



**by John W. Amberg
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2016

Ethics Roundup

Last year attorneys in the state found relief from malpractice claims under statutes regarding one-year tolling limitations and anti-SLAPP provisions

IN 2016, respect for the rule of law and the civic virtues of duty, honesty, and civility embodied in the California Rules of Professional Conduct never seemed more important. Traveling in Colombia, Los Angeles Superior Court Judge Benny Osorio was rescued from kidnappers demanding a \$33,000 ransom.¹ At home, the State Bar of California was rescued by the California Supreme Court, which assessed bar members to fund the State Bar's disciplinary system after the legislature adjourned without authorizing 2017 dues.² A state audit report found that the state bar's client security fund, which reimburses victims of attorney dishonesty, was underfunded at the beginning of the year by \$16 million and experiencing long delays.³

Attorney-Client Privilege

The California Supreme Court twice addressed the attorney-client privilege of government agencies under the Public Records Act (PRA).⁴ In *Ardon v. City of Los Angeles*,⁵ it held that the city's inadvertent disclosure of documents in response to a PRA request did not waive the protection of the attorney-client privilege and work product doc-

trine. After conclusion of class litigation challenging the validity of certain city taxes, one of the plaintiffs' lawyers served a PRA request. An administrative officer released 53 documents, among them three documents that had been listed on a privilege log during the litigation, and the city moved to recover them. Reversing the lower courts, the Supreme Court held that, like the Evidence Code, the PRA protects attorney-client privileged communications absent an intentional and knowing waiver.

In December, a sharply divided Supreme Court again addressed the attorney-client privilege of a government agency, resulting in a controversial new approach to privilege analysis. In *Los Angeles County Board of Supervisors v. Superior Court*,⁶ the American

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Civil Liberties Union served a PRA request seeking invoices from law firms defending the county in nine lawsuits alleging police brutality. The county produced invoices for three closed cases with attorney-client and work product information redacted, and, citing the attorney-client privilege and work product doctrine, declined to produce invoices for six pending cases. On the ACLU's petition for writ of mandate, the superior court ordered the county to produce redacted invoices for all nine cases. The court of appeal reversed, concluding the invoices were entirely privileged. By a 4-3 vote, the supreme court reversed.

The majority opinion, written by Justice Mariano-Florentino Cuéllar and joined by Justices Ming W. Chin (who wrote the *Ardon* opinion), Goodwin Liu, and Leandra Kruger, declined to follow the seminal modern case on the attorney-client privilege, *Costco Wholesale v. Superior Court*,⁷ which held the privilege attaches to the transmission of information during the attorney-client relationship, and does not depend on the content of the communication. Instead, the majority focused on the content and purpose of the communication and concluded: "In order for a communication to be privileged, it must be made for the purpose of legal consultation, rather than some unrelated or ancillary purpose."⁸ Relying on dictum in *Concepcion v. Amscan Holdings, Inc.*⁹ and federal authority, the court found that lawyers' invoices generally are not privileged, but "the information contained within certain invoices may be within the scope of the privilege. . . [t]o the extent it is conveyed 'for the purpose of legal representation'—perhaps to inform the client of the nature or amount of work occurring in connection with a pending legal issue."¹⁰ The court added, "[T]here may come a point when this very same information no longer communicates anything privileged, because it no longer provides any insight into litigation strategy or legal consultation."¹¹ Therefore, invoices for pending cases may be privileged, but invoices for closed cases were no longer privileged and should be produced.

In a vigorous dissent, Justice Kathryn M. Werdegar, joined by Chief Justice Tani Cantil-Sakauye and Justice Carol Corrigan, criticized the majority's reasoning. Evidence Code Section 952 defines a "confidential communication between a client and lawyer" as "information transmitted between a client and his or her lawyer in the course of the relationship and in confidence . . . and includes a legal opinion and the advice given by the lawyer in the course of the relationship."¹² The word "includes" means privileged communications are not limited to legal opinions and advice. "The majority's decision to add consideration of a communication's purpose

as an additional, nonstatutory element to the Legislature's definition of a 'confidential communication' is unsupported in law."¹³ The dissent criticized the majority's "unconvincing attempt to distinguish" *Costco* and, "even more pernicious. . . its suggestion that the protective scope of the privilege somehow wanes with the termination of the subject litigation."¹⁴

The opinion may be limited by its facts, but its broad language belies such limitation. Focusing on the content of the communication is a new approach to privilege analysis in California and will be particularly challenging for state court judges, who are precluded by Evidence Code Section 915(a) from ordering an in camera inspection of the material claimed to be privileged.¹⁵ How will a court determine whether information is properly redacted? It remains to be seen.

Conflicts of Interests

Courts did not hesitate to enforce the duty of loyalty by disqualifying lawyers with conflicts of interest. Three years into a complex racketeering case against dozens of defendants who allegedly paid kickbacks for referrals, engaged in illegal fee sharing, and submitted fraudulent bills for reimbursement, District Judge Andrew J. Guilford disqualified Hueston Hennigan LLP from representing the plaintiff in *State Compensation Insurance Fund v. Drobot*.¹⁶ Concurrently with the firm's representation of SCIF, its partner Brian Hennigan represented one of the alleged co-conspirators, Paul Randall, who pleaded guilty to mail fraud. Hueston Hennigan had amended SCIF's complaint and filed a second civil suit naming more defendants, but, significantly, did not sue Randall. A defendant moved to disqualify Hueston Hennigan on the ground it represented both the victim, SCIF, and one of the perpetrators of the fraud, Randall. Judge Guilford granted the motion, holding Hueston Hennigan had "an actual adverse, concurrent representation conflict."¹⁷ The movant was not a current or former client, but had standing because the ethical breach was so severe that it obstructed the orderly administration of justice. The court rejected conflict waivers obtained from SCIF and Randall, finding them factually and legally inadequate, and explained: "[T]he duty of loyalty is improperly and impermissibly compromised when one firm represents—at the same time, in the same litigation, in the same courthouse—a criminal and his victim. That's what happened here, and if the Court had allowed it to continue, loyalty would have been lost in ways that the client would not—and could not—understand until after harm had been done."¹⁸

Eighty-five years ago, the California Supreme Court established that an attorney

may not use information acquired during a previous engagement against a former client.¹⁹ Refined in Rule 3-310(E) of the California Rules of Professional Conduct, this principle led to a lawyer's disqualification in *Costello v. Buckley*.²⁰ A woman hired her boyfriend's brother, a lawyer, to represent her in an easement dispute. After the case ended and the couple broke up, the woman sued her ex-boyfriend to collect a \$92,000 debt. When her ex-lawyer appeared as counsel for his brother and served requests for admission demanding she admit the money had been a gift, she disqualified the lawyer because he had obtained confidential information about her romantic relationship during the easement dispute. In vain, the defendant argued there could be no conflict because there was no substantial relationship between the two representations and the information was unnecessary to prove plaintiff's case. The plaintiff did not need to rely on the presumption of Rule 3-310(E) that information is material if there is a substantial relationship between the two engagements because she proved that her former lawyer possessed confidential information about her romantic relationship that could be used against her.²¹ She did not need to show that her ex-lawyer actually used material confidential information, only that he could do so.²²

In *Ontiveros v. Constable*,²³ Ontiveros, a minority shareholder in a closely held company, Omega Electric, Inc., brought direct and derivative claims of mismanagement against the majority shareholder and Omega. He moved to disqualify the counsel jointly representing the defendants because their interests were rendered adverse by the derivative claims. The defendants contended they had waived any conflicts and consented to joint representation, but the trial court ruled disqualification was automatic. The Fourth District Court of Appeal affirmed the disqualification order as to the company's lawyers. Though Omega was nominally a defendant, it was in substance the plaintiff in the derivative suit. Also, under Rule 3-600(E), an organization's consent to dual representation must be given by a constituent other than an individual who also is to be represented, thus the majority shareholder could not consent for Omega.²⁴ However, the appellate court partially reversed the disqualification order, thereby permitting the lawyers to continue to represent the majority shareholder because the only confidential company information they possessed came from him, so the representation posed no threat to their duty of confidentiality to Omega.²⁵

Attorney Discipline

A Woodland Hills attorney, Marilyn S. Scheer, was retained to obtain a modification of her client's mortgage and accepted \$5,500 before

MCLE Test No. 267

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. You may take tests from back issues online at <http://www.lacba.org/mcleseftests>.

1. Release of documents pursuant to a Public Records Act request does not waive the attorney-client privilege, absent an intentional and knowing waiver.
by counsel.
True.
False.
2. For a communication between a lawyer and client to be privileged, it must be made for the purpose of legal consultation.
True.
False.
3. Unless waived, attorney-client privileged information never loses the protection of the privilege.
True.
False.
4. A California court generally cannot conduct an in camera inspection of a document claimed to be privileged.
True.
False.
5. After a lawyer has represented a client in a lawsuit for three years, he cannot be disqualified for a conflict of interest.
True.
False.
6. A lawyer has a duty to use information obtained from a former client to aid a current client, so long as the former engagement is concluded.
True.
False.
7. In a derivative suit against the corporation and its officers, the defendants' interests are aligned for purposes of conflict of interest analysis.
True.
False.
8. Under the Rules of Professional Conduct, an entity's consent to joint representation must be given by a representative who is not also a joint client.
True.
False.
9. The state bar's disciplinary system is unconstitutional because judicial review by the California Supreme Court is discretionary.
True.
False.
10. An attorneys' fee arbitration award in favor of the client is nondischargeable in bankruptcy.
True.
False.
11. An opposing attorney may communicate with a public official, even if the official is represented
12. When a class action establishes a monetary fund for the benefit of class members, an award of attorney's fees can be based on a percentage of the fund.
True.
False.
13. Though it is the prevailing party, a suspended corporation forfeits the right to recover its attorneys' fees.
True.
False.
14. A lawyer's sexist remarks to opposing counsel can result in sanctions by the court.
True.
False.
15. When a lawyer forms a business with a client, an arbitration clause in the operating agreement does not automatically govern a malpractice claim arising out of their attorney-client relationship.
True.
False.
16. Trial of a malpractice claim in federal court does not violate the federal policy favoring arbitration if the claimant could not afford the arbitration.
True.
False.
17. The statute of limitations for legal malpractice is tolled while the attorney continues to represent the client regarding the specific subject matter in which the wrongful act or omission occurred.
True.
False.
18. When a lawyer resigns from an engagement, the attorney-client relationship does not end until he or she returns the client's files.
True.
False.
19. E-mail from a lawyer promising to help an investor recover losses from the lawyer's client constitutes protected petitioning activity under the anti-SLAPP statute.
True.
False.
20. A law firm sued for defamation cannot raise the "fair report" privilege as a defense unless its press release is completely true and accurate.
True.
False.

MCLE Answer Sheet #267



2016 ETHICS ROUNDUP

Name _____

Law Firm/Organization _____

Address _____

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E-mail _____

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State Bar # _____

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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

any modification.²⁶ The client fired her and sought return of his money under California's mandatory fee arbitration program. The arbitrator found Scheer had violated Civil Code Section 2944.7(a) by receiving advanced fees for residential mortgage modification services and ordered her to refund the fees plus the arbitration fee. Scheer made a few payments, and then stopped. The presiding arbitrator brought an action in state bar court, which placed Scheer on involuntary inactive status until she repaid the funds. After unsuccessfully seeking review by the state bar court review department and the California Supreme Court, Scheer sued the state bar in district court, alleging that the attorney discipline system violated her First and Fourteenth Amendment rights. The court dismissed her case, and she appealed. Meanwhile, Scheer also filed for Chapter 7 bankruptcy, naming both the former client and the state bar as creditors.²⁷ After the bankruptcy and district courts ruled against her, she appealed. The result was two Ninth Circuit decisions.

In *Scheer v. Kelly*,²⁸ Scheer argued her rights were violated because she was not provided a meaningful judicial review in the fee dispute with her client and the state bar's disciplinary procedures were unconstitutional. The Ninth Circuit rejected her arguments. The *Rooker-Feldman* doctrine barred Scheer's de facto appeal of the California Supreme Court's denial of her petition for review.²⁹ Her claims, based on the California Constitution, had been rejected by the California Supreme Court in *In re Rose*.³⁰ The First Amendment protects the right of access to courts for bona fide claims, but no case creates a freestanding right to have a state court hear a dispute in the absence of some asserted cause of action. Scheer's due process claim failed because she was afforded notice, a hearing, a written decision, and an opportunity for judicial review. That the supreme court's review is discretionary does not violate due process. California's regulation of lawyers does not violate equal protection because the "historically unique role of lawyers" allows the state to treat them differently from other professions. "California's decision to regulate lawyers principally via a judicially supervised administrative body attached to the State Bar of California, the organization of all state-licensed lawyers, is rational and so constitutional."³¹

Alas, the Ninth Circuit's endorsement of the constitutionality of the disciplinary system did not translate into justice for the client. In her bankruptcy, Scheer demanded reinstatement of her law license on the ground her debt was dischargeable. In *In re Marilyn S. Scheer*,³² the Ninth Circuit considered 11 USC Section 523(a) (7), which states a debt is excepted from discharge "to the extent such debt is for a fine, penalty, or forfeiture

payable to any for the benefit of a governmental unit, and is not compensation for actual pecuniary loss" and concluded Scheer's debt was purely compensatory—a fee arbitration award between the lawyer and her former client. Therefore, the court held "our moral take on Scheer's conduct does not control," and the debt was dischargeable.³³

Communicating with Represented Party

Not often do courts have occasion to analyze Rule 2-210, which precludes a lawyer from communicating directly or indirectly about the subject of the representation with a party the lawyer knows to be represented, but District Court Judge Dean Pregerson did in *United States v. County of Los Angeles*.³⁴ A lawyer representing disabled, mentally ill inmates challenging a proposed settlement between the Department of Justice and the County of Los Angeles over inmate discharge procedures was invited to a social gathering at the home of the director of the Los Angeles County Health Agency. The lawyer disclosed his representation to the host, who started talking about the case and expressed support for the disabled inmates. The lawyer noticed the host's deposition. Denying the county's disqualification motion, Judge Pregerson concluded that the lawyer did not breach Rule 2-100 because the host was a "public officer" within the meaning of Rule 2-100(c)(1). Rule 2-100 does not prohibit a lawyer from communicating with a public officer, even if the officer is represented by counsel.

Getting Paid

How to calculate fee awards for prevailing plaintiffs in class actions has been a source of confusion since the California Supreme Court's 1977 decision in *Serrano v. Priest*,³⁵ which recognized a court's equitable authority to award attorneys' fees under a private attorney general theory. In dicta, *Serrano* remarked that "[t]he starting point in every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case" and "[a]nchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts."³⁶ Some courts thereafter concluded that all attorneys' fees awards in class actions had to be based on a lodestar approach—i.e., hours reasonably spent on a matter multiplied by reasonable hourly rates (the lodestar)—adjusted up or down for quality of work, and complexity of issues, results obtained, and risk, as opposed to a simple percentage of recovery. In 2016, the California Supreme Court addressed the confusion.

In *Laffitte v. Robert Half International Inc.*,³⁷ the court affirmed the trial court's order awarding the plaintiffs' counsel one-third of a \$19 million common fund settlement in three related wage and hour class actions. In a scholarly opinion by Justice Werdegar analyzing 50 years of fee awards in class actions, the court joined the overwhelming majority of federal and state courts in holding that when a class action establishes a monetary fund for the benefit of class members and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.³⁸ The calculation is reasonably easy to perform. Incentives between counsel and the class are aligned. Also, the percentage better accounts for the contingency risk involved, and it may encourage early settlement. One may test the reasonableness of a percentage award by comparing it to a hypothetical lodestar award. If there is no common fund and the counsel for prevailing plaintiffs have a statutory or contractual right to recover fees from the defendant, the court must still use the lodestar approach.³⁹ The *Laffitte* court left for another day whether a percentage fee can be applied when there is no conventional common fund to pay class member claims and class counsel a reasonable fee as determined by a court, or when a settlement fund allows unclaimed money to revert to the defendant or a third party.⁴⁰

In *Stetson v. Grissom*⁴¹ and *Stanger v. China Electric Motor, Inc.*,⁴² the Ninth Circuit also addressed fee awards following common fund settlements of class actions. In *Stetson*, the providers of bar review courses agreed to pay \$9.5 million to members of the plaintiff class. Class counsel sought \$1.9 million in fees (20 percent), but District Court Judge Manuel L. Real awarded \$585,000 based on a lodestar approach.⁴³ In *Stanger*, defendants globally settled investors' claims for violations of the Securities Act of 1933 for \$3.78 million. Class counsel sought \$944,583 (25 percent), but Judge Real awarded \$466,038 based on a lodestar approach.⁴⁴ As noted in *Laffitte*, under federal common law, in the absence of statutory or contractual fee-shifting provision, the district court has equitable authority to award reasonable fees when class counsel has recovered a common fund. A district court can use a lodestar approach or a percentage approach. The Ninth Circuit vacated both awards, however, holding that Judge Real did not adequately explain his reasons for reducing the lodestar.⁴⁵ The large disparity between the requested fees and awarded fees required a specific articulation of the court's reasoning, which was missing.

When fees are authorized by statute, the

trial court should rigorously comply with statutory requirements. In *Ramos v. Garcia*,⁴⁶ the Fourth District Court of Appeal reversed an attorneys' fees award to a defendant who prevailed at trial against the plaintiff's claims for unpaid overtime, minimum wages, and other employment compensation. Labor Code Section 218.5 permits a prevailing plaintiff "employee" or a prevailing defendant "employer" to recover fees on an action brought for nonpayment of wages. The statute did not apply to one defendant because, although he prevailed, he was not a defendant employer but merely a coworker. In *Sagonowsky v. Kekoa*,⁴⁷ the First District Court of Appeal affirmed an award under Family Code Section 271 of almost \$90,000 to an ex-husband for fees incurred because his ex-wife's "unscrupulous," "relentless[,] and culpable" conduct frustrated the parties' settlement. An additional \$680,000 sought by the ex-husband was rejected because it was untethered to his fees, and not authorized by Section 271.⁴⁸ Finally, in *City of San Diego v. San Diegans for Open Government*,⁴⁹ the Fourth District Court of Appeal reversed the trial court's award of fees to the prevailing defendant, a nonprofit corporation, because when it filed its answer, the corporation was suspended for having failed to pay past due corporate taxes, and therefore lacked capacity to appear in the lawsuit.

Mistakes and Bad Acts

Lawyers who misrepresent facts to a court or opposing party can face monetary sanctions, disqualification, civil liability, and discipline. In *Arroyo v. TP-Link USA Corp.*,⁵⁰ an out-of-state plaintiffs' lawyer filed a *pro hac vice* application to represent a putative class in federal court in Los Angeles supported by an affidavit swearing that one of his firm's associates, a lawyer licensed in California, maintained an office in the Central District and would serve as local counsel. In fact, it was a "virtual law office" and the "local counsel" lived in Chicago and had no plans to move to the Central District.⁵¹ Judge Percy Anderson denied the *pro hac vice* application, disqualified the firm from serving as class counsel, and ordered it to pay \$5,260 to defense counsel.

In *Garmon v. County of Los Angeles*,⁵² the Ninth Circuit held that a Los Angeles deputy district attorney, who discredited a mother's testimony during her son's murder trial by using the mother's confidential medical records, was not entitled to absolute prosecutorial immunity in the mother's subsequent lawsuit for civil rights violations. The deputy district attorney had obtained the subpoena *duces tecum* for the medical records by falsely swearing that the mother was the murder victim.

In *In the Matter of Hubbard*,⁵³ the Cali-

fornia Supreme Court approved a two-year suspension for a plaintiffs' lawyer who, in one client matter, sent the opposing counsel a settlement agreement purportedly signed by his mother when she had already died. In another client matter, an Americans with Disabilities Act case, the lawyer told the opposing counsel and represented in summary judgment papers that his client had visited the defendant's restaurant when, in fact, it was the lawyer who had done so.

"[D]on't raise your voice at me. It's not becoming of a woman." A defense lawyer making this sexist comment to opposing counsel during a deposition drew the wrath of U.S. Magistrate Judge Paul Grewal. The court granted the plaintiff's discovery motion, awarded fees and costs, and ordered the offending lawyer to make a monetary donation to the Women's Lawyers Association of Los Angeles.⁵⁴ Quoting a report from the American Bar Association, Magistrate Judge Grewal noted that such comments signify discrimination that "contributes to [women's] underrepresentation in the legal field . . . tarnishes the image of the entire legal profession and disgraces our system of justice."⁵⁵

In a suit against JPMorgan Chase Bank, attorney Douglas James Crawford brought a stun gun and pepper spray to a deposition and threatened to use them if opposing counsel "got out of hand." He also made contemptuous comments to the trial judge, who responded with terminating sanctions. Crawford called the appellate justices who affirmed "corrupt . . . Granddads of Anarchy" for their "fecal stained opinion."⁵⁶ The appellate court fined Crawford \$1,000 and the state bar stripped him of his law license.

Arbitration

Courts declined to compel arbitration of malpractice claims in two cases. In *Rice v. Downs*,⁵⁷ an arbitration clause was construed against the lawyer who drafted it. In 2003, William Rice and his lawyer Gary P. Downs formed a limited liability company and went into the subsidized housing business. Downs acted as lawyer for the company and its members, drafting the operating agreement, which provided: "[A]ny controversy between the parties arising out of this Agreement shall be submitted to the American Arbitration Association for arbitration in Los Angeles, California."⁵⁸ The lawyer allegedly never advised his clients regarding conflicts of interest and did not comply with Rule 3-300 governing business transactions between lawyers and their clients. Although prohibited by the operating agreement, Downs was paid by the company for legal services. In 2013, Rice sued Downs and his firm Nixon Peabody for malpractice, breach of fiduciary duty, and breach of contract. Downs moved to compel

arbitration under the operating agreement. The superior court ordered the parties to arbitrate and entered judgment on the subsequent award in the lawyer's favor. The Second District Court of Appeal held the trial court had erred by compelling arbitration. In a thorough analysis, Justice Elwood Lui compared language from arbitration clauses in other cases—all available to Downs when drafting the operating agreement—and concluded from the language used that the parties had intended their arbitration clause to apply to a very limited range of controversies. Rice's claims for malpractice, breach of fiduciary duty, and rescission did not "arise out of" the operating agreement because they were based on violations of duties created by the attorney-client relationship that preceded the parties' decision to go into business together.⁵⁹ They were not subject to arbitration, and the appellate court reversed the judgment and order compelling arbitration.⁶⁰

In *Tillman v. Tillman*,⁶¹ widow Renee Tillman won \$8 million in a wrongful death suit after her husband was killed but ran out of money during the court-ordered arbitration of her malpractice claim against her former lawyers, who failed to join all heirs in the suit. District Judge Virginia A. Phillips stayed Tillman's malpractice suit and enforced the arbitration clause in the retainer agreement. When the plaintiff could not pay, the arbitrator terminated the arbitration, and the lawyers moved to dismiss her suit. Tillman proved the dissipation of her funds through legal fees, debts, educational expenses, payments to family members, vehicle purchases, home improvements, and investment and gambling losses, but the court dismissed, believing the Federal Arbitration Act deprived it of authority to hear claims subject to the arbitration agreement. The Ninth Circuit reversed and remanded. It concluded that the arbitration, though terminated without any award, "has been had in accordance with the terms of the [arbitration] agreement."⁶² Tillman's failure to comply with the court's order compelling arbitration was "not culpable" and did not merit the harsh penalty of dismissal.⁶³ The court reasoned that remand did not violate federal policy favoring arbitration because Tillman was unable to pay rather than choosing not to pay. A district court has a duty to decide cases before it, and allowing Tillman's case to proceed was the only way her claims would be adjudicated.⁶⁴

Statutes of Limitation

Legal malpractice claims are subject to a one-year statute of limitations under Business and Professions Code Section 340.6. Subsection (a)(2) provides the limitations period is tolled during the time "[t]he attorney con-

tinues to represent the plaintiff regarding the specific subject matter in the alleged wrongful act or omission occurred.” In *Kelly v. Orr*,⁶⁵ a daughter seized control of the assets of a family trust, displacing the designated successor trustee, and—advised by lawyers at DLA Piper LLP—refused to relinquish control despite repeated demands from January 2012 to March 2013, when she resigned. In February 2014, the new trustee sued the predecessor trustee’s lawyers for malpractice. The lawyers’ demurrer was sustained on the grounds there was no privity between them and the new trustee, and the suit was time-barred because the new trustee discovered the lawyers’ professional negligence in 2012 and could have sued then. The Fourth District Court of Appeal reversed. As a matter of public policy, a trustee steps into the shoes of his predecessor and succeeds to all of his powers, including the power to bring malpractice claims against the predecessor’s attorneys.⁶⁶ The lawyers continued to represent the predecessor trustee until she resigned in 2013, and therefore, the limitations period was tolled. The lawsuit, filed within one year, was timely.⁶⁷

Time ran out on a malpractice action in *Gotek Energy, Inc. v. SoCal IP Law Group, LLP*.⁶⁸ After patent lawyers at SoCal IP Law Group admitted to their client Gotek Energy, Inc. that they negligently had failed to file foreign patent applications, Gotek announced it was making a malpractice claim. SoCal responded by e-mail on November 7, 2012, stating the firm’s attorney-client relationship with Gotek was “terminated forthwith, and we no longer represent [it] with regard to any matters.”⁶⁹ The firm asked where the client’s files should be sent. In a letter on November 8, Gotek instructed the lawyers to transfer its files to a new firm. The letter concluded: “[Client] sincerely appreciates the services provided by [firm].”⁷⁰ SoCal sent the files to the new counsel on November 15. Three hundred sixty-four days later, on November 14, 2013, Gotek filed suit against SoCal for malpractice. The Superior Court granted summary judgment for the lawyers and dismissed the lawsuit, based on the one-year statute. The Second District Court of Appeal affirmed, rejecting Gotek’s argument that SoCal continued to provide legal services until its files were transferred to the new lawyers, tolling the statute. Transfer of the files was a ministerial act, not evidence of an ongoing mutual relationship. Gotek’s belief that the lawyers were providing legal services by transferring the files was unreasonable as a matter of law.⁷¹ The representation ended when the client consented to SoCal’s express withdrawal and requested delivery of its files to new counsel. Therefore, the one-year statute began to run no later than November

8, 2012, dooming the malpractice suit filed on November 14, 2013, six days too late.⁷²

SLAPP Suits

The anti-SLAPP statute, Code of Civil Procedure Section 425.16, and the litigation privilege, Civil Code Section 47, can provide a means to prevail for lawyers sued by non-clients with respect to litigation matters.

In *Karnazes v. Ares*,⁷³ an attorney was sued for misrepresenting in a series of prelitigation e-mails that he would assist the plaintiff to recover losses on investments the plaintiff had placed through the attorney’s client. The trial court granted the attorney’s motion to strike under the anti-SLAPP statute because the claims were based on protected petitioning activity—which includes assisting a client in adjudicating disputes in the courts—and the plaintiff could not demonstrate a probability of prevailing on the merits because the e-mail correspondence was inadmissible under the litigation privilege.

By the skin of its teeth, the defendant law firm in *J-M Manufacturing Co., Inc. v. Phillips & Cohen, LLP*⁷⁴ also successfully invoked the anti-SLAPP statute to defeat a claim by its client’s litigation adversary, which sued the law firm for defamation and trade libel after the firm issued a celebratory press release about a phase-one jury verdict against the company. The headline proclaimed that J-M Manufacturing “faces billions in damages after jury finds J-M liable for making and selling faulty water system pipes,” which was not technically true.⁷⁵ The jury found that J-M Manufacturing falsely certified that all of its pipes met certain strength and durability standards, not that the pipes were faulty. The litigation privilege protects “fair and true” reports of official proceedings. Rejecting the fair report privilege, the trial court denied the law firm’s motion to strike. A divided panel of the Second District Court of Appeal reversed, concluding that the law firm “may be guilty of self-promotion and puffery,” but its press release “falls comfortably within the permissible degree of flexibility and license afforded communications to the media concerning judicial proceedings”⁷⁶—even though this typically is a question of fact for the jury.⁷⁷ Given the ubiquity of sensational, exaggerated press releases, perhaps it is fair, albeit sad, to say that a reasonable reader would not take away from the press release that J-M Manufacturing had sold defective pipes. In dissent, Judge Stanley Blumenfeld, sitting by designation, said that a jury should decide whether the press release was fair and true. Regardless, lawyers should be more careful with press releases.

The anti-SLAPP statute did not shield JAMS and retired Justice Sheila Prell Sonenshine from a lawsuit by a venture capitalist

alleging that he stipulated to hire Justice Sonenshine as a private judge in his marital dissolution case based on false representations in her website biography concerning her business experience in two ventures and her founding of an equity fund supporting women-owned and -led businesses.⁷⁸ The website neglected to explain that the two ventures faced unfavorable accusations—including class action litigation alleging fraud—and that the equity fund had never raised any equity capital. The alleged omissions constituted commercial speech exempted from an anti-SLAPP motion under Code of Civil Procedure Section 425.17(c).

Rules of Professional Conduct

The second Commission for the Revision of the Rules of Professional Conduct, chaired by Justice Lee Edmon, held public meetings and published draft rules for public comment on a pace to meet its March 31, 2017 deadline for submission of the proposed rules to the California Supreme Court.⁷⁹ ■

¹ *Kidnapped LA County judge is rescued by police in Colombia*, L.A. DAILY J., Nov. 22, 2016.

² In re Attorney Discipline System, Slip Op. S237081 (En Banc) (Nov. 17, 2016).

³ California State Auditor Report 2015-047, The State Bar of California, Calif. State Auditor 24, 27 (May 2016), available at <https://www.bsa.ca.gov>.

⁴ GOV’T CODE §6250 *et seq.*

⁵ Ardon v. City of Los Angeles, 62 Cal. 4th 1176 (2016).

⁶ Los Angeles County Bd. of Supervisors v. Superior Court, 2 Cal. 5th 282 (2016).

⁷ Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725 (2009).

⁸ Los Angeles County, 2 Cal. 5th at 297.

⁹ Concepcion v. Amscan Holdings, Inc., 223 Cal. App. 4th 1309 (2014).

¹⁰ Los Angeles County, 2 Cal. 5th at 297.

¹¹ *Id.* at 298.

¹² *Id.* at 301; *see also* EVID. CODE §952.

¹³ *Id.* at 301.

¹⁴ *Id.* at 304.

¹⁵ *See, e.g.*, DP Pham, LLC v. Cheadle, 246 Cal. App. 4th 653 (2016). The Fourth District Court of Appeal reversed and remanded an order denying a motion to disqualify a lawyer who possessed two confidential attorney-client letters belonging to the opposing party because the trial court reviewed the letters to determine whether they were privileged. Under federal common law courts routinely review in camera materials claimed to be privileged to rule on the claim of privilege. *See, e.g.*, Loop A1 Labs, Inc. v. Gatti, No. 15-cv-00798-HSG(DMR), 2016 WL 730211 (N.D. Cal. Feb. 24, 2016).

¹⁶ State Comp. Ins. Fund v. Drobot, 192 F. Supp. 3d 1080 (C.D. Ca. 2016).

¹⁷ *Id.* at 1090.

¹⁸ *Id.* at 1084.

¹⁹ Wutchumna Water Co. v. Bailey, 216 Cal. 564, 571 (1932).

²⁰ Costello v. Buckley, 245 Cal. App. 4th 748 (2016).

²¹ *Id.* at 755-56.

²² *Id.* at 756.

²³ Ontiveros v. Constable, 245 Cal. App. 4th 686 (2016).

²⁴ *Id.* at 698-99.

²⁵ *Id.* at 699-700.
²⁶ Scheer v. Kelly, 817 F. 3d 1183 (9th Cir. 2016).
²⁷ *In re Marilyn S. Scheer*, 819 F. 3d 1206 (9th Cir. 2016).
²⁸ Scheer, 817 F. 3d at 1185.
²⁹ *Id.* at 1186.
³⁰ *In re Rose*, 22 Cal. 4th 430, 436 (2000).
³¹ Scheer, 817 F. 3d at 1189.
³² *In re Marilyn S. Scheer*, 819 F. 3d at 1206.
³³ *Id.* at 1212.
³⁴ *U.S. v. County of Los Angeles*, No. CV 15-05903 DDP (JEMx), 2016 WL 4059712 (C.D. Cal. July 27, 2016).
³⁵ *Serrano v. Priest*, 20 Cal. 3d 25 (1977).
³⁶ *Id.* at 48 n.23.
³⁷ *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480 (2016).
³⁸ *Laffitte*, 1 Cal. 5th at 503.
³⁹ *See id.* at 497-500.
⁴⁰ *Id.* at 503.
⁴¹ *Stetson v. Grissom*, 821 F. 3d 1157 (9th Cir. 2016).
⁴² *Stanger v. China Elec. Motor, Inc.*, 812 F. 3d 734 (9th Cir. 2016).
⁴³ *Stetson*, 821 F. 3d at 1160.
⁴⁴ *Stanger*, 812 F. 3d at 739.
⁴⁵ *Id.*; *Stetson*, 821 F. 3d at 1157, 1165-66.
⁴⁶ *Ramos v. Garcia*, 248 Cal. App. 4th 778 (2016).
⁴⁷ *Sagonowsky v. Kekoa*, 6 Cal. App. 5th 1142 (2016).
⁴⁸ *Id.* at 1155.
⁴⁹ *City of San Diego v. San Diegans for Open Gov't*, 3 Cal. App. 5th 568 (2016).
⁵⁰ *Arroyo v. TP-Link USA Corp.*, No. CV 16-1044 PA (KKx), (U.S. Dist. Ct., C.D. Cal. Apr. 19, 2016) (Civil Minutes - General, Doc. 145 Page ID #2).
⁵¹ *Id.* at page ID#2523.
⁵² *Garmon v. County of Los Angeles*, 828 F. 3d 837 (9th Cir. 2016).
⁵³ *In the Matter of Lynn Hubbard III*, Cal. State Bar Ct., Review Dept. Nos. 11-O-14081, 13-J-11204, 13-O-17118 nonpublic op. (Aug. 4, 2014), recommended discipline imposed by Cal. Supreme Ct., Nov. 29, 2016, S237296.
⁵⁴ *Claypole v. County of Monterey*, No. 14-cv-02730-BLF, 2016 WL 145557 (N.D. Cal. Jan. 12, 2016).
⁵⁵ *Id.* at *5.
⁵⁶ *In re Douglas James Crawford*, Cal. Bar J. Disciplinary Summary (Sept. 23, 2016), available at <http://members.calbar.ca.gov/fal/Member/Detail/20224>.
⁵⁷ *Rice v. Downs*, 247 Cal. App. 4th 1213 (2016).
⁵⁸ *Id.* at 1218.
⁵⁹ *Id.* at 1229-31.
⁶⁰ *Id.* at 1234.
⁶¹ *Tillman v. Tillman*, 825 F. 3d 1069 (9th Cir. 2016).
⁶² *Id.* at 1074.
⁶³ *Id.* at 1075-76.
⁶⁴ *Id.* at 1076.
⁶⁵ *Kelly v. Orr*, 243 Cal. App. 4th 940 (2016).
⁶⁶ *Id.* at 946-47.
⁶⁷ *Id.* at 950-51.
⁶⁸ *Gotek Energy, Inc. v. SoCal IP Law Group, LLP*, 3 Cal. App. 5th 1240 (2016).
⁶⁹ *Id.* at 1244.
⁷⁰ *Id.*
⁷¹ *Id.* at 1247-48.
⁷² *Id.*
⁷³ *Karnazes v. Ares*, 244 Cal. App. 4th 344 (2016).
⁷⁴ *J-M Mfg. Co., Inc. v. Phillips & Cohen LLP*, 247 Cal. App. 4th 87 (2016).
⁷⁵ *Id.* at 93.
⁷⁶ *Id.* at 105.
⁷⁷ *Id.* at 98-99.
⁷⁸ *JAMS, Inc. v. Superior Court*, 1 Cal. App. 5th 984 (2016).
⁷⁹ Second Commission for the Revision of the Rules of Professional Conduct, State Bar of Calif., available at <http://ethics.calbar.ca.gov>.

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