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by John W. Amberg and Jon L. Rewinski

2014 ETHICS ROUNDUP

California attorneys confronted ethical issues involving nonparty client secrets, conflicts of interest, division of fees, law firm dissolutions, and advertising

DRAMATIC EVENTS roiled California's legal ethics world in 2014. In a shocking letter to the state bar, the California Supreme Court rejected all 67 proposed rules of professional conduct drafted over nine years by the Commission for the Revision of the Rules of Professional Conduct and approved by the State Bar Board of Trustees. The court scuttled years of volunteer effort by the state's most venerable ethics experts, but a new commission, whose members were announced on January 30, includes some veterans who are likely to build on the work product of their predecessors.[1]

The state bar abruptly fired Executive Director Joseph L. Dunn after an investigation concluded Dunn had misled the board of trustees by, among other things, representing that Chief Justice Tani Cantil-Sakauye supported his proposal to sell the bar's San Francisco headquarters and move to Sacramento. Dunn lashed back, suing the bar and its president[2] and claiming retaliation because he was an anonymous whistleblower, a position the bar described as "bewildering…since as the executive who is head of the entire organization he is responsible for managing operations.…"[3]

Two judges narrowly avoided removal from the bench after they were charged with having sex in their chambers and lying about it, in violation of the Code of Judicial Ethics. Kern County Superior Court Judge Cory Woodward engaged in sexual activity with his married courtroom clerk in chambers and public places, and misled the presiding judge, assistant presiding judge, and court executive officer about the relationship.[4] Orange County Superior Court Judge Scott Steiner engaged in sexual activity in his chambers with two women, both former students in law school classes taught by the judge, and one an intern.[5] After the judges expressed remorse, they were censured by the Commission on Judicial Performance in a split vote.[6]

Two married lawyers found guilty of felony false imprisonment and conspiracy faced disbarment. Kent Easter, a former partner with Stradling Yocca Carlson & Rauth PC, and his wife Jilliane Easter embarked on a malicious campaign against a volunteer at their six-year-old son's school that culminated in planting marijuana, Vicodin, Percocet, and a marijuana pipe in their victim's car, and calling the police using a false name and foreign accent to have her arrested. Jilliane

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was disbarred in October 2014, and Kent's disbarment will be decided in 2015.[7]

California's judicial branch continued to struggle to overcome $1 billion in budget cuts since 2008, which has forced the Los Angeles Superior Court to close eight courthouses and 79 courtrooms. Though the state budget provided $223 million in new funding, only $129 million was earmarked for trial courts, and Los Angeles Presiding Judge David S. Wesley bluntly concluded, "[T]his year's budget is a disaster for access to justice."[8]

Confidentiality

A lawyer's obligation to maintain client secrets is of fundamental importance, facilitating the candor necessary for clients to receive sound legal advice.[9] Over 20 years ago, the California Supreme Court admonished in *General Dynamics Corporation v. Superior Court* that "[e]xcept in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of a lawyer to disclose publicly the secrets of a client."[10] More than 10 years ago, the Second District Court of Appeal concluded in *Fox Searchlight Pictures, Inc. v. Paladino* that, notwithstanding this general rule, a former in-house lawyer could ethically disclose to her own attorney client secrets of her former employer to facilitate the preparation of a wrongful termination claim.[11] In 2014, in *Chubb & Son v. Superior Court*,[12] the First District addressed a similar issue in the context of a lawyer-litigant claiming employment discrimination against her former employer, a captive law firm of insurer Chubb & Son. Unlike in *Fox Searchlight*, in *Chubb & Son*, the client secrets belonged to persons not parties to the litigation. When nonparty client secrets are involved, how should the parties and their counsel handle discovery?

Attorney Tracy Lemmon worked for Bragg & Kuluva, a law firm that represented Chubb's insureds in litigation. Lemmon alleged that she had consistently met or exceeded expectations on her performance reviews until after she took medical leaves due to complications with a pregnancy. Lemmon's postleave reviews, based in part on a law firm audit of her cases, stated that she fell short of her goals. Then, claiming that Lemmon had misrepresented facts in a court declaration, Bragg & Kuluva fired Lemmon. Lemmon sued Bragg & Kuluva and Chubb for disability discrimination, defamation, and wrongful termination.

Claiming a duty to protect the confidentiality of its insureds' secrets, Chubb refused to produce letters in which clients gave feedback on Lemmon's performance. Chubb did produce, but with redactions, Bragg & Kuluva's internal case reviews, internal memoranda, and e-mails evaluating Lemmon's performance, and Lemmon's midyear and annual performance reviews. Lemmon moved to compel. The motion raised a host of thorny issues regarding the attorney-client privilege and work product doctrine, including the ability of Chubb, neither an attorney nor client, to assert the privilege on behalf of its insureds. The First Appellate District, however, focused on a narrow, preliminary issue—Chubb's contention that a lawyer's duty of confidentiality precluded each party from disclosing even to that party's own litigation counsel client secrets known by that party. The trial court ordered Chubb and Lemmon to disclose the client secrets to their respective litigation counsel for evaluation of privilege. At the same time, the court prohibited them from disclosing the secrets to anyone else, including the court.

Chubb petitioned the court of appeal for a writ of mandate. The court issued an order to show cause, but, after further briefing, discharged the order and denied the petition. The court rejected Chubb's argument that Lemmon was seeking to create a nonstatutory exception to the attorney-client privilege. Disclosure to one's own lawyer constitutes neither a public disclosure nor a waiver of any privilege. Likewise, Chubb's prediction that allowing such disclosure would spell doom for the attorney-client privilege was "entirely speculative."[13] Fundamental fairness requires that an attorney-litigant be allowed to make a limited disclosure to his or her own lawyer to the extent necessary to prepare a claim. "Attorney-litigants should not be deprived of the right to independent, candid, professional advice about their ethical duties under their particular circumstances."[14] Finally, the appellate court saw no basis for creating a special rule when the client secrets belong to nonparties. The litigation attorneys and attorney-litigants were under ethical, statutory, and court-imposed duties not to disclose the nonparties' secrets, which would adequately protect the nonparties' interests. As the appellate court noted, the trial court has an equitable arsenal of ad hoc measures at its disposal to protect the nonparty client secrets, including the use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, when appropriate, in camera proceedings.[15]

Attorney-Client Privilege

Disclosure of confidential information to nonclients did not waive the attorney-client privilege in *Seahaus La Jolla Owners Association v. Superior Court*.[16] A homeowners association sued the developers and builders of a "common interest development" for water damage in common areas due to construction defects. A second suit was filed by separate counsel for individual homeowners for damage to individual units. The HOA's counsel conducted a series of meetings with homeowners to update them on the status and goals of the litigation, though not all attendees were clients and some were consultants affiliated with the defendants. After the defendants sought to discover what was discussed at the meetings, arguing any privilege had been waived, the superior court overruled the HOA's privilege claim. The court of appeal vacated the lower court order and directed entry of a protective order. It held that information from the lawyers did not lose its confidential nature and the privilege was not waived when disclosed to persons with a "common interest."[17] Under *OXY Resources California LLC v. Superior Court*,[18] the common interest doctrine is not subject to a bright line test, and it applies when the participants have a reasonable expectation that information will remain confidential and disclosure is reasonably necessary to accomplish the purpose for which the lawyer was consulted. The test was met because the HOA had a duty to communicate with homeowners about the litigation under the Davis-Stirling Common Interest Development Act[19] and its covenants, conditions and restrictions. The court also found that the two defect suits were closely related, so the individual homeowners and the HOA had common interests. The presence of some with conflicting loyalties "did not destroy all other common interests."[20]

Edward Snowden's revelations about the government's warrantless collection of electronic communications[21] collided with the attorney-client privilege when American lawyers discovered that privileged communications had been monitored by allied intelligence agencies abroad. The American Bar Association demanded assurances that the National Security Agency was not actively seeking attorney-client communications and would "take all appropriate steps" to ensure that such communications were not disseminated. Lawyers were urged to take "reasonable precautions" to protect confidential communications with foreign clients by meeting in person, using encryption, and using prepaid phones.[22]

In-House Law Firm Privilege

Does a conflict of interest prevent a lawyer from seeking legal advice from designated general counsel of his or her firm on how to handle an ongoing client matter? Is the general counsel's advice to the lawyer privileged? The Second District addressed these issues in *Edwards Wildman Palmer LLP v. Superior Court.* [23]

A contentious relationship with client Shahrokh Mireskandari led an Edwards

MCLE Test No. 245

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 Supreme Court adopted new Rules of Professional Conduct in 2014.
True.
False.

2. Former in-house lawyers may ethically disclose the secrets of their former employer to their own attorney to prepare a wrongful termination claim.
True.
False.

3. Disclosure of privileged information to persons with a common interest does not waive the privilege.
True.
False.

4. The presence of persons with conflicting loyalties destroys the common interest doctrine.
True.
False.

5. Lawyers should take precautions to protect the confidentiality of communications with foreign clients from government surveillance.
True.
False.

6. A lawyer who consults with his firm's general counsel regarding a problem with a client during the engagement breaches his or her fiduciary duty to the client.
True.
False.

7. The attorney-client privilege for communications between lawyers and their firm's general counsel does not relieve the lawyers from reporting malpractice to the client.
True.
False.

8. A conflict of interest between a criminal defendant and his or her lawyer destroys the effective assistance of counsel.
True.
False.

9. A legal malpractice claim arising out of a 14-year-old settlement is time-barred.
True.
False.

10. A lawyer may have a fiduciary duty under the Probate Code to account for funds in his or her client trust account.
True.
False.

11. A conservator's suit against the estate's lawyers is barred by unclean hands because the former conservator's malfeasance is imputed to the successor.
True.
False.

12. A new conservator can enforce the duties owed to the prior conservator by the former lawyers.
True.
False.

13. There is a split of authority in California whether malicious prosecution claims against a lawyer are governed by a one- or two-year statute of limitations.
True.
False.

14. An attorney's lien on settlement proceeds in a successor lawyer's client trust account is not enforceable until after the lawyer files a separate action against the former clients.
True.
False.

15. The Business and Professions Code requires a written fee agreement with an individual client.
True.
False.

16. Lawyers are not entitled to a multiplier on their billing rate if they do not assume any contingent risk.
True.
False.

17. When a firm dissolves, all lawyers in the firm owe a duty to take steps to avoid prejudice to the clients.
True.
False.

18. A dissolved law firm may recover fees earned on ongoing matters for its former clients by successor firms.
True.
False.

19. It is unethical for a lawyer to imply an ability to improperly influence a judge.
True.
False.

20. Photographs on an attorney's website showing the attorney at social events are not subject to rules governing attorney advertising.
True.
False.

MCLE Answer Sheet #245

2014 ETHICS ROUNDUP

Name ________________________

Law Firm/Organization ________________________

Address ________________________

City ________________________

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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

Wildman Palmer lawyer to seek legal advice from her firm's separately designated in-house general counsel and claims counsel on how to handle Mireskandari and his client matter. The appellate court concluded that the attorney-client privilege can attach to such intrafirm communications even while the firm continued to represent Mireskandari, as long as there was a genuine attorney-client relationship between the inquiring lawyer and general counsel. The court endorsed a four-factor test developed by the Massachusetts Supreme Court: 1) the law firm must have formally or informally designated an in-house or ethics counsel, 2) the in-house lawyer must not have performed any work on the underlying client matter or a substantially related matter, 3) the time spent on in-house communications cannot be billed to the underlying client, and 4) the intrafirm communications must have been kept confidential.[24]

The court in *Edwards Wildman Palmer* rejected two federal cases holding that a conflict of interest would preclude a lawyer from forming a lawyer-client relationship with the lawyer's own firm with respect to an open client matter.[25] Under the plain language of Evidence Code Sections 950 to 952, the lawyer qualified as a client and the firm's general counsel and claims counsel qualified as "lawyers" for purposes of the privilege. The law firm's fiduciary and ethical duties to Mireskandari did not trump the privilege. Nor could Mireskandari imply a fiduciary or current-client exception to the privilege protecting the intrafirm communications.[26] Courts have no power to limit the state's statutory privilege by recognizing implied exceptions.

As the court noted, the existence of the privilege does not undercut the law firm's and lawyer's duty to keep a current client apprised of developments in the client's case. The privilege protects confidential communications between lawyer and client, but it would not excuse, for example, a firm from having to report to a current client the fact that the firm had committed malpractice.[27] Such a reporting duty would arise under a lawyer's ethical obligation to keep a client reasonably informed about significant developments in the client's matter.[28]

Conflict of Interest

A client is entitled to representation by counsel free of conflicts of interest no less in criminal proceedings than in civil cases. The existence of an actual conflict destroyed the effective assistance of counsel in *Harris v. Superior Court*.[29] Following a preliminary hearing at which Melvin Harris Jr. was defended by lawyer Gustavo Diaz, an information was filed against Harris, charging him with felony possession for sale of a controlled substance. Unbeknown to Harris and the superior court at the time of the preliminary hearing, attorney Diaz had himself been arrested and was facing felony charges by the same office that was prosecuting Harris. Moreover, the same deputy who had arrested Harris and was the sole prosecution witness at his hearing had also arrested Diaz and was a potential witness against the lawyer. Harris learned this from the deputy, three months later in jail. After his motion to set aside the information resulting from the flawed hearing was denied, he petitioned the court of appeal. The appellate court described the lawyer's conflict: "As a criminal defendant, Diaz had an interest in maintaining a cordial and cooperative (if not subservient) relationship with the district attorney's office.… [But] Diaz's duties with respect to charges simultaneously facing Harris almost certainly called for a different—perhaps somewhat less conciliatory and more adversarial—relationship with the prosecutor's office, were it not for his own contrary self-interest."[30] Declining to remand for a new preliminary hearing, the court issued a writ, directing the lower court to dismiss the information.[31]

The rule's requirements apply to all lawyers of the dissolved firm and with respect to all clients of the firm, regardless of the lawyer's status within the firm and regardless of the lawyer's personal connection to any specific client.

Malpractice

Neither the passage of more than a dozen years nor the absence of an attorney-client relationship was sufficient to defeat claims in two malpractice cases. In *Prakashpalan v. Engstrom, Lipscomb and Lack*,[32] clients Muruganandan and Navamalar Prakashpalan sued the Engstrom law firm for malpractice and fraud in 2011 in connection with the settlement in 1997 of their bad faith and property damage claim against insurer State Farm, arising out of the Northridge earthquake. The Engstrom firm had obtained more than $100 million for 93 insureds, including the plaintiffs, who received $500,000 after the lawyers deducted their one-third fee. After conducting discovery and comparing notes with other Engstrom clients, the plaintiffs contended that $22 million of the settlement was unaccounted for. The superior court sustained the lawyers' demurrer to the amended complaint without leave to amend, holding that the claims were barred under *Solin v. O'Melveny & Myers*[33] because the suit was incapable of complete resolution without breaching the attorney-client privilege of other Engstrom clients.

The appellate court reversed, holding that disclosure of aggregate settlement information did not require disclosure of confidential client information or implicate *Solin*.[34] Instead, it focused on the statutes of limitation. The plaintiffs' professional negligence and breach of fiduciary duty claims were barred by Code of Civil Procedure Section 340.6, which requires actions against an attorney for a wrongful act or omission, other than fraud, arising in the performance of professional services" to be filed within one year after actual or constructive discovery or four years after occurrence, whichever occurs first.[35] However, noting that Section 340.6 does not apply to fraud, the court concluded that the plaintiffs' fraud claims based on the theory Engstrom had not properly distributed the aggregate settlement proceeds from its client trust account were not time-barred. In a novel approach, it relied on Probate Code Section 16460, which applies to a fiduciary's duty to provide an accounting to a beneficiary; Rule of Professional Conduct 4-100(B)(3), which requires a lawyer to account for funds in the client trust account; and Rule 3-310(D), which requires informed written consent from each client before entering into an aggregate settlement.[36] The limitations period in Section 16460 is three years, the same as the general fraud statute, Code of Civil Procedure Section 338(d), but discovery is triggered by the receipt of an accounting or if no accounting is supplied, by facts sufficient to put the plaintiff on notice of wrongdoing. Engstrom's accounting in 1997 was incomplete, the court held, because it did not provide plaintiffs with sufficient information to evaluate whether all monies had been distributed and whether they had received all they were entitled to receive. The plaintiffs' discovery of facts from other Engstrom clients 14 years later made their complaint timely.[37]

In *Stine v. Dell'Osso*,[38] a conservator sued the attorneys for the prior conservator who was removed after misappropriating more than $1 million from the estate of his mother while they represented him. In a pretzel argument enthralling to lawyers, the defendants argued that the new conservator had all of the burden and none of the benefit: Since they had no attorney-client relationship with the new conservator, she could not sue them for malpractice, and since the malfeasance of their client, the former conservator, was imputed to the new conservator, her claim was barred under the doctrine of unclean hands. The court of appeal disagreed, holding that under the successor fiduciary exception, the new conservator succeeds to the duties owed by the prior lawyer. Citing the Probate Code and *Borissoff v. Taylor & Faust*,[39] the court concluded that the successor fiduciary had standing to sue her predecessor's attorneys.[40] Unclean hands did not apply because the former conservator's wrongdoing was outside the scope of his fiduciary authority. The new conservator does not step into the morass created by his personal malfeasance, the court held. "[W]hy would any competent individual agree to take over as a successor fiduciary if he or she was tarred with and shackled by the malfeasance of a prior fiduciary?"[41]

Malicious Prosecution

In *Roger Cleveland Golf Company, Inc. v. Krane & Smith APC*, Division Three of the Second District addressed the applicable statute of limitations when an attorney is sued for malicious prosecution.[42] As noted above, Code of Civil Procedure Section 340.6 sets a one-year limitation following actual or imputed discovery for "[a]n action against an attorney for a wrongful act or omission, other than actual fraud, arising in the performance of professional services." Section 335.1 sets a two-year limitation for "[a]n action for assault, battery, or injury to…an individual caused by the wrongful act or neglect of another." In *Roger Cleveland*, Division Three concluded that Section 335.1 applies. In so holding, the court disagreed with decisions recently published by Division Eight of the Second District[43] and the Fourth Appellate District.[44]

In that Section 340.6(a) applies only to claims against lawyers and malicious prosecution claims can be asserted against lawyers and their clients, the court in *Roger Cleveland* was troubled by the concept that different limitations could apply to lawyer-defendants (one year under Section 340.6(a)) and nonlawyer defendants (two years under Section 335.1). The court was also troubled by the fact that Section 340.6(a) does not permit tolling on a claim against a lawyer while the underlying action is on appeal, even though tolling in these circumstances is well established in malicious prosecution cases. Perplexed, the court turned to the legislative history of Sections 340.6(a) and 335.1 and concluded that Section 340.6(a) was intended to apply to claims for professional negligence against a lawyer and not to malicious prosecution claims against a lawyer.[45] Hopefully, the California Supreme Court will resolve the conflict among appellate courts.

Getting Paid

The Los Angeles County and Beverly Hills Bar Associations unsuccessfully sought depublication of an unduly formalistic and impractical decision by the Second District, *Mojtahedi v. Vargas,* which involved the division of a contingent fee between successive counsel.[46] Attorney Michael Mojtahedi entered into a written fee contract to represent two clients in connection with injuries they suffered in an auto accident. The contract allowed his firm to assert a lien against the plaintiffs' claims. After eight months, Mojtahedi was replaced by new counsel, Fernando Vargas. Mojtahedi informed the claims adjustor he had a lien for attorneys' fees on payments to his clients. After the case settled, settlement checks were made payable jointly to the clients, Mojtahedi's firm, and Vargas's firm, and deposited in Vargas's trust account. Mojtahedi claimed $4,407 from the $14,500 settlement. When Vargas offered $2,000, Mojtahedi sued Vargas, the claims adjustor, and the banks that issued and deposited the checks. The clients were not parties to the suit, and there is no suggestion they disputed the fees.

The superior court sustained a demurrer to the complaint on the ground that Mojtahedi did not have an enforceable lien. The court of appeal affirmed, rejecting the written fee contract and lawyer's time log, and holding that the lawyer must file a separate declaratory judgment action against his former clients to establish the reasonable value of his services. "[T]he attorney's lien is only enforceable after the attorney adjudicates the value and validity of the lien in a separate action against his client."[47] The opinion ignored settled authority regarding the duty of counsel holding the check to divide the contingent fee on a quantum meruit basis, in the absence of objection by the clients and without the need to sue them.[48] In this situation, the bar associations argued, it was poor public policy to require the lawyer to file a new lawsuit against his clients.

After steering his client through two divorce actions and a *Marvin* lawsuit, attorney Hillel Chodos negotiated a divorce settlement worth an estimated $26 million and was discharged by the client without payment. In an action for his fees, in *Chodos v. Borman* a jury awarded Chodos $7.8 million by using a multiplier of five to increase his rate to $5,000 per hour.[49] The court of appeal reversed, remanding the case for entry of a reduced judgment based on a $1,000 hourly rate.[50] The court noted that Chodos and his client had an unenforceable oral agreement to pay him an hourly fee but no written agreement, and no agreement for a contingent fee. Since the lawyer had not voluntarily assumed any contingent risk, it was inappropriate to apply a multiplier. Awarding the lawyer a premium on his fees would reward him for his violation of Business and Professions Code Sections 6147 and 6148, which require a written fee agreement, and violate public policy.[51]

Law Firm Dissolution

The last decade has witnessed the dissolution of several venerable law firms, including Dewey & LeBoeuf LLP in 2012, Howrey LLP in 2011, Wolf Block LLP in 2009, Thacher Proffitt & Wood LLP, Thelen LLP and Heller Ehrman LLP in 2008, and Coudert Brothers in 2005. During 2014, the state bar's Standing Committee on Professional Responsibility and Conduct (COPRAC) and District Court Judge Charles R. Breyer issued important and timely opinions addressing some of the ethical and financial issues resulting from a law firm dissolution.

In Formal Opinion 2014-190, COPRAC reminds us that a law firm dissolution does not terminate a lawyer's ethical duties to clients. On the contrary, under Rule of Professional Conduct 3-700, additional obligations are triggered. Rule 3-700(A)(2) precludes a lawyer from withdrawing from an engagement until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. The rule's requirements apply when the lawyer's withdrawal is prompted by the dissolution of the lawyer's law firm. The rule's requirements apply to *all* lawyers of the dissolved firm and with respect to *all* clients of the firm, regardless of the lawyer's status within the firm and regardless of the lawyer's personal connection, or lack of connection, to any specific client. What "reasonable steps" a particular lawyer must undertake depends on the lawyer's prior relationship with a client, the lawyer's ability to act within the firm, and the lawyer's competence to perform any needed services for the client.

Therefore, COPRAC opined that a litigation partner of the dissolving firm, who supervised an engagement analyzing the potential claims of a client, some of which would soon be lost by operation of relevant statutes of limitation, likely breached her ethical obligations by sending an e-mail that merely notified the client that the firm was dissolving, the partner was joining a new firm, the partner would no longer represent the client, and the client should engage new counsel quickly because of the relevant statutes of limitations. The litigation partner should have done more to protect the client from being prejudiced by her withdrawal, such as being sure that the client retained new counsel and the new counsel knew of the impending deadlines, or perhaps even filing a protective complaint. COPRAC opined that a nonlitigation partner with no prior relationship to the client probably satisfied his ethical obligations under 3-700 by participating in the firm's creation of a dissolution committee responsible for protecting against the abandonment of the dissolving firm's clients, unless the partner had reason to believe the dissolution committee was not doing its job. Finally, COPRAC opined that an associate, who had worked on the client's matter, normally would satisfy her ethical obligations by voicing her concerns to her supervising partner, unless the associate had reason to believe that the partner would not convey those concerns to the client.

In *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP*, [52] District Judge Charles R. Breyer concluded on summary judgment that the trustee of the bankruptcy estate of dissolved law firm Heller Ehrman LLP could not pursue claims for the profits earned by law firms that Heller's former clients retained to work on hourly fee matters begun at Heller. In doing so, he distinguished and questioned the continuing validity of the unfinished business rule first articulated in *Jewel v. Boxer*.[53] The dissolution in *Jewel* was voluntary and involved four partners who created two new law firms. Heller's dissolution, on the other hand, was forced and involved hundreds of lawyers, many of whom joined existing law firms. Judge Breyer questioned the continuing validity of *Jewel*, decided in 1984, in light of material revisions in the Revised Uniform Partnership Act (RUPA) effective in 1999.[54] Under the old act, partners breached their fiduciary duties by taking action with respect to unfinished partnership business for personal gain. Under RUPA, a partner became free to compete with the partnership immediately upon an event of dissolution. Thus, former Heller shareholders who signed new retainer agreements with former Heller clients did not violate any fiduciary duty.[55] Judge Breyer also reasoned that third-party firms should not be punished for hiring former partners of dissolved firms and clients should be able to retain lawyers from a dissolved firm who are familiar with their matters. "A law firm—and its attorneys—do not own the matters on which they perform their legal services. Their clients do. A client, for whatever reason, may summarily discharge counsel and hire someone else. At that point, the client only owes fees for services performed to the date of discharge, and his former lawyer must, even if fees are in dispute, cease working on the matter and immediately cooperate in the transfer of files to new counsel."[56]

Advertising

Two California lawyers succumbed to the modern mania for self-promotion with disastrous results. In *In re Edward R. Reines*, a prominent practitioner before the Federal Circuit Court of Appeals and chair of its advisory council was publicly reprimanded for conduct unbecoming a member of the bar under Federal Rule of Appellate Procedure 46(b)(1)(B).[57] After Reines argued two appeals before the Federal Circuit in March 2014, he received an effusive e-mail from Chief Judge Randall R. Rader reporting an internal court conversation with fellow judges who had praised his performance. After extolling Reines's talents, the chief judge concluded: "In sum, I was really proud to be your friend today! You bring great credit on yourself and all associated with you! And actually I not only do not mind, but encourage you to let others see this message. Your friend for life, rrr."[58] It was an invitation Reines should have declined. However, his judgment no doubt clouded by praise and the rare spectacle of a judge flattering a lawyer, Reines promptly circulated the e-mail to 35 existing and prospective clients with a solicitation for business. In response to the Federal Circuit's order to show cause why he should not be disciplined, Reines minimized his friendship with the judge and argued discipline would violate his First Amendment freedom of speech. Sitting en banc, the court stated that it is misconduct under ABA Model Rule 8.4(e) for a lawyer to state or imply an ability to improperly influence a government agency or official, and concluded, "It would blink reality not to view respondent's action as suggesting his retention because his special relationship would help secure a favorable outcome at the Federal Circuit."[59] The Supreme Court had upheld limits on attorneys' commercial speech in *Ohralik v. Ohio State Bar Association*[60] and *Florida Bar v. Went for It, Inc.*,[61] to protect the integrity of the legal profession and the public from misleading speech.[62] Reines was publicly reprimanded, and Judge Rader resigned as chief judge and retired from the court.[63]

Attorney Svitlana Sangary was a proud immigrant to America whose entrepreneurial spirit traded on her adoptive country's fascination with self-invention and celebrity culture. Sangary solicited clients through her firm's website featuring photos in which she posed with famous celebrities and political figures, including Barack Obama, Bill and Hillary Clinton, Arnold Schwarzenegger, George Clooney, Paris Hilton, and many others. Unfortunately, the photos were created by taking original celebrity photos and overlaying the lawyer's image to create the false appearance that she was in the presence of the celebrity. In a disciplinary action, *In the Matter of Svitlana E. Sangary*,[64] the State Bar Court judge found that the doctored images on Sangary's website violated Rule of Professional Conduct 1-400(D)(2), which prohibits attorney advertising that is false, deceptive, or tends to confuse, deceive or mislead the public.[65] It also found that Sangary had failed to cooperate with the disciplinary investigation, noting that she refused to participate or answer questions, skipped conferences, and filed lengthy documents asserting her personification of the American dream that the court characterized as bizarre soliloquies having "little to no rational connection to the charges." Though the State Bar had originally contacted Sangary about the fake photos in December 2012, they remained on her website throughout the disciplinary hearing in July 2014. Expressing "grave concerns" about her lack of insight and contemptuous conduct, the judge recommended suspension for six months.[66] ■

1 California Supreme Court docket, No. S206125 (Rules of Professional Conduct), 09/19/2014; Press Release, California State Bar, State Bar Announces Formation of Rules Revision Commission (Jan. 30, 2015).

2 *State Bar Fires Its Executive Director*, The Recorder, Nov. 13, 2014; *Fired director misled State Bar, report says*, L.A. Daily J., Nov. 21, 2014; Dunn v. State Bar of Cal., L. A. Super. Ct. No. BC563715.

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14 *Id.* at 1109 (internal quotation omitted).

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[21] Glenn Greenwald, No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State (2014).
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[31] *Id.* at 1149.
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[33] Solin v. O'Melveny & Myers, 89 Cal. App. 4th 451 (2001); *see also* Dietz v. Meisenheimer Herron, 177 Cal. App. 4th 771 (2009).
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[48] *See, e.g.*, Guzzetta v. State Bar, 43 Cal. 3d 962 (1987); Cal. Rules of Prof'l Conduct R. 4-100; Cal. State Bar Committee on Mandatory Fee Arbitration, Arbitration Advisory 1997-03.
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[53] Jewel v. Boxer, 156 Cal. App. 3d 171 (1984).
[54] *See* Corp. Code §§16100 *et seq.*
[55] Heller Ehrman LLP, 2014 WL 2609743, at *4.
[56] *Id.* at *1.
[57] In re Edward R. Reines, 771 F. 3d 1326 (Fed. Cir. 2014).
[58] *Id.* at 1328 n. 1.
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[61] Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995).
[62] Reines, 771 F. 3d at 1332-33.
[63] *Judge Rader, Author of Controversial Email to Lawyer, to Resign from Bench*, Wall Street J., June 13, 2014.
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[66] *Id.* at 15.