).

[6] There is an exception for the case where a member or associate of a law firm (or government legal department) changes jobs, and later he or his new firm is retained by an adversary of a client of his former firm. In such a case, even if there is a substantial relationship between the two matters, the lawyer can avoid disqualification by showing that effective measures were taken to prevent confidences from being received by whichever lawyers in the new firm are handling the new matter. See *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 197 (7th Cir.1979) (en banc); *Freeman v. Chicago Musical Instrument Co., supra*, 689 F.2d at 722–23; *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252 (7th Cir.1983). The exception is inapplicable here; the firm itself changed sides.

Schwartz & Freeman's Mr. Fine not only had access to but received confidential financial and operating data of NPD in 1976 and early 1977 when he was putting together the deal to transfer stock to Mr. Malec. Within a few months, Schwartz & Freeman popped up as counsel to an adversary of NPD's before the FTC, and in that proceeding and later in the antitrust lawsuit advanced contentions to which the data Fine received might have been relevant. Those data concerned NPD's profitability, sales prospects, and general market strength—all matters potentially germane to both the liability and damage phases of an antitrust suit charging NPD with monopolization. The two representations are thus substantially related, even though we do not know whether any of the information Fine received would be useful in Analytica's lawsuit (it might just duplicate information in Malec's possession, but we do not know his role in Analytica's suit), or if so whether he conveyed any of it to his partners and associates who were actually handling the suit. If the "substantial relationship" test applies, however, "it is not appropriate for the court to inquire into whether actual confidences were disclosed," *Westinghouse Elec. Corp. v. Gulf Oil Corp., supra*, 588 F.2d at 224, unless the exception noted above for cases where the law firm itself did not switch sides is applicable, as it is not here. *LaSalle Nat'l Bank v. County*

of Lake, supra, 703 F.2d at 257–58.

[7] Consistently with this distinction, *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.1978)—like this a case where the same law firm represented adversaries in substantially related matters—states that it would have made no difference whether "actual confidences were disclosed" even if the law firm had set up a "Chinese wall" between the teams of lawyers working on substantially related matters, though the two teams were in different offices of the firm, located hundreds of miles apart. Now Schwartz & Freeman has never, in this litigation, contended that it created a "Chinese wall" between Fine and the lawyers working for Analytica against NPD. The offer of proof that it made in the district court was an offer to prove that the individuals in Schwartz & Freeman who were handling Analytica's case against NPD had not received any relevant confidential information about NPD from Fine. This proof would not have established the existence of a "Chinese wall." In *LaSalle Nat'l Bank,* where this court just the other day upheld the disqualification of a law firm that hired a former county lawyer and later was retained to bring a suit against the county, it was not enough that the lawyer "did not disclose to any person associated with the firm any information ... on any matter relevant to this litigation," for "no specific ***1268** institutional mechanisms were in place to insure that that information was not shared, even if inadvertently," until the disqualification motion was filed—months after the lawyer had joined the firm. 703 F.2d at 259. We contrasted the absence of such mechanisms with a case in which the lawyer "was denied access to relevant files and did not share in the profits or fees derived from the representation in question; discussion of the suit was prohibited in his presence and no members of the firm were permitted to show him any documents relating to the case; and both the disqualified attorney and others in his firm affirmed these facts under oath," and with another case where "all other attorneys in the firm were forbidden to discuss the case with the disqualified attorney and instructed to prevent any documents from reaching him; the files were kept in a locked file cabinet, with the keys controlled by two partners and issued to others only on a 'need to know' basis." *Id.* at 258–59. Schwartz & Freeman has never offered to prove—has never so much as intimated—that any "institutional mechanisms" were in place in this case. But we emphasize that even if they were, this would not help Schwartz & Freeman; a law firm is not permitted to switch sides if its former representation was substantially related to its new representation, no matter what screens it sets up.

[8] Schwartz & Freeman argues, it is true, that Malec rather than NPD retained it to structure the stock transfer, but this is both erroneous and irrelevant. NPD's three co-owners retained Schwartz & Freeman to work out a deal beneficial to all of them. All agreed that Mr. Malec should be given two more shares of the stock; the only question was the cheapest way of doing it; the right answer would benefit them all. Cf. Coase, *The Problem of Social Cost,* 3 J. Law & Econ. 1 (1960). The principals saw no need to be represented by separate lawyers, each pushing for a bigger slice of a fixed pie and a fee for getting it. Not only did NPD rather than Malec pay Schwartz & Freeman's bills (and there is no proof that it had a practice of paying its officers' legal expenses), but neither NPD nor the co-owners were represented by counsel other than Schwartz & Freeman. Though Millman, an accountant for NPD, did have a law degree and did do some work on the stock-transfer plan, he was not acting as the co-owners' or NPD's lawyer in a negotiation in which Fine was acting as Malec's lawyer. As is common in closely held corporations, Fine was counsel to the firm, as well as to all of its principals, for the transaction. If the position taken by Schwartz & Freeman prevailed, a corporation that used only one lawyer to counsel it on matters of shareholder compensation would run the risk of the lawyer's later being deemed to have represented a single shareholder rather than the whole firm, and the corporation would lose the protection of the lawyer-client relationship. Schwartz & Freeman's position thus could force up the legal expenses of owners of closely held corporations.

[9] But it does not even matter whether NPD or Malec was the client. In Westinghouse's antitrust suit against Kerr-McGee and other uranium producers, Kerr-McGee moved to disqualify Westinghouse's counsel, Kirkland & Ellis, because of a project that the law firm had done for the American Petroleum Institute, of which Kerr-McGee was a member, on competition in the energy industries. Kirkland & Ellis's client had been the Institute rather than Kerr-McGee but we held that this did not matter; what mattered was that Kerr-McGee had furnished confidential information to Kirkland & Ellis in connection with the law firm's work for the Institute. *Westinghouse Elec. Corp. v. Kerr-McGee Corp., supra.* As in this case, it was not shown that the information had actually been used in the antitrust litigation. The work for the Institute had been done almost entirely by Kirkland & Ellis's Washington office, the antitrust litigation was being handled in the Chicago office, and Kirkland & Ellis is a big firm. The connection between the representation of a trade association of which Kerr-McGee happened to be a member and the representation of its adversary thus was rather tenuous; one may doubt whether Kerr-McGee ***1269** really thought its confidences had been abused by

Kirkland & Ellis. If there is any aspect of the *Kerr-McGee* decision that is subject to criticism, it is this. The present case is a much stronger one for disqualification. If NPD did not retain Schwartz & Freeman—though we think it did—still it supplied Schwartz & Freeman with just the kind of confidential data that it would have furnished a lawyer that it had retained; and it had a right not to see Schwartz & Freeman reappear within months on the opposite side of a litigation to which that data might be highly pertinent.

We acknowledge the growing dissatisfaction, illustrated by Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 Am. Bar Foundation Research J. 419, with the use of disqualification as a remedy for unethical conduct by lawyers. The dissatisfaction is based partly on the effect of disqualification proceedings in delaying the underlying litigation and partly on a sense that current conflict of interest standards, in legal representation as in government employment, are too stringent, particularly as applied to large law firms—though there is no indication that Schwartz & Freeman is a large firm. But we cannot find any authority for withholding the remedy in a case like this, even if we assume contrary to fact that Schwartz & Freeman is as large as Kirkland & Ellis. NPD thought Schwartz & Freeman was its counsel and supplied it without reserve with the sort of data—data about profits and sales and marketing plans—that play a key role in a monopolization suit—and lo and behold, within months Schwartz & Freeman had been hired by a competitor of NPD's to try to get the Federal Trade Commission to sue NPD; and later that competitor, still represented by Schwartz & Freeman, brought its own suit against NPD. We doubt that anyone would argue that Schwartz & Freeman could resist disqualification if it were still representing NPD, even if no confidences were revealed, and we do not think that an interval of a few months ought to make a critical difference.

[10] The "substantial relationship" test has its problems, but conducting a factual inquiry in every case into whether confidences had actually been revealed would not be a satisfactory alternative, particularly in a case such as this where the issue is not just whether they have been revealed but also whether they will be revealed during a pending litigation. Apart from the difficulty of taking evidence on the question without compromising the confidences themselves, the only witnesses would be the very lawyers whose firm was sought to be disqualified (unlike a case where the issue is what confidences a lawyer received while at a former law firm), and their interest not only in retaining a client but in denying a serious breach of professional ethics might outweigh any felt obligation to "come clean." While "appearance of impropriety" as a principle of professional ethics invites and maybe has undergone uncritical expansion because of its vague and open-ended character, in this case it has meaning and weight. For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public—or for that matter the bench and bar—by the filing of affidavits, difficult to verify objectively, denying that improper communication has taken place or will take place between the lawyers in the firm handling the two sides. Clients will not repose confidences in lawyers whom they distrust and will not trust firms that switch sides as nimbly as Schwartz & Freeman.

[11] Since the order disqualifying Schwartz & Freeman was correct, we must decide whether Schwartz & Freeman's insistence on litigating the question rather than bowing out gracefully was so unreasonable that the district judge could properly find it to be in bad faith; otherwise the order to reimburse NPD's legal fees and expenses was improper. *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1087–88 (2d Cir.1977). By bad faith in this context we mean without at least a colorable basis in law—what in a ***1270** malicious prosecution case would be called "probable cause." This court had decided the two *Westinghouse* cases two years before the motion for disqualification was filed in this case, and they were controlling precedents. In its appeal brief Schwartz & Freeman makes a perfunctory effort to distinguish them and then moves on to argue that later decisions in this and other circuits suggest a movement away from those decisions. One would have to move awfully far away to give any solace to Schwartz & Freeman, and we have not found any case that questions the validity of the *Westinghouse* cases on a point relevant to this case. We disagree that the *Westinghouse* cases were overruled by *Novo* or *Freeman*. *Novo* and *Freeman* do not involve a law firm's changing sides—a distinction also implicit in Judge Mansfield's concurring opinion in *Government of India v. Cook Industries, Inc.*, 569 F.2d 737, 740–41 (2d Cir.1978), on which Schwartz & Freeman relies, and in Judge Fairchild's dissent from the panel decision (which was reversed en banc) in *Novo*, where he said, "This is *not* a case where a party's former attorney is now representing the adverse party," 607 F.2d at 193 (emphasis added). And *Novo* and *Freeman* cite the *Westinghouse* cases approvingly, see 607 F.2d at 196–97; 689 F.2d at 722 and n. 10, as does our even more recent decision in *LaSalle Nat'l Bank*, see 703 F.2d at 255–57.

[12] [13] The fact that Schwartz & Freeman is a law firm makes its stubbornness in resisting disqualification less

forgivable than if it were a lay client. Cf. *McCandless v. Great Atlantic & Pac. Tea Co.*, 697 F.2d 198, 201 (7th Cir.1983). The district judge was entitled to find that Schwartz & Freeman had acted in bad faith in opposing the motion to disqualify, and therefore to award NPD its fees and expenses.

[14] NPD's cross-appeal challenging the level of the award has no merit. The district judge found that NPD's counsel had put in excessive, and excessively remunerated, time on the case and he therefore refused to award the full amount sought. His finding was not clearly erroneous and his determination of the reasonable fee was not an abuse of his broad discretion. *Muscare v. Quinn*, 680 F.2d 42, 45 (7th Cir.1982), in fee matters.

Pressman and Hartunian's appeal from the order disqualifying it is dismissed for lack of jurisdiction. The order assessing fees and expenses against Schwartz & Freeman is affirmed. No costs will be awarded in this court.

So Ordered.

COFFEY, Circuit Judge, dissenting.

I am compelled to write separately and dissent as I believe the majority inexplicably refuses to accept or follow the mandates of the court's three most recent decisions on the subject of attorney disqualification. The majority's decision casts aside, without a valid legal basis, this court's reasoning set forth in the recent cases of *LaSalle National Bank v. County of Lake*, 703 F.2d 252 (7th Cir.1983), *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir.1982), and *Novo Terapeutisk, etc. v. Baxter Travenol Lab*, 607 F.2d 186 (7th Cir.1979), in which this court took a more enlightened perspective, contemporaneous with the modern practice of law, on the law of attorney disqualification, rejecting the irrebuttable presumption that the knowledge of one attorney in a law firm is shared with the entire firm, and holding that the presumption of intra-firm sharing of confidences is rebuttable. The majority has incorrectly distinguished the holdings of *LaSalle National Bank, Freeman* and *Novo* and instead has reverted to the same over-simplified analysis that existed prior to our three most recent decisions in the area of attorney disqualification. By attempting to distinguish rather than applying the thoughtful rationale of *LaSalle National Bank, Freeman* and *Novo*, the majority's analysis in this case unnecessarily creates a conflict with our prior precedent and therefore can only generate problems and confusion for our district courts and for law firms as they attempt to deal with and reconcile our most recent pronouncements.

***1271** Prior to *LaSalle National Bank, Novo* and *Freeman*, the accepted analysis in attorney disqualification matters was summary in nature, and thus if a substantial relationship existed between the prior representation and the present litigation, disqualification would and must automatically follow. *See Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.1978). This harsh iron-clad rule, however, was modified in *Novo* and *Freeman.* In *Novo*, this court agreed that the presumption that every attorney in the law firm has knowledge of the confidences and secrets of the firm's clients is rebuttable. *Novo*, 607 F.2d at 197. This conclusion is necessary, as we noted in *Freeman*, just four and a half months ago, because "the possible appearance of impropriety ... is simply too weak and too slender a reed on which to rest a disqualification order ...." 689 F.2d at 723. We went on in *Freeman* to address the question of the quality of proof required to rebut the presumption and held that "if an attorney can clearly and effectively show that he had no knowledge of the confidences and secrets of the client, disqualification is unnecessary ...." Disqualification motions, as we noted, are drastic measures which courts should hesitate to impose except when absolutely necessary. 689 F.2d at 721.

A review of the facts and holding of this court's most recent decision on attorney disqualification, *LaSalle National Bank*, clearly demonstrates, contrary to the majority's interpretation, that that case does not support an irrebuttable presumption of shared confidences. In *LaSalle National Bank*, the defendant County of Lake brought a motion seeking disqualification of the plaintiff's law firm, on the grounds that one of the firm's associates had formerly been employed as a State's Attorney in Lake County. After determining that there was a "substantial relationship" between the present litigation and the associate's previous work for the County, this court properly determined that the individual associate was precluded from representing the plaintiff according to the guidelines reaffirmed in this opinion. The court then turned to the question of whether the disqualification of one associate automatically required the disqualification of the whole firm,

> "Having found that Mr. Seidler was properly disqualified from representation of the plaintiffs in this case, we must now address whether this disqualification should be extended to the entire law firm of Rudnick & Wolfe. Although the knowledge possessed by one attorney in a law firm is presumed to be shared with the other attorneys in the firm,

> *Schloetter,* 546 F.2d at 710–11, *this court has held that this presumption may be rebutted. Novo Terapeutisk,* 607 F.2d at 197. The question arises here whether this presumption may be effectively rebutted by establishing that the 'infected' attorney was 'screened', or insulated, from all participation in and information about a case, thus avoiding disqualification of an entire law firm based on the prior employment of one member."

Id. at 257 (emphasis added). The court went on to hold that a law firm defending against a disqualification motion *may* rebut the presumption of intra-firm sharing of confidences by demonstrating that a timely and effective "Chinese Wall" has been established to insulate against the flow of confidences from the tainted lawyer to his colleagues in the law firm,

> "The screening arrangements which courts and commentators have approved, ... contain certain common characteristics. The attorney involved in the *Armstrong v. McAlpin* [625 F.2d 433 (2d Cir.1980)] case, for example, was denied access to relevant files and did not share in the profits or fees derived from the representation in question; discussion of the suit was prohibited in his presence and no members of the firm were permitted to show him any documents relating to the case; and both the disqualified attorney and others in his firm affirmed these facts under oath. 625 F.2d at 442–43. The screening approved in the *Kesselhaut* [*v. United States,* 555 F.2d 791 (Ct.Cl.1977)] case was similarly specific: all other attorneys in the firm were forbidden ***1272** to discuss the case with the disqualified attorney and instructed to prevent any documents from reaching him; the files were kept in a locked cabinet, with the keys controlled by two partners and issued to others only on a 'need to know' basis. 555 F.2d at 793. In both cases, moreover, as well as in *Greitzer & Locks,* the screening arrangement was set up at the time when the potentially disqualifying event occurred, either when the attorney first joined the firm or when the firm accepted a case presenting an ethical problem."

Id. at 259.

The court in *LaSalle National Bank* concluded that the law firm had failed to rebut the presumption of shared confidences *under the facts of that case* since "no specific institutional mechanisms were in place to insure that that information was not shared, even if inadvertently," prior to filing of the disqualification motion.

Contrary to the majority's assertion, *LaSalle National Bank* does not support the majority's reliance on an irrebuttable presumption of shared confidences. Rather, the court in *LaSalle National Bank* expressly held that the presumption of shared confidences is *rebuttable,* and that the presumption may be rebutted if the law firm is able to demonstrate that a timely and effective "Chinese Wall" has been established to prevent disclosure of confidences. The *LaSalle National Bank* decision, like *Freeman* and *Novo,* mandates that Schwartz & Freeman be afforded the same opportunity to rebut the presumption of shared confidences.

The majority seeks to ignore the clear import of the *LaSalle National Bank* case in two ways, both of which are entirely without merit. First, the majority claims that the *LaSalle National Bank* holding is inapplicable to this case because in *LaSalle National Bank* a lawyer switched employment from one firm (or government agency) to another law firm, while in this case a law firm switched sides by representing interests adverse to a former client. However, the *LaSalle National Bank* opinion fails to make a distinction between a lawyer changing employment and a law firm switching sides, nor does it limit its holding to fact situations involving individual attorneys changing employment, but the majority in this case reads these distinctions into the *LaSalle National Bank* opinion, in a manner which strains the limits of logical legal reasoning. Significantly, both *Freeman* and the *en banc* opinion in *Novo* also fail to allude to the factual distinction which the majority argues is so critical.

Second, the majority contends that Schwartz & Freeman must be disqualified since *LaSalle National Bank* held that, in order to avoid disqualification, a firm must demonstrate that an effective "Chinese Wall" or other safeguard was established early enough to prevent even an inadvertent intra-firm disclosure of a former client's confidences. The fallacy of the majority's reliance on *LaSalle National Bank* is patently obvious—how is a judge supposed to determine whether or not timely and effective safeguards have been established if the law firm is afforded no opportunity to rebut the presumption of shared confidences? The critical point made in *LaSalle National Bank* is that there must be an opportunity to rebut the presumption of shared confidences, and thus *LaSalle National Bank* is diametrically opposed to the majority decision in this case. Ignoring this critical aspect of the *LaSalle National Bank* holding, the majority concludes that Schwartz & Freeman must be disqualified since "Schwartz & Freeman has never offered to prove—has never so much as intimated—that any institutional mechanisms were in place in this case." It is obvious why the record is silent on whether in fact Schwartz & Freeman had established, or even attempted to establish, effective safeguards, such as a "Chinese Wall"—the district court based its disqualification order on an irrebuttable presumption of intra-firm sharing of

confidences and emphatically blocked Schwartz & Freeman from presenting their full case to rebut the presumption, much less to even address the question of whether or not a "Chinese ***1273** Wall" was in effect at that time or, whether any safeguards were in effect or even contemplated. In fact, the court at one point even went so far as to threaten to strike on its own motion the sparse rebuttal evidence it did allow Schwartz & Freeman to present, and frustrated Schwartz & Freeman's attempt to preserve their attorney-client relationship and their professional reputation, by imperiously stating: "The point is we are dealing with an irrebuttable presumption...." The facts in the record should not be misconstrued to achieve the desired result. The case law of this circuit mandates that Schwartz & Freeman must be afforded an opportunity to rebut the presumption of shared confidences by demonstrating, if possible, that (1) none of the confidences of NPD (the former clients) have been shared with the Schwartz & Freeman attorneys handling the monopolization suit *and* (2) that effective safeguards, such as a "Chinese Wall," were instituted as soon as the attorney or law firm became aware, or as soon as a reasonable attorney should have been aware, of the possible conflict of interest. The crucial point is that they should at least be given an opportunity to rebut the presumption of shared confidences.

Furthermore, the majority's extensive reliance on *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.1978) is clearly unfounded. As we recently recognized in *LaSalle National Bank*, the *Kerr-McGee* case involved "*simultaneous* representation of adverse interests" by the Washington and Chicago offices of a large law firm, and disqualification of the law firm was required since no firm, no matter how large, can represent two sides in a controversy at the same time. (emphasis added). Thus, *Kerr-McGee* is inapposite to this case involving *subsequent* representation of adverse interests. The time elapsed since the prior adverse representation should be one factor to consider in deciding whether the presumption of shared confidences has been rebutted. *See* Liebman, The Changing Law of Disqualification: The Role of Presumption and Policy, 73 Nw.U.L.Rev. 996, 1016 (1979). By analogy, a judge who formerly was a member or associate of a law firm is not barred for life from hearing cases involving his former firm; rather the length of time elapsed since his former employment is one factor the judge must reflect upon and consider in determining if and when to recuse himself.

Applying the *LaSalle National Bank*, *Freeman* and *Novo* analysis to the facts of this case, I agree with the majority that Attorney Fine (the Schwartz & Freeman attorney acting as ostensible counsel for NPD in the stock transfer matter) had access to confidential financial and operating data which would be vital information in the monopolization suit. I disagree, however, with the majority's conclusion that since Attorney Fine had confidential financial information, the entire Schwartz & Freeman law firm should automatically be disqualified because of an irrebuttable presumption that the confidences acquired in the prior representation were necessarily shared with Page, and with other Schwartz & Freeman attorneys involved in the monopolization suit. Rather, the case law of this circuit mandates that the Schwartz & Freeman firm be afforded the opportunity to rebut the questionable "irrebuttable" presumption that the knowledge of one individual attorney, Fine, was imputed to the entire firm, including Page. In the disqualification hearing, Schwartz & Freeman sought to rebut the supposed irrebuttable presumption by introducing the sworn testimony of Page stating that Fine never in fact did reveal any of NPD's confidences to him (Page) nor to the best of his knowledge to any other member of the firm. The district court emphatically refused to consider this sworn testimony to rebut the questionable irrebuttable presumption, stating that it would allow Schwartz & Freeman to introduce such testimony only as an offer of proof for the limited purpose of making a record for appeal:

> "Q. You are aware, are you not, from hearing the testimony of Todd Johnson [President of NPD] that he claims to have communicated to Richard Fine in 1976 information generally concerning ***1274** NPD's future plans and strategies, NPD's position in the industry, NPD's prospects for success, NPD's future business investments, and the manner in which NPD carries on its business. Are you aware of that testimony?
>
> "A. I recall the testimony generally.
>
> "Q. Was any such claimed information communicated to you by Mr. Fine?
>
> "Mr. Fornaciari: Objection, your Honor, relevance.
>
> "By The Witness:
>
> "A. No.
>
> "The Court: The objection is sustained, and I should state again in case I have not made it clear for the record that I am simply not going to consider that testimony of Johnson.
>
> "If I were going to consider that testimony of Johnson then obviously I would consider the testimony of Mr. Fine and Mr. Page. But my belief is that I made a mistake in receiving that testimony in the first instance,

> and I suppose the proper thing for me to do, if a motion were made, is to strike it. No one has made such a motion. Maybe I should strike it on my own motion.
>
> "Mr. Elson: Your Honor, under our theory of the case we would want this in the record anyway.
>
> "The Court: All right. But in any case I want to make it clear that my ruling is simply that this testimony on both sides is irrelevant."

In refusing to consider Page's sworn testimony, the district court relied solely on the *Kerr-McGee* holding of an irrebuttable presumption that the knowledge of one individual attorney, Fine, was imputed to the entire law firm, including Page, to justify disqualifying the Schwartz & Freeman law firm.

> "The Court: The point is we are dealing with an irrebuttable presumption that there were confidences."[1]

[1] It should be noted that the district court ruled on the disqualification motion without the benefit of the *Freeman* opinion, which was not decided until sometime after the district court's disqualification order was issued.

The irrebuttable presumption that all information is shared among every attorney in a firm ignores the practical realities of modern day legal practice. The practice of law has changed dramatically in recent years, with many lawyers working in firms consisting of 20, 30, 60, 100 or even 300 or more attorneys, and with some firms having offices located throughout the country or even throughout the world. Additionally, the trend within law firms has been toward greater specialization and departmentalization. Surely, it defies logic and common sense to establish a presumption, with no opportunity for rebuttal, that every individual lawyer in such a multi-member and multi-specialized firm has *substantial knowledge* of the confidences of each of the firm's clients. Recognizing these realities of the modern practice of law, we must continue to take a more realistic view toward the law of attorney disqualification by allowing the presumption that confidences have been shared throughout a firm to be rebuttable, as we have held in *Freeman* and *Novo.* The district court's decision to automatically disqualify the entire law firm based on an irrebuttable presumption is unreasonable and unrealistic and is directly contrary to our holdings in *LaSalle National Bank, Freeman* and *Novo.*

Recognizing that the district court's decision directly contradicts the mandates of the *LaSalle National Bank, Freeman* and *Novo* holdings, the majority feebly attempts to distinguish those cases and states that they do not apply when the firm itself opposes a prior client and, in effect, "changes sides", but apply only to situations where an individual member of a law firm changes employment. This is "poppycock," a distinction without a difference and one which defies both logic and the practical realities of our modern legal system. First, reason tells us that a law firm is indeed nothing more than a group of individual attorneys who have formed an association to further the practice of law. A clear understanding of *LaSalle National Bank, Novo* and *Freeman* establishes that once ***1275** the appearance of impropriety has arisen, the law firm, as well as an individual attorney, must be given the opportunity to demonstrate an absence of professional impropriety or misconduct. The point the majority overlooks is that it is irrelevant when analyzing the allegations of impropriety whether the potential conflict emanates from one new associate or from several partners or even, for that matter, the entire law firm. The governing legal principle must be the same regardless of whether the alleged conflict arises from the firm itself changing sides or from an individual attorney changing employment; a lawyer or law firm must be given an opportunity to rebut the inference of professional impropriety by demonstrating that the former client's confidences have not been shared with the individuals involved in the current litigation. Why must a lawyer or law firm be disqualified if in fact, they have no substantial knowledge of the former client's confidences because of the out-dated irrebuttable presumption? The mere existence of a possible conflict of interest is of such serious magnitude that the trial judge must afford the litigants (law firms) a hearing and explore the ethical questions in their entirety, unless there are unrebutted facts in the pleadings on file supporting disqualification.

More importantly, however, the majority's analysis ignores a basic principle of law, fairness to all litigants. I believe that fairness requires that any law firm and/or individual lawyer accused of professional impropriety, questionable ethics, or misconduct be given the opportunity to rebut any and all adverse inferences which may have arisen by virtue of a prior representation, and this court so held in *LaSalle National Bank* and *Freeman.* A law firm should not be disqualified with only a summary proceeding conducted by a judge on a sparse factual record such as in this case. To disqualify a lawyer or law firm, and besmirch their professional reputation, based on a sparse and inadequate factual record and an antiquated irrebuttable presumption is to trip lightly through the valley of due process since due process guarantees, at the very least, fundamental fairness to litigants. *See e.g. Lassiter v. Dept. of Social Services,* 452 U.S. 18, 24, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981).

The right to rebut allegations of impropriety is necessary because of the immediate and often irreparable ramifications as to both client and counsel alike that a disqualification order carries with it. I believe counsel and, in this instance, the law firm should not only be allowed to protect their relationship with their present client but also their good name and reputation for high ethical standards. After all, an attorney's and/or a law firm's most valuable asset is their professional reputation for competence, and above all honesty and integrity, which should not be jeopardized in a summary type of disqualification proceeding of this nature. As court proceedings are matters of public record, a news media report concerning a summary disqualification order, based on a scant record of this type, can do irreparable harm to an attorney's or law firm's professional reputation. We must recognize that the great majority of lawyers, as officers of the court, do conduct themselves well within the bounds of the Code of Professional Responsibility.

Moreover, as we recognized in *Freeman*, disqualification of an attorney may also adversely affect the client as disqualification deprives the individual of the representation of the attorney of his choice and "it may also be difficult, if not impossible, for an attorney to master 'the nuances of the legal and factual matters' late in the litigation of a complex case." 689 F.2d at 720. However, the majority dismisses this important consideration again citing a supposed "fact" which is nothing more than a bald assumption, without any basis in the record, that "Analytica appears content with whatever substitute counsel it has procured ...." A court should order a lawyer or law firm disqualified only after a factual inquiry allowing for subsequent appellate review, if necessary, in the absence of a clear and unrebutted factual basis supporting disqualification. *See General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704 (6th Cir.1982).

***1276** A summary procedure, premised upon an irrebuttable presumption founded on a mere *appearance* of professional impropriety, is wholly inadequate when ruling on the question of an attorney's or a law firm's professional ethics. We give every defendant in a criminal case the opportunity to be heard, to confront his accusers and to contest all allegations made against him; in fact, in a criminal case we allow the defendant the additional safeguard of a prosecutor's review before even holding a hearing or grand jury prior to filing an information or indictment. We must provide counsel suspected of a violation of the Code of Professional Responsibility with at least a similar opportunity to defend himself and/or explain any and all allegations of impropriety, unless there is a clear unrebutted factual basis contained in the pleadings on file, if we believe in the fairness doctrine. Today, unfortunately, the majority holds the principle of fairness applies only where "a member or associate of a law firm changes jobs" and not where "the firm itself changed sides." Such a distinction is unwarranted and no doubt opens the door to future confusion and possible unjust results.

Assuming Schwartz & Freeman were unable to rebut the presumption that Attorney Fine had access to the confidences and secrets of NPD, and it appears that they were not, the conclusion that Fine himself would not be allowed to represent Analytica is correct. I do not believe and refuse to accept that his disqualification should *automatically* carry over to the entire firm. It is often times true that knowledge of one or more attorneys in a firm has been imputed to other members of that firm. *See, e.g., Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.1978); *Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures*, 224 F.2d 824, 826–27 (2d Cir.1955), *cert. denied*, 350 U.S. 932, 76 S.Ct. 300, 100 L.Ed. 814 (1956). The time has come to abandon this "irrebuttable" presumption, since the principles of *LaSalle National Bank*, *Freeman* and *Novo* are equally applicable in this situation. Fairness requires that a law firm, as well as any partner or associate, must be given the opportunity to rebut this presumption. A rebuttal may be accomplished by demonstrating that the presence of a "Chinese Wall" or some other method will *effectively* insulate against any flow of confidences and/or secrets from the tainted attorney to any other member of the firm. This rebuttal requires a case-by-case factual determination, but in any event, the fairness doctrine mandates that the opportunity to rebut the presumption must exist.[2]

[2] *See*, Murphy, Vicarious Disqualification of Government Lawyers, 69 A.B.A.J. 299 (March 1983) criticizing perfunctory disqualification of an entire law firm based on the knowledge of one firm attorney, in situations involving former government lawyers entering private practice. The author urges rejection of "the presumption in favor of vicarious disqualification", instead advocating a factual inquiry into the existence of a "screening procedure" within the law firm employing the former government attorney.

I wish to stress that the fact finding process of the trial court can indeed be based on objective and verifiable factors. In determining whether a devised plan can effectively prevent disclosures, the trial court should consider a wide variety of factors. For example, the court should consider the size of the law firm, its structural divisions, the likelihood of contact between a "screened" attorney and one handling an adverse representation, and

the existence of a rule prohibiting the "tainted" attorney from sharing in the fees derived from the representation in question. The effectiveness of a plan also depends on what type of routine internal safeguards have been developed in the firm for handling confidential information, such as curtailing access to files by keeping files in a locked file cabinet, with the keys controlled by two partners and issued to others only on a "need to know" basis. *LaSalle National Bank,* at 258–259. The court should also look at the steps the firm has taken to make all members of the firm aware of the ban on exchange of information as well as any steps taken to enforce this ban. *LaSalle National Bank,* at 258–259. Finally, the court must ***1277** keep in mind what should be the lawyer's and the law firm's most valuable assets, their reputations for honesty and integrity, along with competence. While some may argue that this final factor is more subjective than objective in nature, it merely requires an evaluation which district court judges are qualified to make, especially in light of the fact that they make credibility determinations in other cases daily. Only after considering the above factors can a district court make a determination as to whether a devised plan can *effectively* shield a tainted attorney. Reliance upon antiquated notions of disqualification such as irrebuttable presumptions simply will no longer suffice in today's specialized practice of law.

My concern in this area lies in the effect a disqualification motion has on both a law firm as well as a newly hired individual in a firm. In *LaSalle National Bank, Novo* and *Freeman* we gave the newly hired attorney the opportunity to rebut all adverse inferences arising out of his former employment and to prove to the court that he in fact did not have prior knowledge sufficient to disqualify his firm. In *LaSalle National Bank* this court set forth the reasoning requiring the presumption of shared confidences to be rebuttable:

> "If past employment in government results in the disqualification of future employers from representing some of their long-term clients, it seems clearly possible that government attorneys will be regarded as 'Typhoid Marys.' Many talented lawyers, in turn, may be unwilling to spend a period in government service, if that service makes them unattractive or risky for large law firms to hire. In recognition of this problem, several other circuits have begun either explicitly or implicitly to approve the use of screening as a means to avoid disqualification of an entire law firm by 'infection.' The Second Circuit has expressed its approval of the use of screening in a situation where the law firm's continued representation of a client results in no threat of a taint to the trial process. *Armstrong v. McAlpin,* 625 F.2d 433, 445 (2d Cir.1980) (en banc), vacated on other grounds, 449 U.S. 1106 [101 S.Ct. 911, 66 L.Ed.2d 835] (1981). The Fourth Circuit, similarly, has approved an arrangement under which a former Justice Department attorney's new employer was not disqualified, on the basis that the disqualified individual was denied access to all the relevant files and did not participate in fees from the barred litigation. *Greitzer & Locks v. Johns-Manville Corp.,* No. 81–1379, slip op. at 7 (4th Cir. Mar. 5, 1982). Similarly, the Court of Claims has held that a former government attorney's entire firm need not be disqualified where screening procedures insure that he did not consult with the other attorneys about the case or share in fees derived from it. *Kesselhaut v. United States,* 555 F.2d 791 (Court of Claims 1977)."

This reasoning is equally apt in situations involving a law firm representing interests adverse to a former client. If prior representation of a particular client will irrebuttably disqualify an entire firm from handling certain cases, the result could easily be whole law firms of "Typhoid Marys." This would have a drastic impact on the careers of attorneys in entire firms, would impede clients' rights to be represented by attorneys of their choice and would discourage attorneys with expertise in a particular field of law from handling cases in their respective specialties. Just as in cases of individual attorneys changing employment, such a result must be avoided by allowing the presumption of shared confidences to be rebutted. Fairness demands that we now do no less for the law firm itself.

The majority infers that under my analysis a law firm could conceivably represent opposing sides in the same case. Such a conclusion conflicts with this court's maxim that judges should not "stifl[e] the promptings of common sense." *See Planned Parenthood Association of Chicago v. Kempiners,* 700 F.2d 1115, 1137 (7th Cir.1983). In the absence of stipulated facts supporting disqualification, decisions to disqualify counsel should be made only after a factual inquiry has been undertaken allowing lawyers ***1278** an opportunity to rebut all inferences of unethical conduct. The *opportunity* to rebut inferences of professional misconduct or impropriety must exist, whether the disqualification motion is directed toward an individual lawyer or an entire firm. The majority's irrebuttable presumption is a relic from days long ago past, ignoring the realities of the modern practice of law. "[E]quity demands, and the pragmatics of emerging specialization inherent in contemporary legal practice dictates, that this presumption be rebuttable." *City of Cleveland v. Cleveland Elec. Illuminating,* 440 F.Supp. 193, 209 (N.D.Ohio), *aff'd mem.,* 573 F.2d 1310 (6th Cir.1977), *cert. denied,* 435 U.S. 996, 98 S.Ct. 1648, 56 L.Ed.2d 85 (1978). The time has come to abandon the

irrebuttable presumption that the knowledge of one attorney is the knowledge of the entire firm since, as this court recently stated, we should look to the living law, not to that of the dead. *See Norris v. United States,* 687 F.2d 899, 904 (7th Cir.1982).

The majority attempts to justify the irrebuttable presumption by stating "clients will not ... trust firms that switch sides as nimbly as Schwartz & Freeman." If we accept this as true, the "test of the market" and the law of economics will prevail. A fair and just result will be obtained since the concerned client will select other counsel if he does not trust the present firm. *Cf. Merritt v. Faulkner,* 697 F.2d 761 at 769–770 (7th Cir.1983) (Posner, J., concurring in part and dissenting in part); *McKeever v. Israel,* 689 F.2d 1315, 1325 (7th Cir.1982) (Posner, J., dissenting).

The majority makes a second attempt to justify the irrebuttable presumption of intra-firm sharing of confidences by stating that a law firm's "interest not only in retaining a client but in denying a serious breach of professional ethics might outweigh any felt obligation to 'come clean' ". Evidently, the majority believes that lawyers generally are not to be trusted to honor their ethical obligations. I, on the other hand, believe that the great majority of attorneys, as officers of the court, will and do live up to their ethical duties and "come clean" *if given an opportunity to do so. See generally,* Hazard, *The Lawyer's Obligation to be Trustworthy when Dealing with Opposing Parties,* 33 S.C.L.Rev. 181 (1981). As for those attorneys who chose not to "come clean," the district court distinguishes between the meritorious and the frivolous on a regular basis in other types of cases, and I see no reason why the courts cannot perform that task equally well in the context of attorney disqualification, without relying on an ancient out-dated irrebuttable presumption.

I wish to emphasize there are indeed situations where orders of disqualification are both legitimate, necessary and proper. The attorney-client relationship has been most properly described as sacrosanct and "[i]t is part of a court's duty to safeguard the sacrosanct privacy of the attorney-client relationship." *Freeman,* 689 F.2d at 721. However, the majority's irrebuttable presumption that all confidences are shared among every lawyer in a law firm, even a large multi-office firm, ignores the fact that in many firms, particularly large firms, there is little exchange of confidences between, for example, the antitrust, personal injury, tax, patent, securities or corporate sections of a firm because of the work load and the varied nature of the different department's practices. The majority's analysis fails to give Schwartz & Freeman or even contemplate in the future giving other law firms, large or small, the opportunity to demonstrate to the court the absence of impropriety. By analogy, the solution I advocate has worked well in our jury selection procedure for years. Where a juror states that he/she has information concerning a case, they are not automatically disqualified, but it is a trigger for further questioning to ascertain the degree of involvement, potential relationships or formed opinions in the matter. In essence, we are trusting the judge to perform a fact finding process that has been performed successfully for years. Why in our legal system is a juror entitled to more protection than an officer of the court who has dedicated himself to the highest ideals of our legal profession? Why should not a judge ***1279** conduct a meaningful factual inquiry rather than merely relying on an antiquated irrebuttable presumption?

Finally, I disagree with the majority's imposition of fees and expenses upon Schwartz & Freeman as a penalty for defending against the disqualification motion. The majority concludes that Schwartz & Freeman's arguments are without "a colorable basis in law" and are "so unreasonable" as to be in "bad faith." In so holding, the majority denegrates the logic employed by this court in its three most recent decisions pertaining to attorney disqualification, *LaSalle National Bank, Freeman* and *Novo;* all three of these cases expressly hold that the presumption of intra-firm sharing of confidences is rebuttable. Obviously, Schwartz & Freeman's legal argument that they should be allowed to rebut the presumption of shared confidences had at the very least a "colorable basis in law" and was not "so unreasonable as to be in bad faith."

The majority paints a totally inaccurate picture of Schwartz & Freeman's behavior in the trial court, a picture which once again is without support in the record. The majority casts Schwartz & Freeman as nothing but a group of pettifogging attorneys set on running up their fees without concern for truth or moral obligation. An examination of the record, however, discloses a sharply different image as Schwartz & Freeman did at one point move, as the majority puts it, to "gracefully bow out" by withdrawing from the case.

> "Your Honor, we advised the court by letter that after discussion of the situation in depth with our client, that we would come to court this morning and ask the court for leave to withdraw as counsel for plaintiff. The request was made on behalf of all the lawyers at Schwartz & Freeman and on behalf of Mr. Futterman and any lawyers in his firm. We do so with a couple of convictions in mind: that it is in the best interests of our client that we withdraw. The motion to disqualify has become a major dispute, is occupying the court's time,

> is occupying counsel's time, a terrific amount of energy and effort is being spent on it, and we believe that this is working a terrible hardship on our client and, therefore, that that process is just not productive. We have taken the step of waiving our fee to our client in order to make sure that the motion to disqualify, to the best of our ability, does not cause the effect that such a motion can have on a client. We have done everything that we can to help our client get the case back on track and those are our motives."

After the district court had granted the motion to withdraw, the defendants petitioned the court to assess fees and costs of $65,000 against Schwartz & Freeman. Faced with the onerous prospect of not only losing a client but also being penalized $65,000, Schwartz & Freeman rolled up their sleeves and decided to fight for their cause, rather than rolling over and playing dead. Is a decision to stand up for one's rights the kind of behavior that one should be punished for in our American system of justice?

The district court's order assessing fees against Schwartz & Freeman cannot stand in light of our recent decision in *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789 (7th Cir.1983). In *Overnite Transp.*, the plaintiff brought suit based on a novel interpretation of the Interstate Commerce Act, not previously addressed in published case law. The district court granted the defendant's motion to dismiss, and on appeal this court affirmed. Subsequent to this court's affirmance of the dismissal order, the district court granted the defendant's motion for an order assessing attorney's fees against the plaintiff's attorneys, finding that the attorneys had acted vexatiously in instituting the lawsuit. On appeal from the attorney fee award, this court held that the district court had abused its discretion, stating:

> "It is the law of this circuit that the power to assess costs on the attorney involved 'is a power which the courts should exercise *only* in instances of a *serious and studied disregard for the orderly process of justice.*' ... *Since there* ***1280** *was a legal basis for Overnite's original position, even though that position was found to be legally incorrect, we hold Overnite's claim for C.O.D. charges cannot be characterized as 'lacking justification,' and therefore the district court abused its discretion when finding the attorney's conduct was vexatious.*"

Id. at 795 (emphasis in original).

The order assessing fees against Schwartz & Freeman must be reversed since, in defending against the disqualification motion, they obviously did not exhibit a "serious and studied disregard for the orderly process of justice." Rather, Schwartz & Freeman presented a legal argument which not only had a colorable basis in law, but which I believe is a correct interpretation of this court's three most recent pronouncements on the law of attorney disqualification. The majority's draconian decision to assess fees against Schwartz & Freeman is a harsh blow to our adversarial process as it "will have a profound chilling effect upon litigants and [will] further interfere with the presentation of meritorious legal questions ...." *Overnite Transp.*, 697 F.2d at 795, and is nothing less than an insult to the doctrine of *stare decisis* and a slap in the face of the adversary process. In an idealized world, Schwartz & Freeman might indeed have "gracefully" bowed out, but reality dictates that with a client's interest in being represented by the attorney of his choice, an attorney's professional reputation as well as $65,000 in costs on the line, the proper course was to have proceeded exactly as Schwartz & Freeman did. To conclude otherwise is ridiculous.

In short, the distinction the majority has drawn in this case unnecessarily deviates from the standard we set forth in *LaSalle National Bank*, *Novo* and *Freeman.* I believe the distinction advocated by the majority is unwarranted, unworkable, and will only confuse the law of attorney disqualification, a developing area of fundamental importance not only to the legal community, but to our society. We are not in a position, based on the incomplete record developed in the trial court, to decide conclusively whether or not Schwartz & Freeman should be disqualified. Accordingly, I would remand this case to the district court to allow Schwartz & Freeman an opportunity to demonstrate, if possible, that (1) Fine has not disclosed NPD's confidences to any Schwartz & Freeman attorney involved in the monopolization suit; and (2) that some meaningful effective plan has been instituted to ensure that such a disclosure will not occur in the future. Finally, I would not assess attorney's fees against Schwartz & Freeman.

All Citations

708 F.2d 1263, 1983-1 Trade Cases P 65,408

232 Cal.App.3d 572, 283 Cal.Rptr. 732, 60 USLW 2119

In re COMPLEX ASBESTOS LITIGATION. FLOYD W. WIDGER et al., Plaintiffs and Appellants, v. OWENS-CORNING FIBERGLAS CORPORATION et al., Defendants and Appellants; GAF CORPORATION et al., Defendants and Respondents; JEFFREY B. HARRISON et al., Objectors and Appellants. [And eight other cases.][*]

No. A047921.
Court of Appeal, First District, Division 3, California.
July 19, 1991.

* *Clayton v. Owens-Corning Fiberglas Corporation* (S.F. Super. Ct. No. 895216); *Maslowski v. Owens-Corning Fiberglas Corporation* (S.F. Super. Ct. No. 897343); *Box v. Owens-Corning Fiberglas Corporation* (S.F. Super. Ct. No. 897344); *McFarland v. Owens-Corning Fiberglas Corporation* (S.F. Super. Ct. No. 897346); *Dennis v. Owens-Corning Fiberglas Corporation* (S.F. Super. Ct. No. 897347); *Romo v. Owens- Corning Fiberglas Corporation* (S.F. Super. Ct. No. 897533); *Favalora v. Owens-Corning Fiberglas Corporation* (S.F. Super. Ct. No. 898524); *Crain v. Owens-Corning Fiberglas Corporation* (S.F. Super. Ct. No. 898525).

SUMMARY

The trial court granted a motion to disqualify the law firm representing plaintiffs in nine asbestos-related personal injury actions on the basis of the employment by the firm of a paralegal who had previously been employed by the firm representing defendants. The disqualified firm appealed the disqualification order, and defendants cross-appealed, contending that the firm should also have been disqualified in all asbestos cases before the court and in asbestos cases pending in another county. (Superior Court of the City and County of San Francisco, Nos. 828684 and 894175, Alfred G. Chiantelli, Judge.)

The Court of Appeal affirmed the disqualification order. It held that absent written consent, the proper rule and its application for disqualification based on nonlawyer employee conflicts of interest should be as follows: the party seeking disqualification must show that its present or past attorney's former employee possesses confidential attorney-client information materially related to the proceedings before the court. Once this showing is made, a rebuttable presumption arises that the information has been used or disclosed in the current employment. To rebut the presumption, the challenged attorney has the burden of showing that the practical effect of formal ***573** screening has been achieved. The court held that the trial court did not abuse its discretion in disqualifying the firm from representation in the nine cases: the paralegal had obtained confidential attorney-client information when he accessed the files relating to cases undertaken by his future employer on the computer belonging to that of the firm representing defendants, and there was substantial evidence to support a reasonable inference that the paralegal used or disclosed the confidential information. The court held that the trial court did not err in failing to extend the disqualification order to 11 other cases pending in another county, since a superior court does not have any inherent or statutory power to control the conduct of persons in judicial proceedings pending before a different superior court. Further, the court held, the trial court did not abuse its discretion in failing to disqualify the firm from all asbestos litigation before the court, since the record did not show that the paralegal possessed and disclosed confidential attorney-client information materially related to all such litigation. (Opinion by Chin, J., with White, P. J., and Strankman, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

([1])
Attorneys at Law § 10--Disqualification of Attorneys--Necessity of Hearing.
A motion to disqualify an attorney normally should be decided on the basis of the declarations and documents submitted by the parties. An evidentiary hearing should be held only when the court cannot with confidence decide the issue on the written submissions. Such instances should be rare, as when an important

evidentiary gap in the written record must be filled, or a critical question of credibility can be resolved only through live testimony. Whether to conduct an evidentiary hearing is a matter left to the discretion of the trial court.

([2])
Attorneys at Law § 10--Disqualification of Attorneys--Trial Court's Authority.
A trial court's authority to disqualify an attorney derives from the power, inherent in every court and set forth in Code Civ. Proc., § 128, subd. (a)(5), to control the conduct of its ministerial officers and other persons connected with the judicial proceedings before it.

([3])
Attorneys at Law § 10--Disqualification of Attorneys--Review.
On review of an order granting or denying a motion to disqualify an attorney, the appellate court defers to the trial court's discretion, absent an abuse of discretion. The trial court's exercise of this discretion is ***574** limited by the applicable legal principles and is subject to reversal when there is no reasonable basis for the action.

([4])
Attorneys at Law § 15--Conflict of Interest and Remedies of Former Clients--Disqualification--Standard of Review.
On appeal from an order disqualifying a law firm representing plaintiffs in nine asbestos-related personal injury actions on the basis of the former employment of a nonlawyer employee of the firm by the firm representing the defendants in those actions, defendants' cross-appeal, in which they contended that plaintiffs' firm should be disqualified in all asbestos cases throughout the state or all asbestos cases before the court, was not subject to de novo review. Even when there are no factual findings, if substantial evidence supports the trial court's implied findings of fact, an appellate court reviews the conclusions based on the findings for abuse of discretion. The same is true when the trial court has taken the extra step of stating the factual reasons for its disqualification order.

([5])
Attorneys at Law § 15--Conflict of Interest and Remedies of Former Clients--Disqualification--Interests Considered.
When faced with disqualifying an attorney for an alleged conflict of interest, courts consider such interests as the clients' right to counsel of their choice, an attorney's interest in representing a client, the financial burden on the client of replacing disqualified counsel, and any tactical abuse underlying the disqualification proceeding. An additional concern is the ability of attorneys and their employees to change employment for personal reasons or from necessity. However, the paramount concern must be the preservation of public trust in the scrupulous administration of justice and the integrity of the bar.

[Representation of conflicting interests as disqualifying attorney from acting in a civil case, note, 31 **A.L.R.3d** 715.]

([6a], [6b])
Attorneys at Law § 15--Conflict of Interest and Remedies of Former Clients--Disqualification--Substantial Relationship Between Former and Present Representation.
The attorney-client privilege furthers the public policy of ensuring the right of every person to confer and confide freely and fully in one having knowledge of the law, and skilled in its practice, in order that the person may have adequate advice and a proper defense. One of the basic duties of an attorney, set forth in Bus. & Prof. Code, § 6068, subd. (e), is to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. To protect confidentiality, Rules Prof. Conduct, rule 3-310(D), bars an attorney from accepting employment adverse to a client or former client where the ***575** attorney has obtained confidential information material to the employment, except with the informed written consent of the client or former client. For these reasons, an attorney will be disqualified from representing a client against a former client when there is a substantial relationship between the two representations. When a substantial relationship exists, the courts presume that the attorney possesses confidential information of the former client material to the present representation.

[See **Cal.Jur.3d (Rev),** Attorneys at Law, § 97.]

([7])
Attorneys at Law § 10--Duties to Opposing Party--Confidentiality.
An attorney does not owe a duty to an opposing party to maintain that party's confidences in the absence of a prior attorney-client relationship. The imposition of such a duty would be antithetical to our adversary system and would interfere with the attorney's relationship with his or her own clients.

([8])
Attorneys at Law § 15--Conflict of Interest and Remedies of Former Clients--Disqualification--Possession of Confidential Information--Disclosure of Information to Court.
When the issue is disqualification of an attorney on the basis of a conflict of interest that may have resulted in the attorney's obtaining confidential information he might use against an adverse party, it may be proper to require some showing of the general nature of the information and its relationship to the present proceeding, but requiring disclosure of the information itself is not.

([9])
Attorneys at Law § 15.2--Conflict of Interest and Remedies of Former Clients--Disclosure of Conflict; Consent to Representation--Means of Avoiding Disqualification Absent Consent.
Hiring a former employee of an opposing counsel is not, in and of itself, sufficient to warrant disqualification of an attorney or law firm. However, when the former employee possesses confidential attorney-client information, materially related to pending litigation, the situation implicates considerations of ethics involving the very integrity of the judicial process. The phrase "confidential attorney-client information" corresponds to the definition of confidential communication between client and lawyer contained in Evid. Code, § 952, and it encompasses an attorney's legal opinions, impressions, and conclusions, regardless of whether they have been communicated to the client. Under such circumstances, the hiring attorney must obtain the informed written consent of the former employer. Failing that, the hiring attorney is subject to disqualification unless the attorney can rebut a presumption ***576** that the confidential attorney-client information has been used or disclosed in the new employment. The most likely means of rebutting this presumption is to implement a procedure, before the employee is hired, that effectively screens the employee from any involvement with the litigation.

([10])
Attorneys at Law § 15--Conflict of Interest and Remedies of Former Clients--Screening.
Screening of potential employees, so as to avoid conflicts of interest arising from the possession of confidential client information, should be implemented before undertaking the challenged representation or hiring the tainted individual. It must take place at the outset to prevent any confidences from being disclosed. The tainted individual should be precluded from any involvement in or communication about the challenged representation. To avoid inadvertent disclosures and to establish an evidentiary record, a memorandum should be circulated warning the legal staff to isolate the individual from communications on the matter and to prevent access to the relevant files.

([11])
Attorneys at Law § 15--Conflict of Interest and Remedies of Former Clients--Disqualification--Nonlawyer Employee Conflicts of Interest.
Absent written consent, the proper rule and its application for disqualification based on nonlawyer employee conflicts of interest should be as follows: the party seeking disqualification must show that its present or past attorney's former employee possesses confidential attorney-client information materially related to the proceedings before the court. The party should not be required to disclose the actual information contended to be confidential. However, the court should be provided with the nature of the information and its material relationship to the proceeding. Once this showing is made, a rebuttable presumption arises that the information has been used or disclosed in the current employment. To rebut the presumption, the challenged attorney has the burden of showing that the practical effect of formal screening has been achieved. The showing must satisfy the trial court that the employee has not had and will not have any involvement with the litigation, or any communication with attorneys or coemployees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed. If the challenged attorney fails to make this showing, then the court may disqualify the attorney and his firm.

([12a], [12b])
Attorneys at Law § 15--Conflict of Interest and Remedies of Former Clients--Disqualification--Nonlawyer Employee Conflicts of Interest-- Where Paralegal Employed by Plaintiffs' Attorney Formerly Worked for Defendants' Attorney.
In nine asbestos-related ***577** personal injury actions, the trial court did not abuse its discretion in disqualifying the law firm representing plaintiffs on the basis of the employment by that firm of a paralegal who had previously worked for the firm representing defendants. The paralegal had obtained confidential attorney-client information when he accessed the files relating to cases undertaken by his future employer on the computer belonging to that of the firm representing defendants. Defendants did not need to show the specific confidences the paralegal obtained. Further, there was substantial evidence to support a reasonable inference that the paralegal used or disclosed the confidential information. The new employer never told the paralegal not to discuss

the information he had learned at his previous employment and did not consider screening the paralegal, even after the previous employer first inquired about the paralegal's work on asbestos cases.

[See 1 **Witkin,** Cal. Procedure (3d ed. 1985) Attorneys, § 121 et seq.]

([13])
Appellate Review § 155--Scope--Questions of Law and Fact--Sufficiency of Evidence--Consideration of Evidence--Inferences.
On review, the appellate court must accept the trial court's resolution of conflicting evidence and uphold the trial court's ruling if it is supported by substantial evidence. The court must consider the evidence in the light most favorable to the prevailing party and take into account every reasonable inference supporting the trial court's decision.

([14a], [14b])
Attorneys at Law § 15--Conflict of Interest and Remedies of Former Clients--Disqualification--Nonlawyer Employee Conflicts of Interest-- Where Paralegal Employed by Plaintiffs' Attorney Formerly Worked for Defendants' Attorney--Equitable Considerations.
In nine asbestos-related personal injury actions, equitable considerations did not preclude disqualification of the law firm representing plaintiffs on the basis of the employment by that firm of a paralegal who had previously worked for the firm representing defendants, even though defendants did not file their disqualification motion until the eve of trial in a significant asbestos case and months after the date by which defendants knew the paralegal was working for the firm representing plaintiffs and that his work included asbestos litigation. The firm representing plaintiffs failed to show that the delay caused any prejudice, much less the requisite extreme prejudice. Resolution of the asbestos case set for trial was not substantially delayed, and the only prejudice was that plaintiffs lost the services of knowledgeable counsel of their choice and were forced to retain new counsel. ***578**

([15])
Attorneys at Law § 10--Disqualification of Attorneys--Where Motion Brought for Delay.
In exercising its discretion with respect to granting or denying a motion to disqualify an attorney, a trial court may properly consider the possibility that the party brought the motion as a tactical device to delay litigation. Where the party opposing the motion can demonstrate prima facie evidence of unreasonable delay in bringing the motion causing prejudice to the present client, disqualification should not be ordered. The burden then shifts back to the party seeking disqualification to justify the delay. Delay will not necessarily result in the denial of a disqualification motion; the delay and ensuing prejudice must be extreme. Even if tactical advantages attend the motion for disqualification, that alone does not justify denying an otherwise meritorious motion.

([16])
Attorneys at Law § 15--Conflict of Interest and Remedies of Former Clients--Disqualification--Nonlawyer Employee Conflicts of Interest--Where Paralegal Employed by Plaintiffs' Attorney Formerly Worked for Defendants' Attorney--Extension of Disqualification to Cases Pending in Another County.
In disqualifying the firm representing plaintiffs in nine asbestos-related personal injury cases on the basis of the employment by that firm of a paralegal who had previously worked for the firm representing defendants, the trial court did not err in failing to extend the disqualification order to 11 other cases pending in another county. While with his previous employer, the paralegal had obtained confidential attorney-client information when he accessed the files relating to cases undertaken by his future employer on the computer belonging to the firm representing defendants. The cases included those pending in the other county. However, a superior court does not have any inherent or statutory power to control the conduct of persons in judicial proceedings pending before a different superior court. On a motion to disqualify counsel the circumstances of each case should be examined. This rule is not expendable simply because a party seeks disqualification for many cases in one motion, even if the cases bear as many similarities as are commonly found in asbestos litigation.

([17])
Attorneys at Law § 15--Conflict of Interest and Remedies of Former Clients--Disqualification--Nonlawyer Employee Conflicts of Interest--Where Paralegal Employed by Plaintiffs' Attorney Formerly Worked for Defendants' Attorney--Extension of Disqualification to All Similar Cases Before Court.
In disqualifying the firm representing plaintiffs in nine asbestos-related personal injury cases on the basis of the employment by that firm of a paralegal who had previously worked for the firm representing defendants, the trial ***579** court did not abuse its discretion in failing to disqualify the firm from all asbestos litigation before the court. As to the nine cases, the trial court was satisfied

that there was a reasonable probability that the paralegal had acquired confidential information that he disclosed or used in his new employment. The record did not show that he possessed and disclosed confidential attorney-client information materially related to all of the asbestos litigation undertaken by the firm representing plaintiffs. Some of the information known by the paralegal would have lost any materiality to the firm's cases through the passage of time, and the firm presented substantial evidence showing that the paralegal's use or disclosure of confidential information was not so pervasive as to require disqualification from all asbestos litigation.

COUNSEL
Bryce C. Anderson for Plaintiffs and Appellants and for Objectors and Appellants.
Morgenstein & Jubelirer, Eliot S. Jubelirer and Larry C. Lowe for Defendants and Appellants.
No appearance for Defendants and Respondents.

CHIN, J.

Attorney Jeffrey B. Harrison, his law firm, and their affected clients appeal from an order disqualifying the Harrison firm in nine asbestos-related personal injury actions.[1] The appeal presents the difficult issue of whether a law firm should be disqualified because an employee of the firm possessed attorney-client confidences from previous employment by opposing counsel in pending litigation. We hold that disqualification is appropriate unless there is written consent or the law firm has effectively screened the employee from involvement with the litigation to which the information relates. ***580**

1 The order disqualified the law firm of Jeffrey B. Harrison, including the attorneys employed by the firm and the firm's nonattorney staff members, as well as the joint venturers in the firm's asbestos practice, Attorneys George Corey and Robert Glynn. In this opinion, we will refer to these appellants collectively as the Harrison firm. The employee involved, Michael Vogel, has not appealed from the trial court's order, which placed certain restrictions on him.

Respondents[2] cross-appeal from the trial court's order, contending that the Harrison firm should have been disqualified in all asbestos cases throughout the state. We hold that a trial court does not have authority to disqualify counsel in proceedings pending in other courts. Further, the trial court did not abuse its discretion by not disqualifying the Harrison firm in all asbestos cases before the court. Therefore, we affirm the order of the trial court.

2 The respondents who appealed from the judgment are ACandS, Inc., Celotex Corporation, Eagle-Picher Industries, Inc., Fibreboard Corporation, Owens-Corning Fiberglas Corporation, Owens-Illinois, Inc., and Pittsburgh Corning Corporation. These parties will be referred to collectively as respondents in this opinion. Additional respondents who did not appeal are A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Carey Canada, Inc.; Certainteed Corporation; Flexitallic Gasket Company, Inc.; Flintkote Company; GAF Corporation; Keene Corporation; National Gypsum Company; Plant Insulation Company; Turner & Newall, P.L.C.; and United States Gypsum Company.

Facts

Michael Vogel worked as a paralegal for the law firm of Brobeck, Phleger & Harrison (Brobeck) from October 28, 1985, to November 30, 1988. Vogel came to Brobeck with experience working for a law firm that represented defendants in asbestos litigation.[3] Brobeck also represented asbestos litigation defendants, including respondents. At Brobeck, Vogel worked exclusively on asbestos litigation.

3 In this opinion we use the term "asbestos litigation" to refer to civil actions for personal injury and wrongful death, allegedly caused by exposure to asbestos products, brought against manufacturers, distributors, and sellers of such products.

During most of the period Brobeck employed Vogel, he worked on settlement evaluations. He extracted information from medical reports, discovery responses, and plaintiffs' depositions for entry on "Settlement Evaluation and Authority Request" (SEAR) forms. The SEAR forms were brief summaries of the information and issues used by the defense attorneys and their clients to evaluate each plaintiff's case. The SEAR forms were sent to the clients.

Vogel attended many defense attorney meetings where the attorneys discussed the strengths and weaknesses of cases to reach consensus settlement recommendations for each case. The SEAR forms were the primary informational materials the attorneys used at the meetings. Vogel's responsibility at these meetings was to record the amounts agreed on for settlement recommendations to the clients. Vogel sent the settlement authority requests and SEAR forms to the clients. He also attended meetings and

telephone conferences where attorneys discussed the recommendations with clients and settlement authority was granted. Vogel recorded on the SEAR forms the ***581** amount of settlement authority granted and distributed the information to the defense attorneys.

The SEAR form information was included in Brobeck's computer record on each asbestos case. The SEAR forms contained the plaintiff's name and family information, capsule summaries of medical reports, the plaintiff's work history, asbestos products identified at the plaintiff's work sites, and any special considerations that might affect the jury's response to the plaintiff's case. The SEAR forms also contained information about any prior settlements and settlement authorizations. Information was added to the forms as it was developed during the course of a case. Vogel, like other Brobeck staff working on asbestos cases, had a computer password that allowed access to the information on any asbestos case in Brobeck's computer system.

Vogel also monitored trial events, received daily reports from the attorneys in trial, and relayed trial reports to the clients. Vogel reviewed plaintiffs' interrogatory answers to get SEAR form data and to assess whether the answers were adequate or further responses were needed.

In 1988, Vogel's duties changed when he was assigned to work for a trial team. With that change, Vogel no longer was involved with the settlement evaluation meetings and reports. Instead, he helped prepare specific cases assigned to the team. Vogel did not work on any cases in which the Harrison firm represented the plaintiffs.

During the time Vogel worked on asbestos cases for Brobeck, that firm and two others represented respondents in asbestos litigation filed in Northern California. Brobeck and the other firms were selected for this work by the Asbestos Claims Facility (ACF), a corporation organized by respondents and others to manage the defense of asbestos litigation on their behalf. The ACF dissolved in October 1988, though Brobeck continued to represent most of the respondents through at least the end of the year.[4] Not long after the ACF's dissolution, Brobeck gave Vogel two weeks' notice of his termination, though his termination date was later extended to the end of November.

4 The exceptions were Eagle-Picher Industries, Inc., which withdrew from the ACF and retained other counsel in February 1988, and Celotex Corporation and Carey Canada, Inc., which were represented by Bjork, Fleer, Lawrence & Harris (Bjork) beginning in December 1988.

Vogel contacted a number of firms about employment, and learned that the Harrison firm was looking for paralegals. The Harrison firm recently had opened a Northern California office and filed a number of asbestos cases ***582** against respondents. Sometime in the second half of November 1988, Vogel called Harrison to ask him for a job with his firm.

In that first telephone conversation, Harrison learned that Vogel had worked for Brobeck on asbestos litigation settlements. Harrison testified that he did not then offer Vogel a job for two reasons. First, Harrison did not think he would need a new paralegal until February or March of 1989. Second, Harrison was concerned about the appearance of a conflict of interest in his firm's hiring a paralegal from Brobeck. Harrison discussed the conflict problem with other attorneys, and told Vogel that he could be hired only if Vogel got a waiver from the senior asbestos litigation partner at Brobeck.

Vogel testified that he spoke with Stephen Snyder, the Brobeck partner in charge of managing the Northern California asbestos litigation. Vogel claimed he told Snyder of the possible job with the Harrison firm, and that Snyder later told him the clients had approved and that Snyder would provide a written waiver if Vogel wanted. In his testimony, Snyder firmly denied having any such conversations or giving Vogel any conflicts waiver to work for Harrison. The trial court resolved this credibility dispute in favor of Snyder.

While waiting for a job with the Harrison firm, Vogel went to work for Bjork, which represented two of the respondents in asbestos litigation in Northern California. Vogel worked for Bjork during December 1988, organizing boxes of materials transferred from Brobeck to Bjork. While there, Vogel again called Harrison to press him for a job. Vogel told Harrison that Brobeck had approved his working for Harrison, and Harrison offered Vogel a job starting after the holidays. During their conversations, Harrison told Vogel the job involved work on complex, nonasbestos civil matters, and later would involve processing release documents and checks for asbestos litigation settlements. Harrison did not contact Brobeck to confirm Vogel's claim that he made a full disclosure and obtained Brobeck's consent. Nor did Harrison tell Vogel that he needed a waiver from Bjork.

Vogel informed Bjork he was quitting to work for the Harrison firm. Vogel told a partner at Bjork that he wanted experience in areas other than asbestos litigation, and that he would work on securities and real estate development litigation at the Harrison firm. Initially,

Vogel's work for the Harrison firm was confined to those two areas.

However, at the end of February 1989, Vogel was asked to finish another paralegal's job of contacting asbestos plaintiffs to complete client questionnaires. The questionnaire answers provided information for discovery requests ***583** by the defendants. Vogel contacted Bjork and others to request copies of discovery materials for the Harrison firm. Vogel also assisted when the Harrison firm's asbestos trial teams needed extra help.

In March 1989, Snyder learned from a Brobeck trial attorney that Vogel was involved in asbestos litigation. In a March 31 letter, Snyder asked Harrison if Vogel's duties included asbestos litigation. Harrison responded to Snyder by letter on April 6. In the letter, Harrison stated Vogel told Snyder his work for the Harrison firm would include periodic work on asbestos cases, and that Harrison assumed there was no conflict of interest. Harrison also asked Snyder to provide details of the basis for any claimed conflict. There were no other communications between Brobeck and the Harrison firm concerning Vogel before the disqualification motion was filed.

In June, a Harrison firm attorney asked Vogel to call respondent Fibreboard Corporation to see if it would accept service of a subpoena for its corporate minutes. Vogel called the company and spoke to a person he knew from working for Brobeck. Vogel asked who should be served with the subpoena in place of the company's retired general counsel. Vogel's call prompted renewed concern among respondents' counsel over Vogel's involvement with asbestos litigation for a plaintiffs' firm. On July 31, counsel for three respondents demanded that the Harrison firm disqualify itself from cases against those respondents. Three days later, the motion to disqualify the Harrison firm was filed; it was subsequently joined by all respondents.

([1])**(See fn. 5.)** The trial court held a total of 21 hearing sessions on the motion, including 16 sessions of testimony.[5] During the hearing, several witnesses testified that Vogel liked to talk, and the record indicates that he would volunteer information in an effort to be helpful.

5 We note that a motion to disqualify normally should be decided on the basis of the declarations and documents submitted by the parties. An evidentiary hearing should be held only when the court cannot with confidence decide the issue on the written submissions. Such instances should be rare, as when an important evidentiary gap in the written record must be filled, or a critical question of credibility can be resolved only through live testimony. (See *Dewey v. R.J. Reynolds Tobacco Co.* (1988) 109 N.J. 201 [536 A.2d 243, 253].) Of course, whether to conduct an evidentiary hearing is a matter left to the discretion of the trial court. In light of the broad scope of the disqualification order respondents sought, the sharp conflicts in the testimony, and the unique and difficult issues presented, we cannot criticize the trial court's diligence in conducting such an extensive hearing and providing such a thorough record.

A critical incident involving Vogel's activities at Brobeck first came to light during the hearing. Brobeck's computer system access log showed that on November 17, 1988, Vogel accessed the computer records for 20 cases ***584** filed by the Harrison firm. On the witness stand, Vogel at first flatly denied having looked at these case records, but when confronted with the access log, he admitted reviewing the records "to see what kind of cases [the Harrison firm] had filed." At the time, Vogel had no responsibilities for any Harrison firm cases at Brobeck. The date Vogel reviewed those computer records was very close to the time Vogel and Harrison first spoke. The access log documented that Vogel opened each record long enough to view and print copies of all the information on the case in the computer system.

The case information on the computer included the SEAR form data. Many of the 20 cases had been entered on the computer just over a week earlier, though others had been on the computer for weeks or months. The initial computer entries for a case consisted of information taken from the complaint by paralegals trained as part of Brobeck's case intake team. Vogel denied recalling what information for the Harrison firm's cases he saw on the computer, and Brobeck's witness could not tell what specific information was on the computer that day.

Vogel, Harrison, and the other two witnesses from the Harrison firm denied that Vogel ever disclosed any client confidences obtained while he worked for Brobeck. However, Harrison never instructed Vogel not to discuss any confidential information obtained at Brobeck. Vogel did discuss with Harrison firm attorneys his impressions of several Brobeck attorneys. After the disqualification motion was filed, Harrison and his office manager debriefed Vogel, not to obtain any confidences but to discuss his duties at Brobeck in detail and to assess respondents' factual allegations. During the course of the hearing, the Harrison firm terminated Vogel on August 25, 1989.

The trial court found that Vogel's work for Brobeck and the Harrison firm was substantially related, and that there was no express or implied waiver by Brobeck or its clients. The court believed there was a substantial

likelihood that the Harrison firm's hiring of Vogel, without first building "an ethical wall" or having a waiver, would affect the outcome in asbestos cases. The court also found that Vogel obtained confidential information when he accessed Brobeck's computer records on the Harrison firm's cases, and that there was a reasonable probability Vogel used that information or disclosed it to other members of the Harrison firm's staff. The court refused to extend the disqualification beyond those cases where there was tangible evidence of interference by Vogel, stating that on the rest of the cases it would require the court to speculate.

The trial court initially disqualified the Harrison firm in all 20 cases Vogel accessed on November 17, 1988, which included 11 cases pending in Contra ***585** Costa County. However, on further consideration, the trial court restricted its disqualification order to the nine cases pending in San Francisco. The Harrison firm timely noticed an appeal from the disqualification order, and respondents cross-appealed from the denial of disqualification in the Contra Costa County cases and all asbestos litigation.

Discussion

The Standard of Review

([2]) A trial court's authority to disqualify an attorney derives from the power inherent in every court, "[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ. Proc., § 128, subd. (a)(5); *People* ex rel. *Clancy v. Superior Court* (1985) 39 Cal.3d 740, 745 [218 Cal.Rptr. 24, 705 P.2d 347]; *Comden v. Superior Court* (1978) 20 Cal.3d 906, 916, fn. 4 [145 Cal.Rptr. 9, 576 P.2d 971, 5 A.L.R.4th 562]; *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 299-300 [254 Cal.Rptr. 853].)

([3]) On review of an order granting or denying a disqualification motion, we defer to the trial court's decision, absent an abuse of discretion. (*Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 Cal.App.3d 752, 758 [261 Cal.Rptr. 100]; *Bell v. 20th Century Ins. Co.* (1989) 212 Cal.App.3d 194, 198 [260 Cal.Rptr. 459]; *Klein v. Superior Court* (1988) 198 Cal.App.3d 894, 908 [244 Cal.Rptr. 226].) The trial court's exercise of this discretion is limited by the applicable legal principles and is subject to reversal when there is no reasonable basis for the action. (*Bell, supra,* at p. 198; *Mills Land & Water Co. v. Golden West Refining Co.* (1986) 186 Cal.App.3d 116, 126 [230 Cal.Rptr. 461].)

([4]) Respondents contend their cross-appeal raises only questions of law entitled to de novo review because they do not challenge the trial court's findings. We disagree. Even when there are no factual findings, if substantial evidence supports the trial court's implied findings of fact, an appellate court reviews the conclusions based on the findings for abuse of discretion. (*Higdon v. Superior Court* (1991) 227 Cal.App.3d 1667, 1671 [278 Cal.Rptr. 588].) The same is true when the trial court has taken the extra step of stating the factual reasons for its disqualification order. In any event, the importance of disqualification motions requires careful review of the trial court's exercise of discretion. (*River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1302 [234 Cal.Rptr. 33].) ***586**

Concerns Raised by Disqualification Motions

Our courts recognize that a motion to disqualify a party's counsel implicates several important interests. These concerns are magnified when, as here, disqualification is sought not just for a single case but for many and, indeed, an entire class of litigation. ([5]) When faced with disqualifying an attorney for an alleged conflict of interest, courts have considered such interests as the clients' right to counsel of their choice, an attorney's interest in representing a client, the financial burden on the client of replacing disqualified counsel, and any tactical abuse underlying the disqualification proceeding. (*Bell v. 20th Century Ins. Co., supra,* 212 Cal.App.3d at pp. 197-198; *Gregori v. Bank of America, supra,* 207 Cal.App.3d at pp. 300-301; *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1048 [197 Cal.Rptr. 232]; but see *River West, Inc. v. Nickel, supra,* 188 Cal.App.3d at pp. 1304-1308.)

An additional concern arises if disqualification rules based on exposure to confidential information are applied broadly and mechanically. In the era of large, multioffice law firms and increased attention to the business aspects of the practice of law, we must consider the ability of attorneys and their employees to change employment for personal reasons or from necessity. To paraphrase Lord Chancellor Eldon's statement in *Bricheno v. Thorp* (1821) Jacob 300, 302 [37 Eng. Reprint 864, 865], as quoted in *Kraus v. Davis* (1970) 6 Cal.App.3d 484, 492 [85 Cal.Rptr. 846]: persons going into business for

themselves must not carry into it the secrets of their employers; but on the other hand, we think it our duty to take care that they not be prevented from engaging in any business they may obtain fairly and honorably.

Accordingly, judicial scrutiny of disqualification orders is necessary to prevent literalism from possibly overcoming substantial justice to the parties. (*Comden v. Superior Court, supra,* 20 Cal.3d at p. 915.) However, as the Supreme Court recognized in *Comden,* the issue ultimately involves a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. The paramount concern, though, must be the preservation of public trust in the scrupulous administration of justice and the integrity of the bar. The recognized and important right to counsel of one's choosing must yield to considerations of ethics that run to the very integrity of our judicial process. (*Ibid.*)

Confidentiality and the Attorney-Client Relationship

Preserving confidentiality of communications between attorney and client is fundamental to our legal system. ([6a]) The attorney-client privilege is a ***587** hallmark of Anglo-American jurisprudence that furthers the public policy of insuring " 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.' [Citation.]" (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599 [208 Cal.Rptr. 886, 691 P.2d 642].) One of the basic duties of an attorney is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code, § 6068, subd. (e).) To protect the confidentiality of the attorney-client relationship, the California Rules of Professional Conduct bar an attorney from accepting "employment adverse to a client or former client where, by reason of the representation of the client or former client, the [attorney] has obtained confidential information material to the employment except with the informed written consent of the client or former client." (Rules Prof. Conduct, rule 3- 310(D); *Western Continental Operating Co. v. Natural Gas Corp., supra,* 212 Cal.App.3d at p. 759.)

For these reasons, an attorney will be disqualified from representing a client against a former client when there is a substantial relationship between the two representations. (*Western Continental Operating Co. v. Natural Gas Corp., supra,* 212 Cal.App.3d at pp. 759- 760; *River West, Inc. v. Nickel, supra,* 188 Cal.App.3d at pp. 1303-1304.) When a substantial relationship exists, the courts presume the attorney possesses confidential information of the former client material to the present representation. (*Ibid.*)

Confidentiality and the Nonlawyer Employee

The courts have discussed extensively the remedies for the ethical problems created by attorneys changing their employment from a law firm representing one party in litigation to a firm representing an adverse party. Considerably less attention has been given to the problems posed by nonlawyer employees of law firms who do the same. The issue this appeal presents is one of first impression for California courts. While several Courts of Appeal have considered factual situations raising many of the same concerns, as will be discussed below, the decisions in those cases hinged on factors not present here. In short, this case is yet another square peg that does not fit the round holes of attorney disqualification rules. (See, e.g., *Gregori v. Bank of America, supra,* 207 Cal.App.3d at p. 301; *William H. Raley Co. v. Superior Court, supra,* 149 Cal.App.3d at pp. 1049-1050, fn. 3.)

Our statutes and public policy recognize the importance of protecting the confidentiality of the attorney-client relationship. (E.g., Bus. & Prof. Code, § 6068, subd. (e); Evid. Code, §§ 915, 917, 951, 952, 954; *Mitchell v.* ***588** *Superior Court, supra,* 37 Cal.3d at pp. 599-600.) The obligation to maintain the client's confidences traditionally and properly has been placed on the attorney representing the client. But nonlawyer employees must handle confidential client information if legal services are to be efficient and cost-effective. Although a law firm has the ability to supervise its employees and assure that they protect client confidences, that ability and assurance are tenuous when the nonlawyer leaves the firm's employment. If the nonlawyer finds employment with opposing counsel, there is a heightened risk that confidences of the former employer's clients will be compromised, whether from base motives, an excess of zeal, or simple inadvertence.

Under such circumstances, the attorney who traditionally has been responsible for protecting the client's confidences—the former employer—has no effective means of doing so. The public policy of protecting the confidentiality of attorney-client communications must depend upon the attorney or law firm that hires an opposing counsel's employee. Certain requirements must be imposed on attorneys who hire their opposing

counsel's employees to assure that attorney-client confidences are protected.

Limits on Protecting Confidentiality

([7]) We emphasize that our analysis does not mean that there is or should be any broad duty owed by an attorney to an opposing party to maintain that party's confidences in the absence of a prior attorney-client relationship. The imposition of such a duty would be antithetical to our adversary system and would interfere with the attorney's relationship with his or her own clients. The courts have recognized repeatedly that attorneys owe no duty of care to adversaries in litigation or to those with whom their clients deal at arm's length. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 344 [134 Cal.Rptr. 375, 556 P.2d 737]; *Wasmann v. Seidenberg* (1988) 202 Cal.App.3d 752, 755 [248 Cal.Rptr. 744]; *Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1330-1331 [238 Cal.Rptr. 902]; *St. Paul Title Co. v. Meier* (1986) 181 Cal.App.3d 948, 951 [226 Cal.Rptr. 538]; *Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 Cal.App.3d 307, 318 [160 Cal.Rptr. 239].) Instead, we deal here with a prophylactic rule necessary to protect the confidentiality of the attorney-client relationship and the integrity of the judicial system, and with the appropriate scope of the remedy supporting such a rule.

The Harrison firm argues that conflict of interest disqualification rules governing attorneys should not apply to the acts of nonlawyers, citing *Maruman Integrated Circuits, Inc. v. Consortium Co.* (1985) 166 Cal.App.3d 443 [212 Cal.Rptr. 497] and *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582 [147 Cal.Rptr. 915]. The courts in both cases refused to disqualify ***589** attorneys who possessed an adverse party's confidences when no attorney-client relationship ever existed between the party and the attorney sought to be disqualified.

Maruman involved a suit by a corporation against its former president and the acts of the corporate secretary's assistant who left the corporation's employment to work for the former president. While still with the corporation, the assistant dealt with the corporation's litigation attorneys and obtained copies of two letters between the attorneys and the corporation. After leaving the corporation, the assistant gave her new employer's attorneys the two letters and shared with them her discussions with the corporation's attorneys. The Court of Appeal found that the trial court did not abuse its discretion in denying the corporation's motion to disqualify the former president's attorneys. (*Maruman Integrated Circuits, Inc. v. Consortium Co., supra,* 166 Cal.App.3d at p. 451.)

The court noted that the rule against attorneys using client confidences in representing an adverse party can lead to disqualification, but not when an attorney-client relationship never existed between the party and the attorneys sought to be disqualified. (166 Cal.App.3d at pp. 447-449.) The court relied heavily on the reasoning of *Cooke v. Superior Court, supra,* 83 Cal.App.3d 582, in declining to adopt a rule that an attorney's exposure to confidential and privileged information requires, as a matter of law, the attorney's disqualification. (*Maruman, supra,* 166 Cal.App.3d at p. 448.) As in *Cooke,* the *Maruman* court found no basis for extending disqualification to situations where confidential information is transmitted to an attorney by a third party outside the attorney-client relationship. (*Maruman, supra,* at pp. 447-451; *Cooke, supra,* at pp. 590-592.)

We believe the *Maruman* court's conclusions are appropriate for the factual situation that case presented.[6] Mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. Protecting the integrity of judicial proceedings does not require so draconian a rule. Such a rule would nullify a party's right to representation by chosen counsel any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox. Nonetheless, we consider the means and sources of breaches of attorney-client confidentiality to be important considerations.

6 An additional factor affected the decision in *Maruman.* The Court of Appeal held that the trial court, in denying disqualification, properly considered the possibility that the motion was brought as a tactical device to delay trial. (*Maruman Integrated Circuits, Inc. v. Consortium Co., supra,* 166 Cal.App.3d at p. 451.)

In *Maruman,* the adversary's confidences came to the attorney through an employee of the client, the former assistant to the adversary's corporate ***590** secretary. There can be no question that the information the assistant possessed was attorney-client privileged. (See Evid. Code, §§ 952, 954.) However, the information was disclosed to the attorney, in effect, by the attorney's own client. Since the purpose of confidentiality is to promote full and open discussions between attorney and client (*Mitchell v. Superior Court, supra,* 37 Cal.3d at p. 599), it would be ironic to protect confidentiality by effectively barring from such discussions an adversary's confidences known to the client. A lay client should not be expected to make such distinctions in what can and cannot be told to the attorney at the risk of losing the attorney's services.[7]

7 For this reason, we question part of the rationale of *Williams v. Trans World Airlines, Inc.* (W.D.Mo. 1984) 588 F.Supp. 1037, a case relied on by respondents. In *Williams,* the defendant's personnel manager assisted its attorneys in several age discrimination cases, including the plaintiffs' cases. After the defendant put the manager on involuntary furlough, she retained the plaintiffs' attorneys to pursue her discrimination claim, bringing with her substantial information about defendant's policies and procedures. Although the manager denied any specific recollection of plaintiffs' cases, or possessing any confidential documents, the court nevertheless disqualified the plaintiffs' attorneys in order to avoid the appearance of impropriety. (*Id.,* at pp. 1040, 1043, 1046.)
Avoiding the appearance of impropriety has never been used by a California court as the sole basis for disqualification. (*Gregori v. Bank of America, supra,* 207 Cal.App.3d at pp. 306-308; see also *People v. Lopez* (1984) 155 Cal.App.3d 813, 823 [202 Cal.Rptr. 333] ["The appearance of impropriety, however, is a malleable factor having the chameleon-like quality of reflecting the subjective views of the percipient. [Citations.]"].) But the court in *Williams* actually grounded its decision on a more concrete test: whether there is a reasonable possibility that some specifically identifiable impropriety occurred that threatens the integrity of the trial process. (*Williams v. Trans World Airlines, Inc., supra,* 588 F.Supp. at pp. 1042, 1045.) This standard is not inimical to our approach in this case. Nevertheless, we would be reluctant to conclude that free exchange of information between attorney and client constitutes an impropriety threatening the integrity of the judicial process, at least when a nonattorney client is involved. (Compare *Bell v. 20th Century Ins. Co., supra,* 212 Cal.App.3d at p. 198, with *Hull v. Celanese Corporation* (2d Cir. 1975) 513 F.2d 568 [staff attorney for corporation sought to intervene as a plaintiff in discrimination suit against corporation, resulting in plaintiffs' counsel being disqualified].)

Similarly, in *Cooke,* the client in a dissolution proceeding gave her attorney copies of eight attorney-client privileged documents belonging to her husband. The source of the documents was the husband's butler, who eavesdropped on the husband's discussions with his attorneys and surreptitiously copied the documents and mailed them to the wife. The Court of Appeal upheld an order requiring the wife's attorneys to surrender the copies, but also affirmed that the attorneys need not be disqualified. (*Cooke v. Superior Court, supra,* 83 Cal.App.3d at pp. 589, 592.) In summarizing the precedents, the court stated that "it is confidences acquired in the course of an attorney-client relationship which are protected by preventing the recipient of those confidences from representing an adverse party." (*Id.,* at p. 591.) The court found no case imposing disqualification solely as a punitive or disciplinary measure, and there was no prior relationship between the complaining ***591** party and the attorneys sought to be disqualified. (*Id.,* at p. 592.) Significantly, though, the court concluded that "[o]ur function is to protect Mr. Cooke from improper use of any privileged data ...," and that was done by ordering the wife's attorneys to give up the documents. (*Ibid.*)

The salient fact that distinguishes the present appeal from *Maruman* and *Cooke* is the person who disclosed the adverse party's attorney-client communications. If the disclosure is made by the attorney's own client, disqualification is neither justified nor an effective remedy. A party cannot "improperly" disclose information to its own counsel in the prosecution of its own lawsuit. Even if counsel were disqualified, the party would be free to give new counsel the information, leaving the opposing party with the same situation. (*Bell v. 20th Century Ins. Co., supra,* 212 Cal.App.3d at p. 198.) However, preservation of open communication between attorney and client is endangered when an attorney's employee discloses client confidences.

Confidentiality and the Gregori Rule

Gregori v. Bank of America, supra, 207 Cal.App.3d 291, presented circumstances more nearly analogous to this case. An attorney for the plaintiffs initiated a social relationship with a secretary administering the case for an opposing law firm. The attorney admitted discussing with the secretary certain aspects of the case, primarily the personalities of the lawyers involved. The Court of Appeal recognized that the Rules of Professional Conduct did not explicitly proscribe the attorney's conduct. The court also acknowledged that the rules and statutes governing attorneys and privileged information "cannot be applied to the facts of this case without procrustean effort." (*Id.,* at p. 302.) Nor was the court inclined to rely solely on the appearance of impropriety standard because that standard lacks precision. (*Id.,* at pp. 307- 308.)

The *Gregori* court distilled the case law and legal literature to produce a new rule for such situations. "Since the purpose of a disqualification order must be prophylactic, not punitive, the significant question is whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court. Thus, disqualification is proper where, as a result of a prior representation or through improper means, there is a reasonable probability counsel has obtained information

the court believes would likely be used advantageously against an adverse party during the course of the litigation." (*Gregori v. Bank of America, supra,* 207 Cal.App.3d at pp. 308-309.)

([6b]) We cannot entirely agree with the rule formulated in *Gregori.* First, as Justice Benson noted in his separate opinion, the rule focuses attention on ***592** the end result of the challenged conduct without including the paramount concern of preserving public trust in the scrupulous administration of justice and the integrity of judicial proceedings. (*Gregori v. Bank of America, supra,* 207 Cal.App.3d at p. 314 (conc. and dis. opn. of Benson, J.).) Second, the rule requires the trial judge to predict the effect on the proceedings of information likely to be unknown to the court. ([8]) Although requiring some showing of the general nature of the information and its relationship to the proceeding can be proper (*Elliott v. McFarland Unified School Dist.* (1985) 165 Cal.App.3d 562, 572 [211 Cal.Rptr. 802]), requiring disclosure of the information itself is not (*Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [197 Cal.Rptr. 185]). Third, the rule's emphasis on attorney "misconduct" and use of "improper means" distracts from the prophylactic purpose of disqualification. (*Gregori, supra,* at pp. 308-309.)

Thus, the rule in *Gregori* does not address the situation in this case, where the integrity of judicial proceedings was threatened not by attorney misconduct, but by employee misconduct neither sanctioned nor sought by the attorney. The Harrison firm's disqualification is required not because of an attorney's affirmative misconduct, but because errors of omission and insensitivity to ethical dictates allowed the employee's misconduct to taint the firm with a violation of attorney-client confidentiality.

Protecting Confidentiality-The Cone of Silence

([9]) Hiring a former employee of an opposing counsel is not, in and of itself, sufficient to warrant disqualification of an attorney or law firm. However, when the former employee possesses confidential attorney-client information,[8] materially related to pending litigation, the situation implicates " '... considerations of ethics which run to the very integrity of our judicial process.' [Citation.]" (*Comden v. Superior Court, supra,* 20 Cal.3d at p. 915, fn. omitted.) Under such circumstances, the hiring attorney must ***593** obtain the informed written consent of the former employer,[9] thereby dispelling any basis for disqualification. (Cf. Rules Prof. Conduct, rule 3-310(D); see Civ. Code, § 3515 ("[One] who consents to an act is not wronged by it.") Failing that, the hiring attorney is subject to disqualification unless the attorney can rebut a presumption that the confidential attorney-client information has been used or disclosed in the new employment.

8 We specifically mean the phrase, "confidential attorney-client information," to correspond to the definition of " 'confidential communication between client and lawyer' " contained in Evidence Code section 952: "information transmitted between a client and his [or her] lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." The definition encompasses an attorney's legal opinions, impressions, and conclusions, regardless of whether they have been communicated to the client. (*Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 345 [182 Cal.Rptr. 275]; see Cal. Law Revision Com. com., 29B West's Ann. Evid. Code, § 952 (1991 pocket supp.) p. 74 [Deering's Ann. Evid. Code (1986) § 952, p. 112].)

9 Rule 2-100 of the Rules of Professional Conduct would preclude the hiring attorney from seeking the consent directly from the opposing party. Thus, the consent should be sought from the former employer. The hiring attorney ought to be entitled to rely on a written consent from the former employer. If the opposing party contends the former employer was not authorized to give consent, that is a matter between the former employer and its client.
The hiring attorney, and not the prospective employee, must obtain the consent. The prospective employee is unlikely both to know enough about the new job and to have the legal ethics training necessary to obtain informed consent. Also, an individual under economic pressure to get the new job could be tempted to give less attention to candor and honesty than to securing employment. Harrison should not have delegated this sensitive task to a nonlawyer job seeker. Harrison's reliance on Vogel's word alone for the claimed waiver by Brobeck was unreasonable and a serious lapse in judgment.

A law firm that hires a nonlawyer who possesses an adversary's confidences creates a situation, similar to hiring an adversary's attorney, which suggests that confidential information is at risk. We adapt our approach, then, from cases that discuss whether an entire firm is subject to vicarious disqualification because one

attorney changed sides. (See, e.g., *Klein v. Superior Court, supra,* 198 Cal.App.3d at pp. 908- 914; *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575].) The courts disagree on whether vicarious disqualification should be automatic in attorney conflict of interest cases, or whether a presumption of shared confidences should be rebuttable. (See *Klein, supra,* at pp. 910-913.) An inflexible presumption of shared confidences would not be appropriate for nonlawyers, though, whatever its merits when applied to attorneys. There are obvious differences between lawyers and their nonlawyer employees in training, responsibilities, and acquisition and use of confidential information. These differences satisfy us that a rebuttable presumption of shared confidences provides a just balance between protecting confidentiality and the right to chosen counsel.

The most likely means of rebutting the presumption is to implement a procedure, before the employee is hired, which effectively screens the employee from any involvement with the litigation, a procedure one court aptly described as a " 'cone of silence.' " (See *Nemours Foundation v. Gilbane, Aetna, Federal Ins.* (D.Del. 1986) 632 F.Supp. 418, 428.) Whether a potential employee will require a cone of silence should be determined as a matter of routine during the hiring process. It is reasonable to ask potential ***594** employees about the nature of their prior legal work; prudence alone would dictate such inquiries. Here, Harrison's first conversation with Vogel revealed a potential problem—Vogel's work for Brobeck on asbestos litigation settlements.

The leading treatise on legal malpractice also discusses screening procedures and case law. (1 Mallen & Smith, Legal Malpractice (3d ed. 1989) §§ 13.18-13.19, pp. 792-797.) We find several points to be persuasive when adapted to the context of employee conflicts. ([10]) "Screening is a prophylactic, affirmative measure to avoid both the reality and appearance of impropriety. It is *a* means, but not *the* means, of rebutting the presumption of shared confidences." (*Id.,* § 13.19, at p. 794, original italics, fn. omitted.) Two objectives must be achieved. First, screening should be implemented before undertaking the challenged representation or hiring the tainted individual. Screening must take place at the outset to prevent any confidences from being disclosed. Second, the tainted individual should be precluded from any involvement in or communication about the challenged representation. To avoid inadvertent disclosures and to establish an evidentiary record, a memorandum should be circulated warning the legal staff to isolate the individual from communications on the matter and to prevent access to the relevant files. (*Id.,* at pp. 795-796.)[10]

10 A further recommendation by the authors is worth noting. To detect conflicts created by employee hiring, a firm's conflict checking system should include the identity of adverse counsel to enable a search for those matters where the prospective employee's former employer is or was adverse. (1 Mallen & Smith, Legal Malpractice, *supra,* § 13.18, at pp. 793-794.)

The need for such a rule is manifest. We agree with the observations made by the *Williams* court: "[Nonlawyer] personnel are widely used by lawyers to assist in rendering legal services. Paralegals, investigators, and secretaries must have ready access to client confidences in order to assist their attorney employers. If information provided by a client in confidence to an attorney for the purpose of obtaining legal advice could be used against the client because a member of the attorney's [nonlawyer] support staff left the attorney's employment, it would have a devastating effect both on the free flow of information between client and attorney and on the cost and quality of the legal services rendered by an attorney." (*Williams v. Trans World Airlines, Inc., supra,* 588 F.Supp. at p. 1044.) Further, no regulatory or ethical rules, comparable to those governing attorneys, restrain all of the many types of nonlawyer employees of attorneys. The restraint on such employees' disclosing confidential attorney-client information must be the employing attorney's admonishment against revealing the information.[11] ***595**

11 We surmise that a practical, if limited, check on the problem may exist. Attorneys are unlikely to hire those who disregard preserving confidences; such persons are as likely to betray new entrustments as old.

The Substantial Relationship Test and Nonlawyer Employees

We decline to adopt the broader rule urged by respondents and applied by other courts,[12] which treats the nonlawyer employee as an attorney and requires disqualification upon the showing and standards applicable to individual attorneys. Respondents argue that disqualification must follow a showing of a "substantial relationship" between the matters worked on by the nonlawyer at the former and present employers' firms. However, the substantial relationship test is a tool devised for presuming an attorney possesses confidential information material to a representation adverse to a former client. (*Western Continental Operating Co. v. Natural Gas Corp., supra,* 212 Cal.App.3d at pp. 759-

760.) The presumption is a rule of necessity because the former client cannot know what confidential information the former attorney acquired and carried into the new adverse representation. (*Ibid.*) The reasons for the presumption, and therefore the test, are not applicable though, when a nonlawyer employee leaves and the attorney remains available to the client. The client and the attorney are then in the best position to know what confidential attorney-client information was available to the former employee.

12 See, e.g., *Kapco Mfg. Co., Inc. v. C & O Enterprises, Inc.* (N.D.Ill. 1985) 637 F.Supp. 1231, 1236-1237 (applying to nonlawyer employee the Seventh Circuit's analysis for disqualification of attorney who changes sides); *Williams v. Trans World Airlines, Inc., supra,* 588 F.Supp. at page 1044 ("The only practical way to assure that [confidences will not be disclosed] and to preserve public trust in the scrupulous administration of justice is to subject these 'agents' of lawyers to the same disability lawyers have when they leave legal employment with confidential information."); *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.* (1987) 129 A.D.2d 678 [514 N.Y.S.2d 440]; *Lackow v. Walter E. Heller & Co. Southeast* (Fla.Dist.Ct.App. 1985) 466 So.2d 1120, 1123; but see *Esquire Care, Inc. v. Maguire* (Fla.Dist.Ct.App. 1988) 532 So.2d 740, 741 (imposing additional step of evidentiary hearing to determine if ethical violation has resulted in one party's obtaining "an unfair advantage over the other which can only be alleviated by removal of the attorney. [Citations.]").

Respondents' alternative formulation, that a substantial relationship between the type of work done for the former and present employers requires disqualification, presents unnecessary barriers to employment mobility. Such a rule sweeps more widely than needed to protect client confidences. We share the concerns expressed by the American Bar Association's Standing Committee on Ethics and Professional Responsibility: "It is important that nonlawyer employees have as much mobility in employment opportunity as possible consistent with the protection of clients' interests. To so limit employment opportunities that some nonlawyers trained to work with law firms might be required to leave the careers for which they are trained would disserve clients as well as the legal profession. Accordingly, any restrictions on the nonlawyer's employment should be held to the minimum necessary to protect confidentiality of client information." (Imputed Disqualification ***596** Arising from Change in Employment by Nonlawyer Employee, ABA Standing Com. on Ethics & Prof. Responsibility, Informal Opn. No. 88-1526 (1988) p. 3.) Respondents' suggested rule could easily result in nonlawyer employees becoming "Typhoid Marys," unemployable by firms practicing in specialized areas of the law where the employees are most skilled and experienced.

Protecting Confidentiality-The Rule for Disqualification

([11]) Absent written consent, the proper rule and its application for disqualification based on nonlawyer employee conflicts of interest should be as follows. The party seeking disqualification must show that its present or past attorney's former employee possesses confidential attorney-client information materially related to the proceedings before the court.[13] The party should not be required to disclose the actual information contended to be confidential. However, the court should be provided with the nature of the information and its material relationship to the proceeding. (See *Elliott v. McFarland Unified School Dist., supra,* 165 Cal.App.3d at p. 572.)

13 The evidence showing the former employee's possession of such information need not be as dramatic as Vogel's confession in this case. Possession of the information can be shown, for example, by competent evidence of the former employee's job responsibilities or participation in privileged communications. We caution, however, that showing merely potential access to confidences without actual exposure is insufficient. The threat to confidentiality must be real, not hypothetical.

Once this showing has been made, a rebuttable presumption arises that the information has been used or disclosed in the current employment. The presumption is a rule by necessity because the party seeking disqualification will be at a loss to prove what is known by the adversary's attorneys and legal staff. (Cf. *Western Continental Operating Co. v. Natural Gas Corp., supra,* 212 Cal.App.3d at pp. 759-760.) To rebut the presumption, the challenged attorney has the burden of showing that the practical effect of formal screening has been achieved. The showing must satisfy the trial court that the employee has not had and will not have any involvement with the litigation, or any communication with attorneys or coemployees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed. If the challenged attorney fails to make this showing, then the court may disqualify the attorney and law firm.

The Trial Court Properly Exercised Its Discretion

([12a]) With the foregoing principles in mind, we turn to the trial court's exercise of discretion. The Harrison firm devotes a substantial portion of its arguments to challenging the sufficiency of the evidence to support disqualification. ***597** However, the factual arguments advanced by the Harrison firm do not take appropriate account of the applicable standard of review. ([13]) On review, we must accept the trial court's resolution of conflicting evidence and uphold the trial court's ruling if it is supported by substantial evidence. (*Higdon v. Superior Court, supra,* 227 Cal.App.3d at p. 1671; *Klein v. Superior Court, supra,* 198 Cal.App.3d at p. 913.) Under the familiar rules, we must consider the evidence in the light most favorable to the prevailing party and take into account every reasonable inference supporting the trial court's decision. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 278, p. 289.)

([12b]) The Harrison firm's primary contention on appeal is that respondents failed to show that Vogel possessed any specific client confidences. The Harrison firm's repeated invocation of *specific* confidences misses the point and underscores the futility of its factual argument. Vogel admitted reviewing the Harrison firm's cases on Brobeck's computer to see "what kind of cases [the Harrison firm] had filed." The plain inference is that Vogel used his training in asbestos litigation to make a rough analysis of his prospective employer's cases. Vogel acknowledged that because of his experience in looking at SEAR forms, he knew that some cases have more value than others. He also testified that the SEAR forms are used as the basis for evaluating cases. The SEAR form information Vogel obtained about the Harrison firm's cases was part of a system of attorney-client communications.

There can be no question that Vogel obtained confidential attorney-client information when he accessed the Harrison firm's case files on Brobeck's computer. Respondents need not show the specific confidences Vogel obtained; such a showing would serve only to exacerbate the damage to the confidentiality of the attorney-client relationship. As discussed above, respondents had to show only the nature of the information and its material relationship to the present proceedings. They have done so.

To blunt the impact of Vogel's misconduct, the Harrison firm argues that the cases on the computer were newly filed and that no evidence showed the computer information to be more than appeared on the face of the complaints, which are public records. The argument is wrong on both points. While many of the cases were entered on the computer little more than a week earlier, others were entered weeks or months before Vogel looked at them. Moreover, the fact that some of the same information may appear in the public domain does not affect the privileged status of the information when it is distilled for an attorney-client communication. (*Mitchell v. Superior Court, supra,* 37 Cal.3d at p. 600; *In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371, 526 P.2d 523].) Therefore, there was substantial ***598** evidence that Vogel possessed confidential attorney-client information materially related to the cases for which the trial court ordered disqualification.[14]

14 We think it important to mention a point not briefed by the parties, though our decision does not turn on it. When Vogel used his computer access, training, and experience at Brobeck to review the information on the Harrison firm's cases, he necessarily formed some impressions, conclusions, and opinions about those cases. It seems to us that such opinions, formed while a Brobeck employee, would constitute confidential attorney-client information belonging to Brobeck. If a Brobeck attorney had directed Vogel to use SEAR form data to prepare a memorandum on "what kind of cases" the Harrison firm filed, no one would dispute that the Harrison firm could not properly obtain that memorandum without Brobeck's consent. We perceive no reason for a different conclusion when such opinions are not recorded and are the result of unauthorized conduct by the employee.

The Harrison firm also argues that there was no evidence that Vogel disclosed any confidences to any member of the firm, or that any such information was sought from or volunteered by Vogel. Harrison testified that he never asked Vogel to divulge anything other than impressions about three Brobeck attorneys. Harrison and his office manager also testified that Vogel was not involved in case evaluation or trial tactics discussions at the Harrison firm. However, this evidence is not sufficient to rebut the presumption that Vogel used the confidential material or disclosed it to staff members at the Harrison firm. Moreover, there was substantial evidence to support a reasonable inference that Vogel used or disclosed the confidential information.

Despite Harrison's own concern over an appearance of impropriety, Harrison never told Vogel not to discuss the information Vogel learned at Brobeck and did not consider screening Vogel even after Brobeck first inquired about Vogel's work on asbestos cases. The evidence also amply supports the trial court's observation that Vogel was "a very talkative person, a person who loves to share information." Further, Vogel's willingness to use information acquired at Brobeck, and the Harrison

firm's insensitivity to ethical considerations, were demonstrated when Vogel was told to call respondent Fibreboard Corporation and Vogel knew the person to contact there.[15]

15 We do not address whether this direct contact with a party represented by counsel violated the Rules of Professional Conduct, rule 2-100. We agree with the Harrison firm's contention that this contact would not itself support the trial court's disqualification order. (See *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 603, 607 [168 Cal.Rptr. 196] [former Rules Prof. Conduct, rule 7-103].) However, the trial court did not base disqualification on that contact. We consider the contact to be probative of the likelihood that Vogel used or disclosed confidential information during his employment by the Harrison firm.

The trial court did not apply a presumption of disclosure, which would have been appropriate under the rule we have set forth. The evidence offered by the Harrison firm is manifestly insufficient to rebut the presumption. ***599** Beyond that, though, substantial evidence established a reasonable probability that Vogel used or disclosed to the Harrison firm the confidential attorney-client information obtained from Brobeck's computer records. Accordingly, the trial court was well within a sound exercise of discretion in ordering the Harrison firm's disqualification.

Equitable Considerations for Disqualification Motions

([14a]) The Harrison firm argues that equitable considerations preclude disqualification, contending that respondents unreasonably delayed moving for disqualification and that prejudice to the Harrison firm's clients resulted. The evidence shows that by March 1989 Brobeck knew Vogel was working for Harrison and that his work included asbestos litigation. There also was evidence that Vogel himself was dealing with respondents' law firms during June and July of 1989. In the same time period, Brobeck learned of Vogel's call to Fibreboard Corporation. But respondents did not file their disqualification motion until August 3, 1989, the eve of trial in a significant asbestos case. The Harrison firm also alludes to other possible tactical advantages respondents sought in the timing of their motion.

([15]) This court addressed the standard applicable to this issue in *Western Continental Operating Co. v. Natural Gas Corp., supra*, 212 Cal.App.3d at pages 763-764. There we stated: "In exercising its discretion with respect to granting or denying a disqualification motion, a trial court may properly consider the possibility that the party brought the motion as a tactical device to delay litigation. [Citations.] Where the party opposing the motion can demonstrate prima facie evidence of unreasonable delay in bringing the motion causing prejudice to the present client, disqualification should not be ordered. The burden then shifts back to the party seeking disqualification to justify the delay. [Citation.] Delay will not necessarily result in the denial of a disqualification motion; the delay and the ensuing prejudice must be extreme. [Citation.]" (*Ibid.*) Even if tactical advantages attend the motion or disqualification, that alone does not justify denying an otherwise meritorious motion.

([14b]) We are disturbed by respondents' delay in bringing the motion, and that the motion was timed to coincide with the start of a significant asbestos case. However, the Harrison firm failed to show that the delay caused any prejudice, much less extreme prejudice. The evidence does not show that resolution of the asbestos case set for trial was substantially delayed. The only prejudice cited by the Harrison firm is that their clients lost the services of knowledgeable counsel of their choice, and were forced to retain new counsel. This is not the type of prejudice contemplated by our decision in ***600** *Western Continental Operating Co. v. Natural Gas Corp., supra*, 212 Cal.App.3d at pages 763-764. (See *River West, Inc. v. Nickel, supra*, 188 Cal.App.3d at p. 1313.) Rather, the Harrison firm has simply identified those client interests implicated by any disqualification motion. (See, e.g., *Bell v. 20th Century Ins. Co., supra*, 212 Cal.App.3d at pp. 197-198.) We find no abuse of discretion by the trial court on this issue.

Jurisdictional Limits on the Power to Disqualify Counsel

([16]) On their cross-appeal, respondents contend the trial court erred by not extending the disqualification order to the 11 Harrison firm cases pending in Contra Costa County that Vogel reviewed on Brobeck's computer. Respondents also exhort us to extend the disqualification order to preclude the Harrison firm from representing any asbestos litigation plaintiffs.

Noting that superior courts are courts of general jurisdiction, respondents analogize the situation to one where the court has personal jurisdiction over a party. Respondents argue that if the court may enjoin a party's conduct anywhere in the state, then it also must have the power to enjoin an attorney from participation in cases anywhere in the state. Such a rule is necessary,

respondents contend, to avoid a multiplicity of disqualification motions and the risk of inconsistent or contrary outcomes. Respondents urge such a rule as the only meaningful way to protect their confidential information. While respondents' arguments have a superficial appeal to the interests of judicial economy, neither the law nor necessity warrants adopting respondents' position.

The power to disqualify an attorney, as we stated above, derives from the court's inherent power to control the conduct of persons "in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ. Proc., § 128, subd. (a)(5); *Comden v. Superior Court, supra,* 20 Cal.3d at p. 916, fn. 4.) This does not mean that a superior court has any inherent or statutory power to control the conduct of persons in judicial proceedings pending before a different superior court. One court may not interfere with the process of another court of equal jurisdiction in a case properly before the latter. (*Steiner v. Flournoy* (1972) 23 Cal.App.3d 1051, 1055-1056 [100 Cal.Rptr. 680]; see *Williams v. Superior Court* (1939) 14 Cal.2d 656, 662 [96 P.2d 334]; *Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 741-742 [233 Cal.Rptr. 607].) Respondents' desire to disqualify the Harrison firm from an entire class of litigation, and to do so economically in one hearing, does not enable one court to disqualify counsel of record in actions over which another court has jurisdiction. A court may not usurp the discretion vested in another court to control the conduct of counsel in its judicial proceedings. This is a matter of fundamental comity between the courts, which should not be cast aside because it may be expedient under the novel circumstances of this case. ***601**

On a motion to disqualify counsel, the circumstances of each case should be examined. (See *Mills Land & Water Co. v. Golden West Refining Co., supra,* 186 Cal.App.3d at p. 133; *William H. Raley Co. v. Superior Court, supra,* 149 Cal.App.3d at p. 1049.) This rule is not expendable simply because a party seeks disqualification for many cases in one motion, even if the cases bear as many similarities as are commonly found in asbestos litigation. The test still must be whether the former employee of counsel for the party seeking disqualification possessed information materially related to each case.[16] In any event, whether the Harrison firm should be disqualified in any cases pending in other superior courts is a question we leave for those courts to decide in the sound exercise of their discretion in light of our opinion. Because each case must be evaluated on its own, there need be no concern about inconsistent or contrary outcomes. Disqualification is either warranted or not on a case-by-case basis.

16 In this regard, the evidence may warrant a court's consideration of whether the passage of time has affected the materiality of the confidential information. (Cf. *Johnson v. Superior Court* (1984) 159 Cal.App.3d 573, 579 [205 Cal.Rptr. 605].) As respondents' own witnesses recognized was true for asbestos litigation, each case is different for many reasons; different clients have different concerns, and those concerns change from time to time.

Disqualification in All Asbestos Litigation Is Unwarranted

([17]) Finally, we consider whether the trial court abused its discretion in not ordering the Harrison firm disqualified from all asbestos litigation before the court. Respondents argue that disqualification should have been extended to all asbestos cases because all are substantially related, or because Vogel's work at Brobeck and the Harrison firm was substantially related-arguments we have considered and rejected. Respondents point to evidence that Vogel was exposed to their counsels' theories, strategies, and tactics, including assessments of witnesses and settlement values assigned to different types of asbestos cases, as requiring total disqualification. We disagree.

The trial court was satisfied that for the Harrison firm cases Vogel accessed on the computer, there was a reasonable probability that Vogel acquired confidential information that he disclosed or used at the Harrison firm. As to other cases, the court felt it was simply speculative. The record does not show that Vogel possessed and disclosed confidential attorney-client information materially related to all of the Harrison firm's asbestos litigation. On the evidence before the trial court, we cannot say that the court's decision was an abuse of discretion. Indeed, when considered under ***602** the standard applicable to our review, the evidence supports a conclusion that a broader disqualification would be unwarranted.

Vogel stopped attending settlement evaluation meetings in mid-1988. These were the principal source of the confidential information to which Vogel was exposed. Vogel did not begin to work for the Harrison firm until January 1989. Initially, Vogel's work and work area were separate and isolated from the Harrison firm's asbestos cases. Vogel first started work on asbestos cases in late February or early March and certainly ceased by the time he was terminated in August. His work for the Harrison firm on asbestos cases apparently was limited and

sporadic. Vogel did not participate in any of the Harrison firm's asbestos litigation evaluation and strategy meetings. At the Harrison firm, Vogel processed settlement releases and checks, inventoried and obtained generalized discovery materials, and completed plaintiff questionnaires. These were not the types of duties that required Vogel to use or disclose the broader categories of information respondents contend are confidential.

Undoubtedly, some of the information known by Vogel lost any materiality to the Harrison firm's cases through the passage of time. (Cf. *Johnson v. Superior Court, supra*, 159 Cal.App.3d at p. 579.) The evidence showed that even litigation as subject to routine as asbestos cases nevertheless evolves over time. Moreover, the Harrison firm presented substantial evidence showing that Vogel's use or disclosure of confidential information was not so pervasive as to require disqualification from all asbestos litigation. This conclusion is bolstered by the fact that Vogel's termination removed any threat of further disclosures to the Harrison firm.

We have considered the remaining contentions raised by the parties and, in view of the determinations reached above, those contentions do not require further discussion.

Conclusion

We realize the serious consequences of disqualifying attorneys and depriving clients of representation by their chosen counsel. However, we must balance the important right to counsel of one's choice against the competing fundamental interest in preserving confidences of the attorney-client relationship. All attorneys share certain basic obligations of professional conduct, obligations that are essential to the integrity and function of our legal system. Attorneys must respect the confidentiality of attorney-client information and recognize that protecting confidentiality is an imperative to be obeyed in both form and substance. A requisite corollary to these principles is that attorneys must prohibit their employees from violating confidences of ***603** former employers as well as confidences of present clients. Until the Legislature or the State Bar chooses to disseminate a different standard, attorneys must be held accountable for their employees' conduct, particularly when that conduct poses a clear threat to attorney-client confidentiality and the integrity of our judicial process.

The order of the trial court is affirmed. Each party shall bear its own costs.

White, P. J., and Strankman, J., concurred.

The petition of plaintiffs and appellants and objectors and appellants for review by the Supreme Court was denied October 3, 1991.

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6 Cal.App.4th 1050, 8 Cal.Rptr.2d 228

TRUCK INSURANCE EXCHANGE,
Plaintiff and Appellant,
v.
FIREMAN'S FUND INSURANCE COMPANY, Defendant and Respondent.

No. A053471.
Court of Appeal, First District, Division 4, California.
May 21, 1992.

SUMMARY

In an action by two corporations and their insurance company against other insurance companies for equitable subrogation, equitable contribution, declaratory relief, and breach of contract, in which plaintiffs sought contribution for the defense and indemnity of the corporations in asbestos cases, the trial court granted one defendant's motion to disqualify the law firm representing plaintiff insurance company, on the ground that the firm, having also represented defendant in two unrelated wrongful termination actions, was in violation of Rules Prof. Conduct, rule 3-310(B), prohibiting concurrent representation of clients with conflicting interests without written consent. (Superior Court of Marin County, No. 145126, William H. Stephens, Judge.)

The Court of Appeal affirmed the order of disqualification. The court held that although the firm, which knew it had been representing defendant in the other actions, withdrew from those actions upon defendant's refusal to consent to the concurrent representation, the trial court properly applied the per se standard of disqualification that applies in cases of concurrent representation, rather than the discretionary standard applicable to cases of former representation. The firm owed a duty of loyalty and commitment to defendant, the court held, and having knowingly undertaken adverse concurrent representation, the firm could not avoid disqualification by withdrawing from the representation of the less favored client before the hearing on the motion to disqualify the firm. (Opinion by Reardon, J., with Poche, Acting P. J., and Perley, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

([1])
Appellate Review § 18--Decisions Appealable--Final Judgments and Orders--Final Determination of Collateral Matters--Order ***1051** Granting Motion to Disqualify Attorney.
An order granting a motion to disqualify a law firm from representing a party is appealable as a final order on a collateral matter that is unrelated to the merits of the underlying litigation.

[Appealability of state court's order granting or denying motion to disqualify attorney, note, 5 **A.L.R.4th** 1251.]

([2])
Attorneys at Law § 15--Attorney-client Relationship--Conflict of Interest and Remedies of Former Clients--Motion to Disqualify Attorney--Standard of Review.
When reviewing an order granting or denying a motion to disqualify an attorney, the reviewing court defers to the trial court's decision, absent an abuse of discretion. Discretion is deemed abused when there is a failure to exercise discretion in a situation where such exercise is required.

([3a], [3b])
Attorneys at Law § 15.2--Attorney-client Relationship--Conflict of Interest and Remedies of Former Clients--Disclosure of Conflict; Consent to Representation--Ceasing Representation of Client Who Refuses to Consent to Dual Representation.
In an action by two corporations and their insurance company against other insurance companies seeking contribution for the defense and indemnity of the corporations in asbestos cases, the trial court properly granted one defendant's motion to disqualify the law firm representing plaintiff insurance company, on the ground that because the firm had represented defendant in two unrelated wrongful termination actions, it was in violation of Rules Prof. Conduct, rule 3-310(B), prohibiting concurrent representation of clients with conflicting

interests without written consent. Although the firm, which knew it had been representing defendant in the other actions, withdrew from those actions upon defendant's refusal to consent to the concurrent representation, the trial court properly applied the per se standard of disqualification that applies in cases of concurrent representation, rather than the discretionary standard applicable to cases of former representation. The firm could not avoid disqualification simply by withdrawing from the representation of the less favored client before the hearing on the motion to disqualify the firm.

[Representation of conflicting interests as disqualifying attorney from acting in a civil case, note, 31 **A.L.R.3d** 715. See also **Cal.Jur.3d (Rev),** Attorneys at Law, §§ 94, 97; 1 **Witkin,** Cal. Procedure (3d ed. 1985) Attorneys, § 103 et seq.]

([4])
Attorneys at Law § 15--Attorney-client Relationship--Conflict of Interest and Remedies of Former Clients--Standards for Assessing ***1052** Conflict.
In cases involving an attorney's representation of a client against a former client, the initial question is whether the former representation is substantially related to the current representation. Substantiality is present if the factual contexts of the two representations are similar or related. If a substantial relationship exists, courts will presume that confidences were disclosed during the former representation that may have value in the current relationship, and actual possession of confidential information need not be proven. In contrast, in the concurrent representation context, the principle precluding representing interests adverse to those of a current client is not concerned with the confidential relationship between attorney and client, but rather with the need to assure the attorney's undivided loyalty and commitment to the client. Thus, representation adverse to a present client must be measured, not so much on the basis of the similarities in the litigation, but on the basis of the duty of undivided loyalty.

COUNSEL
Paul Delano Wolf, Susan Raffanti, Jeffrey S. Kross, Crosby, Heafey, Roach & May, Raoul D. Kennedy, Ezra Hendon, Jacqueline M. Jauregui and Marshall C. Wallace for Plaintiff and Appellant.
Kaufman & Logan, Peter J. Logan and Richard E. Flamm for Defendant and Respondent.

REARDON, J.

In an action for equitable subrogation, equitable contribution, declaratory relief and damages for breach of contract, defendant Fireman's Fund Insurance Company (FFIC) successfully moved to disqualify the law firm of Crosby, Heafey, Roach & May (Crosby) from acting as counsel for plaintiff Truck Insurance Exchange (Truck). ([1])**(See fn. 1.)** Truck has appealed.[1] ***1053**

1 Citing federal cases, FFIC argues that an order granting a motion to disqualify a law firm is not appealable. (See *Richardson-Merrell Inc. v. Koller* (1985) 472 U.S. 424, 440-441 [86 L.Ed.2d 340, 352-353, 105 S.Ct. 2757].) Although California's rule has been criticized, it has been held that an order granting or denying a motion to disqualify an attorney is appealable, either as a denial of injunctive relief or as a final order upon a collateral matter unrelated to the merits of the underlying litigation. (*Meehan v. Hopps* (1955) 45 Cal.2d 213, 215-217 [288 P.2d 267] [motion den.]; *Vivitar Corp. v. Broidy* (1983) 143 Cal.App.3d 878, 881 [192 Cal.Rptr. 281] [motion granted].)
In this case, neither FFIC's motion nor the court's order was couched in injunctive language. (Compare *Meehan v. Hopps, supra,* 45 Cal.2d at pp. 214-215.) On the other hand, the alternative theory of appealability cited in *Meehan* has been criticized because the final order in a collateral matter such as this does not direct the payment of money or the performance of an act. (See *Efron v. Kalmanovitz* (1960) 185 Cal.App.2d 149, 154-156 [8 Cal.Rptr. 107]; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 45, 47-48, pp. 69, 70-74; 1 Eisenberg et al., Cal. Procedure Guide: Civil Appeals & Writs (The Rutter Group 1991) ¶¶ 2-80, 2:133.1, pp. 2-27, 2-39; compare *I. J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331 [220 Cal.Rptr. 103, 708 P.2d 682] [final order on collateral matter directing payment of money appealable]; *Bauguess v. Paine* (1978) 22 Cal.3d 626, 634, fn. 3 [150 Cal.Rptr. 461, 586 P.2d 942] [same].)
Under the doctrine of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 [20 Cal.Rptr. 321, 369 P.2d 937], however, we adhere to the Supreme Court's alternative holding in *Meehan v. Hopps, supra,* 45 Cal.2d at pages 215-217. The order is appealable as a final order upon a collateral matter unrelated to the merits of the underlying litigation.

I. Facts

A. *Introduction*

The underlying lawsuit was commenced in February 1990. Kaiser Cement Corporation, Kaiser Gypsum Company, Inc. (collectively, Kaiser), and Truck seek contribution from FFIC and other insurers to defend and indemnify Kaiser against third party asbestos-related bodily injury lawsuits. Truck alleged that it alone had undertaken the defense of Kaiser and had expended more than $11.3 million in defense costs and almost $1.3 million in indemnity expenses for those claims.[2] A key issue in the coverage cases is the terms of insurance policies issued by FFIC between 1939 and 1964. At the time the lawsuit was initiated, Truck was represented by the law firm of Ropers, Majeski, Kohn, Bentley, Wagner & Kane (Ropers).

2 By the time the trial court heard the motion to disqualify Crosby, Truck's defense costs in Kaiser's asbestos- related bodily injury cases had risen to more than $17 million.

On January 11, 1991, the trial court granted FFIC's motion to disqualify Ropers. Truck then asked Crosby to represent it. The Crosby firm had represented Truck and its affiliated companies in numerous other matters.

When Truck contacted Crosby concerning the instant case, Crosby ran a computerized conflicts check and found that for several months it had been defending Fireman's Fund Credit Union—an entity related to FFIC—in two wrongful termination suits. Crosby concedes that defending Fireman's Fund Credit Union made FFIC Crosby's client.

In a letter dated January 18, 1991, Crosby informed FFIC of Truck's desire for representation by Crosby and inquired of FFIC if it objected to ***1054** Crosby representing Truck in the insurance coverage case. (See Rules Prof. Conduct of State Bar, rule 3-310(B).)[3] As an alternative, Crosby informed FFIC that to eliminate any conflict, it was willing to withdraw from the two wrongful termination cases, to help transfer those cases smoothly to new counsel, and to waive any fee for its past services. FFIC objected to the concurrent representation, did not provide written consent, and stated its desire to have Crosby continue as its attorney in the wrongful termination cases. Crosby, nonetheless, accepted representation of Truck.

3 Unless otherwise indicated, all references hereafter to rules are to the Rules of Professional Conduct of the State Bar of California.

On February 19, 1991, Crosby moved to withdraw as counsel for Fireman's Fund Credit Union in the wrongful termination cases. On March 7, Crosby notified the court that substitute counsel had been retained in each of those cases, that the case files had been transferred, and that other steps were being taken to insure an orderly transition of the matters.

B. *The Motion to Disqualify*

Meanwhile, also on February 19, 1991, FFIC filed its motion to disqualify Crosby from representing Truck against FFIC in this case while it concurrently represented FFIC in the wrongful termination cases. In support of its motion, FFIC argued that a law firm may not sue a present client without that client's written consent; that FFIC did not consent to Crosby representing Truck; that Crosby thereby breached its duty of loyalty toward FFIC; and that a per se rule of disqualification applied.

Truck, on the other hand, argued that since Crosby had withdrawn as counsel for FFIC in the wrongful termination cases, FFIC was now only Crosby's former client. The issue, Truck contended, was therefore whether Crosby's former representation of FFIC in those cases was substantially related to the present case so as to give Crosby access to confidential information now helpful to Truck. Truck argued that since there was no factual or legal connection between this and the wrongful termination cases, Crosby possessed no confidential information that could be misused to FFIC's prejudice.

C. *Hearing on Motion*

Before the March 14, 1991, hearing on the motion, the trial court issued a tentative ruling indicating its intent to grant FFIC's motion to disqualify Crosby. The trial court found that Crosby was already representing FFIC when it undertook to represent Truck, as well as when FFIC filed its motion ***1055** to disqualify Crosby. The court explained that an attorney may not represent an interest adverse to a current client without that client's approval, even if the attorney withdraws from the other cases before the motion to disqualify is heard.

During the hearing, the court acknowledged that this case presented a "hybrid" situation involving "an existing [representation] with an intent to depart." The court recognized that conflict problems of large compartmentalized law firms and insurance companies

differ from those of sole practitioners representing private individuals, but it saw no reason why different rules should apply. Clarifying its tentative ruling, the court stated that absent a recognized exception, the per se disqualification rule used in concurrent representation cases applied. The court reaffirmed its order disqualifying Crosby.[4]

4 On July 25, 1991, this court granted Truck's petition for a writ of supersedeas, staying the order disqualifying Crosby from representing Truck (A053922).

II. Discussion

A. *Standard of Review*

([2]) When reviewing an order granting or denying a motion to disqualify, a reviewing court defers to the trial court's decision, absent an abuse of discretion. (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 585 [283 Cal.Rptr. 732]; *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300 [254 Cal.Rptr. 853].) Discretion is deemed abused when there is a failure to exercise discretion in a situation where such exercise is required. (*Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 338-339 [227 Cal.Rptr. 78]; *Nadler v. Superior Court* (1967) 255 Cal.App.2d 523, 524 [63 Cal.Rptr. 352].) ([3a]) In the instant case, the trial court applied a per se standard of disqualification based upon the finding of "concurrent" representation. Truck contends that the trial court applied an incorrect standard and, in doing so, failed to exercise its discretion which is required under the "former" representation standard.

B. *The Rule*

Rule 3-310, effective May 27, 1989, provides in relevant part: "(B) A member shall not concurrently represent clients whose interests conflict, except with their informed written consent ...." The rule is clear in prohibiting an attorney from representing two or more clients at the same time whose interests conflict, unless there is informed written consent.

The undisputed facts before the trial court established that Crosby, knowing that it was representing FFIC in the wrongful termination cases, nevertheless agreed to begin representing Truck against FFIC in the insurance ***1056** coverage case. In doing so, Crosby did not obtain the informed written consent of FFIC, and proceeded with its representation of Truck after such consent was explicitly denied. There was, therefore, concurrent representation of clients whose interests conflicted, with no informed written consent.

On its face, rule 3-310(B) was violated.

C. *Withdrawal as a Cure for Rule Violation*

Also undisputed is the fact that prior to the hearing on FFIC's motion to disqualify, Crosby had withdrawn from its representation of FFIC in the wrongful termination cases. Truck argues that this withdrawal rendered FFIC a former client and that, as such, the less severe former representation standard (see *Global Van Lines v. Superior Court* (1983) 144 Cal.App.3d 483 [192 Cal.Rptr. 609]), rather than the standard governing concurrent representation, should have been applied. We disagree.

([4]) In cases involving the representation of a client against a former client, "the initial question is 'whether the former representation is " substantially related" to the current representation.' (See *Trone v. Smith* (9th Cir. 1980) 621 F.2d 994, 998, and authorities cited therein.)" (*Global Van Lines v. Superior Court, supra,* 144 Cal.App.3d at p. 488, fn. omitted.) "Substantiality is present if the factual contexts of the two representations are similar or related." (*Trone v. Smith* (9th Cir. 1980) 621 F.2d 994, 998.) If a substantial relationship exists, courts will presume that confidences were disclosed during the former representation which may have value in the current relationship. Thus, actual possession of confidential information need not be proven when seeking an order of disqualification. (*Civil Service Com. v. Superior Court* (1984) 163 Cal.App.3d 70, 79-80 [209 Cal.Rptr. 159].)

In contrast, in the concurrent representation context "[t]he principle precluding representing an interest adverse to those of a current client is based not on any concern with the confidential relationship between attorney and client but rather on the need to assure the attorney's undivided loyalty and commitment to the client. [Citations.]" (*Civil Service Com. v. Superior Court, supra,* 163 Cal.App.3d at p. 78, fn. 1.) This distinction between former representation and concurrent representation, and the distinct concerns at issue, are well recognized: "In contrast to representation undertaken adverse to a *former*

client, representation adverse to a *present* client must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients." (*Unified Sewerage Agency, etc. v. Jelco Inc.* (9th Cir. 1981) 646 F.2d 1339, 1345, italics in original; see also ***1057** *Cinema 5, Ltd. v. Cinerama, Inc.* (2d Cir. 1976) 528 F.2d 1384, 1386.) If this duty of undivided loyalty is violated, "public confidence in the legal profession and the judicial process" is undermined. (See *In re Yarn Processing Patent Validity Litigation* (5th Cir. 1976) 530 F.2d 83, 89.)

([3b]) Since Crosby unquestionably owed a duty of loyalty and commitment to FFIC, was that duty satisfied by Crosby's withdrawal of representation of FFIC before the hearing on the motion to disqualify? Simply put, may the automatic disqualification rule applicable to concurrent representation be avoided by unilaterally converting a present client into a former client prior to hearing on the motion for disqualification? We answer each question in the negative and hold, consistent with all applicable authority, that a law firm that knowingly undertakes adverse concurrent representation may not avoid disqualification by withdrawing from the representation of the less favored client before hearing. (See *Unified Sewerage Agency, etc. v. Jelco Inc., supra,* 646 F.2d at p. 1345; *Picker Intern., Inc. v. Varian Associates, Inc.* (N.D.Ohio 1987) 670 F.Supp. 1363, 1366, affd. (Fed. Cir. 1989) 869 F.2d 578; *Harte Biltmore Ltd. v. First Pennsylvania Bank, N.A.* (S.D.Fla. 1987) 655 F.Supp. 419, 421; *Ransburg Corp. v. Champion Spark Plug Co.* (N.D.Ill. 1986) 648 F.Supp. 1040; *Margulies by Margulies v. Upchurch* (Utah 1985) 696 P.2d 1195.) Indeed, Truck's position to the contrary has been repeatedly rejected by numerous authorities in no uncertain terms.

In *Unified Sewerage Agency, etc. v. Jelco Inc., supra,* 646 F.2d 1339, the Ninth Circuit, in discussing the concurrent representation standard, rejected the precise contention urged by Truck herein: "This standard continues even though the representation ceases prior to filing of the motion to disqualify. If this were not the case, the challenged attorney could always convert a present client into a 'former client' by choosing when to cease to represent the disfavored client." (*Id.,* at p. 1345, fn. 4.) Similarly, in *Picker Intern., Inc. v. Varian Associates, Inc., supra,* 670 F.Supp. 1363, the court, in construing Ohio's concurrent or simultaneous representation rule (DR 5-105 of the Code of Prof. Responsibility) stated: "The rationale behind this rule is that a firm owes a client a duty of undivided loyalty. [Citation.] This is true even though a firm may cease representing a client before the disqualification motion is made. Otherwise, a firm could avoid D.R. 5-105 by simply converting a present client into a former one. [Citations.]" (670 F.Supp. at p. 1366.) The Utah Supreme Court, in construing its rule prohibiting concurrent representation (canon 5 of the Utah Code of Prof. Responsibility), concluded rather clearly: "It is our strong view that an attorney who is simultaneously representing two clients with differing interests should not be able to avoid conforming to Canon 5 by simply dropping one of the clients ***1058** at his option when a disqualification motion is filed. [Citations.] Otherwise, little incentive would exist for attorneys to avoid dual employment by adverse parties in the first place." (*Margulies by Margulies v. Upchurch, supra,* 696 P.2d at pp. 1202-1203.) "To hold otherwise would allow such unethical behavior to continue unrestricted because a law firm could always convert a present client to a former client merely by seeking to withdraw after suing a present client. [Citation.] A client's right to the undivided loyalty of its attorney requires more than this." (*Ransburg Corp. v. Champion Spark Plug Co., supra,* 648 F.Supp. at p. 1044.)

We agree with the rationale of the foregoing authorities and see no reason to depart therefrom. In fact, Truck has provided us with no authority justifying departure in our case from this well-established principle requiring automatic disqualification.

In its brief, we are told by Truck that the "proper rule under these circumstances is set forth in *Florida Insurance Guarantee Associated, Inc. v. Carey Canada,* 749 F.Supp. 255, 261 (S.D.Fla. 1990)," from which the following language is extracted: "When counsel, upon discovery and absent consent, immediately withdraws from a concurrent adverse representation, the proper disqualification standard is expressed in the former representation rule. Otherwise, to require disqualification for the *mere happenstance of an unseen concurrent adverse representation*—where the representations are not substantially related and client confidences are not endangered—would unfairly prevent a client from retaining counsel of choice and would penalize an attorney who had done no wrong." (*Florida Ins. Guar. Ass'n, Inc. v. Carey Canada* (S.D.Fla. 1990) 749 F.Supp. 255, 261, italics added.) We agree with Truck that "the proper rule under the circumstances" is announced in *Carey Canada* but it certainly is not the rule Truck purports to glean from that case.

In *Carey Canada,* a law firm (Shackleford) was separately representing Florida Insurance Guaranty Association (FIGA) and Carey Canada in a nonconflicting context. When several insurers of Carey Canada became

insolvent, FIGA was mandated by state law to step "into the shoes of the insolvent insurers" and thus became "the object of Carey Canada's asbestos related claims." (749 F.Supp. at p. 257.) When FIGA filed an action seeking declaratory relief to resolve its obligations with Carey Canada, Shackleford appeared on behalf of Carey Canada after withdrawing from representation of FIGA. FIGA moved to disqualify and the court *granted* the motion concluding that there had not been an immediate withdrawal "upon discovery of the conflict of interest and failure to obtain consent." (*Id.*, at p. 261.) Significantly, in explaining the language relied on by Truck, the court stated: "The option of dismissing FIGA, obviously, would not be available to ***1059** Shackleford if Carey Canada were a new client that had come along subsequent to the conflict arising. [Citation.]" (*Id.*, at pp. 260-261.)

Under our facts, there was no "mere happenstance of an unseen concurrent adverse representation." There was nothing happenstance or unseen in terms of concurrent adverse representation when Crosby agreed to represent Truck against its client, FFIC. In agreeing to represent Truck, Crosby knew that it was undertaking concurrent adverse representation and that it was doing so without the consent of FFIC. Under no circumstances can this activity be characterized as inadvertent, happenstance, or unseen. Whether the withdrawal of representation of FFIC was, therefore, immediate or delayed, is of no consequence because, under *Carey Canada*, the option of dismissing FFIC "obviously, would not be available ...." (749 F.Supp. at p. 260.)

The unavailability of withdrawal as a means of escaping application of the per se disqualification rule when a law firm creates the conflict was recently discussed in *Gould, Inc. v. Mitsui Min. & Smelting Co.* (N.D.Ohio 1990) 738 F.Supp. 1121. In *Gould*, the concurrent representation arose as a result of an acquisition by a party being sued of a company represented by the law firm. In finding an "exception" to the rule requiring disqualification, the court relied upon the fact that the law firm "did not create the IGT [the company acquired] conflict." (*Id.*, at p. 1127.) In discussing the general rule of disqualification, the court stated: "These other decisions, in large part, are based on the premise that courts should not allow a law firm to profit from a conflict of interest which it created. This is the potential result when a law firm discards a less profitable relationship in contemplation of taking on a more profitable, conflicting representation .... In such cases, law firms will not be permitted to drop one client in favor of another at the late date when it is called to the attention of the court." (*Ibid.*; see also *Ex Parte AmSouth Bank, N.A.* (Ala. 1991) 589 So.2d 715, 722 [recognizing the *Gould* exception "provided that the law firm did not play a role originally in creating the conflict of interest"].)

As heretofore discussed, at the time Crosby accepted representation of Truck against FFIC, the firm knew that it was representing FFIC in the wrongful termination litigation. By such action, Crosby must be viewed as having created the conflict. Having done so, Crosby cannot find refuge in the *Gould* exception and cannot avoid application of the concurrent representation rule of disqualification by withdrawing from its representation of FFIC. (See *Gould, Inc. v. Mitsui Min. & Smelting Co., supra*, 738 F.Supp. at p. 1127; see also *Florida Ins. Guar. Ass'n, Inc. v. Carey Canada, supra*, 749 F.Supp. at p. 261; *Ex Parte AmSouth Bank, N.A., supra*, 589 So.2d at p. 722.)

Truck finally contends that the automatic disqualification rule is harsh when applied to large law firms organized into specialty practice groups ***1060** representing institutional clients where such situations may arise "inadvertently." Two observations seem appropriate: (1) there was nothing inadvertent when the firm agreed to represent Truck while representing FFIC; (2) to the extent this argument implies or suggests that the duty of loyalty owed a client of a large law firm is somehow less than that owed to the client of a smaller firm or sole practitioner, we summarily reject the implication.

We conclude, therefore, as follows: that the undisputed facts establish adverse concurrent representation within the meaning of rule 3-310(B); that withdrawing from representation of FFIC before the hearing on the motion to disqualify did not convert concurrent representation into prior representation for purposes of assessing the conflict; that the trial court applied the correct standard of automatic disqualification because of the adverse concurrent representation; that the motion to disqualify was properly granted.

III. Conclusion

The trial court's order disqualifying appellant Truck's attorney is affirmed. The writ of supersedeas heretofore issued is vacated and dissolved effective forthwith.[5]

5 As heretofore noted, this court issued a writ of supersedeas staying the superior court's order disqualifying Crosby. That writ is now vacated and the disqualification order is in full force and effect. Although Crosby may pursue its appellate remedies on behalf of Truck in connection with this decision, the disqualification order obviously precludes Crosby from representing Truck in any capacity, including associate

counsel, in superior court case No. 145126.

A petition for a rehearing was denied June 10, 1992, and appellant's petition for review by the Supreme Court was denied August 20, 1992. Lucas, C. J., and Panelli, J., were of the opinion that the petition should be granted. ***1061**

Poche, Acting P. J., and Perley, J., concurred.