



By John W. Amberg and Jon L. Rewinski



# 2001 ETHICS ROUNDUP

Old issues and new forms of practice defined developments in legal ethics in 2001

**L**ast year, legal ethics in California involved renewed self-examination by the legal profession as well as new challenges to practitioners. During 2001, the State Bar reactivated the Commission for the Revision of the Rules of Professional Conduct for the purpose of conducting the first comprehensive review and revision of the Rules of Professional Conduct since 1992. This process is expected to take several years. Meanwhile, separate advisory task forces appointed by the California Supreme Court and State Bar recommended the first tentative steps towards easing restrictions on multijurisdictional and multidisciplinary practices. (See "New Forms of Practicing Law," page 32.)

Nationally, representatives of the Los Angeles County Bar Association were key participants in the debate over recommendations by the American Bar Association's Ethics 2000 Commission to amend the ABA Model Rules of Professional Conduct. And in the aftermath of the September 11 terrorist attacks, lawyers throughout the country, including members of LACBA's Professional Responsibility and Ethics Committee, publicly registered their opposition to rules issued by Attorney General John Ashcroft that would permit the government

to eavesdrop on interviews between lawyers and their clients in derogation of the confidentiality in the lawyer-client relationship.

## The Duty of Confidentiality

In California, the duty to maintain client confidence and secrets is of paramount importance. Business and Professions Code Section 6068(e) provides, "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." Last year, in *Adams v. Aerojet-General Corporation*,<sup>1</sup> the Third District Court of Appeal considered this duty in the context of a lawyer's move from one law firm to another. The lawyer was previously a principal of a law firm that provided legal advice to Aerojet-General Corporation on its disposal and treat-

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ment of hazardous wastes. The lawyer had not billed any of his time to Aerojet-General and stated in his declaration that he possessed no client secrets. The lawyer resigned from his law firm and became a principal of a new firm, which represented plaintiffs suing Aerojet-General over alleged groundwater contamination.

Aerojet-General moved to disqualify the lawyer and his new firm. The trial court granted the motion, but the court of appeal reversed. In so doing, the court of appeal rejected Aerojet-General's contention that there should be a nonrebuttable presumption of imputed knowledge from the lawyer's previous law firm to the lawyer. Rather, the court of appeal held that if the lawyer did not personally represent the former client who seeks to remove the lawyer from the case, the trial court must determine whether confidential information material to the current representation would normally have been imparted to the lawyer during his tenure at the old firm.<sup>2</sup> To hold otherwise, the appellate court reasoned, would unfairly restrict lawyer mobility and was unrealistic in view of the growth of large law firms in recent years.

The court of appeal did not reject the notion that confidential information possessed by a lawyer can be imputed to the law firm. Instead, the court addressed, and rejected, the reverse—the presumption that the knowledge of a law firm should be imputed to an individual lawyer. Under the facts of the case, the court concluded that the paramount duty to maintain client confidence and secrets did not warrant denying plaintiffs their choice of counsel.

The duty to maintain client secrets may commence upon the initial consultation with a potential client, even before the attorney-client relationship is formalized. This situation is illustrated by an opinion issued on January 2, 2001, by LACBA's Professional Responsibility and Ethics Committee. According to the facts in Ethics Opinion No. 506,<sup>3</sup> the lawyer learned in an initial consultation with a potential client that the potential client was contemplating filing a bankruptcy petition. While performing a conflicts check, the lawyer learned that his law firm was representing an existing client in unrelated litigation against the potential client. The fact that the potential client was contemplating bankruptcy was presumed to be important to the existing client.

The committee concluded that neither the lawyer nor the law firm could tell the existing client that the potential client was contemplating bankruptcy. This conclusion rested, in part, on the determination that the confidential information was not related to the law firm's current representation of the existing

client within the meaning of Rule 3-500 of the Rules of Professional Conduct, which requires a lawyer to keep a client reasonably informed about "significant developments relating to the employment or representation."

### Secrets of Third Parties

Does an attorney also have an obligation to preserve the confidentiality of information that originates with someone other than the client? California courts addressed this question in a trio of cases in 2001. In *Packard Bell NEC, Inc. v. Aztech Systems, Inc.*,<sup>4</sup> a U.S. district court disqualified the defendant's lawyers under Rule 3-310 of the Rules of Professional Conduct in order to prevent them from using the plaintiff's privileged information. Rule 3-310 prohibits lawyers from representing actual or potentially adverse interests without written disclosure and, in many cases, a client's written consent. The court did this even though both parties agreed that Rule 3-310 did not apply, and the court acknowledged the case was a "square peg which does not fit into the round holes of the rules."<sup>5</sup>

Packard Bell sued the defendant, Aztech Systems, for breach of warranty and fraud, alleging that Aztech had misrepresented that its printed circuit boards qualified for duty-free importation. Aztech's defense was that Packard Bell knew the boards did not qualify for duty-free importation, and Aztech supported this contention with the testimony of Metzler, a former Packard Bell officer. Metzler was represented during his deposition by the Levy law firm. Aztech subsequently retained the Levy firm as counsel.

Packard Bell moved to disqualify the Levy firm on the grounds that its representation of Aztech violated the portion of Rule 3-310 that provides that a lawyer shall not, without the informed written consent of each client, accept representation of more than one client in a matter in which the interests potentially conflict. Packard Bell acknowledged that Rule 3-310 did not literally apply because the Levy firm never represented Packard Bell. Nevertheless, it argued that since Metzler, as a former Packard Bell officer, owed a continuing fiduciary duty not to disclose privileged communications between Packard Bell and its lawyers, the Levy firm, as Metzler's agent, owed a similar duty to Packard Bell and could not disclose or use this confidential information to help Aztech.

Aztech observed that this argument could prevent a terminated officer from ever finding counsel to sue his or her former employer. Nevertheless, the district court held that the Levy firm's representation of Aztech, following its representation of Metzler, "undermined the judicial process and will effect

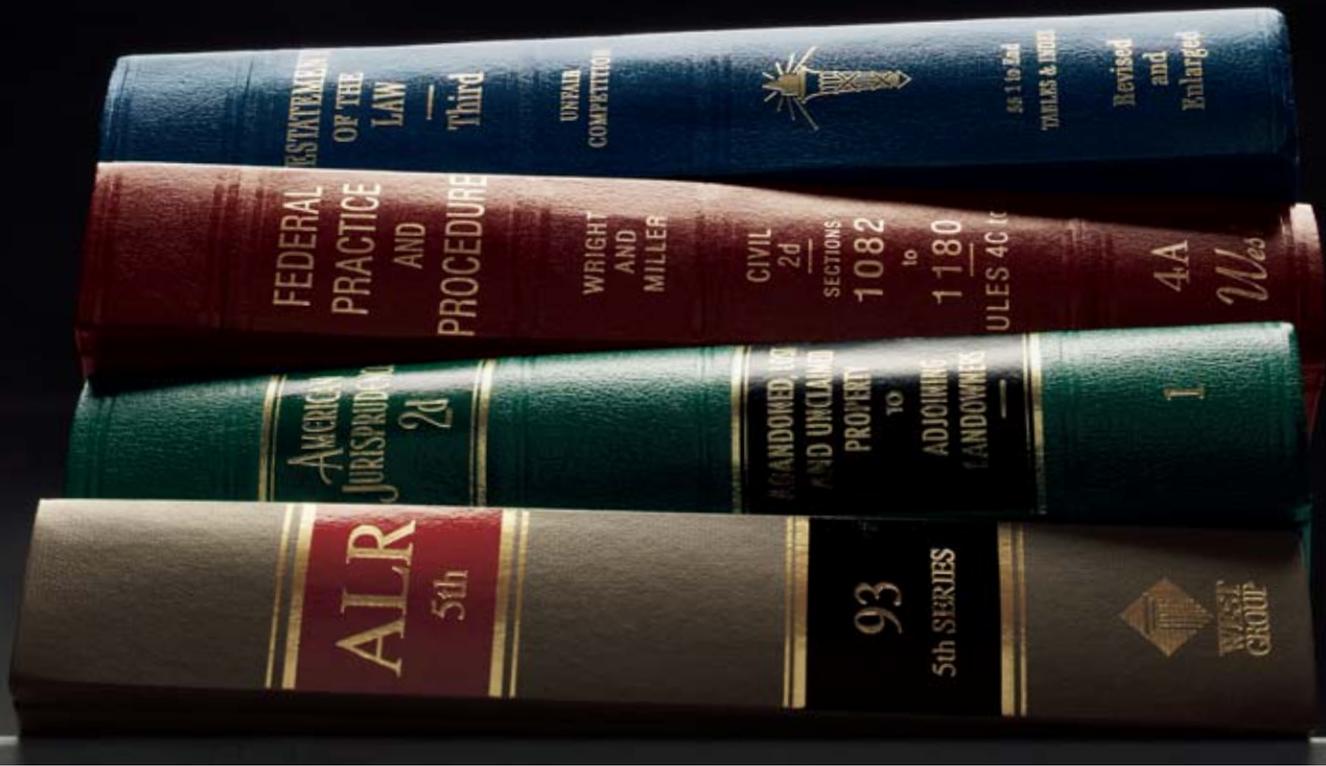
[sic] the proceedings before this Court."<sup>6</sup> The court concluded the lawyers had obtained an "unfair advantage" over Packard Bell. It reached this conclusion with difficulty, citing *Gregori v. Bank of America*,<sup>7</sup> a case that denied disqualification, and the prescription of the ABA Model Code of Professional Responsibility that a lawyer "should avoid even the appearance of professional impropriety," which has never been adopted in California.

The confidential information that the Levy firm was presumed to possess consisted of communications between the opposing party, Packard Bell, and Packard Bell's lawyers. The Levy firm never represented Packard Bell, and as counsel to Aztech, the lawyers arguably had a duty to exploit the information for the benefit of their client. The court acknowledged this clash of principles and disqualified the Levy law firm: "Though such information cannot be unlearned, and the lawyer who obtained it cannot be prevented from giving it to others, disqualification still serves the useful purpose of eliminating from the case the attorney who could most effectively exploit the unfair advantage."<sup>8</sup>

On the other hand, both the trial court and the appellate court in *Fox Searchlight Pictures, Inc. v. Paladino* refused to disqualify lawyers with knowledge of the opposing party's confidential information and secrets.<sup>9</sup> Fox Searchlight sued its former in-house counsel, Paladino, for disclosing privileged communications in the course of preparing her wrongful termination lawsuit against the company. The plaintiff moved to disqualify the defendant's attorneys because they possessed confidential and privileged information. The superior court denied the motion to disqualify, and the Second District Court of Appeal affirmed.

According to the court of appeal, disqualification was not warranted because the defendant's attorneys did not learn the confidential information while representing Fox Searchlight. The court noted that California courts had never disqualified attorneys merely because, absent a professional relationship, they were exposed to an opposing party's confidential information. Furthermore, the court found an implied exception to Business and Professions Code Section 6068(e).

In *General Dynamics v. Superior Court*,<sup>10</sup> an earlier case, the California Supreme Court had held that an in-house attorney, in the same manner as a nonattorney employee, was permitted to pursue a wrongful termination claim against his former employer. A former in-house counsel may sue his or her employer for wrongful termination "provided it can be established without breaching the



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attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship.<sup>11</sup> Privileged information may be protected from unwarranted disclosure through State Bar discipline, judicial management, and dismissal if the plaintiff's case could not be fully established without breaching the attorney-client privilege.<sup>12</sup>

The *Fox Searchlight* court weighed the lawyer's duty of confidentiality under Section 6068(e) against the right of an in-house attorney not to be discriminated against in his or her employment. It concluded that Paladino, the former in-house counsel, may disclose confidences to her lawyers "to the extent they may be relevant to the preparation and prosecution of her wrongful termination claim against her former client-employer."<sup>13</sup> The *Fox Searchlight* court found that this limited disclosure was contemplated by the supreme court in *General Dynamics*.<sup>14</sup> The attorneys for the former employee are bound by the rules of confidentiality and attorney-client privilege and, therefore, disclosure to them does not constitute a public disclosure.<sup>15</sup>

Although Section 6068(e) on its face "brooks no exceptions," the court of appeal in *Fox Searchlight* found the section was impliedly qualified by other statutes and ethical rules that permit a lawyer to breach client confidentiality.<sup>16</sup> As an example, the court cited Evidence Code Section 958, which states the attorney-client privilege does not apply "to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." If the Evidence Code permits the lawyer to use otherwise privileged communications during trial, the court said, Paladino must be entitled to disclose them before trial to her attorneys. The problem with this argument is that Section 6068(e) requires a lawyer to protect the client's secrets, which are generally understood to be much broader than privileged communications, and a limited exception to the Evidence Code privilege would not establish a broad exception to lawyers' statutory duty of confidentiality.

The court of appeal, as additional support for its ruling, asserted the State Bar Court had held that the duty of confidentiality in Section 6068(e) is modified by the exceptions to the attorney-client privilege in the Evidence Code. However, the State Bar Court decision cited for this proposition, *In the Matter of Lilly*,<sup>17</sup> states nothing of the kind. Except for the court's ipse dixit, there is no support in the case for the proposition that Section 6068(e) is modified by the Evidence Code.

Unfortunately, the same unsubstantiated assertion from *Fox Searchlight* was repeated in *People v. Dang*.<sup>18</sup> In *Dang*, the Second District Court of Appeal held it was not im-

proper for an attorney to testify about confidential communications in which his client made physical threats against witnesses. The court held that Evidence Code Section 956.5 exempts disclosures that would prevent a client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm. The court of appeal noted the conflict between Section 956.5 and Section 6068(e) but concluded: "Since our issue is limited to the admissibility of the testimony by [the lawyer], we need not resolve the conflict." The court continued, "We note that the State Bar Court has held the duty of confidentiality under Business and Professions Code Section 6068(e) is modified by the exceptions to the attorney client privilege codified in the Evidence Code." This is incorrect. The State Bar Court has not held that the duty under Section 6068(e) is modified by the Evidence Code.

In *Solin v. O'Melveny & Myers, LLP*,<sup>19</sup> a different panel of the Second District Court of Appeal permitted a legal malpractice case to be dismissed rather than risk disclosure of confidential information. Published just two days after *Fox Searchlight*, the *Solin* opinion derived a different lesson from *General Dynamics*: "[A]s *General Dynamics Corp. v. Superior Court* teaches, unless a statutory provision removes the protection afforded by the attorney-client privilege to confidential communications between attorney and client, an attorney plaintiff may not prosecute a lawsuit if in doing so client confidences would be disclosed."<sup>20</sup>

Plaintiff Solin, a lawyer, retained defendant O'Melveny & Myers to advise him concerning his representation of two clients. Solin disclosed privileged and confidential information from his clients, implicating them in criminal activities, to the O'Melveny firm. Subsequently, Solin sued O'Melveny for malpractice, and his clients intervened to prevent the disclosure of the incriminating secrets. The superior court determined that the O'Melveny firm could not defend the action without disclosing the third parties' secrets, and dismissed Solin's suit. The court of appeal affirmed.

There was no attorney-client relationship between O'Melveny and the intervenors. Nevertheless, the court recognized that Solin, as their attorney, had a duty under Evidence Code Section 955 to claim the privilege on their behalf, which the trial court would sustain. Thus, the plaintiff would gain an unfair advantage: "Solin would be permitted to sue his lawyers for malpractice, yet gag O'Melveny in defending the charge by preventing full disclosure of all matters counseled upon."<sup>21</sup> The court was unwilling to second-guess O'Melveny's assertion that this

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# MCLE Test No. 106

**The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education legal ethics credit by the State Bar of California in the amount of 1 hour.**

1. The California Rules of Professional Conduct last underwent a thorough revision in:  
A. 1975.  
B. 1989.  
C. 1992.  
D. 2001.
2. California lawyers receive guidance on ethics questions in published opinions from:  
A. The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association.  
B. The Committee on Professional Responsibility and Conduct (COPRAC) of the State Bar of California.  
C. Both A and B.
3. Under California law, it is the duty of an attorney to preserve the secrets of a client at every peril to himself or herself.  
True.  
False.
4. When a lawyer moves from one firm to another, there is a nonrebuttable presumption of imputed knowledge from the lawyer's previous law firm to the lawyer. Thus the lawyer is disqualified from taking a position adverse to a client of the former firm.  
True.  
False.
5. In considering whether to disqualify a lawyer who moved to another firm and took a position adverse to a client of his or her former firm, a court must consider:



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2.  A  B  C
3.  True  False
4.  True  False
5.  A  B  C  D
6.  True  False
7.  True  False
8.  True  False
9.  True  False
10.  True  False
11.  A  B  C  D
12.  True  False
13.  A  B  C  D
14.  A  B  C  D
15.  A  B  C  D
16.  True  False
17.  True  False
18.  A  B  C  D
19.  True  False
20.  A  B  C

- A. Whether the lawyer personally represented the client.
- B. Whether confidential information normally would have been imparted to the lawyer.
- C. Whether the confidential information is material to the current representation.
- D. All of the above.

**6.** An attorney's duty to maintain client secrets does not arise until the attorney-client relationship is formalized.

- True.
- False.

**7.** A lawyer has a duty to inform his or her client about significant developments relating to the employment or representation.

- True.
- False.

**8.** A lawyer in California must avoid even the appearance of professional impropriety, consistent with the ABA Model Code of Professional Responsibility.

- True.
- False.

**9.** In-house lawyer X may not sue X's former employer if it means that X would have to disclose the confidences of X's former employer to X's lawyers.

- True.
- False.

**10.** Lawyer Y may not sue Y's lawyers for malpractice if their defense would require the disclosure of the privileged information of Y's clients.

- True.
- False.

**11.** Under Evidence Code Section 958, in the event of a breach of a duty by a lawyer or client arising out of the attorney-client relationship:

- A. There is no attorney-client privilege regarding the breach.
- B. There is no attorney-client privilege.
- C. There is no duty of confidentiality for client secrets.
- D. All of the above.

**12.** Under Evidence Code Section 956.5, a lawyer can testify about confidential communications in which a client made physical threats against witnesses without breaching the attorney-client privilege.

- True.
- False.

**13.** A lawyer employed by the state of California believes an agent of her department is violating the law. In accordance with her duty to her client, which action can she currently not take?

- A. Urge the agent to reconsider the action by explaining the likely consequences.
- B. Refer the matter to higher authority within the organization.
- C. Resign.

D. Disclose the lawbreaking to the state legislature.

**14.** An attorney is employed by a city. He was appointed by the mayor and confirmed by the city council, which is the municipal corporation's governing body. Who is the attorney's client?

- A. The mayor.
- B. The city council.
- C. The city.
- D. All of the above.

**15.** A lawyer may divide a fee for legal services with another lawyer who is not a partner, associate, or shareholder, if:

- A. The total fee is not increased by the division of fees and is not unconscionable.
- B. The lawyer discloses to the client in writing that a division of fees will be made and the terms of the division.
- C. The client consents in writing.
- D. All of the above.

**16.** A lawyer has a First Amendment right to tell a jury during closing argument, without fear of sanction, that his or her client has not received a fair trial.

- True.
- False.

**17.** When a lawyer accepts a private reproof under the State Bar's attorney disciplinary process, the State Bar cannot publicize the lawyer's discipline on its Web site.

- True.
- False.

**18.** Under Rule 1-400(F) of the Rules of Professional Conduct, a lawyer who maintains a Web site must keep all the pages of every version of his or her Web site and make them available to the State Bar, if requested, for:

- A. One year plus one day.
- B. Two years.
- C. 10 years.
- D. The life of the lawyer's laptop.

**19.** A task force on multijurisdictional practice recommended to the California Supreme Court that California adopt full reciprocity with other states regarding the admission of lawyers.

- True.
- False.

**20.** Multidisciplinary practice would require modification of the Rules of Professional Conduct because the rules currently prohibit a lawyer from:

- A. Forming a partnership with a nonlawyer if the activity of the partnership includes the practice of law.
- B. Sharing legal fees with a nonlawyer.
- C. Both A and B.

evidence was necessary to its defense. Citing *General Dynamics*, the *Solin* court concluded that since the lawsuit was incapable of complete resolution without breaching the attorney-client privilege, the suit against O'Melveny must be dismissed.<sup>22</sup>

### Loyalty and Whistle-Blowing

Rule 3-310 of the Rules of Professional Conduct makes it clear that a lawyer owes his or her client a duty of undivided loyalty. What happens, though, when a lawyer for an organization believes the organization is embarking on an unlawful course of action that will harm the public? Rule 3-600 in its current form provides that when a lawyer represents an organization, the lawyer owes duties of confidentiality and loyalty to the organization, and not to individual representatives of the organization with whom the lawyer routinely communicates and receives instructions or to the organization's constituents. If the lawyer has reason to believe that the organization may be about to violate the law and an individual representative refuses to act, Rule 3-600 permits

the lawyer to urge reconsideration of the decision and/or refer the issue to the next highest authority within the organization. If the organization does not change its course, the lawyer may need to withdraw from the representation pursuant to Rule 3-700. In accordance with Section 6068(e), the lawyer is bound to maintain the client's confidence and secrets.

The recent Department of Insurance scandal involving former Insurance Commissioner Chuck Quackenbush has caused some to reassess this approach. The scandal began brewing in 2000 when, in confidential reports, the Department of Insurance concluded that the practices of several insurance companies handling claims from the 1994 Northridge earthquake violated insurance regulations.<sup>23</sup> Nevertheless, the Department of Insurance decided not to impose fines or finalize the reports. Subsequently, the insurance companies allegedly contributed several million dollars to foundations that then-Insurance Commissioner Chuck Quackenbush had created, and the funds were purportedly used in part to pay for television commercials fea-

ting Quackenbush.<sup>24</sup> An Insurance Department lawyer, Cindy Alayne Ossias, was outraged that no fines were levied in view of the internal reports' conclusions. She provided copies of the internal reports to the Assembly Insurance Committee,<sup>25</sup> which triggered an investigation, public outrage, and the eventual resignation of Quackenbush.<sup>26</sup>

Thereafter, the State Bar opened an investigation of Ossias's conduct. Ultimately, the State Bar terminated its investigation without taking any action. Nevertheless, the tension between a government lawyer's "duty" to the public and duty to protect confidential information, as illustrated by the Insurance Department scandal, prompted reassessment of Rule 3-600 of the Rules of Professional Conduct. In February 2001, Assemblyman Darrell Steinberg and several coauthors introduced AB 363, which proposed that on or before January 31, 2002, the Rules of Professional Conduct be amended to give guidance to public agency lawyers to disclose privileged communications when necessary to protect the interests of the public.

In response, the State Bar's Committee on

## New Forms of Practicing Law

Last year, California, through two separate task forces, for the first time suggested approaches for permitting multijurisdictional practice (MJP)—legal practice across state lines—and multidisciplinary practice (MDP)—the practice of law in conjunction with other disciplines, such as accounting. The early results satisfied no one, but the process of study and reform is likely to continue.

Many lawyers would no doubt be surprised to learn that they or their colleagues may be engaged in the unauthorized practice of law. Rule 6125 of the California Rules of Court states: "No person shall practice law in California unless the person is an active member of the State Bar." Yet it is common for lawyers admitted in other jurisdictions to perform legal services in California. For example, in-house counsel give legal advice, assist in transactions, or interview witnesses in California, even though they are not admitted to practice in the state. Out-of-state attorneys come to California to take depositions or to conduct investigations. Still other out-of-state attorneys in law firms with offices in multiple states work together, short of making appearances, on lawsuits pending in California courts or on transactions occurring in the state. As the California Supreme Court Advisory Task Force on Multijurisdictional Practice noted, "Today's reality is that the needs of many clients do not

stop at state borders, and neither does the legal practice of the attorneys who represent them."

The MJP task force issued a preliminary report last year that recommended very modest changes in California law. It did not advocate reciprocity with other states but did recommend allowing out-of-state lawyers to practice in California for limited periods of time and for limited purposes in return for registration. The task force recommended that in-house counsel not admitted to practice in California be permitted to represent their employers in California without taking the bar exam in return for State Bar registration and compliance with various regulations. It recommended that litigators be allowed to work on a lawsuit until it is filed in California and they could apply for admission pro hac vice. The task force also recommended that litigators be permitted to perform tasks in California for suits filed elsewhere. It recommended that transactional lawyers be allowed to apply for temporary admission, similar to pro hac vice admission for litigators, for the purpose of performing limited tasks. These recommendations were the subject of public comment and further study, and on January 7, 2002, the task force issued a Final Report and Recommendations that was consistent with the preliminary report.<sup>1</sup>

The State Bar of California Task Force on Multidisciplinary Practice also reported its rec-

ommendations last year.<sup>2</sup> Proponents of MDP envision a profession in which lawyers deliver legal services in combination with accountants, physicians, scientists, and other specialists, similar to the way the major accounting firms have attempted to operate in recent years. MDP also is common in Europe. Currently, Rule 1-310 of the Rules of Professional Conduct prohibits a lawyer from forming a partnership with a non-lawyer if the activity of the partnership includes the practice of law, and Rule 1-320 prohibits sharing legal fees with a nonlawyer.

The MDP task force was charged with studying whether there were viable models for California. It concluded that MDP would require modification of the Rules of Professional Conduct, but that MDP could be implemented without compromising the legal profession's "core values" by continued individual accountability of lawyers and through a certification process for MDP entities. The report recognized five models:

- 1) A cooperative model, in which lawyers employ nonlawyer professionals who are under the lawyers' control.
- 2) An ancillary business model, in which a law firm owns a separate, nonintegrated business that provides nonlegal services.
- 3) A strategic alliance model, in which there is an agreement between a law firm and a professional service firm to purchase goods and

Professional Responsibility and Conduct (COPRAC) issued a report in August 2001<sup>27</sup> recommending clarification of Rule 3-600, which is titled "Organization as Client." COPRAC suggested adding a new section to address the special issues regarding government lawyers without weakening the need to maintain the client's (i.e., the public agency's) confidence and secrets. The committee in effect urged a government lawyer who believes a public agency is considering unlawful conduct to follow a procedure comparable to the one set forth in existing Rule 3-600 for lawyers serving corporate clients.

Thus, according to Rule 3-600(B), the lawyer may not violate his or her duties under Business and Professions Code Section 6068(e) but "may take such actions as appear to the [lawyer] to be in the best lawful interest of the organization. Such actions may include among others: (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter,

referral to the highest internal authority that can act on behalf of the organization." To date, there has been no decision on the form of the appropriate amendment to the rules, but it seems likely that an amendment to Rule 3-600 will emerge.

COPRAC also addressed ethics issues relating to public agency lawyers in its Formal Opinion No. 2001-156 on a matter involving the city of Paradise. The Paradise city charter established the city council as the municipal corporation's governing body. The city also employed a full-time city attorney, who was appointed by the mayor and confirmed by the city council. When the city faced a fiscal crisis, a member of the city council introduced a motion to borrow \$100 million in earmarked funds. The city attorney advised both the mayor and the city council that the borrowing would be lawful. The mayor disagreed with the advice and accused the city attorney of representing two different and adverse clients (the city council and the mayor) without written consent pursuant to Rule 3-310(C) of the Rules of Professional Conduct.

In Formal Opinion No. 2001-156, COPRAC

concluded that the city attorney's client was the city, not the mayor, and therefore the city attorney did not represent two clients with a conflict of interest. Thus, the city attorney was not required to obtain written consent pursuant to Rule 3-310(C).

## Equitable Indemnity between Lawyers

How powerful is the duty of undivided loyalty owed to a client? Is such a duty so important that cocounsel should be precluded from asserting claims against each other? During a two-week period in 2001, the First District Court of Appeal considered this issue twice, with seemingly contradictory conclusions. The California Supreme Court has granted review in both cases.

In the first case, *American Equity Insurance Company v. Beck*,<sup>28</sup> family members retained lawyer Beck to represent them in a lawsuit against an automobile manufacturer as a result of serious injuries the clients sustained when their pickup truck rolled over and burst into flames. With the clients' permission, lawyer Beck associated a Texas lawyer experienced in prosecuting "side-saddle" gas tank cases and a law firm as local trial counsel. The three sets of attorneys agreed to split the contingent fee. During trial, the defendant offered to settle for \$6 million. The clients wanted to accept and instructed the Texas lawyer to contact the defendant to discuss settlement. The Texas lawyer failed to do so. The jury returned a defense verdict.

The clients sued the Texas lawyer and the trial counsel for malpractice. Both the Texas lawyer and the trial counsel settled. Lawyer Beck claimed that he too suffered a loss (his portion of a contingency fee based on a \$6 million settlement) as a result of the other lawyers' malpractice. The Texas lawyer settled his claims with lawyer Beck. The trial counsel, however, refused. Thereafter, lawyer Beck sued the trial counsel for breach of fiduciary duty. The trial counsel's insurance carrier responded by asserting a cross-claim against lawyer Beck for indemnity under the theory that the lawyers' joint representation of the clients constituted a joint venture. Through summary judgment, the trial court concluded that cocounsel do not owe a fiduciary duty to each other and therefore denied lawyer Beck's claim. The court also found that the arrangement between cocounsel does not constitute a joint venture and therefore denied the cross-claim by the trial counsel's insurance carrier.

The First District Court of Appeal affirmed. It concluded that cocounsel jointly representing a client do not owe a fiduciary duty to each other and that the relationship

services, or to refer business.

4) A command and control model, in which lawyers share legal fees and equity interests with nonlawyers, the nonlawyers agree to comply with the lawyers' rules of professional conduct, and the lawyers take responsibility for the acts of the nonlawyers.

5) A fully integrated model, or "pure form" MDP, which is currently prohibited in California.

As with MJP, the MDP recommendations received public comment and are currently undergoing further review.

It is unclear how strong the interest in MDP remains. An American Bar Association committee met fierce opposition last year when it recommended expanding opportunities for MDP. Also, the apparent failure of major accounting firms to provide independent advice and oversight to Enron and Global Crossing before their ignominious collapses should dampen enthusiasm for emulating the accounting profession and provide fresh reasons for lawyers to appreciate the ethical standards of their profession.—**J.W.A. & J.L.R.**

<sup>1</sup> See California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002), available at <http://www.calbar.org/ebriefs/02/010902.htm>.

<sup>2</sup> See Report and Findings of the State Bar of California Task Force on Multidisciplinary Practice, available at <http://www.calbar.org/2bar/3com/3cp0106.htm>.



between cocounsel is not a joint venture permitting one cocounsel to seek indemnity from the other. The court noted that “[t]o avoid any detriment to the jointly represented client, it is imperative that no collateral duties arise to interfere with the duty of ‘undivided loyalty and total devotion’ owed to the client.”<sup>29</sup>

In the second case, *Musser v. Provencher*,<sup>30</sup> a different division of the First District Court of Appeal concluded that the duties owed to a client do not, as a matter of law, prohibit cocounsel from asserting claims for indemnity against each other. The client was a wife seeking a dissolution of marriage. Lawyer Musser filed a petition on the client’s behalf for child and spousal support. The husband filed for bankruptcy. Lawyer Musser arranged for a bankruptcy specialist, lawyer Provencher, to obtain relief from the automatic stay. Lawyer Provencher advised lawyer Musser and the client to go forward with the petition for child support in spite of the stay. This advice was wrong. The award for spousal and child support was set aside on appeal for violation of the automatic stay.

Faced with a claim for punitive damages for violation of the automatic stay, the client settled with her former husband for less than the original support order. She then sued lawyer Musser for malpractice. The former husband also sued lawyer Musser for violating the automatic stay. Lawyer Musser cross-claimed against lawyer Provencher for indemnity. The trial court dismissed the cross-claim, but the court of appeal reversed, noting that “it would be extremely unjust to bar Musser from seeking indemnity or contribution from Provencher when Musser was sued by [the client] for damages allegedly attributable to Provencher’s tortious conduct, absent a real potential for conflict between Provencher’s duty to [the client] and his duty to Musser during the course of their joint representation or of a real impact upon attorney-client confidentiality presented by Musser’s indemnity action.”<sup>31</sup>

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## Fee Splitting

The relationship between cocounsel may be regulated by the Rules of Professional Conduct even when there is no demonstrable harm to the clients. For example, fee splitting is generally prohibited unless, according to Rule 2-200 of the Rules of Professional Conduct, the client has given written consent after full written disclosure of the terms of the division. But when is an agreement to divide fees subject to the rule? Two cases answered that question in diametrically opposite ways in 2001.<sup>32</sup> The supreme court has accepted one case for review.

In *Sims v. Charness*,<sup>33</sup> both parties were lawyers. Charness was engaged to prosecute

his clients’ claims against a motel, and he retained Sims to try the case in return for 60 percent of the attorney’s fees due under Charness’s written retainer agreement with the clients. The retainer agreement between Charness and Sims was oral. The trial resulted in a jury verdict favorable to the clients, and Charness paid Sims a portion of the attorney’s fees. Sims was dissatisfied with the split and sued Charness. Charness argued that the oral fee-splitting agreement was void because it was against public policy and contrary to Rule 2-200.

The Second District Court of Appeal held the oral agreement was not prohibited by Rule 2-200 because it was not a “pure referral.” The court relied on COPRAC’s Formal Opinion No. 1994-138, which defined a “pure referral” as one “which compensates one lawyer with a percentage of a contingent fee for doing nothing more than obtaining the signature of a client upon a retainer agreement while the lawyer to whom the case is referred does all the work....” A pure referral does not encompass an outside lawyer who is employed for his or her expertise in an area of the law, including trial skills, and is paid for these services, the court said. Charness did not relinquish his involvement in the case by referring it to Sims in return for a percentage of the fees. Indeed, Charness continued to participate in the case. The court also concluded that Sims was functioning as Charness’s “associate” within the contemplation of Rule 2-200, which expressly exempts a lawyer’s division of fees with his or her partners, associates, and shareholders. The court held the oral agreement was enforceable.

The First District Court of Appeal declined to follow the same rationale in *Chambers v. Kay*.<sup>34</sup> Chambers and Kay were cocounsel for the plaintiff in the Rena Weeks sexual harassment lawsuit against the law firm Baker & McKenzie. Kay orally agreed to pay Chambers a percentage of the attorney’s fees, but after a disagreement over discovery, Kay removed Chambers from the case. Kay nevertheless confirmed that Chambers would receive the agreed percentage in a letter that was copied and sent to the client, but the terms were not explained and the client’s written consent was not obtained. Following the sizeable verdict, Kay abrogated the agreement and instead offered to compensate Chambers for the hours Chambers had worked on the case. Chambers sued to enforce the agreement, and the superior court granted summary judgment to Kay on the ground the fee-splitting agreement violated Rule 2-200.

The court of appeal affirmed. It held that Rule 2-200 is not limited to pure referrals, and the rule required full disclosure to the client and the client’s written consent.

Chambers and Kay were not associates within the meaning of the rule. Because the lawyers did not comply with Rule 2-200, the agreement was illegal and void.<sup>35</sup> On July 11, 2001, the supreme court granted review of *Chambers*.

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## Contempt and Lawyer Discipline

A breach of ethical duties may not only subject a lawyer to forfeiture of his or her fees but also to contempt proceedings or formal discipline. In *Hanson v. Superior Court of Siskiyou County*,<sup>36</sup> a lawyer for the defendant in a criminal trial stated to the jury in closing argument that, among other things, the job of a lawyer is “to bend the facts” and the defendant “has not received a fair trial in this case.” The trial court sustained the prosecutor’s objections to these statements and issued an order to show cause to hold the defendant’s lawyer in contempt. After the jury was discharged, another trial judge held a hearing on the matter, found the defendant’s lawyer in contempt, and ordered the lawyer to pay a \$200 fine or to serve four days in the county jail. The court of appeal affirmed, holding that the lawyer’s statement that the defendant “has not received a fair trial” impugned the judge’s integrity by suggesting the judge had failed in his duty to guarantee a fair trial. The court also held that a contempt charge against the defendant’s lawyer was warranted because it was inappropriate for the lawyer “to assert that opposing counsel’s job is to misrepresent the facts.”

Ethical violations can also lead to formal disciplinary proceedings before the State Bar. In two recent cases, the state supreme court reminds lawyers that certain violations constitute grounds for summary disbarment. In *In re Cristeta S. Paguirigan*,<sup>37</sup> a lawyer was summarily disbarred after entering a plea of no contest to one felony count of forgery for affixing a witness’s signature on two declarations that were then filed in opposition to summary judgment motions. The supreme court upheld the summary disbarment. In doing so, it rejected the lawyer’s contentions that summary disbarment required an evidentiary hearing and that the summary disbarment statute violates the principle of separation of powers by usurping the inherent authority of the supreme court over attorney discipline.

Lawyers should be aware that the State Bar posts on its Web site the disciplinary history of lawyers, even though the discipline may be a private reproof. In *Mack v. State Bar of California*,<sup>38</sup> a lawyer sued the State Bar to remove from its Web site a notice that the lawyer “has a public record of discipline.” The Web site did not describe the nature of

the disciplinary proceedings or the sanctions imposed. Rather, the Web site noted that an interested party could request a copy of the file from the State Bar. Years before, the lawyer settled disciplinary proceedings in exchange for a private reproof, pursuant to which the State Bar agreed not to publicize affirmatively the lawyer's discipline. The stipulation noted, though, that the lawyer's discipline was a matter of public record that would be furnished to members of the public upon request.

The trial court granted the State Bar's motion for judgment on the pleadings. The court of appeal affirmed, concluding that posting the fact that the lawyer "has a public record of discipline" did not violate the terms of the earlier stipulation.

## Web Sites and Lawyer Advertising

More and more lawyers have Web sites describing their services. The use of a Web site, though, raises several ethical issues, as illustrated by COPRAC's Formal Opinion No. 2001-155. In the opinion, COPRAC concluded that a Web site constitutes a "communication" within the meaning of Rule 1-400(A) of the Rules of Professional Conduct and, therefore, must comply with all of the rules governing communications, such as Rule 1-400(D) (which prohibits false and misleading communications), Rule 1-400(F) (which requires lawyers to retain copies of communications for two years), and Business and Professions Code Sections 6157 et seq. (which prohibit, for example, advertisements including a guarantee of a particular outcome or a promise of quick payment). The committee also noted that according to Rule 1-400(F), lawyers must keep copies of their Web sites, including each page of every version and revision of the Web site, for two years—and these copies must be made available to the State Bar if requested.

COPRAC further states in its opinion that pursuant to Rule 1-300(B), a member lawyer "shall not practice law in a jurisdiction where to do so would be a violation of regulations of the profession in that jurisdiction." The committee warned that other jurisdictions may construe the posting of a Web site as the unauthorized practice of law if individual lawyers are not licensed in that jurisdiction. To avoid this problem, the committee suggested that lawyers:

- Explain in the Web site where they are licensed to practice law.
- Describe where the firm maintains offices and practices law.
- State that they will appear in certain courts only.

- State that they do not seek to represent anyone based on a Web site visit.

None of these methods, however, provides assurance that a Web site will necessarily comply with the rules of other jurisdictions. ■

<sup>1</sup> Adams v. Aerojet-General Corp., 86 Cal App. 4th 1324 (2001).

<sup>2</sup> *Id.* at 1340.

<sup>3</sup> Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Ethics Opinion No. 506, *Initial Client Interview—Duty of Confidentiality*, LOS ANGELES LAWYER, July-August 2001, at 60.

<sup>4</sup> Packard Bell NEC, Inc. v. Aztech Sys., Inc., \_\_\_ F. Supp. 2d \_\_\_, 2001 WL 880957 (C.D. Cal. 2001).

<sup>5</sup> *Id.*, 2001 WL 880957, at \*9.

<sup>6</sup> *Id.*

<sup>7</sup> Gregori v. Bank of Am., 207 Cal. App. 3d 291 (1989).

<sup>8</sup> Packard Bell, 2001 WL 880957, at \*9-10 (quoting Gregori, 207 Cal. App. 3d at 309).

<sup>9</sup> Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294 (2001).

<sup>10</sup> General Dynamics v. Superior Court, 7 Cal. 4th 1164 (1994).

<sup>11</sup> *Id.* at 1169.

<sup>12</sup> *Id.* at 1190.

<sup>13</sup> Fox Searchlight, 89 Cal. App. 4th at 310.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 311.

<sup>16</sup> *Id.* at 313.

<sup>17</sup> In the Matter of Lilly, 2 Cal State Bar Court Rptr. 473, 478 (1993).

<sup>18</sup> People v. Dang, 93 Cal. App. 4th 1293 (2001).

<sup>19</sup> Solin v. O'Melveny & Myers, LLP, 89 Cal. App. 4th

451 (2001).

<sup>20</sup> *Id.* at 457-58.

<sup>21</sup> *Id.* at 464.

<sup>22</sup> *Id.* at 467.

<sup>23</sup> See COPRAC Report and Recommendation on AB 363 (Aug. 17, 2001), at 4-5, available at <http://calbar.org/2bar/3com/3cp0107c.pdf> [hereinafter COPRAC Report]. See also Virginia Ellis & Carl Ingram, *Whistle-Blower Emerges in Quackenbush Probe*, LOS ANGELES TIMES, June 23, 2000, at A1.

<sup>24</sup> See COPRAC Report, *supra* note 23.

<sup>25</sup> See *id.* For Ossias's description of what happened, see <http://www.guerrillalaw.com/cindyO.html>.

<sup>26</sup> Quackenbush resigned effective July 10, 2000. See LOS ANGELES TIMES, June 29, 2000, at A1.

<sup>27</sup> See COPRAC Report, *supra* note 23.

<sup>28</sup> American Equity Ins. Co. v. Beck, 90 Cal. App. 4th 162 (June 26, 2001), *review granted*, \_\_\_ Cal. 4th \_\_\_, 31 P. 3d 1270, 112 Cal. Rptr. 2d 258 (2001).

<sup>29</sup> *Id.*, 90 Cal. App. 4th at 171 (quoting Joseph A. Saunders, P.C. v. Weissburg & Aronson, 74 Cal. App. 4th 869, 874 (1999)).

<sup>30</sup> Musser v. Provencher, 90 Cal. App. 4th 545 (July 10, 2001), *review granted*, \_\_\_ Cal. 4th \_\_\_, 31 P. 3d 1271, 112 Cal. Rptr. 2d 258 (2001).

<sup>31</sup> *Id.*, 90 Cal. App. 4th at 560.

<sup>32</sup> See Charlotte E. Costan, *Fee-Splitting Headaches*, LOS ANGELES LAWYER, Dec. 2001, at 26.

<sup>33</sup> Sims v. Charness, 86 Cal. App. 4th 884 (2001).

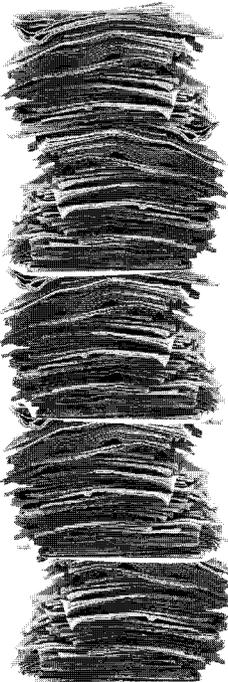
<sup>34</sup> Chambers v. Kay, 88 Cal. App. 4th 903 (2001), *review granted*, \_\_\_ Cal. 4th \_\_\_, 109 Cal. Rptr. 2d 301 (July 28, 2001).

<sup>35</sup> *Id.*, 90 Cal. App. 4th at 919.

<sup>36</sup> Hanson v. Superior Court of Siskiyou County, 91 Cal. App. 4th 75 (July 31, 2001).

<sup>37</sup> In re Cristeta S. Paguirigan, 25 Cal. 4th 1 (2001).

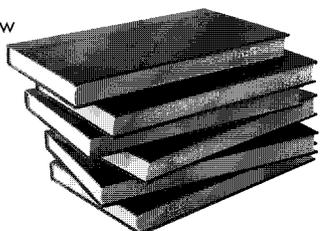
<sup>38</sup> Mack v. State Bar of Cal., 92 Cal. App. 4th 957 (2001).



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