

MCLE ARTICLE AND SELF-ASSESSMENT TEST

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by **John W. Amberg** and **Jon L. Rewinski**

2013 ETHICS ROUNDUP

Last year, prominent ethics cases involved the duty of loyalty and confidentiality as well as advertising and solicitation

THE YEAR 2013 saw the California judicial system continue to buckle under budget cuts. Eight Los Angeles County courthouses shut their doors, the superior court's nationally recognized Alternative Dispute Resolution Department closed, trial dates extended out into future years, and court reporters were eliminated. Governor Jerry Brown slashed an increased allocation to the judicial branch. "2014-2015, that's when we're going to fall off the cliff," warned Curt Soderlund, Chief Administrative Officer for the judicial branch.¹ As legal jobs became scarcer, law school applications fell nearly 18 percent.²

The California Supreme Court acknowledged a new state law that allows undocumented immigrants to become lawyers and granted the request of the Committee of Bar Examiners to admit Sergio C. Garcia to the State Bar.³ The court took a more hostile

view of the application of Steven Glass, who fabricated 42 articles written for *The New Republic* in the 1990s before he changed careers and passed the California bar exam. In January this year, the court unanimously denied Glass's application, finding that he "failed to carry his heavy burden of establishing his rehabilitation and current fitness."⁴

The Supreme Court unanimously held that there is a public right of access to information regarding the State Bar admission process if the identity of applicants is not disclosed. Richard Sander, a UCLA law professor, sought data regarding bar exam scores, law schools attended, grade point averages, LSAT scores, and race or ethnicity to test his theory that racial preferences in law school admissions result in a "mismatch" between minority students and law schools.⁵ A guideline requiring each accredited law school in

the state to post its bar exam pass rate was upheld by District Judge James V. Selna against a First Amendment challenge.⁶

Twelve years ago, the authors of this article were recruited to write a roundup of ethics decisions by Sam Lipsman, the redoubtable editor and publisher of *Los Angeles Lawyer* magazine, who served as mentor, fan, and occasional critic of the annual articles through the ensuing years. Lipsman died of cancer on

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June 13, 2013, and his intelligence and humor will be missed by all.

Conflict of Interest

Last year produced its share of cases illustrating risks arising from conflicts of interest, including disqualification, malpractice claims, and loss or disgorgement of fees.⁷ Two disqualification cases are especially noteworthy.

In *Khani v. Superior Court*,⁸ plaintiff Behnam Khani bought a 2008 Lincoln Navigator from Galpin Motors. Claiming the Navigator was defective, Khani, represented by attorney Payam Shahian, sued Ford and Galpin under California's lemon law. The defendants moved to disqualify Shahian because between 2004 and July 2007, he had worked at the law firm of Bowman and Brooke, Ford's corporate counsel. There he had represented Ford in 150 cases, including lemon law cases. Shahian was "privy to confidential client communications and information" relating to Ford's defense of lemon law cases, as well as Ford's "pre-litigation strategies, tactics, and case handling procedures."⁹ The trial court granted the disqualification motion.

The court of appeal reversed. In the case of successive representation of clients with adverse interests, a court must balance the current client's right to 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.¹⁰ The former client has the burden of showing that the subjects of the successive representations are "substantially related," which requires a test comparing not only the "legal issues involved in successive representations, but also of [the] evidence bearing on the materiality of the information the attorney received during the earlier representation."¹¹ Ford provided no evidence that Shahian had worked on any lemon law cases involving allegedly defective 2008 Navigators or Galpin's repair history. The successive engagements involved similar legal issues but not similar factual issues. The appellate court held that the trial court also "incorrectly assumed that Shahian's exposure to playbook information in prior lemon law cases was sufficient to disqualify him in this case without any showing of its materiality."¹²

Unlike *Khani*, *Havasu Lakeshore Investments, LLC v. Fleming* involved an attorney's concurrent representation of clients allegedly with conflicting interests.¹³ In concurrent representation cases, the lawyer's duty of undivided loyalty is center stage. In *Havasu*, a limited liability company was formed to develop a recreational mobile-home park near Lake Havasu. The Flemings were minority members of the LLC. They held a put option giving them a right to force

Jean Victor Peloquin, the general partner of the LLC's managing member, to purchase their membership interest. In litigation over whether the Flemings properly exercised their put option, the law firm Hart, King & Coldren (HK&C) represented jointly the LLC, the LLC's managing member, and Peloquin. Citing *Gong v. RFG Oil, Inc.*,¹⁴ the Flemings moved to disqualify HK&C. In *Gong*, the superior court abused its discretion in denying a motion by a minority shareholder to disqualify a law firm jointly representing the corporation and its majority shareholder in litigation concerning a buy-sell agreement. Persuaded by the Flemings' argument, the superior court disqualified HK&C. The court of appeal reversed.

What is the difference between *Gong* and *Havasu*? In *Gong*, there was an actual conflict between the corporation and majority shareholder because the minority shareholder asserted a derivative claim for corporate waste against the majority shareholder and sought dissolution. In *Havasu*, on the other hand, there was no actual conflict based on the Flemings' claims. At best, there was a potential conflict—the same potential conflict that exists whenever a lawyer jointly represents multiple parties in a single lawsuit. A potential conflict is insufficient to justify disqualification.

Confidentiality and the Attorney-Client Privilege

A client accused his former lawyer of disclosing confidential information to a business rival in *Castleman v. Sagaser*.¹⁵ Following an acrimonious dispute with his law partner Timothy Jones, attorney Howard Sagaser resigned from their Fresno law firm. Before his resignation was effective, Sagaser remotely accessed the firm's computer system and reviewed client files regarding real estate deals between two clients, Bratton and Castleman, who had compensated Jones for legal services by granting him a percentage interest in their real estate development projects.¹⁶ After reviewing the client files, Sagaser met with Bratton and his new lawyers, who subsequently sued Castleman, Jones, and Sagaser's former firm for conspiracy and fraud. Sagaser filed an arbitration claim against Jones, contending that Jones's ownership interest in the deals should have gone to their law firm, entitling Sagaser to a share worth millions of dollars. Deposed in Bratton's suit against Castleman, Sagaser asserted the attorney-client privilege for his communications with Bratton and Bratton's lawyers.¹⁷

Castleman sued Sagaser for breach of his fiduciary duties of loyalty and confidentiality, alleging that the lawyer had communicated Castleman's confidential information to Bratton and his lawyers. Sagaser denied

revealing client information and filed a motion to strike under the anti-SLAPP statute, Code of Civil Procedure Section 425.16, arguing that his communications with Bratton and his lawyers were constitutionally protected speech and petitioning activity in connection with litigation. The superior court denied the motion and the court of appeal affirmed, holding that Sagaser's role in Bratton's litigation was collateral to the principal thrust of Castleman's lawsuit. The complaint charged that Sagaser had aligned himself with his former client's adversaries in violation of the Rules of Professional Conduct.¹⁸ The causes of action against the lawyer did not arise from protected activity under the anti-SLAPP statute, the appellate court held, but from alleged breaches of his ethical duties of loyalty and confidentiality.¹⁹

Confidential information shared with an expert gave rise to a disqualification motion in *DeLuca v. State Fish Co., Inc.*²⁰ During the trial of a suit between State Fish, a seafood business owned by the DeLuca family, and John DeLuca, a dissident family member, State Fish offered the expert testimony of real estate broker Leo Vusich regarding the value of a fish processing plant claimed by both sides. Following remand, Vusich switched sides and proposed to testify for DeLuca at the retrial. State Fish objected and moved to disqualify DeLuca's counsel on the ground that he had gained access to its lawyer's confidential "impressions, conclusions, opinions and theories," which had been disclosed to the expert before the first trial. Vusich claimed no memory of the lawyer's mental impressions, but the superior court found the lawyer was more credible than the expert and disqualified DeLuca's counsel.²¹

The court of appeal reversed. A party moving to disqualify opposing counsel for improper contact with the moving party's expert must prove the expert possesses confidential information material to the proceedings. If this showing is made, a rebuttable presumption arises that the information has been disclosed to opposing counsel.²² While State Fish was not required to disclose the work product information conveyed to the expert, it had to provide the court with the nature of the information and its material relationship to the proceedings, which State Fish had failed to do. Neither the attorney-client privilege nor work product doctrine protects statements to a testifying expert such as Vusich. Even if he had access to work product related to nontestimonial subjects, State Fish failed to show that its lawyer's impressions, conclusions, opinions, and theories remained confidential after the first trial, during which, the court assumed, his strategy had been revealed.²³

MCLE Test No. 234

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

1. A conflict of interest can result in an attorney's disqualification, malpractice claims, and disgorgement of fees.
True.
False.
2. When an attorney represents successive clients with adverse interests, the new client's right to counsel is weighed against the former client's right to confidentiality.
True.
False.
3. Exposure to a client's playbook information will always result in an attorney's disqualification if he or she is adverse to the client in a later representation.
True.
False.
4. When an attorney concurrently represents clients with conflicting interests, he or she must be concerned about the duty of loyalty.
True.
False.
5. An attorney's disclosure of confidential client information in connection with litigation is constitutionally protected speech and petitioning activity under the anti-SLAPP statute.
True.
False.
6. If an expert who possesses confidential information material to the proceedings is contacted by opposing counsel, a rebuttable presumption arises that the information was disclosed.
True.
False.
7. The attorney-client privilege and work product doctrine always protect statements to experts from discovery.
True.
False.
8. The crime-fraud exception requires independent evidence before an attorney can use a privileged document.
True.
False.
9. The litigation privilege protects an attorney from liability for false statements to the press.
True.
False.
10. A demand letter that couples a demand for money with a threat to report conduct to criminal and government authorities if payment is not made violates the

- Rules of Professional Conduct.
True.
False.
11. A demand letter that couples a demand for money with a threat to file a lawsuit if payment is not made violates the Rules of Professional Conduct.
True.
False.
12. A lawyer for an employer may defend an employee's deposition but must advise the employee of any potential conflicts of interest.
True.
False.
13. A law firm can compel a former client to arbitrate their dispute even if the client cannot afford the arbitrator's charges.
True.
False.
14. It is not reasonable to doubt whether an arbitrator could be impartial because of a reference to an attorney in a 10-year-old resume.
True.
False.
15. Malicious prosecution requires proof of termination in favor of the plaintiff, lack of probable cause, and malice.
True.
False.
16. A voluntary dismissal is presumed to be a favorable termination on the merits.
True.
False.
17. Malice can be inferred when a lawyer sues the defendant to put pressure on another party.
True.
False.
18. A lawyer who deceives a federal court can only be reported to the district's disciplinary committee.
True.
False.
19. A court has discretion to deny recovery of legal fees by a lawyer who obstructs discovery of his or her time records.
True.
False.
20. The California Supreme Court has approved new Rules of Professional Conduct.
True.
False.

MCLE Answer Sheet #234



ETHICS ROUNDUP 2013

Name _____
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ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

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

Seven years ago, in *Rico v. Mitsubishi Motors Corporation*,²⁴ the California Supreme Court considered what to do when privileged, work product, or otherwise confidential documents are inadvertently received by opposing counsel. Adopting language from the Second District Court of Appeal's opinion in *State Compensation Insurance Fund v. WPS, Inc.*,²⁵ the court held that the lawyer receiving the document should refrain from examining it any more than essential to ascertain if it is privileged and should immediately notify the sender.²⁶ The court left unan-

camera review is not available to determine whether an exception applies, absent independent prima facie evidence.²⁸

Advertising and Solicitation

Lawyers and courts continue to wrestle with applying longstanding ethics rules in an increasingly connected world. Many lawyers regularly tweet, post, and blog, instantaneously disseminating statements across the globe. There are risks to doing this.

Having recently filed a shareholder lawsuit in federal court against Los Angeles-

RICO claim with prejudice. As the federal court dismissed the RICO claim, GetFugu and various officers filed a \$500,000 defamation lawsuit against attorney Oparil, Patton Boggs, and others. About a week later, Oparil tweeted: "GetFugu runs an organization for the benefit of its officers and directors, not shareholders and employees. The RICO suit was not frivolous. The 500K lawsuit is frivolous, however, so buyer be wary." In an amended complaint, the GetFugu parties added Oparil's tweet to the defamation claim.

Oparil and Patton Boggs persuaded the

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swered what the lawyer should do if the document reveals the existence of a crime or fraud, which could vitiate the privilege under Evidence Code Section 956. Is he or she obligated to notify the other side or to return the evidence of wrongdoing and thereby risk its disappearance or destruction? In 2013, the California State Bar's Committee on Professional Responsibility and Conduct (COPRAC) tackled that issue in Formal Opinion No. 2013-188. Citing the deference paid to the privilege in California, COPRAC concluded that the ethical duties in *Rico* and *State Fund* apply whether the document is received through inadvertence or intentionally from a whistleblower, and the duties would bar use of the document unless independent evidence of a crime or fraud exists. "The mere assertion of a crime or fraud is insufficient to trigger the exception—there must be a prima facie showing by the proponent through non-privileged information that the allegation that the attorney's services were sought or obtained to enable the planning of a crime or fraud has some foundation in fact."²⁷ The lawyer receiving the document may seek court guidance, but in

based Getfugu, Inc., and some of its officers, Patton Boggs LLP partner Richard J. Oparil issued a press release through Investment Wire titled "FBI SAID TO BE INVESTIGATING GETFUGU'S CARL FREER."²⁹ According to the press release, Oparil's clients, the plaintiffs, "were pleased about a report by the Copenhagen Post that the FBI and Danish authorities are investigating Freer's involvement in the Danish IT Factory scandal." The release went on, "[a]ccording to the article, the FBI is following what is said to be a complex international money trail that allegedly links GetFugu and Freer to several failed 'pump and dump' investments...." The release described a criminal conviction against one GetFugu officer in a German court and the fraud conviction against another GetFugu officer. Citing their clients' federal complaint, the press release stated that the SEC was investigating GetFugu and its officers. The release invited readers to send investigative leads to an e-mail address.³⁰

After the press release was issued, the *Copenhagen Post* retracted its article. The federal court dismissed the state law claims without prejudice, and later dismissed the

superior court to strike the defamation claim under the anti-SLAPP statute. The court of appeal agreed that Oparil's tweet was not actionable. It merely reflected his opinion. The court of appeal reversed, however, the dismissal of the defamation claim based on the press release. The issuance of the press release constituted protected petitioning activity in a matter of public interest within the meaning of the anti-SLAPP statute. This shifted the burden to GetFugu and its officers to prove a probability of prevailing on their defamation claim. GetFugu's president subsequently submitted a declaration stating that, contrary to Oparil's press release, neither he nor GetFugu had ever been under investigation by the FBI, the SEC, or any other governmental agency. This declaration was enough to defeat the attorneys' motion to strike. Oparil and Patton Boggs could not rely on the litigation privilege codified in Civil Code Section 47(b) to insulate their press release from the defamation claim. The litigation privilege does not encompass statements that are published to the general public through the press.³¹

In *Steiner v. Superior Court*, the court of appeal addressed a trial court's authority to

issue an order restricting an attorney's free speech rights during trial to prevent potential jury contamination.³² On her firm's Web site, attorney Simona A. Farrisese touted verdicts for \$1.6 million and \$4.3 million against Ford Motor Company and others in personal injury litigation alleging illnesses caused by exposure to asbestos. On the eve of a jury trial on similar claims asserted by Farrisese's clients against Ford and Volkswagen Group of America, the trial court ordered Farrisese to remove from her Web site the descriptions of the two earlier verdicts pending the completion of trial. The appellate court found that the trial court's order constituted an unlawful prior restraint on Farrisese's constitutional right to free speech.

Without deciding whether the trial court's order should be analyzed under a strict scrutiny standard or the intermediate scrutiny standard generally applicable to prior restraints on commercial speech, the court in *Steiner* reasoned that even under the intermediate scrutiny standard, the trial court's order was unlawful.³³ The trial court had already admonished the jury not to Google trial counsel. "[I]t must be assumed that a jury does its duty, abides by cautionary instructions, and finds facts only because those facts are proved."³⁴ The court's order was more restrictive than necessary, thereby unable to withstand even intermediate scrutiny. In addition, the appellate record contained no evidence on which to conclude that attorney Farrisese's statements were subject to restraint as misleading advertising.³⁵

Demand Letters

Overbearing demand letters can come back to haunt the lawyers who write them. In *Mendoza v. Hamzeh*, the lawyer's demand letter went too far, subjecting the lawyer to claims for civil extortion, emotional distress, and unfair business practices.³⁶ In *Malin v. Singer*, on the other hand, the litigation privilege shielded a lawyer from claims for civil extortion and emotional distress based on his acerbic but not extortionate demand letter.³⁷

In *Mendoza*, lawyer Reed Hamzeh wrote a demand letter advising the addressee, a former manager at Hamzeh's client's business, that Hamzeh and his client were investigating a substantial fraud and "if your client does not agree to cooperate with our investigation and provide us with a repayment of such damages caused, we will be forced to proceed with filing a legal action against him, as well as reporting him to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service regarding tax fraud...."³⁸ In *Malin*, lawyer Martin Singer wrote a demand letter advising the addressee, a former business associate of Singer's client, that Singer and his client intended to sue the

addressee and others for "embezzling and stealing money" from Singer's client, for engaging "in insurance scams designed to defraud" various insurers, for attempting to hide assets from creditors and taxing authorities in offshore accounts, and for "using company resources to arrange sexual liaisons with older men" including a retired judge of the superior court—"unless this matter is resolved to my client's satisfaction within five (5) business days..."³⁹ Even though Singer's letter was in many ways more offensive than Hamzeh's, Hamzeh's letter coupled a threat to report conduct to criminal and governmental authorities with a demand for money. That constitutes a violation of Rule of Professional Conduct 1-500 and "criminal extortion as a matter of law."⁴⁰ Singer's letter concluded with a demand for money, but without a threat to report the recipient's conduct to governmental authorities. Therefore, it did not constitute extortion as a matter of law.⁴¹ That Singer's letter insinuated that the recipient's failure to pay money in settlement would expose third parties to potential public humiliation was not enough.⁴²

Malpractice

A lawyer for Union Pacific Railroad was sued for malpractice by an employee of the railroad in *Yanez v. Plummer* after he defended the employee in a deposition that went terribly wrong and the employee was fired.⁴³ Union Pacific employee Michael Yanez was present when a coworker was injured on the job and wrote two witness statements. In the first, Yanez wrote that the coworker slipped and fell on an oil-soaked floor, and in the second, he wrote that he saw the coworker slip and fall.⁴⁴ Attorney Brian Plummer was retained to defend the coworker's suit against Union Pacific under the Federal Employers Liability Act, and when Yanez was deposed, Plummer represented both the railroad and Yanez. Meeting with Plummer before the deposition, Yanez expressed concern because his testimony was not likely to be favorable to the railroad, but Plummer told him his job would not be affected so long as he told the truth. The lawyer did not discuss any conflict of interest in representing both Union Pacific and Yanez at the deposition.⁴⁵ During the deposition, after the plaintiff's lawyer examined Yanez, Plummer questioned him and confirmed he had not seen the coworker fall. The lawyer marked the second written statement in which Yanez wrote that he had seen the fall. Union Pacific subsequently terminated Yanez for dishonesty based on the contradiction between his written statement and his deposition testimony.⁴⁶

Yanez sued Plummer for legal malpractice, breach of fiduciary duty, and fraud. The superior court granted summary judgment for

the lawyer on the ground that Yanez could not show that but for the lawyer's conduct, he would not have been fired, but the court of appeal reversed. It held that the lawyer had a conflict of interest while representing both employer and employee in the deposition because he portrayed the employee in the worst possible light to benefit the employer. It was Plummer who highlighted his client's testimony that he did not see the coworker slip, introduced the contradictory written statement, and then got him to admit that his testimony conflicted with the statement.⁴⁷ Since the employer had had the two contradictory written statements for nine months without charging Yanez with dishonesty, the court concluded that it was the deposition that led to his dismissal. It rejected the lawyer's argument that the appeal would bar a lawyer for an employer from ever representing an employee and held the case merely raised a triable issue of fact regarding causation.⁴⁸

Arbitration

In *Roldan v. Callahan & Blaine*, Justice William F. Rylaarsdam wrote a groundbreaking opinion for the Fourth Appellate District imposing conditions on a law firm's right to enforce a mandatory arbitration provision in their retainer agreement.⁴⁹ The former clients, alleging that the law firm improperly coerced them into settling toxic mold cases, sued the law firm for elder abuse, conversion (for not promptly forwarding settlement proceeds), and breach of fiduciary duty. The law firm petitioned to compel arbitration. The former clients alleged that they could not afford to pay the upfront charges imposed by the arbitrator. Reasoning that "all litigants have access to the justice system for resolution of their grievances, without regard to their financial means"⁵⁰ and that if the former clients could not front the costs of arbitration, they might be effectively deprived of access to any forum, Justice Rylaarsdam gave the law firm a choice. Upon a showing that the former clients lacked the financial means to pay the upfront arbitration costs, the law firm could pay the former clients' share of the costs or waive its right to arbitrate the dispute.⁵¹

In *Mt. Holyoke Homes L.P. v. Jeffer Mangels Butler & Mitchell, LLP*, the court of appeal reversed an arbitration award issued by retired superior court judge Eli Chernow in favor of Jeffer Mangels on a legal malpractice claim.⁵² Before being selected, Judge Chernow had disclosed that he had known one of the Jeffer Mangels lawyers for years and that the Jeffer Mangels defendants' counsel had mediated a case before him within the last five years. After receiving Judge Chernow's unfavorable award, the claimant found on the Internet a 10-year-old resume in

which Judge Chernow had named named-partner Robert Mangels as a reference for his mediation services. Although Mangels had appeared before Judge Chernow as a judge, mediator, and arbitrator, he and Judge Chernow had never had a professional or personal relationship. The court of appeal concluded that the arbitration award had to be vacated because a reasonable person aware of the facts could reasonably entertain a doubt that Judge Chernow could be impartial in the arbitration.⁵³

Malicious Prosecution

Limited partners sued for malicious prosecution in *Jay v. Mahaffey* after they were dismissed from a cross-complaint filed by the owners of an Anaheim mobile home park against a limited partnership in which the limited partners were passive investors.⁵⁴ In a campaign to break a 50-year lease with the partnership so the property could be redeveloped, the owners unsuccessfully tried to buy off the limited partners, failed to foment a condemnation suit by the city, and then sued the partnership but lost at trial. Undaunted, their lawyer Douglas Mahaffey threatened to tie up the partnership in expensive litigation for five years and filed a new cross action in which he named 45 limited partners, although they were not parties to the lease and had no involvement in the partnership's business.⁵⁵ Mahaffey offered to dismiss the limited partners if they would hire him to file a derivative action against the partnership and proposed to pay a finder's fee to their current counsel.⁵⁶ When this was rejected, he voluntarily dismissed the limited partners. Twelve of them sued Mahaffey and his clients for malicious prosecution.

The superior court denied the defendants' motion to strike under the anti-SLAPP statute, and the court of appeal affirmed. To prevail on a malicious prosecution claim, a plaintiff must show the prior action was pursued to a legal termination favorable to the plaintiff, was brought without probable cause, and was initiated with malice.⁵⁷ In its *de novo* review, the appellate court held the plaintiffs had established a probability of prevailing because a voluntary dismissal is presumed to be a favorable termination on the merits, and there was no probable cause to sue the limited partners since they are immune from liability under the Uniform Limited Partnership Act unless they help operate the partnership's business.⁵⁸ The court inferred malice from the conduct of the defendant clients.⁵⁹ As to the attorney Mahaffey, the court ruled that he had sued the limited partners not to vindicate a legal right but to use them as pawns in the chess game against the limited partnership and that a jury could find the case was a "poster child" for cases instituted

for an improper purpose.⁶⁰ Regarding his malice, the court concluded: "Was the evidence sufficient? 'Overwhelming' would be a better word."⁶¹

Lawyers Behaving Badly

District Judge Otis D. Wright II "went to battlestations" to sanction lawyers for manipulating the legal system in *Ingenuity 13 LLC v. Doe* and four related cases.⁶² The lawyers represented a "porno-trolling collective" comprised of shell corporations that owned copyrights to pornographic movies. They traced download activity of the movies, subpoenaed the identity of subscribers from Internet service providers, and sent cease and desist letters offering to settle each copyright infringement claim for about \$4,000. Most recipients settled to avoid embarrassment and the cost of litigation, but if they refused, the lawyers filed vexatious lawsuits. Although copyright owners have the right to protect their intellectual property rights, the court found a pattern of deception and ordered the lawyers to pay attorney's fees and costs for their "brazen misconduct and relentless fraud." The judge also referred them to their respective state and federal bar associations, the U.S. Attorney for the Central District, the Criminal Investigation Division of the Internal Revenue Service, and the district court's Standing Committee on Discipline.⁶³

A lawyer's application for legal fees following the settlement of a class action was forfeited by her unprofessional conduct in *Ellis v. Toshiba American Information Systems, Inc.*⁶⁴ Two law firms brought a class action on behalf of purchasers of a Toshiba laptop computer with an electrostatic discharge problem, which was settled by giving each member a 12-month repair warranty extension and either \$25 cash or a \$50 voucher for replacement of the defective part. Caddell & Chapman was awarded slightly over \$1 million in fees and expenses, but Toshiba opposed the request by the cocounsel, Lori Sklar of the Sklar Law Offices (SLO), a sole practitioner admitted in California but working from a home office in Minnesota, who sought \$12,079,534.69 in fees for herself (originally \$24 million) and \$908,752.72 in expenses for SLO. After Sklar obstructed Toshiba's discovery and violated court orders by wiping her electronic time records and refusing to let experts inspect her computer, Judge Anthony J. Mohr awarded discovery sanctions of \$165,000.⁶⁵

Ultimately, Judge Mohr denied Sklar's entire fee request, and his detailed findings were affirmed by the Second District Court of Appeal. The superior court found that Sklar's billing records were unusable to calculate the lodestar because they contained "troubling inconsistencies and omissions"

and numerous inaccurate and contradictory entries, which destroyed her credibility. The total hours were excessive, showing her working almost 11 hours every day, including weekends and holidays, for five years.⁶⁶ Sklar's accusations of unethical behavior against the court and other parties were inappropriate and unprofessional and justified a denial of fees.⁶⁷

Judge Mohr did not believe Sklar's evidence concerning her time spent working on the class action, and the court of appeal declined to reassess her credibility, which is uniquely the province of the trial court.⁶⁸ The court affirmed the denial of any fees to Sklar and directed the clerk to send the opinion to the State Bar pursuant to Business and Professions Code Section 6086.7, which requires the State Bar to investigate the appropriateness of disciplinary action against an attorney.⁶⁹

Rules Revision

The State Bar continued to send proposed new Rules of Professional Conduct to the California Supreme Court for its adoption or modification. After two proposed rules were submitted in 2012, 12 more proposed rules were submitted in 2013, but the Court did not take action on any of them.⁷⁰ ■

¹ *Judicial branch budget outlook still cloudy*, L.A. DAILY J., Dec. 26, 2013.

² *Law school applications drop nearly 18 percent, benefitting students seeking financial aid*, A.B.A. J., Aug. 23, 2013.

³ *Immigrant in U.S. Illegally May Practice Law, California Court Rules*, N.Y. TIMES, Jan. 2, 2014; see also *In re Sergio C. Garcia on Admission*, 58 Cal. 4th 440 (2014).

⁴ *Would-be lawyer who fabricated stories gets chilly reception at high court*, L.A. DAILY J., Nov. 7, 2013; *In re Glass*, 58 Cal. 4th 500 (2014); 30 LAW. MAN. PROF. CONDUCT 69, Jan. 28, 2014.

⁵ *Sander v. State Bar of Cal.*, 58 Cal. 4th 300 (2013).

⁶ *Southern California Institute of Law v. Biggers*, No. SACv 13-00193 JVS (RNBx) (C.D. Cal. Aug. 19, 2013).

⁷ See, e.g., *Fiduciary Trust Int'l of Cal. v. Superior Court*, 218 Cal. App. 4th 465 (2013) (disqualification); *Yanez v. Plummer*, 221 Cal. App. 4th 180 (2013) (malpractice); *In re GFI Commercial Mortgage LLP v. Meyers Law Group, P.C.*, 2013 WL 4647300, 2013 U.S. Dist. LEXIS 124077 (N.D. Cal. Aug. 29, 2013) (alleged conflicts violation not sufficiently egregious to warrant fee forfeiture); *Sabey v. City of Pomona*, 215 Cal. App. 4th 489 (2013) (private law firm's multiple roles during administrative proceedings violated police officer's due process rights).

⁸ *Khani v. Superior Court*, 215 Cal. App. 4th 916 (2013).

⁹ *Id.* at 919.

¹⁰ *Id.* at 920.

¹¹ *Id.* at 921.

¹² *Id.* at 922.

¹³ *Havasu Lakeshore Invs., LLC v. Fleming*, 217 Cal. App. 4th 770 (2013).

¹⁴ *Gong v. RFG Oil, Inc.*, 166 Cal. App. 4th 209 (2008).

¹⁵ *Castleman v. Sagaser*, 216 Cal. App. 4th 481 (2013).

¹⁶ *Id.* at 486.
¹⁷ *Id.* at 487.
¹⁸ Castleman, 216 Cal. App. 4th at 494.
¹⁹ *Id.* at 495.
²⁰ DeLuca v. State Fish Co., Inc., 217 Cal. App. 4th 671 (2013).
²¹ *Id.* at 682-83.
²² *Id.* at 691.
²³ *Id.* at 693.
²⁴ Rico v. Mitsubishi Motors Corp., 42 Cal. 4th 807 (2007).
²⁵ State Compensation Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644 (1999).
²⁶ *Id.* at 817-18.
²⁷ State Bar Standing Committee on Professional Responsibility and Conduct, Formal Op. No. 2013-188 at 5.
²⁸ *Id.*; see also Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725, 739-40 (2009); EVID. CODE §915.
²⁹ GetFugu, Inc. v. Patton Boggs LLP, 220 Cal. App. 4th 141, 145-46 (2013).
³⁰ *Id.*
³¹ *Id.* at 153.
³² Steiner v. Superior Court, 220 Cal. App. 4th 1479 (2013).
³³ *Id.* at 1488.
³⁴ *Id.* at 1489 (quoting NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 1223-24 (1999)).
³⁵ Steiner, 220 Cal. App. 4th at 1488; see also Hunter v. Virginia State Bar, ex rel. Third District Committee, 285 Va. 485, cert. denied, 133 S. Ct. 2871 (2013) (An attorney's blog constituted commercial speech subject to regulation under Virginia's rules of professional conduct governing advertising and solicitation.).
³⁶ Mendoza v. Hamzeh, 215 Cal. App. 4th 799 (2013).
³⁷ Malin v. Singer, 217 Cal. App. 4th 1283 (2013).
³⁸ Mendoza, 215 Cal. App. 4th at 802.
³⁹ Malin, 217 Cal. App. 4th at 1288-89.
⁴⁰ Mendoza, 215 Cal. App. 4th at 806.
⁴¹ Malin, 217 Cal. App. 4th at 1299.
⁴² *Id.*
⁴³ Yanez v. Plummer, 221 Cal. App. 4th 180 (2013).
⁴⁴ *Id.* at 183-84.
⁴⁵ *Id.* at 184.
⁴⁶ *Id.* at 185.
⁴⁷ *Id.* at 189.
⁴⁸ *Id.* at 190.
⁴⁹ Roldan v. Callahan & Blaine, 219 Cal. App. 4th 87 (2013).
⁵⁰ *Id.* at 94.
⁵¹ See *id.* at 89-90.
⁵² Mt. Holyoke Homes LP v. Jeffer Mangels Butler & Mitchell LLP, 219 Cal. App. 4th 1299 (2013).
⁵³ *Id.* at 1314.
⁵⁴ Jay v. Mahaffey, 218 Cal. App. 4th 1522 (2013).
⁵⁵ *Id.* at 1531.
⁵⁶ *Id.*
⁵⁷ Soukup v. Law Office of Herbert Hafif, 39 Cal. 4th 260, 269 n.3 (2006).
⁵⁸ *Id.* at 1540-41.
⁵⁹ *Id.* at 1542.
⁶⁰ *Id.* at 1545.
⁶¹ *Id.*
⁶² Ingenuity 13 LLC v. Doe, 2013 WL 1898633 (C.D. Cal. May 6, 2013).
⁶³ *Id.* at *5-6.
⁶⁴ Ellis v. Toshiba Am. Info. Sys., Inc., 218 Cal. App. 4th 853 (2013).
⁶⁵ *Id.* at 867-68.
⁶⁶ *Id.* at 872-73.
⁶⁷ *Id.* at 872.
⁶⁸ *Id.* at 884.
⁶⁹ *Id.* at 890-91.
⁷⁰ California Supreme Court docket, Case No. S206125 (Rules of Professional Conduct), eff. 01/02/2014.

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