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by John W. Amberg and Jon L. Rewinski

ETHICS ROUNDUP

In a year marked by political upheaval at the State Bar, attorneys faced ethical challenges in the areas of disqualification, attorney-client privilege, technology, statutes of limitation, and malpractice

THE YEAR 2015 witnessed a new State Bar leader, continuing state court budget woes, and the death of one of the pillars of the legal ethics bar in California. Elizabeth Rindskopf Parker took over as the State Bar's new executive director and chief executive officer as it battled claims for wrongful termination by former director Joseph L. Dunn, defamation by former State Bar president Luis J. Rodriguez, and retaliation by dismissed managing director of investigations John Noonan.¹ No stranger to bureaucratic infighting as former general counsel of the Central Intelligence Agency and the National Security Agency, and as the former dean of McGeorge School of Law, Parker backed controversial chief trial counsel Jayne Kim for a second term, even after Kim received a no-confidence vote by the bar's employees' union.²

California courts struggled with funding at just 1.4 percent of the state's general fund budget. Governor Jerry Brown vetoed the first judicial funding bill to pass both legislative houses since 2007.³ State Auditor Elaine M. Howle issued a blistering report criticizing the Judicial Council of California and the Administrative Office

of the Courts for excessive compensation and wasteful expenditures that she suggested might have been redirected to the trial courts.⁴

The California Supreme Court granted posthumous State Bar admission to Hong Yen Chang, a native of China, 125 years after the court had denied his original motion for admission.⁵ Chang graduated from Columbia Law School and was admitted to practice in New York but was denied a California license in 1890 because he was held ineligible for citizenship, then a requirement for admission, under the xenophobic and later-repealed Chinese Exclusion Act.⁶ Chang's exclusion was a grievous wrong that, among other things, denied California Chang's services as a lawyer. "But we need not be denied his example for a more inclusive legal profession."⁷

California lawyers mourned Paul Vapnek, who died on February 28, 2015, aged 86. An author of the Rutter Guide treatise on professional responsibility, Vapnek was a tireless legal ethics mentor and recipient of the Harry B. Sondheim Professional Responsibility Award. Rules Revision Commission colleague Mark Tuft spoke for many: "It is every lawyer's aspiration to have a colleague and

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friend during his career as first rate as Paul Vapnek.”⁸

Conflict of Interests and Law Firm Disqualification

Generally, standing to disqualify a law firm for a conflict of interest is limited to a current or former client.⁹ In a matter of first impression, and based on the unusual facts of the case, the Fourth District Court of Appeal concluded in *Acacia Patent Acquisition, LLC v. Superior Court*¹⁰ that defendant SM Graphics could disqualify the plaintiff’s law firm, AlvaradoSmith, because AlvaradoSmith had represented another adversary of SM Graphics in substantially related prior litigation. SM Graphics obtained a \$45 million settlement in patent litigation. AlvaradoSmith represented SM Graphics’s former lawyers in a subsequent fee dispute. After AlvaradoSmith settled the lawyers’ claim, an expert consultant from the same patent litigation retained AlvaradoSmith to sue SM Graphics over his fee. With evidence demonstrating that AlvaradoSmith, through its representation of SM Graphics’s prior lawyers, had had access to thousands of privileged documents, SM Graphics promptly moved to disqualify AlvaradoSmith. The trial court denied the motion, in part, because AlvaradoSmith had complied with protective orders by returning or destroying the privileged documents after settlement of the lawyers’ fee dispute. The court of appeal, concluding that the trial court had abused its discretion, issued a preemptory writ instructing the trial court to grant disqualification. A disqualifying conflict can arise with regard to an adverse nonclient if 1) the first representation resulted in a broad disclosure of the nonclient’s privileged information and 2) a substantial relationship exists between the two matters.¹¹

In *Castaneda v. Superior Court*,¹² the appellate court issued a preemptory writ instructing the trial court to grant the plaintiff’s motion to disqualify the defendant’s law firm because of a conflict of interest. A former employee sued his former employer for wrongful termination and discrimination. The parties participated in a court-ordered settlement conference before a judicial officer and two volunteer attorneys, including Elsa Bañuelos. The case did not settle. Not long thereafter, the defendant retained Bañuelos’s firm as new counsel. The law firm imposed an ethical screen around Bañuelos. Confronted with conflicting evidence over whether confidential information had been conveyed to Bañuelos during the settlement conference, the trial court denied the plaintiff’s motion to disqualify Bañuelos’s law firm. The Second District Court of Appeal reversed. Once it has been shown that ex parte communications have occurred with the settlement officer, it

is conclusively presumed that confidential information has been exchanged.¹³ “No amount of assurances or screening procedures, no ‘cone of silence,’ could ever convince the opposing party that the confidences would not be used to its disadvantage.”¹⁴

Attorney-Client Privilege

In a case of first impression, the Second District Court of Appeal in *Anten v. Superior Court*¹⁵ considered the viability of the attorney-client privilege when one joint client sues the lawyer for malpractice. Lewis Anten and Arnold and Lillian Rubin jointly retained the firm of Weintraub Tobin Chediak Coleman Grodin to advise them regarding incorrect tax advice from their former lawyers. The Rubins decided to sue the former attorneys, but Anten wanted to settle, so Weintraub fired him as a client and represented the Rubins in their suit against the tax lawyers. Anten sued both the tax lawyers and Weintraub for malpractice. During discovery, Anten sought information from Weintraub, but the firm asserted the attorney-client privilege, and the Rubins declined to waive. Normally, the privilege belongs to both clients, and one joint client cannot waive the attorney-client privilege for another joint client.¹⁶ The superior court denied Anten’s motion to compel, but the appellate court granted a writ, holding that in an action based on breach of a duty arising from the attorney-client relationship, relevant communications between the attorney and any of the joint clients were not privileged.¹⁷ The case fell squarely within Section 958 of the Evidence Code, which provides: “[T]here is no privilege...as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the attorney-client relationship.” Because Anten and the Rubins were joint clients, the Rubins’ communications with Weintraub were not confidential, and therefore, not privileged as to Anten.¹⁸ Furthermore, the court held, “fundamental fairness” compelled production because the risk of collusion between the attorney and the nonsuing clients would be substantial, especially if the attorney were being sued for favoring the interests of the nonsuing clients over the suing client.¹⁹

After the Catalina Island Yacht Club kicked Timothy Beatty off its board and suspended his membership, he sued and sought production of documents in *Catalina Island Yacht Club v. Superior Court*.²⁰ The club listed 167 e-mails on a privilege log, and Beatty moved to compel, arguing the privilege had been waived because the log lacked sufficient information to enable him to evaluate the privilege objections. The superior court granted the motion, but the Fourth District Court of Appeal vacated the order. Serving an inadequate privilege log does not waive

the privilege. The court can order the party to serve a supplemental log that identifies the factual basis for the privilege claim, and if the supplemental log is still inadequate, can impose evidence, issue, and even terminating sanctions, but it may not impose a waiver of the privilege or work product doctrine.²¹

Unauthorized Practice of Law

No person may recover compensation for practicing law in California unless the person is a member of the State Bar or admitted pro hac vice or the legal services fall into an exception.²² Applying these principles, the Fourth District Court of Appeal concluded in *Golba v. Dick’s Sporting Goods, Inc.*,²³ that the trial court properly awarded only \$11,000 in attorney’s fees and costs out of the \$210,000 sought by the plaintiff’s counsel following the settlement of a class action alleging that—in violation of the Song-Beverly Credit Card Act of 1971, Sections 1747 et seq. of the Civil Code—Dick’s Sporting Goods requested inappropriate personal information from consumers during credit card transactions. The fee request included substantial fees incurred by two members of the Illinois Bar who were not admitted pro hac vice even though their firm was intended to serve as the plaintiff’s lead counsel. Local California counsel, who signed the complaints, had submitted a pro hac vice application for the senior Illinois attorney that was denied for failure to pay the administrative fee. By the time the Illinois attorney discovered this and submitted a renewed application, he had submitted pro hac vice applications in 12 other California matters, which the trial court cited as a basis for denying his renewed application. The fee motion itself established that the two Illinois attorneys had engaged in the unlicensed practice of law in California. Therefore, the attorney’s fee provision in the settlement agreement was illegal and void as to any fees sought for services provided by the two Illinois attorneys.

Malpractice

Once again, a court rejected an attempt to use communications between a client and his lawyers during a mediation as a basis for a malpractice claim. In *Amis v. Greenberg Traurig LLP*,²⁴ John Amis, a shareholder in Pacific Marketing Works, Inc., was forced into bankruptcy when Pacific was unable to fund a settlement for which he and the company were obligated. He sued his lawyers for malpractice, alleging they caused him to sign the settlement agreement without advising him of the personal risks. During his deposition, he admitted that all discussions regarding the settlement occurred during a mediation. Under Section 1119 of the Evidence Code, all communications in a mediation are confidential. They may not be used

MCLE Test No. 256

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1. Generally, standing to disqualify a lawyer for a conflict of interest is limited to a current or former client.
True.
False.
2. A conflict can arise with respect to a nonclient if a prior representation resulted in the disclosure of the nonclient's privileged information, and there is a substantial relationship between the two matters.
True.
False.
3. A settlement officer in an unsuccessful settlement conference can later represent one of the parties if an ethical screen is created.
True.
False.
4. In a joint representation, the privilege belongs to both clients, and one cannot waive the privilege for the other.
True.
False.
5. In an action based on breach of a duty arising from the attorney-client relationship, one joint client can prevent the other client from using privileged communications against the lawyer.
True.
False.
6. Serving an inadequate privilege log waives the privilege.
True.
False.
7. No person can practice law in California unless he or she is a member of the California Bar, is admitted pro hac vice, or falls within an exception.
True.
False.
8. Submitting a pro hac vice application for approval is sufficient to practice law in California.
True.
False.
9. Evidence of communications during a mediation cannot be introduced in evidence, whether directly or by inference.
True.
False.
10. Before suing a lawyer and the lawyer's client for conspiracy, a plaintiff must obtain an order determining that there is a reasonable probability of prevailing.
True.
False.
11. Section 340.6 of the Code of Civil Procedure bars all stale claims against an attorney, whether or not they arise from a breach of his or her professional obligations.
True.
False.
12. The statute of limitations for a claim against an attorney is not tolled if the client possesses sufficient facts to give rise to a duty of inquiry.
True.
False.
13. A client can rely on his lawyer to discharge the duty of inquiry.
True.
False.
14. To avoid the anti-SLAPP statute, the acts complained of must be criminal, not merely violations of a statute.
True.
False.
15. If the acts complained of are protected by the litigation privilege, a plaintiff cannot show a probability of prevailing.
True.
False.
16. A line of California authority holds that the anti-SLAPP statute does not apply to legal malpractice actions brought by a former client.
True.
False.
17. The anti-SLAPP statute does not contain an exception for legal malpractice actions.
True.
False.
18. California's Rules of Professional Conduct require a lawyer to allow a client with diminished capacity to make fundamental decisions regarding the engagement.
True.
False.
19. An attorney lacking the technical knowledge and ability for a particular matter must decline the representation.
True.
False.
20. When withdrawing from an engagement, a lawyer may reveal client secrets in camera or under seal.
True.
False.

MCLE Answer Sheet #256



2015 ETHICS ROUNDUP

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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

to prove a legal malpractice claim.²⁵ The Second District affirmed summary judgment for defendants. Amis argued that the lawyers' advice could be inferred from the fact that he signed the agreement after consulting with them, even though direct evidence of their advice would be inadmissible. The court reasoned that such an inference would allow Amis to accomplish indirectly what the statutes prohibited him from doing directly. This would turn mediation confidentiality into a sword by which Amis could claim he received negligent legal advice while precluding the lawyers from rebutting the inference by explaining the advice actually given.²⁶

Conspiracy

The gate-keeping function of the Code of Civil Procedure's Section 1714.10 for conspiracy claims against lawyers was invoked in *Klotz v. Milbank, Tweed, Hadley & McCloy*.²⁷ Plaintiffs Adam Klotz, Richard Spitz, and SageMill LLC sued Milbank, Tweed and partner Deborah Festa for malpractice, breach of fiduciary duty, and conspiracy after Stephen Bruce withdrew from SageMill and, allegedly with Festa's advice, usurped a corporate opportunity. Festa represented Bruce initially and then allegedly began representing SageMill, Klotz, and Spitz without an engagement agreement or conflict letter. Festa denied being counsel to SageMill.²⁸

Milbank and Festa demurred, arguing that Section 1714.10 prohibits a cause of action against an attorney for civil conspiracy with her client arising from an attempt to contest or compromise a claim or dispute unless the court enters an order allowing the pleading and determining "that there is a reasonable probability that the party will prevail in the action." The superior court overruled the demurrer, and defendants took a direct appeal under Section 1714.10(d). The Second District Court of Appeal reversed, holding that the conspiracy claim arose from legal services in connection with the settlement of a claim or dispute—namely, Bruce's withdrawal from the partnership and request for advice on a new business opportunity, which conflicted with SageMill's interests.²⁹ The plaintiffs' failure to obtain a court order was fatal to their conspiracy claim.

Statutes of Limitation

Nancy F. Lee retained William B. Hanley to represent her in litigation and advanced \$110,000 to cover his fees. When the case settled, she demanded refund of \$46,000 in unearned fees, but he refused. More than one year later, she sued in *Lee v. Hanley*.³⁰ Hanley demurred on the ground that her lawsuit was time-barred under Code of Civil Procedure Section 340.6, which provides: "An action against an attorney for a wrongful act or omis-

sion, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission." The superior court sustained the demurrer, but the court of appeal reversed, and the California Supreme Court affirmed by a 5-2 vote. After lengthy consideration of the legislative history, the majority concluded that while Section 340.6 applies to claims other than professional negligence, "section 340.6(a) does not bar a claim for wrongdoing—for example, garden-variety theft—that does not require proof that the attorney has violated a professional obligation, even if the theft occurs while the attorney and the victim are discussing the victim's legal affairs."³¹ Since Lee's complaint could be construed to allege that Hanley was liable for conversion for refusing to return an identifiable sum of Lee's money, one of her claims did not depend on proof that Hanley violated a professional obligation, and the suit was not barred by Section 340.6.³²

In 2014, in *Prakashpalan v. Engstrom, Lipscomb and Lack*,³³ the Second District held that a suit for malpractice and fraud arising out of a settlement 17 years earlier was not time-barred because the clients lacked knowledge of wrongdoing. In 2015, in *Britton v. Girardi*,³⁴ a copycat suit arising out of the same settlement and against many of the same lawyers, the same court reached the opposite conclusion. Like the *Prakashpalan* plaintiffs, the plaintiffs in *Britton* were represented by the defendant lawyers in an action against State Farm arising out of the 1994 Northridge earthquake. That suit settled for \$100 million, and the plaintiffs were paid in 1997. The plaintiffs claimed that they did not discover until 2012 that the defendants had allegedly misappropriated settlement funds.

The court disagreed, pointing to numerous facts in *Britton* establishing inquiry notice and triggering the running of statutes of limitation. For example, a 1997 letter informed the settling plaintiffs that a retired judge had made the allocation determinations. In addition, the attorneys could not distribute the settlement until the plaintiffs signed a signature page to be appended to a master settlement agreement, and that that by signing, the plaintiffs agreed to the settlement terms and would no longer have any claims against State Farm. Moreover, the signature page indicated that the settlement was confidential.³⁵ The court took judicial notice of the fact that two retired judges had been appointed to act as special masters to preside over the settlement, including the allocation of funds.³⁶ Unlike *Prakashpalan*, the appellate court concluded, sufficient facts were available to the *Britton* plaintiffs to trigger their inquiry

duty. Although they signed the signature page and dismissed their claims against State Farm, they knew they did not have the master settlement agreement, the master release, or the confidentiality agreement. They did not inquire about the special masters or the allocation. Reliance on one's lawyer does not discharge the duty of inquiry. Plaintiffs could have inquired in 1997, so the statutes ran, and their 2012 complaint was untimely.³⁷

Anti-SLAPP

Use of Code of Civil Procedure Section 425.16, the anti-SLAPP statute, to fend off claims against lawyers produced mixed results. In *Bergstein v. Stroock & Stroock & Lavan*,³⁸ the plaintiffs sued the lawyers for their litigation adversaries, alleging that the defendants had used privileged information from Bergstein's former general counsel and had aided and abetted her breach of fiduciary duty. The defendants moved to strike the complaint under the anti-SLAPP statute on the grounds that litigation is protected conduct and that the plaintiffs' complaint was barred by statutes of limitation and the litigation privilege. The plaintiffs contended the theft of confidential and privileged documents was nonlitigation conduct and illegal, and therefore, not protected by the statute. The superior court granted the motion to strike and awarded \$150,000 in attorney's fees. The Second District affirmed. To avoid the anti-SLAPP statute, the acts must be criminal, not merely violative of a statute.³⁹ The focus of the anti-SLAPP statute is whether the defendants' activity constituted protected petitioning, and the court concluded that most of the alleged wrongdoing in the complaint was litigation activity.⁴⁰ The plaintiffs could not show a probability of prevailing because their complaint was subject to the litigation privilege under Civil Code Section 47(b) and the one-year statute of limitations for claims against attorneys (Code of Civil Procedure Section 340.6), which began to run when Bergstein executed a declaration stating that he suspected his former counsel was behind the defendants' litigation, which was two years before he sued.⁴¹

An allegedly stolen hard drive in the hands of opposing parties led to a separate lawsuit against their lawyers and an anti-SLAPP motion in *Finton Construction, Inc. v. Bidna & Keys, APLC*.⁴² After one of the owners of Finton Construction left the company and sued for an accounting, Finton cross-complained for misappropriation of proprietary information, charging that computer files had been downloaded to a hard drive and demanding its return. A stipulated order ultimately directed Finton's computer expert to make copies of the hard drive for the lawyers for both sides and stated that the data could be used for purposes of the litigation. Not

content, Finton filed a new lawsuit against the lawyers, a theft report with the Costa Mesa Police Department, and a complaint with the State Bar. Finton also moved unsuccessfully to disqualify the lawyers. The superior court granted the lawyers' anti-SLAPP motion to strike the complaint on the grounds that their actions were subject to the litigation privilege, and the Fourth District affirmed. The appellate court noted: "No attorney can litigate a trade secret case without examining the disputed materials to determine if they contain trade secrets or even contain the relevant data at all."⁴³ It excoriated the plaintiffs and their counsel for "scorched earth tactics" and stated: "[Plaintiff's] overreach does not suggest zealotry or righteousness, but a calculated effort to undermine the parties in the underlying case by turning their attorneys into fellow defendants.... The type of uncivil behavior and specious tactics demonstrated by filing this case represents conduct that brings disrepute to the entire legal profession and amounts to toying with the courts."⁴⁴

In *Sprengel v. Zbylut*,⁴⁵ Jean E. Sprengel, a 50-percent owner of Purposeful Press LLC, sued lawyers for the company for malpractice, claiming that she had an implied attorney-client relationship with them, based on her status as an owner. The defendants had been retained by the other 50-percent owner, Lanette Mohr, to defend Purposeful and Mohr in previous litigation by Sprengel. Sprengel's malpractice suit alleged that the lawyers breached a duty to her and included claims for professional negligence, breach of fiduciary duty, constructive fraud, and money had and received. The superior court denied the defendants' anti-SLAPP motion on the ground they failed to establish that Sprengel's claims arose from protected activity, and the Second District affirmed. Citing a long line of authority, the majority held that the anti-SLAPP statute does not apply when a legal malpractice action is brought by an attorney's former client claiming a breach of fiduciary obligations to the client. Although Sprengel's claims may have been triggered by the defendants' litigation activities, they did not arise out of those acts.⁴⁶ In a dissent, Presiding Justice Dennis Perluss noted that the plain language of the anti-SLAPP statute makes no exception for malpractice claims.⁴⁷

Representing a Client Who May Have Diminished Capacity

Representing an individual with diminished capacity presents unique challenges. The California Rules of Professional Conduct include no rule specifically addressing this issue. ABA Model Rule 1.14 directs a lawyer representing such a client to maintain, as far as reasonably possible, a normal client-lawyer relationship. This means allowing the client to make fundamental decisions pertaining to the engagement.

The year 2015 produced three noteworthy opinions on whether counsel for a client who may have diminished capacity is authorized to waive the client's right to a jury trial in a proceeding relating to the client's cognitive capacity. In *People v. Blackburn*⁴⁸ and *People v. Tran*,⁴⁹ the California Supreme Court concluded that the statutory schemes for extending the involuntary commitment of a mentally disordered offender beyond termination of parole and of a defendant who pled not guilty by reason of insanity, respectively, required the trial court to advise the defendant of his or her statutory right to a jury trial. Before holding a bench trial, the court must obtain a waiver directly from the defendant unless the court finds substantial evidence—that is, evidence sufficient to raise a reasonable doubt—that the defendant lacks the capacity to make a knowing and voluntary waiver, in which case defense counsel controls the waiver decision. In *Conservatorship of the Person and Estate of Kevin A.*,⁵⁰ the Fourth District, applying a similar standard, reversed the trial court's order, following a bench trial, that imposed a Lanterman-Petris-Short conservatorship on an individual diagnosed with schizoaffective disorder. The trial court should not have accepted counsel's jury waiver when the proposed conservatee plainly expressed his wish to have a jury hear the matter: "I—I would like a full jury trial, please, your Honor, for today."⁵¹

Competence and Evolving Technology

According to Clarke's Third Law, any sufficiently advanced technology is indistinguishable from magic.⁵² Because of the ethical duty of competence, an attorney confronted with evolving technologies applicable to discovery of electronically stored information must take reasonable steps to understand and implement the "magic" or potentially be subject to discipline, as the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC) opined in its Formal Opinion 2015-193. "Legal rules and procedures, when placed alongside ever-changing technology, produce professional challenges that attorneys must meet to remain competent. Maintaining learning and skill consistent with an attorney's duty of competence includes keeping abreast of changes in the law and in practice, including the benefits and risks associated with relevant technology."⁵³ An attorney lacking the technical knowledge and ability needed for a particular matter has three alternatives: 1) learn it before you need it, 2) retain technical consultants or cocounsel who know it, or 3) decline the representation.

Bad Acts and Their Consequences

Clients regularly learn that bad acts have consequences. Last year provided some examples

in which lawyers learned a similar lesson. In *Crawford v. JPMorgan Chase Bank*,⁵⁴ a lawyer sued a bank for selling a 29-year annuity to his 79-year old mother. Regardless of the merits of his case, the lawyer crossed the line by making contemptuous statements in court documents (characterizing the judge as a "former D.A., currently masquerading as a Superior Court Judge"), walking out on a deposition, failing to pay discovery sanctions, and pointing pepper spray and a stun gun at opposing counsel during the reconvened deposition ("if you get out of hand"). In affirming the trial court's dismissal of the action as a terminating sanction, Presiding Justice Arthur Gilbert wrote, "Far from the trial court abusing its discretion, it would have been an abuse of discretion not to impose a terminating sanction."⁵⁵

Attorney David Tamman prepared private placement memoranda (PPMs) for offerings of debentures through which his client, NewPoint Financial Services, Inc., raised over \$30 million from investors. When regulators began investigating whether the PPMs contained adequate disclosures and NewPoint's principal was perpetrating a Ponzi scheme, Tamman substantially changed and backdated PPMs that he then provided to the regulators. In *United States v. Tamman*,⁵⁶ the Ninth Circuit affirmed attorney Tamman's conviction for conspiracy to obstruct justice, accessory after the fact to mail fraud and securities laws violations, altering documents to influence a federal investigation, and aiding and abetting his client's principal's false testimony to regulators. Tamman was sentenced to 84 months of imprisonment.

In *Martinez v. State of California, Department of Transportation*,⁵⁷ a motorcyclist sued Caltrans for injuries after he hit a low curb between two parallel road transitions within the Orange Crush freeway interchange. During trial, Caltrans counsel Karen Bilotti repeatedly violated the court's in limine orders during her opening statement, witness examinations, and closing argument. The appellate court granted a new trial based on counsel's deliberate misconduct. Acting Presiding Justice William W. Bedsworth lamented, "That word—egregious—is difficult to write, but nothing else seems adequate."⁵⁸

Withdrawal

Rule of Professional Conduct 3-700 requires an attorney to withdraw from an engagement in certain circumstances (e.g., when the attorney's mental or physical condition so dictates) and permits an attorney to withdraw in other circumstances (e.g., an inability to work with the client or cocounsel). Regardless, an attorney must seek permission from the court or other tribunal if procedural rules require it, and an attorney must take reasonable steps to avoid (continued on page 59)

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reasonably foreseeable prejudice to the client's rights.⁵⁹

In Formal Opinion 2015-192, COPRAC reiterated that a lawyer's duties of loyalty and confidentiality under Rule of Professional Conduct 3-310 and Business and Professions Code Section 6068(e) limit what a lawyer who wishes to withdraw can tell the court. "An attorney may disclose to the court only as much as reasonably necessary to demonstrate her need to withdraw, and ordinarily it will be sufficient to say only words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship."⁶⁰ Revealing client secrets in camera or under seal does not excuse a violation of Rule 3-100 and Section 6068(e). Nor does a court order requiring the attorney to provide a detailed explanation, although such an order may force an attorney to choose between two ethical duties—to preserve the client's secrets or to obey a court order. COPRAC encourages the attorney to act cautiously but "cannot categorically opine which ethical obligation should prevail."⁶¹

In *Cavemen Foods, LLC v. Ann Payne's Caveman Foods, LLC*,⁶² the Eastern District denied Baker & Hostetler's motion to withdraw from representing a defendant in a trademark infringement case even though Baker supported its motion with an attorney declaration that stated that the defendant was no longer an active company and had no office, telephone, e-mail, employees, or forwarding contact information in the United States. The court's own internet search revealed that the defendant had ongoing operations in Canada. Baker had not satisfied its obligations under Rule 3-700, including demonstrating the defendant's understanding that Baker's withdrawal would result in a default judgment's being entered against the corporation unless it retained other counsel. In *Citizens Development Corporation v. County of San Diego*,⁶³ a CERCLA case, the Southern District granted a motion to withdraw by plaintiff's cocounsel Wood, Smith, Henning & Berman LLP because the client's conduct made it unreasonably difficult for Wood Smith to continue. The plaintiff's insurer appointed Wood Smith to represent the plaintiff alongside the plaintiff's retained lead counsel. The plaintiff filed a cross-motion seeking to disqualify Wood Smith for purported ethics violations (including allegedly sharing plaintiff's confidential information with the insurer) that the court emphatically denied. The plaintiff's motion included communications to Wood Smith from the plaintiff's retained counsel reflecting "an adver-

sarial, confrontational tone...which the Court would find uncivil if used when addressing opposing counsel, much less co-counsel."⁶⁴ The cross-motion demonstrated that the plaintiff's conduct had made it unreasonably difficult for Wood Smith to continue to represent the plaintiff, thereby justifying Wood Smith's motion to withdraw.

Getting Paid

An insurer was permitted to seek reimbursement for excessive legal fees directly from its insured's *Cumis* counsel, rather than from the insured, in *Hartford Casualty Insurance Company v. J.R. Marketing, LLC*.⁶⁵ Initially, Hartford refused to defend its insured and was compelled by court order to pay for independent counsel under a reservation of rights. The insurer subsequently contended that the *Cumis* counsel padded its bills by charging excessive fees and sought reimbursement. Because the court order expressly preserved the insurer's right to challenge and recover payments for excessive fees, the California Supreme Court held that Hartford could recoup the overbilled amounts directly from the *Cumis* counsel. On these facts, responsibility for excessive billing should not fall on the clients.⁶⁶

In Los Angeles County Bar Association Opinion 526, LACBA's Professional Responsibility and Ethics Committee opined that a contingency fee lawyer could ethically negotiate a fee agreement that gives the lawyer first proceeds and shifts to the client the risk of nonpayment. Any such risk-shifting requires the client's informed consent, and must be based upon full and fair disclosure of pertinent information known to the lawyer.⁶⁷ ■

¹ *New State Bar CEO is comfortable with crisis*, L.A. DAILY J., Aug. 10, 2015, available at <https://www.dailyjournal.com>.

² *State Bar board votes to support Kim for another term*, L.A. DAILY J., Dec. 22, 2015, available at <https://www.dailyjournal.com>.

³ *Governor vetoes bill to fund judgeships*, L.A. Daily J., Oct. 12, 2015, available at <https://www.dailyjournal.com>.

⁴ *California Auditor Issues Scathing Catalog of Judicial Overspending*, Courthouse News Service, Jan. 7, 2015, available at <http://www.courthousenews.com>.

⁵ *In re Chang*, 60 Cal. 4th 1169 (2015).

⁶ *In re Hong Yen Chang*, 84 Cal. 163 (1890).

⁷ *Id.* at 1175.

⁸ E-mail from M. Tuft to Rules Revision Commission, Mar. 2, 2015 (on file with authors).

⁹ See, e.g., *Coldren v. Hart, King & Coldren, Inc.*, 239 Cal. App. 4th 237, 245 (2015).

¹⁰ *Acacia Patent Acquisition, LLC v. Superior Court*, 234 Cal. App. 4th 1091 (2015).

¹¹ *Id.* at 1104.

¹² *Castaneda v. Superior Court*, 237 Cal. App. 4th 1434 (2015).

¹³ *Id.* at 1452.

¹⁴ *Id.* at 1444 (quoting *Cho v. Superior Court*, 39 Cal. App. 4th 113, 125 (1995)).

¹⁵ *Anten v. Superior Court*, 233 Cal. App. 4th 1254

(2015).

¹⁶ *American Mut. Liab. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579 (1974).

¹⁷ *Id.* at 1257.

¹⁸ *Id.* at 1259-60; *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285 (1995).

¹⁹ *Id.* at 1260.

²⁰ *Catalina Island Yacht Club v. Superior Court*, 242 Cal. App. 4th 1116 (2015).

²¹ *Id.* at 11.

²² See *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 127, 136-37 (1998).

²³ *Golba v. Dick's Sporting Goods, Inc.*, 238 Cal. App. 4th 1251 (2015).

²⁴ *Amis v. Greenberg Traurig*, 235 Cal. App. 4th 331 (2015).

²⁵ *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011).

²⁶ *Id.* at 142.

²⁷ *Klotz v. Milbank, Tweed, Hadley & McCloy*, 238 Cal. App. 4th 1339 (2015).

²⁸ *Id.* at 1345.

²⁹ *Id.* at 1352.

³⁰ *Lee v. Hanley*, 61 Cal. 4th 1225 (2015).

³¹ *Id.* at 1237.

³² *Id.* at 1240.

³³ *Prakashpalan v. Engstrom, Lipscomb and Lack*, 223 Cal. App. 4th 1105 (2014).

³⁴ *Britton v. Girardi*, 235 Cal. App. 4th 721 (2015).

³⁵ *Id.* at 727-28.

³⁶ *Id.* at 729-30.

³⁷ *Id.* at 737.

³⁸ *Bergstein v. Stroock & Stroock & Lavan*, 236 Cal. App. 4th 793 (2015).

³⁹ *Id.* at 806, 809-10.

⁴⁰ *Id.* at 811.

⁴¹ *Id.* at 813, 816-17.

⁴² *Finton Const., Inc. v. Bidna & Keys, APLC*, 238 Cal. App. 4th 200 (2015).

⁴³ *Id.* at 212.

⁴⁴ *Id.* at 204.

⁴⁵ *Sprengel v. Zbylut*, 241 Cal. App. 4th 140 (2015).

⁴⁶ *Id.* at 155-56.

⁴⁷ *Id.* at 162.

⁴⁸ *People v. Blackburn*, 61 Cal. 4th 1113 (2015).

⁴⁹ *People v. Tran*, 61 Cal. 4th 1160 (2015).

⁵⁰ *Conservatorship of the Person and Estate of Kevin A.*, 240 Cal. App. 4th 1241 (2015).

⁵¹ *Id.* at 1251.

⁵² *Arthur C. Clarke, Profiles of the Future: An Enquiry into the Limits of the Possible* 36 (1982).

⁵³ *State Bar Formal Op. 2015-193*, at 3.

⁵⁴ *Crawford v. JPMorgan Chase Bank*, 242 Cal. App. 4th 1265 (2015).

⁵⁵ *Id.* at 1271.

⁵⁶ *United States v. Tamman*, 782 F. 3d 543 (9th Cir. 2015).

⁵⁷ *Martinez v. State of Cal. Dept. of Transp.*, 238 Cal. App. 4th 559 (2015).

⁵⁸ *Id.* at 561.

⁵⁹ CAL. RULES OF PROF'L CONDUCT R. 3-700(A).

⁶⁰ *State Bar Formal Op. 2015-192*, at 1.

⁶¹ *Id.* at 7.

⁶² *Cavemen Foods, LLC v. Ann Payne's Caveman Foods, LLC*, 2015 U.S. Dist. LEXIS 150001 (E.D. Cal. Nov. 4, 2015).

⁶³ *Citizens Dev. Corp. v. County of San Diego*, 2015 WL 9244287 (S.D. Cal. Dec. 17, 2015).

⁶⁴ *Id.* at *5 (emphasis in original).

⁶⁵ *Hartford Cas. Ins. Co. v. J.R. Marketing, LLC*, 61 Cal. 4th 988 (2015).

⁶⁶ *Id.* at 992-93.

⁶⁷ LACBA Op. No. 526: Contingency Lawyer's Right to Negotiate a Fee Agreement that Gives First Proceeds to the Lawyer and Shifts to the Client the Risk of Nonpayment, available at <http://www.lacba.org/resources/tools-documents/ethics-opinions>.