United States Department of Agriculture

Marketing and Regulatory Programs

Animal Plant Health Inspection Service

Biotechnology Regulatory Services

4700 River Road
Riverdale
MD 20737

David Heron, Ph.D.
Global Regulatory Advisor
Moolec Science, SA

RSR number: 23-234-01rsr

RE: Regulatory Status Review of soybean developed using genetic engineering for accumulation of a meat protein

Dear Dr. Heron:

Thank you for your letter dated August 22nd, 2023, requesting a Regulatory Status Review (RSR) for soybean developed using genetic engineering (modified soybean). In your letter, you described that the soybean was modified to impart accumulation of a meat protein via genetic engineering.

The Plant Protection Act of 2000 (7 U.S.C. §§ 7701 et seq.) provides USDA authority to oversee the detection, control, eradication, suppression, prevention, or retardation of the spread of plant pests to protect agriculture, environment, and the economy of the United States. USDA, through the Animal and Plant Health Inspection Service (APHIS), regulates the "Movement of Organisms Modified or Produced through Genetic Engineering" as described in 7 CFR part 340.

Consistent with 7 CFR 340.4, APHIS reviewed your modified soybean to determine whether it is subject to the regulations in 7 CFR part 340. Specifically, APHIS reviewed the modified soybean to determine whether there is a plausible pathway by which the soybean would pose an increased plant pest risk relative to the plant pest risk posed by an appropriate soybean comparator. Based on information you provided, publicly available resources, and APHIS' familiarity with soybean and knowledge of the trait, phenotype, and mechanism of action, APHIS considered the (1) biology of nonmodified soybean and its sexually compatible relatives; (2) the trait and mechanism-of-action of the modification; and (3) the effect of the trait and mechanism-of-action on the (a) distribution, density, or development of the plant and its sexually compatible relatives, (b) production, creation, or enhancement of a plant pest or a reservoir for a plant pest, (c) harm to non-target organisms beneficial to agriculture, and (d) weedy impacts of the plant. APHIS did not identify any plausible pathway by which your modified soybean would pose an increased plant pest risk relative to comparator soybean plants. APHIS has determined your soybean is unlikely to pose an increased plant pest risk relative to its comparators. Once APHIS determines that a plant product is unlikely to pose an increased plant pest risk relative to its comparator, and, thus, is not a plant pest or a plant that requires regulation because it is capable of introducing or disseminating a plant pest, APHIS has no authority to regulate it under 7 CFR part 340. Accordingly, your soybean is not subject to the regulations under 7 CFR part 340. APHIS' determination that this modified plant is not subject to the regulations extends to any progeny of the modified plant that is derived from crosses with other non-modified plants or other modified plants that are also not subject to the regulations in 7 CFR part 340.

Please be advised that APHIS' decision applies to the soybean developed using genetic engineering exactly as described in your letter. If at any time you become aware of any information that may affect our review of your modified soybean, including, for example, new information that shows the trait, phenotype, or mechanism of action is different than described in your letter, you must contact APHIS for further review of the plant at RSRrequests@usda.gov.

Please be advised that your plant product, while not regulated under 7 CFR part 340, may be subject to APHIS Plant Protection and Quarantine (PPQ) permit and/or quarantine requirements. For further information, you may contact the PPQ general number for such inquiries at 877-770-5990. Your plant product may also be subject to other regulatory authorities such as the U.S.

Environmental Protection Agency (EPA) or the Food and Drug Administration (FDA). Please contact EPA and FDA to enquire about the regulatory status of your product.

Sincerely,

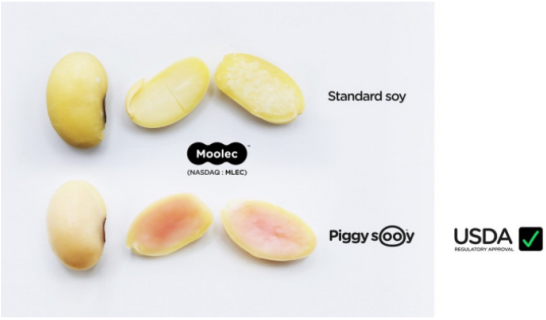
Bernadette Juarez April 18, 2024
APHIS Deputy Administrator
Biotechnology Regulatory Services
Animal and Plant Health Inspection Service
U.S. Department of Agriculture

ACCESSWIRE

Moolec Becomes First Molecular Farming Company to Achieve USDA Approval for Plant-Grown Animal Proteins

Provided by Accesswire
Apr 22, 2024 4:00am

LUXEMBOURG / ACCESSWIRE / April 22, 2024 / Moolec Science SA (NASDAQ:MLEC)("The company"), a Molecular Farming food-ingredient company, announced today that the Animal and Plant Health Inspection Service ("APHIS") of the U.S. Department of Agriculture ("USDA") has concluded its Regulatory Status Review ("RSR") for Moolec's genetically engineered ("GE") soybean Piggy Sooy™. See post online here: https://www.aphis.usda.gov/sites/default/files/23-234-01rsr-response.pdf [1].



USDA Piggy Sooy

The USDA-APHIS RSR determines that Moolec's genetically engineered soybean, accumulating animal meat protein, is unlikely to pose an increased plant pest risk relative to non-engineered soybeans. Therefore, it is not subject to the APHIS regulation that governs the movement of organisms modified or produced through genetic engineering (as described in 7 CFR part 340).

"Moolec embraced Nasdaq's slogan 'Rewrite Tomorrow' and took it literally! We achieved an unprecedented milestone in biotechnology with the first-ever USDA-APHIS approval of this kind," stated Gastón Paladini, Moolec Science's CEO & Co-Founder. *"We are unlocking the power of plants by leveraging science to overcome climate change and global food security concerns. I am very proud of the Moolec team, creating value for shareholders and the planet at the same time."*

This milestone reinforces Moolec's B2B go-to-market strategy for Piggy Sooy™ product, an innovative, functional, and nutritious ingredient. By adding a well-known animal meat protein (porcine myoglobin) to the standard soybean proteins, the company expects to provide food manufacturers with a unique ingredient that will have a positive carbon and water footprint.

Martin Salinas, Chief of Technology & Co-Founder at Moolec, enthusiastically announced: *"We believe this milestone sets the stage for a revolution in the food-industrial biotech landscape, paving the way for expedited adoption of Molecular Farming technology by other industry players. Also, this compelling advancement signifies a stride in enhancing our operational efficiency, transforming our methods of raw material sourcing, and optimizing our downstream crushing and processing operations."*

In June 2023, the company announced that Piggy Sooy™ seeds had achieved high levels of expression of pork protein (up to 26.6% of the total soluble protein) and had patented their technology. The company clarifies that Piggy

Sooy™ development is set to keep moving forward completing the necessary consultation with the United States Food and Drug Administration ("FDA"). Moolec declares to be engaged in the consultation process with the FDA, representing the next pivotal regulatory milestone preceding the commercial availability of Piggy Sooy™ ingredient.

About Moolec Science SA

Moolec is a science-based ingredient company leader in the use of Molecular Farming technology for food and dietary supplementation markets. The Company's mission is to create unique food ingredients by engineering plants with animal protein genes. Its purpose is to redefine the way the world produces animal proteins, for good and for all. Moolec's technological approach aims to have the cost structure of plant-based solutions with the nutrition and functionality of animal-based ones. Moolec's technology has been under development for more than a decade and is known for pioneering the production of a bovine protein in a crop for the food industry. The Company's product portfolio and pipeline leverages the agronomic efficiency of broadly used target crops, like soybean, pea, and safflower to produce oils and proteins. Moolec also has an industrial and commercial R&D capability to complement the company's Molecular Farming technology. Moolec secures a growing international patent portfolio (25+, both granted and pending) for its Molecular Farming technology. The Company is run by a diverse team of Ph.Ds and Food Insiders, and operates in the United States, Europe, and South America. For more information, visit moolecscience.com and ir.moolecscience.com.

Forward-Looking Statements

This press release contains "forward-looking statements." Forward-looking statements may be identified by the use of words such as "forecast," "intend," "seek," "target," "anticipate," "believe," "expect," "estimate," "plan," "outlook," and "project" and other similar expressions that predict or indicate future events or trends or that are not statements of historical matters. Such forward-looking statements with respect to performance, prospects, revenues, and other aspects of the business of Moolec are predictions, projections and other statements about future events that are based on current expectations and assumptions and, as a result, are subject to risks and uncertainties. Although we believe that we have a reasonable basis for each forward-looking statement contained in this press release, we caution you that these statements are based on a combination of facts and factors, about which we cannot be certain. We cannot assure you that the forward-looking statements in this press release will prove accurate. These forward-looking statements are subject to a number of significant risks and uncertainties that could cause actual results to differ materially from expected results, including, among others, changes in applicable laws or regulations, the possibility that Moolec may be adversely affected by economic, business and/or other competitive factors, costs related to the scaling up of Moolec's business and other risks and uncertainties, including those included under the header "Risk Factors" in Moolec's Annual Report on Form 20-F filed with the U.S. Securities and Exchange Commission ("SEC"), as well as Moolec's other filings with the SEC. Should one or more of these risks or uncertainties materialize, or should any of our assumptions prove incorrect, actual results may vary in material respects from those projected in these forward-looking statements. We undertake no obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, except as may be required under applicable securities laws. Accordingly, you should not put undue reliance on these statements.

Contacts:

- Press & Media inquiries: comms@moolecscience.com
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[1] In the first paragraph of the USDA-APHIS online response letter, please note that the term "gene editing" should be understood as "genetic engineering" due to an unintentional error that may be addressed in the coming days.

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Related Files

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SOURCE: Moolec Science

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Matthew Dolgin, CFA • Apr 19, 2024

Steady

Brett Horn, CFA • Apr 22, 2024

MORNINGSTAR

March 20, 2024

Via E-Mail

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Re: *In re: Paraquat Products Liability Litigation*,
Case No. 21-md-3004-NJR

Counsel:

I represent the Minnesota Department of Agriculture in connection with the subpoenas served by plaintiffs in the above captioned matter.

This letter serves as an omnibus objection to the subpoenas, as set forth below.

Objection to the Place of Production: Most of the subpoenas purport to require production of documents in locations other than St. Paul, Minnesota. While the production of documents is likely to be electronic, the Department objects to a production of any physical documents at a location other than St. Paul.

Objections to the Timing of Production:

The Department began receiving subpoenas on March 6, and has received approximately 48 subpoenas so far with the majority being received between March 11 and March 18. Given the number of subpoenas the Department has received, the Department will not be able to produce documents on or before April 19.

Improper Service:

The Department notes that the vast majority of subpoenas it has received were not properly served, with most simply being mailed to the Department. The Department reserves its right to contest service if any motion is filed with respect to any subpoena.

Objections to Definitions and Instructions:

The definitions and instructions included in the subpoenas are substantially identical. Certain of the definitions and instructions are clearly inappropriate in the context of a third-party subpoena, many others are not consistent with the Federal Rules of Civil Procedure, and still others purport to impose unreasonable constructions on the language of the subpoenas themselves. In particular:

- Definition 8 purports to require production of any document in the possession, custody, or control of the Department's "present and former partners, members, associates, attorneys,

employees, agents, and representatives thereof." The Department will limit its production to those documents actually within its own possession, custody, or control.

- Instruction 1 purports to control the format of the Department's production. The Department will produce its documents in a format of its own choosing, taking into account the reasonable needs of your clients and the burdens on the Department.

- Definitions 1 and 2, and Instruction 3 contains various demands that words be given unnatural meanings. The Department will give the words "and," "or," and "each," their natural meanings. The Department objects to the instruction to construe singular as plurals and vice versa, and will construe such words consistent with their natural meanings. The Department objects to the instruction to construe past tense verbs as present tense and vice versa, and will give construe such words consistent with their natural meaning. The Department objects to the instruction to construe "negative terms to include the positive and vice versa." The instruction is nonsensical. To the extent the Department encounters negative or positive terms it will give such terms their natural meaning.

- Instruction 4 purports to require the Department to provide detail on responsive documents that it no longer possesses. The Department objects and will not provide such detail, which is not required by applicable rules.

- Instruction 5 purports to specify the manner in which the Department will assert any claims of privilege or other protections. The Department objects, and will provide reasonable disclosures on these issues, consistent with the requirements of the applicable rules. At present, the Department is not asserting any privileges.

- Instruction 6 purports to impose an obligation to supplement responses to the subpoena. The Department will not provide supplemental responses, which are not required of subpoena respondents – something you should know. *See*, *e.g.*, *Discover Fin. Servs. v. Visa U.S.A., Inc.*, 2006 WL 8460949 *2 n.1 (S.D.N.Y. Aug. 3, 2006); *Alexander v. F.B.I.*, 192 F.R.D. 37, 38 (D.D.C. 2000).

Documents the Department will Produce:

As set forth above and below, the Department objects to various elements of the subpoenas. For clarity, the Department will search for and produce the following:

- Licensing data sufficient to show the licensing and/or registration status of sufficiently identified persons or entities;

- Current, publicly available training materials created by the Department for restricted use pesticide licenses.

Common Objections to Production Requests:

Licensing Data:

The subpoenas broadly seek production of all documents of any nature in any way related to licensing. These requests are overbroad and too vague to allow any meaningful response. The Department will produce records sufficient to show the licensing status of any individual or entity that the subpoena proponent has identified with sufficient specificity to allow the records to be located. The Department notes that many large entities have multiple sites, and multiple licenses. For these entities, the subpoena proponent will need to identify the specific location for which they seek licensing data. The Department will correspond separately on this issue as it reviews the subpoenas.

Licensing Requirements:

The Department is unsure how data about the requirements for obtaining a license is relevant to the issue of whether a plaintiff was or was not exposed to Paraquat. There are no Paraquat-specific licensing requirements.

Your clients can find the current licensing requirements here: https://www.mda.state.mn.us/pesticide-fertilizer/pesticide-applicator-licensing. The Department objects to the production of other documents relating to these requirements as unreasonably burdensome.

Training Materials:

The Department is (again) unsure how data about training requirements is relevant to the issue of whether a plaintiff was or was not exposed to Paraquat.

Nonetheless, the Department does not object to the production of current training materials created by the Department that were made available to the general public, and will produce those

documents. The Department objects to the production of *all* documents relating to training as unduly burdensome.

Use Reports:

The Department does not require applicators to report on their specific uses of restricted pesticides. It also does not require applicators to furnish contracts relating to applications, or records of sales or purchases of restricted use pesticides. As a result, the Department has no such records available for production.

In its enforcement actions, the Department does sometimes require applicators to furnish information on the restricted use pesticides they used leading to the enforcement matter. There is no way for the Department to review its enforcement records for such reports other than with a document by document search of the files. Even if such usage reports existed, the records would generally lack sufficient detail to establish whether a particular individual was or was not exposed to Paraquat. The Department's enforcement files are also generally classified as not public data under the Minnesota Government Data Practices Act and Minnesota Statutes, Chapter 18B.

For all these reasons, the Department objects to conducting searches for restricted pesticide usage reports, or documents relating to sales, purchases, or applications of restricted use pesticides.

Time Periods:

The Department notes that its document retention period for most types of records that have been requested is six years.

Additional Objections to Production Requests:

Certain subpoenas have additional requests beyond those appearing in the bulk of the subpoenas. With respect to those subpoenas, the Department provides the following information and objections:

Studies:

Certain subpoenas seek studies regarding Paraquat. The Department has not conducted studies of Paraquat. Any studies the Department might possess would be generally available to the public. The Department objects to searching its files for the ad hoc presence of such studies.

Examination Materials:

Certain subpoenas seek license examination materials. The Department objects to the production of examination materials, which cannot be released publicly for obvious reasons, and which are also

generally classified as protected data pursuant to Section 13.34 of the Minnesota Government Data Practices Act.

Contacts at Other Entities:

Certain subpoenas seek documents showing contacts at other agencies or entities that may possess relevant documents. The Department objects to this request as an improper subject for third-party discovery, vague, and as imposing undue burden for the Department. The Department has no readily available document identifying other entities that may possess documents relevant to the plaintiffs' claims.

Service of Additional Subpoenas:

Having put the plaintiffs on notice of the plainly improper nature of many of the definitions and instructions in their subpoenas, the Department also provides the plaintiffs with notice that it will not respond to any additional subpoenas that repeat the improper definitions or instructions.

Rule 45(d) requires attorney serving subpoenas to avoid imposing undue burden or expense on a subpoena respondent. Serving subpoenas with clearly improper definitions and instructions violates this rule. Subpoena respondents should not be burdened with the task of culling through improper definitions and instructions to preserve their objections. Service of additional subpoenas with these improper definitions and instructions will be met with a flat refusal to respond to the subpoena unless and until an appropriate subpoena is served.

Sincerely,

OLIVER J. LARSON
Assistant Attorney General

(651) 757-1265 (Voice)
(651) 297-1235 (Fax)

cc: Doug Spanier, Esq.
Chris McNulty, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

In re: PARAQUAT PRODUCTS LIABILITY LITIGATION **This Document Relates to All Cases.**	**Case No. 3:21-md-3004-NJR** **MDL No. 3004**

CASE MANAGEMENT ORDER NO. 21
RELATING TO LIMITED THIRD-PARTY DISCOVERY

ROSENSTENGEL, Chief Judge:

On May 15, 2023, the Court entered Case Management Order No. 18 relating to Deceased Plaintiffs' Submissions and Cases Based on Implausible Theories of Proof (CMO 18). (Doc. 4242.) CMO 18 reflects the Court's concern "about the presence of cases on its docket that present implausible or far-fetched theories of liability, and therefore would not have been filed but for the availability of this multidistrict litigation." (CMO 18 at 3.) The Court identified four categories of cases that present implausible theories of liability: "(i) a plaintiff states that they have no information concerning their exposure to paraquat (as opposed to a different product); or (ii) a plaintiff has no medical evidence to support a diagnosis of Parkinson's disease; or (iii) a plaintiff claims to have used paraquat in a form in which it never existed (e.g., in powder or pellet form); or (iv) there are other evidentiary issues such as those that led to the voluntarily dismissal of the bellwether plaintiffs." (*Id.* at 4.)

Since CMO 18 was issued, the Court has reiterated its concern about the existence of many implausible and unsubstantiated claims on the docket in this MDL. During the

August 2023 hearing on motions filed pursuant to Federal Rule of Evidence 702, the Court clarified CMO 18 and ordered that the parties' "time in the coming weeks . . . be focused on getting [the] docket cleaned up." (Doc. 4795 at 184:9-10; *id.* at 183:14-17 (explaining that CMO 18 ordered "examination and clean up of the docket").) On January 22, 2024, the Court issued Case Management Order No. 20 (CMO 20), selecting certain cases for limited discovery to address the Court's concern "that a significant number of plaintiffs in the MDL . . . do not plausibly allege exposure to paraquat." (Doc. 5102 at 2.) In the two weeks following the issuance of CMO 20, nine of the 25 Plaintiffs who were selected for limited discovery voluntarily dismissed their complaints. This prompted the Court to issue Case Management Order No. 20A (CMO 20A), where it selected nine additional Plaintiffs for limited discovery. (Doc. 5127.) As stated in CMO 20A, "[t]hese dismissals . . . only reinforced the Court's concern about the proliferation of non-meritorious claims on the docket of this MDL." (*Id.* at 1.)

The Court asked the Special Master to review and analyze the documentary evidence of Plaintiffs' use of and/or exposure to paraquat as shown in their Plaintiff's Assessment Questionnaires ("PAQ"). The Special Master has advised the Court that many Plaintiffs in the MDL have not produced any documentary evidence in support of their exposure allegations, despite the opportunity to do so in the PAQ itself, as well as requests for the same types of documents made by Defendants to certain Plaintiffs in letters sent to Plaintiffs' counsel. This may be because such proof does not exist, or it may instead be because the relevant documentary evidence is in the possession, custody, or control of a third-party. Until now, the Court has not required Plaintiffs to request or

produce such documentary evidence. *See* Section XXIII of the Plaintiff's Assessment Questionnaire ("For purposes of this Plaintiff's Assessment Questionnaire, you are not required to obtain records from third party entities ….")[1]

In light of the foregoing, the Court directs *each Plaintiff in this MDL* to serve third-party subpoenas pursuant to Federal Rule of Civil Procedure 45 seeking documentary evidence providing proof of use and/or exposure to paraquat. Each Plaintiff is encouraged to serve any and all subpoenas he or she believes are necessary to establish documentary proof of his or her use of and/or exposure to paraquat. The Court likewise directs each Plaintiff to produce—by uploading to the PAQ portal—any documentary evidence providing proof of use and/or exposure currently in their possession, custody, or control that has not already been uploaded to the PAQ portal. This additional limited third-party discovery will provide Plaintiffs an opportunity to better determine the strength of their claims, as well as expose non-meritorious claims. Additional information about Plaintiffs in this MDL also will assist the Court in facilitating the expeditious, economical, and just resolution of this litigation, which has been the Court's goal since the MDL's inception. (*See* Doc. 16.)

The Court **ORDERS** that the third-party subpoenas be served by **March 11, 2023.** The subpoenas **SHALL** specify a return date of **21 days from service**. Any documents received in response to the subpoenas **SHALL** be uploaded to the PAQ portal within **10 days** of production to Plaintiffs' counsel by the third-party. So long as all documents

[1] *See* Plaintiff's Assessment Questionnaire, available at https://www.ilsd.uscourts.gov//documents/Paraquat/PlaintiffAssmntQuestionnaire.pdf.

received in response to a subpoena are uploaded to the PAQ portal, they do not otherwise need to be served on defense counsel or the Special Master. Given the expected number of forthcoming subpoenas, Lead Counsel for all parties **SHALL** confer regarding the notice requirements under Rule 45(a)(4) and refer any disputes to the Special Master.

Finally, it is this Court's preference to adjudicate any discovery disputes concerning this CMO. Should a dispute arise in connection with a subpoena issued pursuant to this CMO, the Plaintiff serving the subpoena **SHALL** promptly notify this Court and inform the presiding Judge of this Court's preference to decide it.

IT IS SO ORDERED.

DATED: February 26, 2024

NANCY J. ROSENSTENGEL
Chief U.S. District Judge

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of Water Right Application R-87871 in the Name of

EAST VALLEY WATER DISTRICT,
Petitioner,

v.

OREGON WATER RESOURCES COMMISSION,
OREGON WATER RESOURCES DEPARTMENT,
and WATERWATCH OF OREGON, INC.,
Respondents,

and

Joel RUE et al.,
Protestants below.

Oregon Water Resources Commission
R87871; A173292

Argued and submitted November 3, 2022.

Crystal S. Chase argued the cause for petitioner. Also on the briefs were Stoel Rives LLP and Kirk B. Maag.

Denise G. Fjordbeck, Assistant Attorney General, argued the cause for respondents Oregon Water Resources Commission and Oregon Water Resources Department. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Thomas M. Christ argued the cause for respondent WaterWatch of Oregon, Inc. Also on the briefs were Brian J. Posewitz and Sussman Shank LLP.

Before Shorr, Presiding Judge, and Mooney, Judge, and Pagán, Judge.

SHORR, P. J.

Affirmed.

SHORR, P. J.

Petitioner East Valley Water District (district) petitions for judicial review of a final order of the Oregon Water Resources Commission (commission). In that order, the commission denied the district's application for a permit that would allow storage in a reservoir of 12,000 acre-feet of water annually from Drift Creek, which is a tributary of the Pudding River. At issue, among other things, was a potential conflict between the proposed reservoir and an existing instream water right in Drift Creek, which has the purpose of "[p]roviding required stream flows for cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing." Although the proposed use—storage of water—would not "injure" the existing water right, the commission determined that the inundation of a portion of the creek to allow storage of water would frustrate the beneficial purpose of the existing right. The commission concluded that, "under ORS 537.170(8)(f) the proposed use will impair or be detrimental to the public interest and so the public interest presumption is overcome." It rejected the application "because, on this record, there are no modifications that will allow the proposed use to comport with the public interest to allow for approval." In other words, the commission determined that the application for the new water storage right conflicted with the purpose of the existing instream water right and therefore the application had to be denied.

Before us, the district raises seven assignments of error, contending that we should reverse the final order because it exceeded the commission's delegated authority, is legally erroneous, and is not supported by substantial evidence and reason. The district also requests that we remand to the commission with directions to issue a final order and water storage permit to the district that is consistent with the terms of the Oregon Water Resources Department Director's final order, which had approved the permit with conditions. Respondents Oregon Water Resources Department (department) and the commission contend that the commission did not err as alleged by the district.[1]

[1] The commission and the department filed a joint brief and we refer to them collectively herein as the state.

Respondent WaterWatch of Oregon (WaterWatch) agrees with the commission's denial of the district's application; however, it disagrees with the commission's determination that the proposed permit would not "injure" existing water rights and raises a cross-assignment of error. As we explain, we affirm.[2]

We are presented both with questions of law and questions of fact. On questions of law, we review for errors of law. ORS 183.482(8)(a). On questions of fact, we review for whether the findings in the commission's order are supported by substantial evidence. ORS 183.482(8)(c).

I. BACKGROUND

A. *Regulatory Framework*

Under ORS 537.110, "[a]ll water within the state from all sources of water supply belongs to the public." "Subject to existing rights, *** all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act." ORS 537.120. "[A]ny person intending to acquire the right to the beneficial use of any of the surface waters of this state shall, before beginning construction *** or performing any work in connection with the construction, or proposed appropriation, make an application to the Water Resources Department for a permit to make the appropriation." ORS 537.130; *see* ORS 537.140 (describing information to be provided in application for permit). If the "application is complete and not defective," and the proposed use is not prohibited by ORS Chapter 538, "the department shall undertake an initial review of the application" and "notify the applicant of its preliminary determinations." ORS 537.150(3) - (5). The department must also give public notice of the application that includes "a request for comments on the application." ORS 537.150(6).

ORS 537.153 contains requirements for the department's review of the application and issuance of a proposed final order. ORS 537.153(2) provides,

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[2] Based on our disposition of the district's assignments of error, we need not reach WaterWatch's cross-assignment.

> "In reviewing the application ***, the department shall presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission. This shall be a rebuttable presumption and may be overcome by a preponderance of evidence that either:
>
> "(a) One or more of the criteria for establishing the presumption are not satisfied; or
>
> "(b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest under subsection (6) of this section or in a finding of the department that shows:
>
> "(A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
>
> "(B) Specifically how the identified public interest would be impaired or detrimentally affected."

That is, there is a rebuttable presumption that the proposed use is in the public interest. The presumption can be overcome if one or more of the criteria in subsection (2) are not satisfied or if a preponderance of the evidence shows that the proposed use will impair or be detrimental to one of seven statutory public interest factors in ORS 537.170(8). The proposed final order must "cite findings of fact and conclusions of law" and shall include "[w]hether the rebuttable presumption that the proposed use will not impair or be detrimental to the public interest has been established." ORS 537.153(3)(g).

If the presumption is rebutted, an application can still be approved if the director determines that it would not impair or be detrimental to the public interest. ORS 537.170(8) provides:

> "If the presumption of public interest under ORS 537.153(2) is overcome, then before issuing a final order, the director or the commission, if applicable, shall make the final determination of whether the proposed use or the proposed use as modified in the proposed final order

would impair or be detrimental to the public interest by considering:

"(a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.

"(b) The maximum economic development of the waters involved.

"(c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.

"(d) The amount of waters available for appropriation for beneficial use.

"(e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.

"(f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.

"(g) The state water resources policy ***."

If a proposed use would "impair or be detrimental to the public interest, the director shall issue a final order rejecting the application or modifying the proposed final order to conform to the public interest." ORS 537.170(6). If the "director determines that the proposed use would not impair or be detrimental to the public interest, the director shall issue a final order approving the application or otherwise modifying the proposed final order." *Id.*

Within 20 days after the director issues a final order after a contested hearing, any party may file exceptions to the order with the commission. ORS 537.173(1). The commission "shall issue a modified order, if allowed, or deny the exceptions within 60 days after the close of the exception period." ORS 537.173(2).

B. *Procedural and Substantive Facts*

The background and procedural facts are undisputed unless otherwise specified. In 2000, a group of Willamette Valley farmers, who were looking for additional water sources to irrigate their crops, organized themselves into an irrigation district under ORS 545.025. The district's boundaries are in Marion County and its purpose is to develop a secure source of future agricultural water for its members. In February 2013, the district filed a water storage application with the department.

The application requested a permit to build a dam and reservoir to store, each year from October 1 to April 30, 12,000 acre-feet of water from Drift Creek and unnamed tributaries of Drift Creek.[3] The reservoir would be built on-channel—in Drift Creek's streambed. The proposed height of the dam is approximately 70 feet above the streambed or ground surface at the center of the dam's crest. The area submerged by the reservoir when full would be approximately 384 acres. The application does not require the applicant to provide many details about the container or reservoir in which water will be stored, explain how the water will be conveyed, specify the amount of water it will release from the reservoir on a monthly or yearly basis, or explain how the project will be financed.[4] *See* ORS 537.140(1). Although the application asks for it, the district did not provide information about the proposed dam's composition, the locations and dimensions of its outlet conduits, or its emergency spillway. The district responded that, "because it is a water district, such plans and specifications are not required before the Department issues a permit."

The application is limited to a storage permit, which would only allow the district to store water. The district would need to obtain another water permit from the department to use the water. The district would also need to obtain authority from various state agencies, local agencies, and federal agencies to build the dam and reservoir, construct a

[3] Drift Creek is part of the Willamette River Basin, which only allows storage of surface waters from November 1 to April 30. The department advised the district that its requested storage season would be modified.

[4] The district estimates the total cost of the project to be $84 million.

method to convey the water, and use the water.[5] Before the dam could be constructed, its plans and specifications would have to be approved by the department's Dam Safety Office; the dam would also have to be approved by the federal Army Corps of Engineers. The district indicated in its application that it did not own the land from which the storage water would be diverted and transported; nor did it have written authorization or easements permitting access to that land.

As of the date of the district's application, there were two existing water rights on Drift Creek in the projected footprint of the reservoir. The water right pertinent to this petition for review is an instream water right reflected in Certificate number 72591 issued by the department in 1996, which has a priority date of October 18, 1990. The instream right was created pursuant to the Instream Water Act of 1987, under which public agencies, such as the Oregon Department of Fish and Wildlife (ODFW), may apply for water rights certificates for instream flows to benefit fish habitat, pollution abatement, or scenic attraction uses. The right in Certificate 72591 allows for specified monthly amounts of water flow, in cubic feet per second, to be maintained in Drift Creek from river mile 11, which is above the proposed dam and reservoir site, to Drift Creek's mouth, which is below the site. There are several conditions that apply to the use of water under the certificate, including that "[t]he flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach." The certificate states that its "[p]urpose and/or use" is "[p]roviding required stream flows for cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing."

In July 2014, the department issued a proposed final order in which it proposed to approve the application and issue a water storage permit to the district. In September 2014, certain individuals, referred to collectively as the Rue protestants, and WaterWatch, filed protests to

[5] Those agencies could include the Oregon Department of Environmental Quality, the Oregon Department of Fish and Wildlife, the Department of State Lands—which will require a wetlands mitigation permit—the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

the proposed final order.[6] The Rue protestants all own or lease land that would be inundated by the proposed reservoir and dam; they would not benefit from the project, in that the stored water would not be used by them for irrigation. They asserted that the public interest would not be served by issuance of the requested permit.[7] WaterWatch describes itself as a "nonprofit membership organization dedicated to promoting water allocation decisions in Oregon that provide the quality and quantity of water necessary to support fish, wildlife, recreation, biological diversity, ecological values, public health and a sound economy." WaterWatch asserted, among other things, several reasons why it believed that the proposed use would impair or be detrimental to the public interest.

In November 2016, the department requested that the Office of Administrative Hearings conduct a contested case hearing regarding the proposed final order, and an administrative law judge (ALJ) was assigned to the matter. A hearing was held June 18-29, 2018; written testimony was offered by three of the parties prior to the hearing, and numerous witnesses testified at the hearing.[8] The record was closed on September 12, 2018, after the parties submitted closing briefs. The ALJ issued a proposed order in February 2019, and the parties filed exceptions.

After reviewing those exceptions, the director of the department issued a final order dated September 13, 2019, which affirmed the proposed final order issued in July 2014, with certain conditions.[9] The director concluded as a matter of law, as relevant here, that "a presumption was established under ORS 537.153(2) that the proposed use will not impair or be detrimental to the public interest" and that the "[p]rotestants did not demonstrate under ORS 537.170(8) that the proposed use will impair or be detrimental to the

[6] The Rue protestants do not appear on judicial review.

[7] We do not provide details of the Rue protestants' concerns and specific protests to the proposed final order as those details are not necessary to explain our decision.

[8] The parties to the hearing were the department, the district, the Rue protestants, and WaterWatch.

[9] The director's final order is 148 pages in length and contains numerous factual findings.

public interest." WaterWatch and the Rue protestants timely filed with the commission exceptions to the director's final order in accordance with ORS 537.173(1).

At a public meeting of the commission on November 21, 2019, a subcommittee of commissioners, which had been created by the commission to review exceptions to the director's final order, made recommendations to the full commission. The full commission allowed oral argument the following day, deliberated on the disposition of the exceptions, and voted unanimously to issue a final order that was consistent with the subcommittee's recommendations. The commission issued a final order dated November 25, 2019.

The commission adopted and incorporated by reference, without any modifications, all of the findings of fact from the director's final order. It made three ultimate findings of fact: (1) "[i]n-stream water right 72591 is a certificated right on Drift Creek with a priority date of October 18, 1990, that provides for specified monthly amounts of water to flow from river mile 11 to the mouth of Drift Creek," (2) "[t]he beneficial purpose of Certificate 72591 is to provide required stream flows as stated on the face of the water right for cutthroat trout migration, spawning, egg incubation, fry emergence and juvenile rearing," and (3) "[t]he proposed appropriation would inundate a portion of the reach protected by Certificate 72591." The commission concluded as a matter of law that the "record establishes that under ORS 537.170(8)(f) the proposed use will impair or be detrimental to the public interest and so the public interest presumption is overcome" and that the "application must be rejected because, on this record, there are no modifications that will allow the proposed use to comport with the public interest to allow for approval."

In its analysis, the commission explained that in the exceptions filed by protestants, they had argued that the proposed use would not protect Certificate 72591 "because the in-stream water right requires that the protected flows be maintained throughout the 11-mile reach of the in-stream water right, as opposed to only being protected at the mouth of Drift Creek." The protestants had also argued that "the conditions in the Director's Final Order do not address all of

the expected impacts of the proposed use because the conditions do not 'make up for' the inundation of Drift Creek within the reservoir footprint." And because the director's final order did not fully address the impacts of inundation, the protestants asserted that the proposed appropriation will not protect the instream water right.

The commission explained that the protestants had raised the issue of inundation, in part, in the context of their argument that the proposed use would injure the existing water right, ORS 537.153(2). However, the commission noted that the department had defined "the term 'injury' to mean that an existing water right would not receive previously available water to which it is legally entitled"—a quantitative protection—and that the arguments of the protestants did not focus on that aspect.[10] Rather, according to the commission, the protestants' arguments addressed "competing types of uses presented by a proposed new appropriation that inundates an in-stream water right so as to frustrate the beneficial purpose of the existing vested right." In sum, the commission determined under ORS 537.153(2)(b)(A) that the presumption that the proposed use, *i.e.*, storage of water in a reservoir, would not impair or be detrimental to the public interest was overcome when considering the specific public interest factor in ORS 537.170(8)(f): "[a]ll vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights."

The district petitions for judicial review and seeks reversal and remand of the commission's order.

II. ANALYSIS

In its first assignment of error, the district asserts that the commission erred or acted outside the range of discretion delegated to it by law by denying the application based on a perceived deficiency in the director's final order that was not specifically raised in the exceptions filed by the protestants. Respondents contend that the issue was sufficiently raised for the commission to consider it. We

[10] The commission confirmed the treatment of "injury" in the director's final order.

agree with respondents and reject that assignment without discussion.

The district combines its argument for its second, third, and fourth assignments of error and we address them in that manner. In its second assignment of error, the district asserts that the commission erred in denying the district's application based on an erroneous interpretation of ORS 537.170(8)(f). In its third assignment of error, the district asserts that the commission erred in denying the application due to its erroneous interpretation of Certificate 72591 and the statutes governing instream water rights. In its fourth assignment of error, the district asserts that the commission erred in denying the application based on its erroneous conclusion that ORS 537.170(8) requires consideration of only a single public interest factor to determine whether the proposed use would impair or be detrimental to the public interest. Respondents argue that the commission did not err in the ways asserted by the district.

To the extent those assignments, or portions thereof, present a question of statutory interpretation, we apply our familiar methodology, considering the text, context of the relevant statutes, and any relevant legislative history that we deem helpful. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

The commission's order states, in part:

> "In light of the arguments that the proposed appropriation, as currently conditioned, does not protect the portions of the in-stream water right that would be inundated by the proposed appropriation, the Commission examines the public interest factor in ORS 537.170(8)(f), which requires consideration of:
>
> > "'All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.'
>
> "The direction to assure that new appropriations protect vested rights in water is consistent with other provisions of the Water Rights Act that require the Commission to determine, in addition to its injury determination, whether a new appropriation will 'take away,' 'impair,' or 'conflict' with existing vested rights.

> "For example, ORS 537.120 states:
>
> > "'Subject to existing rights *** all waters within the state may be appropriated for beneficial use as provided in the Water Rights Act and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water.'
>
> "In addition, ORS 537.160(1) states that the Department 'shall approve all applications made in proper form which contemplate the application of water to a beneficial use, unless the proposed use conflicts with existing rights.'
>
> "Taken as a regulatory whole, in considering all vested rights to the waters of this state and the means necessary to protect such rights, the Commission must identify the attributes of existing vested water rights affected by the new appropriation and then examine whether there are the means necessary to protect those attributes. The elements of a water right that merit protection include not just the rate and the priority date, but also the beneficial purpose to which the water will be applied. Given this, we examine whether the in-stream water right is a vested right that merits protection, and if so, whether the Director's Order provides conditions that adequately protect the in-stream water right."

(Footnotes omitted.) The commission referred to a Supreme Court decision in which the court described the elements of a water right as part of the basis for its analysis. In *Fort Vannoy Irrigation v. Water Resources Comm.*, 345 Or 56, 79, 188 P3d 277 (2008), the court stated:

> "The elements of an appropriation of water *** are: (a) Quantity of water appropriated; (b) time, period, or season when the right to the use exists; (c) the place upon the stream at which the right of diversion attaches; (d) the nature of the use or the purpose to which the right of use applies, such as irrigation, domestic use, culinary use, commercial use, or otherwise; (e) the place where the right of use may be applied; [and] (f) the priority date of appropriation or right as related to other rights and priorities."

(Internal quotation marks omitted.) From that, the commission concluded that it was appropriate to consider the

purpose of the water right reflected in Certificate 72591, and not just the quantity of water as specified in the certificate.

The district takes the position that the commission misinterpreted ORS 537.170(8)(f). In its view, the commission should have limited its public interest evaluation to whether the proposed reservoir and dam would prevent Drift Creek from having a specific quantity of flow *at the mouth of the stream* and should not have considered the purpose or use of the water right contained in Certificate 72591. In support of that contention, the district argues that the commission ignored binding precedent, unnecessarily and incorrectly complicated its analysis by relying on and misconstruing ORS 537.120 and ORS 537.160(1), and "misapprehended the scope of protection afforded to a vested water right under Oregon law and misconstrued the terms of Certificate 72591."

The district relies on *Benz v. Water Resources Commission*, 94 Or App 73, 764 P2d 594 (1988) for the proposition that where a proposed permit would allow use of unappropriated water consistent with Oregon's prior appropriation system, existing vested rights are sufficiently protected. In that case, the commission had considered two criteria in what is now ORS 537.170(8) and the concern raised was the quantity of water available and whether water would be available for a junior right.[11] We stated that "[a] junior appropriator's water right cannot be exercised until the senior appropriator's right has been satisfied." *Id.* at 81. However, in *Benz*, we did not consider all of the possible applications of criterion (f), and did not address a situation like the one before us now, in which the commission held that the proposed new use would conflict with the *beneficial use* of an existing right, as opposed to just the amount of water available. *Benz* is not directly on point, nor controlling on the issue before us.[12]

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[11] At the time of that decision, the factors were contained in ORS 537.170(5), but the statute has since been amended. *See former* ORS 537.170(5) (1985).

[12] We note that for some types of water use, such as irrigation, it makes sense to consider the quantity of water that is available when determining whether a water right is protected. However, not all water uses are consumptive. *See* ORS 537.170(8)(a) (referring to "highest use of the water for all purposes" including navigation, scenic attraction, and game fishing).

Next, the district contends that the commission incorrectly relied on and misconstrued ORS 537.120 and ORS 537.160(1) in its analysis. The district argues that ORS 537.120 and ORS 537.160(1) are not referenced or incorporated into the public interest analysis required under ORS 537.170(8) and that they do not require the commission to "identify the attributes of existing vested water rights affected by the new appropriation and then examine whether there are the means necessary to protect those attributes." The district interprets the commission's order as the commission stating that those statutes created an additional requirement to the public interest analysis.

We do not understand the commission's order the same way as the district does. As noted above, it is proper to consider related statutes for context when construing the meaning of a statute. In our view, the commission was undertaking its obligation to consider the protection of existing rights within the broader statutory scheme to assure that it was applying ORS 537.170(8)(f) consistently with related statutes. It was considering those statutes for context, which was proper for it to do.

The district also argues that the commission's analysis drastically expands the scope of rights protected by an instream water right beyond that protected by Oregon law. ORS 537.332 contains definitions regarding the statutes pertaining to instream water rights. That statute states, in part:

> "As used in ORS 537.332 to 537.360:
>
> "(1) 'In-stream' means within the natural stream channel or lake bed or place where water naturally flows or occurs.
>
> "(2) 'In-stream flow' means the minimum quantity of water necessary to support the public use requested by an agency.
>
> "(3) 'In-stream water right' means a water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water in-stream for public use. An in-stream water right does not require a diversion or any other means of physical control over the water.

> "(4) 'Public benefit' means a benefit that accrues to the public at large rather than to a person, a small group of persons or to a private enterprise.
>
> "(5) 'Public use' includes but is not limited to:
>
> "* * * * *
>
> "(b) Conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values[.]"

ORS 537.332. Under ORS 537.336(1), ODFW may request a water right certificate "for in-stream water rights on the waters of this state in which there are public uses relating to the conservation, maintenance and enhancement of aquatic and fish life, wildlife and fish and wildlife habitat" and that request "shall be for the quantity of water necessary to support those public uses as recommended by the State Department of Fish and Wildlife." The district argues that an instream water right merely guarantees that the required minimum flows are left instream—and does not entitle the holder to a particular velocity of stream flow, particular stream characteristics, a particular stream channel, or otherwise favorable habitat conditions for fish and wildlife. And as stated above, the district's position is that as long as the flow measured at the lower end meets the flow designated in the certificate, the water right is protected.

WaterWatch argues in response that the right to be protected by statute is not simply the right to a minimum quantity of water at a certain point on the creek. The state similarly argues that the water right certificate protects flows from river mile 0 at the confluence of the Pudding River up to river mile 11, and although the flow is to be measured at the lower end of the stream reach, that is to be done, according to the certificate, "to protect necessary flows *throughout the reach*." (Emphasis added.)

We agree with respondents that the commission did not err in its construction of the relevant statutes or of the certificate. The water right is for the benefit of Oregonians "to maintain water in-stream for public use." ORS 537.332(3). And "public use" here, is "[c]onservation, maintenance and

enhancement of aquatic and fish life, ***, [and] fish and wildlife habitat." ORS 537.332(5)(b). The certificate requires "stream flows for cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing." ORS 537.170(8)(f) requires the commission to consider "[a]ll vested and inchoate rights to the waters of this state *or to the use of the waters* of this state, and the means necessary to protect such rights." (Emphasis added.)

Reading all of those statutory provisions together and taking into consideration the language of the certificate itself, we think it unlikely that the legislature intended that a junior water right would be permitted to frustrate the actual purpose and use of a senior water right. Multiple statutes refer to the use of the waters—not just the quantity. Therefore, we conclude that the commission did not err.

The district also asserts that the commission erred by incorrectly interpreting ORS 537.170(8) by failing to consider all of the public interest factors listed in subsections (a) through (f) and relying only on factor (f). It argues that the commission should have considered all seven factors with and against one another, whether the proposed use would impair or be detrimental to the public interest as a whole. We disagree with the district.

ORS 537.153(2) provides that the rebuttable presumption that a proposed use will not impair or be detrimental to the public interest can be overcome by a preponderance of evidence showing that

> "(b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest under subsection (6) of this section or in a finding of the department that shows:
>
> "(A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
>
> "(B) Specifically how the identified public interest would be impaired or detrimentally affected."

That provision requires the commission to identify *the specific public interest* that would be impaired or detrimentally affected and to explain how *the identified public interest* would be affected. The legislature used the word "the"

with the singular word "interest." A plain reading of that statutory requirement is that only one factor needs to be identified and explained. The commission was permitted to rely on a single factor to decide that the presumption was overcome.[13]

In its fifth assignment of error, the district asserts that the commission improperly shifted the burden of proof to the district to demonstrate an absence of impairment or detriment of the public interest, contrary to ORS 537.153(2). The district bases its contention on a phrase in one of the conclusions reached by the commission:

> "If a portion of the reach is inundated to allow storage of up to 12,000 acre feet of water, *and absent evidence to the contrary*, the Commission concludes that the beneficial purpose of the flows to support the life stages of cutthroat trout is frustrated and the application for the new storage right conflicts with an existing in-stream water right."

(Emphasis added.) The state and WaterWatch argue that the commission did not improperly shift the burden.

We agree with respondents that the commission did not improperly shift the burden of proof. ORS 537.153 creates a rebuttable presumption that a proposed use is in the public interest *if* certain conditions are met; however, under paragraph (2)(b) of that statute, the presumption does not apply here, where the commission determined that the proposed use will impair or be detrimental to the public interest. The presumption was overcome. Once the presumption was overcome, it was the district's burden to prove that the reservoir would not impair or be detrimental to the public interest and that its application should be granted.

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[13] Respondents point out that the commission cited OAR 690-310-0120(5) in its final order. That rule states,

> "If the Department finds that under section (4) of this rule the presumption is overcome, the Department shall issue a final order in accordance with OAR 690-310-0190 denying the application unless the Department makes specific findings to demonstrate that considering all of the public interest factors listed in ORS 537.170(8) the issuance of a permit will not impair or be detrimental to the public interest."

That is, if the commission were going to *grant* an application after determining that the presumption had been overcome, it would be required to consider all of the public interest factors.

In its sixth assignment of error, the district contends that the commission's findings and conclusions that the beneficial purpose of the instream water right will be "frustrated" by the issuance of the water storage permit are not supported by substantial reason. Agencies are "required to demonstrate in their opinions the reasoning that leads the agency from the facts that it has found to the conclusions that it draws from those facts." *Drew v. PSRB*, 322 Or 491, 500, 909 P2d 1211 (1996) (emphases omitted). Here, the district argues that there is no connection between the fact that the district would store 12,000 acre-feet of water annually in an on-channel reservoir and the conclusion that the minimum amounts required to be measured at the lower end of the reach will not be maintained. That argument is premised on its assertion that the commission erred by not basing its public interest analysis on the quantity of water to be measured at the lower end of the stream below the proposed dam. As discussed above, we rejected that argument. We likewise reject this assignment of error.

In its seventh assignment of error, the district asserts that substantial evidence in the record does not demonstrate that the use proposed by the application would impair or be detrimental to the public interest by somehow failing to support the life stages of cutthroat trout. Under ORS 183.482(8)(c), we must set aside or remand the order if we find that "the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." "Our review for substantial evidence does not entail or permit [us] to reweigh or to assess the credibility of the evidence that was presented to the factfinding body. As part of our substantial evidence review, we [also] look at whether the findings provide substantial reason to support the legal conclusion reached by the agency." *WaterWatch of Oregon v. Water Resources Dept.*, 324 Or App 362, 384, 527 P3d 1, *rev den*, 371 Or 332 (2023) (citations and internal quotation marks omitted; second brackets in original).

The district argues that the commission's factual conclusion that the use proposed by the application—an

instream reservoir that would inundate the creek—would frustrate the protection of flows to support the life stages of cutthroat trout is not supported by substantial evidence in the record. The district then points to certain findings that had been made in the director's final order, which were adopted by the commission: (1) Drift Creek's "temperature from mid-June to September is too warm for salmon and trout rearing and migration," and (2) "Drift Creek's water temperature is too warm because of hot weather, reduced summer water flow, and a lack of trees and other vegetation to shade the creek water." The district also points to testimony from its expert that reflected his opinion that the proposed reservoir had the potential to mitigate the primary factor limiting trout-rearing capacity, *i.e.*, decrease the water temperature, and improve habitat for cutthroat trout. The district then asserts that the commission's "conclusion that the proposed reservoir would be detrimental to the public interest cannot be reconciled with the [c]ommission's own factual finding that Drift Creek currently *does not support* key life stages of cutthroat trout during summer months." (Emphasis in original.) The district's argument focuses on certain findings made regarding the limited capacity of Drift Creek in the summer months. Notably, the district does not assign error to any of the findings contained in the commission's final order and does not assert that there is a *lack* of evidence in the record to support the commission's findings and conclusions that inundation of a portion of the creek that is protected by the instream water right will frustrate the beneficial purpose of the flows to support the life stages of cutthroat trout.

The state and WaterWatch both argue that substantial evidence in the record supports the conclusion that inundation of a portion of the 11-mile reach of Drift Creek will defeat the stated purpose of the instream water right.

The director's findings, adopted by the commission, include the following:

- "The following fish have been observed in Drift Creek or are reasonably expected to spawn or rear in the creek: *** Cutthroat Trout ***."

- "There are at least two non-listed fish present in Drift Creek. These include Cutthroat Trout and Coho Salmon. These two species may be impacted by the proposed use."[14]
- "Cutthroat Trout and Coho Salmon are members of the Salmonid family that live in Drift Creek for portions of their lives. Cutthroat Trout and Coho Salmon spawn and rear in Drift Creek."
- "*** Drift Creek's water quality is impacted by a low content of dissolved oxygen. Fish need dissolved oxygen to survive."
- "Four months after recommending to the Department that it approve [the district's] application with conditions, Mr. Murtagh [(the district fish biologist for ODFW)] made the following comments in an email message to a colleague at ODWF:

> '… [B]ased on the stream miles lost due to inundation, I remain very skeptical that they will be able to provide us with appropriate mitigation even if they provide passage as they are going to inundate most of the flowing stretch of stream with the 400-acre reservoir.
>
> '…[C]an we as an agency simply "not support" this project as planned even if they provide mitigation through the waiver process? I think we really stand to lose too much here in terms of function, connectivity, fish and wildlife values etc.'"[15]

In addition to those findings, there was evidence that cutthroat trout had been observed in Drift Creek in the summer months, contrary to the implication in findings relied on by the district. There is an area above the dam site that provides summer cold water refugia and where upstream migration is not blocked by waterfalls or dams. Trout and salmon from lower elevations in the watershed are likely to move into those cool water zones during the hottest part of the summer. There was testimony by Murtagh that

[14] "Non-listed" refers to fish that are not listed as sensitive, threatened, or endangered fish species.

[15] Murtagh never withdrew ODFW's recommendation that the Department grant the district's application with conditions.

cutthroat trout, and other fish, need running water habitats with clean gravel beds for spawning and may need a functioning watershed that provides a rearing area to live in for a period of time. Murtagh explained that cutthroat trout are fluvial migrating fish; they spend part of their life cycle in the lower trunks of rivers, including lower Drift Creek, and in the winter and early spring, move up in order to spawn. Murtagh was concerned about inundation, as expressed in his email above, and testified that if there was no fish passage as part of the dam, seven to ten linear miles of stream would be lost as habitat.[16]

There was testimony that although Drift Creek has degraded habitat, there are some pockets of habitat above the proposed dam site that look to be suitable for the reproduction of native salmonids. Mr. Gowell, a fellowship director with the Native Fish Society, testified that although fish passage is the impact most focused on when looking at impacts to fish from a dam, there are other impacts, such as getting juvenile fish downstream; because of the lack of flow associated with reservoirs, the fish tend to get lost and cannot find the outlet to them. In addition, there can be severe water quality impacts including water temperature modifications, dissolved oxygen, and nutrient changes. Gowell also testified that the transport of sediments and bedload is inhibited; "the flow of a stream typically carries rock, sediment, and other debris downstream, like woody debris or leaf litter; and when you impound water, those sediment and bedload transport processes end up in the bottom of the reservoir instead of being carried downstream into *** the waterway." Gowell explained that those natural processes are what fish have adapted to living with and depend on to complete their life cycles. Gregory Apke, the statewide fish passage program coordinator for ODFW, testified that he is familiar with the stretch of stream that would be upstream from the proposed dam and that there is habitat for native migratory fish up there.[17] Apke also testified that

[16] ODFW's fish passage coordinator testified that it was his understanding that the district planned to seek a waiver of the fish passage requirements rather than build a fish passage structure.

[17] Apke testified that cutthroat trout are native migratory fish.

"[r]eservoirs can be problematic for fish migrating upstream and downstream."

We conclude that there is substantial evidence in the record upon which a reasonable person could find that the proposed reservoir and resulting inundation of the creek would conflict with the habitat needs of cutthroat trout, and the beneficial purpose of the instream water right would be frustrated. For that reason and the additional reasons expressed above, we affirm the commission's final order.

Affirmed.

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

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

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June 14, 2024

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.

End of Document

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.

End of Document

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.

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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.

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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.

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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.

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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.

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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.

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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"].)

***57 C**

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.

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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.

All Citations

38 Cal.4th 839, 135 P.3d 20, 43 Cal.Rptr.3d 771, 06 Cal. Daily Op. Serv. 4709, 2006 Daily Journal D.A.R. 6880

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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.

Wingert Grebing Brubaker & Juskie, Charles R. Grebing and Eric R. Deitz, San Diego, for Defendants and Appellants.

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.

All Citations

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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

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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.

The Future of Pesticides in Western States: The Latest Legal Developments & Trends

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The Deal With Dicamba: Court Vacates Over-the-Top Registration

Brigit Rollins

On February 6, 2024, a federal court in Arizona issued a ruling directing the Environmental Protection Agency ("EPA") to vacate the 2020 registrations allowing over-the-top use of three dicamba-based pesticides, XtendiMax, Engenia, and Tavium. This marks the second time a court has ordered EPA to vacate a dicamba registration, following a ruling from the Ninth Circuit Court of Appeals which overturned the then-current over-the-top dicamba registration in June 2020. While the decision from the Arizona court relies on different legal arguments than the Ninth Circuit's 2020 decision, the outcome is the same. Following the ruling, EPA has issued an order that will enable farmers to use existing stocks of dicamba directly onto crops during the 2024 growing season, but only if the pesticides were "labeled, packaged, and released for shipment" prior to February 6. After 2024, it is unclear whether dicamba will be available for over-the-top use going forward.

Background

The herbicide known as dicamba has been used since the 1960s to target broadleaf plants. In recent years, dicamba has been used to combat weeds that have grown resistant to glyphosate including palmer amaranth, commonly known as pigweed. Prior to 2016, dicamba was primarily used as a pre-emergent, applied to the ground in late winter or early spring before any crops were planted. Dicamba is known for being highly volatile, meaning that it will evaporate into the air and travel off-target. This volatility is the reason why dicamba was historically used as a pre-emergent. However, in late 2016, EPA issued its first ever registration allowing dicamba to be used directly onto crops for the 2017 and 2018 growing seasons. The registration was granted to new, low-volatility forms of dicamba that were intended to be used on soybean and cotton seeds that were genetically modified to be resistant to dicamba.

The decision to approve over-the-top use of dicamba was highly controversial and quickly subject to legal challenge. Environmental plaintiffs filed a lawsuit against EPA claiming that the registration decision violated both the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and the Endangered Species Act ("ESA"). While the lawsuit challenging the 2016 registration was ultimately dismissed by the court after the registration expired, the plaintiffs quickly refiled to challenge the 2018 dicamba registration which EPA had issued to reapprove over-the-top use for another two years. In their challenge to the 2018 registration, the plaintiffs once again claimed that EPA had violated FIFRA and the ESA by failing to ensure that the registration decision met the standards of either statute. Ultimately, the plaintiffs were successful in their challenge and the Ninth Circuit issued a decision directing EPA to vacate the over-the-top dicamba registration for three dicamba-based products, XtendiMax, Engenia, and FeXapan. The decision was issued in June 2020, leaving many farmers with questions and

uncertainty in the middle of the growing season. To learn more about the Ninth Circuit's decision, click here.

Following the Ninth Circuit's 2020 decision, EPA issued a Notice of Cancellation to formally cancel the 2018 dicamba registration. However, months later, EPA issued a new registration re-approving over-the-top use of dicamba for the 2021-2025 growing seasons. The new registration included additional use restrictions that EPA believed would resolve the issues the Ninth Circuit found with the 2018 registration. Once again, the same environmental plaintiffs that challenged the 2016 and 2018 registrations filed suit to challenge the 2020 registration. While the plaintiffs raised the same claims in their latest lawsuit as they had in the previous two challenges, it was the novel arguments made against the 2020 registration decision that ultimately swayed the court.

The Court's Decision

The plaintiffs in ***Ctr. for Biological Diversity v. U.S. Envtl. Agency*, No. 4:20-cv-00555 (D. Ariz. Feb. 6, 2024)** raised various legal challenges against the 2020 over-the-top dicamba registration, claiming that the decision violated FIFRA and the ESA. The plaintiffs also raised procedural challenges, alleging that EPA had failed to follow mandatory notice-and-comment procedure when issuing the registration. Ultimately, the court agreed with the plaintiffs on the procedural arguments and vacated the registration without ever reaching the FIFRA and ESA claims. For an in-depth look at all the arguments raised by the plaintiffs in *Ctr. for Biological Diversity v. U.S. Envtl. Agency*, click here.

In their complaint, the plaintiffs argued that the 2020 over-the-top registration of XtendiMax, Engenia, and Tavium violated mandatory FIFRA notice-and-comment requirements. Specifically, the plaintiffs claimed that by issuing the 2020 registration decision without a period of public comment, EPA had violated FIFRA procedures for issuing a new use of a pesticide, and FIFRA procedures for "uncancelling" a pesticide use that had been formally cancelled.

Under FIFRA, EPA is directed to "publish in the Federal Register, […] a notice of each application for registration of any pesticide if it contains any new active ingredient or *if it would entail a changed use pattern*. The notice shall provide 30 days in which any Federal agency or any other interested person may comment." 7 U.S.C. § 136a(c)(4), (emphasis added). In other words, FIFRA allows EPA to register a changed or new use of an already-registered pesticide after a 30-day period of public comment. In this context, a "new use" is defined as "any additional use pattern that would result in a significant increase in the level of exposure, or a change in the route of exposure, to the active ingredient of man or other organisms." 40 C.F.R. § 152.3. The plaintiffs in *Ctr. for Biological Diversity v. U.S. Envtl. Agency* argued that the 2020 over-the-top dicamba registration was a "new use" registration because at the time it was issued, over-the-top use was not approved for dicamba due to EPA's formal cancellation order. Because the 2020 registration was issued without a period of public comment, the plaintiffs claim that the decision violates FIFRA's process for registering a new use.

In response, EPA claimed that the 2020 registrations were not new use registrations approved under section 136a(c)(4) of FIFRA, but were instead approved under a different FIFRA provision colloquially referred to as the "me-too" provision. Under this "me-too" provision, EPA may register or amend registration of a pesticide which is "identical or substantially similar in composition and labeling to a currently-registered pesticide […] or that would differ in composition and labeling from such currently-registered pesticide only in ways that would not significantly increase the risk of unreasonable adverse effects on the environment[.]" 7 U.S.C. § 136a(c)(3)(B). Under FIFRA, "unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb). Before a pesticide may be registered for use under FIFRA, EPA must determine that when used as intended, the pesticide will not cause any unreasonable adverse effects on the environment. FIFRA's "me-too" registration allows EPA to register a pesticide product, or amend an already registered pesticide label, so long as the new product or amended label is "substantially similar" to a currently registered pesticide and the new product or amended label would not "significantly increase" the risk of unreasonable adverse effects to the environment. EPA argued that the 2020 over-the-top registrations were "me-too" registrations because the Ninth Circuit's decision directed EPA to cancel over-the-top use of XtendiMax, Engenia, and FeXapan. Tavium, though registered for over-the-top use in 2019 for the 2020 growing season, was not included in the Ninth Circuit's decision. EPA claims that the 2020 re-registration of XtendiMax and Engenia were "me-too" registrations because the products were substantially similar to Tavium. Unlike "new use" registrations, "me-too" registrations do not have a notice-and-comment requirement.

Ultimately, the court agreed with the plaintiffs that the 2020 registrations of over-the-top use for XtendiMax and Engenia were "new use" registrations that were subject to notice-and-comment requirements. Crucial to the court's decision was the fact that Tavium itself had been approved for over-the-top use as a "me-too" registration. The 2019 Tavium registration was made pursuant to FIFRA's "me-too" provisions based on the already-registered over-the-top dicamba products XtendiMax and Engenia. According to the court, "EPA erred when it relied on the Tavium 2019 registration, which was premised on these vacated and cancelled XtendiMax and Engenia registrations." The court determined that the 2020 registrations met the definition of "new use" and that EPA should have followed the notice-and-comment requirements for a "new use" registration.

Along with concluding that EPA failed to provide the required notice-and-comment period for registering a new use of a pesticide, the court also concluded that EPA violated FIFRA's requirement to provide a period of notice-and-comment when re-approving a cancelled pesticide use. According to FIFRA's implementing regulations, if EPA would like to re-approve a pesticide registration that "has been finally cancelled or suspended," then the agency must allow "notice and hearing opportunities." 40 C.F.R. § 160.130. The plaintiffs argued that because EPA's 2020 registration decision re-approved a use that had been formally cancelled without a

period of public notice and comment, the registration decision violated FIFRA. The court agreed with the plaintiffs, finding that EPA had twice violated FIFRA's procedural mandates by failing to provide the notice-and-comment period required to registering a new use of a pesticide and to re-approve a cancelled use. For those reasons, the court overturned the 2020 over-the-top registrations of XtendiMax, Engenia, and Tavium. Following that decision, there are no dicamba products with an approved over-the-top use for the 2024 growing season.

Going Forward

On February 14, EPA issued an order to allow existing stocks of XtendiMax, Engenia, and Tavium directly onto crops so long as the pesticides were "labeled, packaged, and released for shipment" prior to the February 6 court decision. The existing stocks order was welcomed by members of the agricultural industry who were concerned that farmers who had already purchased dicamba products for the 2024 growing season would be unable to use what they had already purchased. The order also provides instructions for how to dispose of unwanted or unused dicamba products.

While the existing stocks order helps to clarify requirements for the upcoming growing season, it is unclear what the fate of over-the-top use of dicamba will be going forward. Currently, it is unknown whether EPA will appeal the court's decision, or how successful such an appeal would be. The district of Arizona is part of the Ninth Circuit, so any appeal would bring the question of over-the-top dicamba registration back before a court that has previously vacated a similar registration. It is also unknown whether EPA will look to re-register over-the-top use of dicamba, or what steps the agency would need to take to produce a registration capable of withstanding judicial scrutiny.

At the moment, farmers and pesticide applicators who had intended to make over-the-top applications of dicamba during the 2024 growing season have more questions than answers.

EPA Proposes Vulnerable Species Pilot Project

Brigit Rollins

One June 22, 2023, the Environmental Protection Agency ("EPA") released a draft white paper for its Vulnerable Species Pilot Project ("VSPP"), a central component of the agency's new policy approach to meeting its Endangered Species Act ("ESA") responsibilities when carrying out actions under the Federal Insecticide, Rodenticide, and Fungicide Act ("FIFRA"). While the draft white paper was released earlier this year, the EPA began developing the VSPP in 2021 and announced the program in 2022. The primary purpose of the VSPP is to add new restrictions to pesticide labels in order to limit exposure to species that EPA has found are highly sensitive to pesticides. Although the program has yet to be fully implemented, it is expected that the VSPP will lead to increased restrictions on pesticide applications, and possibly even prohibit applications in some areas all together.

Background

According to the ESA, whenever a federal agency takes an agency action, the agency must consult with either the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") (collectively, "the Services") to ensure that the action will not jeopardize a species listed as threatened or endangered under the ESA. 16 U.S.C. § 1536(a)(2). In this context, an agency action is any activity that a federal agency has "authorized, funded, or carried out[.]" 50 C.F.R. § 402.02. Meanwhile, "jeopardy" refers to an action that is reasonably expected to appreciably reduce the likelihood of the survival of a listed species. 50 C.F.R. § 402.02.

Whenever a federal agency takes an agency action, it must determine whether that action "may affect" a species listed under the ESA. 50 C.F.R. § 402.14. The "may affect" standard is considered a relatively low threshold to clear as it includes any possible impacts the proposed agency action may have on a listed species. If the agency reaches a "may affect" finding, it will then reach out to the Services to determine whether the action is "likely to adversely affect" or "not likely to adversely affect" a listed species. This is considered the first step of the consultation process, often referred to as informal consultation. If the agency reaches a "not likely to adversely affect" finding and the consulting Service agrees, then the consultation process is at an end and the agency may proceed with its action. 50 C.F.R. § 402.14(m)(3). However, if the agency finds that its proposed action is "likely to adversely affect" a listed species, then the agency must initiate formal consultation with the Services. 50 C.F.R. § 402.14. The formal consultation process requires the consulting Service to thoroughly examine the expected impacts the proposed agency action will have on listed species, and culminates in the development of a document known as a Biological Opinion or BiOp. 50 C.F.R. § 402.14(m)(1). Among other things, the BiOp will contain the consulting Service's determination as to whether

the proposed agency action will result in jeopardy to a listed species. 50 C.F.R. § 402.14(h)(1)(iv). If the consulting Service finds that the agency action is likely to result in jeopardy, the BiOp will contain recommended mitigation measures that the agency can adopt to reduce or eliminate the likelihood of jeopardy. 50 C.F.R. § 402.14(h)(2).

EPA is the federal agency responsible for administering FIFRA. In that capacity, EPA takes numerous agency actions every year. Such actions include registering a new pesticide product for use, modifying an already registered pesticide to allow for a new use or new labeling instructions, re-registering a pesticide product, and carrying out pesticide registration review. For each of these activities, FIFRA requires EPA to determine that the action will not cause "unreasonable adverse effects on the environment." 7 U.S.C. §§ 136a(a), (c)(5)(C), (7)(A). FIFRA defines "unreasonable adverse effects on the environment" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide[.]" 7 U.S.C. § 136(bb). Unlike the ESA's "may affect" standard which is a simple yes/no test, the "unreasonable adverse effects" standard is a balancing test that requires EPA to weigh both the costs and benefits of using a pesticide before making a final decision.

While each of the actions EPA takes under FIFRA are recognized as agency actions subject to ESA consultation, until recently EPA has primarily only engaged in ESA consultation when registering new pesticide active ingredients. For all other actions, EPA has relied on FIFRA's "unreasonable adverse effects" standard. This practice has led to a wave of lawsuits, mostly resulting in wins for environmental plaintiffs. Currently, EPA believes that completing all of the ESA consultations for FIFRA actions that are subject to court ordered deadlines would take the agency until at least the 2040s. In an effort to more efficiently meet its ESA obligations, while also crafting pesticide labels more likely to hold up under judicial review, EPA has developed its new ESA-FIFRA Policy.

Vulnerable Species Pilot Program

EPA's new policy for satisfying its ESA responsibilities while carrying out agency actions under FIFRA employs two primary strategies. In a work plan published by EPA in April 2022, and a subsequent update published the following November, EPA outlined the two basic approaches the agency would pursue in an attempt to bring existing pesticide labels into ESA compliance. The first strategy involves dividing registered pesticides into similar groups – herbicides, insecticides, and rodenticides – and then identifying and implementing early mitigation measures intended to reduce the impacts those groups of pesticides have on listed species. Currently, EPA is focusing on creating mitigation measures for herbicides. To learn more about this first strategy and what steps EPA has taken so far, click here.

The second strategy EPA has developed as part of its new policy is the VSPP. Under this approach, EPA will identify threatened and endangered species that are considered highly vulnerable to pesticide use, and develop mitigation measures designed specifically to protect

those species from pesticide exposure. While the VSPP is still in the process of development, a draft plan issued by EPA earlier this year outlines how the agency intends the program to function.

In the draft plan, EPA identified twenty-seven species that serve as the "initial set" of pilot species addressed by the VSPP. According to EPA, these species are considered particularly sensitive to pesticides due to a combination of factors such as small population sizes, limited geographic ranges, and overall general susceptibility to environmental stressors. EPA claims that these species have a higher likelihood of receiving a "jeopardy" determination in future ESA consultations on FIFRA actions. In effort to reduce the possibility of future jeopardy determinations, EPA intends to use the VSPP to introduce "early" mitigation measures across multiple registered pesticides to protect the pilot species. These mitigations will take the form of additional restrictions on pesticide application.

Under the VSPP, EPA is proposing two broad categories of early mitigation measures – avoidance and minimization. Each mitigation is intended to apply broadly to conventional pesticides that are applied outdoors. As the name suggests, avoidance mitigation would involve prohibiting pesticide applications in certain areas, specifically those areas where one of the pilot species is most likely to occur. To identify these areas, EPA is relying on "species-specific location information," primarily the species range and habitat description provided by FWS. For areas subject to avoidance mitigations, all pesticide applications would be prohibited unless the applicator coordinated with FWS at least three months prior to the application.

The other category of mitigation measures identified under the VSPP focuses on minimizing pesticide exposure to the twenty-seven pilot species through additional restrictions on pesticide applications that are designed to minimize pesticide spray drift, runoff, and erosion. Spray drift mitigation measures identified in the draft plan include additional buffer requirements, and prohibitions of certain application methods or droplet sizes. Proposed runoff and erosion mitigation measures include prohibitions on applications when the soil is saturated or when rain is in the forecast, and the requirement of certain land use practices designed to reduce both runoff and erosion such as contour farming, cover cropping, or grassed waterways. When any additional land use practices are required, EPA intends to allow farmers and applicators flexibility in choosing which methods to apply, noting that farmers are the most knowledgeable about the characteristics of their fields.

All of the mitigation measures identified under the VSPP, whether avoidance or minimization, will be geographically specific and based on the areas where the pilot species are located. Because of that, EPA intends to incorporate all VSPP mitigation measures into the applicable pesticide labels through bulletins rather than directly into the general label. All such bulletins will be available through EPA's website Bulletins Live! Two, and any pesticide label that contains a VSPP bulletin will include language directing the applicator to visit the website. Each bulletin will include a description of the relevant mitigation measures and the geographic area where the restrictions apply.

Going Forward

When the draft plan for the VSPP was published in June, a 45-day public comment period was provided. According to EPA, the draft plan received more than 10,000 comments. In November 2023, EPA published a brief update to the VSPP addressing the categories of comments EPA received and outlining modifications EPA plans to make to the VSPP going forward. According to EPA, one of the main themes that emerged in comments on the VSPP draft plan focused on how EPA would identify the geographic areas where VSPP mitigation measures would apply. In response to concerns that EPA would take an overly broad approach, the agency states that it plans to refine the process by which those areas are identified by relying on species habitat maps over habitat descriptions and limiting areas with VSPP restrictions to only include locations that are most important for species conservation. Other modifications EPA intends to make based on the comments it received on the draft plan include clarifying potential exemptions to the VSPP, revisiting how vulnerable species are identified and selected, and developing a consistent approach for the strategies used to reduce pesticide exposure to listed species.

Currently, it is unclear when the VSPP will be fully implemented. In the June draft plan, EPA noted that it would spend the next eighteen months developing mitigation bulletins for the initial set of twenty-seven pilot species and begin posting the bulletins to the Bulletins Live! Two website when they become available. EPA also stated its intention to expand the VSPP to other vulnerable species, although currently the number of species included in the program remains at twenty-seven.

Ultimately, many questions remain as to whether the VSPP satisfies either EPA's ESA or FIFRA responsibilities. It is unclear whether the early mitigations proposed by the VSPP satisfy the ESA's consultation requirements, or meet FIFRA's "unreasonable adverse effects" standards. EPA has stated that it expects to provide further updates to the VSPP by fall 2024. The NALC will continue to follow the VSPP as the program develops.

EPA Draft Herbicide Strategy Open for Comment

Brigit Rollins

October 22, 2023, is the last day to submit comments on the Environmental Protection Agency's ("EPA") Draft Herbicide Strategy Framework to Reduce Exposure of Federally Listed Endangered and Threatened Species and Designated Critical Habitats from the Use of Conventional Agricultural Herbicides ("Draft Herbicide Strategy"). The document is one component of EPA's new policy on how to satisfy its responsibilities under the Endangered Species Act ("ESA") when carrying out actions pursuant to the Federal Insecticide, Fungicide, Rodenticide Act ("FIFRA"). The policy shift comes in part as the result of multiple lawsuits that have been filed against EPA over the past several years by environmental groups claiming that EPA violated the ESA by failing to engage in mandatory consultation when carrying out FIFRA actions. Although the policy is still under development, the Draft Herbicide Strategy is expected to be finalized in 2024.

Endangered Species Act

The U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, "the Services") are responsible for administering the ESA. The Services work to identify species at risk of extinction and then list those species as either "threatened" or "endangered" under the ESA. Once a species is listed, it receives ESA protection. However, the Services are not the only federal agencies tasked with carrying out the ESA. All federal agencies are required to further the purposes and aims of the ESA by consulting with the Services any time they carry out an agency action to ensure that the action will not jeopardize the existence of listed species. 16 U.S.C. § 1536(a)(2).

Under the ESA, an agency action is defined as any activity that a federal agency has "authorized, funded, or carried out[.]" 16 U.S.C. § 1536(a)(2). Examples of activities that would be considered agency actions under the ESA include the promulgation of regulations; granting a license, contract, lease, or permit; or actions that directly or indirectly cause modification to the environment. 50 C.F.R. § 402.02. When a federal agency carries out an agency action, the ESA requires that agency to determine whether the action "may affect" any threatened or endangered species. 50 C.F.R. § 402.14. In general, this is regarded as a very low threshold to clear. According to FWS, a "may affect" finding is appropriate when the proposed action may have consequences to any protected species. If a federal agency finds that its action "may affect" a species listed under the ESA, its next step is to reach out to the Services to determine whether the proposed agency action is likely to adversely affect any listed species. If the action is likely to adversely affect a listed species, then the agency carrying out the proposed action (known as the "action agency") will initiate formal consultation with the Services.

During formal consultation, the Services will prepare a document known as a Biological Opinion or "BiOp." 50 C.F.R. § 402.14(e). The goal of formal consultation is to ensure that the proposed agency action will not jeopardize the continued existence of a listed species. 16 U.S.C. § 1536(a)(2). The ESA defines "jeopardy" as "an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. If the Services find that a proposed agency action will result in jeopardy, then the BiOp will contain a selection of mitigation measures or alternative proposals that will meet the intended purpose of the proposed agency action while avoiding the likelihood of jeopardy. 50 C.F.R. § 402.02. From there, it is up to the action agency to decide how to proceed.

While there are a handful of exceptions to the ESA's consultation requirements, the United States Supreme Court affirmed in *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), that all "actions in which there is discretionary Federal involvement or control" are subject to ESA consultation.

Federal Insecticide, Rodenticide, and Fungicide Act

FIFRA is the primary federal statute regulating the sale and use of pesticide products in the United States. EPA is responsible for administering FIFRA and carrying out numerous agency actions pursuant to the statute.

Under FIFRA, no pesticide product may be legally sold or used in the United States until the EPA has registered a label for that product. 7 U.S.C. § 136a(a). To register a label, EPA must determine that use of the pesticide according to its label instructions will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). FIFRA defines "unreasonable adverse effects on the environment" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb). Unlike the ESA "may affect" standard which serves as a yes/no threshold, FIFRA's "unreasonable adverse effects" standard is a balancing test that requires EPA to weigh all expected impacts of registering the pesticide.

Along with registering new pesticide labels, FIFRA directs EPA to review all registered pesticides once every fifteen years. The registration review process can take multiple years, and may involve issuing an interim decision prior to a final decision. Additionally, EPA may take a variety of other actions under FIFRA such as adding a new use to a previously registered pesticide label, or granting an emergency use. Each of these actions is recognized as an agency action for purposes of the ESA, and is therefore subject to ESA consultation. However, up until recently, EPA has primarily only conducted ESA consultation when registering new pesticide active ingredients. For all other actions, EPA relied on FIFRA's "unreasonable adverse effects" standard. This policy ultimately resulted in numerous lawsuits.

Recent Lawsuits

Over the last several years, EPA has been subject to various lawsuits filed by different environmental groups alleging that EPA has violated the ESA by failing to engage in ESA consultation when taking agency actions under FIFRA. In some cases, such as *Ctr. for Food Safety v. U.S. Envt'l Protection Agency*, No. 1:23-cv-01633 (D. D.C., June 6, 2023), which was filed earlier this year, the plaintiffs challenge the registration of a pesticide without prior ESA consultation. More information on that case is available here. In other cases, such as *Nat. Res. Def. Council v. U.S. Envt'l Prot. Agency*, No. 20-70787 (9th Cir. 2020) and *Rural Coal. v. U.S. Envt'l Prot. Agency*, No. 20-70801 (9th Cir. 2020), the plaintiffs challenged registration review decisions that were issued without consultation. More information on both of those cases is available here. Still other cases, like *Farmworker Ass'n of FL v. Envtl. Protection Agency*, No. 21-1079 (D.C. Cir. 2021) have involved challenges to EPA actions that amend a registered pesticide label by adding a new use without ESA consultation on that specific use. Information on that case is available here.

Many of these cases have ended in court decisions favorable to the plaintiffs. In *Farmworker Ass'n of FL v. Envtl. Protection Agency*, the court found that EPA had failed to undergo ESA consultation when it amended the label for the pesticide aldicarb to allow for use on orange and grapefruit trees in Florida to combat citrus greening disease. There, the court vacated the label and sent it back to EPA for further ESA review. Without the label in place, aldicarb was unavailable for use on citrus trees. In *Ctr. for Food Safety v. Regan*, No. 19-72109 (9th Cir. 2022), the court found that EPA had unlawfully registered the pesticide sulfoxaflor without undergoing ESA consultation. While the court chose to leave the registration in place, it remanded the decision to EPA with a court-ordered timeline to complete consultation. The full decision is available here.

Currently, EPA claims that completing all the ESA consultations for pesticides that are currently subject to court decisions or on-going litigation would take the agency at least until the 2040s and would represent only 5% of EPA's ESA obligations. In an effort to more efficiently meet its ESA obligations and craft stronger pesticide labels, EPA has developed its new ESA-FIFRA policy.

Draft Herbicide Strategy

EPA's new policy on how to meet its ESA obligations while taking agency action under FIFRA contains a variety of different strategies. In a work plan published by EPA in April 2022, and a subsequent update published the following November, EPA outlined two overall strategies that it would pursue in an effort to bring existing pesticide labels into ESA compliance. The first strategy involves breaking out registered pesticides into similar groups – herbicides, insecticides, and rodenticides – and then identifying and implementing early ESA mitigation measures for those groups. The second strategy involves identifying threatened and endangered species that are considered highly vulnerable to pesticides, and developing mitigation measures to protect those species from pesticide exposure. While several of these approaches are still in the planning stage, EPA has made its Draft Herbicide Strategy available

for public comment, and expects to finalize and begin implementing this part of its ESA-FIFRA policy in 2024.

Under the Draft Herbicide Strategy, EPA has identified two primary categories of mitigation measures that it expects to include on herbicide labels. The first category of mitigation measures will be targeted at reducing pesticide spray drift, while the second category will focus on reducing pesticide runoff and erosion. According to EPA, these are two of the most common ways that threatened and endangered species are exposed to herbicides. Reducing exposure is expected to reduce the likelihood that future ESA consultations will result in a finding that FIFRA actions will jeopardize the existence of listed species.

The Draft Herbicide Strategy identifies buffers in the form of windbreaks or hedgerows, hooded sprayers, and application rate reductions as mitigation measures to reduce spray drift. To reduce runoff and erosion, the Draft Herbicide Strategy identified a variety of mitigation measures, including restrictions on applications if rain is in the forecast; restrictions based on field characteristics such as soil make up and field slope; methods of application; in-field management activities designed to reduce runoff such as mulch amendment or terrace farming; management activities adjacent to sprayed fields such as establishing a buffer strip; and other activities aimed at increasing water retention. For the mitigation measures for runoff and erosion, EPA is also proposing a point-based system designed to give farmers more control over which measures to implement. Each of the previously mentioned mitigation measures would be assigned a point value based on how effective the measure is at reducing runoff or erosion. Pesticide labels will identify how many points are necessary for the pesticide's intended use. From there, farmers can implement the mitigation measures that work best for them to achieve the number of points needed to apply the pesticide. Importantly, the Draft Herbicide Strategy notes that activities farmers are already taking to reduce runoff or erosion may be used to satisfy the point system. Currently, EPA does not appear to be recommending a similar system for implementing spray drift mitigation measures.

According to the Draft Herbicide Strategy, the proposed mitigation measures will be incorporated into pesticide labels in two primary ways. Mitigation measures that EPA finds are necessary across the contiguous 48 states will be directly included as part of the pesticide label. However, some mitigation measures are only needed in specific geographic areas. For those measures, EPA expects to increase its use of the website Bulletins Live Two ("BLT"). BLT is a website run by EPA that provides geographic-specific updates to pesticide labels. For example, if EPA determines that mitigation measures are needed to reduce runoff of a particular pesticide in the Pacific Northwest region of the country to prevent exposure to listed species only found in that area, instead of adding additional language to the pesticide label, it would direct applicators to check the BLT website. There, EPA would have language addressing geographic-specific restrictions. According to the Draft Herbicide Strategy, EPA intends to make greater use of BLT as it begins implementing its new policy, and will include additional language on pesticide labels directing applicators to check BLT prior to application.

Going Forward

The Draft Herbicide Strategy represents only one aspect of EPA's new ESA-FIFRA policy. As roll out and implementation of this policy continues, farmers and pesticide applicators can expect to see additional application restrictions included on pesticide labels. As previously mentioned, some of the restrictions will be included in the labels themselves, while others will be available on the BLT website. It is currently unclear how quickly these label changes will be made. EPA's work plans and the Draft Herbicide Strategy suggest that these mitigation measures will be incorporated into labels as they come before EPA for registration and registration review.

The comment period on the Draft Herbicide Strategy will close on October 22, 2023 with a final draft expected next year. EPA also intends to release a draft of its insecticide strategy in 2024, along with drafts of the strategies aimed at protecting vulnerable species. While it is still too early to know what the ultimate outcome of this new policy will be, the Draft Herbicide Strategy offers an informative look at what is to come.

ACCELERATING

SUSTAINABLE PEST MANAGEMENT: EXECUTIVE SUMMARY

A ROADMAP FOR CALIFORNIA

DEVELOPED BY:

Members of the Sustainable Pest Management Work Group and Urban Subgroup

IN COLLABORATION WITH:

California Department of Pesticide Regulation

California Department of Food and Agriculture

California Environmental Protection Agency

FACILITATED BY:

Ag Innovations

PUBLISHED:

January 2023

THE SPM WORK GROUP AND URBAN SUBGROUP

ORIGIN

While much progress has been made in recent decades by a wide range of entities to transition to safer and more sustainable pest management practices, more work is clearly needed. Despite California's strict regulatory system and robust risk assessment process, there are still chemical tools in use that can cause harm to humans and the environment. The California Department of Pesticide Regulation (DPR), the California Environmental Protection Agency (CalEPA), and California Department of Food and Agriculture (CDFA) launched the Sustainable Pest Management (SPM) Work Group, as part of the State of California's commitment to accelerating the transition away from high-risk pesticides[1] toward adoption of safer, sustainable pest control practices.

SPM WORK GROUP

Twenty-nine leaders representing diverse interests were charged with aligning on a pathway to minimize reliance on the use of toxic pesticides and promote solutions that protect health and safety, are agronomically and economically sound, eliminate racial and other disparities, and engage, educate, and promote collaboration toward safe, sustainable pest management practices in production agriculture.

URBAN SUBGROUP

While most people associate pesticide use with agricultural settings, there is significant use and impact in urban settings. Based on limited current data, nonagricultural uses account for between 35-55 percent of pesticide sales (pounds sold), 16-19 percent of reported pesticide use (pounds applied primarily by licensed applicators), and 65-75 percent of reported pesticide-related illnesses.[2] DPR invited nine leaders to collaboratively develop guidance on where and how to focus DPR resources, as well as other recommendations for ways that DPR and other entities might support urban sustainable pest management in California.

APPROACH

The SPM Work Group and Urban Subgroup developed this report "Accelerating Sustainable Pest Management: A Roadmap for California," hereafter referred to as simply the "Roadmap," through focus groups, learning journeys, a systems assessment, stakeholder feedback, and months of dialogue. Leaders representing a wide range of interests in the system, including production agriculture, farmworker and rural communities, Tribes, urban communities, socially disadvantaged and historically marginalized communities, the pest control sector, chemical input companies, government, supply chain companies, academia, environmental sciences, public health, and technical assistance, were asked to think holistically and work collaboratively in developing a roadmap that would advance pest management in California.

1 The SPM Work Group and Urban Subgroup define "high-risk pesticides" as active ingredients that are highly hazardous and/or formulations or uses that pose a likelihood of, or are known to cause, significant or widespread human and/or ecological impacts from their use.

2 Ranges provided by DPR for the four most recent years of data available through the pesticide mill reporting (2018-2021), pesticide use reporting (2018-2021), and pesticide illness surveillance program (2016-2019).

SPM: AN OVERVIEW

Sustainable pest management (SPM) is a process of continual improvement that integrates an array of practices and products aimed at creating healthy, resilient ecosystems, farms, communities, cities, landscapes, homes, and gardens. SPM examines the interconnectedness of pest pressures, ecosystem health, and human wellbeing. SPM asks each of us to become an active participant and an informed steward in the effort to enhance a healthy, thriving California.

WHAT IS SPM?

Sustainable Pest Management (SPM) is a holistic, whole-system approach applicable in agricultural and other managed ecosystems and urban and rural communities that builds on the concept of integrated pest management (IPM) to include the wider context of the **three sustainability pillars ▸**

SPM is an evolution of the IPM concept, which the University of California Statewide Integrated Pest Management Program (UC IPM) defines as an ecosystem-based strategy that focuses on long-term prevention of pests or their damage through a combination of techniques such as biological control, habitat manipulation, modification of cultural practices, and use of resistant varieties. Pesticides are used only after monitoring indicates they are needed according to established guidelines, and treatments are made with the goal of removing only the target organism. Pest control materials are selected and applied in a manner that minimizes risks to human health, beneficial and nontarget organisms, and the environment.

Like IPM, SPM guides pest management decisions, and includes a wide range of tools and approaches. SPM goes beyond a checklist of practices or products to address: **1. Impacts on communities, and equity, 2. Linkages to broader environmental issues such as water conservation, biodiversity conservation, soil health, and climate impact, 3. A broader consideration of economic benefits and impacts.**

OUR NORTH STAR

By 2050, pest management approaches in both agricultural and urban contexts in California will promote human health and safety, ecosystem resilience, agricultural sustainability, community wellbeing, and economic vitality. The implementation of these approaches will help steward the state's natural and cultural resources, enabling healthy lives for all and an abundant, healthy food supply for future generations.

We believe that by implementing the Roadmap's recommendations, California will be able to achieve the following goals by 2050.

2050 GOALS FOR CALIFORNIA PEST MANAGEMENT

1

BY 2050...

California has eliminated the use of Priority Pesticides by transitioning to sustainable pest management practices.

2

BY 2050...

Sustainable pest management has been adopted as the de facto pest management system in California.

A priority outcome of these 2050 goals is the elimination of the adverse human health and environmental impacts associated with pesticide use.

KEYSTONE ACTIONS

The following are the Work Group and Urban Subgroup's keystone actions - those that are urgent and foundational to the success of our collective efforts towards safer, sustainable pest management:

A **Prioritize Prevention**

Strengthen California's commitment to pest prevention by proactively preventing the establishment of new invasive pest species, and by proactively eliminating pest-conducive conditions both in agricultural and urban settings.

B **Coordinate State-Level Leadership**

Create an accountable and connected leadership structure to champion SPM in the field, effectively embed SPM principles across agencies, and improve coordination.

C **Invest in Building SPM Knowledge**

Significantly invest in SPM-focused research and outreach so that all pest management practitioners have equal and adequate access to the support and resources necessary to develop and implement their own SPM system.

▶ **IN AGRICULTURAL PEST MANAGEMENT:**

Secure a significant increase in SPM-trained technical advisors and funding for SPM multi-directional research and outreach.

▶ **IN URBAN PEST MANAGEMENT:**

Expand funding and infrastructure for urban SPM research, innovation, and outreach to align with and reflect the volume and impacts of pesticides used in urban contexts.

D **Improve California's Pesticide Registration Processes and Bring Alternative Products to Market**

Create mechanisms to improve DPR's registration review process and to prioritize and expedite safer, more sustainable alternative products to high-risk pesticides, and improve processes for evaluating currently registered pesticides.

E **Enhance Monitoring and Data Collection**

Significantly expand and fully fund health & environmental monitoring infrastructure, data collection, and interpretation.

PRIORITY PESTICIDES

"Priority Pesticides," which we are intentionally capitalizing, refer to pesticide products, active ingredients, and groups of related products within the context of specific product uses or pest/location use combinations that have been deemed to be of greatest concern and warrant heightened attention, planning, and support to expedite their replacement and eventual elimination. The criteria for classifying pesticides as "Priority Pesticides" includes, but is not limited to hazard and risk classifications,[3] availability of effective alternative products or practices,[4] and special consideration of pest management situations that potentially cause severe or widespread adverse impacts. The identification of these Priority Pesticides will be conducted by DPR under advisement of the multistakeholder Sustainable Pest Management Priorities Advisory Committee. Priority Pesticides are a subset of high-risk pesticides. We define "high risk" pesticides as active ingredients that are highly hazardous and/or formulations or uses that pose a likelihood of, or are known to cause, significant or widespread human and/or ecological impacts from their use.

LEVERAGE POINTS

The keystone actions above are part of a complete and interconnected set of recommendations developed by the SPM Work Group and Urban Subgroup, which fall into the following leverage points in the system–places where sustained and focused effort lead to outsize effect in moving the system toward a greater state of health.

TO ACHIEVE AGRICULTURAL AND URBAN SPM

1. Update California's pest prevention, exclusion and mitigation systems.
2. Improve California's pesticide registration and continuous evaluation.
3. Strengthen coordinated SPM leadership structures.

TO ACHIEVE AGRICULTURAL SPM

4. Enhance knowledge, research, and technical assistance.
5. Align pest control advisors with SPM.
6. Reduce economic risk for growers transitioning to SPM.
7. Activate markets to drive SPM.

TO ACHIEVE URBAN SPM

8. Enhance data and information collection for urban pesticide use.
9. Advance research and outreach on urban pest management issues.
10. Make SPM the preferred choice for both licensed and unlicensed users.
11. Refocus urban design, building codes, and regulations to enhance pest prevention.

3 Including but not limited to California classifications of groundwater contaminants, toxic air contaminants, and restricted products as well as carcinogens, endocrine disruptors, reproductive and developmental toxicants, and environmental toxicants, such as those toxic to non-target pollinators, mammals, birds, and fish.

4 Consideration of alternative products or consideration of the availability of multiple techniques and products to prevent resistance development and when the product under review has no viable alternatives. Viability includes but is not limited to the variables of efficacy, affordability, and availability. Preventive practices include methods of biological and cultural ecosystem management that minimize pest problems and the need for pest control.

WHAT'S NEXT

By 2025, as a first step in implementing these priorities, the SPM Work Group and Urban Subgroup call on the state to develop a plan, funding mechanisms, and programs to prioritize pesticides for reduction, and to support the practice change necessary to transition away from the use of high-risk pesticides in agricultural and nonagricultural settings.

No one recommendation—or even one leverage point—will, on its own, bring about systemic change. To meet the 2050 goals, the full breadth of the Roadmap must be implemented. In addition, the Roadmap recommendations can only be effectively implemented if the entire system is working together to create the conditions necessary for these outcomes to be realized. Please join us in making this bold vision a reality!

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IN FOCUS

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Farm Bill Primer: What Is the Farm Bill?

The farm bill is an omnibus, multiyear law that governs an array of agricultural and food programs. It provides an opportunity for policymakers to comprehensively and periodically address agricultural and food issues. In addition to developing and enacting farm legislation, Congress is involved in overseeing its implementation. The farm bill typically is renewed about every five years. Since the 1930s, Congress has enacted 18 farm bills.

Farm bills traditionally have focused on farm commodity program support for a handful of staple commodities—corn, soybeans, wheat, cotton, rice, peanuts, dairy, and sugar. Farm bills have become increasingly expansive in nature since 1973, when a nutrition title was first included. Other prominent additions since then include horticulture and bioenergy titles and expansion of conservation, research, and rural development titles.

Without reauthorization, some farm bill programs expire, such as the nutrition assistance and farm commodity support programs. Other programs have permanent authority and do not need reauthorization (e.g., crop insurance) and are included in a farm bill to make policy changes or achieve budgetary goals. The farm bill extends authorizations of discretionary programs. The farm bill also suspends long-abandoned permanent laws for certain farm commodity programs from the 1940s that used supply controls and price regimes that would be costly if restored.

The omnibus nature of the farm bill can create broad coalitions of support among sometimes conflicting interests for policies that individually might have greater difficulty achieving majority support in the legislative process. In recent years, more stakeholders have become involved in the debate on farm bills, including national farm groups; commodity associations; state organizations; nutrition and public health officials; and advocacy groups representing conservation, recreation, rural development, faith-based interests, local food systems, and organic production. These factors can contribute to increased interest in the allocation of funds provided in a farm bill.

What Is in the 2018 Farm Bill?

The Agriculture Improvement Act of 2018 (2018 farm bill; P.L. 115-334, H.Rept. 115-1072) was the most recent omnibus farm bill. It contained 12 titles (see **text box**). In November 2023, Congress enacted a one-year extension to cover FY2024 and crop year 2024 (P.L. 118-22, Division B, §102). Provisions in the 2018 farm bill modified some of the farm commodity programs, expanded crop insurance, amended conservation programs, reauthorized and revised nutrition assistance, and extended authority to appropriate funds for many U.S. Department of Agriculture (USDA) discretionary programs. The 2018 farm bill, as extended, begins expiring at the end of FY2024.

Titles of the Farm Bill (P.L. 115-334)

Title I, Commodities: Provides support for major commodity crops, including wheat, corn, soybeans, peanuts, rice, dairy, and sugar, as well as disaster assistance.

Title II, Conservation: Encourages environmental stewardship of farmlands and improved management through land retirement programs, working lands programs, or both.

Title III, Trade: Supports U.S. agricultural export programs and international food assistance programs.

Title IV, Nutrition: Provides nutrition assistance for low-income households through programs, including the Supplemental Nutrition Assistance Program (SNAP).

Title V, Credit: Offers direct government loans and guarantees to producers to buy land and operate farms and ranches.

Title VI, Rural Development: Supports rural housing, community facilities, business, and utility programs through grants, loans, and guarantees.

Title VII, Research, Extension, and Related Matters: Supports agricultural research and extension programs to expand academic knowledge and help producers be more productive.

Title VIII, Forestry: Supports forestry management programs run by USDA's Forest Service.

Title IX, Energy: Encourages the development of farm and community renewable energy systems through various programs, including grants and loan guarantees.

Title X, Horticulture: Supports the production of specialty crops, USDA-certified organic foods, and locally produced foods and authorizes a regulatory framework for industrial hemp.

Title XI, Crop Insurance: Enhances risk management through the permanently authorized Federal Crop Insurance Program.

Title XII, Miscellaneous: Includes programs and assistance for livestock and poultry production, support for beginning farmers and ranchers, and other miscellaneous and general provisions.

What Was the Estimated Cost in 2018?

Farm bills authorize programs in two spending categories: mandatory and discretionary. While both types of programs are important, mandatory programs usually dominate the farm bill debate. Programs with mandatory spending generally operate as entitlements. The farm bill provides mandatory funding for programs based on multiyear budget estimates (*baseline*). Programs authorized for discretionary funding are not funded in the farm bill and wait for future appropriations action.

Farm bills have both 5-year and 10-year budget projections. The 10-year score for the 2018 farm bill was budget

neutral, and program outlays were projected to be $867 billion over FY2019-FY2028 (**Table 1**). Four titles accounted for 99% of the 2018 farm bill's mandatory spending: nutrition (primarily SNAP), commodities, crop insurance, and conservation. Programs in all other farm bill titles accounted for about 1% of mandatory outlays and receive mostly discretionary (appropriated) funds.

Table 1. Budget for the 2018 Farm Bill and the Baseline in February 2024 for Farm Bill Programs
(million dollars, 10-year mandatory outlays)

Titles	2018 Farm Bill at Enactment FY2019-FY2028 ($ millions)	Baseline as of February 2024 FY2025-FY2034 ($ millions)
Commodities	61,414	61,510
Conservation	59,748	57,919
Trade	4,094	4,990
Nutrition	663,828	1,147,727
Credit	-4,558	a/
Rural Development	-2,362	a/
Research	1,219	1,300
Forestry	10	a/
Energy	737	500
Horticulture	2,047	2,100
Crop Insurance	77,933	123,999
Miscellaneous	3,091	800
Total	**867,200**	**1,400,845**

Sources: CRS using CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*; and CRS analysis of the Congressional Budget Office (CBO) February 2024 baseline at https://www.cbo.gov/about/products/baseline-projections-selected-programs, for the five largest titles and amounts in law for programs in other titles.

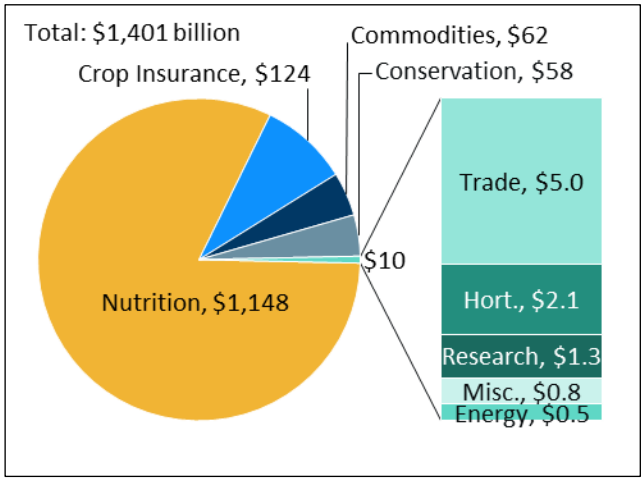
Notes: a/ = Baseline for the credit title is likely negative indicating payments into the Farm Credit System Insurance fund. The rural development title has no current programs with baseline. Baseline for the forestry title is $10 million or less.

What Is the Current Farm Bill Budget?

The CBO baseline represents budget authority and is a projection at a particular point in time of what future federal spending on mandatory programs would be assuming current law continues. It is the benchmark against which proposed changes in law are measured. Having a baseline provides projected future funding if policymakers decide that programs are to continue.

CBO released a scoring baseline for the 2023 legislative session in May 2023. It may remain the scoring baseline until CBO releases another baseline in spring 2024, at the discretion of the Budget Committees. The February 2024 baseline indicates resources that may be in a new scoring baseline. CRS used this projection for the major farm bill programs, and funding indicated in law for other farm bill programs that are not included in the annual projection, to estimate a budget availability in farm bill programs of $682 billion over 5 years (FY2025-FY2029) and $1,401 billion over 10 years (FY2025-FY2034) (**Figure 1**).

Figure 1. Baseline for Farm Bill Programs, by Title
(billion dollars, 10-year mandatory outlays, FY2025-FY2034)



Source: CRS using the CBO February 2024 baseline for the five largest titles and amounts in law for programs in other titles.

The relative proportions of farm bill spending have shifted over time. In the 2024 projection, the nutrition title is 82% of the baseline, compared with about 76% when the 2018 farm bill was enacted. Sharp increases in the nutrition title reflect pandemic assistance and administrative adjustments to SNAP benefit calculations. For non-nutrition programs, baseline amounts in 2024 are greater than when the 2018 farm bill was enacted ($253 billion over 10 years as of 2024 compared with $210 billion over 10 years in 2018).

Supplemental spending is not part of the baseline but may be important because of its size in recent years. In FY2019 and FY2020, the Trump Administration increased outlays by over $25 billion to producers affected by retaliatory tariffs. From FY2020 to FY2022, Congress and the White House provided over $30 billion of supplemental pandemic assistance to farms and over $60 billion for nutrition. In addition, P.L. 117-169 (the Inflation Reduction Act of 2022) added over $17 billion in outlays for programs in the farm bill's conservation and energy titles. Since 2018, Congress has authorized more than $19 billion of ad hoc disaster assistance for agricultural losses. In 2023, the Biden Administration announced $2 billion from its authority for trade promotion and food aid. Congress may address farm bill programs in light of this funding.

Information in Selected CRS Reports

CRS In Focus IF12233, *Farm Bill Primer: Budget Dynamics*

CRS In Focus IF12115, *Farm Bill Primer: Programs Without Baseline Beyond FY2024*

CRS Report R47659, *Expiration of the 2018 Farm Bill and Extension in 2024*

CRS Report R45210, *Farm Bills: Major Legislative Actions, 1965-2023*

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IN FOCUS

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Farm Bill Primer: Forestry Title

Forest management generally, as well as forest research and forestry assistance, is within the jurisdiction of the agriculture committees in Congress. Although most forestry programs are permanently authorized, forestry often is addressed in the periodic farm bills to reauthorize many agriculture programs. Five of the past six farm bills included a separate forestry title, including the most recent farm bill, Title VIII of the Agricultural Improvement Act of 2018 (P.L. 115-334; the 2018 farm bill). In November 2023, Congress enacted a one-year extension of P.L. 115-334 to cover FY2024 and crop year 2024 (P.L. 118-22, Division B, §102). This In Focus summarizes some of the forestry provisions addressed in the 2018 farm bill and issues Congress may debate in future farm bills.

Forestry in the United States

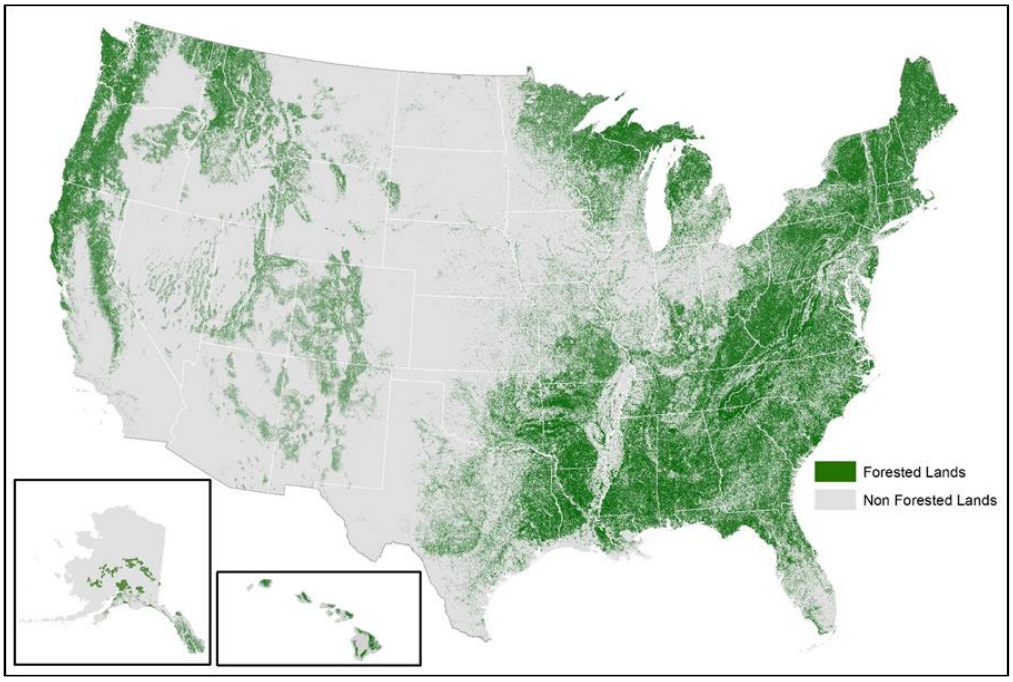
One-third of the land area in the United States is forestland (765 million acres; see **Figure 1**). These lands provide ecological services, including air and water resources; fish and wildlife habitat; opportunities for recreation and cultural use; and timber resources for lumber, plywood, paper, and other materials, among other uses and benefits.

Most forestland in the United States is privately owned (444 million acres, or 58%). Nonindustrial private landowners (i.e., private, noncorporate entities that do not own wood-processing facilities) own 288 million acres; private corporate landowners (e.g., timber investment trusts) own the remaining 156 million acres. The federal government owns 238 million acres of forestland, and states and other public entities own 84 million acres of forestland.

The federal government engages in four types of forestry activities: managing federal forests; providing financial, technical, or other resources to promote forest ownership and stewardship and the forest products industry generally (referred to as *forestry assistance*); sponsoring or conducting research to advance the science of forestry; and engaging in international forestry assistance and research.

The Forest Service (FS, within the U.S. Department of Agriculture) is the principal federal forest management agency. In addition to administering most forestry assistance programs, conducting forestry research, and leading U.S. international forestry assistance and research efforts, FS also is responsible for managing 19% of all U.S. forestlands (145 million acres) as part of the National Forest System (NFS). Many of FS's land management, assistance, and research programs have permanent authorities and receive appropriations annually through the discretionary appropriations process. Other federal agencies also manage forestlands, including the Department of the Interior's Bureau of Land Management, National Park Service, and Fish and Wildlife Service.

Figure 1. Forest Cover Across the United States



Source: Congressional Research Service, using data from the U.S. Forest Service and the State of Alaska.
Note: The conterminous United States, Alaska, and Hawaii are presented at different scales.

Forestry in the 2018 Farm Bill

Title VIII of the 2018 farm bill repealed, modified, reauthorized, and created several forestry research, assistance, and federal land management programs.

- **Research.** The forestry title of the 2018 farm bill modified one and repealed several forestry research programs, including repealing a grant program to support minority and female students studying forestry and a project demonstrating wood bioenergy.

- **Assistance.** The 2018 farm bill repealed, modified, and reauthorized some forestry assistance programs. This included providing explicit statutory authorization and congressional direction for programs that had been operating under existing but broad authorization, such as the Landscape Scale Restoration Program. The law also established, reauthorized, and modified assistance programs to promote wood innovation for energy use, building construction, and other purposes to facilitate the removal of forest biomass on both federal and nonfederal lands and to mitigate wildfire risk.

- **Federal Forest Management.** The 2018 farm bill included provisions related to federal and tribal forest management, such as provisions modifying planning requirements; establishing two watershed protection programs; expanding the availability of agreements to perform cross-boundary projects; reauthorizing and extending the Collaborative Forest Landscape Restoration Program; and adding or modifying FS's authorities to lease, sell, or exchange NFS lands.

Forestry-related provisions also were included in other 2018 farm bill titles. For example, the Conservation (Title II), Research (Title VII), Energy (Title IX), and Miscellaneous (Title XII) titles each contained provisions related to forestry or forest ownership.

Considerations for a Future Farm Bill

Congress may use a future farm bill to modify existing programs or funding authorizations, or to establish new options for forestry research, assistance to nonfederal forest owners, and management of federal forestlands. In addition, Congress may use a new farm bill to address any unforeseen issues with provisions enacted in the Infrastructure Investment and Jobs Act (IIJA; P.L. 117-58). The IIJA authorized, provided program direction, and appropriated funding for several FS assistance and research programs and activities. Alternatively, Congress may elect not to address forestry issues in a new farm bill if, for example, Congress determines existing authorities and programs adequately address the nation's forestry needs.

Congress also could use a new farm bill to address any concerns related to forest health management generally on both federal and nonfederal lands. For example, this could include programs to reduce the risk of catastrophic disturbance events, such as an uncharacteristically severe wildfire or insect or disease infestations. For nonfederal forests, this may include establishing or modifying assistance programs to enhance wildfire protection, preparedness, and forest resiliency. For federal forests, this may involve establishing new authorities or expanding existing authorities to reduce the accumulation of vegetation—often referred to as *hazardous fuels reduction*—or other forest restoration activities.

Because many forest risks span multiple ownership boundaries, Congress may use a future farm bill to consider new approaches to expand or facilitate cross-boundary forest management activities. This could be done by authorizing and/or incentivizing various federal and nonfederal partnerships and collaborations. In contrast, Congress may want to restrict those activities, for example, to target more specific concerns or areas.

Congress also may use a new farm bill to continue facilitating the development or advancement of wood products. In previous farm bills, and in other legislation, Congress established several programs to promote new markets and uses for woody biomass, in part to encourage forest restoration and reduce wildfire threats. A new farm bill might extend, expand, alter, or terminate these programs or could replace them with alternative approaches.

Forests have the potential to mitigate climate risk but also may be impacted by changing climatic conditions. Forests sequester and store large amounts of carbon and have the potential to mitigate future greenhouse-gas emissions. The effects of changing climatic conditions on forests is uncertain but include potential impacts to the range and distribution of tree species, changes in wildland fire behavior, and uncertainties related to future carbon sequestration potential, among others.

To address some of the uncertainties regarding climate impacts to forest management, Congress may consider using a new farm bill to modify existing research programs or establish new ones, domestically and internationally. Additionally, Congress could use a new farm bill to establish programs to increase or optimize carbon sequestration on both federal and nonfederal lands, through market or nonmarket mechanisms. Relatedly, Congress may consider modifying the amount or type of resources invested in forest inventorying and monitoring, which could provide benefits related to the establishment and implementation of programs to promote forest carbon sequestration. In particular, advancements in forest carbon lifecycle accounting may improve understanding of the carbon footprint of wood products relative to other products.

Related CRS Reports

CRS Report R45219, *Forest Service Assistance Programs*.

CRS Report R46976, *U.S. Forest Ownership and Management: Background and Issues for Congress*

CRS Report R45696, *Forest Management Provisions Enacted in the 115th Congress*

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Legal Sidebar

Federal Land Management: When "Multiple Use" and "Sustained Yield" Diverge

June 21, 2023

The Federal Land Policy and Management Act (FLPMA) has provided the framework for federal management of public lands since 1976. Among other things, FLPMA instructs the Secretary of the Interior (Secretary) to manage public lands "under principles of multiple use and sustained yield." This Legal Sidebar explains a potential change that the Bureau of Land Management (BLM), an agency within the Department of the Interior tasked with management of federal lands, has proposed in how it implements the dual mandate of multiple use/sustained yield on federal lands.

The Supreme Court has described "multiple use management" as "a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." Because FLPMA includes more than 200 million acres in its definition of *public lands*, many parties have significant interests in the interpretation and application of this short phrase *multiple use and sustained yield*.

Understanding the meaning of that phrase starts with FLPMA itself. The statute envisions management that balances the use of the resources of public lands with the preservation of those resources for future generations. It defines *sustained yield* as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." FLMPA offers a more detailed definition of *multiple use* that obliges BLM to manage the lands under its purview "so that they are utilized in the combination that will best meet the present and future needs of the American people," allowing for periodic adjustments "to conform to changing needs and conditions" and taking into account "the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." It also requires "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output."

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These statutory definitions create some obligations and constraints for BLM's land management policies, but they also allow the agency some latitude to interpret the subjective concepts found in these statutory definitions as it sees fit. Federal case law has interpreted multiple use/sustained yield obligations in the context of FLPMA and in the related Multiple-Use Sustained-Yield Act of 1960, which sets forth management principles for national forests administered by the U.S. Forest Service. That case law suggests that the courts will be deferential to agency evaluations and interpretations related to land management, particularly where those decisions are informed by technical expertise. One court noted that the multiple use/sustained yield and related obligations in the act "breathe discretion at every pore."

To date, BLM has not made a comprehensive attempt to explain how it interprets its authority and obligations under FLPMA's multiple use and sustained yield principles. The phrases *multiple use* and *sustained yield* barely appear in BLM's FLPMA promulgated regulations, although BLM's forest management regulations include a framework for "sustained-yield forest units" in certain regions in accordance with FLMPA and other statutory obligations. Instead, BLM's interpretation of its multiple use and sustained yield goals must be inferred from its decisions on a case-by-case basis. BLM has promulgated a variety of manuals, handbooks, and memoranda to guide staff and stakeholders in particular decisions, but those sources often refer to multiple use and sustained yield principles in the abstract rather than providing details about implementation. For example, BLM's handbook on "Land Use Planning" provides that agency plans should be crafted "under the principles of multiple use and sustained yield."

On March 30, 2023, BLM took a step to define more explicitly how it will balance the competing goals of multiple use and sustained yield principles, issuing a proposed rule to amend its regulations to prioritize healthy ecosystems. The text of the proposed rules focuses on the "sustained yield" aspect of BLM's obligation, noting that it is imperative that the agency "steward public lands to maintain functioning and productive ecosystems and work to ensure their resilience." By *resilience*, the agency means that "ecosystems and their components can absorb, or recover from, the effects of disturbances and environmental change."

The proposed rule focuses on the protection, resilience, and restoration of public lands, framing the conservation policies contained in the proposed rule as necessary to allow BLM to "effectively manage for multiple use and sustained yield in the long term." BLM highlights three tools for protecting resilience: protection of intact native habitats, restoration of degraded habitats, and informed decisionmaking—particularly with respect to plans, programs, and permits.

The proposed rule would create a new regulatory framework to allow the agency to focus land management practices that protect this resilience. FLMPA directs BLM to adopt Land Use Plans for tracts or areas under its purview and to ensure that management decisions about particular projects or actions conform to those plans. This proposed rule would apply a "fundamentals of land health" analysis, which is currently used on grazing areas, to all BLM lands. It would also amend and codify the process for designation of "areas of critical environmental concern" (ACECs). The latter change includes a requirement that the agency consider "ecosystem resilience, landscape-level needs, and rapidly changing landscape conditions" in ACEC designation and management considerations. These new types of analysis and area designations would be incorporated into its management plans to guide project-level decisionmaking.

Perhaps the most significant change proposed in the rule is the creation of "conservation leases," a proposed new program that would allow BLM to issue leases on federal lands "for the purpose of pursuing ecosystem resilience through mitigation and restoration." Details on this proposal are sparse, as BLM is soliciting comments on the appropriate format, duration, scope, and even name for the proposed leasing program. BLM also clarified that the program "is not intended to provide a mechanism for precluding other [federal land] uses, such as grazing, mining, and recreation" and that "[c]onservation leases should not disturb existing authorizations, valid existing rights, or state or Tribal land use

management." BLM's explanation for the conservation leases suggests that they could be used in conjunction with other multiple use goals to achieve an appropriate balance between those goals. For example, BLM suggests that the project sponsor for a renewable energy project might also enter into a conservation lease to compensate for the loss of wildlife habitat that the renewable energy project may cause.

Stakeholders who wish to participate in this rulemaking process may do so by submitting comments to BLM. Comments are due July 5, 2023. Additionally, some Members of Congress have suggested that legislation may be appropriate to address the proposed rule. Members in both the House and the Senate have drafted legislation directing BLM to withdraw the proposed rule and to prohibit adoption of the rule "or any substantially similar rule" in the future. These opponents of the proposed rule argue that it could infringe on "long-standing multiple uses (of federal lands), like grazing, timber management, and mineral development." Congressional supporters of the proposed rule may also consider enacting the programs and priorities contemplated by the proposed rule into legislation, as a future Administration would otherwise be free to amend or repeal the rule.

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DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 1600 and 6100

[BLM_HQ_FRN_MO450017935]

RIN 1004–AE92

Conservation and Landscape Health

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Land Management (BLM) promulgates this final rule, pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, and other relevant authorities, to advance the BLM's multiple use and sustained yield mission by prioritizing the health and resilience of ecosystems across public lands. To support ecosystem health and resilience, the rule provides that the BLM will protect intact landscapes, restore degraded habitat, and make informed management decisions based on science and data. To support these activities, the rule applies land health standards to all BLM-managed public lands and uses, codifies conservation tools to be used within FLPMA's multiple-use framework, and revises existing regulations to better meet FLPMA's requirement that the BLM prioritize designating and protecting areas of critical environmental concern (ACECs). The rule also provides an overarching framework for multiple BLM programs to facilitate ecosystem resilience on public lands.

DATES: The final rule is effective on June 10, 2024.

FOR FURTHER INFORMATION CONTACT: Patricia Johnston, Project Manager for the Conservation and Landscape Health Rule, at 541–600–9693, for information relating to the substance of the final rule. Individuals in the United States who are deaf, deafblind, or hard of hearing, or who have a speech disability, may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Under FLPMA, the principles of multiple use and sustained yield govern the BLM's stewardship of public lands, unless otherwise provided by law. The BLM's ability to manage for multiple use and sustained yield of public lands depends on the resilience of ecosystems across those lands—that is, the ability of the ecosystems to withstand disturbance. Ecosystems that collapse due to disturbance cannot deliver ecosystem services, such as clean air and water, food and fiber, wildlife habitat, natural carbon storage, and more. Establishing and safeguarding resilient ecosystems has become imperative as the public lands experience adverse impacts from climate change and as the BLM works to ensure public lands and ecosystem services benefit human communities. The Conservation and Landscape Health Rule establishes the policy for the BLM to build and maintain the resilience of ecosystems on public lands in three primary ways: (1) protecting the most intact, functioning landscapes; [1] (2) restoring degraded habitat and ecosystems; and (3) using science and data as the foundation for management decisions across all plans and programs.

The rule establishes a definition of ''conservation'' that encompasses both protection and restoration actions,[2] recognizing that the BLM must protect intact natural landscapes and restore degraded landscapes to achieve ecosystem resilience. To support efforts to protect and restore public lands, the rule clarifies that conservation is a use on par with other uses of the public lands under FLPMA's multiple-use and sustained-yield mandate. Recognizing that public land conservation is incompatible with a ''one size fits all'' approach, the rule identifies multiple conservation tools to be used where appropriate, including protection of intact landscapes, restoration and mitigation planning, and ACEC designation. Consistent with how the BLM promotes and administers other uses, the rule establishes a durable mechanism—mitigation and restoration leasing—to facilitate both mitigation and restoration on the public lands, while providing opportunities to engage the public in the management of public lands for this purpose. Achieving ecosystem resilience will require, to some extent, the protection of intact landscapes. The goal of the rule is to provide a decision support and prioritization framework for the BLM as it seeks to identify where such protection is appropriate. The rule does not prioritize conservation above other uses; instead, it provides for considering and, where appropriate, implementing or authorizing conservation as one of the many uses managed under FLPMA, consistent with the statute's plain language.

The final rule also clarifies throughout that its provisions should be implemented in a manner that supports land use planning decisions and objectives that emphasize specific uses in specific areas. The Desert Renewable Energy Conservation Plan, for example, identifies Development Focus Areas and conservation areas, as well as conservation and management actions to mitigate the effects of renewable energy development. The 2015 Greater Sage-grouse Plans provide more protections for the most valuable Priority Habitat Management Areas while permitting more activities and related impacts in General Habitat Management Areas. The West-wide Energy Corridors designated by the BLM are identified as areas that are suitable for large transmission lines or pipelines, subject to site-specific analysis of proposed projects and required conditions to avoid or minimize adverse impacts. This preamble and the rule text raise as an example throughout areas that are managed for recreation or degraded lands prioritized for development. The use of this example is not meant to imply that the Bureau permits development only on degraded land.

This final rule does not alter the manner in which the BLM makes or implements these types of land use planning decisions and recognizes how managing for ecosystem resilience across a landscape can incorporate conservation and development, as well as other uses. This recognition is reflected in the rule's approach to identifying and managing areas for landscape intactness, prioritizing areas for restoration, and evaluating land health to inform decision-making.

[1] This rule defines ''intact landscape'' to mean ''a relatively unfragmented landscape free of local conditions that could permanently or significantly disrupt, impair, or degrade the landscape's composition, structure, or function. Intact landscapes are large enough to maintain native biological diversity, including viable populations of wide-ranging species. Intact landscapes provide critical ecosystem services and are resilient to disturbance and environmental change and thus may be prioritized for conservation action. For example, an intact landscape would have minimal fragmentation from roads, fences, and dams; low densities of agricultural, urban, and industrial development; and minimal pollution levels.''

[2] In this rule, conservation is a use; protection and restoration are tools to achieve conservation. Protection is not synonymous with preservation; rather, it allows for active management or other uses consistent with multiple use and sustained yield principles.

The BLM's efforts to protect and restore landscapes and ecosystems and make informed planning, permitting, and program decisions rest on the agency's ability to assess land health conditions and consider those conditions when making decisions. The rule therefore modifies existing BLM practice by applying the fundamentals of land health and related standards and guidelines to all BLM-managed public lands and uses, not just grazing (see § 6103.1(a)). This broad application includes uses, such as oil and gas development and renewable energy generation, that are likely to result in at least local impacts to land health. This rule requires the BLM to take ''appropriate action'' where a specific land use is a factor in failing to achieve land health, but what constitutes ''appropriate action'' may be constrained in a given case both by law and the applicable resource management plan (RMP). For example, where lands are available for solar development under the RMP, options for taking ''appropriate action'' to address land health would not include prohibiting solar development, but may include measures to avoid, minimize, or compensate for impacts from solar development. In general, assessments of land health are intended to inform how uses are managed, rather than if they occur, by providing accurate data on current conditions. In implementing the fundamentals of land health, the rule codifies the need across BLM programs to use high-quality information to prepare land health assessments and evaluations and make determinations about land health condition.

The rule reiterates the importance of meaningful consultation during decision-making processes with Tribes and Alaska Native Corporations on issues that affect their interests, as determined by the Tribes. It requires the BLM to respect and incorporate Indigenous Knowledge into management decisions for ecosystem resilience and directs the BLM to seek opportunities for Tribal co-stewardship of intact landscapes and other lands and ecosystems, consistent with agency and departmental guidance.

Finally, the rule amends the existing ACEC regulations to better assist the BLM in carrying out FLPMA's requirement to give priority to the designation and protection of ACECs. The regulatory changes elaborate on the role of ACECs as the principal administrative designation for protecting important natural, cultural, and scenic resources, and they establish a more comprehensive framework for the BLM to identify, evaluate, and consider special management attention for ACECs in land use planning. The rule emphasizes the role of ACECs in contributing to ecosystem resilience by clarifying that ACEC designation can be used to protect landscape intactness and habitat connectivity.

II. Background

A. The Need for Resilient Public Lands To Achieve Multiple Use and Sustained Yield

The BLM manages approximately 245 million acres of public lands, roughly one-tenth of the land area of the United States. These lands have become increasingly degraded in recent decades through the appearance of invasive species, extreme wildfire events, prolonged drought, and increased habitat fragmentation.[3] Degradation of the health of public lands threatens the BLM's ability to manage public lands as directed by FLPMA.

FLPMA requires that unless ''public land has been dedicated to specific uses according to any other provisions of law,'' the Secretary, through the BLM, must ''manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by [the Secretary] under section 202 of this Act when they are available'' (43 U.S.C. 1732(a)). The term ''sustained yield'' means ''the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use'' (43 U.S.C. 1702(h)).

The term ''multiple use'' means ''the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.'' (43 U.S.C. 1702(c)).

FLPMA also directs the BLM to ''take any action necessary to prevent unnecessary or undue degradation of the lands.'' (43 U.S.C. 1732(b)). Additionally, section 102(a)(8) of FLPMA declares that it is the policy of the United States that ''the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use'' (43 U.S.C. 1701(a)(8)). Many of these resources and values that FLPMA authorizes the BLM to safeguard emanate from functioning and productive native ecosystems that supply food, water, habitat, and other ecological necessities.

Taken together, FLPMA's mandate to manage public lands for multiple use and sustained yield and its requirement to protect certain resources and values requires balanced management that maintains the availability of such resources and values for future generations. (See 43 U.S.C. 1702(c)) Widespread degradation of land health significantly limits the ability of public lands and their ecosystems to provide such resources and values and is inconsistent with the management direction and responsibility conferred to the BLM through FLPMA. The general resilience of public lands will determine the BLM's ability to effectively manage for multiple use and sustained yield over the long term. Resilience is a critical ecosystem trait that allows ecosystems to maintain or regain their composition, structure, and function following disturbances, including those resulting from changing environmental conditions. For example, maintaining habitat connectivity allows organisms to adapt to a changing climate from the North Slope of Alaska to the Rio Grande Valley of Colorado and New Mexico. To ensure the resilience of public lands,

[3] See, *e.g.,* Long-Term Trends in Vegetation on Bureau of Land Management Rangelands in the Western United States (*https://www.sciencedirect.com/science/article/pii/S1550742422001075*); Greater Sage-grouse Plan Implementation: Range-wide Monitoring Report 2015–2020 (*https://eplanning.blm.gov/public_projects/2016719/200502020/20050224/250056407/Greater%20Sage-Grouse%20Five-year%20Monitoring%20Report%202020.pdf*).

FLPMA provides the BLM with ample authority and direction to conserve ecosystems and other resources and values across the public lands.

The BLM recognizes this need for public lands to continue to provide resources and values when declaring its mission ''to sustain the health, diversity, and productivity of public lands for the use and enjoyment of present and future generations.'' (*blm.gov;* see also 43 U.S.C. 1702(c)) Without ensuring that public lands and their component ecosystems can maintain their function and be resilient to future change, the agency risks failing on its statutory mandate and its commitment to future generations.

To assist the BLM in carrying out its mission and statutory mandate, this rule provides direction and tools to protect and restore landscapes and ecosystems and make decisions supported by science and data, assisting the agency in managing for resilient landscapes that support multiple uses and sustained yield of resources and preventing unnecessary or undue degradation of the lands and their resources. As intact landscapes play a central role in maintaining the resilience of an ecosystem, the rule emphasizes protecting those public lands with intact, functioning landscapes and restoring others. This rule is designed to support sustained yield such that the nation's public lands can continue to supply food, water, habitat, and other ecological necessities that can resist and recover from drought, wildfire, and other disturbances, and continue to provide energy, forage, timber, recreational opportunities, and safe and reliable access to minerals.

B. Conservation Use for Resilient Public Lands

Conservation is a key strategy for supporting resilient public lands, now and into the future. Conservation takes many forms on public lands, including in the ways grazing, recreation, forestry, wildlife and fisheries management, and many other uses are carried out. Conservation is both a land use and also an investment in the landscape intended to increase the yield of certain other benefits elsewhere or later in time. This rule focuses on conservation as a land use within the multiple use framework, including in decision-making, authorization, and planning processes. The rule develops the toolbox for conservation use—defined here as encompassing both protection and restoration actions—enabling some of the many conservation strategies the agency employs to steward the public lands for multiple use and sustained yield.

FLPMA has always encompassed conservation as a land use. As described above, FLPMA authorizes and obligates the BLM to, within the multiple use framework, protect natural resources, preserve public lands, and provide habitat for fish and wildlife, among other conservation measures. The BLM has been practicing conservation of the public lands throughout the agency's history. The change this rule aims to achieve is providing clear, consistent, and informed direction, vetted and shaped by public input, for conservation use to be implemented on the public lands in support of ecosystem resilience.

The rule does not prioritize conservation above other multiple uses. It also does not preclude other uses where conservation use is occurring. Many uses are compatible with different types of conservation use, such as sustainable recreation, grazing, and habitat management. The rule also does not enable conservation use to occur in places where an existing, authorized, and incompatible use is occurring.

One of the primary tools for conservation use that is established in this rule is restoration and mitigation leasing (called conservation leasing in the proposed rule). Restoration or mitigation leases can help facilitate dynamic landscape management over time by allowing an area to recover and be available for other uses after the termination of the lease. For example, a restoration lessee may collaborate with an existing grazing permittee to restore degraded rangeland with the ultimate goal of resuming sustainable grazing. These leases are not the only way to conduct restoration and mitigation on the public lands; these types of conservation activities occur in many ways. The leases provide a clear and consistent tool for those actions when appropriate and useful. Like all conservation uses included in the rule, restoration and mitigation leases will not be used where existing rights and authorized uses are in place that would conflict with the conservation use.

The BLM has, over the years, developed and revised regulations for many multiple uses, whereas a placeholder has remained in Title 43 of the CFR for the agency to develop regulations broadly pertaining to conservation. With this rule, the BLM provides necessary regulations for using conservation to support ecosystem resilience and landscape health.

C. Management Decisions To Build Resilient Public Lands

The rule recognizes that the BLM has three primary ways of applying conservation actions to manage for resilient public lands that inform one another and potentially overlap: (1) protection of intact, functioning landscapes; (2) restoration of degraded habitats and ecosystems; and (3) making decisions informed by appropriate conservation considerations identified through the development and execution of plans, programs, and permits. The organization of the rule text emanates from this structure, with principal sections on (1) protection of landscape intactness and guidance on the identification and designation of ACECs; (2) direction to plan for and restore degraded habitats; and (3) instruction for management actions to facilitate conservation, including application of mitigation, all based on the use of high-quality information and adherence to land health standards for all BLM programs.

1. Protection

As intact landscapes play a central role in maintaining the resilience of ecosystems, the rule provides direction for the protection of intact, functioning landscapes. The final rule directs the BLM to maintain an inventory of landscape intactness as a resource value and identify intact landscapes in land use plans and to protect the intactness of certain landscapes by, for example, implementing conservation actions that maintain ecosystem resilience and conserving landscape intactness when managing compatible uses. Inventories of landscape intactness focus on an estimate of naturalness measured against human-caused disturbance and influence. The BLM intends to assess intactness through use of watershed condition assessments consistent with peer-reviewed methods developed jointly with the U.S. Geological Survey.[4] One of the principal administrative tools the BLM has available to protect public land resources is the designation of ACECs. ACECs are areas where special management attention is needed to protect important historical, cultural, and scenic values or fish and wildlife or other natural resources; ACECs can also be designated to protect human life and safety from natural hazards. The rule clarifies and expands existing ACEC regulations to better support the BLM in carrying out FLPMA's direction to give

[4] See, for instance, this collaborative effort between the BLM and the USGS: A Multiscale Index of Landscape Intactness for the Western U.S. | U.S. Geological Survey (*usgs.gov*).

priority to the designation and protection of these important areas.

Pursuant to Executive Order 14072, *Strengthening the Nation's Forests, Communities, and Local Economies,* 87 FR 24851 (Apr. 22, 2022), and consistent with managing for multiple use and sustained yield and other applicable law, the BLM is working to ensure that forests and woodlands on public lands, including old and mature forests and woodlands, are managed to: promote their continued health and resilience, retain and enhance carbon storage, recruit old-growth forests and characteristics, conserve biodiversity, mitigate the risk of wildfires, enhance climate resilience, enable subsistence and cultural uses, provide outdoor recreation opportunities, and promote sustainable local economic development. Older forests and woodlands, including pinyon and juniper woodlands, which are the BLM's most abundant old forest type, have characteristics that contribute to ecosystem resilience and further the objectives of this rule. The characteristics include providing important wildlife habitat, maintaining intact landscapes, contributing ecosystem services, and harboring significant social and cultural values for human communities. As such, these resources will be considered and evaluated for protection and expansion under multiple provisions of the rule.

2. Restoration

To promote consistency in its application, the final rule establishes principles for the design and implementation of BLM restoration actions on public lands. To direct restoration efforts, the rule also requires that resource management plans identify restoration outcomes and that the BLM identify priority landscapes for restoration, develop restoration plans, and track implementation of restoration actions.

The rule offers new tools in the form of restoration leases and mitigation leases that allow qualified entities to directly support efforts to build and maintain resilient public lands. These leases will be available to entities seeking to restore public lands or mitigate reasonably foreseeable impacts from an authorized activity. Leases will not override valid existing rights or preclude other, subsequent authorizations so long as those authorizations are compatible with the restoration or mitigation use. The rule establishes the process for applying for and granting leases, terminating or suspending them, determining noncompliance, and setting bonding obligations. The rule expresses a preference for lease applications that are derived from collaboration with existing permittees, lease holders, or adjacent land managers or owners, or that include other specific factors enumerated in 6102.4(d) that will make lease issuance more likely. Restoration and mitigation leases will be issued for a term consistent with the time required to achieve their objectives. Restoration leases will be issued for a maximum of 10 years but can be renewed if necessary to serve the purposes for which the lease was first issued. Once these purposes have been achieved, the lease will not warrant renewal. Any mitigation lease will require a term commensurate with the impact(s) it is offsetting. Restoration and mitigation leases may also provide opportunities for co-stewardship with federally recognized Tribes.

3. Management Actions for Decision-Making

The final rule delineates how its goals can be achieved when implementing programs, establishing land use plans, and authorizing use. In doing so, the rule requires the BLM to use high-quality information, including Indigenous Knowledge. To ensure the BLM does not limit its ability to build resilient public lands when authorizing use, the rule requires the BLM to apply a mitigation hierarchy (*i.e.,* take actions to avoid, minimize, and compensate for certain residual impacts, generally in that order). (See § 6102.5.1(a)).[5] For important, scarce, or sensitive resources, the BLM must apply the mitigation hierarchy with particular care, with the goal of eliminating, reducing, and/or offsetting impact on the resource. The rule also establishes regulations to govern the BLM's approval of a third-party mitigation fund holder.

The final rule highlights the importance of environmental justice in decision-making, including advancing environmental justice through restoration and mitigation actions as one of the rule's objectives. The BLM is implementing Executive Order 14008 on *Tackling the Climate Crisis at Home and Abroad,* 86 FR 7619 (Jan. 27, 2021) and Executive Order 14096 on *Revitalizing Our Nation's Commitment to Environmental Justice for All,* 88 FR 25251 (Apr. 26, 2023), which establish environmental justice initiatives and policy goals.[6] The BLM issued guidance in September 2022 clarifying minimum requirements for incorporating environmental justice considerations in environmental reviews (Instruction Memorandum 2022–059, ''Environmental Justice Implementation''). This rule builds on the agency's current commitments and direction by highlighting opportunities to address impacts to disadvantaged communities that are marginalized by underinvestment and overburdened by pollution and to advance environmental justice. In planning for and prioritizing landscapes for restoration, the rule requires consideration of where restoration can address impacts on communities' environmental justice concerns, as well as other social and economic benefits. Environmental justice considerations are also identified as a factor in evaluating proposals for restoration and mitigation lease applications.

To support conservation actions and decision-making, the rule extends the application of the fundamentals of land health (taken verbatim from the existing fundamentals of rangeland health at 43 CFR 4180.1 (2005)) and related standards and guidelines to all lands managed by the BLM and across all program areas. The fundamentals are general descriptions of conditions that maintain the health and functionality of watersheds, ecological processes, water quality, and threatened, endangered, and special-status species habitat. The standards measure the level of physical and biological conditions required for healthy lands and sustainable uses of public lands, essentially identifying trends toward achieving or not achieving desired conditions. Assessment and evaluation of the standards informs decision-making at all levels of the BLM, including decisions made in resource management plans. However, it is the evaluation of multiple lines of evidence to conclude whether or not each land health standard is being achieved that is most relevant to a decision maker. Multiple lines of evidence that may be used to evaluate land health include, but are not limited to, standardized quantitative monitoring data, remote sensing-derived maps and data, qualitative assessments, photos, water quality data, habitat assessments, disturbance and land use

[5] The BLM's final rule adopts the definition of ''mitigation'' used by the Council on Environmental Quality's regulations implementing the procedural requirements of NEPA, 40 CFR 1508.1(s), including for compensatory mitigation: ''Compensating for the effect by replacing or providing substitute resources or environments.'' *Id.* § 1508.1(s)(5). This definition also aligns with existing BLM policy, including its Mitigation Manual Section, MS–1794, and its Mitigation Handbook, H–1794–1.

[6] These efforts build on prior Executive Orders, such as Executive Order 12898 on *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* 59 FR 7629 (Feb. 11, 1994).

history, and weather and climate data relevant to each land health standard. Determining if a standard is being achieved, or not achieved, can inform how a land use may be modified or adapted to improve land health conditions consistent with the fundamentals. The rule does not require, however, that individual actions ''comply'' with the fundamentals of land health, nor does it require achievement of those fundamentals (as measured by the land health standards) as a precondition for any BLM decision.

Currently, the fundamentals of land health and related standards apply only to rangeland systems where the BLM authorizes grazing.[7] Existing land health standards vary across regions and states creating a complex, but locally adapted system of rangeland evaluation. The rule includes a process for developing and adopting consistent national land health standards and amending or supplementing them to apply them more effectively to habitats managed by the BLM other than rangelands (*e.g.,* forests, deserts, shrublands, wetlands). Until the BLM has developed a consistent set of national standards, existing standards and indicators will be applied according to the process described within this rule. However, broadening the applicability of existing land health standards ensures the BLM will more formally and consistently consider the condition of public lands in decision-making. The rule includes instruction, largely consistent with the existing framework at 43 CFR 4180.1, on how the BLM must assess, evaluate, and determine if public lands are meeting land health standards. At a critical moment in the health and history of our public lands, the rule directs the BLM to perform such assessments and evaluations at broad spatial and temporal scales, thereby creating efficiencies in the land health process and opportunities to streamline permit renewals and authorizations.

D. Tribal Engagement and Co-Stewardship

The final rule reflects the U.S. Government's special relationship with Indian Tribes by incorporating updated requirements for government-to-government consultation, provisions for respecting Indigenous Knowledge, and direction to seek opportunities for Tribal co-stewardship.

The BLM is committed to working with Tribes in the management of the public lands, which are the ancestral homelands of many American Indian and Alaska Native Tribes. The BLM is the country's largest land manager, and it is vital that the BLM respect the nation-to-nation relationship that exists with American Indian and Alaska Native Tribes while incorporating co-stewardship where possible. Engaging with Tribes through co-stewardship opportunities is a priority for the BLM as identified in: Joint Secretarial Order 3403 on *Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters* (Nov. 15, 2021); BLM Permanent Instruction Memorandum No. 2022–011, *Co-Stewardship with Federally Recognized Indian and Alaska Native Tribes Pursuant to Secretary's Order 3403* (Sept. 13, 2022); and the Department of the Interior Departmental Manual Part 502, *Collaborative and Cooperative Stewardship with Tribes and the Native Hawaiian Community.*

In response to comments and consultation on the proposed rule,[8] the BLM made several updates to the final rule to better embrace its commitment to working with Tribes in managing the public lands for ecosystem resilience and landscape health. A stated objective of the final rule (43 CFR 6101.2(i)) is to: ''[i]mprove engagement and co-stewardship of public lands with Tribal entities and promote the use of Indigenous Knowledge in decision-making.'' The final rule intends to achieve this objective through provisions for Tribal consultation, incorporation of Indigenous Knowledge, and co-stewardship.

The final rule directs the BLM to meaningfully consult with Indian Tribes and Alaska Native Corporations on actions that are determined, after allowing for Tribal input, to potentially have a substantial effect on the Tribe or Corporation. In taking management actions for ecosystem resilience, and in recognition that Tribes can initiate consultation upon request, the final rule requires the BLM to meaningfully consult with Indian Tribes and Alaska Native Corporations during the decision-making process. These changes promote consistency with Departmental Manual guidance for consultation with Tribes.

The rule includes guidance for respecting and considering Indigenous Knowledge and directs the BLM to identify opportunities for co-stewardship as an overarching objective and specifically when managing intact landscapes, planning restoration actions on public lands, and taking management actions for ecosystem resilience.

The final rule also includes updated definitions for Indigenous Knowledge and high-quality information to reflect current guidance and to make clear that Indigenous Knowledge qualifies as high-quality information when it is gained by prior informed consent, free of coercion, and generally meets the standards for high-quality information.

E. Inventory, Evaluation, Designation, and Management of ACECs

To implement FLPMA's direction to ''give priority to the designation and protection of areas of critical environmental concern,'' (43 U.S.C. 1712(c)(3)), the rule updates regulatory requirements found at 43 CFR 1610.7–2 and codifies policy instruction found in the BLM Manual that guides its treatment of ACECs. (*https://www.ntc.blm.gov/krc/system/files?file=legacy/uploads/5657/5_1613_ACEC_Manual%201988.pdf*) The BLM inventories, evaluates, and designates ACECs as part of the land use planning process. The land use planning process guides BLM resource management decisions in a manner that allows the BLM to respond to issues and consider trade-offs among environmental, social, and economic values in determining appropriate land uses for specific areas. Further, the planning process requires coordination, cooperation, and consultation and provides other opportunities for public involvement that can foster relationships, build trust, and result in durable decision-making.

In 40 years of applying the procedures found at 43 CFR 1610.7–2 and in the ACEC Manual, the BLM has identified a need for several revisions that it has now made in this final rule. These revisions are needed to provide clear direction and comprehensive guidance encompassing all elements of the ACEC designation and management process.

[7] The BLM currently maintains inventory, assessment and monitoring data from its implementation of the grazing regulations related to rangeland health through the agency's Assessment, Inventory, and Monitoring (AIM) program, and makes this data available to the public. *https://www.blm.gov/aim.*

[8] Pueblo of Tesque Comments on Bureau of Land Management Conservation and Landscape Health Rule (July 5, 2023), ; Pyramid Lake Paiute Tribe, Public Comment Regarding the Proposed Public Lands Rule (June 27, 2023), *https://www.regulations.gov/comment/BLM-2023-0001-153233;* Northwest Arctic Native Association (NANA) Regional Corporation, Inc., Comments—Proposed Conservation and Landscape Health Rule (July 5, 2023), *https://www.regulations.gov/comment/BLM-2023-0001-154147;* Colorado River Indian Tribes, Comments on BLM Proposed Federal Land Policy and Management Act of 1979 (FLPMA) Regulations on Conservation and Landscape Health (June 20, 2023), *https://www.regulations.gov/comment/BLM-2023-0001-120501;* Ute Indian Tribe of the Uintah and Ouray Reservation, Comments on the Bureau of Land Management Proposed Rule on Conservation and Landscape Health (June 27, 2023), *https://www.regulations.gov/comment/BLM-2023-0001-147694.*

Additionally, the final rule codifies the BLM's procedures for considering and designating potential ACECs, providing more cohesive direction and consistency than the previous procedures, which were described partially in regulation and partially in agency policy. The rule maintains the general process for inventorying, evaluating, designating, and managing ACECs, but makes specific changes to clarify and improve that process. The process is generally described here, with more detailed explanation in the ''Section-by-Section Discussion of the Final Rule and Revisions from the Proposed Rule'' and in the ''Response to Public Comments'' sections of this preamble to the final rule.

In the initial stages of the land use planning process, the BLM, through inventories and external nominations, identifies any potential new ACECs to evaluate for relevance, importance, and the need for special management attention. The BLM determines whether such special management attention is needed by evaluating land use planning alternatives and considering additional issues related to the management of the proposed ACEC, including public comments received during the planning process. Special management measures may also provide an opportunity for Tribal co-stewardship. In approved resource management plans, the BLM identifies all designated ACECs and provides the management direction necessary to protect the relevant and important values for which the ACECs were designated.

This rule establishes procedures that require the BLM to consider ecosystem resilience, landscape-level needs, and rapidly changing landscape conditions in designating and managing ACECs, and it establishes a management standard to ensure ACEC values are appropriately conserved. The rule also provides that the BLM may, at the agency's discretion, implement temporary management for potential ACECs identified outside of an ongoing planning process until the potential ACEC can be evaluated for designation through a land use planning process. When implementing temporary management, the BLM will comply with all applicable laws, including the National Environmental Policy Act (NEPA), notify the public of the temporary management, and periodically reevaluate its decision to provide for temporary management. These provisions do not change the presumption that the BLM generally addresses its management of areas that may be appropriate for an ACEC designation through the land use planning process. The final rule also codifies research natural areas as a type of ACEC designated for the primary purpose of research and education on public lands, consistent with existing regulations (43 CFR subpart 8223) and policy.

The BLM intends to revise its ACEC manual to integrate the new and existing regulations into policy and provide more detailed guidance for their implementation. Guidance will help the BLM and the public better understand how the ACEC regulations are applied on a case-by-case basis.

F. Statutory Authority

FLPMA establishes the BLM's mission to manage public lands ''under principles of multiple use and sustained yield'' (except for lands where another law directs otherwise). (43 U.S.C. 1732(a)) Multiple use is defined as:

> the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long- term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

(43 U.S.C. 1702(c)). Sustained yield is defined as, ''the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.'' (43 U.S.C. 1702(h)).

FLPMA also authorizes the Secretary to promulgate implementing regulations necessary ''to carry out the purposes'' of the Act. (43 U.S.C. 1740) This rule, enacted under that authority, (1) defines and regulates conservation use on the public lands in service of FLPMA's multiple use and sustained yield mandates; (2) provides for third-party authorizations to use the public lands for restoration and mitigation under FLPMA section 302(b) (43 U.S.C. 1732(b)); and (3) revises the existing regulations implementing FLPMA's direction in sections 201(a) and 202(c)(3) (43 U.S.C. 1711(a) and 1712(c)(3)) that the BLM shall give priority to the designation and protection of ACECs. (*See also* 43 U.S.C. 1701(a)(11) (''[I]t is the policy of the United States that—regulations and plans for the protection of public land areas of critical environmental concern be promptly developed.'')).

This rule clarifies that conservation is a use on par with other uses and responds to the direction inherent in FLPMA's multiple use and sustained yield mandate to manage public lands for resilience and future productivity and to mitigate resource impacts. A number of comments questioned the BLM's authority to treat ''conservation'' as a use within FLPMA's multiple use framework. As a general matter, the definition of ''multiple use'' makes clear, and courts have affirmed, that managing some lands for conservation use is a permissible, and indeed crucial, aspect of managing public lands under the principles of multiple use and sustained yield, as FLPMA requires. (*See* 43 U.S.C. 1702(c); *see also New Mexico ex rel. Richardson* v. *BLM,* 565 F.3d 683, 710 (10th Cir. 2009) (''It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses . . . BLM's obligation to manage for multiple use does not mean that development must be allowed . . . Development is a possible use, which BLM must weigh against other possible uses—including conservation to protect environmental values.''); *Theodore Roosevelt Conservation P'ship* v. *Salazar,* 616 F.3d 497, 518 (D.C. Cir. 2010) (''[T]he Bureau has wide discretion to determine how those [FLPMA] principles [of multiple use and sustained yield] should be applied.''); *Or. Nat. Desert Ass'n* v. *BLM,* 531 F.3d 1114, 1134 (9th Cir. 2008) (recognizing that the BLM's ''wide authority to manage the public lands under principles of multiple use and sustained yield allows it ample discretion for management of lands with wilderness values'')).

Public Comments on Statutory Authority

Several comments suggested more specifically that the decision in *Public Lands Council* v. *Babbitt,* 167 F.3d 1287 (10th Cir. 1999), would prohibit the restoration and mitigation leases available under this rule.

We disagree. In that case, the Tenth Circuit held that the Taylor Grazing Act and section 402 of FLPMA could not authorize ''issuing a 'grazing permit' that excludes livestock grazing for the entire term of the permit.'' *Id.* at 1307.

The court, therefore, enjoined the regulations purporting to authorize Taylor Grazing Act permits that provided for no grazing. In doing so, the Tenth Circuit expressly stated that the question in the case was ''not whether the Secretary possesses general authority to take conservation measures—which clearly he does.'' *Id.*

The present rule, in contrast to the grazing rule at issue in *Public Lands Council* v. *Babbitt,* is an exercise of that authority to take conservation measures. It does not rely on the Taylor Grazing Act, nor does it modify the terms and conditions available for grazing permits or authorize the BLM to issue grazing permits approving non-grazing uses. Rather, this rule provides for a separate category of leases, which can be exercised on public lands in areas with other ongoing uses, such as active grazing, consistent with the BLM's authority under FLPMA to ''manage the public lands under principles of multiple use and sustained yield'' (43 U.S.C. 1732(a)) and to ''regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands.'' (43 U.S.C. 1732(b)) The final rule renames what the proposed rule called ''conservation leases'' as ''restoration leases'' and ''mitigation leases'' to more precisely describe the activities that would be authorized on the leased lands.

A number of comments that object to including ''conservation'' alongside other uses in FLPMA's multiple use framework, including a letter from the Small Business Administration, Office of Advocacy (Advocacy), point to the absence of the word ''conservation'' from FLPMA's definition of ''principal or major uses.'' (*See* 43 U.S.C. 1702(*l*))

We disagree. Those comments misapprehend the meaning of the term ''principal or major uses'' within the statutory framework established by FLPMA. That term does not appear in any of FLPMA's discussion of multiple use, and the principal or major uses included in the definition of that term do not hold an exclusive or even superior position within the multiple use framework. Indeed, that defined term appears in FLPMA only in section 202(e) (43 U.S.C. 1712(e)), which provides that all land use plan decisions are subject to revision and modification and—specific to principal or major uses—includes a Congressional reporting provision (section 202(e)(2)) that contains no substantive constraint on the BLM's authority. The Advocacy letter asserts that restoration or mitigation leases must be submitted to Congress, citing Section 202(e)(2). But section 202(e)(2) merely provides for congressional *notification* if a management decision ''excludes (that is, totally eliminates)'' one or more of the principal or major uses for two or more years on an area exceeding one hundred thousand acres or more'' of the public lands. (43 U.S.C. 1712(e)(2)) The adoption of the final rule does not immediately result in any restoration or mitigation lease going into effect, much less one that covers one hundred thousand or more acres, let alone one that ''totally eliminates'' a principal or major use on such an area for two or more years. Nor does it follow from the rule that the leases the BLM does issue would necessarily meet the criteria to trigger section 202(e)(2). More importantly, the Advocacy letter fails to grapple with the necessary and obvious implication of this provision: Congress's clear recognition that the BLM is *authorized* to take actions that would exclude principal or major uses—including from large tracts of land—as long as it reports such actions to Congress when it does. In short, the provision is not only inapplicable to most, if not all, restoration and mitigation leases that may be issued under this rule, but it clearly demonstrates that the BLM has the authority Advocacy claims it lacks.

Several commenters suggested that the issuance of a final rule that recognizes conservation as a use of the public lands and allows for the issuance of restoration and mitigation leases might be challenged in federal court under the Administrative Procedure Act, speculating further that a reviewing court might evaluate these features of the rulemaking under the major questions doctrine.

We disagree. The Supreme Court deemed the major questions doctrine to apply when an agency's asserted statutory authority is unclear and when the ''history and the breadth of the authority'' and the ''economic and political significance'' of its assertion provide a ''reason to hesitate.'' *West Virginia* v. *EPA,* 142 S. Ct. 2587, 2595 (2022). But as this preamble to this final rule explains elsewhere in detail, and as courts have confirmed, FLPMA's animating principles of multiple use and sustained yield embrace conservation use as an integral component of the BLM's stewardship of the public lands. Moreover, while restoration and mitigation leases are specific new tools for managing the public lands, FLPMA provides clear and broad authority to manage the public lands at the discretion of the Secretary, including for conservation use, for the reasons described in detail above, and including through leases. (43 U.S.C. 1732(a)–(b))

The BLM has a long history of exercising that broad regulatory authority to manage its lands through leases and similar instruments, including by issuing permits or right-of-way grants that authorize the permit holder to implement restoration and mitigation as a component or a condition of an authorization to use the public lands for development or extractive purposes. See, *e.g.,* M–37039, The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations through Mitigation, at 11–22 (Dec. 21, 2016) (reinstated by M–37075 (Apr. 15, 2022)) (''[The] BLM's charge under FLPMA to manage public lands based on principles of multiple use and sustained yield supports use of mitigation. The authority to evaluate and impose mitigation arises out of the broad authority FLPMA vests in the BLM to pursue congressional goals . . . for public lands. The BLM can evaluate and require mitigation through both the land use planning process and site-specific authorizations.''); *Theodore Roosevelt Conservation P'ship,* 616 F.3d at 505–06, 515–17 (concerning planning decision that outlined mitigation measures to be imposed as conditions of approval for oil and gas drilling). For the reasons noted above, Congress has spoken clearly that conservation—including in the forms of restoration or mitigation—is an appropriate use of the public lands and that, where a given use of the public lands is appropriate, leasing is an appropriate means to regulate such use.

Several commenters noted that a different BLM rule—Resource Management Planning, 81 FR 89580 (Dec. 12, 2016)—was subject to a congressional joint resolution of disapproval under the Congressional Review Act (CRA) (5 U.S.C. 802). These commenters suggested that this rule, therefore, may be precluded by the CRA provision that ''a new rule that is substantially the same as'' a rule that does not continue in effect due to a joint resolution of disapproval may not be issued. (5 U.S.C. 801(b)(2))

We disagree. This rule, which would promulgate a series of new regulations at 43 CFR part 6100 and make changes to 43 CFR 1610.7–2, is not substantially the same as the BLM's 2016 rule. The 2016 rule included amendments to § 1610.7–2, but they were different in substance and form from the revisions proposed in this rule and involved a much broader amendment to all of the

planning regulations at 43 CFR part 1600. For example, this rule identifies ''landscape intactness'' as a value meriting consideration for conservation, including through designation of ACECs, and calls for land health evaluations at geographic scales broader than grazing allotments. But these features of the present rule do not amount to the same landscape-scale planning approach that was central to the 2016 rule, and which would have been (and would need to be) implemented through a wholesale revision of the planning regulations at 43 CFR part 1600.

A number of comments noted that the BLM's management of the public lands is subject to additional laws beyond FLPMA and in some cases asked that the BLM limit the geographic scope of the final rule to exclude areas of public lands where another statute provides direction or informs how the BLM should manage those lands.

We agree that laws beyond FLPMA govern BLM's management of the public lands, but we decline to amend the rule in response to these comments. The final rule applies across BLM-managed lands. However, implementation of the rule—that is, land use planning and individual project-level decisions—will be subject to and must be undertaken consistent with all applicable laws, including the Mining Law of 1872, 30 U.S.C. 22 *et seq.,* the Oregon and California Revested Lands Sustained Yield Management Act of 1937, 43 U.S.C. 2601 *et seq.* (the O&C Act), the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3101 *et seq.* (ANILCA), the Paleontological Resources Preservation Act of 2009, 16 U.S.C. 470aaa *et seq.* (PRPA), the Endangered Species Act, 16 U.S.C. 1531 *et seq.* (ESA), the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA), and the National Historic Preservation Act, 54 U.S.C. 300101 *et seq.* (NHPA).

G. Related Executive and Secretarial Direction

The rule is consistent with directives set forth in several Executive and Secretary's Orders and related policies and strategies. These directives call on the Department of the Interior (DOI), and the Federal Government more generally, to use landscape-scale, science-based, collaborative approaches to natural resource management.

They include Executive Order 14072, *Strengthening the Nation's Forests, Communities, and Local Economies,* recognizes that healthy forests are ''critical to the health, prosperity, and resilience of our communities.'' It states a policy to:

> pursue science-based, sustainable forest and land management; conserve America's mature and old-growth forests on Federal lands; invest in forest health and restoration; support indigenous traditional ecological knowledge and cultural and subsistence practices; honor Tribal treaty rights; and deploy climate-smart forestry practices and other nature-based solutions to improve the resilience of our lands, waters, wildlife, and communities in the face of increasing disturbances and chronic stress arising from climate impacts.

The Executive Order calls for defining, identifying, and inventorying our nation's old and mature forests, then stewarding them for future generations to provide clean air and water, sustain plant and animal life, and respect their special importance to Tribal Nations. This rule advances these objectives by providing a framework for conservation use on public lands that would apply to mature and old-growth forests and woodlands managed by the BLM.

And Joint Secretarial Order 3403 on *Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters,* issued on November 15, 2021, by DOI and the Department of Agriculture, reiterates the Departments' commitment to the United States' trust and treaty obligations as an integral part of managing Federal lands. The order emphasizes that ''Tribal consultation and collaboration must be implemented as components of, or in addition to, Federal land management priorities and direction for recreation, range, timber, energy production, and other uses, and conservation of wilderness, refuges, watersheds, wildlife habitat, and other values.'' The order also notes the benefit of incorporating Tribal expertise and Indigenous Knowledge into Federal land and resources management.

H. Public Involvement in the Proposed Rule

The BLM published the proposed rule in the **Federal Register** on April 3, 2023 (88 FR 19583), for a 75-day comment period ending on June 20, 2023. In response to public requests for an extension, on June 15, 2023, the BLM announced a 15-day extension of the comment period. The official comment period extension notice was published on June 20, 2023 (88 FR 39818). The extended comment period closed on July 5, 2023.

During the comment period, the BLM hosted a variety of public outreach activities. The BLM held two virtual public meetings on May 15 and June 5, 2023. The BLM held three in-person meetings in Denver, Colorado (May 25, 2023); Albuquerque, New Mexico (May 30, 2023); and Reno, Nevada (June 1, 2023) to provide an overview of the proposed rule and answer questions from the public. All webinars and meetings were led by a third-party facilitator. A video recording of the May 15 virtual meeting and presentation slides in English and Spanish are available on the BLM website. The BLM also posted a reviewer guide and fact sheet, frequently asked questions on topics of interest, infographics, and other background information on the BLM website to further public understanding of the proposed rule. (*https://www.blm.gov/public-lands-rule.*)

In addition, the BLM conducted external outreach and participated in dozens of meetings to discuss the content of the proposed rule, including congressional briefings; meetings with States and State agencies; meetings with grazing, recreation, renewable energy, and other stakeholder interest groups and associations; and presentations at conferences and events. Meetings were conducted by both headquarters staff and regional staff across the country.

I. Tribal Consultation on the Proposed Rule

At the beginning of the rulemaking process, letters were sent to all federally recognized Tribes and Alaska Native Claims Settlement Act Corporations informing them of the proposed rule and inviting them to engage with the BLM to discuss their thoughts and concerns. The BLM conducted government-to-government consultation on the proposed rule as requested by Tribes.

To facilitate understanding of the proposed rule, the BLM posted all meeting materials, including a recording of the first virtual meeting, frequently asked questions, and meeting handouts, on its website to accommodate Tribal members and other members of the public who could not attend a public meeting. This final rule is informed by input received from Tribes during the public comment period. Over 20 Tribal governments, Alaska Native Corporations, and tribal entities submitted formal comments on the proposed rule. Tribal comments covered a range of topics including ACEC nomination, tribal consultation and co-stewardship, protection of cultural resources, and restoration and mitigation leasing. Responses to Tribal input are addressed in the ''Tribal Engagement and Co-Stewardship'' and ''Section-by-Section Discussion of the Final Rule and Revisions from the

Proposed Rule'' sections of this preamble to the final rule.

J. Summary of Changes

The BLM received an initial total of 216,403 comments from regulations.gov. Further analysis showed that there were public comment submissions with multiple cosigners, sometimes several thousand on one submission, which were initially counted as separate submissions but ultimately identified as a single submission with multiple signatures. Therefore, although 216,403 people voiced their opinion, the final count of comment letters came to 152,673. The comment letters on the proposed rule are available for viewing on the Federal e-rulemaking portal (*https://www.regulations.gov*) (search Docket ID: BLM–2023–0001).

The BLM has reviewed all public comments and made changes, as appropriate, to the final rule based on those comments and internal review. Those changes are described in detail in the ''Section-by-Section Discussion of the Final Rule and Revisions from the Proposed Rule'' of this preamble to the final rule. In addition, the ''Response to Public Comments'' section in this preamble to the final rule provides a summary of issues raised most frequently in public comments and the BLM's response.

III. Section-by-Section Discussion of the Final Rule and Revisions From the Proposed Rule

Note: This section of the preamble discusses newly promulgated part 6100 first before turning to the revisions to § 1610.7–2, notwithstanding that § 1610.7–2 appears first in the final rule text. Part 6100 contains the core content of this final rule, which frames the need for revision to § 1610.7–2.

43 CFR Subchapter F—Preservation and Conservation

PART 6100—ECOSYSTEM RESILIENCE

Subpart 6101—General Information

Section 6101.1—Purpose

This section describes the overall purpose for the rule. The rule is designed to facilitate healthy wildlife habitat, clean water, and ecosystem resilience so that public lands can better resist and recover from disturbances like drought and wildfire. It also aims to enhance mitigation options, establishing a regulatory framework for those seeking to use the public lands, while also ensuring that the public enjoys the benefits of mitigation measures. The rule discusses the use of protection and restoration actions, as well as tools such as land health evaluations, inventory, assessment, and monitoring.

In response to public comments, the final rule expands the purpose statement to include preventing permanent impairment or unnecessary or undue degradation of public lands, in addition to promoting the use of conservation to ensure ecosystem resilience.

Section 6101.2—Objectives

This section lists the specific objectives of the rulemaking. These objectives were discussed at length earlier in the preamble for the rule. In response to public comments, the BLM added four objectives to the original six, which are to: provide for healthy lands and waters that support sustainable outdoor recreation experiences for current and future generations; prevent permanent impairment or unnecessary or undue degradation of public lands; improve engagement and co-stewardship of public lands with Tribal entities and promote the use of Indigenous Knowledge in decision-making; and advance environmental justice through restoration and mitigation actions.

Additionally, in response to public comments, the final rule expands the objective that originally read ''Promote conservation by maintaining, protecting, and restoring ecosystem resilience and intact landscapes'' by specifically adding ''including habitat connectivity and old-growth forests.''

Section 6101.3—Authority

A number of comments identified potential additional statutory authority on which the BLM might rely in promulgating this rule. The BLM has determined the reference to statutory authority is sufficient.

A number of comments raised questions about the relationship between the rule and other laws, such as the Mining Law, the O&C Act, and ANILCA, that apply to particular areas or particular uses of the public lands. The final rule adds language in this section to clarify that implementation of the rule is subject to other applicable laws.

Section 6101.4—Definitions

This section provides new definitions for concepts such as conservation, ecosystem resilience, sustained yield, mitigation, and unnecessary or undue degradation, along with other terms used throughout the rule text. These definitions apply to the use of those terms in part 6100, while definitions for the terms casual use, conserve, ecosystem resilience, intactness, landscape, monitoring, protect, and restore also apply to the use of those terms in § 1610.7–2.

The final rule adopts, without revision, the proposed definitions of the terms: casual use; important, scarce, and sensitive resources; mitigation; mitigation strategies; monitoring; public lands; and reclamation. The final rule revises the proposed definitions of the terms: conservation, disturbance, effects, high-quality information, Indigenous Knowledge, intact landscape, landscape, permittee, protection, restoration, sustained yield, and unnecessary or undue degradation (including by identifying the elements of undue degradation and unnecessary degradation).

The final rule defines additional terms to provide further clarity for implementing the rule: in-lieu fee program, intactness, land health, mitigation bank, mitigation fund, significant causal factor, significant progress, and watershed condition assessment. The final rule removes the definitions of the terms best management practices and land enhancement. The BLM decided to remove the definition of best management practices, because it is not a term that is generally used for describing mitigation measures. The BLM decided to remove the definition of land enhancement based on public comments that found the term confusing.

The proposed rule defined the term ''resilient ecosystems.'' The final rule defines ''ecosystem resilience'' instead. The final rule does not, as some comments suggested it should, formally define the term ''permanent impairment,'' but the BLM intends that its meaning be informed by how it is used within the rule's definition of sustained yield.

The following paragraphs describe the definitions adopted in the final rule and changes to these definitions from the proposed rule as applicable.

The final rule defines the term ''casual use'' in order to clarify that the existence of a restoration or mitigation lease would not in and of itself preclude the public from accessing public lands for noncommercial activities such as recreation. Authorized officers may temporarily close public access for purposes authorized by restoration and mitigation leases, such as habitat improvement projects. However, in general, public lands leased for these purposes under the final rule would continue to be open to public use. The BLM received public comments recommending the definition be expanded to explicitly include uses

such as recreation. However, the BLM decided to retain the definition from the proposed rule because it exists in the same form in current regulations at 43 CFR 2920.0–5(k). The final rule adds language to the restoration and mitigation leasing section to clarify that leases will not preclude access to or across leased areas for recreation use, research use, or other compatible authorized uses, in addition to casual use. The definition of ''casual use'' in this part does not change the definition of casual use in 43 CFR 3809.5.

The final rule defines ''conservation'' in the context of these regulations to mean the management of natural resources to promote protection and restoration. The overarching purpose of the rule is to help facilitate the use of conservation to support ecosystem resilience, and in doing so the final rule clarifies conservation as a use within the BLM's multiple use framework, including in decision-making concerning land use planning and proposed projects. The final rule includes a stated objective to promote conservation on public lands, and subpart 6102 outlines principles, directives, management actions, and tools—including a new tool in restoration and mitigation leases—to meet this objective and fulfill the purpose of the rule. The BLM received comments recommending the definition of ''conservation'' more closely align with other definitions and recommending that the BLM distinguish between ''conservation'' and ''preservation.'' The definition of ''conservation'' was updated in the final rule to make clear that conservation is a use and that protection and restoration are tools to achieve conservation.

The final rule defines the term ''disturbance'' to provide the BLM with guidance in identifying and assessing impacts to ecosystems, restoring affected public lands, and minimizing and mitigating future impacts. Identifying and mitigating disturbances and restoring ecosystems are important components of supporting ecosystem resilience on public lands. The BLM received public comments recommending the BLM clarify that disturbances can be natural or human-caused, suggesting that defining disturbance as a discrete event was too restrictive, and recommending that the BLM adjust the definition to more closely align with how ''disturbance'' is used in environmental impact statements. The definition of disturbance was updated in the final rule to clarify that disturbance can be either discrete or chronic, characteristic (where ecosystem or species have evolved to survive such a disturbance) or uncharacteristic, and that disturbance can be natural or human-caused.

The final rule defines the term ''ecosystem resilience'' (whereas the proposed rule included a definition of ''resilient ecosystem'') in the context of the rule's foundational precept that the BLM's management of public lands on the basis of multiple use and sustained yield relies on resilient ecosystems. The definition is broad and mirrors Department guidance by including concepts of resistance, recovery, and adaptation. The BLM received comments that suggested removing this term, changing the definition to clarify that habitat connectivity is key to a resilient ecosystem, and changing the definition to better and more accurately describe the characteristics of a resilient ecosystem. The BLM changed the term to ''ecosystem resilience'' to match the usage of this term in the rule and defined ecosystem resilience to be consistent with existing DOI definitions of this term.[9] DOI's definition of ecosystem resilience is inclusive of three commonly used terms in scientific literature: resistance (*i.e.,* withstand disturbance), recovery (*i.e.,* recover from disturbance, and adaptability (*i.e.,* change/adapt to disturbance). The purpose of the rule is to facilitate the use of conservation as part of sustained yield, such that ecosystems on public lands can adapt to environmental change, resist disturbance, and maintain or regain their function following environmental stressors such as drought and wildfire.

The final rule defines the term ''effects'' as the direct, indirect, and cumulative impacts from a public land use and clarifies that the term should be viewed as synonymous with the term ''impacts'' for the purposes of the rule. The BLM received comments recommending the definition be changed to match the definition of effects in the BLM's planning regulations. The definition of effects was updated in the final rule to reference 40 CFR 1508.1(g) and clarify that the use of direct, indirect, and cumulative impacts in the rule is consistent with the definition of those terms in 40 CFR 1508.1(g).

The final rule defines the term ''high-quality information'' so that its use would ensure that the best available scientific information underpins decisions and actions that would be implemented under the proposed rule to achieve ecosystem resilience. The definition also clarifies that Indigenous Knowledge can be high-quality information that should be considered alongside other information that meets the standards for objectivity, utility, integrity, and quality set forth in the Department's Information Quality Guidelines. *https://www.doi.gov/ocio/policy-mgmt-support/information-quality-guidelines.* The BLM received public comments recommending that Indigenous Knowledge be considered as high-quality information, recommending that the BLM use the term ''credible data'' to describe high-quality information, and that the definition be clarified to be more specific about what qualifies as high-quality information. The definition of high-quality information was updated in the final rule to reference the most current Department guidance on scientific information and to specify when Indigenous Knowledge would be considered high-quality information in decision-making.

The final rule defines the terms ''important,'' ''scarce,'' and ''sensitive'' resources to provide clarity and consistency in the BLM's implementation of mitigation requirements, including under the final rule. The BLM received comments that the definition of these terms was vague and requesting more detail to clarify when a resource would qualify as important, scarce, or sensitive, as well as comments requesting more clarity on how the BLM determines whether a resource is important, scarce, or sensitive. The final rule does not change the definition of these terms, which are consistent with the BLM's mitigation policy and handbook. A determination that a resource is important, scarce, or sensitive is dependent on location, conditions within a planning area affecting a particular resource (*e.g.,* drought), and the adverse effects on that resource from other past and foreseeable future land uses.

The final rule defines the term ''Indigenous Knowledge'' to reflect the DOI's policies, responsibilities, and procedures to respect and equitably promote the inclusion of Indigenous Knowledge in the Department's decision-making, resource management, program implementation, policy development, scientific research, and other actions. The BLM received comments recommending changes to the definition of this term to encompass proper terminology for Indigenous Knowledge and make it consistent with existing Department regulations and guidance, or to drop the term from the rule. The definition of Indigenous Knowledge was updated in the final

[9] *https://www.doi.gov/sites/default/files/department-of-interior-climate-action-plan-final-signed-508-9.14.21.pdf.*

rule to clarify that Tribes may use different terms to refer to this concept and to bring the definition of Indigenous Knowledge in line with current BLM, Department, and White House guidance.[10] The final rule adds a definition for the term ''in lieu fee program.'' This term is used in § 6102.5.1, Mitigation, to describe an available method for offsetting adverse impacts. The definition of this term is consistent with the BLM's mitigation policy.

The final rule defines the term ''intact landscape'' to guide the BLM with implementing direction. The rule (§ 6102.2) would require the BLM to identify intact landscapes on public lands, manage certain landscapes to protect their intactness, and pursue strategies to protect and connect intact landscapes. The BLM received comments suggesting the definition be updated to clarify the size of an intact landscape, clarify the characteristics of an intact landscape (including cultural landscapes), and add habitat connectivity and mature, old-growth forests as markers of an intact landscape. The definition was updated in the final rule to reflect commonly used definitions in policy and ecological literature, link the definition of ''intact landscape'' to the revised ''landscape'' definition, and define intact landscapes in a manner that is more easily measured and assessed by the BLM to inform conservation actions. The revised definition reflects the reality that intactness exists on a spectrum and efforts to protect intactness should not be limited by a single threshold, but rather reflect landscape-specific levels required to support multiple use and sustained yield.

The final rule adds a definition for the term ''intactness,'' which is a measure of the degree to which human influences alter or impair the structure, function, or composition of a landscape. Because the rule requires the BLM to identify intact landscapes, the agency will need to measure and inventory intactness as a resource value. The final rule clarifies that as part of managing to protect intact landscapes, the BLM will develop and maintain an inventory of landscape intactness using watershed condition assessments to establish a consistent baseline condition. The BLM will then use the intactness inventory, along with other high-quality information including habitat connectivity and migration corridor data, to identify intact landscapes in the land use planning process and consider management opportunities.

The final rule adds a definition for the term ''land health.'' Land health is used throughout the rule to refer to the concept of a healthy and functioning ecosystem, and the BLM defines the term in the final rule to clarify the desired outcome of establishing land health standards and to be consistent with the definition of rangeland health in the BLM's Rangeland Health Standards Handbook, H–4180–1.[11]

The final rule makes small adjustments to the definition of the term ''landscape'' to be more inclusive in terms of the types of resources and interests that can anchor a landscape and to align with definitions used in landscape ecology. The term ''landscape'' is used throughout the rule to characterize a meaningful area of land and waters on which restoration, protection, and other management actions will take place. Determining how the BLM's management actions can influence the health and resilience of ecosystems can vary across landscapes and over time.

The rule defines ''mitigation'' consistent with the definition provided by existing Council on Environmental Quality regulations (40 CFR 1508.1(s)), which identify various ways to address adverse impacts to resources, including steps to avoid and minimize those impacts and compensate for residual impacts. As a tool to achieve ecosystem resilience of public lands, the BLM will generally apply a mitigation hierarchy to address impacts to public land resources, seeking to avoid, then minimize, and then compensate for any residual impacts. This definition and the related provisions in the rule supplement existing DOI policy, which among other things provides boundaries to ensure that compensatory mitigation is durable and effective. The BLM made no changes to the definition from the proposed rule.

The final rule adds a new definition for the term ''mitigation bank'' because the term is used in the final rule along with ''in-lieu fee program'' as a category of mitigation projects that would require a mitigation lease with additional requirements beyond those that would be required for smaller, single-use mitigation projects. A mitigation bank is a site where resources are restored, established, enhanced, or protected for the purpose of providing compensatory mitigation for an authorized use that is impacting similar resources elsewhere. The definition in the rule is consistent with the definition in the BLM's Mitigation Manual, MS–1794.[12]

The final rule adds a new definition for the term ''mitigation fund'' because the rule provides standards for the BLM to approve, through a formal agreement, a third-party mitigation fund holder to implement compensatory mitigation programs or projects. A mitigation fund is an account established by a mitigation fund holder to collect and then disperse funds for projects that satisfy compensatory mitigation commitments and obligations. The rule also provides for the BLM in some circumstances to require mitigation lease holders to submit a formal agreement with a qualified mitigation fund holder.

The final rule defines the term ''mitigation strategies'' as documents that identify, evaluate, and communicate potential mitigation needs and mitigation measures in advance of anticipated public land uses. The BLM received comments recommending replacing the word ''strategies'' with ''approaches'' or ''documents.'' The final rule does not change the definition of this term, which is consistent with the definition of mitigation strategies from the BLM's Mitigation Manual, MS–1794.

The rule defines the term ''monitoring'' to describe a critical suite of activities involving observation and data collection to evaluate (1) existing conditions, (2) the effects of management actions, or (3) the effectiveness of actions taken to meet management objectives. Management for ecosystem resilience requires the BLM to understand how proposed use activities impact resource condition at many scales. Monitoring is a critical component of the BLM's Assessment, Inventory and Monitoring (AIM) Strategy,[13] which provides a standardized framework for assessing natural resource condition and trends

[10] Executive Office of the President, Office of Science and Technology Policy and Council on Environmental Quality, Guidance for Federal Departments and Agencies on Indigenous Knowledge (Nov. 30, 2022), *https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf;* BLM Instruction Memorandum No. 2022–011, Co-Stewardship with Federally Recognized Indian and Alaska Native Tribes Pursuant to Secretary's Order 3403 (Sept. 13, 2022), *https://www.blm.gov/policy/pim-2022-011.*

[11] This handbook describes the authorities, objectives, and policies that guide assessment of public land health and taking appropriate action to achieve, or make progress toward achieving, specified rangeland health standards. *https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_h4180-1.pdf.*

[12] This manual provides guidance on implementing consistent principles and procedures for mitigation in the BLM's authorization of public land uses. *https://www.blm.gov/sites/default/files/docs/2021-11/MS-1794%20Rel.%201-1807.pdf.*

[13] The *AIM Strategy* provides quantitative data and tools to guide and justify policy actions, land uses, and adaptive management decisions. *https://www.blm.gov/aim.*

on BLM-administered public lands. The BLM did not change the definition of ''monitoring'' from the proposed rule because it is based on the definition and use of that term in the grazing regulations (43 CFR 4100.0–5), is science-based, and enables the application of data to inform land management and understand management effects.

The rule defines the term ''permittee'' as a person or organization with a valid permit, right-of-way grant, lease, or other land use authorization from the BLM. The rule largely discusses ''permittees'' when identifying the responsibility of parties in the context of mitigation and in discussing the opportunities to rely on third parties in complying with mitigation requirements. The proposed rule defined a permittee as a person; the final rule defines a permittee as a person or other legal entity.

The final rule defines ''protection'' in the context of the overarching purpose of the rule, which is to promote the use of conservation measures to support the ecosystem resilience of public lands. ''Protection'' is a critical component of conservation, alongside restoration, and describes acts or processes that keep resources safe from degradation, damage, or destruction. The rule (§ 6101.2(b)) would include a stated objective to promote the protection of intact landscapes on public lands as a critical means to achieve ecosystem resilience. The BLM received comments that requested clarification of the term protection and recommended distinguishing between protection and preservation. Commenters suggested removing the term preserve from the definition of protection, and commenters were concerned that the term protection, as it was defined in the proposed rule, was intended to set land aside and preclude other uses. The definition of protection was updated in the final rule to clarify that protection is not synonymous with preservation and is not intended to prevent active management or other uses.

The rule defines ''public lands'' in order to clarify the scope of the proposed rule and its intended application to all BLM-managed lands and uses. The definition is similar to the definition of ''public lands'' that appears at 43 CFR 6301.5, but the BLM has modified the definition from the proposed rule in response to comments to clarify that this rule extends only to BLM-managed surface estate. The resulting definition in this rule is specific to new part 6100 and should not be interpreted as changing the definition of ''public lands'' in any other context, including where that term would extend to BLM-managed mineral estate under other BLM regulations.

The rule defines ''reclamation'' to identify restoration practices intended to achieve an outcome that reflects project goals and objectives, such as site stabilization and revegetation. While ''reclamation'' is a part of a continuum of restoration practices, it contrasts with other actions that are specifically designed to recover ecosystems that have been degraded, damaged, or destroyed. Reclamation often involves initial practices that can prepare projects or sites for further restoration activities. The rule, at § 6102.4.2, discusses reclamation in the context of bonding restoration and mitigation leases to ensure lessees hold sufficient bond amounts to provide for the reclamation of the lease areas and the restoration of any lands or surface waters adversely affected by lease operations. The BLM made no changes to the definition from the proposed rule.

The final rule defines ''restoration'' in the context of the overarching purpose of this rule, which is to promote the use of conservation to ensure the ecosystem resilience of public lands. ''Restoration'' is a critical component of conservation, alongside protection, and describes acts or processes of conservation that passively or actively assist the recovery of an ecosystem that has been degraded, damaged, or destroyed. The BLM received comments suggesting that the rule acknowledge both passive and active restoration as legitimate restoration methods and comments calling for the clarification of what the BLM's broad-scale recovery goals are for restoration. Specifically, commenters identified the need to be explicit about the goal of returning ecosystems to a more natural, native ecological state and that the use of nonnative species in restoration projects is not the preferred option. The definition of restoration was updated in the final rule to include both active and passive restoration and to clarify that the goal of restoration efforts is the recovery of an ecosystem to a more natural, native ecological state.

The final rule adds a definition for the term ''significant causal factor'' because the rule uses this term to trigger an obligation on the part of the BLM to take appropriate action, including through the modification of authorizations and management practices for relevant programs and uses, in order to achieve land health. A significant causal factor is a use, activity, or disturbance that prevents an area from achieving or making significant progress toward achieving one or more land health standards. The rule requires the BLM to document a determination of the significant causal factor in circumstances in which resource conditions are not achieving or making significant progress toward achieving land health standards. If the BLM determines that existing management is a significant causal factor preventing achievement of land health standards, authorized officers must take appropriate action as soon as practicable.

The final rule adds a definition for the term ''significant progress,'' which is used in the rule as the measure of satisfactory progress toward achieving land health standards. Many comments requested clarification of this term, and while it is impractical to quantify the magnitude or rate of change that constitutes significant progress, the BLM developed a qualitative definition for purposes of implementing the rule. The term is defined to mean measurable or observable changes in the indicators that demonstrate improved land health. Acceptable levels of change must be realistic in terms of the capability of the resource but must also be as expeditious and effective as practical.

The final rule bases its definition of ''sustained yield'' on the FLPMA definition of that same term. This rule facilitates the use of conservation to achieve resilient ecosystems on public lands, which are essential to managing for multiple use and sustained yield. The BLM received comments suggesting the definition be updated to incorporate more precisely the language of the statutory definition, as well as comments recommending combining the definitions of sustained yield and multiple use and incorporating non-renewable resources into the definition of sustained yield. The final rule updates the definition of sustained yield to remain focused on renewable resources and responsible development of non-renewable resources and to add ''consistent with multiple use'' to mirror the FLPMA definition of sustained yield.

In response to public comments, the final rule expands the definition of ''unnecessary or undue degradation'' to address its distinct elements of ''unnecessary degradation'' and ''undue degradation''; and confirms that the statutory obligation to prevent ''unnecessary or undue degradation'' applies when either unnecessary degradation or undue degradation, and not necessarily both, is implicated. The rule explains that ''undue degradation'' is harm to land resources or values that is excessive or disproportionate to the proposed action or an existing disturbance. For example, approving a

proposed access road through the only remaining critical habitat for a plant listed as endangered under the Endangered Species Act, even if there is not another location for the road, would generally (although not always) result in undue degradation. The rule explains that ''unnecessary degradation'' is harm to land resources or values that is not needed to accomplish a use's stated goals. For example, approving a proposed access road through critical habitat for a plant listed as endangered under the Endangered Species Act that could be located elsewhere without impacting critical habitat and still provide the needed access would generally (although not always) result in unnecessary degradation.

This definition is consistent with BLM's affirmative obligation under FLPMA to take action to prevent unnecessary or undue degradation, which applies when either unnecessary degradation or undue degradation, and not necessarily both, is implicated. The definition of ''unnecessary or undue degradation'' applies to the use of those terms in the part 6100 regulations promulgated by this rule. It does not alter the definition of the term ''unnecessary or undue degradation'' at § 3809.5 of this chapter and does not apply to that term's use in the regulations at subpart 3809 of this chapter.

The final rule adds a definition for ''watershed condition assessment,'' which is defined to mean a process for assessing and synthesizing information on the condition of soil, water, habitats, and ecological processes within a watershed following the land health fundamentals through consideration of the watershed's physical and biological characteristics, landscape intactness, and disturbances. Watershed condition assessments are equivalent to the ''watershed condition classifications'' and ''land health assessments'' discussed in the proposed rule. The final rule updates the term and provides this definition in response to many public comments seeking clarification and efficiency of process.

Section 6101.5—Principles for Ecosystem Resilience

The rule relies upon express direction provided in FLPMA to manage public lands on the basis of multiple use and sustained yield, and it establishes the principle that the BLM must conserve renewable natural resources at a level that maintains or improves ecosystem resilience in order to achieve this mission. The BLM made only minimal changes to this section from the proposed rule.

Section 6101.5(d) directs authorized officers to implement principles of ecosystem resilience by recognizing conservation as a land use within the multiple use framework, including in decision-making, authorizations, and planning processes; protecting and maintaining the fundamentals of land health; restoring and protecting intact public lands; applying the full mitigation hierarchy to address impacts to species, habitats, and ecosystems from land use authorizations; and preventing unnecessary or undue degradation.

Subpart 6102—Conservation Use To Achieve Ecosystem Resilience

The rule clarifies that conservation is a use on par with other uses of public lands under FLPMA's multiple use framework. FLPMA directs the BLM to manage the public lands in a manner that protects the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values, among other resources and values, and that protects certain public lands in their natural condition. The BLM implements this mandate through land use plan allocations, including designations, and other planning decisions that conserve public land resources, seeking to balance conservation uses with other uses, such as energy development and recreation. The BLM also complies with this mandate when issuing decisions that implement its land use plans. In these implementation decisions, including when authorizing projects, the BLM promotes conservation use by requiring appropriate mitigation of impacts to natural resources on public lands. The rule provides specific direction for implementing certain programs in a way that emphasizes conservation use and provides new tools and direction for managing conservation use to facilitate ecosystem resilience on public lands.

As described in detail in each section, the BLM updated the final rule in response to public comments to clarify processes, including how conservation uses would occur within and outside of land use planning processes; enumerate guiding principles for restoration and mitigation actions; and provide other adjustments to improve public understanding and agency implementation of the rule. The most significant change to this subpart is that the final rule establishes restoration and mitigation leases as two separate types of leases instead of providing simply for conservation leases available for both purposes (which was the approach in the proposed rule). The final rule expands the regulations governing these leases to provide a more comprehensive framework for implementation and respond to concerns heard from the public.

Section 6102.1—Protection of Landscape Intactness

The BLM changed the title of § 6102.1 from ''Protection of Intact Landscapes'' in the proposed rule to ''Protection of Landscape Intactness'' in the final rule. Public comments suggested that the rule distinguish intactness as a resource value from intact landscapes as delineated units. The change in the title of § 6102.1 reflects that landscape intactness is the resource value that the BLM is seeking to identify and protect. The final rule includes a definition of the term ''intactness'' to further guide implementation of this section. Section 6102.1(a) and (b) require the BLM to manage certain landscapes to protect their intactness and to seek to prioritize actions that conserve and protect landscape intactness. The following section, 6102.2, provides direction for the BLM to inventory and protect intactness on the public lands by identifying and managing intact landscapes in the land use planning process.

Section 6102.2—Management To Protect Intact Landscapes

The BLM revised § 6102.2 in response to public comments requesting clarity around how intact landscapes would be identified and managed within and outside of the land use planning process and to distinguish intactness as a resource value from intact landscapes as delineated units. The final rule establishes in § 6102.2(a) that the BLM will maintain an inventory of intactness on the public lands, in accordance with FLPMA's requirement that the BLM maintain an inventory of all public lands and their resources and other values.

In the land use planning process, § 6102.2(b) requires the BLM to use the intactness inventory, and other available information including habitat connectivity and migration corridor data, to identify intact landscapes, evaluate alternatives to manage intact landscapes, and identify which intact landscapes or portions of intact landscapes will be managed for protection. Furthermore, in the land use planning process, § 6102.2(c) requires the BLM to identify desired conditions and landscape objectives to guide implementation decisions regarding management of intact landscapes. In making management decisions for intact landscapes, the BLM will seek to work

with communities to identify the most suitable areas to protect as intact landscapes; consult with Tribes to identify opportunities for co-stewardship; establish partnerships; and monitor effectiveness of ecological protection activities.

In addition to the land use planning process described above, § 6102.2(d) requires authorized officers to prioritize acquisition of lands or interests in lands that would further protect and connect intact landscapes and functioning ecosystems, and § 6102.2(e) directs the BLM to develop a national system for collecting and tracking disturbance and intactness data and to use those data to minimize disturbance and improve ecosystem resilience. Data will be made available to the public.

Section 6102.3—Restoration

In the proposed rule, restoration was divided across three sections (Restoration, Restoration Prioritization, and Restoration Planning). The final rule keeps a Restoration section but combines the remaining two sections into a Restoration Prioritization and Planning section. The definition of restoration, critical to interpretation of this section, has been updated to provide that restoration actions include both passive and active measures that assist the recovery of an ecosystem that has been degraded, damaged, or destroyed. The definition has been further updated to clarify that the intent of restoration actions is the return of more natural, native ecological states. The final rule emphasizes the importance of restoration in achieving multiple use and sustained yield and requires a consideration of the causes of degradation, the recovery potential of an ecosystem, and the allowable uses in the governing land use plan, such as whether an area is managed for recreation or is degraded land prioritized for development, in determining restoration actions. Principles for restoration actions, which were previously located in the Restoration Planning section of the proposed rule, are now found in the Restoration section to clarify that such principles apply to all restoration actions.[14] The principles include direction to consult with Tribes to identify opportunities for co-stewardship or collaboration, similar to the direction provided for managing intact landscapes.

[14] The reference to ''low-tech restoration activities'' in section 6102.3(d) means the practice of using simple, low unit-cost, structural additions (*e.g.,* wood and beaver dams in streams) to mimic natural functions and promote specific processes.

Section 6102.3.1—Restoration Prioritization and Planning

A combined restoration prioritization and planning section at 6102.3.1 requires the identification of restoration outcomes in resource management plans. Consistent with these outcomes, the section requires the identification of priority landscapes for restoration at least every 5 years and provides for a number of considerations for authorized officers when doing so. The section requires the development of restoration plans at least every 5 years and enumerates criteria with which restoration goals, objectives, and management actions identified in the plans must adhere. Among other criteria, restoration plans must adhere to commonly accepted principles and standards within the field of ecological restoration. Lastly, the section requires authorized officers to track restoration implementation and progress against identified goals and assess why restoration outcomes are not being met and what, if anything, is additionally needed to achieve restoration goals.

Section 6102.4—Restoration and Mitigation Leasing

Section 302(b) of FLPMA (43 U.S.C. 1732(b)) grants the Secretary authority to regulate through appropriate instruments the use, occupancy, and development of the public lands. Under that broad authority, the rule provides a framework for the BLM to issue restoration and mitigation leases on public lands for the purpose of pursuing ecosystem resilience through mitigation and restoration actions. The BLM will determine whether a lease is an appropriate mechanism based on the context of each application for a proposed lease, consistent with the final rule.

The BLM received many comments on the leasing provisions in the proposed rule that resulted in changes in the final rule. These changes include: establishing restoration leases and mitigation leases rather than conservation leases, which as proposed would have been used for either purpose; enabling conservation districts and State fish and wildlife agencies to hold leases; including consideration of factors to incentivize lease proposals that collaborate with existing permittees and other affected interests and meet other desirable criteria; requiring lessees to report annually on lease activity; and providing for the BLM to waive or reduce the rent of a restoration lease if the lease is providing valuable benefit to the public lands and is not generating revenue.

Many commenters were concerned about public access to public lands that are leased for restoration or mitigation purposes and expressed concern that the rule's definition of ''casual use'' does not explicitly guarantee use for common activities. While the BLM did not change the definition of ''casual use'' in order to remain consistent with existing regulations, the final rule specifically states that a restoration or mitigation lease will not preclude access to or across leased areas for recreation use, research use, or other authorized use that is compatible with the restoration or mitigation activities.

Some commenters questioned whether the BLM through this rulemaking or subsequent land use planning would allocate public lands as available to or excluded from restoration and mitigation leasing. The final rule does not identify or limit public lands that could be leased for restoration or mitigation purposes. However, several provisions guide the evaluation of which lands are suitable for leasing. The rule requires the BLM to identify restoration priority landscapes, intact landscapes, and landscape-scale mitigation strategies, and these areas would be logical locations for leases to support restoration and mitigation efforts the agency is prioritizing. The rule also enumerates factors for evaluating lease proposals based on criteria that are expected to make leases more successful. The rule does not allow for leases to be issued where an existing, authorized, and incompatible use is occurring, effectively removing areas from consideration for at least some activities that could be authorized by a restoration or mitigation lease. Additionally, any restoration or mitigation lease would need to conform to the BLM's approved land use plan. These provisions collectively guide restoration and mitigation leases to the most suitable locations without requiring the BLM, in every instance, to undertake a plan amendment or revision to allocate lands as available for leasing.

The following paragraphs summarize the restoration and mitigation leasing provisions in the final rule.

Section 6102.4(a) authorizes the BLM to issue restoration and mitigation leases for the purpose of restoring degraded landscapes or mitigating impacts resulting from other land use authorizations. Entities that can hold restoration and mitigation leases include individuals, businesses, non-governmental organizations, Tribal governments, conservation districts, and State fish and wildlife agencies. Qualified entities for a mitigation lease to establish an in-lieu fee program

would be limited to non-governmental organizations, State fish and wildlife agencies, and Tribal government organizations. Leases cannot be held by foreign persons as that term is defined in 31 CFR 802.221. The BLM will rely on standard lease adjudication practices established in 43 CFR 2920 to determine if a lease applicant meets the preconditions in this part for a qualified entity. Restoration and mitigation leases will be issued for the necessary amount of time to meet the lease objective. A lease issued for restoration purposes can be issued for an initial term of up to 10 years, whereas a lease issued for mitigation purposes will be issued for a term commensurate with the impact it is mitigating. Activity on all leases will be reviewed for consistency with lease provisions at regular intervals and can be extended beyond their primary terms when extension is necessary to serve the purpose for which the lease was first issued. Section 6102.4(a)(4) precludes the BLM from issuing new authorizations to use the leased lands if the use would be incompatible with the authorized restoration or mitigation use set forth in the lease.

Section 6102.4(b) and (c) set forth the application process for restoration and mitigation leases. Applicants are required to submit detailed restoration or mitigation development plans that include information on outreach with existing permittees, lease holders, adjacent land managers or owners, and other interested parties. The authorized officer can require additional information such as environmental data and proof that the applicant has the technical and financial capability to perform the restoration and mitigation activities.

Section 6102.4(d) enumerates factors for the authorized officer to consider when evaluating a lease application. Those factors include: lease outcomes that are consistent with restoration principles established in the rule; lease outcomes tied to desired future conditions that are consistent with the management objectives and allowable uses in the governing land use plan, such as an area managed for recreation or degraded land prioritized for development; collaboration with existing permittees, leaseholders, and adjacent land managers or owners; outreach to or support from local communities; and consideration of environmental justice objectives.

Once a lease application is approved, § 6102.4(e) requires the applicant to provide the BLM with a monitoring plan and to report annually and at the end of the lease period on lease activity.

Section 6102.4(f) and (g) provide that restoration and mitigation leases do not entitle leaseholders to the exclusive use of the public lands and that other uses compatible with the objectives of the restoration or mitigation lease are explicitly allowed on leased lands. Consistent with other land use authorizations, such as rights-of-way, it is the BLM's view that no property interest is conveyed by issuing these leases. Section 6102.4(g) confirms that a restoration or mitigation lease will not preclude access to or across leased areas for casual use, recreation use, research use, or other use taken pursuant to a land use authorization that is compatible with the approved restoration or mitigation use.

Section 6102.4(j) directs that cost recovery, rents, and fees for restoration and mitigation leases will be governed by existing regulations at 43 CFR 2920.6 and 2920.8 and that the BLM will generally collect annual rental based on fair market value. Recognizing that restoration lessees are providing a service to the public and the BLM, the rule provides for waiving or reducing the rent of a restoration lease if a valuable benefit is being provided to the public and revenue is not being generated. This approach is consistent with the approach in waiving rents for rights-of-way in 43 CFR 2806.15. Although section 102 of FLPMA provides a policy preference for recovering fair market value for the use of the public lands (*see* 43 U.S.C. 1701(a)(9)), the BLM is not required to do so, especially in circumstances in which departing from charging a fair market value rent would further other policy priorities identified in section 102 of FLPMA. Here, the BLM has determined that allowing authorized officers the discretion to reduce or waive rent for restoration leases will assist in its effort to manage the public lands to protect the quality of ecological and other relevant values. (*See* 43 U.S.C. 1701(a)(8))

Section 6102.4.1—Termination and Suspension of Restoration and Mitigation Leases

The final rule makes only minimal changes to § 6102.4.1 from the proposed rule. Section 6102.4.1 outlines processes for suspending and terminating restoration and mitigation leases. Where the leaseholder fails to comply with applicable requirements, fails to use the lease for its intended purpose, or cannot fulfill the lease's purpose, the BLM may suspend or terminate the lease. An authorized officer must issue an immediate temporary suspension of a lease upon determination that a noncompliance issue adversely affects or poses a threat to public lands or public health or safety. Following termination of a lease, the leaseholder has sixty days to fulfill its obligation to reclaim the site (*i.e.,* return the site to its prior condition or as otherwise provided in the lease). That obligation is distinct from the goal of restoring the site to its ecological potential that underlies the lease.

Section 6102.4.2—Bonding for Restoration and Mitigation Leases

The final rule authorizes the BLM to require a bond for a restoration or mitigation lease involving surface-disturbing or active management activities, but does not require a bond in all cases as the proposed rule would have. Section 6102.4.2(a) directs that for mitigation leases, the lease holder will usually be required to provide letters of credit or establish an escrow account for the full amount needed to ensure the development plan meets all performance criteria. The final rule includes considerations for requiring a bond, such as the type and intensity of surface-disturbing activities, proposed use of experimental or non-natural restoration methods, and risks associated with the proposed actions.

Section 6102.4.2(b) through (d) establishes additional bonding provisions regarding statewide bonds, filing of bonds, and default and are unchanged from the proposed rule.

Section 6102.5—Management Actions for Ecosystem Resilience

The final rule includes minor updates to this section in response to comments suggesting more clarity around how the section connects to other sections of the rule. Commenters also recommended strengthening the focus on ecosystem resilience and emphasizing biodiversity as an important component of ecosystem resilience. This rule focuses primarily on supporting healthy and resilient ecosystems, which are the basis for multiple use and sustained yield and which, if achieved, will benefit biodiversity, water security, carbon sequestration, forage, and a host of other values.

Section 6102.5 sets forth a framework for the BLM to make informed management decisions based on science and data, including at the planning, permitting, and program levels, that would help to facilitate ecosystem resilience. As part of this framework, authorized officers are required to identify priority watersheds, landscapes, and ecosystems that require protection and restoration efforts; develop and implement protection,

restoration, mitigation, monitoring, and adaptive management strategies; [15] and share watershed condition assessment data with the public. The final rule cross-references these requirements listed in § 6102.5(a) with other sections of the rule that provide additional guidance on these management actions for ecosystem resilience.

Section 6102.5(b) requires the BLM to meaningfully consult with Tribes and Alaska Native Corporations and makes a change from the proposed rule that provides for Tribal input on whether actions are likely to substantially impact Tribes or Alaska Native Corporations. The rule also requires the BLM to respect and include Indigenous Knowledge in decision-making, including through Tribal co-stewardship, and updates provisions and definitions in the rule to reflect current departmental and agency guidance.

Consistent with applicable law and resource management plans, including, for example, where an area is managed for recreation or is degraded land prioritized for development, authorized officers are required to make every effort to avoid authorizing any use of the public lands that permanently impairs ecosystem resilience. Permanent impairment of ecosystem resilience would be difficult or impossible to avoid, for example, on lands on which the BLM has authorized intensive uses, including infrastructure and energy projects or mining, or where the BLM has limited discretion to condition or deny the use. Through this frame, the rule recognizes that the BLM may develop land use plans that prioritize degraded areas for development, such as in the Arizona Restoration Design Energy Project, or generally prioritize areas for utility-scale development, such as the Solar Energy Zones designated in the 2012 Western Solar Plan, and that the effects on ecosystem resilience in such a plan may be mitigated but will not be completely avoided. The rule also requires the authorized officer to provide justification for decisions that may impair ecosystem resilience. In other words, the rule does not prohibit land uses that impair ecosystem resilience; it requires avoidance as a general matter and an explanation if impairment cannot be avoided.

[15] Adaptive management is a system of management practices based on clearly identified outcomes and monitoring to determine whether management actions are meeting desired outcomes and, if not, facilitating management changes that will best ensure that outcomes are met or reevaluated. Adaptive management recognizes that knowledge about natural resource systems is sometimes uncertain (43 CFR 46.30).

To ensure the best available science is underpinning management actions, the rule requires the BLM to use national and site-based assessment, inventory, and monitoring data, along with other high-quality information, to evaluate resource conditions and inform decision-making.

Section 6102.5.1—Mitigation

The rule at § 6102.5.1(a) directs the BLM to apply the mitigation hierarchy to avoid, minimize, and compensate for adverse impacts to all public land resources, generally in that order. The rule states further that mitigation approaches or requirements may be identified in land use plans or other decision documents. Consistent with BLM's existing policy on mitigation (H–1794–1), which requires BLM to consider compensatory mitigation for important, scarce, or sensitive resources, § 6102.5.1(b) expands upon this direction by requiring that mitigation to address adverse impacts to such resources should be applied with the goal of eliminating, reducing, and/or offsetting impacts on the resource, consistent with applicable law. This facilitates BLM's compliance with its multiple-use and sustained yield mission by conserving such resources for future generations. Determining the maximum benefit to an impacted resource from a compensatory measure is often achieved by carefully identifying the type, location, timing, and other aspects of the compensatory mitigation measure. This assessment is conducted as standard practice in the BLM's NEPA analysis and decision documents.

The rule also identifies new principles at § 6102.5.1(c) to apply when implementing mitigation, including the need to ensure compensatory mitigation is commensurate with the impacts, and the use of adaptive management, landscape-scale approaches, high-quality information, and performance criteria and effectiveness monitoring.

At § 6102.5.1(d), the rule allows the BLM to approve and use third-party mitigation fund holders to administer funds for the implementation of compensatory mitigation programs or projects and specifies the type of actions third parties can perform with compensatory mitigation funding. Section 6102.5.1(e) establishes the requirements for different types of entities that could be considered and approved as mitigation fund holders. The mitigation fund holder could be a State or local government, if, among other requirements, that entity can demonstrate to the satisfaction of the BLM that it is acting as a fiduciary for the benefit of the mitigation project and site. The section also allows for a mitigation fund holder to be an entity that, among other requirements, qualifies for tax-exempt status and provides evidence it can successfully hold and manage mitigation accounts.

Sections 6102.5.1(f) through (i) provide further direction to authorized officers in managing mitigation leases and lease holders, including provisions to govern the collection of annual rent at fair market value for large or otherwise substantial compensatory mitigation programs or projects on public lands, including mitigation banks and in-lieu fee programs.

Subpart 6103 Managing Land Health To Achieve Ecosystem Resilience

Section 6103.1—Land Health Standards

Consistent with the proposed rule, § 6103.1 of the final rule directs that all program areas of the BLM must be managed in accordance with the fundamentals of land health, which are adopted, verbatim, from the fundamentals of rangeland health included at 43 CFR 4180.1 (2005). It does so by establishing a series of procedural requirements to guide the BLM's actions to address land health. The rule does not require that individual actions ''comply'' with the fundamentals of land health, nor does it require achievement of those fundamentals (as measured by the land health standards) as a precondition for any BLM decision.

The rule in this section directs authorized officers to adopt national land health standards across all ecosystems that provide consistency and conformance with the fundamentals of land health and facilitate progress toward meeting land health. Acknowledging the importance of standards in managing all of the BLM's programs in accordance with the fundamentals, the title of § 6103.1 has been changed to Land Health Standards. Section 6103.1 includes a new paragraph (b) describing the resources, processes, and values addressed through national land health standards as well as a new timeline at paragraph (e) to review and amend or supplement standards and a subsequent timeline to ensure standards remain sufficient. A new paragraph at § 6103.1(d) instructs authorized officers to incorporate geographically distinct land health standards when needed to address unique or rare ecosystem types that may not be addressed by the national standards. These new timelines in the final rule—along with additional

implementation specificity found in other land-health related sections of the rule—are introduced in response to comments that sought more clarity and specificity for how standards may be updated to serve as appropriate measures for the fundamentals. Section 6103.1(f) makes explicit that any new or amended land health standard must be approved by the BLM Director prior to implementation.

Section 6103.1.1—Management for Land Health

Section 6103.1.1(a) conveys the importance of assessing land health at a broad scale to manage for ecosystem resilience and provides that authorized officers should rely on assessments and evaluations conducted at such scales, as appropriate, to support decision-making. Section 6103.1.1(b) reinforces the direction that all BLM program areas must be managed to facilitate progress toward achieving land health standards. Section 6103.1.1(b)(1) requires authorized officers to apply existing standards in the administration of all BLM programs. Initially, this will mean applying the existing standards prepared pursuant to subpart 4180 of this chapter to all programs, *not just* grazing. Moving forward, consistent, national standards will be completed pursuant to procedures set out in this subpart, and not under the procedures set out in subpart 4180, and will then apply to all programs, *including* grazing. Section 6103.1.1(b)(2) directs programs to develop management guidelines, which are best practices in managing programs to achieve goals. Management guidelines are to be reviewed at least every 10 years consistent with review timelines in other sections that relate to land health. As with standards, existing management guidelines applicable to the grazing program will continue to apply. New and amended guidelines for grazing should be developed under the procedures in this subpart, and not subpart 4180. Sections 6103.1.1(c) and (d) require that land health be included in land use planning, primarily when identifying allocation decisions and actions that are anticipated to achieve land health outcomes, as well as any impediments in doing so.

Section 6103.1.2—Land Health Evaluations and Determinations

Section 6103.1.2(a) has been modified to require that authorized officers complete watershed condition assessments and land health evaluations at least every 10 years. Watershed condition assessments supplant land health assessments in the proposed rule and characterize resource conditions, while subsequent land health evaluations interpret assessment findings to draw conclusions about whether land health standards are being achieved consistent with the fundamentals of land health. This efficiency of process responds to many comments and concerns about the BLM's ability to complete land health assessments across broad spatial scales.

Direction to conduct watershed condition assessments and land health evaluations at broader spatial scales, as opposed to at the scale of an allotment or other more narrowly drawn boundary or project area, builds on best practices currently deployed by BLM field offices, responds to comments recommending landscape-scale approaches as a way to address the backlog of pending land health assessments and evaluations, and better serves efforts to understand and address land health conditions across management boundaries.

Section 6103.1.2(d) provides what must be incorporated when conducting land health evaluations, such as watershed condition assessments and high-quality information requirements. Section 6103.1.2(d) further clarifies the requirements for conducting land health evaluations, including that authorized officers document the rationale and findings as to whether each land health standard is achieved or making significant progress towards achievement.

Sections 6103.1.2(e), (f), and (g) describe the process after land health evaluations determine if resource conditions are or are not achieving or making significant progress toward achieving land health standards. When watershed condition assessments and land health evaluations find that resource conditions are achieving or making significant progress toward achieving land health, then project-level decisions should rely on such evidence where possible and appropriate. Section 6103.1.2(f) provides for tiering documentation and evidence from broad-scale assessments and evaluations for project-level decisions, such as grazing permit renewals, which promotes efficiency and streamlines decision-making. This provision responds to comments concerned with the existing backlog of assessments land health evaluations.

When watershed condition assessments and land health evaluations find that resource conditions are not achieving, or making significant progress toward achieving, land health standards, then causal factor determinations, as directed by § 6103.1.2(f), must be prepared no later than a year after the evaluation. Determinations document significant causal factors for non-achievement. Section 6103.1.2(f)(3) requires authorized officers to take appropriate action as soon as practicable to address nonachievement of land health standards when the significant causal factors include existing management practices or levels of use on public lands. However, as clarified in § 6103.1.2(f)(4), to the extent existing grazing management practices or levels of grazing use on public lands are significant causal factors preventing achievement of land health standards, authorized officers must also comply with the requirement for taking appropriate action set by § 4180.2(c) of this chapter, including that appropriate action be taken not later than the start of the next grazing year.

Further, as noted previously, appropriate actions in a specific situation will be informed and may be constrained by applicable law and the governing land use plan. For example, where a land use planning approach, such as BLM Arizona's Restoration Design Energy Project, is intended to support development of renewable energy on disturbed or previously developed sites, then appropriate actions would be designed to add measures that facilitate the progress of the affected lands toward meeting the applicable fundamentals of land health. However, these actions would be informed by the overall approach of identifying disturbed lands suitable for renewable energy development and applying measures consistent with those management decisions. This is consistent with the approach to incorporate design features into the Restoration Design Energy Project Record of Decision to reduce overall impacts to the lands identified for development. (See *https://eplanning.blm.gov/public_projects/nepa/79922/107093/131007/RDEP-ROD-ARMP.pdf*).

Section 6103.1.2(f)(5) identifies some appropriate actions that may be deployed to address practices and uses determined to be significant causal factors, consistent with applicable law, regulation, and the governing resource management plan and its management objectives, such as where an area is managed for recreation or is degraded land prioritized for development. For example, if a governing resource management plan identifies degraded lands for solar development and those areas are not meeting standards, the authorized officer should consider that land use planning decision in determining the appropriate action. In that circumstance, it would typically

not be appropriate to deny solar or wind use altogether, although design features or other mitigation measures may be applied. Section 6103.1.2(i) reinforces that appropriate actions must be consistent with existing resource management plans and notes that if planning decisions do not allow for appropriate actions to address significant causal factors, then an authorized officer may decide to amend or revise the applicable land use plan. However, whether to undertake a planning process is at the discretion of the authorized officer. Sections 6103.1.2 (j) and (k) respond to public comment by requiring annual, publicly available reporting on assessment, evaluation, and determination accomplishments; results; and actions.

Section 6103.2—Inventory, Assessment, and Monitoring

The final rule requires the BLM to complete watershed condition assessments every 10 years and consider them in multiple decision-making processes. New paragraphs at § 6103.2(a) further describe the purpose, process, and requirements of conducting watershed condition assessments in support of land use planning, protection of intact landscapes, managing for ecosystem resilience, informing restoration actions, and informing land health evaluations and determinations. In response to public comments encouraging consistency in analysis approach, standard data sources, and transparency, the final rule adds in § 6103.2(a) that the BLM must utilize multiple sources of high-quality information to understand conditions and trends relevant to land health standards and incorporate consistent analytical approaches, quantitative indicators, and benchmarks where practicable. It is anticipated that watershed condition assessments will frequently be completed not by BLM State Offices, but by national-level resources, such as the National Operations Center, utilizing standardized procedures and existing data and analyses and validated with local data and high-quality information as appropriate.

Section 6103.2(b) clarifies that the BLM's inventory of public lands includes both landscape components and core indicators that address land health fundamentals and requires the use of high-quality information and inventory, assessment, and monitoring information, including standardized quantitative monitoring data, remote sensing maps, and geospatial analyses, to inform decision-making across program areas. In response to public comments, the BLM clarified that this inventory specifically includes infrastructure and renewable resources and that it is available to the public (currently, *https://gbp-blm-egis.hub.arcgis.com/*). Section 6103.2(c) establishes principles to ensure that inventory, assessment, and monitoring activities are evidence-based, standardized, efficient, and defensible.

43 CFR Chapter II

Subpart 1610—Resource Management Planning

Section 1610.7–2—Designation of Areas of Critical Environmental Concern

The rule includes changes to the land use planning regulations to elaborate on the role ACECs play as the principal administrative designation for public lands where special management attention is required to protect important natural, cultural, and scenic resources and to protect against natural hazards. It reiterates FLPMA's requirement that the BLM give priority to the identification, evaluation, and designation of ACECs during the land use planning process and provides additional clarity and direction for complying with this statutory requirement. The rule codifies in regulation procedures for considering and designating potential ACECs that were, prior to promulgation of this rule, partially described in regulation and partially described in agency policy.

The BLM received many comments on the ACEC provisions of the proposed rule, and the final rule reflects changes the BLM made based on public comments. As described in more detail below, changes from the proposed rule include: providing for the BLM to implement temporary management for potential ACECs identified outside of an ongoing planning process, with public notice and periodic reevaluation; codification of research natural areas as a type of ACEC designated for the primary purpose of research and education on public lands, consistent with existing regulations and policy; a presumption that all areas found to meet all three ACEC criteria will be designated in the resource management plan; a management standard that requires the BLM to administer designated ACECs in a manner that conserves, protects, and enhances the relevant and important values; and a definition for the term ''irreparable damage.''

The final rule also confirms that proposed and existing ACECs being addressed in the planning process for a resource management plan or a plan amendment will be identified in all applicable **Federal Register** Notices and in public outreach materials. The BLM will not be required to produce separate notices specific to ACECs. The following paragraphs summarize the ACEC provisions in the final rule.

Section 1610.7–2(a) confirms that ACECs are the principal administrative designation for public lands where special management is required to protect and prevent irreparable damage to important resources. ACECs are considered and designated in land use planning processes, including resource management plan revisions and amendments.

Section 1610.7–2(b) requires authorized officers to identify, evaluate, and give priority to areas that have potential for designation and management as ACECs in the land use planning process, and it provides that proposed and existing ACECs that will be addressed in the planning process for a resource management plan, plan revision, or plan amendment will be identified in all applicable public notices.

Section 1610.7–2(c) requires authorized officers to identify areas that may be eligible for ACEC status early in the planning process and specifies the need to target areas for evaluation based on resource inventories, internal and external nominations, and existing ACEC designations.

Section 1610.7–2(d) outlines the three criteria that must be met for ACEC designation, which are relevance, importance, and special management attention. The rule provides that values and resources may have importance if they contribute to ecosystem resilience, landscape intactness, or habitat connectivity, in addition to other importance criteria. The final rule requires that values and resources have more than local importance to meet the importance criteria, a change from the proposed rule based on public comments. Special management attention prevents irreparable damage to the relevant and important values and would not be prescribed if the relevant and important values were not present. The rule defines ''irreparable damage'' in this context to mean: ''harm to a value, resource, system, or process that substantially diminishes the relevance or importance of that value, resource, system, or process in such a way that recovery of the value, resource, system, or process to the extent necessary to restore its prior relevance or importance is impossible.'' Requiring a finding that special management attention is necessary for ACEC designation is consistent with BLM practice and guidance but was not a feature of the

regulations prior to promulgation of this rule.

Section 1610.7–2(e) provides that the BLM may designate an ACEC research natural area (RNA) for an area that meets all three ACEC criteria set forth in § 1610.7–2(e) and is consistent with the purposes for research natural areas established in existing regulations at 43 CFR subpart 8223. These regulations allow the BLM to establish RNAs for the primary purpose of research and education on public lands having natural characteristics that are unusual or that are of scientific or other special interest. The BLM's current guidance, as set forth in the agency's Land Use Planning Handbook and ACEC Manual, considers RNAs as a type of ACEC that are to be designated following the ACEC designation process. The BLM has designated many ACEC RNAs in existing land use plans following this guidance. Because this rule is codifying the BLM's ACEC guidance and process, and in response to public comments on this topic, the final rule provides for this RNA designation.

Section 1610.7–2(f) provides that the boundaries of proposed ACECs shall be identified for public lands as appropriate to encompass the relevant and important values and geographic extent of the special management attention needed to provide protection.

Section 1610.7–2(g) requires the BLM to analyze in detail all potential ACECs that have relevant and important values in planning documents. In the land use planning process, the BLM evaluates the need for special management attention to protect the relevant and important values of potential ACECs, which could include other allocations and designations that would provide appropriate protection and prevent irreparable damage to the relevant and important values.

Section 1610.7–2(h) directs that an approved resource management plan, plan revision, or plan amendment will list all designated ACECs, identify their relevant and important values, and include the special management attention being provided to them.

Section 1610.7–2(i) establishes procedures for addressing potential ACECs that are identified outside of an ongoing planning process. The State Director has the discretion to determine the appropriate time to evaluate whether the nomination meets the relevant, important, and special management criteria identified in 1610.7–2(d)(1) through (3). If a potential ACEC nomination meets all three criteria specified in the regulations—that is, it has relevance and importance and needs special management attention—then the State Director will, at their discretion, either initiate a land use planning process to evaluate the potential ACEC for designation or provide temporary management consistent with the existing resource management plan to protect the relevant and important values from irreparable damage. The final rule clarifies that the authorized officer in this context would be the State Director, consistent with other portions of the rule addressing decisions on potential ACECs. If the BLM decides to implement temporary management, the BLM will comply with all applicable laws, including NEPA, notify the public, and reevaluate the area periodically to ensure temporary management is still necessary. This provision does not change the presumption that ACECs are nominated and addressed through resource management planning processes, and it does not require the BLM to evaluate ACEC nominations outside the planning process.

Section 1610.7–2(j) requires the State Director to: determine which ACECs to designate based on specific factors including a presumption that all potential ACECs that meet all three criteria will be designated; provide a justification and rationale in decision documents for decisions both to designate an ACEC and not to designate an ACEC; administer designated ACECs in a manner that conserves, protects, and enhances the relevant and important values and only allow casual use or uses that will ensure the protection of the relevant and important values; and prioritize acquisition of inholdings within ACECs and adjacent or connecting lands that also possess the relevant and important values of a specific ACEC. In response to comments, the final rule eliminated the requirement included in the proposed rule that State Directors provide annual reports describing activity plans and implementation actions for each ACEC in the State. Such reporting is more appropriately developed during implementation of the final rule and should remain within the discretion of the State Director.

Section 1610.7–2(k) authorizes the State Director to remove an ACEC designation in a land use planning process only when special management attention is not needed because another legally enforceable mechanism provides an equal or greater level of protection, or when the relevant and important values are no longer present, cannot be recovered, or have recovered to the point where special management is no longer necessary.

Section 1610.7–2(l) identifies terms that are used in the ACEC section—casual use, conserve, ecosystem resilience, intactness, landscape, monitoring, protect, and restore—and provides that they should be interpreted consistent with the definitions of those same terms in § 6101.4.

Severability

The provisions of the rule should be considered separately. If any portion of the rule were stayed or invalidated by a reviewing court, the remaining elements would continue to provide the BLM with important and independently effective tools to advance conservation on the public lands. In particular, revisions to existing planning regulations at 43 CFR part 1600 governing the designation and management of ACECs are separate from the balance of the rule, which promulgates the new 43 CFR part 6100. Within part 6100, the rule includes a number of aspects that function independently and hold independent utility. For example, the rule's provisions pertaining to the identification and management of intact landscapes and other values in land use planning and agency decision-making; its framework for third-party restoration and mitigation leasing; and its procedures for adopting national land health standards, assessing land health, and using those assessments to drive agency decisions operate as independent means to achieve the rule's overarching goal of facilitating conservation of the public lands. Hence, if a court prevents any provision of one part of this rule from taking effect, that should not affect the other parts of the rule. The remaining provisions would remain in force.

IV. Additional Response to Public Comments

The BLM received an initial total of 216,403 comments from regulations.gov. Further analysis showed that there were public comment submissions with multiple cosigners, sometimes several thousand on one submission, which were initially counted as separate submissions but ultimately identified as a single submission with multiple signatures. Therefore, although 216,403 voiced their opinion, the final count of comment letters came to 152,673. The comment letters on the proposed rule are available for viewing on the Federal e-rulemaking portal (*https://www.regulations.gov*) (search Docket ID: BLM–2023–0001).

The BLM has reviewed all public comments in the context of the proposed rule and the particular

solicitations for comment in its preamble. The BLM has made changes to the final rule based on the public comments that refine and further develop the concepts identified in the proposed rule. The BLM did not make wholesale changes or additions, even when prompted to do so by the public comments, that would have caused the final rule to materially alter the issues included in or substantially depart from the terms and substance of the proposed rule. Changes made are described in this section and the ''Section-by-Section Discussion of Final Rule and Revisions from the Proposed Rule'' section.

The following is a summary of significant issues raised in comments the BLM received on the proposed rule and responses to these comments. The comments highlighted in the following paragraphs fell into several categories: comments related to sections of the proposed rule; comments related to public lands uses and resources not addressed in the rule; and comments on the rulemaking process. See the Section-by-Section discussion for responses to public comments on specific sections of the proposed rule.

A. Conservation Leasing

Commenters generally sought a better understanding of many aspects of the conservation leasing proposal, including the purposes and uses of the leases, and identified the need for terminology that better reflects those purposes and uses. Commenters requested additional detail within the rule text for what would and would not be allowed under a conservation lease, clarification on the terms and duration of the leases, and information on how conservation leases would interact with existing uses such as grazing and recreation.

In response to these comments, the BLM updated the rule to provide clarity and specificity for the leasing program being established in the rule. Significantly, the final rule establishes two distinct types of leases in place of referring to ''conservation leases'': restoration leases and mitigation leases. Restoration leases can be used to facilitate restoration of land and resources by passively or actively assisting the recovery of an ecosystem; and mitigation leases can be used to offset impacts to resources resulting from other land use authorizations. Restoration can occur under a mitigation lease when restoration is a mitigation action being taken pursuant to the lease. The final rule enumerates factors for authorized officers to consider when evaluating lease proposals, such as whether the applicant is collaborating with existing permittees, whether the lease would advance environmental justice objectives, or whether the objectives of the proposed leases would be supported by current management of the lands. The final rule also enables conservation districts and State fish and wildlife agencies to hold restoration and mitigation leases and specifies that recreation uses would not generally be precluded by restoration or mitigation leases.

Many comments also asked about how conservation leases relate to valid existing rights and permitted uses, including grazing, mining, and oil and gas leasing. Restoration and mitigation leases would not disturb existing authorizations, valid existing rights, or State or Tribal land use management. If the proposed activities in a restoration or mitigation lease would conflict with existing authorizations, such as if a specific type of restoration would not be compatible with grazing and the proposed location is already subject to a grazing authorization, then the restoration or mitigation lease could not be issued on those particular lands unless the proposal were modified to eliminate the conflict. While an applicant might propose a lease to help achieve restoration or mitigation outcomes on public lands, the BLM retains discretion as to whether to issue a lease in response to a proposal.

Some commenters raised concerns about the ability of foreign entities to use conservation leases to block development of critical mineral or energy projects on public lands or to obtain conservation leases near military bases or other sensitive government installations. In response to these and other comments on the potential use of conservation leases in ways that would excessively interfere with other uses or to intentionally block development, the BLM clarified that restoration and mitigation leases may only be issued for two discrete purposes: restoration of degraded landscapes or mitigation to offset the impacts of development (6102.4(a)(1)). To specifically address concerns around foreign actors, the BLM also revised the rule to explicitly exclude foreign persons, as that term is defined in 31 CFR 802.221, from being qualified to hold a restoration or mitigation lease. The BLM will rely on its standard lease adjudication practices established in 43 CFR 2920 to determine if a lease applicant meets the preconditions for a qualified lease holder.

The final rule includes various other updates to the language throughout the text of the rule to provide readers with a clearer understanding of the goals and future implementation of the leasing program. For example, the final rule adopts principles for restoration and mitigation that provide additional structure for restoration and mitigation leases. The final rule also refines the BLM's discussion of intact landscapes and restoration priority landscapes, which would support identification of areas for restoration and mitigation leases.

Many commenters recommended that conservation leases should undergo NEPA analysis. A project-level decision to issue a restoration or mitigation lease will comply with NEPA, as is typically the case for Federal actions on public lands, and the BLM will prepare a NEPA analysis to support such project-level decisions when appropriate.

B. Restoration

Commenters provided a wide variety of comments on the topic of restoration. Comments generally related to one of three broad issues: the definition of restoration; the process by which restoration priorities are identified and the use of resource management plans (RMPs) in doing so; and conflicts that can arise in the application of restoration actions.

Several commenters expressed the need for clarifying the definition of restoration and suggested that it should include the concept of returning an area to its natural, native ecological state with several comments recommending that the BLM look to the Society for Ecological Restoration's ''International Principles and Standards for the Practice of Ecological Restoration'' for guidance.

Other commenters requested clarification as to where, how, and when restoration priorities are determined under the rule and called for transparency and public engagement in this process. Some comments also mentioned the use of resource management plans to identify and communicate restoration priorities and expressed concern that including restoration plans in RMPs could complicate and lengthen the RMP adoption or revision process. Other commenters, however, suggested that focusing on creating a 5-year schedule for restoration activities within RMPs is too narrow and proposed looking across watersheds (or subbasins or basins) to identify priorities at the state level, irrespective of RMP boundaries. They stated doing so may assist the BLM in better allocating limited restoration funds. Other comments suggested that restoration plans focus on implementation-level decisions rather than being incorporated into RMPs. One

comment suggested that each BLM district have a map identifying specific areas suitable for restoration measures.

Commenters expressed concerns about the practicalities and potential conflicts with implementing restoration across all BLM-administered lands. Comments discussed how in certain cases, restoration to a reference state may not be feasible or appropriate because the landscape has crossed an ecological threshold and is highly unlikely to be fully restored, or because the resource has high value or function and unique character that cannot be restored or replaced. Several comments discussed the proposed rule's treatment of land health standards in the context of restoration, noting that some restoration actions may not always have positive effects on land health and questioning whether achieving land health standards should be the sole purpose of restoration plans. Commenters raised examples of restoration projects in which the BLM removed pinyon-juniper forest through ecologically damaging practices such as chaining.

In response to comments, the BLM included a new provision within § 6102.3 (''Restoration'') to apply a set of principles to all restoration activities. These principles were largely identified in the draft rule in the context of planning for restoration. In response to comments, these principles now apply to all restoration actions and, among other purposes, seek to ensure that restoration actions directly address the causes of degradation and, importantly, take into consideration the recovery potential of the habitat. These principles will help the BLM target the right restoration actions in the right places, thereby reducing unintended outcomes and increasing the potential for successful restoration.

The principles also ensure that both passive and active management actions are allowable and promoted as restoration activities. Likewise, the definition of restoration has been changed to include explicit mention of both passive and active processes or actions and, in response to comments, include a stated goal of restoration actions to return ecosystems to a ''more natural, native ecological state.''

In response to comments on restoration prioritization and planning, the BLM revised the rule text to provide for the development of restoration plans outside of the RMP revision or amendment process. The final rule requires authorized officers to identify priority landscapes for restoration, consistent with existing, applicable RMP goals and objectives, and to prepare a restoration plan for those priority landscapes. Technical details, including for example geographic scale, for the development of restoration plans can be addressed through agency guidance. Such guidance may also address how to incorporate land health standards into restoration plans and may identify commonly accepted scientific standards within the field of ecological restoration for restoration work.

C. Mitigation

Generally, comments on the mitigation aspects of the rule could be grouped into three categories: the BLM's authority under FLPMA to require mitigation; the policies and practices that govern how the BLM will deploy mitigation, including use of the mitigation hierarchy; and the use of leases, as proposed by the rule, for mitigation purposes.

Many commenters expressed reservations about the BLM's mitigation management approach under the proposed rule, particularly how it might conflict with the multiple use mandate outlined in FLPMA. Critics argued that this could inadvertently prioritize resource preservation at the expense of a more comprehensive management approach, in particular with regard to grazing and recreation. Some commenters posited that the proposed mitigation standards are unlawful and reach beyond the BLM's authority under FLPMA and conflict with other statutory mandates. Other commenters conveyed the reverse, suggesting that the BLM's authority and responsibility to apply the mitigation hierarchy is central to managing for multiple use and sustained yield.

For the reasons discussed in more detail in the Background section above, FLPMA allows the BLM to balance the need for resource conservation alongside other uses as part of managing under principles of multiple use and sustained yield. In turn, FLPMA vests the BLM with broad authority to incorporate appropriate mitigation in its land use planning and to require other users of the public land to avoid, minimize, and compensate for resource impacts, as appropriate, from authorized uses. 43 U.S.C. 1712I, 1732(a)–(b); *see also* M–37039, The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations through Mitigation, at 11–22 (Dec. 21, 2016) (reinstated by M–37075 (Apr. 15, 2022)) (''[The] BLM's charge under FLPMA to manage public lands based on principles of multiple use and sustained yield supports use of mitigation. The authority to evaluate and impose mitigation arises out of the broad authority FLPMA vests in the BLM to pursue congressional goals . . . for public lands. The BLM can evaluate and require mitigation through both the land use planning process and site-specific authorizations.'').

There were a number of comments regarding how and where the BLM would deploy mitigation under the proposed rule. Commenters recommended that the BLM amend the rule to require mitigation only to the extent practicable or reasonable and highlighted the need for the BLM to coordinate mitigation with local and State conservation plans. Many commenters were concerned that the use of compensatory mitigation would allow for development in sensitive areas that would otherwise not be allowed, such as ACECs or intact landscapes, and recommended that compensation should not be used to justify activities that could degrade these areas. Some commenters called on the BLM to require that compensatory mitigation measures ensure a net benefit for biodiversity, adhering to established international principles, or avoid the net loss of ecologically intact land. Some commenters narrowed their concern to how compensatory mitigation may specifically impact recreation, which can significantly degrade public resources, and urged that the rule not apply compensatory mitigation requirements to nonprofit organizations, and that ongoing trail use not be subject to such requirements.

In response to these comments, the BLM added mitigation principles to the final rule to provide a framework for how mitigation will be deployed under the rule, including through the mitigation hierarchy and mitigation leasing. The principles are consistent with agency policy and guidance for implementing mitigation, such as developing landscape-scale mitigation strategies, requiring performance criteria and effectiveness monitoring for mitigation programs and projects, and ensuring that compensatory mitigation is durable, additional, timely, and commensurate with adverse impacts. The final rule also confirms that the BLM will adhere to the mitigation hierarchy and that for important, scarce, or sensitive resources, the BLM will apply the mitigation hierarchy in the manner that achieves the maximum benefit to the impacted resource.

Many commenters emphasized the necessity of ensuring that any mitigation credits are based on completed restoration efforts that are actively functioning as habitat for native species impacted by development. These

commenters objected to permitting any proposal to issue credits based on future promises of restoration. Another commenter advocated for third-party mitigation fund holders to facilitate restoration on BLM-managed lands, specifically highlighting the role of private sector mitigation providers, including the ability for private third-party providers to hold mitigation funds. In response to comments, the BLM clarified the types of third-party entities it will allow to hold mitigation funds through a formal agreement. The mitigation fund holder could be a State or local government, if, among other requirements, that entity can demonstrate to the satisfaction of the BLM that it is acting as a fiduciary for the benefit of the mitigation project and site. The section also allows for a mitigation fund holder to be an entity that, among other requirements, qualifies for tax-exempt status and provides evidence it can successfully hold and manage mitigation accounts.

D. Land Health

Comments on aspects of land health in the proposed rule were diverse and focused on: BLM's capacity to evaluate land health across all BLM managed lands, the land health fundamentals, standards, and guidelines; the connection between land health and ecosystem resilience; the application of land health in resource decision-making; and questions about the role of Resource Advisory Councils.

Several commenters conveyed support for the proposal to apply the fundamentals of land health and related standards and guidelines to all BLM-managed public lands and uses, expanding them beyond their original application to rangelands and grazing.

In response to comments, the rule includes streamlined assessment processes applicable at broad spatial scales and a subsequent timeline to review whether such standards remain sufficient.

Commenters provided different recommendations as to how standards and guidelines should be updated. Some suggestions included tying new standards to quantifiable ecologically based performance metrics, specific ecoregions, specific resources, or local ecosystems and conditions. Whatever the outcome of new standards, many commenters conveyed a need for the BLM to provide the public the rationale for new standards and guidelines and clarity as to how they will be applied.

In response to comments, the final rule includes language adopting consistent national land health standards and an allowance to modify national standards to address unique and rare geographic needs.

A few commenters recommended the BLM use flexibility in land health standards to accommodate the diverse array of land uses, especially nonrenewable resources and those with potential surface-disturbing impacts. Various commenters expressed concern that expanding application of land health was unworkable as the BLM cannot meet the current demands for conducting land health analysis under 43 CFR Subpart 4180. To address this, commenters provided several recommendations, including setting appropriate monitoring frequencies, scales, and thresholds, with timelines for corrective actions and milestones. Additionally, commenters supported applying land health at the watershed rather than narrower or smaller scales (allotments, projects, etc.).

In response to comments, the final rule directs the BLM to establish nationally consistent land health standards and indicators and tiers land health standards directly from the fundamentals of land health in order to apply land health standards to a diverse array of land uses. Authorized officers must adopt the national standards and may also adopt geographically specific standards when necessary to evaluate rare or unique habitat or ecosystem types, such as permafrost. To address concerns about the BLM's capacity to apply land health standards to all program areas, the final rule allows field offices to use watershed condition assessments (completed every 10 years) as the baseline for land health evaluations. With watershed condition assessments, land health is assessed at a broad spatial and temporal scale, and may be supplemented by locally specific data.

Some commenters were confused about the role of the Resource Advisory Councils in the development of new standards and guidelines and sought clarification. Although the BLM engages with its Resource Advisory Councils on a wide range of issues, the rule does not require the engagement of Resource Advisory Councils in the development and supplementation of standards and guidelines.

E. Areas of Critical Environmental Concern

Various commenters advocated for strengthening the ACEC relevance and importance criteria, particularly by including habitat connectivity and biodiversity considerations, to ensure the protection of natural, cultural, and scenic resources. Additionally, many comments highlighted the importance of old-growth and mature forests and requested explicit language in the rule to protect and restore old-growth conditions through ACEC designation. The final rule establishes that a historic, cultural, or scenic value; a fish or wildlife resource; or a natural system or process has importance if it contributes to ecosystem resilience, landscape intactness, or habitat connectivity, among other importance criteria. While the final rule does not explicitly contemplate protection of old-growth forest conditions through ACEC designation, the rule specifically enables that management decision by identifying ecosystem resilience and landscape intactness as elements of the ACEC importance criterion. Other provisions in the final rule note that old-growth forests contribute to ecosystem resilience and landscape intactness, such as §§ 6101.2 and 6102.1.

Commenters recommended the final rule mandate more stringent management of designated ACECs in order to ensure protection of relevant and important values identified by the BLM. In response to these comments, the BLM added a management standard to the final rule to ensure ACEC values are appropriately managed for protection and clarified the presumption that a potential ACEC that meets all three criteria of relevance, importance, and needing special management attention will be designated in the land use plan.

Commenters raised concerns about ACEC nominations occurring outside of land use planning processes and that temporary management of potential ACECs would delay other land use authorizations such as renewable energy projects. Questions were raised about the responsibility to notify the public of temporary management decisions and whether temporary management must conform to the current resource management plan. Commenters were also generally interested in ensuring stakeholders and the public have adequate opportunities to participate in ACEC designation decisions.

Generally, the BLM addresses ACECs in the land use planning process. This is because designation of ACECs is intended to be a proactive land management decision to enhance management of important lands and resources. Such decisions should be made while also considering other potential management decisions that may affect those same lands and resources. In rarer situations, the BLM may identify a potential ACEC outside of the planning process and find that it needs special management attention to

ensure proper stewardship of resources and values the agency is charged with managing. In both contexts, the BLM must find that the lands at issue not only possess relevant and important values but also require special management attention. The final element of the standard for ACEC designation means more than finding special management attention will benefit the identified values; rather, it requires a finding that special management is necessary for their stewardship.

Within the land use planning process, the BLM has many tools at its disposal to provide necessary management of resources, ranging from special designation to more narrow management prescriptions. Outside of the planning process, temporary management of a potential ACEC may be the best option for addressing an area that has relevant and important values and requires special management attention to protect them. In those situations, under the final rule and consistent with existing guidance, the BLM may at the agency's discretion implement temporary management to protect the relevant and important values from irreparable damage until the BLM determines whether to designate the potential ACEC through a land use planning process. When implementing temporary management, the BLM would comply with applicable laws and regulations, notify the public, and reevaluate the decision periodically.

The BLM has the authority and the responsibility to mitigate impacts to public land resources from land use authorizations, including by avoiding, minimizing, and offsetting those impacts, independent of ACEC designation status. 43 U.S.C. 1732(a)–(b). Therefore, the BLM does not expect that an ACEC nomination or temporary management process will increase conflict where resources may be impacted by development proposals. Rather, the BLM intends these provisions of the rule to provide a proactive pathway for managing relevant and important values that require special management attention in the limited circumstances in which these values are identified outside of the planning process.

For example, if the BLM is evaluating a proposed development project and has not incorporated consideration of new ACEC designations into the NEPA process for that project, then it is anticipated that the BLM, consistent with existing guidance, would analyze potential impacts to resources and apply the mitigation hierarchy to address those impacts through the NEPA process rather than considering new ACEC designations as part of the ongoing NEPA process. This rule would not require the authorized officer to analyze ACEC nominations during that NEPA process. Rather, the State Director would have the discretion to determine when to evaluate ACEC nominations; the State Director could elect to defer that evaluation to an upcoming planning process. The State Director also would have the discretion to apply temporary management in the area, but only after determining that the area meets the relevance and importance criteria and that special management is necessary to protect the area's relevant and important values from irreparable damage. In other words, the State Director's discretion would include: continuing to process the project by deferring analysis of ACEC nominations; using the data related to ACEC nominations to inform the project analysis; and processing ACEC nominations and incorporating any temporary management into the project evaluation. In all circumstances, the BLM has the discretion to consider ACEC nominations and take steps to implement temporary management for relevant and important values or undertake a plan amendment process to designate new ACECs as outlined in the final rule. The BLM plans to provide additional guidance on situations in which an ACEC nomination overlaps with a pending development project application.

The final rule also emphasizes the ample opportunities for public notice and comment on the ACEC designation process through the resource management planning process, which requires robust public and stakeholder engagement as well as cooperation with local governments and consultation with Tribal governments (43 CFR 1610.2). The final rule confirms that proposed and existing ACECs being addressed by a resource management plan or a plan amendment will be identified in all applicable **Federal Register** Notices and in public outreach materials. The BLM will not, however, be required to continue to produce separate notices specific to ACECs which the BLM found to be duplicative and not in the public interest. The BLM will continue to provide the public with an opportunity to comment on proposed and existing ACECs through the land use planning and associated NEPA requirements for public involvement.

F. Intact Landscapes

Many commenters requested clarity on the rule provisions related to intactness, including how intact landscapes would be identified and managed. Comments recommended that a comprehensive inventory of intact landscapes be part of the land use planning process and that the rule make stronger commitments to prioritizing the conservation and protection of intact landscapes in order to advance the purpose of supporting ecosystem resilience. Additionally, commenters stressed the importance of incorporating community input.

Some commenters emphasized the need to consider other potential uses, such as renewable energy development, and the multiple use management approach when determining whether to manage certain landscapes for intactness. Several comments addressed the importance of acknowledging the human history of intact landscapes and incorporating the concept of cultural landscapes, as well as considering co-stewardship agreements for identified landscapes.

In response to these comments, the BLM updated the rule to clarify that ''landscape intactness'' is part of the resource inventory that is to be maintained and considered in accordance with FLPMA. The final rule also clarifies the land use planning process for this resource, which includes using the intactness inventory to identify and delineate intact landscapes, evaluating alternatives for managing the intact landscapes, and making management decisions for at least some of the intact landscapes or portions of intact landscapes that conserve their intactness. Habitat connectivity and migration corridor data would inform identification and management of intact landscapes, and the BLM would seek opportunities for Tribal co-stewardship in managing and protecting intact landscapes. The BLM anticipates that intact landscapes may vary widely in size and that not every acre of an intact landscape will be managed the same way, as the management focus would be on maintaining function of intact landscapes while facilitating multiple use and supporting sustained yield.

The identification of intact landscapes in the land use planning process would not necessarily preclude land use authorizations that would impair their intactness; rather the BLM would make management decisions for each landscape that would determine allowable uses. Some development could be compatible with management to conserve intactness, and intact landscapes may serve as desirable areas for restoration and mitigation leases. Once an intact landscape has been identified in a land use planning

process, the BLM would consider that resource and analyze potential impacts to it in the planning process and NEPA analysis to evaluate proposed uses, regardless of management decisions for the landscape, consistent with NEPA's requirement that the BLM analyze potential impacts from proposed actions.

G. Grazing

Commenters expressed concern regarding what they considered to be broad and ambiguous interpretations of terms ''conservation,'' ''intact landscapes,'' and ''ecosystem resilience,'' and for the potential for the proposed rule to limit or prohibit consumptive uses, such as grazing. The comments highlighted the need for clarity and consistency in definitions and objectives, suggesting modifications to acknowledge existing uses permitted under FLPMA.

The BLM also received a significant number of comments questioning how conservation leases relate to authorized grazing. Many comments highlighted the need to clarify how proposed conservation leases will interact with grazing management, particularly in cases where grazing may conflict with restoration goals.

In response to comments, the BLM made changes to the leasing section of the final rule. Those changes are summarized in the ''Section-by-Section Discussion of the Final Rule and Revisions from the Proposed Rule'' section and in the ''Conservation Leasing'' section of this discussion. Importantly, the BLM clarified that if proposed activities in a restoration or mitigation lease would conflict with existing authorizations, such as if a specific type of restoration would not be compatible with grazing and the proposed location is already subject to a grazing authorization, then a lease authorizing that type of restoration could not be issued on those particular lands. Additionally, the final rule elevates proposals for leases that can demonstrate collaboration with existing permittees, leaseholders, and adjacent land managers or owners and those that have support from local communities.

Commenters expressed different views as to whether grazing can be used as a land health solution, with some noting that grazing should be used as a land health management tool, while others stated that any use of grazing operations by the BLM to promote land health standards would likely preclude achieving land health goals. Some commenters argued that managed grazing can in fact achieve land health standards and that specific practices, such as targeted grazing, have been used to create fire breaks, manage invasive species, and promote land health. Other commenters argued that livestock grazing is incompatible with restoration and that grazing should be eliminated in areas undergoing restoration. This rule is not establishing or revising regulations governing the BLM's grazing program and does not contemplate using or not using grazing as a land health management tool. As previously discussed, conservation takes many forms on public lands, including in the ways grazing and many other uses are carried out. This rule focuses on conservation as a land use within the multiple use framework and develops the toolbox for conservation use that enables some of the many conservation strategies the agency employs to steward the public lands for multiple use and sustained yield. Grazing as a management tool may fit within these strategies.

Many commenters emphasized the impact that livestock grazing has had on BLM-managed public lands and the need for the BLM to commit to its responsibility under 43 CFR subpart 4180 to monitor achievement of rangeland health standards and manage for proper functioning conditions. One commenter noted that when an allotment fails to meet the standards, changes in grazing practices must be instituted to restore rangeland health. The BLM is not revising subpart 4180 as part of this rulemaking.

H. Recreation

Many commenters emphasized that outdoor recreation is dependent on healthy public lands and waters that provide desirable recreation experiences, which in turn support regional economic growth and help Americans connect with their public lands. They further noted that climate change is having a particular impact on outdoor recreation through drought and catastrophic wildfire, highlighting the need for resilient public lands that can continue to provide recreation opportunities in a changing future. These commenters requested the rule explicitly recognize the tie between landscape health and outdoor recreation and acknowledge that sustainable recreation is compatible with conservation use.

In response to comments, the final rule includes a new objective to: ''Provide for healthy lands and waters that support sustainable outdoor recreation experiences for current and future generations.'' The BLM views sustainable recreation as being compatible with conservation management, including specifically with restoration and mitigation leasing, protection of intact landscapes, management for land health, designation of ACECs, and other principles and management actions provided for in the rule. Furthermore, the BLM anticipates that outdoor recreation would benefit from these conservation measures and would be considered a reason to protect and restore certain landscapes. The additional objective at § 6101.2(g) aims to reflect this intent. The final rule does not specifically address recreation in more detail because the rule is not intended to establish regulations governing recreation use.

Some commenters raised concerns that the rule would reduce the amount of public land available for outdoor recreation. The rule would not change plans, policies, or programs governing recreation activities on public lands; recreation management would still be determined at the local level through land use planning and site-specific recreation management actions such as developed recreation sites, transportation system routes, or trails. As the BLM implements the rule, recreation management decisions will incorporate the objectives and principles set forth in the rule to support landscape health and ecosystem resilience. The rule is not intended to prevent or decrease outdoor recreation use; rather it ensures that recreation on public lands can be managed and grow sustainably while benefiting from the conservation of healthy lands and water.

I. Renewable Energy

Commenters raised concerns about the potential conflicts that could arise between the proposed rule and the BLM's ability to manage and promote renewable energy development. In response to comments, the BLM clarified mitigation language that would allow for renewable energy siting and development, or other kinds of projects, even when that development produces unavoidable impacts. Establishing methods to ensure impacts can be offset and expanding the ability to site compensatory mitigation on public lands through mitigation leases creates more opportunity to permit use while accounting for the unavoidable impacts of such use.

Commenters argued that application of land health standards to renewable energy projects as well as changes to identification and designation of ACECs may have the effect of significantly diminishing the BLM's ability to identify locations where it can permit renewable energy installations and

associated infrastructure. As noted in the discussion of the BLM's response to comments on ACECs, the BLM does not expect that ACEC designations or the potential for temporary management of proposed ACECs will increase conflict where resources may be impacted by development proposals. Rather, the BLM intends these provisions of the rule to provide a proactive pathway for managing relevant and important values that require special management attention, including in the limited circumstances in which these values are identified outside of the planning process.

Lastly, commenters conveyed concern that the proposed rule rested too much decision-making authority on BLM staff over a number of aspects of the rule and that such authority should reside with BLM State Directors. In response, the BLM clarified the responsibilities of Field Managers and State Directors in the ACEC section.

J. Cultural Resource Management

Some comments discussed the connection between cultural values and ecosystem resilience and requested an acknowledgement of this connection and clarity for whether and how the rule would incorporate cultural values or otherwise apply to cultural resource management. Commenters requested that the BLM consider how conservation strategies included in the rule intersect with cultural resources. Specifically, commenters recommended that the rule address American Indian contributions to stewarding the landscapes that the BLM now manages as public lands and may conserve through implementation of this rule, including Indigenous Knowledge and practices handed down over millennia. Commenters also recommended that lands that contain areas of sacred and ceremonial significance to Tribes should not be eligible for conservation leasing unless the purpose of the lease is directly related to those resources.

The BLM is committed to working with Tribes in the management of the public lands, which are the ancestral homelands of American Indian and Alaska Native Tribes. The BLM recognizes Indigenous Peoples have interacted with and stewarded the lands now managed as public lands since time immemorial. This human presence and stewardship continue to influence the lands addressed in the rule, including intact landscapes and ACECs.

Cultural resources can be and often are an essential component of functioning and productive ecosystems, and natural components of ecosystems can also be cultural resources. Some of the BLM's most intact and resilient ecosystems are often also locations with a high probability of containing cultural resources. Cultural and natural values of landscapes co-exist as reasons to protect and manage these landscapes, emphasizing the importance of Indigenous Knowledge and co-stewardship.

Actions and decisions aimed at restoring, maintaining, and conserving ecosystems and landscapes may inadvertently result in impacts to cultural resources. All such undertakings will be subject to section 106 of the NHPA, as well as NEPA. Through the section 106 process, the BLM will, in consultation with Tribes, State and Tribal Historic Preservation Officers, and interested parties, identify, evaluate, and resolve any adverse effects on historic properties. Any potential adverse effects to historic properties will be avoided, minimized, or otherwise mitigated in accordance with law, regulation, and policy. Effects to cultural resources that are not identified as historic properties under the NHPA will be considered and managed through land use plans and the NEPA process. In addition, the BLM will strive to consider and implement the new Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites.[16]

K. Mature and Old-Growth Forests

Many comments were received emphasizing the need to protect old-growth and mature forests as part of meeting the rule's stated purpose of supporting ecosystem resilience on public lands. Commenters recommended adding provisions to the rule to establish emphasis areas for old-growth and mature forests, limit or prohibit tree cutting on BLM-managed lands, facilitate designation of old-growth forests as ACECs, and focus on climate sustainable logging. Commenters highlighted the scientific and social values of old-growth and mature forests and requested explicit language in the rule to protect these valuable ecosystems consistent with Executive Order 14072.

Executive Order 14072, *Strengthening the Nation's Forests, Communities, and Local Economies,* calls for defining, identifying, and inventorying the nation's old and mature forests and stewarding them for future generations to provide clean air and water, sustain plant and animal life, and respect their special importance to Tribal Nations, consistent with applicable law. The BLM is working with the U.S. Forest Service to implement the provisions in Executive Order 14072 related to mature and old-growth forests. In April 2023, the BLM and U.S. Forest Service released a definition framework and initial inventory of mature and old-growth forests on Federal lands, and the agencies are now analyzing threats to those forests pursuant to the Executive Order. The initial inventory identified 8.3 million acres of old-growth and 12.7 million acres of mature forest on BLM-administered lands, the majority of which are pinyon and juniper woodlands. Mature and old-growth forests and woodlands contribute to ecosystem resilience by providing wildlife habitat, clean water, carbon storage, and landscape intactness. They also have important social and cultural values.

The final rule facilitates conservation of BLM-managed forests and woodlands through multiple provisions, including those related to identification and protection of intact landscapes; conservation tools to protect certain lands and resources through land use planning; avoiding authorizing uses of the public lands that permanently impair ecosystem resilience; and co-stewardship opportunities with Tribes. In order to clarify this intent, the final rule specifically identifies conservation of old-growth forests within the objectives of the regulation. Because this is a procedural rule, establishing emphasis areas or other site-specific protections for old-growth forests is outside the scope of the rule.

L. Wild Horses and Burros

The BLM received comments on using the rule to change wild horse and burro management on public lands. Commenters recommended classifying wild horses and burros as a use of public lands, requiring the BLM to show that removal of livestock could not achieve the same objective as removal of wild horses and burros, restricting livestock grazing to reduce methane emissions and provide more forage for wild horses and burros, and allowing restoration and mitigation leases to be used to protect wild horse and burro habitat.

Management of wild horses and burros is governed by the Wild Free-Roaming Horses and Burros Act of 1971, as amended, and its implementing regulations (43 CFR part 4700). Wild horses and burros are managed in the

[16] Working Group of the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites (2023), *https://www.bia.gov/sites/default/files/media_document/sacred_sites_guide_508_2023-1205.pdf* (providing guidance on implementation of Executive Orders 13175, 13007, and 14096, and related policies).

areas where they are found, and decisions on herd management are made through the BLM's land use planning process. This rule does not authorize or mandate decisions to manage wild horses and burros. The rule does require the use of high-quality information that promotes reasoned, fact-based agency decisions in making land use allocations and other land use authorizations, including grazing authorizations. Restoration and mitigation leases are narrowly defined tools for restoring degraded landscapes or compensating for impacts of development and are not appropriate mechanisms for protecting wild horse and burro habitat.

M. NEPA Compliance for the Rule

A number of comments objected to the BLM's intent to rely on a categorical exclusion to comply with NEPA and called on the BLM to instead prepare an environmental assessment or environmental impact statement under NEPA.

The BLM has determined that the categorical exclusion set out at 43 CFR 46.210(i) applies to this rulemaking. That provision excludes from NEPA analysis and review actions that are ''of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.'' That categorical exclusion applies because the rule sets out a framework but is not self-executing in that it does not itself make substantive changes on the ground and will not (absent future decisions that implement the rule) restrict the BLM's discretion to undertake or authorize future on-the-ground action; thus, the rule is administrative or procedural in nature. Any future actions, including both land use planning and individual project-level decisions, including decisions to issue a restoration or mitigation lease, will be subject to the appropriate level of NEPA review at the time of that decision. Where the BLM will undertake such actions, which of the various tools provided in this rule it will use when doing so, and the particular methods and activities it will employ are unknown at this time, making the environmental effects associated with those future actions too speculative or conjectural to meaningfully evaluate now. The BLM has also determined that none of the extraordinary circumstances identified at 43 CFR 46.215 applies to this rulemaking.

N. Inventory, Assessment, and Monitoring

Public comments recommended that monitoring data and analyses should be made public to promote transparent decision processes. Commenters recommended emphasis on particular monitoring approaches and discouraged use of other approaches and requested more details on the monitoring implementation process and how it would tie to decision-making across different types of decisions. Commenters also recommended adding a process for monitoring prioritization.

Many commenters asked for clarification on watershed condition classifications, renamed ''watershed condition assessments'' in the final rule, including who would complete them and how often, what data they would include, whether outside partners would be engaged, and how they would tie to decision-making. Many recommended a nationally consistent process for completing watershed condition assessments in order to ensure that they were efficient and effective. Some asked how watershed condition assessments would interact with and inform the BLM land health process. Several questioned whether additional assessments were needed.

In response to public comments, the final rule clarifies that a focus of the rule is monitoring of infrastructure and renewable resources. It states that inventory, monitoring, and assessment information will be publicly available (currently, at the BLM Geospatial Business Platform Hub, *https://gbp-blm-egis.hub.arcgis.com/*), consistent with the Open Government Data Act, section 202(b). The final rule defines watershed condition assessments and specifies that they will be created using a consistent process and standardized data. The final rule recommends that high-quality information, including monitoring and watershed condition assessments, be used to inform many different types of decisions in the rule. Further details regarding inventory, assessment, and monitoring, including watershed condition assessments, may be addressed in implementation guidance.

Some comments questioned whether the monitoring provisions of the rule apply to cultural and paleontological resources. As stated in the Authority section of the final rule, implementation of the rule will be subject to and must be undertaken consistent with all applicable laws, which would include the NHPA and the PRPA.

O. Economic Analysis and Compliance With the Regulatory Flexibility Act

Many commenters insisted that the Regulatory Flexibility Act (RFA) required the BLM to prepare an initial regulatory flexibility analysis and, by extension, that this final rule would require a final regulatory flexibility analysis. Those commenters requested specific documentation and details of the economic impact on small businesses and other entities. Commenters stated that the BLM's certification that the rule would not have a significant economic impact on a substantial number of small entities lacked a proper factual basis.

The BLM disagrees with commenters' assertion that the RFA required for the proposed rule and so requires for this final rule a regulatory flexibility analysis. The BLM certified at the proposed rule stage and certifies again in promulgating this final rule that the rule will not have a significant economic impact on a substantial number of small entities. Under the Small Business Administration's (SBA) Guide for Federal Agencies to Comply with the Regulatory Flexibility Act, when certifying that a regulatory flexibility analysis is not required, the ''certification should contain a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification.'' Here, the BLM has undertaken an economic threshold analysis and concluded that the magnitude of the impact on any individual or group, including small entities, is expected to be negligible (Economic Threshold Analysis). In support of this determination, the BLM followed SBA's certification checklist items.

The SBA's guidelines provide, ''The RFA does not define 'significant impact' or 'substantial number,' and it is the agencies' discretion on where to set these thresholds on a rule-to-rule basis based on their judgment.'' The BLM exercised its discretion to conclude that an initial regulatory flexibility analysis was not required for the proposed rule and that a final regulatory flexibility analysis is not required now.

V. Procedural Matters

Regulatory Planning and Review (Executive Orders 12866, 13563 and 14094)

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan.

21, 2011) and amended by E.O. 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. E.O. 12866, as amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget (''OMB'') will review all significant rules. Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this final regulatory action constitutes a ''significant regulatory action'' within the scope of E.O. 12866.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rule making process must allow for public participation and an open exchange of ideas. The BLM has developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires that Federal agencies prepare a regulatory flexibility analysis for rules subject to the ''notice-and-comment'' rulemaking requirements found in the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), if the rule would have a significant economic impact, whether detrimental or beneficial, on a substantial number of small entities. See 5 U.S.C. 601–612. Congress enacted the RFA to ensure that government regulations do not unnecessarily or disproportionately burden small entities. Small entities include small businesses, small governmental jurisdictions, and small not-for-profit enterprises.

For the purpose of conducting its review pursuant to the RFA, the BLM certifies that the rule would not have a ''significant economic impact on a substantial number of small entities,'' as that phrase is used in 5 U.S.C. 605. The rule does not affect any existing use of public lands, nor does it impose restrictions on future use. The rule modifies BLM decision-making processes and does not directly regulate any industry, but it may affect industries related to environmental restoration or mitigation activity or other sectors that rely on public lands management. The BLM does not expect those impacts to be significant. See the Economic Analysis, *Potential Impact on Small Entities,* for more information.

Congressional Review Act (CRA)

Pursuant to subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act), the Office of Information and Regulatory Affairs has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2). This rule:

a. Does not have an annual effect on the economy of $100 million or more. The BLM did not estimate the annual benefits that this rule would provide to the economy. Please see the Economic Analysis for this rule for a more detailed discussion.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule would benefit small businesses by streamlining the BLM's processes.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The rule would not have adverse effects on any of these criteria.

Unfunded Mandates Reform Act (UMRA)

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments, or the private sector. Under the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1531 *et seq.*), agencies must prepare a written statement about benefits and costs prior to issuing a proposed or final rule that may result in aggregate expenditure by State, local, and tribal governments, or the private sector, of $100 million or more in any 1 year.

This rule is not subject to those requirements of the UMRA. The rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or to the private sector in any one year. The rule would not significantly or uniquely affect small governments. A statement containing the information required by the UMRA is not required.

Government Actions and Interference With Constitutionally Protected Property Rights Takings (E.O 12630)

This rule does not effect a taking of private property or otherwise have taking implications under E.O. 12630. Section 2(a) of E.O. 12630 identifies policies that do not have takings implications, such as those that abolish regulations, discontinue governmental programs, or modify regulations in a manner that lessens interference with the use of private property. The rule will not interfere with private property. A takings implication assessment is not required.

Federalism (E.O 13132)

Under the criteria in Section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

The BLM received broad and general comments suggesting that E.O. 13132 requires preparation of a federalism summary impact statement with respect to this rule. In particular, some comments raised concerns that conservation leases (now titled

restoration and mitigation leases) could infringe on state and local authority. Executive Order 13132 generally prohibits Federal agencies from promulgating rules that might have a substantial direct effect on states or local governments, on the relationship between Federal and State governments, or on the distribution of power and responsibilities among the various levels of government, without meeting certain conditions, such as consulting with elected State and local government officials early in the process. In particular, administrative rules may not create substantial direct compliance costs for state or local governments that are not otherwise required by statute and may not expressly or impliedly preempt state law without Federal agencies undertaking additional processes. This rule will inform the BLM's management approach on federal land in the several states where BLM manages public land, but nothing in the rule, including its provisions for restoration and mitigation leasing, preempts state law or requires state or local governments to comply with specific provisions. Nor does the rule modify let alone reduce the role, under FLPMA, of state and local governments in land use planning. As a result, a federalism summary impact statement is not required.

Civil Justice Reform (E.O 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

a. Meets the criteria of Section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

b. Meets the criteria of Section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation and Coordination With Indian Tribes (E.O 13175 and Departmental Policy)

The Department of the Interior (DOI) endeavors to maintain and strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the DOI's consultation policy and under the criteria in E.O. 13175 and have determined that the rule has tribal implications.

In conformance with the Secretary's policy on Tribal consultation, the BLM sent letters to all Tribes at the beginning of the rulemaking process informing them of the proposed rule and inviting them to engage with BLM on their thoughts and concerns. The BLM received input from Tribal governments, Alaska Native Corporations, and Tribal entities in comments on the proposed rule, as well as in other meetings that included a broader range of topics, and incorporated their input in drafting the final rule. Consistent with the DOI's consultation policy (52 Departmental Manual 4) and the criteria in E.O. 13175, the BLM will continue to consult with federally recognized Indian Tribes on any proposal that may have Tribal implications.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3521) generally provides that an agency may not conduct or sponsor, and notwithstanding any other provision of law a person is not required to respond to, a collection of information, unless it displays a currently valid Office of Management and Budget (OMB) control number. This rule contains information collection requirements that are subject to review by the OMB under the PRA. Collections of information include any request or requirement that persons obtain, maintain, retain, or report information to an agency, or disclose information to a third party or to the public (44 U.S.C. 3502(3) and 5 CFR 1320.3(c)).

OMB has generally approved the existing information collection requirements contained in the BLM's regulations contained in 43 CFR subpart 1610 under OMB Control Number 1004–0212. The final rule would not result in any new or revised information collection requirements that are currently approved under that OMB Control Number.

For the reasons set out in the preamble, the BLM is amending 43 CFR by creating Part 6100 which would result in new information collection requirements that require approval by OMB. The information collection requirement contained in part 6100 will allow the BLM to issue a restoration or mitigation lease to qualified entities for the purpose of restoring degraded land or resources, or mitigation to offset the impacts of other land use authorizations. The new information collection requirements contained in the final rule are discussed below.

New Information Collection Requirements

§ 6102.4(b) and (c)—Restoration and Mitigation Leasing: Applications for restoration or mitigation leases shall be filed with the Bureau of Land Management office having jurisdiction over the public lands covered by the application. Applications for restoration or mitigation leases shall include a restoration or mitigation development plan which includes sufficient detail to enable the authorized officer to evaluate the feasibility, impacts, benefits, costs, threats to public health and safety, collaborative efforts, and conformance with BLM plans, programs, and policies, including compatibility with other uses. The development plan shall include but not be limited to:

- Results from available assessments, inventory and monitoring efforts, or other high-quality information that identify the current conditions of the site(s) of the proposed restoration or mitigation action;
- The desired future condition of the proposed lease area including clear goals, objectives, and measurable performance criteria needed to achieve the objectives;
- Justification for passive restoration or mitigation if proposed;
- A description of all facilities for which authorization is sought, including access needs and any other special types of authorizations that may be needed;
- A map of sufficient scale to allow the required information to be legible as well as a legal description of primary and alternative project locations;
- Justification of the total acres proposed for the restoration or mitigation lease;
- A schedule for restoration activities, if applicable; and
- Information on outreach conducted or to be conducted with existing permittees, lease holders, adjacent land managers or owners, and other interested parties.

§ 6102.4(c)(4)—Restoration and Mitigation Leasing (additional information): After review of the restoration or mitigation development plan, the authorized officer may require the applicant to provide additional high-quality information, if such information is necessary for the BLM to decide whether to issue, issue with modification, or deny the proposed lease. An application for the use of public lands may require documentation or proof of application for additional private, State, local or other Federal agency licenses, permits, easements, certificates, or other approval documents. The authorized officer may require evidence that the applicant has or prior to commencement of lease activities will have the technical and financial capability to operate, maintain, and terminate the authorized lease activities.

§ 6102.4(e)—Restoration and Mitigation Leasing/Monitoring Plan: If approved, the lease holder shall provide a monitoring plan that describes how the terms and conditions of the lease will be applied, the monitoring methodology and frequency, measurable criteria, and adaptive management triggers.

§ 6102.4(e)(1)—Restoration and Mitigation Leasing/Annual Report: The lease holder shall provide a lease activity report annually and at the end of the lease period. At a minimum, the report shall describe:

- the restoration or mitigation activities taken as of the time of the report;
- any barriers to meeting the stated purpose of the lease;
- proposed steps to resolve any identified barriers; and
- monitoring information and data that meet BLM methodology requirements and data standards (see § 6103.2(c)).

§ 6102.4.1(d)(3)—Termination and Suspension of Restoration and Mitigation Leases: Upon determination that there is noncompliance with the terms and conditions of a restoration or mitigation lease which adversely affects land or public health or safety, or impacts ecosystem resilience, the authorized officer shall issue an immediate temporary suspension. Any time after an order of suspension has been issued, the holder may file with the authorized officer a request for permission to resume. The request shall be in writing and shall contain a statement of the facts supporting the request.

§ 6102.4.2(a)—Bonding for Restoration and Mitigation Leases: Prior to the commencement of surface-disturbing activities, the authorized officer may require the restoration or mitigation lease holder to submit a reclamation, decommission, or performance bond conditioned upon compliance with all the terms and conditions of the lease covered by the bond. For mitigation leases, the lease holder will usually be required to provide letters of credit or establish an escrow account for the full amount needed to ensure the development plan meets all performance criteria.

§ 6102.5.1(d)—Mitigation—Approval of third parties as mitigation fund holders: § 6102.5.1(d) would allow in certain limited circumstances authorized officers to approve third parties as mitigation fund holders to establish mitigation accounts for use by entities granted land use authorizations by the BLM. The authorized officer will approve the use of a mitigation account by a permittee only if a mitigation fund holder has a formal agreement with the BLM.

§ 6102.5.1(e)—Mitigation—Approval of third parties as mitigation fund holders/State and local government agencies: State and local government agencies are limited in their ability to accept, manage, and disburse funds for the purpose outlined in § 6102.5.1 and generally should not be approved by the BLM to hold mitigation funds for compensatory mitigation sites on public or private lands. An exception may be made where a government agency is able to demonstrate, to the satisfaction of the BLM, that they are acting as a fiduciary for the benefit of the mitigation project or site, essentially as if they are a third party, and can show that they have the authority and perform the duties described in § 6102.5.1.

Information Collection Changes From Proposed to Final Rule:

The BLM introduced the following information collection requirements that were not in the proposed rule:

- Restoration and Mitigation Leasing/Monitoring Plan—43 CFR 6102.4(e);
- Restoration and Mitigation Leasing/Annual Report—43 CFR 6102.4(e)(1); and
- Mitigation/Approval third parties as mitigation fund holders/Annual Fiscal Reports—43 CFR 6102.5–1(e).

These ICs are necessary to provide monitoring mechanisms to help the BLM assure that we are achieving the desired outcomes of the restoration and mitigation plans.

The information collection requirements contained in this rule are needed to ensure that accountability through restoration monitoring and tracking is carried out effectively and that project goals are being met. The estimated annual information collection burdens for this rule are outlined below:

Collection of information	Number of responses	Time per response (hours)	Total hours
Restoration and Mitigation Leasing/Restoration or Mitigation Development Plan—43 CFR 6102.4(b) and (c)	10	10	100
Restoration and Mitigation Leasing/Additional Information 43 CFR 6102.4(c)(5)	8	25	200
Restoration and Mitigation Leasing/Monitoring Plan—43 CFR 6102.4(e)	9	5	45
Restoration and Mitigation Leasing/Annual Report—43 CFR 6102.4(e)(1)	9	2	18
Termination and Suspension of Restoration and Mitigation Leases/written request to resume or suspended activity—43 CFR 6102.4–1(d)(3)	1	240	240
Bonding for Restoration and Mitigation Leases—43 CFR 6102.4–2(a)	10	80	800
Mitigation/Approval third parties as mitigation fund holders—43 CFR 6102.5–1(e)	4	5	20
Mitigation/Approval third parties as mitigation fund holders—43 CFR 6102.5–1(g)	4	5	20
Mitigation/Approval third parties as mitigation fund holders/Annual Fiscal Reports—43 CFR 6102.5–1(e)	4	2	8
Mitigation/Approval third parties as mitigation fund holders/Annual Fiscal Reports—43 CFR 6102.5–1(e)	4	2	8

Information Collection Summary:

Title of Collection: Ecosystem Resilience (43 CFR part 6100).

OMB Control Number: 1004–0218.

Form Number: None.

Type of Review: New collection of information.

Respondents/Affected Public: Private sector businesses; Not-for-profit organizations; and State, local, or Tribal governments.

Respondent's Obligation: Required to Obtain or Retain a Benefit.

Frequency of Collection: On occasion; Annual.

Estimated Completion Time per Response: Varies from 5 hours to 240 hours per response, depending on activity.

Number of Respondents: 63.

Annual Responses: 63.

Annual Burden Hours: 1,459.

Annual Burden Cost: $0.

If you want to comment on the information-collection requirements in this rule, please send your comments and suggestions on this information-collection within 30 days of publication of this final rule in the **Federal Register**

to OMB by going to *www.reginfo.gov.* Click on the link, ''Currently under Review—Open for Public Comments.''

National Environmental Policy Act (NEPA)

This rule is excluded from review under the National Environmental Policy Act under Department Categorical Exclusion (CX) at 43 CFR 46.210(i). This CX covers policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case. The BLM has documented this CX's applicability to this action and posted it for public review here in docket BLM–2023–0001 on regulations.gov.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (E.O. 13211)

Federal agencies must prepare and submit to OMB a Statement of Energy Effects (SEE) for any significant energy action. A ''significant energy action'' is defined as any action by an agency that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order, and is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) Is designated by the Administrator of OIRA as a significant energy action. This rule is a significant action under Executive Order 12866; however, this rule does not affect energy supply, distribution, or use, and OIRA has not designated it a significant energy action. Therefore, it is not a significant energy action under E.O. 13211, and a SEE is not required.

The BLM received many comments on its determination that this rule is not a significant energy action. Commenters stated that the proposed rule, particularly the regulations pertaining to ACECs and the establishment of a restoration and mitigation leasing program (conservation leasing in the proposed rule), would displace oil and gas production and mining for critical minerals on public lands. Commenters also expressed concern that ACEC designation and restoration and mitigation leases could preclude energy rights of way for transmission lines. Commenters requested more information on how the BLM determined that this rulemaking would not have a significant adverse effect on energy supply, distribution, or use, and specifically requested the BLM complete a SEE for this rulemaking.

The BLM disagrees that the rule would adversely impact the supply, distribution, or use of energy. No part of the rule would preclude the development or transmission of energy on or across public lands without due consideration of multiple use and sustained yield principles through BLM's existing decision-making processes, including the required public engagement. Restoration and mitigation leases may not be issued in areas where an existing and otherwise incompatible use is occurring; thus, they would not displace existing mineral leases or mining claims. Restoration and mitigation leases are a narrow tool which may only be issued to restore degraded landscapes or to offset impacts of other land use authorizations; they may not be used to ''block'' development of mineral resources on lands allocated to such use in the governing Resource Management Plan. In many cases, these leases will facilitate the development of energy on public lands by providing an avenue for developers to satisfy obligations to offset the impacts of energy development through compensatory mitigation.

The revised regulations for ACEC designation will not adversely affect the supply, distribution or use of energy on public lands. FLPMA has required that the BLM prioritize the designation and protection of ACECs since 1976, and the final rule does not change that requirement or the overall process and parameters for their designation and management. The BLM does not expect that ACEC designations or the potential for temporary management of proposed ACECs will increase conflict where resources may be impacted by development proposals. Rather, the BLM intends these provisions of the rule to provide a proactive pathway for managing relevant and important values that require special management attention in the limited circumstances in which these values are identified outside of the planning process. See Section IV, Response to Comments, part E., Areas of Critical Environmental Concern, for more information.

Clarity of This Regulation (Executive Orders 12866, 12988 and 13563)

We are required by Executive Orders 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1988, to write all rules in plain language. This means that each rule must: a) Be logically organized; b) Use the active voice to address readers directly; c) Use common, everyday words and clear language rather than jargon; d) Be divided into short sections and sentences; and e) Use lists and tables wherever possible.

Authors

The principal authors of this rule are: Patricia Johnston, BLM Division of Wildlife Conservation, Aquatics, and Environmental Protection; Darrin King, BLM Division of Regulatory Affairs; Chandra Little, BLM Division of Regulatory Affairs, assisted by the DOI Office of the Solicitor.

The action taken herein is pursuant to an existing delegation of authority.

List of Subjects in 43 CFR Part 1600

Administrative practice and procedure, Coal, Conservation, Environmental impact statements, Environmental protection, Intergovernmental relations, Preservation, Public lands.

This action by the Principal Deputy Assistant Secretary is taken pursuant to an existing delegation of authority.

Steven H. Feldgus,

Deputy Assistant Secretary for Land and Minerals Management.

Accordingly, for the reasons set out in the preamble, the Bureau of Land Management amends 43 CFR Chapter II as set forth below:

PART 1600—PLANNING, PROGRAMMING, BUDGETING

■ 1. The authority citation for part 1600 continues to read as follows:

Authority: 43 U.S.C. 1711–1712.

■ 2. Revise § 1610.7–2 to read as follows:

§ 1610.7–2 Designation of areas of critical environmental concern.

(a) An area of critical environmental concern (ACEC) designation is the principal BLM designation for public lands where special management is required to protect and prevent irreparable damage to important historic, cultural, or scenic values; fish or wildlife resources; or natural systems or processes or to protect life and safety from natural hazards. The BLM designates ACECs when issuing a decision to approve a resource management plan, plan revision, or plan amendment. ACECs shall be managed to protect the relevant and important values for which they are designated.

(b) In the land use planning process, authorized officers must identify, evaluate, and give priority to areas that have potential for designation and management as ACECs. Identification, evaluation, and priority management of

ACECs shall be considered during the development and revision of resource management plans and during amendments to resource management plans when such action falls within the scope of the amendment (*see* §§ 1610.4–1 through 1610.4–9). Proposed and existing ACECs that will be addressed by a resource management plan, plan revision, or plan amendment will be identified in all public notices required by this part (*see, e.g.,* § 1610.2).

(c) The authorized officer must facilitate the identification of eligible ACECs early in the land use planning process by:

(1) Analyzing inventory, assessment, and monitoring data to determine whether there are areas containing important historic, cultural, or scenic values; fish or wildlife resources; natural systems or processes; or natural hazards potentially impacting life and safety that are eligible for designation;

(2) Reevaluating existing ACECs in order to determine if the relevant and important values are still present and special management attention is still necessary; and

(3) Seeking nominations for ACECs, during public scoping, from the public, State and local governments, Indian Tribes, and other Federal agencies (*see* §§ 1610.2(c), 1602.5(b)(4) through (6)).

(d) To be designated as an ACEC, an area must meet the following criteria:

(1) *Relevance.* The area contains important historic, cultural, or scenic values; fish or wildlife resources; natural systems or processes; or natural hazards potentially impacting life and safety.

(2) *Importance.* A historic, cultural, or scenic value; a fish or wildlife resource; a natural system or process; or a natural hazard potentially impacting life and safety has importance if it has qualities of special worth, consequence, meaning, distinctiveness, or cause for concern; national or more than local importance, subsistence value, or regional contribution of a resource, value, system, or process; or contributes to ecosystem resilience, landscape intactness, or habitat connectivity. A natural hazard can be important if it is a significant threat to human life and safety.

(3) *Special management attention.* The important historic, cultural, or scenic values; fish or wildlife resources; natural systems or processes; or natural hazards potentially impacting life and safety require special management attention. ''Special management attention'' means management prescriptions that:

(i) Protect and prevent irreparable damage to the relevant and important values, or that protect life and safety from natural hazards; and

(ii) Would not be prescribed if the relevant and important values were not present. In this context, ''irreparable damage'' means harm to a value, resource, system, or process that substantially diminishes the relevance or importance of that value, resource, system, or process in such a way that recovery of the value, resource, system, or process to the extent necessary to restore its prior relevance or importance is impossible.

(e) The authorized officer may designate an ACEC research natural area if the area:

(1) Meets all of the criteria identified in § 1610.7–2(d)(1) through (3); and

(2) Is consistent with one or more of the primary purposes found at § 8223.0–5 of this chapter. A designated ACEC research natural area will be subject to the use restrictions at § 8223.1 of this title in addition to the special management attention prescribed by the authorized officer through land use planning.

(f) The boundaries of proposed ACECs shall be identified for public lands, as appropriate, to encompass the relevant and important values and geographic extent of the special management attention needed to provide protection.

(g) During a planning process, the planning documents must analyze in detail any proposed ACEC that has relevant and important values. Where the BLM has received ACEC proposals that do not have relevant and important values, the agency is not required to review those proposals in detail in planning documents. Through land use planning, the BLM will evaluate the need for special management attention to protect the relevant and important values, which could include other allocations and designations being considered, in order to provide for informed decision-making on the trade-offs associated with ACEC designation.

(h) The approved resource management plan, plan revision, or plan amendment shall list all designated ACECs, identify their relevant and important values, and include the special management attention, including management prescriptions for other uses, identified for each designated ACEC.

(i) ACEC nominations typically should be evaluated during a planning process. If a nomination for an ACEC is received outside of the planning process, the following provisions apply.

(1) The State Director will evaluate whether the relevant, important, and special management criteria identified in paragraph (d) of this section are met. The State Director will determine the appropriate time to complete this analysis. If the criteria identified in paragraph (d) of this section are met, then the State Director shall, at their discretion, either:

(i) Initiate a land use planning process; or

(ii) Provide temporary management consistent with the applicable resource management plan to protect the relevant and important values from irreparable damage. Any temporary management that is implemented would be in effect until the BLM either completes a land use planning process to determine whether to designate the area as an ACEC or, through periodic evaluation, finds designation is no longer necessary. The BLM will publish a public notice if temporary management is implemented.

(2) The State Director may defer evaluating the nomination to an upcoming planning process.

(j) The State Director shall:

(1) Determine which ACECs to designate based on:

(i) The presumption that all areas found to require special management attention will be designated;

(ii) The value of other resource uses in the area;

(iii) The feasibility of managing the designation; and

(iv) The relationship to other types of designations and protective management available.

(2) In the decision document for the resource management plan or plan amendment, provide a justification and rationale for both ACEC designation decisions and decisions not to designate a proposed ACEC.

(3) Administer designated ACECs in a manner that conserves, protects, and enhances the relevant and important values and only allow casual use or uses that will ensure the protection of the relevant and important values. This paragraph (j)(3) does not apply to those ACECs designated for natural hazards potentially impacting life and safety.

(4) Prioritize acquisition of inholdings within ACECs and adjacent or connecting lands identified as holding relevant and important values related to the designated ACEC.

(k) The State Director, through the land use planning process, may remove the designation of an ACEC, in whole or in part, only when:

(1) The State Director finds that special management attention is not needed because another legally enforceable mechanism provides an equal or greater level of protection; or

(2) The State Director finds that the relevant and important values are no longer present, cannot be recovered, or

have recovered to the point where special management is no longer necessary. The findings must be supported by data or documented changes on the ground.

(l) As used in this section, the terms casual use, conservation, ecosystem resilience, intactness, landscape, monitoring, protection, and restoration have the same meanings as in § 6101.4 of this chapter.

■ 3. Add part 6100 to read as follows:

PART 6100—ECOSYSTEM RESILIENCE

Subpart 6101—General Information

Subpart 6102—Conservation Use to Achieve Ecosystem Resilience

Subpart 6103—Managing Land Health to Achieve Ecosystem Resilience

Authority: 16 U.S.C. 7202; 43 U.S.C. 1701 *et seq.*

PART 6100—ECOSYSTEM RESILIENCE

Subpart 6101—General Information

§ 6101.1 Purpose.

The BLM's management of public lands on the basis of multiple use and sustained yield relies on healthy landscapes and resilient ecosystems. The purpose of this part is to promote the use of conservation to ensure ecosystem resilience and prevent permanent impairment or unnecessary or undue degradation of public lands. This part discusses the use of protection and restoration actions, as well as tools such as watershed condition assessments, land health evaluations, inventory, assessment, and monitoring.

§ 6101.2 Objectives.

The objectives of this part are to:

(a) Achieve and maintain ecosystem resilience when administering Bureau programs; developing, amending, and revising land use plans; and approving uses on the public lands;

(b) Promote conservation by maintaining, protecting, and restoring ecosystem resilience and intact landscapes, including habitat connectivity and old-growth forests;

(c) Integrate the fundamentals of land health and related standards and guidelines into resource management for all uses and activities on BLM-managed lands;

(d) Incorporate inventory, assessment, and monitoring principles into decision-making and use this information to identify trends and implement adaptive management strategies;

(e) Accelerate restoration and improvement of degraded public lands, air, and waters to properly functioning and desired conditions;

(f) Manage for ecosystems and their components to adapt, absorb, or recover from the effects of disturbances or environmental change through conservation, protection, restoration, or improvement of essential structures, functions, and redundancy of ecological patterns across the landscape;

(g) Provide for healthy lands and waters that support sustainable outdoor recreation experiences for current and future generations;

(h) Prevent permanent impairment or unnecessary or undue degradation of public lands;

(i) Improve engagement and co-stewardship of public lands with Tribal entities and promote the use of Indigenous Knowledge in decision-making; and

(j) Advance environmental justice through restoration and mitigation actions.

§ 6101.3 Authority.

These regulations are issued under the authority of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) as amended and section 2002 of the Omnibus Public Land Management Act of 2009 (16 U.S.C. 7202). Implementation of this part is subject to all applicable law.

§ 6101.4 Definitions.

As used in this part, the term:

(a) *Casual use* means any short-term, noncommercial activity that does not cause appreciable damage or disturbance to the public lands or their resources or improvements and that is not prohibited by closure of the lands to any such activity.

(b) *Conservation* means the management of natural resources to promote protection and restoration. Conservation actions are effective at building resilient lands and are designed to reach desired future conditions through protection, restoration, and other types of planning, permitting, and program decision-making.

(c) *Disturbance* means changes in environmental conditions, either discrete or chronic. Disturbances may be viewed as ''characteristic'' when ecosystems and/or species have evolved to survive, exploit, and even depend on a disturbance or ''uncharacteristic'' when attributes of the disturbance (*e.g.,* type, timing, frequency, magnitude, duration) are outside prevailing background conditions. Disturbances may be natural or human-caused.

(d) *Ecosystem resilience* means the capacity of ecosystems (*e.g.,* old-growth forests and woodlands, sagebrush core areas) to maintain or regain their fundamental composition, structure, and function (including maintaining habitat connectivity and providing ecosystem services) when affected by disturbances such as drought, wildfire, and nonnative invasive species.

(e) *Effects* means the direct, indirect, and cumulative impacts, as defined in 40 CFR 1508.1(g), from a public land use. Effects and impacts as used in these regulations are synonymous.

(f) *High-quality information* means information that promotes reasoned, evidence-based agency decisions. Information that meets the standards for objectivity, utility, and integrity as set forth in the Department's Information Quality Guidelines [17] qualifies as high-quality information. Indigenous Knowledge qualifies as high-quality information when it is gained by prior, informed consent free of coercion, and generally meets the standards for high-quality information.

(g) *Important, scarce, or sensitive resources:*

(1) ''Important resources'' means resources that the BLM has determined to warrant special consideration, consistent with applicable law.

(2) ''Scarce resources'' means resources that are not plentiful or abundant and may include resources that are experiencing a downward trend in condition.

[17] U.S. Department of the Interior, Information Quality Guidelines, *https://www.doi.gov/ocio/policy-mgmt-support/information-quality-guidelines.*

(3) ''Sensitive resources'' means resources that are delicate and vulnerable to adverse change, such as resources that lack resilience to changing circumstances.

(h) *Indigenous Knowledge* means a body of observations, oral and written knowledge, innovations, technologies, practices, and beliefs developed by Indigenous Peoples through interaction and experience with the environment. Indigenous Knowledge is applied to phenomena across biological, physical, social, cultural, and spiritual systems. Indigenous Knowledge can be developed over millennia, continue to develop, and include understanding based on evidence acquired through direct contact with the environment and long-term experiences, as well as extensive observations, lessons, and skills passed from generation to generation. Indigenous Knowledge is developed, held, and stewarded by Indigenous Peoples and is often intrinsic within Indigenous legal traditions, including customary law or traditional governance structures and decision-making processes. Other terms, such as Traditional Knowledge, Traditional Ecological Knowledge, Genetic Resources associated with Traditional Knowledge, Traditional Cultural Expression, Tribal Ecological Knowledge, Native Science, Indigenous Applied Science, Indigenous Science, and others, are sometimes used to describe this knowledge system.

(i) *In-lieu fee program* means a program involving the restoration, establishment, and/or enhancement and protection of resources at specific sites through funds paid to a local or State government agency, non-profit organization that qualifies for tax-exempt status in accordance with Internal Revenue Code (IRC) section 501(c)(3), or Tribal organization to satisfy compensatory mitigation requirements for adverse impacts resulting from BLM-authorized public land uses. Collected funds are pooled and expended on projects that provide compensatory mitigation for the same types of resource impacts. Similar to a mitigation bank, an in-lieu fee program sells mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor.

(j) *Intact landscape* means a relatively unfragmented landscape free of local conditions that could permanently or significantly disrupt, impair, or degrade the landscape's composition, structure, or function. Intact landscapes are large enough to maintain native biological diversity, including viable populations of wide-ranging species. Intact landscapes provide critical ecosystem services and are resilient to disturbance and environmental change and thus may be prioritized for conservation action. For example, an intact landscape would have minimal fragmentation from roads, fences, and dams; low densities of agricultural, urban, and industrial development; and minimal pollution levels.

(k) *Intactness* means a measure of the degree to which human influences, which can include invasive species and unnatural wildfire, alter or impair the structure, function, or composition of a landscape. Areas experiencing a natural fire regime can be intact.

(l) *Land health* means the degree to which the integrity of the soil, water, and ecological processes sustain habitat quality and ecosystem functions.

(m) *Landscape* means an area that is spatially heterogeneous in at least one factor of interest which may include common management concerns or conditions. The landscape is not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context. Landscapes may be defined in terms of aquatic conditions, such as watersheds, or terrestrial conditions, such as ecoregions.

(n) *Mitigation* means:

(1) avoiding the impacts of a proposed action by not taking a certain action or parts of an action;

(2) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(3) rectifying the impact of the action by repairing, rehabilitating, or restoring the affected environment;

(4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and

(5) compensating for the impact of the action by replacing or providing substitute resources or environments. In practice, the mitigation sequence is often summarized as avoid, minimize, and compensate. The BLM generally applies mitigation hierarchically: first avoid, then minimize, and then compensate for any residual impacts from proposed actions.

(o) *Mitigation bank* means a site, or suite of sites, where resources are restored, established, enhanced, or protected for the purpose of providing compensatory mitigation for impacts to the same types of resources from BLM-authorized public land uses. In general, the sponsor of a mitigation bank sells mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor.

(p) *Mitigation fund* means an account established by a mitigation fund holder through a written agreement with the BLM. Permittees with compensatory mitigation requirements may deposit funds with the fund holder, when approved to do so by the BLM. Funds are then expended by the fund holder on projects that mitigate for the same types of resources that were impacted as a result of BLM-authorized land uses.

(q) *Mitigation strategies* means documents that identify, evaluate, and communicate potential mitigation needs and mitigation measures in a geographic area, at relevant scales, in advance of anticipated public land uses.

(r) ''Monitoring'' means the periodic observation and orderly collection of data to evaluate:

(1) existing conditions;

(2) the effects of management actions; or

(3) the effectiveness of actions taken to meet management objectives.

(s) *Permittee* means any person or other legal entity that has a valid permit, right-of-way grant, lease, or other BLM land use authorization.

(t) *Protection* means the act or process of conservation by maintaining the existence of resources while preventing degradation, damage, or destruction. Protection is not synonymous with preservation and allows for active management or other uses consistent with multiple use and sustained yield principles.

(u) *Public lands* means any surface estate or interests in the surface estate owned by the United States and administered by the Secretary of the Interior through the BLM without regard to how the United States acquired ownership.

(v) *Reclamation* means, when used in relation to individual project goals and objectives, practices intended to achieve an outcome that reflects the final goal to restore the character and productivity of the land and water. Components of reclamation include, as applicable:

(1) Isolating, controlling, or removing toxic or deleterious substances;

(2) Regrading and reshaping to conform with adjacent landforms, facilitate revegetation, control drainage, and minimize erosion;

(3) Rehabilitating fisheries or wildlife habitat;

(4) Placing growth medium and establishing self-sustaining revegetation;

(5) Removing or stabilizing buildings, structures, or other support facilities;

(6) Plugging drill holes and closing underground workings; and

(7) Providing for post-activity monitoring, maintenance, or treatment.

(w) *Restoration* means the process or act of conservation by passively or actively assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed to a more natural, native ecological state.

(x) *Significant causal factor* means a use, activity, or disturbance that prevents an area from achieving or making significant progress toward achieving one or more land health standards. To be a significant factor, a use may be one of several causal factors in contributing to less-than-healthy conditions; it need not be the sole causal factor inhibiting progress toward the standards.

(y) *Significant progress* means measurable or observable changes in the indicators that demonstrate improved land health. Acceptable levels of change must be realistic in terms of the capability of the resource but must also be as expeditious and effective as practical.

(z) *Sustained yield* means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of BLM-managed lands consistent with multiple use and without permanent impairment of the productivity of the land. Preventing permanent impairment means that renewable resources are not permanently depleted and that desired future conditions are met for future generations. Ecosystem resilience is essential to the BLM's ability to manage for sustained yield.

(aa) *Unnecessary or undue degradation* means harm to resources or values that is not necessary to accomplish a use's stated goals or is excessive or disproportionate to the proposed action or an existing disturbance. Unnecessary or undue degradation includes two distinct elements: ''Unnecessary degradation'' means harm to land resources or values that is not needed to accomplish a use's stated goals. For example, approving a proposed access road causing damage to critical habitat for a plant listed as endangered under the Endangered Species Act that could be located without any such impacts and still provide the needed access may result in unnecessary degradation. ''Undue degradation'' means harm to land resources or values that is excessive or disproportionate to the proposed action or an existing disturbance. For example, approving a proposed access road causing damage to the only remaining critical habitat for a plant listed as endangered under the Endangered Species Act, even if there is not another location for the road, may result in undue degradation. The statutory obligation to prevent ''unnecessary or undue degradation'' applies when either unnecessary degradation or undue degradation, and not necessarily both, is implicated.

(bb) *Watershed condition assessment* means a process for assessing and synthesizing information on the condition of soil, water, habitats, and ecological processes within watersheds relative to the BLM's land health fundamentals. A watershed condition assessment may include assessment of one or more of watershed physical and biological characteristics, landscape intactness, and disturbances.

§ 6101.5 Principles for Ecosystem Resilience.

(a) Except where otherwise provided by law, public lands must be managed under the principles of multiple use and sustained yield.

(b) To ensure multiple use and sustained yield, the BLM's management must conserve the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; preserve and protect certain public lands in their natural condition (including ecological and environmental values); maintain the productivity of renewable natural resources in perpetuity; and consider the long-term needs of future generations, without permanent impairment of the productivity of the land.

(c) The BLM must conserve renewable natural resources at a level that maintains or improves future resource availability and ecosystem resilience, in a manner consistent with multiple use and sustained yield.

(d) Authorized officers must implement the foregoing principles through:

(1) Conservation as a land use within the multiple use framework, including in decision-making, authorization, and planning processes;

(2) Protection and maintenance of the fundamentals of land health and ecosystem resilience;

(3) Restoration and protection of public lands to support ecosystem resilience, including habitat connectivity and old-growth forests;

(4) Use of the full mitigation hierarchy to address impacts to species, habitats, and ecosystems from land use authorizations; and

(5) Prevention of unnecessary or undue degradation.

Subpart 6102—Conservation Use To Achieve Ecosystem Resilience

§ 6102.1 Protection of Landscape Intactness.

(a) The BLM must manage certain landscapes to protect their intactness, including habitat connectivity and old-growth forests. This requires:

(1) Maintaining ecosystem resilience and habitat connectivity through conservation actions;

(2) Conserving landscape intactness when managing compatible uses, especially where development or fragmentation that could permanently impair ecosystem resilience has the potential to occur on public lands;

(3) Maintaining or restoring resilient ecosystems through habitat and ecosystem restoration projects that are implemented over broader spatial and longer temporal scales;

(4) Coordinating and implementing actions across BLM programs, offices, and partners to protect intact landscapes; and

(5) Pursuing management actions that maintain or mimic characteristic disturbance, or mimic natural disturbance, when maintaining it is not possible.

(b) Authorized officers will seek to prioritize actions that conserve and protect landscape intactness in accordance with § 6101.2.

§ 6102.2 Management to Protect Intact Landscapes.

(a) The BLM will maintain an inventory of landscape intactness as a resource value using watershed condition assessments (*see* § 6103.2(a)) to establish a consistent baseline condition.

(b) When updating a resource management plan under part 1600 of this chapter, the BLM will use a baseline condition of intactness and available high-quality information about landscape intactness, such as watershed condition assessments, environmental disturbances, and monitoring (*see* § 6103.2), to:

(1) Identify and delineate boundaries for intact landscapes within the planning area, taking into consideration habitat connectivity and migration corridor data;

(2) Evaluate alternatives to protect intact landscapes or portions of the intact landscapes from activities that would permanently or significantly disrupt, impair, or degrade the ecosystem's structure or functionality of the intact landscapes; and

(3) Identify which intact landscapes or portions of intact landscapes will be managed for protection consistent with

the principles enumerated in § 6102.1(a).

(c) The BLM will identify desired conditions and landscape objectives to guide implementation of decisions regarding management of intact landscapes, habitat connectivity, and old-growth forests. As part of carrying out paragraph (b) of this section, the BLM will seek to:

(1) Establish partnerships to work across Federal and non-Federal lands to promote and protect intact landscapes;

(2) Work with communities to identify geographic areas important for their strategic growth and development in order to allow for better identification of the most suitable areas to protect intact landscapes and habitat connectivity;

(3) Consult with Tribes to identify opportunities for co-stewardship to protect intact landscapes (*see* § 6102.5(b)(4) through (6)); and

(4) Use high-quality information including standardized quantitative monitoring to evaluate the effectiveness of management actions for ecosystem resilience (*see* § 6103.2).

(d) When determining whether to acquire lands or interests in lands through purchase, donation, or exchange, authorized officers must prioritize the acquisition of lands or interests in lands that would further protect and connect intact landscapes and functioning ecosystems.

(e) Authorized officers must collect and track landscape intactness data to support minimizing surface disturbance and inform conservation actions. This information must be included in a publicly available national tracking system.

§ 6102.3 Restoration.

(a) The BLM must emphasize restoration on the public lands to achieve its multiple use and sustained yield mandate.

(b) In determining the restoration actions required to achieve recovery of ecosystems and promote resilience, the BLM must consider the causes of degradation, the recovery potential of the ecosystem, and the allowable uses in the governing land use plan, such as whether an area is managed for recreation or is degraded land prioritized for development. The BLM must then develop commensurate restoration goals and objectives (*see* § 6103.1.1).

(c) The BLM should employ management actions to promote restoration. Over the long-term, restoration actions must be durable, self-sustaining, and expected to persist in a manner that supports land health and ecosystem resilience.

(d) When designing and implementing restoration actions on public lands, including authorizing restoration leases, authorized officers must adhere to the following principles:

(1) Ensure that restoration actions address causes of degradation, focus on process-based solutions, and where possible maintain attributes and resource values associated with the potential or capability of the ecosystem;

(2) Ensure that actions are designed, implemented, and monitored at appropriate spatial and temporal scales using suitable treatments and tools to achieve desired outcomes;

(3) Coordinate and implement actions across BLM programs, with partners, and in consideration of existing uses to develop holistic restoration actions;

(4) Ensure incorporation of locally appropriate best management practices, high-quality information, and adaptive management that supports restoration;

(5) Identify opportunities to implement nature-based or low-tech restoration activities and use seed from native plants; and

(6) Consult with Tribes to identify opportunities for co-stewardship or collaboration (*see* § 6102.5(b)(4) through (6)).

§ 6102.3.1 Restoration Prioritization and Planning.

(a) Authorized officers must identify measurable and quantifiable restoration outcomes consistent with the restoration principles enumerated in § 6102.3 in all resource management plans.

(b) Authorized officers will, at least every 5 years, identify priority landscapes for restoration consistent with resource management plan objectives and the restoration principles enumerated in § 6102.3. In doing so, authorized officers must consider:

(1) Current conditions and causes of degradation as indicated by watershed condition assessments, existing land health assessments, evaluations, and determinations, and other high-quality information (*see* § 6103.2);

(2) The likelihood of success of restoration activities to achieve resource or conservation objectives including ecosystem resilience;

(3) Where restoration actions may have the most social and economic benefits or work to address environmental justice, including impacts on communities with environmental justice concerns; and

(4) Where restoration or mitigation can minimize or offset unnecessary or undue degradation, such as ecosystem conversion, fragmentation, habitat loss, or other negative outcomes that permanently impair ecosystem resilience.

(c) For priority landscapes identified in accordance with this subpart, authorized officers must periodically, and at least every 5 years, develop or amend restoration plans consistent with resource management plan objectives in accordance with part 1600 of this chapter. Each restoration plan must include goals, objectives, and management actions that are:

(1) Consistent with the restoration principles enumerated in § 6102.3;

(2) Commensurate with recovery potential;

(3) Evaluated against measurable objectives, including to facilitate adaptive management to achieve outcomes supporting ecosystem resilience (*see* subpart 6103);

(4) Developed consistent with scientifically accepted standards and principles for restoration; and

(5) Consistent with statewide and regional needs as identified in the assessment of priority landscapes for restoration as identified in this subpart.

(d) Authorized officers must track restoration implementation and progress toward achieving goals at appropriate temporal scales. If restoration goals are not met, authorized officers must assess why restoration outcomes are not being achieved and what, if any, additional resources or changes to management are needed to achieve restoration goals.

§ 6102.4 Restoration and Mitigation Leasing.

(a) The BLM may authorize restoration leases or mitigation leases under such terms and conditions as the authorized officer determines are appropriate for the purpose of restoring degraded landscapes or mitigating impacts of other uses.

(1) Restoration or mitigation leases on the public lands may be authorized for the following purposes:

(i) Restoration of land and resources by passively or actively assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed to a more natural, resilient ecological state; and

(ii) Mitigation to offset impacts to resources resulting from other land use authorizations.

(2) Authorized officers may issue restoration or mitigation leases to any qualified entity that can demonstrate capacity for implementing restoration or mitigation projects (as appropriate) and meets the lease requirements. Consistent with the lease adjudication practices established in 43 CFR 2920, qualified entities for restoration or mitigation

leases may be individuals, businesses, non-governmental organizations, Tribal governments, conservation districts, or State fish and wildlife agencies. Qualified entities for a mitigation lease to establish an in-lieu fee program are limited to non-governmental organizations, State fish and wildlife agencies, and Tribal government organizations. Restoration and mitigation leases may not be held by a foreign person as that term is defined in 31 CFR 802.221.

(3) Restoration or mitigation leases shall be issued for a term consistent with the time required to achieve their objective.

(i) A lease issued for purposes of restoration may be issued for a maximum term of 10 years, and all activities taken under the lease shall be reviewed mid-term for consistency with the lease provisions.

(ii) A lease issued for purposes of mitigation shall be issued for a term commensurate with the impact it is mitigating, and all activities taken under the lease reviewed every 5 years for consistency with the lease provisions.

(iii) Authorized officers may renew a restoration or mitigation lease if necessary to serve the purpose for which the lease was first issued, provided that the lease holder is in compliance with the terms and conditions of the lease and renewal is consistent with applicable law. Such renewal can be for a period no longer than the original term of the lease.

(4) Subject to valid existing rights and applicable law, once the BLM has issued a lease, the BLM shall not issue new authorizations to use the leased lands if the use would be incompatible with the authorized restoration or mitigation use.

(5) No land use authorization is required under the regulations in this part for casual use of the public lands covered by a restoration or mitigation lease.

(b) The application process for a restoration or mitigation lease and for renewal of such a lease is as follows:

(1) An application for a restoration or mitigation lease must be filed using an approved application form with the Bureau of Land Management office having jurisdiction over the public lands covered by the application.

(2) The filing of an application gives the applicant no right to use the public lands.

(3) Acceptance of an application or approval of a lease is not guaranteed and is at the discretion of the authorized officer.

(4) Actions that pertain to or address geographic areas or resource conditions previously identified as needing restoration by the BLM through watershed condition assessments and existing land health assessments, land health evaluations, an existing restoration plan, a mitigation strategy, or high-quality inventory, assessment, and monitoring information shall be given priority for consideration (*see* subpart 6103).

(c) An application for a restoration or mitigation lease must comply with the following requirements:

(1) An application must include a restoration or mitigation development plan that describes the proposed restoration or mitigation use in sufficient detail to enable authorized officers to evaluate the feasibility, impacts, benefits, costs, threats to public health and safety, collaborative efforts, and conformance with BLM plans, programs, and policies, including compatibility with other uses.

(2) The development plan shall include, but not be limited to:

(i) Results from available assessments, inventory and monitoring efforts, or other high-quality information (*see* subpart 6103) that identify the current conditions of the site(s) of the proposed restoration or mitigation action;

(ii) The desired future condition of the proposed lease area including clear goals, objectives, and measurable performance criteria needed to determine progress toward achieving the objectives;

(iii) Justification for passive restoration or mitigation if proposed;

(iv) A description of all facilities for which authorization is sought, including access needs and any other special types of authorizations that may be needed;

(v) A map of sufficient scale to allow the required information to be legible as well as a legal description of primary and alternative project locations;

(vi) Justification of the total acres proposed for the restoration or mitigation lease;

(vii) A schedule for restoration activities if applicable; and

(viii) Information on outreach already conducted or to be conducted with existing permittees, lease holders, adjacent land managers or owners, and other interested parties.

(3) Restoration lease development plans must be consistent with § 6102.3 and mitigation lease development plans must be consistent with § 6102.5.1.

(4) Applicants must submit the following additional information, upon request of the authorized officer:

(i) Additional high-quality information, if such information is necessary for the BLM to decide whether to issue, issue with modification, or deny the proposed lease;

(ii) Documentation of or proof of application for any required private, State, local, or other Federal agency licenses, permits, easements, certificates, or other approvals; and

(iii) Evidence that the applicant has, or will have prior to commencement of lease activities, the technical and financial capability to operate, maintain, and terminate the authorized lease activities.

(d) When reviewing restoration and mitigation lease applications, authorized officers will consider the following factors, along with other applicable legal requirements, which will make lease issuance more likely:

(1) Lease outcomes that are consistent with the restoration principles in § 6102.3(d);

(2) Desired future conditions that are consistent with the management objectives and allowable uses in the governing land use plan, such as an area managed for recreation or prioritized for development;

(3) Collaboration with existing permittees, leaseholders, and adjacent land managers or owners;

(4) Outreach to or support from local communities; or

(5) Consideration of environmental justice objectives.

(e) If approved, the leaseholder shall provide a monitoring plan that describes how the terms and conditions of the lease will be applied, the monitoring methodology and frequency, measurable criteria, and adaptive management triggers.

(1) The lease holder shall provide a lease activity report annually and at the end of the lease period. At a minimum, the report shall specify:

(i) The restoration or mitigation activities taken as of the time of the report;

(ii) Any barriers to meeting the stated purpose of the lease;

(iii) Proposed steps to resolve any identified barriers; and

(iv) Monitoring information and data that meet BLM methodology requirements and data standards (*see* § 6103.2(d)).

(2) Additional requirements for development plans and monitoring plans for mitigation leases are provided in § 6102.5.1.

(f) An approved lease does not convey exclusive rights to use the public lands to the lease holder The authorized officer retains the discretion to determine compatibility of the renewal of existing authorizations and future land use proposals on lands subject to restoration or mitigation leases.

(g) A restoration or mitigation lease will not preclude access to or across leased areas for casual use, recreation use, research use, or other use taken pursuant to a land use authorization that is compatible with the approved restoration or mitigation use.

(h) Existing access that accommodates accessibility under section 504 of the Rehabilitation Act shall remain after a lease has been issued.

(i) A restoration or mitigation lease may only be amended, assigned, or transferred with the written approval of the authorized officer, and no amendment, assignment, or transfer shall be effective until the BLM has approved it in writing. Authorized officers may authorize assignment or transfer of a restoration or mitigation lease in their discretion if no additional rights will be conveyed beyond those granted by the original authorization, the proposed assignee or transferee is qualified to hold the lease, and the assignment or transfer is in the public interest.

(j) Administrative cost recovery, rents, and fees for restoration and mitigation leases will be governed by the provisions of 43 CFR 2920.6 and 2920.8, provided that the BLM may waive or reduce administrative cost recovery, fees, and rent of a restoration lease if the restoration lease is not used to generate revenue or satisfy the requirements of a mitigation program (*e.g.,* selling credits in an established market), and the restoration lease will enhance ecological or cultural resources or provide a benefit to the general public.

§ 6102.4.1 Termination and Suspension of Restoration and Mitigation Leases.

(a) If a restoration or mitigation lease provides by its terms that it shall terminate on the occurrence of a fixed or agreed-upon event, the restoration or mitigation lease shall automatically terminate by operation of law upon the occurrence of such event.

(b) A restoration or mitigation lease may be terminated by mutual written agreement between the authorized officer and the lease holder.

(c) Authorized officers have discretion to suspend or terminate restoration or mitigation leases under the following circumstances:

(1) Improper issuance of the lease;

(2) Noncompliance by the holder with applicable law, regulations, or terms and conditions of the lease;

(3) Failure of the holder to use the lease for the purpose for which it was authorized; or

(4) Impossibility of fulfilling the purposes of the lease.

(d) Upon determination that the holder has failed to comply with any terms or conditions of a lease and that such noncompliance adversely affects or poses a threat to land or public health or safety, or impacts ecosystem resilience, the authorized officer shall issue an immediate temporary suspension.

(1) The authorized officer may issue an immediate temporary suspension order orally or in writing at the site of the activity to the holder or a contractor or subcontractor of the holder, or to any representative, agent, employee, or contractor of any such holder, contractor, or subcontractor, and the suspended activity shall cease at that time. As soon as practicable, the authorized officer shall confirm the order by a written notice to the holder addressed to the holder or the holder's designated agent. The authorized officer may also take such action that the authorized officer considers necessary to address the adverse effects or threat to land or public health or safety or impacts to ecosystem resilience.

(2) The authorized officer may order immediate temporary suspension of an activity independent of any action that has been or is being taken by another Federal or State agency.

(3) Any time after an order of temporary suspension has been issued, the holder may file with the authorized officer a request for permission to resume activities authorized by the lease. The request shall be in writing and shall contain a statement of the facts supporting the request. The authorized officer may grant the request upon determination that the adverse effects or threat to land or public health or safety or impacts to ecosystem resilience are resolved.

(4) The authorized officer may render an order to either grant or deny the request to resume within 30 working days of the date the request is filed. If the authorized officer does not render an order on the request within 30 working days, the request shall be considered denied, and the holder shall have the same right to appeal as if an order denying the request had been issued.

(e) Process for termination or suspension other than temporary immediate suspension.

(1) Prior to commencing any proceeding to suspend or terminate a lease, the authorized officer shall give written notice to the holder of the legal grounds for such action and shall give the holder a reasonable time to address the legal basis the authorized officer identifies for suspension or termination.

(2) After due notice of termination or suspension to the holder of a restoration or mitigation lease, if grounds for suspension or termination still exist after a reasonable time, the authorized officer shall give written notice to the holder and refer the matter to the Office of Hearings and Appeals for a hearing before an administrative law judge pursuant to 43 CFR part 4. The authorized officer shall suspend or revoke the restoration or mitigation lease if the administrative law judge determines that grounds for suspension or revocation exist and that such action is justified.

(3) Authorized officers shall terminate a suspension order when they determine that the grounds for such suspension no longer exist.

(4) Upon termination of a restoration or mitigation lease, the holder shall, for 60 days after the notice of termination, retain authorization to use the associated public lands solely for the purposes of reclaiming the site to its pre-use conditions consistent with achieving land health fundamentals, unless otherwise agreed upon in writing or in the lease terms. If the holder fails to reclaim the site consistent with the requirements of the lease terms within a reasonable period, all authorization to use the associated public lands will terminate, but that shall not relieve the holder of liability for the cost of reclaiming the site.

§ 6102.4.2 Bonding for Restoration and Mitigation Leases.

(a) *Bonding obligations.* (1) Prior to the commencement of surface-disturbing or active management activities, the authorized officer may require the restoration or mitigation lease holder to submit a reclamation, decommission, or performance bond conditioned upon compliance with all the terms and conditions of the lease covered by the bond, as described in this subpart. For mitigation leases, the lease holder will usually be required to provide letters of credit or establish an escrow account for the full amount needed to ensure the development plan meets all performance criteria. The bond amounts shall be sufficient to ensure reclamation of the restoration and mitigation lease area(s) and the restoration of any lands or surface waters adversely affected by restoration or mitigation lease operations. Such restoration may be required after the abandonment or cessation of operations by the restoration or mitigation lease holder in accordance with, but not limited to, the standards and requirements set forth by authorized officers.

(2) Considerations for requiring a bond include, but are not limited to:

(i) The type and level of active restoration;

(ii) Amount and type of surface disturbing activity;

(iii) Proposed use of non-natural restoration methods, such as the use of pesticides;

(iv) Proposed use of experimental methods of restoration;

(v) Risk of compounding effects resulting from restoration activities, such as a proliferation of invasive species; and

(vi) Fire risk.

(3) Surety bonds shall be issued by qualified surety companies certified by the Department of the Treasury.

(4) Personal bonds shall be accompanied by:

(i) Cashier's check;

(ii) Certified check; or

(iii) Negotiable Treasury securities of the United States of a value equal to the amount specified in the bond. Negotiable Treasury securities shall be accompanied by a proper conveyance to the Secretary of full authority to sell such securities in case of default in the performance of the terms and conditions of a conservation use authorization.

(b) In lieu of bonds for each individual restoration or mitigation lease, holders may furnish a bond covering all restoration or mitigation leases and operations in any one State. Such a bond must be at least $25,000 and must be sufficient to ensure reclamation of all of the holder's restoration or mitigation lease area(s) and the restoration of any lands or surface waters adversely affected by restoration or mitigation lease operations in the State.

(c) All bonds shall be filed in the proper BLM office on a current form approved by the Office of the Director. A single copy executed by the principal or, in the case of surety bonds, by both the principal and an acceptable surety is sufficient. Bonds shall be filed in the Bureau State Office having jurisdiction of the restoration or mitigation lease covered by the bond.

(d) Default.

(1) Where, upon a default, the surety makes a payment to the United States of an obligation incurred under a restoration or mitigation lease, the face amount of the surety bond or personal bonds and the surety's liability thereunder shall be reduced by the amount of such payment.

(2) After default, where the obligation in default equals or is less than the face amount of the bond(s), the principal shall either post a new bond or restore the existing bond(s) to the amount previously held or a larger amount as determined by authorized officers. In lieu thereof, the principal may file separate or substitute bonds for each conservation use covered by the deficient bond(s). Where the obligation incurred exceeds the face amount of the bond(s), the principal shall make full payment to the United States for all obligations incurred that are in excess of the face amount of the bond(s) and shall post a new bond in the amount previously held or such larger amount as determined by authorized officers. The restoration of a bond or posting of a new bond shall be made within 6 months or less after receipt of notice from authorized officers.

(3) Failure to comply with these requirements may:

(i) Subject all leases covered by such bond(s) to termination under the provisions of this title;

(ii) Prevent the bond obligor or principal from acquiring any additional restoration or mitigation leases or interest therein under this subpart; and

(iii) Result in the bond obligor or principal being referred to the suspension and debarment program under 2 CFR part 1400 to determine if the entity will be suspended or debarred from doing business with the Federal Government.

§ 6102.5 Management Actions for Ecosystem Resilience.

(a) Authorized officers must:

(1) Identify priority watersheds, landscapes, and ecosystems that require protection and restoration efforts (*see* §§ 6102.2 and 6102.3.1);

(2) Develop and implement plans and strategies, including protection, restoration, and mitigation strategies that effectively manage public lands to protect and promote resilient ecosystems (*see* §§ 6102.1, 6102.3.1, 6102.5.1, 6103.1.2);

(3) Develop and implement monitoring and adaptive management strategies for maintaining sustained yield of renewable resources, accounting for changing landscapes, fragmentation, invasive species, and other disturbances (*see* § 6103.2);

(4) Report annually on the results of land health evaluations, and determinations (*see* § 6103.1.2);

(5) Ensure that watershed condition assessments incorporate consistent analytical approaches (*see* § 6103.2) both among neighboring BLM State Offices and with the fundamentals of land health; and

(6) Share watershed condition assessments in a publicly available national database to determine changes in watershed condition and record measures of success based on conservation and restoration goals.

(b) In taking management actions, and as consistent with applicable law and resource management plans, such as where an area is managed for recreation or is degraded land prioritized for development, authorized officers must:

(1) Make every effort to avoid authorizing uses of the public lands that permanently impair ecosystem resilience;

(2) Promote opportunities to support conservation and other actions that work toward achieving land health standards and ecosystem resilience;

(3) Issue decisions that promote the ability of ecosystems to passively recover or the BLM's ability to actively restore ecosystem composition, structure, and function;

(4) Meaningfully consult with Indian Tribes and Alaska Native Corporations during the decision-making process on actions that are determined, after allowing for Tribal input, to potentially have a substantial effect on the Tribe or Corporation;

(5) Allow State, Tribal, and local agencies to serve as joint lead agencies consistent with 40 CFR 1501.7(b) or as cooperating agencies consistent with 40 CFR 1501.8(a) in the development of environmental impact statements or environmental assessments;

(6) Respect Indigenous Knowledge, by:

(i) Improving engagement and expanding co-stewardship of public lands with Tribal entities;

(ii) Encouraging Tribes to suggest ways in which Indigenous Knowledge can be used to inform the development of alternatives, analysis of effects, and when necessary, identification of mitigation measures; and

(iii) Communicating to Tribes in a timely manner and in an appropriate format how their Indigenous Knowledge was included in decision-making, including addressing management of sensitive information;

(7) Seek opportunities to restore or protect ecosystem resilience when the effects of potential uses are unknown; and

(8) Provide justification for decisions that may impair ecosystem resilience.

(c) Authorized officers must use high-quality inventory, assessment, and monitoring data, as available and appropriate, to evaluate resource conditions and inform decision-making across program areas (*see* § 6103.2(c)), specifically by:

(1) Identifying clear goals or desired outcomes relevant to the management decision;

(2) Gathering high-quality information relevant to the management decision, including standardized quantitative monitoring data and data about land health;

(3) Selecting relevant indicators for each applicable management question (*e.g.,* land health standards, restoration effectiveness, assessments of intactness);

(4) Establishing a framework for translating indicator values to condition categories (such as quantitative monitoring objectives or science-based conceptual models); and

(5) Summarizing results and ensuring that a clear and understandable rationale is documented, explaining how the data were used to make the decision.

§ 6102.5.1 Mitigation.

(a) The BLM will apply the mitigation hierarchy to avoid, minimize, and compensate, as appropriate, for adverse impacts to resources when authorizing uses of public lands. As appropriate, the authorized officer may identify specific mitigation approaches or requirements to address resource impacts through land use plans or in other decision documents.

(b) For important, scarce, or sensitive resources, authorized officers shall apply the mitigation hierarchy with particular care, with the goal of eliminating, reducing, and/or offsetting impact on the resource, consistent with applicable law.

(c) When implementing the mitigation hierarchy, including authorizing mitigation leases, the BLM will:

(1) Use a landscape-scale approach to develop and implement mitigation strategies that identify mitigation needs and opportunities in a geographic area, including opportunities for the siting of large, market-based mitigation programs or projects (*e.g.,* mitigation banks) on public lands;

(2) Use high-quality information to inform the identification and analysis of adverse impacts, to determine appropriate mitigation programs or projects for those impacts, and to achieve appropriate and effective mitigation outcomes;

(3) Require identification of performance criteria for mitigation programs or projects, effectiveness monitoring of those performance criteria, and reports that assess the achievement of those performance criteria;

(4) Use adaptive management principles to guide and improve mitigation outcomes; and

(5) Ensure that any compensatory mitigation programs or projects are commensurate with the applicable adverse impacts and that the required compensatory mitigation programs and projects are durable, additional, and timely.

(6) As used in this section, the terms *additional, commensurate, durable,* and *timely* have the following definitions:

(i) *Additional* means the compensatory mitigation program or project's benefit is demonstrably new and would not have occurred without the compensatory mitigation measure.

(ii) *Commensurate* means the compensatory mitigation program or project is reasonably related and proportional to the adverse impact from authorizing uses of public lands.

(iii) *Durable* means the maintenance of the effectiveness of a mitigation program or project, including resource, administrative, and financial considerations.

(iv) *Timely* means the lack of a time lag between the impact to the resources and the achievement of the outcomes of the associated compensatory mitigation.

(d) The BLM may approve, through a formal agreement, a third-party mitigation fund holder to administer funds for the implementation of compensatory mitigation programs or projects. A BLM-approved third-party mitigation fund holder may:

(1) Collect mitigation funds from permittees;

(2) Manage funds in accordance with agency decision documents, use authorizations and applicable law; and

(3) Disperse those funds in accordance with agency decision documents, use authorizations, and applicable law.

(e) Approved third-party mitigation fund holders must file with the BLM annual fiscal reports. To qualify as a third-party mitigation fund holder, the entity must either:

(1) Qualify for tax-exempt status in accordance with Internal Revenue Code section 501(c)(3); provide evidence that they can successfully hold and manage mitigation accounts; be a public charity bureau for the State in which the mitigation area is located, or otherwise comply with applicable State laws; be a third party organizationally separate from and having no corporate or family connection to the entity accomplishing the mitigation program or project, BLM employees, or the permittee; adhere to generally accepted accounting practices that are promulgated by the Financial Accounting Standards Board, or any successor entity; and have the capability to hold, invest, and manage the mitigation funds to the extent allowed by law; or

(2) Be a State or local government agency, if the government agency is able to demonstrate, to the satisfaction of the BLM, that:

(i) it is acting as a fiduciary for the benefit of the mitigation project or site and can show that it has the authority and ability to collect the funds, protect the account from being used for purposes other than the management of the mitigation project or site, and disburse the funds to the entities conducting the mitigation project or management of the mitigation site;

(ii) it is organizationally separate from and has no corporate or family connection to the entity accomplishing the mitigation program or project, BLM employees, or the permittee; and

(iii) it adheres to generally accepted accounting practices that are promulgated by the Governmental Accounting Standards Board or any successor entity.

(f) Authorized officers will require mitigation leases and collect annual rent at fair market value for large or otherwise substantial compensatory mitigation programs or projects on public lands, including mitigation banks and in-lieu fee programs. Mitigation leases may be required for other compensatory mitigation projects on public lands at the discretion of the authorized officer.

(g) In addition to the general requirements for mitigation leases (§ 6102.4), in some circumstances, authorized officers may require that mitigation lease holders submit to the agency a formal agreement with a qualified mitigation fund holder as defined in paragraph (d) of this section.

(h) An application for a mitigation lease for a mitigation bank or an in-lieu fee program, in addition to the requirements in (§ 6102.4(c)), must also include sufficient information about the anticipated demand for and duration of the mitigation bank or in-lieu fee program, the anticipated types of mitigation projects that will be conducted, and the methods that will be used to generate, evaluate, assess, and maintain the mitigation projects.

(i) Authorized officers will ensure that compensatory mitigation programs and projects, including those with mitigation leases, are tracked in the appropriate BLM data systems.

Subpart 6103—Managing Land Health To Achieve Ecosystem Resilience

§ 6103.1 Land Health Standards.

(a) The BLM shall develop national land health standards that facilitate progress toward achieving the following fundamentals of land health across all ecosystems on lands managed by the BLM:

(1) Watersheds are in, or are making significant progress toward, properly functioning physical condition, including their upland, riparian-wetland, and aquatic components; soil and plant conditions support infiltration, soil moisture storage, and the release of water that are in balance with climate and landform and maintain or improve water quality, water quantity, and timing and duration of flow.

(2) Ecological processes, including the hydrologic cycle, nutrient cycle, and energy flow, are maintained, or there is significant progress toward their attainment, in order to support healthy biotic populations and communities.

(3) Water quality complies with State water quality standards and achieves, or is making significant progress toward achieving, BLM management objectives established in the land use plan, such as meeting wildlife needs.

(4) Habitats are, or are making significant progress toward being, restored or maintained for Federal threatened and endangered species, Federal proposed or candidate threatened and endangered species, and other special status species.

(b) Land health fundamentals will be advanced through national land health standards that, at a minimum, address the following resources, processes, and values:

(1) Upland hydrologic function;

(2) Riparian, wetland, and aquatic hydrologic function;

(3) Upland ecological processes and biotic communities, including connectivity, and intactness of native plant and animal habitats;

(4) Riparian, wetland, and aquatic ecological processes and biotic communities including condition, connectivity, and intactness of native plant and animal habitats;

(5) Water quality; and

(6) Habitat condition connectivity and intactness for Federal threatened and endangered species, Federal proposed or candidate threatened and endangered species, and other special status species.

(c) To facilitate land health evaluations, the national land health standards will include indicators that are broadly applicable across the major ecosystem or habitat types (*e.g.,* forest, rangeland, cold water fisheries) the BLM manages, and will include indicators derived from standardized datasets.

(d) Authorized officers must manage all program areas in accordance with the fundamentals of land health and standards, as provided in this subpart. Authorized officers must adopt the national standards and indicators, and may, when necessary, incorporate geographically distinct land health standards and indicators to evaluate rare or unique habitat or ecosystem types (*e.g.,* permafrost) if such habitats or ecosystems cannot be evaluated using the national land health standards and indicators.

(e) Rangeland health standards developed under 43 CFR subpart 4180 will be reviewed and amended or supplemented as necessary to incorporate the national standards and indicators within 3 years of the effective date of these regulations. Subsequently, authorized officers shall review all land health standards for sufficiency at least every 10 years.

(f) Amended land health standards must be approved by the appropriate BLM State Director prior to implementation.

§ 6103.1.1 Management for Land Health.

(a) To facilitate ecosystem resilience, authorized officers should use watershed condition assessments (*see* § 6103.2), and land health evaluations and causal factor determinations to support decision-making. Such action promotes efficiency, supports environmental analysis, and streamlines decision-making.

(b) To facilitate ecosystem resilience, authorized officers must manage all program areas to progress toward achieving land health standards.

(1) Authorized officers must apply approved land health standards, as revised from rangeland health standards previously established under subpart 4180 of this chapter (fundamentals of rangeland health), across all ecosystems managed by the BLM.

(2) Programs that authorize and manage uses or implement management actions on public land will develop management guidelines, which are best management practices designed to facilitate progress toward achievement and maintenance of land health standards.

(i) Authorized officers may develop or adopt additional management guidelines to address local ecosystems and management practices.

(ii) Programs and authorized officers will review management guidelines for sufficiency and make necessary revisions at least every 10 years in conjunction with the review of land health standards described in this subpart.

(c) Land use plans must identify the allocations and actions anticipated to achieve desired land health outcomes, including actions to maintain or restore land health in accordance with the land health standards. These actions include, but are not limited to, prioritizing development in degraded areas as well as prioritizing and implementing restoration actions (*see* § 6102.3).

(d) Land use plans shall identify statutory, regulatory, and other requirements that may prevent achievement of land health standards.

(1) Best management practices and mitigation measures to minimize effects to land health resulting from these requirements should be identified and required where practicable.

(2) Environmental effects analysis, consistent with NEPA requirements, for proposed management actions must consider effects to relevant land health standards.

§ 6103.1.2 Land Health Evaluations and Determinations.

(a) Authorized officers shall rely on watershed condition assessments when possible to complete land health evaluations for BLM-managed lands on a periodic basis, at least every 10 years (§ 6103.2).

(b) Authorized officers must determine the priority landscape and appropriate scale for completing land health evaluations based on resource concerns and, as necessary, to support decision-making processes.

(c) Authorized officers must consider available watershed condition assessments and existing land health assessments, evaluations, and determinations in the course of decision-making processes for all program areas.

(d) Land health evaluations interpret watershed condition assessments, including locally relevant high-quality information to draw conclusions about whether land health standards are achieved on public lands. In the course of conducting land health evaluations, authorized officers should:

(1) Consider multiple lines of evidence to evaluate achievement of each standard;

(2) Identify trends toward or away from desired conditions through analysis of high-quality information available over relevant time periods and spatial scales;

(3) Document the rationale and findings as to whether each land health standard is achieved or significant progress is being made towards its achievement; and

(4) Develop an interdisciplinary monitoring plan with quantitative objectives that can be measured to demonstrate significant progress when a land health evaluation report identifies that any standard is not achieved but significant progress is being made towards achievement.

(e) When conducting a land health evaluation, if the authorized officer

finds that resource conditions are achieving or making significant progress toward achieving land health standards, no additional land health analysis is needed to authorize a use or permit activities.

(f) When conducting a land health evaluation, if the authorized officer finds that resource conditions are not achieving or making significant progress toward achieving land health standards, a documented causal factor determination must be prepared as soon as practicable but no later than 1 year after completion of the land health evaluation identifying the nonachievement. Causal factor determinations use available data to identify significant causal factors and describe contributing causal factors or conditions leading to non-achievement of standards.

(1) If the authorized officer determines sufficient information exists to identify and address the significant causal factors preventing resources from achieving or making significant progress towards achieving land health standards, no further land health analysis is required to address such factors.

(2) If the authorized officer determines insufficient information exists to identify and address the significant causal factors preventing resources from achieving or making significant progress to achieving land health standards, additional information, assessment and evaluation may be needed at finer scale.

(3) The authorized officer must take appropriate actions to facilitate achievement or significant progress toward achievement of land health standards as soon as practicable, unless otherwise specified in the land use plan, or when significant causal factors are outside of BLM control (*e.g.,* lack of streamflow due to dewatering on connected lands not administered by the BLM).

(4) To the extent existing grazing management practices or levels of grazing use on public lands are identified as significant causal factors preventing resources from achieving or making significant progress towards achieving land health standards, authorized officers must proceed under § 4180.2(c) of this chapter. by taking appropriate action as soon as practicable but no later than the start of the next grazing year.

(5) Taking appropriate action means implementing actions that will result in significant progress toward achieving land health standards. Appropriate action must be consistent with applicable law, regulation, and the governing land use plan and its management objectives, such as where an area is managed for recreation or is degraded land prioritized for development. Appropriate actions may include, but are not limited to:

(i) Establishment or modification of terms and conditions for permits, leases, and other use authorizations;

(ii) Development and implementation of activity plans;

(iii) Implementation of adaptive management actions; and

(iv) Control of unauthorized use.

(g) Upon determining that significant causal factors other than current management practices are preventing achievement of land health standards, but are not outside of BLM control (*e.g.,* presence of invasive species), the authorized officer shall identify and prioritize appropriate actions that may result in significant progress toward achievement of land health standards (*see* § 6102.5).

(h) Subject to other applicable law, authorized officers may implement restoration plans, modify authorized uses, or implement other management actions to increase expediency and effectiveness of progress towards achieving land health standards, to protect areas achieving land health standards, or to meet other objectives.

(i) If current authorized uses are determined to be significant causal factors and the authorized officer determines appropriate action is needed, then appropriate action must be consistent with the governing land use plan. Changes to some types of authorized uses may first warrant an amendment to the land use plan to allow the authorized officer to adjust those uses sufficient to make progress toward meeting land health standards. However, whether to undertake a planning process is at the discretion of the authorized officer.

(j) Authorized officers will report annually on land health evaluation, and determination accomplishments; results; and actions taken to address areas not achieving or making progress toward achieving standards.

(k) The BLM will maintain and annually update a publicly available record of land health evaluation and determination results and management actions taken to facilitate progress toward achieving land health standards.

§ 6103.2 Inventory, Assessment, and Monitoring.

(a) Watershed condition assessments must be completed at least once every 10 years and used to inform land use planning, protect intact landscapes (§ 6102.2), manage for ecosystem resilience (§ 6102.5), inform restoration actions (§ 6102.3), and inform land health evaluations and determinations (§ 6103.1.1). Watershed condition assessments assess and synthesize information on the condition of soil, water, habitats, and ecological processes within watersheds relative to the BLM's land health fundamentals and the national land health standards. When conducting watershed condition assessments, the BLM must:

(1) Compile and analyze multiple sources of high-quality information to understand conditions and trends relevant to each land health standard, including remote sensing products, field-based data, and other data gathered through inventory, assessment, and monitoring activities; and

(2) Incorporate consistent analytical approaches, quantitative indicators, and benchmarks where practicable.

(b) The BLM will maintain a publicly available inventory of infrastructure and natural resources on public lands. This inventory must include both critical landscape components (*e.g.,* roads, land types, streams, habitats) and core indicators that address land health fundamentals.

(c) Authorized officers will use high-quality inventory, assessment, and monitoring information, including standardized quantitative monitoring data, remote sensing maps, and geospatial analyses, to inform decision-making across program areas, including, but not limited to:

(1) Authorization of permitted uses;

(2) Land use planning;

(3) Watershed condition assessments and land health evaluations;

(4) Restoration planning, including prioritization;

(5) Assessments of restoration effectiveness;

(6) Consideration of areas of critical environmental concern;

(7) Evaluation and protection of intact landscapes;

(8) Restoration and mitigation leasing; and

(9) Other decision-making processes.

(d) Authorized officers must inventory, assess, and monitor activities as necessary to inform the decision-making processes identified in paragraph (b) of this section and, in so doing, must employ the following:

(1) Interdisciplinary monitoring plans for providing data relevant to decision makers;

(2) Standardized field protocols and indicators to allow data comparisons through space and time in support of multiple management decisions;

(3) Appropriate sample designs to minimize bias and maximize applicability of collected data;

(4) Integration with remote sensing products to optimize sampling and calibrate continuous map products; and

(5) Data management and stewardship to ensure data quality, accessibility, and use.

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"Streambeds, Game Trails, & Corner Crossings: Public Access & Private Property"

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I. Corner Crossings

A. Defining the "Corner Crossing" Issue

1. "Corner crossing" is "travel by foot through the checkerboard from public land to public land at the corners, while never physically touching private land and not damaging private property, without the permission of the owner(s) of the adjoining private land(s)."[1]

2. The legal question about "corner crossing" can be asked several ways, but the primary competing versions of the question are:

   a. Does "corner crossing" in the Checkerboard involve trespassing on adjacent private land?;

   b. Can a landowner in the Checkerboard prohibit a person from "corner crossing"?

3. The "corner crossing" problem affects everyone—from landowners, their business operations, employees, and agents to local, state, and federal governments and law enforcement to public land users of every stripe. And it affects an enormous amount of land—more than 8 million acres scattered across the U.S., by some estimates.

4. The territory/property – the "Checkerboard:"

[1] *Iron Bar Holdings, LLC v. Cape*, 674 F. Supp. 3d 1059, 1062 (D. Wyo. 2023); *appeal pending*, No. 23-8043 (10th Cir., June 20, 2023).

a. From the1820s through the 1870s, Congress "gave away" 150 million acres of public land through "checkerboard" land grants with the idea that the States or private companies would sell the lands to raise the capital needed to build roads, canals and other infrastructure projects.[2]

b. These lands were platted into six-mile by six-mile squares called "townships" that were themselves subdivided into 36 square mile parcels called "sections."[3] Each section contained approximately 640 acres and surveyors numbered each section sequentially from 1 to 36 starting with a given township's northeastern-most section and snaking west and east until reaching Section 36, the southeastern-most section.[4]

c. The following image illustrates the general section numbering for each township:[5]

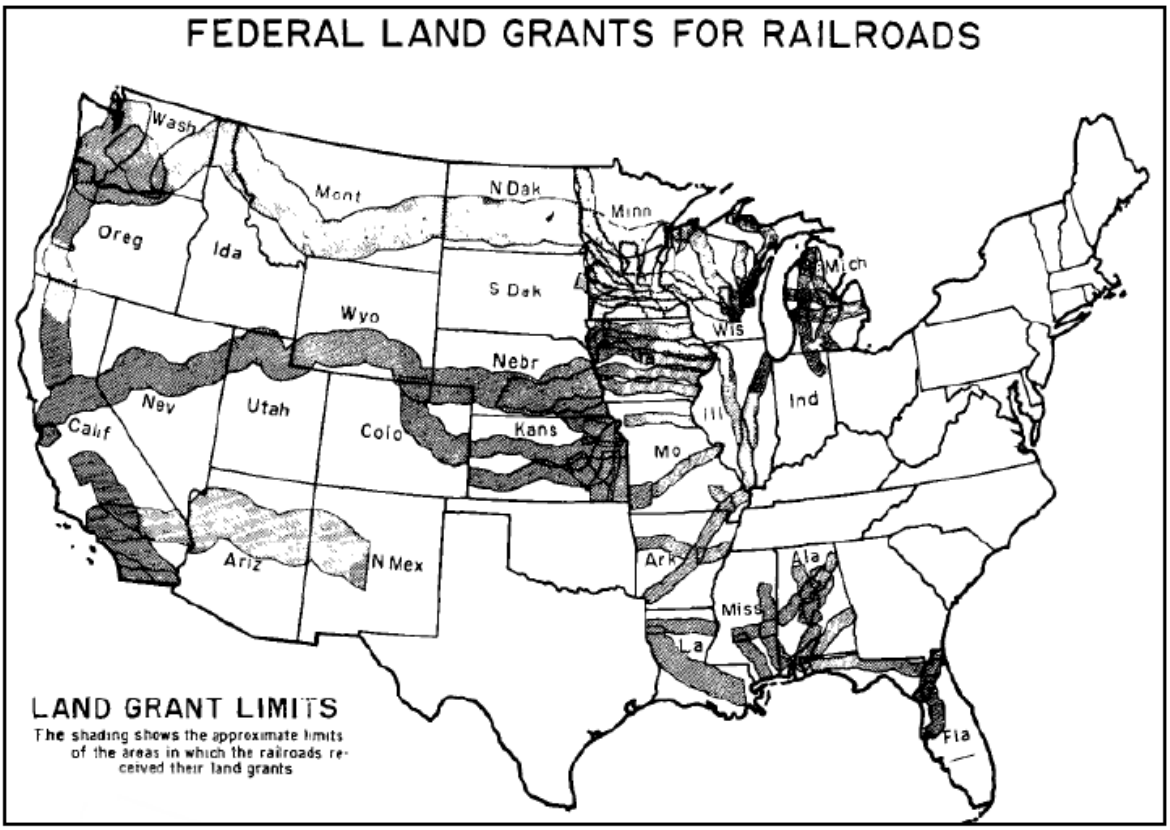
[2]*See* Paul Gates, *History of Public Land Law Development* 357–58 (1968) (examples include Act of March 2, 1827, 4. Stat. 237 (1827) (giving land to Indiana for the construction of the Wabash and Erie Canal; similar land grants were made in Ohio and Alabama); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1424 n.1 (10th Cir. 1986).
[3]Bureau of Land Management, *Manual of Surveying Instructions for the Survey of the Public Lands of the United States* 12 (2009).
[4]*Id.*
[5]This diagram comes from the opening brief of the Plaintiff/Appellant Iron Bar Holdings, LLC, filed in the Tenth Circuit under Case No. 23-8043 ("Iron Bar's Opening Brief") at page 16.

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

d. Through its "checkerboard" land grant scheme, Congress generally deeded the odd-numbered "sections" while it retained the even-numbered sections.[6] One of the beneficiaries of these land grants were railroad companies constructing what would

[6]*See* Gates, *supra* note 2, at 357–58; *Mountain States Legal Found.*, 799 F.2d at 1424 n.1; Pacific Railroad Act, 12 Stat. 489, 492, § 3 (July 1, 1862).

become the transcontinental railroad.[7] By the early 1870s, Congress had granted around 150 million acres with 130 million acres to the railroad companies alone.[8]



e. Congress justified this enormous land give-away with the belief that the railroad would sell its sections to raise money to build the railroad meaning that the value of the federally retained even-numbered sections would increase substantially as the surrounding odd-numbered sections developed following the completion of the railroad. The Congressional intent was for the federal government to then sell their retained

[7]Pacific Railroad Act, 12 Stat. 489, 490, § 1; Act of July 2, 1864, 13 Stat. 356, 358.
[8]Gates, *supra* note 2, at 384–85.

checkerboard lands for a higher price.[9] This plan of granting railroads the odd numbered sections and then selling the federally retained even numbered sections worked well

PUBLIC	PRIVATE	PUBLIC	PRIVATE
PRIVATE	PUBLIC	PRIVATE	PUBLIC
PUBLIC	PRIVATE	PUBLIC	PRIVATE

throughout Illinois, Indiana, Minnesota, Iowa and Missouri because all of the lands eventually left federal ownership or control. By the end of 1853, over 2,600 miles of railroads were projected and over 8 million acres had been granted for railroads.[10]

f. "By granting to the railroad the odd-numbered sections, and retaining the even-numbered sections, a checkerboard effect resulted."[11]

[9] *Id.* at 346; Cong. Globe, 31st Cong., 1st Sess., 845 (1850).
[10] *Id.* at 360.
[11] *Leo Sheep Co. v. United States*, 570 F.2d 881, 885 (10th Cir. 1977), *rev'd* 440 U.S. 668 (1979).

g. While this plan worked well in eastern states where people were more willing to move, it did not prove as successful out west. The government was unable to sell all of its lands, so it began disposing of them through the various Homestead acts.[12] The lands that were not disposed of were retained by the government with many now managed by the BLM.[13]

h. This ownership pattern remains to the present day across several western states, including New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Nevada, Arizona, California, Oregon, and Washington.[14]

i. These lands are rich with wildlife, including big game, which make them coveted for hunting, fishing, birding, and other recreational purposes.[15] These lands also contain vast natural resources, including native grasses, which have served the cattle ranching and wool growing operations for centuries.[16]

j. For many years, all people—the private parties owning odd-numbered sections in the "checkerboard" and any other person interested in using the public land for a lawful purpose—could travel to and use the public land sandwiched

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[12] *See* Merry J. Chavez, *Public Access to Landlocked Public Lands*, 39 STANFORD L. REV. 1373, 1377-78 (1987).
[13] *See id.* at 1778.
[14] *See* "The Corner-Locked Report," onX Maps, *available at* https://www.onxmaps.com/onx-access-initiatives/corner-crossing-report; *See also* Brief of *Amicus Curiae* Wyoming Stock Growers Association and Wyoming Wool Growers Association in Support of Plaintiff-Appellant and the Reversal of the Appealed Decision, filed in the Tenth Circuit in Case No. 23-8043 ("WSGA & WWGA Amicus Brief"), at pages 1-2 (Statement of Identity and Interest of Amici).
[15] "The Corner-Locked Report," *supra* note 11.
[16] *See Buford v. Houtz*, 133 U.S. 320, 322 (1890) ("The allegation is, that these lands are very valuable for pasturage and the grazing of stock and are of little or no value for any other purpose . . . .").

between private sections even if these travels took them across the surface of the private land.[17] Landowners bristled against this practice, which produced conflict and strife between ranchers and shepherds, homesteaders, and other travelers.[18] With the passage of the Taylor Grazing Act of 1934,[19] the conflict between the private landowners and ranchers or shepherds ended because with that Act livestock grazing on the "public checkerboard lands" was completely excluded unless the grazing permittee acquired a preference right to graze on those federal lands. This conflict extended to landowners engaging in a variety of practices to exert monopolistic control over neighboring public sections in the Checkerboard.[20]

k. Congress responded with legislation that forbids *both* enclosures of public land *and* other efforts to obstruct entry to public land.[21] Those Acts however did not prohibit the

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[17]*See Buford*, 133 U.S. at 326 ("We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use."); *Homer v. United States*, 185 F. 741, 747 (8th Cir. 1911) ("Purchasers of odd number sections of land from the railroad company take the same with knowledge that the United States may retain the ownership of the even numbered sections indefinitely . . . We think, that . . . an opening should be made in the general inclosure as will allow free ingress and egress to the public lands in question."); Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 666, 674–75 (2011). However, there were other court cases that determined that *Buford v. Houtz* (see fn 16 infra.) was based on the custom in Utah and other states called into question whether such grazing or crossing of private land to get to federal land was proper. *See e.g., Northern Pac. Ry. Co. v. Cunningham*, 89 F.594 (D. Wash. 1898).

[18]Candy Moulton, *Conflict on the Range*, True West (Aug. 28, 2011).

[19] Pub. L. 73-482 48 Stat. 1269, 43 U.S.C. §§ 315 *et seq*.

[20]S. Rep. No. 48-979, at 1 (1885); H.R. Exec. Doc. No. 49-166 (Feb. 15, 1887), at 2; Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 GEO. ENVTL. L. REV. 155, 181–82 (2016).

[21]Unlawful Inclosures of Public Lands Act, 43 U.S.C. §§ 1061 *et seq*.

legitimate protection of the private lands in the checkerboard. The scope, sweep, and application of that legislation—the Unlawful Inclosures Act—as well as this history, tradition, and custom has been hotly debated in recent years as the question of public access through "corner crossing" has been litigated in Wyoming courts.

l. However, at no time has Congress expressly authorized trespass across private lands or reserved a right of access across private lands to reach the federal lands even though Congress clearly reserved access in other cases.[22]

m. Still, "[i]t is at once apparent that that this checkerboard ownership pattern necessarily impedes the ability of government employees and the general public to travel to and from federal land, as frequently the only access routes travers [sic] private property."[23] The only possible route from one section of public land to another *without* intruding on private land is to cross at the section corners shared by the two sections of public land—to corner cross.

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[22] This contrast between the reservations in the checkerboard land grants versus the Stock-Raising Homestead Act must mean something. *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ...."). The absence of a specific access reservation in the "checkboard" grants in contrast to the specific access reservation in the 1916 Stock-Raising Homestead Act must be given recognition. A court cannot amend the law to fit what the court thinks Congress may have intended had Congress known what we do today. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76 (1996) (stating "Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known. If that effort is to be made, it should be made by Congress, and not by the federal courts.").

[23] *United States v. 82.46 Acres of Land, More or Less, Situated in Carbon Cnty., Wyo.*, 691 F.2d 474, 475 (10th Cir. 1982); *see also Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979) ("Because of the checkerboard configuration, it is physically impossible to enter the Seminoe Reservoir sector from this direction without some minimum physical intrusion upon private land.").

n. The question, then, is whether corner crossing is an unlawful trespass, an uncompensated taking of private land, or a lawful way of accessing public land in the Checkerboard.

B. The competing property interests — private landowners; public land users

1. Private Landowners

a. "This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned . . . ."[24]

b. Current owners of the odd-numbered sections in the Checkerboard—successors-in-fee to the railroads—have deep-seated, well-justified, and long-recognized interests in keeping uninvited and unwanted people off their property.[25]

c. Without the ability to control the flow of trespassers on their property, landowners lose something fundamental about

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[24]*Leo Sheep*, 440 U.S. at 687.

[25]"The right to exclude is 'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). "In less exuberant terms, we have stated that the right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Cedar Point*, 141 S. Ct. at 2072 (quoting *Kaiser Aetna v. United States*, 444 U. S. 164, 176, 179–80 (1979)); *see also* Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998) (calling the right to exclude the "sine qua non" of property).

property ownership, of course.[26] But, practically, these landowners also have to worry about damage to any business operations on their land, including ranching, cattle-raising, and wool-growing, among others, as well as physical damage to their property and interference with quiet enjoyment and use of their property.[27]

d. As the "corner crossing" question has been fought over in court, landowners have argued that a person commits a trespass by corner crossing because the person necessarily intrudes into some portion of airspace situated directly above the surface of the adjacent landowner's property.[28]

e. This argument is:

1. A landowner has the right to exclude people from his property.[29]

2. "Property" includes the "superadjacent [sic] airspace" above the surface of the land.[30]

3. Thus, a landowner has the right to exclude people from the suprajacent airspace above the surface of his land.[31]

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[26]*See supra* note 19.
[27]*See* WSGA & WWGA Amicus Brief at 3-6; *see also* United Property Owners of Montana's *Amicus Curiae* Brief in Support of Plaintiff-Appellant Iron Bar Holdings, LLC filed in the Tenth Circuit in Case No. 23-8043 ("UPOM Amicus Brief") at 20-24.
[28]*See, e.g.,* "Corner Trespass," United Property Owners of Montana, *available at* https://upom.org/corner-trespass-2/.
[29]*Cedar Point*, 141 S. Ct. at 2072.
[30]*United States v. Causby*, 328 U.S. 256, 265 (1946).
[31]*Id.*; *see also* Restatement (Second) of Torts § 159 (1965) (trespass may be committed "on, beneath, or above the surface of the earth").

4. Corner crossing requires, if nothing else, *some* entry into the superjacent airspace above the surface of neighboring private land.

5. Therefore, a landowner has the right to prohibit corner crossing because (1) corner crossing involves entry into suprajacent airspace above the surface of land and (2) a landowner has the right to exclude people from that suprajacent airspace. Put another way, unauthorized corner crossing—corner crossing done with the consent of the neighboring private landowner—is a trespass.

6. There is also a concern over where this trespass ends. If someone can trespass over a corner of airspace to shoot wildlife, can they take a four-wheeler across the corner to retrieve any game that was killed? If someone can trespass by putting a ladder over a corner, can they take down a fence to be able to cross the corner? Does physical crossing include flying a drone across the corner and how does a landowner protect his private property when a drone is flying across the corner? Just like Congress did not consider the unintended future consequences of failing to reserve access across the checkerboard sections because Congress believed that the Western states would be settled like the Eastern states, what are the unintended consequences of allowing trespass that, for now, only includes the airspace immediately above the private property.

f. Beyond this syllogism, landowners point to the Supreme Court's decision in *Leo Sheep*[32] to bolster their position that others should not be able to corner cross—*i.e.*, use some minimal portion of private land to access public land—with impunity.

[32]440 U.S. 668 (1979).

1. *Leo Sheep* involved a lawsuit brought by a wool growing company and a stock raising company that owned odd-numbered sections of the Checkerboard in Carbon County, Wyoming, against the United States. The companies sued the United States because the government had "cleared a dirt road extending from a local county road to the [Seminoe] [R]eservoir across both public domain lands [even-numbered sections] and fee lands of the Leo Sheep Co." and the companies argued this governmental action was contrary to the companies' fee title in the odd-numbered lands in question.[33] The United States erected this road because it had received "complaints that private owners were denying access over their lands to the reservoir area or requiring the payment of access fees."[34] After negotiations with the landowners failed, the government simply cleared the road without the consent of the landowners.

2. The federal district court granted the companies' motion for summary judgment, but that order was reversed by the Tenth Circuit on appeal because the Tenth Circuit reasoned that "when Congress granted land to the Union Pacific Railroad, it implicitly reserved an easement to pass over the odd-numbered sections in order to reach the even-numbered sections that were held by the Government."[35]

3. The Supreme Court granted certiorari because the Tenth Circuit's holding "affects property rights in 150 million acres of land in the Western United States."[36]

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[33] *Id.* at 677–78.
[34] *Id.* at 678.
[35] *Id.*
[36] *Id.*

And, it reversed the Tenth Circuit's judgment for two main reasons.

a. First, the Supreme Court held that the Tenth Circuit's recognition of an implied easement was wrong twice-over.[37]

b. While recognizing that "[w]here a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property," the Supreme Court concluded that such an "easement by necessity" would not normally include "the right to construct a road for public access to a recreational area."[38]

c. Additionally, the Court held that the United States, unlike another landowner, cannot rely on the "easement-by-necessity" doctrine. "More importantly, the easement is not actually a matter of necessity in this case because the Government has the power of eminent domain. Jurisdictions have generally seen eminent domain and easements by necessity as alternative ways to affect the same result."[39] In short, if the United States wanted to enjoy easement-like access over private land, it would have to use its power of eminent domain to take the land and then pay just compensation for the taking.

[37] *Id.* at 678–83.
[38] *Id.* at 679.
[39] *Id.* at 679–80.

d. Instead, the United States could only avail itself of some access easement if the Pacific Railroad Act of 1862—the act creating the Checkerboard—actually granted the government an easement over the odd-numbered sections.[40] Finding no such reservation of right in the act itself, the Supreme Court concluded "we are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication than the Government makes here."[41]

4. Second, the Supreme Court concluded that the Unlawful Inclosures of Public Lands Act of 1885 had no application to the legality of the government's claim.[42]

a. "The Government argues that the prohibitions of this Act should somehow be read to include the Leo Sheep Co.'s refusal to acquiesce in a public road over its property, and that such a conclusion is supported by this Court's opinion in *Camfield v. United States*, 167 U.S. 518 (1897). We find, however, that Camfield does not afford the support that the Government seeks. That case involved a fence that was constructed on odd-numbered lots so as to enclose 20,000 acres of public land, thereby appropriating it to the exclusive use of Camfield and his associates. This Court analyzed the fence from the perspective of nuisance law and

[40] *Id.* at 680–82.
[41] *Id.* at 682.
[42] *Id.* at 683 ("Nor do we find the Unlawful Inclosures of Public Lands Act of 1885 of any significance in this controversy.").

concluded that the Unlawful Inclosures Act was an appropriate exercise of the police power."[43]

b. "There is nothing, however, in the *Camfield* opinion to suggest that the Government has the authority asserted here. In fact, the Court affirmed the grantee's right to fence completely his own land."[44]

c. "In that light we cannot see how the Leo Sheep Co.'s unwillingness to entertain a public road without compensation can be a violation of that Act."[45]

d. Finally, landowners and supporting groups argue that legalizing corner crossing is bad public policy.

5. Corner crossing will lead to increased trespassing and damage to private property because of bad faith actors and because corner monuments are not always findable or traversable.[46]

6. Legalized corner crossing will place increased burdens on owners of odd-numbered sections to fence and patrol their property to keep out unwanted trespassers.[47] Increased fencing and other efforts will disrupt "previously intact wildlife corridors and habitats, leading to biodiversity loss and ecosystem degradation."[48]

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[43]*Id.* at 684–85.
[44]*Id.* at 685.
[45]*Id.*
[46]Iron Bar's Opening Brief at 54-55.
[47]*Id.* at 55.
[48]*Id.*at 57.

7. Given the popularity of hunting in the Checkerboard, the risks of errant (or intentional) gunfire will increase with more foot traffic in the area.[49]

8. Corner crossing will hurt efforts to establish public access in more appropriately situated locations for access.[50]

9. Corner crossing will not increase access to public land because landowners will fence off the private land.[51]

10. Corner crossing opens up federal property to use by the public without the government's input or planning concerning consequences or the effects of increased use.[52]

11. Corner crossing deprives landowners of any entitlement or claim to compensation for providing public access to public land.[53]

12. Uncontrolled public activity in the Checkerboard while cattle or sheep are in the vicinity "can cause great stress to livestock, resulting in decreased weight gains, poor breeding rates, and damage to both private and public land from the excessive movement of stressed livestock."[54]

13. "Interactions with the public may cause livestock to congregate on private and state lands which will cause

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[49] *Id.* at 56.
[50] UPOM Amicus Brief at 20.
[51] Iron Bar's Opening Brief at 57.
[52] UPOM Amicus Brief at 21.
[53] *Id.* at 22.
[54] WSGA & WWGA Amicus Brief at 3.

degradation of these parcels and remove the balance found in cooperative management of public and private lands."[55]

b. *Public Land Users*

1. "And if I apply that rule, is the public land encompassed within the private[ly] owned sections no longer public?"[56]

2. From the creation of the Checkerboard in 1862 to present, the even-numbered sections of land in the Checkerboard—which are publicly owned and managed by local, state, or federal governments[57]—have been held open to the public for any lawfully recognized use.[58]

3. To protect public ingress and egress to and from the even-numbered sections (public land) and to thwart private monopolization of these lands, courts have declared unlawful various efforts by private landowners to police, control, or limit public use of these public lands.[59]

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[55]*Id.* at 3-4.
[56]Hearing Transcript from Summary Judgment Hearing in *Iron Bar Holdings, LLC v. Cape et al.*, Case No. 2:22-cv-67-SWS, at 12:20-22 (May 10, 2023).
[57]*Mountain States Legal Found.*, 799 F.2d at 1424 n.1.
[58]*Buford*, 133 U.S. at 326 (holding that public lands "shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use").
[59]*See Camfield v. United States*, 167 U.S. 518, 519–20 (fencing on odd-numbered sections only encircling public land); *McKelvey v. United States*, 260 U.S. 353, 355–59 (1922) (armed militias patrolling and policing even-numbered sections); *Mackay v. Uinta Development Co.*, 219 F. 116, 119–20 (8th Cir. 1914) (trespass lawsuit); *Buford*, 133 U.S. at 321–25 (trespass lawsuit).

4. Beyond helicopter or some other mode of transportation,[60] the only way of egress and ingress to most sections of public land in the Checkerboard is at shared section corners—*i.e.*, by corner crossing.[61] If corner crossing is subject to the absolute control of adjacent private landowners, then about 4.15 million acres of public land becomes privately controlled.[62]

5. Public land users make several arguments that corner crossing is lawful or, put another way, that landowners cannot lawfully stop or control corner crossing.

6. Traversing low-level airspace is not an actionable trespass unless doing so interferes with use of the land or causes damage to the land.[63]

7. Long-standing American custom and tradition supports public access to unenclosed, unimproved public land for lawful purposes.[64] To this end, a landowner's right to exclude others from *its property* does not extend so far as to allow landowners to exclude others from

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[60]*Iron Bar*, 674 F. Supp. 3d at 1076 (referring to helicopter or "human cannon shot").
[61]Appellees'/Defendants' Answering Brief filed in the Tenth Circuit in Case No. 23-8043 (the "Hunters' Brief") at 2-3.
[62]The Corner-Locked Report, *supra* note 11.
[63]*Pueblo of Sandia ex rel. Chaves v. Smith*, 497 F.2d 1043, 1045 (10th Cir. 1974) ("But traversing the airspace above a plaintiff's land is not, of itself, a trespass. It is lawful unless done under circumstances which cause injury."); *see also Palisades Citizens Ass'n v. Civil Aeronautics Bd.*, 420 F.2d 188, 192 (D.C. Cir. 1969); *Allegheny Airlines, Inc. v. Cedarhurst*, 132 F. Supp. 871, 878–79 (E.D.N.Y. 1955), *aff'd* 238 F.2d 812 (2d Cir. 1956); *Browning v. MCI, Inc. (In re WorldCom, Inc.)*, 546 F.3d 211, 217 (2d Cir. 2008).
[64]*Buford*, 133 U.S. at 326.

neighboring public land or to achieve monopolistic control over that public land by implication.[65]

8. The Unlawful Inclosures of Public Lands Act of 1885 (the "UIA") prohibits "all 'enclosures' of public lands, by whatever means . . . ."[66] The UIA expressly outlaws any person using "force, threats, [or] intimidation" (along with fences and "any other unlawful means") to prevent or obstruct peaceful entry to public lands.[67] So, using a state-law trespass claim to achieve an *effective* enclosure of public land or in a way that completely prevents and obstructs peaceful entry to public lands violates the UIA.

9. *Mackay* illustrates this argument.

a. John Mackay sought to drive a band of sheep across Wyoming's Checkerboard to reach his winter range.[68]

b. The Uinta Development Company, a cattle ranching outfit that owned several odd-numbered

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[65]*See id.* at 332 ("Upon the whole, we see no equity in the relief sought by the appellants in this case, which undertakes to deprive the defendants of this recognized right to permit their cattle to run at large over the lands of the United States and feed upon the grasses found in them, while, under pretense of owing a small proportion of the land which is the subject of controversy, they themselves obtain the monopoly of this valuable privilege."). *See also United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1508 (10th Cir. 1988) ("All that Lawrence has lost is the right to exclude others, including wildlife, from the public domain -- a right he never had."); *Camfield*, 167 U.S. at 526 ("It seems but an ill return for the generosity of the Government in granting these roads half its lands to claim that it thereby incidentally granted them the benefit of the whole.").
[66]*Camfield*, 167 U.S. at 525. *Accord Bergen*, 848 F.2d at 1505, 1508–09.
[67]43 U.S.C. § 1063; *see also Mackay*, 219 F. at 119–20; *Bergen*, 848 F.2d at 1511 ("[I]t is not the fence itself, but its effect which constitutes the UIA violation.").
[68]*Mackay*, 219 F. at 117–18.

sections of land in the area, warned Mackay not to cross its land.[69]

c. Because no other path existed to get Mackay and his flock to their winter range, Mackay started across the Checkerboard, including the odd-numbered sections, despite the Uinta Company's warnings.[70] He was arrested in route for trespassing.[71] The Uinta Company also sued him for damages in the United States District Court for the District of Wyoming.[72]

d. At trial, Mackay argued that, if the cattle company refused to designate a reasonable path to the public domain for him and his flock, then "he was entitled to select a reasonable way."[73] The trial court rejected this argument and found that Mackay was indeed liable for trespassing on the Uinta Company's land.[74]

e. On appeal, the then-Eighth Circuit[75] reversed the trial court's legal conclusion about Mackay's "reasonable way" argument.[76]

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[69] *Id.* at 118.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] "In 1929, Congress divided the Eighth Circuit into two circuits. The Eighth Circuit retained Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Missouri, and Arkansas. The new Tenth Circuit took Wyoming, Colorado, Utah, New Mexico, Kansas, and Oklahoma. Thus, at the time of *Mackay*, Wyoming was part of the Eighth Circuit. In the years since its formation, the Tenth Circuit has issued conflicting guidance on the binding nature of prior Eighth Circuit decisions." *Iron Bar*, 674 F. Supp. 3d at 1073.
[76] *Mackay*, 219 F. at 118–20.

f. Surveying *Buford*, *Camfield*, the UIA, and cases applying them, the Eighth Circuit concluded that the UIA "has been construed to prohibit every method that works a practical denial of access to and passage over the public lands" and so, in the Checkerboard, a landowner cannot use *either* fences *or* "warnings and actions in trespass" to obstruct access to public lands and "secure for itself that value, which includes as an element the exclusive use of the public lands[.]"[77]

g. Thus, the Eighth Circuit held that Mackay was "entitled to a reasonable way of passage over the unenclosed tract of land without being guilty of trespass."[78]

10. In the most recent high-profile lawsuit weighing private property rights against public access to public land in the Checkerboard, the United States District Court for the District of Wyoming followed *Mackay* to conclude that "where a person corner crosses on foot within the checkerboard from public land to public land without touching the surface of private land and without damaging private property, there is no liability for trespass."[79] That decision is being reviewed on appeal by the Tenth Circuit, which held oral arguments in the case on May 14, 2024, in Denver, Colorado.

[77] *Id.* at 119–20.
[78] *Id.* at 120.
[79] *Iron Bar*, 674 F. Supp. 3d at 1077.

II. Access of Wyoming streams across private property for fishing/boating/recreation

A. Wyoming

Just as corner crossing across private lands is an issue, so is whether a recreationist or angler can take a boat down a waterway on private property. Most western state Constitutions state that water is held in trust for the citizens of the state[80] but generally at statehood the banks and bed of a stream were granted to the property owners under most homestead acts (There is some variation because there were dozens of homestead acts). So, if under the Wyoming constitution, the state holds the water in trust for the citizens and that water is declared to be the property of the state,[81] but the landowner owns the stream bed and banks, the question is whether a fisherman or boater just use the state's water for fishing or boating while crossing over the private property of the landowner.

1. Navigability and use of streams for boating by the public is a state law issue. In Wyoming, the issue was decided in *Day v. Armstrong.*[82]

a. Navigable water – defined by the original Rivers and Harbor Act of 1882.[83] The Act said that while the states own or manage most of the water in the state, the federal government has control over navigable water and the federal government owns the riverbed of navigable waters which are waters that pass between states used to transport commerce.

b. Wyoming, in fact, has few legally defined navigable waters under the Rivers and Harbors Act. Wyoming is the headwaters of 4 major river basins, based on how the continental divide runs. They are Missouri-Mississippi, Green-Colorado, Snake-Columbia, and Great Salt Lake. The few "navigable waters" Wyoming includes the Snake River from

[80] *See e.g.,* Wyo. Const. Art. 1 § 31.
[81] *See e.g.,* Wyo. Const. Art. 8 § 1.
[82] *Day. v. Armstrong*, 362 P.2d 137 (Wyo. 1961).
[83] Act of March 3, 1899, ch. 425, § 10, 30 Stat. 1151.

Jackson Lake to the Utah border and Flaming Gorge near Green River to the Colorado line.

c. *Day v. Armstrong* held that boaters could float down both navigable and "non-navigable waters" so long as such water is actually usable by a small craft.[84] Being "actually usable" does not mean that if there is one rapid or obstruction, the stream cannot be used for boating, but generally the recreationist cannot touch the sides or bottom of the stream as that is private property.[85] The landowner also owns all islands in the stream so resting on an island is a trespass in Wyoming.

2. Once the Clean Water Act of 1972 was passed as an amendment to the Rivers and Harbor Act, Congress and the courts expanded the definition of a navigable water, but the Wyoming access case was decided before the Clean Water Act amendments and there has not been another challenge in Wyoming.

B. Montana

1. In 1984, the Montana Supreme Court held that the streambed of any river or stream that has the capability to be used for recreation can be accessed by the public regardless of whether the river is navigable or who owns the streambed property.[86]

2. On January 16, 2014, the Montana Supreme Court, in a lawsuit filed by the Public Land/Water Access Association over access via county bridges on the Ruby River in Madison County, Montana expanded this right, reaffirmed the Montana Stream Access Law and the a right to access rivers in Montana from public easements.[87] Thus, while the landowner may put up fences to stop livestock from accessing the area between a roadway or bridge to the

[84] *Day*, 362 P.2d at 147.
[85] *Day*, 362 P.2d at 147.
[86] *Montana Coalition for Stream Access, Inc. v. Curran,* 210 Mont. 38, 53, 682 P.2d 163, 171 (1984).
[87] Bitterroot Protective Ass'n v. Bitterroot Conservation Dist. (BRPA II), 198 P.3d 219 (Mont. 2008).

water, the landowner has to also erect styles or put up gates to allow public access to the stream or river.[88]

C. Colorado

1. Stream access in Colorado followed Wyoming's rules until a 2023 decision brought some aspects into question. In 1979, the Colorado Supreme Court held that the public had a right to traverse on "navigable waters" in Colorado for boating and fishing.[89] However, in 2023, an angler named Roger Hill sued a landowner named Mark Warsewa and Linda Joseph for blocking his access to the navigable stream bed. Hill sought to quiet title against the landowners by arguing that since the Arkansas River was navigable at statehood, the stream bed was public land held by the state therefore he could walk up and down the River to fish. The State of Colorado joined the suit (since Hill argued that the streambed was public land). After years of procedural arguments and bouncing around between the state and federal court, the case ended at the Colorado Supreme Court which held that Hill did not have standing to sue to argue that the streambed was public land.[90]

2. Based on this ruling, recreationists and anglers have claimed that access to waterways is now in question based on the need to be able to pull boats across rapids or rocks or portage around barriers.[91]

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[88] *Lane, Robert N. (2015). "The Remarkable Odyssey of Stream Access in Montana". Public Land and Resources Law Review Vol. 36, Article 5. Retrieved 2018-04-10.*

[89] *People v. Emmert,* 198 Colo. 137 (Colo. 1979).

[90] State of Colorado v. Hill, 530 P.3d 623 (Colo. 2023).

[91] "The problem, of course, with this transfer of title to the bed is that there's no paper to sort of designate which streams are navigable or not navigable," said Mark Squillace, Hill's lawyer and a professor of natural resources law at the University of Colorado Law School. "It requires this type of litigation to make the determination that a particular stream or stream segment is in fact navigable for title. And so that's what we sought to do in this case." Emma VandenEinde, *Colorado Supreme Court upholds a narrow stream access laws – "a total outlier" in the Mountain West,* Wyoming Public Media, June 12, 2023.