



# 2017 ETHICS ROUNDUP

## California lawyers confronted ethical issues involving conflict of interest, work product and attorney-client protections, and malicious prosecution

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**LAST YEAR,** the State Bar of California was radically restructured, and the influence of its 190,000 active members reduced by the legislature and Governor Jerry Brown, with the acquiescence of the California Supreme Court.<sup>1</sup> After 90 years as a unified bar, the State Bar was segregated, effective January 1, 2018, with practice sections spun off into a voluntary association and core regulatory functions of admissions and discipline retained in a shrunken remnant. The new law reduced the board of trustees to 13, including six nonlawyers, and eliminated the election of trustees by lawyers. Now, all trustees will be appointed by the legislature, governor, and supreme court.<sup>2</sup>

The #MeToo movement against sexual harassment in the workplace claimed Judge Alex Kozinski of the Ninth Circuit Court of Appeals, who resigned after 15 former clerks accused him of inappropriate touching and lewd behavior.<sup>3</sup>

The Los Angeles Sheriff's Department identified a suspect in the 2009 murder of Jeffrey Tidus, a respected litigator and member of LACBA's Professional Responsibility and Ethics Committee. Richard Wall, also suspected in two other professional hits tied to legal disputes, was traced

to Montenegro, which has no extradition treaty with the United States.<sup>4</sup> Wall's attorney denied any wrongdoing by Wall.

### Conflicts of Interest

Last year, several lawyers charged with conflicts of interest escaped disqualification. In *Beachcomber Management Crystal Cove, LLC v. Superior Court*,<sup>5</sup> nonmanaging members of a limited liability company (Beachcomber) brought a derivative lawsuit on behalf of the company against the managing member and its principal. They successfully moved to disqualify defense counsel Kohut & Kohut on the grounds that in a derivative suit the company is the true plaintiff and the firm had previously represented Beachcomber and obtained its confidential information in substantially related matters.

The Fourth District Court of Appeal issued a writ of mandate to vacate the disqualification order, holding the trial court had failed to determine "whether the insiders possessed or had access to the same confidential information as the attorney who previously represented the company."<sup>6</sup> If so, Kohut's representation of insiders in the derivative suit would not threaten its lawyers' duty to the company because the insiders already were privy to all of the

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company's confidential information.<sup>7</sup>

The Fourth District Court of Appeal reversed another disqualification in *Lynn v. George*.<sup>8</sup> Angelica Lynn and Angel Lynn Realty, Inc. (ALR) sued Steve George and his real estate investment company Real Estate Portfolio Management, LLC (REPM), alleging the parties had orally agreed to form a partnership to purchase and flip properties. The defendants admitted ALR had acted as a broker and property manager but denied any partnership. During negotiations to sell one of the properties, lawyer Kevin Spainhour communicated with Lynn by e-mail and phone, and copied her on his e-mail messages to George. The plaintiffs moved to disqualify Spainhour from representing the defendants in the lawsuit. The trial court found that the lawyer represented REPM and that his legal advice related solely to ALR's work as REPM's broker but nevertheless disqualified him, reasoning that he had a "confidential nonclient relationship" with the plaintiffs and a "potential attorney-client relationship" with the alleged partnership.<sup>9</sup> The appellate court reversed, holding that since none of the communications to the lawyer disclosed information confidential to the plaintiffs, there was no confidential relationship between them.<sup>10</sup> A potential attorney-client relationship was not sufficient to overcome the important right of defendants to their long-standing counsel of choice.<sup>11</sup>

Ethical screens can insulate lawyers from disqualifying conflicts. Attorney Anthony Valenti was employed by the Porter Scott law firm from March to October 2014, and billed 26 hours on a state court lawsuit brought by the firm on behalf of National Grange of the Order of Patrons of Husbandry (National Grange) against California Guild. He did not work on a second case in federal court between the same parties, *National Grange v. California Guild*, brought under the Lanham Act.<sup>12</sup> After leaving Porter Scott, Valenti joined the Ellis Law Group which began defending California Guild in the federal case in 2016. When California Guild filed a notice that Valenti would be one of its attorneys of record, National Grange moved to disqualify the entire Ellis law firm. Finding that Valenti was "tainted" with

National Grange's confidential information based on his previous work, the district court nevertheless declined to disqualify the Ellis firm because it had rebutted the presumption of shared confidences by screening Valenti from working on the Lanham Act case. The notice was a clerical error.<sup>13</sup>

### Attorney-Client Privilege

Lawyers who improperly use an adversary's privileged communications risk disqualification, even if they have a good faith belief that the privilege was waived. Nearly twenty years ago the court in *State Compensation Insurance Fund v. WPS, Inc.* held that a lawyer who receives documents that appear to be privileged and to have been inadvertently disclosed may review the documents no more than necessary to determine whether they are privileged, must notify the privilege holder the lawyer has documents that appear to be privileged, and must refrain from using the documents until the parties or the court resolves any dispute about their privileged nature.<sup>14</sup> This past year, the Fourth District Court of Appeal concluded in *McDermott Will & Emory LLP v. Superior Court* that the *State Fund* duties apply not only to privileged documents inadvertently produced by opposing counsel during discovery, but also to privileged documents that the privilege holder inadvertently shares with others.<sup>15</sup>

Certain family members sued McDermott Will & Emory and partner Jonathan Lurie for legal malpractice allegedly for concurrently representing them and other family members notwithstanding conflicts of interest and for preparing trust documentation that did not satisfactorily address control of the family holding company. Gibson Dunn represented McDermott Will and Lurie. Previously, the family's patriarch forwarded to family members a privileged e-mail from his personal lawyer. Those family members, in turn, distributed the e-mail to Lurie, other (including adverse) family members and the holding company's financial advisor. The privileged e-mail was in circulation for about a year when Gibson Dunn used it during depositions over the objection of the patriarch's lawyer. Gibson Dunn reasonably contended that

the privilege had been waived. The trial court nevertheless concluded that the patriarch's inadvertent disclosure of the e-mail did not waive the privilege and disqualified Gibson Dunn. The appellate court denied McDermott Will and Lurie's writ petition, holding that Gibson Dunn's reasonable belief did not vitiate the lawyers' *State Fund* duties. Gibson Dunn presumably had information that could be used advantageously against the patriarch. By using the patriarch's privileged communication before a court that resolved the dispute over waiver, Gibson Dunn assumed the risk of disqualification.

Longstanding, acrimonious probate litigation was also the context for the First Appellate District's 2017 decision in *Fiduciary Trust International of California v. Klein*, in which the court addressed the extent to which a successor trustee controls the privilege as to communications between predecessor trustees and counsel.<sup>16</sup> Previously, trustees of the Mark Hughes Family Trust had been removed for failing to exercise reasonable prudence in connection with the trust's sale of Tower Grove, a 157-acre parcel of previously undeveloped Beverly Hills property. As Mark Hughes's only child asserted multimillion dollar surcharge claims against the former trustees, the interim successor trustee, Fiduciary Trust International, demanded that the former trustees turn over all trust documents, including communications between the former trustees and their lawyers paid for with trust funds. The probate court ordered the former trustees to turn over some privileged communications but not others.

The First District Court of Appeal affirmed in part and reversed in part. A successor trustee acquires the authority to assert the attorney-client privilege with respect to confidential communications between a predecessor trustee and his or her lawyers involving legal advice on trust administration, but a predecessor trustee retains the authority to assert the privilege with respect to confidential communications with his or her personal lawyers arising from a genuine concern for possible future charges for breach of fiduciary duty when the trustee personally pays for the legal advice.<sup>17</sup> The probate court did not hold the predecessor trustees to their burden of proof. They could not establish their privilege claim by simply characterizing a particular communication as relevant to a defense against the beneficiary's claims. Rather, they needed to focus on the relationship between the predecessor trustees and the lawyers when the communications occurred. And, to preserve a claim of personal privilege, the predecessor trustees were required to take some affirmative steps at the time of the communications to distinguish the communications from trust property. The appellate court therefore remanded the matter for further analysis.

### Privileged Communications

A lawyer's communications with a media consultant may not be privileged, as illustrated in the Second District Court of Appeal's 2017 decision in *Behunin v. Superior Court*.<sup>18</sup> Nicholas Behunin sued Charles Schwab and his son, Michael, for not funding a real estate development venture. Behunin's lawyer retained a public relations consultant to create a social media campaign to induce the Schwabs to settle. Behunin and the lawyer created a website, [www.chuck-you.com](http://www.chuck-you.com), purporting to link the Schwabs to corruption, human rights violations, and atrocities associated with former Indonesian dictator Mohammad Suharto and his family.

The Schwabs sued Behunin and his lawyer for libel and slander. A discovery referee ordered production of correspondence among Behunin, his lawyer, and the consultant. The appellate court denied Behunin's writ petition. The trial court did not abuse its discretion in concluding that the lawyer's communications with the consultant were not reasonably necessary for the accomplish-

ment of the purpose for which the lawyer was consulted and, therefore, not privileged.<sup>19</sup> "There may be situations in which an attorney's use of a public relations consultant to develop a litigation strategy or a plan for maneuvering a lawsuit into an optimal position for settlement would make communications among the attorney, the client, and the consultant reasonably necessary for the accomplishment of the purpose for which the attorney was consulted. But this is not that case."<sup>20</sup> Interestingly, the court declined to analyze whether the lawyer's communications with the public relations consultant could be protected as attorney work product because Behunin provided no legal argument or authorities to support the application of that doctrine.<sup>21</sup>

### Attorney Work Product

As between a lawyer who creates work product and that lawyer's law firm, who holds the right to assert or waive the work product privilege? In *Tucker Ellis LLP v. Superior Court*, the First District Court of Appeal concluded that, under the circumstances of this case, the law firm—as opposed to the lawyer—controlled the privilege.<sup>22</sup> Attorney Evan Nelson, who specialized in asbestos defense, sued his former law firm, Tucker Ellis, for negligence, interference with contract and prospective economic advantage, invasion of privacy, and conversion after Tucker Ellis produced in response to a subpoena work product that Nelson had created while Nelson worked at Tucker Ellis. Following the production, Nelson's work product—correspondence with certain scientific consultants on the causes of mesothelioma—was posted on the Internet, which, Nelson claimed, compromised his ability to retain experts and resulted in the loss of his job. Because Tucker Ellis, as opposed to Nelson, retained the scientific consultants and Nelson created the work in his capacity as a Tucker Ellis employee, the court concluded that Tucker Ellis controlled the attorney work product privilege.<sup>23</sup>

Practical considerations support this conclusion. When multiple current and former lawyers create the work product, it would be difficult to track them down and resolve disagreements over whether to assert or waive the privilege.<sup>24</sup>

*Sargon Enterprises, Inc. v. Broune George Ross LLP* provides important guidance on the effect of an arbitration clause in a retainer agreement on a former client's legal malpractice claim.<sup>25</sup> Unhappy with the results of long-running litigation against the University of Southern California, Sargon filed in court a malpractice claim against its former lawyers, Brown George Ross LLP, notwithstanding a mandatory arbitration clause in their retainer agreement and Sargon's prior release of malpractice claims. The court granted the law firm's petition to compel arbitration. The JAMS arbitrator summarily denied Sargon's malpractice claim because of the release and, on the law firm's breach of contract counterclaim, awarded the law firm \$200,000 in general damages, based primarily on the fees and costs incurred in compelling arbitration of Sargon's malpractice claim. The superior court confirmed the award. Notwithstanding the limited judicial review generally afforded arbitration awards, the appellate court reversed the portion of the judgment awarding the law firm \$200,000 in damages on its counterclaim. "[T]here is nothing to prevent one of the parties to a contractual arbitration provision from resorting initially to an action at law" and, thereby, forcing the other party to compel arbitration.<sup>26</sup> A right to compel arbitration is not self-executing.<sup>27</sup> Thus, Sargon did not breach the retainer agreement's arbitration provision by first filing its malpractice action in superior court and the arbitrator's damage award had the effect of depriving Sargon of a statutory right—namely, the right to test in court the validity and enforcement of the parties' arbitration clause.

# MCLE Test No. 277

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/mcleselftests>.

- On January 1, 2018, the State Bar of California de-unified, spinning off its trade association activities from its regulatory functions.  
True.  
False.
- In a derivative lawsuit, the corporation is the true plaintiff, which may create a conflict of interest for former corporate counsel defending the suit.  
True.  
False.
- If corporate insiders sued in a derivative lawsuit were privy to the corporation's confidential information, corporate counsel may avoid disqualification.  
True.  
False.
- A lawyer will be disqualified if he or she has a conflict of interest based on a potential attorney-client relationship.  
True.  
False.
- A lawyer who has knowledge of the opposing party's confidential information cannot be screened, and his or her entire law firm will be disqualified.  
True.  
False.
- Lawyers who use an adversary's privileged communication may be disqualified, even though they have a good faith belief that the privilege was waived.  
True.  
False.
- A lawyer receiving a privileged document that appears to have been inadvertently disclosed must notify the privilege holder.  
True.  
False.
- A lawyer's duties are different depending on whether the privileged document was disclosed by the privilege holder or by opposing counsel in discovery.  
True.  
False.
- A successor trustee acquires the authority to assert or waive the attorney-client privilege for communications between a predecessor trustee and a lawyer for the trust.  
True.  
False.
- An attorney's communications with a media consultant are privileged, whether or not reasonably necessary to accomplish the purpose for which the attorney was consulted.  
True.  
False.
- If multiple lawyers in a law firm create work product,

- the work product doctrine, not the individual lawyers.  
True.  
False.
- A right to compel arbitration is not self-executing, and a client does not breach a retainer agreement with a mandatory arbitration clause by suing the lawyers.  
True.  
False.
  - A comparative fault instruction is improper in a jury trial for professional negligence.  
True.  
False.
  - Receipt of a motion to withdraw is reasonable notice that the lawyer had stopped working for the client.  
True.  
False.
  - Probable cause for a claim is established if the court rules for the plaintiff on the merits, even if the ruling is later overturned.  
True.  
False.
  - The "interim adverse judgment rule" does not apply if the plaintiff prosecuted the claim in bad faith.  
True.  
False.
  - A fair and true report in a public journal about a judicial proceeding is privileged.  
True.  
False.
  - The litigation privilege does not protect statements to persons who lack a substantial interest in the litigation, including the press.  
True.  
False.
  - An attorney's demand letter may be protected by the litigation privilege, but only if its threat to commence litigation is made in good faith.  
True.  
False.
  - A lawyer's failure to get an individual client's signature on an engagement letter renders the contract voidable.  
True.  
False.



Name \_\_\_\_\_

Law Firm/Organization \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State/Zip \_\_\_\_\_

E-mail \_\_\_\_\_

Phone \_\_\_\_\_

State Bar # \_\_\_\_\_

## INSTRUCTIONS FOR OBTAINING MCLE CREDITS

- Study the MCLE article in this issue.
- Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
- Mail the answer sheet and the \$20 testing fee (\$25 for non-LACBA members) to:

Los Angeles Lawyer  
MCLE Test  
P.O. Box 55020  
Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

- Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-study activity.
- For future reference, please retain the MCLE test materials returned to you.

## ANSWERS

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

- True  False

In *Yale v. Brown*, the Second District Court of Appeal issued apparently the first published California appellate opinion approving a comparative fault instruction in a legal malpractice action.<sup>28</sup> The former client claimed that her trust and estates lawyer improperly transmuted her separate property into community property. Noting that legal malpractice claims are a subset of negligence actions and comparative fault principles apply in all actions for negligence resulting in injury to person or property, the court concluded that the evidence in this case supported a comparative fault instruction. “It is undisputed that [plaintiff] read the granting clauses of the deeds, saw the change from separate property to community property in two of the deeds, and was entirely conversant with the issue....”<sup>29</sup> In an earlier marriage that had ended in divorce, the plaintiff had lost assets because some of her separate property had been transmuted to community property. Based on her existing knowledge and her decision to remain silent, the court of appeal concluded it was appropriate for the jury to evaluate whether the client’s failure to inquire contributed to her situation.<sup>30</sup> The jury decreased the plaintiff’s damages by ten percent. Because the plaintiff had dismissed her breach of fiduciary duty claim prior to trial, the court did not have an opportunity to determine the availability of a comparative fault instruction in response to a breach of fiduciary duty claim.

*Flake v. Neumiller & Beardslee* illustrates the importance—for purposes of managing legal malpractice exposure—of taking action so that a client has an objectively reasonable belief that the lawyer-client relationship has ended.<sup>31</sup> Code of Civil Procedure Section 340.6 generally requires an action against an attorney to be brought within one year of when a client should reasonably have discovered the wrongful act or omission or within four years of the wrongful act or omission, whichever occurs first. But the limitations period is tolled while “the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.”<sup>32</sup> Unfortunately, “[t]he end of an attorney-client relationship is not always signaled by a bright line...”<sup>33</sup> In *Flake*, a group of plaintiffs, including Stanley Flake and attorney Richard Sinclair, lost their underlying case over a real estate investment. Their counsel of record, Neumiller & Beardslee, filed a motion to withdraw on November 25, 2009, as posttrial motions in the underlying case were pending. The motion stated that attorney Sinclair (one of the plaintiffs) would handle posttrial motions and an appeal. The Neumiller firm’s motion to withdraw being unopposed, the trial court granted it on January 7, 2010. Flake filed a malpractice claim against the Neumiller firm on January 6, 2011—that is, more than one year after Flake had received a copy of the motion to withdraw, but less than one year after the motion had been granted. In *Flake*, the Third Appellate District affirmed the trial court’s summary judgment in favor of the Neumiller firm and its attorneys contending that Flake’s malpractice claims were time barred. Although “Flake may have (subjectively) thought otherwise, any objectively reasonable client would have understood on receipt of the motion to withdraw that Neumiller had stopped working on the case.”<sup>34</sup> That attorney Sinclair disputed that he had agreed to handle posttrial motions and appeal did not create a triable issue of material fact.

### Malicious Prosecution

In *Parrish v. Latham & Watkins*,<sup>35</sup> the Supreme Court considered whether a bad faith exception should be created for the “interim adverse judgment rule” in malicious prosecution cases. William Parrish and E. Timothy Fitzgibbon were sued by their former employer for misappropriation of trade secrets after they left to start their own business. They moved for summary judgment,

arguing their business plan was developed before they joined the company and no trade secrets were misappropriated. In opposition, Latham, representing the former employer, submitted declarations by two experts who opined the plan could not be implemented without using the company’s trade secrets. The superior court denied the motion. At a bench trial, in which the former employees prevailed, the court found that the former employer had pursued the action in “subjective bad faith,” primarily to thwart a competing business, and in “objective bad faith,” because it knew or should have known it lacked sufficient evidence to initiate or continue the lawsuit.<sup>36</sup> The court of appeal affirmed, noting that at trial the experts admitted, contrary to their declarations, that there was no scientific methodology to predict the likelihood of trade secret misuse.<sup>37</sup>

Parrish and Fitzgibbons sued Latham and partner Daniel Scott Schecter for malicious prosecution. The tort has three elements: the underlying case was initiated or maintained without probable cause, was brought with malice, and was terminated in the original defendant’s favor.<sup>38</sup> The existence of probable cause is a question of law to be determined as an objective matter—whether, on the basis of the facts known to the original plaintiff, the filing of the case was legally tenable.<sup>39</sup> In *Wilson v. Parker, Covert & Chidester*,<sup>40</sup> the supreme court adopted the “interim adverse judgment rule,” holding that probable cause is established if the trial court rules on the merits in favor of the underlying plaintiff, unless procured by fraud or perjury, even if the ruling is overturned by a later ruling. In response to the malicious prosecution complaint, Latham filed an anti-SLAPP motion, relying in part on the superior court’s order denying summary judgment, which, it argued, established probable cause. The motion was granted, and the court of appeal affirmed.<sup>41</sup>

On supreme court review, Parrish and Fitzgibbons argued the interim adverse judgment rule should not apply because their former employer brought the suit in bad faith, but a unanimous court declined to create a bad faith exception. It concluded that just because the trial court had found the underlying suit was “objectively specious” did not mean the action completely lacked merit. Reiterating the very low bar for probable cause set in *Zamos v. Stroud*,<sup>42</sup> the court stated that only those actions any reasonable attorney would agree are “totally and completely without merit” may support a malicious prosecution suit.<sup>43</sup> The court also refused appellants’ invitation to create an exception because the interim ruling denying summary judgment was based on “materially false” expert declarations. Fraud and perjury were not before the court, it noted, and a litigant is entitled to rely on favorable inferences in bringing a suit, even if the inferences later prove false.<sup>44</sup>

### Fair Report Privilege

In *Argentieri v. Zuckerberg*,<sup>45</sup> Facebook’s general counsel Colin Stretch escaped potential liability for defamation by invoking the fair report privilege in Civil Code Section 47(d)(1), which provides that a “fair and true report in, or a communication to, a public journal” about a judicial proceeding is privileged. In 2010, Paul Ceglia sued Mark Zuckerberg and Facebook, alleging that he owned 84 percent of the company based on a 2003 “work for hire” contract. The verified complaint was filed by attorney Paul Argentieri. When the contract was exposed as a fabrication, the suit was dismissed, and Zuckerberg and Facebook sued Argentieri and Ceglia’s other lawyers for malicious prosecution. On the same day that the malicious prosecution suit was filed, Stretch sent a gloating e-mail to media outlets stating that the lawyers had knowingly pursued the case based on forged documents and now should be held to account. Although Argentieri was not named in the e-mail, he ensured his notoriety by suing Facebook,

Zuckerberg, and Stretch for defamation. The superior court granted the defendants' anti-SLAPP motion to the defamation complaint, and the First District Court of Appeal affirmed, although not on the same grounds. The appellate court agreed that the suit was barred by the fair report privilege but, displaying the antipathy many courts have to litigating in the press, rejected an alternative argument based on the litigation privilege. The litigation privilege, the court held, does not protect statements that do not further the object of the lawsuit, or statements made to persons who lack a substantial interest in the litigation, including the press.<sup>46</sup> Because Stretch admitted he sent his e-mail to "set the public record straight," it was a publication to the general public through the press, and not protected by the litigation privilege.<sup>47</sup>

### Demand letters

Los Angeles attorney Martin Singer earned a well-deserved reputation for aggressive advocacy on behalf of his celebrity clients and has elevated the demand letter to a fearsome art form. In 2017, however, in *Dickinson v. Cosby*,<sup>48</sup> a Singer demand letter and press release for his client Bill Cosby plunged them into trouble. In 1982, model Janice Dickinson allegedly was drugged and raped by Cosby but, fearing retaliation, did not report the crime. She told the ghost writer of her 2002 autobiography, but the publisher's legal department refused to publish the rape allegation without corroboration. In 2014, Dickinson described the alleged assault in a television interview. Identifying himself as Cosby's attorney, Singer sent a demand letter to media outlets, denouncing the story as a recent fabrication and warning them not to disseminate it under threat of litigation. In a follow-up press release, Singer repeated that Dickinson's story was a lie.

Dickinson sued Cosby, alleging that Singer's demand letter and press release were defamatory and the entertainer had ratified them. Cosby filed an anti-SLAPP motion, arguing that Dickinson could not demonstrate a likelihood of prevailing on her complaint because, inter alia, the demand letter was protected by the litigation privilege, the letter and press release were Singer's opinions, and Dickinson was a liar. Dickinson denied the demand letter was privileged and argued the statements were probably false assertions of fact, not mere opinions. The superior court granted the anti-SLAPP motion as to the demand letter, finding it was covered by the litigation privilege but concluded there was evidence to support a prima facie case that Cosby had raped her, and, therefore, the press release was false. While the anti-SLAPP motion was pending, Dickinson filed an amended complaint adding Singer as a defendant and accusing him of reckless behavior, but the superior court struck the amended complaint as procedurally impermissible.

The Second District Court of Appeal reversed the dismissal of the amended complaint as to Singer and rejected Cosby's anti-SLAPP arguments. It acknowledged that an attorney's demand letter can fall within the litigation privilege, but only if litigation is contemplated in good faith. Even a letter threatening litigation is insufficient to trigger the privilege if it is actually a negotiating tactic to induce settlement.<sup>49</sup> Singer sent his demand letter only to media outlets that had not yet run the story and when many ran the story anyway, Cosby did not sue. Because the demand letter was "a bluff intended to frighten the media outlets into silence," Dickinson showed a likelihood of prevailing on the litigation privilege defense.<sup>50</sup>

Both the demand letter and the press release contained actionable statements of fact. Contrary to Cosby's argument that the letter merely expressed Singer's opinions, the court held that a reasonable fact finder could conclude it stated or implied that Cosby did not rape Dickinson and she was lying when she said

he did. As Cosby's attorney, Singer was speaking for Cosby, and Cosby knew whether he sexually assaulted Dickinson. "Cosby's agent's absolute denial is a factual one."<sup>51</sup> The press release contained similar language.<sup>52</sup> As a result, the suit would proceed against both Cosby and his lawyer.

### Getting paid

In *Leighton v. Forster*,<sup>53</sup> an attorney unsuccessfully sued to recover payment for her services over several years. Between 2004 and 2007, Sheryl Leighton was a contract attorney for lawyer Robert James in Berkeley and performed legal services for his clients Bob and Rochelle Forster. After James died, Bob asked Leighton to continue doing their legal work in connection with a lawsuit against their business partners. Leighton sent the Forsters an engagement letter in May 2007, but they never signed it. Bob made partial payments to the lawyer, but when he died in May 2008, the suit was still ongoing, and Leighton was owed more than \$100,000. Leighton had dealt with Bob only, and Rochelle knew nothing about the suit or legal bills. The lawyer withdrew from the representation in August 2008.

In 2012, Leighton sued Rochelle for nearly \$115,000 in unpaid legal services, alleging breach of contract and account stated. The superior court granted Rochelle's motion for summary judgment, and Leighton appealed. The First District Court of Appeal affirmed, holding that the lawyer's failure to get the clients' signatures on the May 2007 engagement letter under Business and Professions Code Section 6148(a) rendered it voidable under Section 6148(c).<sup>54</sup> Leighton could not prove an implied in-fact contract based on prior payments as a contract lawyer, because her legal services after May 2007 were materially different.<sup>55</sup> Her quantum meruit claim was barred by the two-year statute of limitations in Code of Civil Procedure Section 339.<sup>56</sup> Finally, her common count for account stated failed because there was no evidence of an enforceable contract with Rochelle to pay her fees.<sup>57</sup>

### Sharp Practices and Their Consequences

Engaging in sharp practices can cause trouble as demonstrated in *Diaz v. Professional Management, Inc.*<sup>58</sup> Eleven days before trial in a wrongful termination lawsuit by a tree-trimmer against his employer for failure to accommodate reasonable workplace restrictions, the employer applied ex parte for an order shortening time to hear a motion to compel arbitration pursuant to the grievance and arbitration procedure in the applicable collective bargaining agreement. The trial court denied the application and refused to delay trial to accommodate a hearing on regular notice. The employer's lawyers submitted a proposed order reflecting inaccurately that the trial court had denied the motion to compel on the merits, which the court signed. The employer then filed a notice of appeal on the last court day before trial was to commence, thereby staying trial.

"[L]oathe to conclude that the court was actually tricked into signing an order it had not intended to issue," the court reasoned that the employer was estopped from challenging it on appeal under the doctrine of invited error. The court took the unusual step of making a factual finding on appeal that the employer acted in bad faith in connection with the motion to compel arbitration and concluding, as a matter of law, that the employer had waived any right to compel arbitration. The court ordered the employer and its counsel to pay the court of appeal \$8,500 in "damages" for having to process a frivolous appeal and instructed the trial court to set a hearing to determine how much the employer and its counsel would have to pay the employee for the reasonable value of his lawyer's services in

preparing for the aborted trial and defending the appeal. The employer's lawyers were also ordered to report the sanctions to the State Bar.

In *Loop A1 Labs, Inc. v. Gatti*,<sup>59</sup> Magistrate Judge Donna M. Ryu of the Northern District had to address "contentious and cringe-worthy exchanges" between the plaintiff's lawyer, Valeria Healy (a New York lawyer admitted *pro hac vice*) and Thomas Wallerstein of Venable LLP during a deposition "before things completely unraveled."<sup>60</sup> Counsel for both sides exchanged snide and gratuitous comments, until temperatures flared, and Healy, in response to a suggestion that she take a break, responded, "No, I think you should take a f\*\*\*\*\*g break."<sup>61</sup> Then things really got ugly as Healy's coffee went flying across the table. Although the intended target was hotly debated, Wallerstein and his computer were hit. His client sought sanctions for assault. Healy "doubled down and went on the attack" in her opposition. What is a Magistrate Judge to do? Finding Healy's conduct willful and improper—not only for uttering curse words and losing control, but also for refusing to apologize and blaming opposing counsel for her bad behavior—Magistrate Judge Ryu ordered Healy to pay \$250 in damages to Wallerstein for dry-cleaning charges. She deferred

a ruling on further sanctions to District Court Judge Haywood S. Gilliam, who issued an order to show cause regarding terminating sanctions.

### Rules of Professional Conduct Revised

On March 30, 2017, the State Bar delivered 70 proposed new and amended rules of professional conduct to the supreme court for its review. The court approved only one, Rule 5-110, which requires prosecutors to disclose to the defense all evidence or information that the prosecutor knows or should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence.<sup>62</sup> The other rules remain under consideration. ■

<sup>1</sup> Press release, State Bar of Cal., State Bar prepares to implement historic reforms following Gov. Brown's signature on the agency's annual fee bill (Oct. 2, 2017), available at <http://www.calbar.ca.gov>.

<sup>2</sup> BUS & PROF. CODE §§6011, 6013.1, 6013.3, 6013.5, as amended.

<sup>3</sup> Maura Dolan, *9th Circuit Judge Alex Kozinski steps down after accusations of sexual misconduct*, L.A. TIMES, Dec. 17, 2017, available at <http://www.latimes.com>.

<sup>4</sup> Nicole Santa Cruz, *A California businessman is a suspect in 3 execution-style slayings in L.A. and Las Vegas, police say*, L.A. TIMES, Sept. 18, 2017, available at <http://www.latimes.com>.

<sup>5</sup> Beachcomber Mgmt. Crystal Cove, LLC v. Superior Ct., 13 Cal. App. 5th 1105 (2017).

<sup>6</sup> *Id.* At 877.

<sup>7</sup> *Id.*

<sup>8</sup> Lynn v. George, 15 Cal. App. 5th 630 (2017).

<sup>9</sup> *Id.* at 633.

<sup>10</sup> *Id.* at 634.

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

<sup>12</sup> National Grange of the Order of Patrons of Husbandry v. California Guild, CIV-No. 2:16-201 WBS DB (E.D. Ca. May 11, 2017), available at <https://www.leagle.com/decision/infdc020170515c92>.

<sup>13</sup> *Id.*

<sup>14</sup> State Comp. Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644, 657 (1999).

<sup>15</sup> McDermott Will & Emory LLP v. Superior Ct., 10 Cal. App. 5th 1083, 1092 (2017).

<sup>16</sup> Fiduciary Trust Int'l of Cal. v. Klein, 9 Cal. App. 5th 1184 (2017).

<sup>17</sup> See Moeller v. Superior Ct., 16 Cal. 4th 1124, 1134 (1997).

<sup>18</sup> Behunin v. Superior Ct., 9 Cal. App. 5th 833 (2017).

<sup>19</sup> See EVID. CODE §912(d).

<sup>20</sup> Behunin, 9 Cal. App. 5th at 849-50.

<sup>21</sup> *Id.* at 854 n.11.

<sup>22</sup> Tucker Ellis LLP v. Superior Ct., 12 Cal. App. 5th 1233 (2017).

<sup>23</sup> *Id.* at 1245.

<sup>24</sup> *Id.* at 1247.

<sup>25</sup> Sargon Enters., Inc. v. Superior Ct., 15 Cal. App. 5th 749, 756 (2017).

<sup>26</sup> *Id.* at 768 (quoting Spence v. Omnibus Inds., 44 Cal. App. 3d 970, 975 (1975)).

<sup>27</sup> Sargon, 15 Cal. App. 5th at 768.

<sup>28</sup> Yale v. Bowne, 9 Cal. App. 5th 649 (2017).

<sup>29</sup> *Id.* at 658.

<sup>30</sup> *Id.*

<sup>31</sup> Flake v. Neumiller & Beardslee, 9 Cal. App. 5th 223 (2017).

<sup>32</sup> CODE CIV. PROC. §340.6(a)(2).

<sup>33</sup> Flake, 9 Cal. App. 5th at 230.

<sup>34</sup> *Id.* at 232 (emphasis in original).

<sup>35</sup> Parrish v. Latham & Watkins, 3 Cal. 5th 767 (2017).

<sup>36</sup> *Id.* at 773.

<sup>37</sup> *Id.*

<sup>38</sup> Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 871 (1989).

<sup>39</sup> *Id.* at 874-75, 878.

<sup>40</sup> Wilson v. Parker, Covert & Chidester, 28 Cal. 4th 811, 817 (2002).

<sup>41</sup> Parrish, 3 Cal. 5th at 775.

<sup>42</sup> Zamos v. Stroud, 32 Cal. 4th 958, 970 (2004).

<sup>43</sup> Parrish, 3 Cal. 5th at 779.

<sup>44</sup> *Id.* at 782.

<sup>45</sup> Argentieri v. Zuckerberg, 8 Cal. App. 5th 768 (2017).

<sup>46</sup> *Id.* at 783-87.

<sup>47</sup> *Id.* at 784.

<sup>48</sup> Dickinson v. Cosby, 17 Cal. App. 5th 655 (2017).

<sup>49</sup> *Id.* at 682.

<sup>50</sup> *Id.* at 684.

<sup>51</sup> *Id.* at 689.

<sup>52</sup> *Id.* at 690.

<sup>53</sup> Leighton v. Forster, 8 Cal. App. 5th 467 (2017).

<sup>54</sup> *Id.* at 486-88.

<sup>55</sup> *Id.* at 489.

<sup>56</sup> *Id.* at 490.

<sup>57</sup> *Id.* at 491-94.

<sup>58</sup> Diaz v. Professional Mgmt., Inc., 16 Cal. App. 5th 1190 (2017).

<sup>59</sup> Loop A1 Labs, Inc. v. Gatti, No. 3:15-CV-00798-HSG (DMR) 2017 U.S. Dist. LEXIS 11839 (N.D. Cal. Jan. 27, 2017).

<sup>60</sup> *Id.* at \*2.

<sup>61</sup> *Id.* (asterisks in original).

<sup>62</sup> Press Release, State Bar of Cal., State Bar will implement new ethics rule addressing prosecutor misconduct (Nov. 2, 2017), available at <http://www.calbar.ca.gov>.



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