ETHICS QUARTERLY

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Daniel E. Eaton, Publisher July, 2013 Vol. 10, No. 2

IN THIS ISSUE . . .

Among the questions answered by rulings abstracted in this issue of *Ethics Quarterly* are:

- May a law firm partner advise a City Council reviewing an administrative ruling of a City agency where a different firm partner advised the agency in the underlying administrative proceeding? (10.2.4)
- Is disqualification of plaintiff's trial counsel in a California lemon law action warranted where, four years earlier while at a prior firm, the same lawyer represented the defendant-manufacturer in a number of cases arising out of the same law? (10.2.7)
- Did a trial court err in awarding monetary sanctions under C.C.P. § 128.7 on its own motion against plaintiff's counsel payable to defense counsel for plaintiff's counsel attaching the wrong version of an allegedly breached contract to a verified complaint and then, despite the service of a cross-complaint that should have alerted counsel to the error, failing to seek to rectify the error until the defendant brought a motion for summary judgment based on the error? (10.2.14)

The Commentary is entitled: **"The Occasional Ethical Imperative To Say More."**

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CASE NOTES

10.2.1 Rule 3-600: Communications with Company Employees, Potential Class Members

Case: *Quezada v. Schneider Logistics Transloading and Distribution* (C.D.Cal. 2013) 2013 WL 1296761

Issue: In a putative class action alleging violations of wage and hour laws, defense counsel obtained 106 sworn declarations from employees, potential class members, regarding the conduct at issue following individual interviews in a manager's office to which the employees had been summoned during work hours. Was defense counsel properly barred from further communication with potential class member-employees about the lawsuit where defense counsel did not disclose the evidence-gathering purpose of the interview to the interviewed employees and did not tell the interviewees that the document they were signing after the interview was a sworn affidavit that could be used in the lawsuit to limit the employees' potential recovery?

Holding: **Yes**. "Failing to inform the employees of the evidence-gathering purpose of the interviews rendered the communications fundamentally misleading and deceptive because the employees were unaware that the interview was taking place in an adversarial context, and that the employees' statements could be used to limit their right to relief." (2013 WL 1296761 at *5.)

The Court further found that failing to disclose the evidence-gathering nature of the interviews led to an apparent violation of Rule of Professional Conduct 3-600(D), prohibiting an attorney representing a company or other organization from misleading an employee into believing that the employee may share confidential information in a

way that will not be used in the organization's interests against the employee's interests. (2013 WL 1296761 at *5.)

The Court found that relief was warranted on the additional ground that the interviews were "impermissibly coercive." (2013 WL 1296761 at *6.) It was not enough that defense counsel had told the interviewees that their participation was "voluntary"; the employees were ordered to attend the meetings, making defense counsel's comment about the nature of the meeting "confusing and slightly self-contradictory." (*Ibid*.)

Accordingly, the Court: (1) barred further contact by the defendant-employer or its agents with the employees about the lawsuit without written permission from the Court; (2) held that the 106 declarations would be disregarded if the employer attempted to use them for any purpose; and (3) issued a curative notice to potential class members that any declaration they signed would not be considered by the Court and that the employer could not retaliate against them for cooperating with plaintiffs' counsel in the lawsuit. (2013 WL 1296761 at *7.)

Notes: The Court noted that plaintiffs had sought an order compelling production of the declarations obtained during the interviews, which defendant asserted was non-discoverable work product. The Court directed that this discovery matter be brought before the assigned Magistrate Judge. (2013 WL 1296761 at *6, note 3.)

Defendant objected to declarations by employees purporting to describe the conditions under which the interviews took place on the ground that they were originally executed in Spanish and were translated by plaintiffs' counsel rather than a court-certified third party. The Court overruled the objection: "Defendant implicitly argues that the translator is biased because she is acting as plaintiffs' counsel, but does not cite any authority supporting the proposition that potential bias can render an interpreter unqualified." (2013 WL 1296761 at *3.)

10.2.2 Rule 3-310: Avoiding Representation of Adverse Interests; Tripartite Insurer-Insured Attorney-Client Privilege

Case: *Endurance American Specialty Ins. Co. v. WFP Securities Corp.* (S.D.Cal. 2013) 2013 WL 1316701

Issue: An insurer brought a coverage action against its insured broker/dealer and related parties alleging the broker/dealer provided misleading information about pre-existing or potential claims at the time the policy was issued. During a previous interpleader action brought by the insurer that ultimately was dismissed, plaintiff-insurer's counsel obtained from counsel plaintiff-insurer had appointed to defend broker/dealer in a number of FINRA actions from which the instant coverage dispute arose, under a reservation of rights, a set of emails in the underlying FINRA actions insured's counsel was then defending. Was disqualification of plaintiff-insurer's counsel warranted under these circumstances where insured's counsel in the prior interpleader action did not authorize disclosure of the emails to the insurer?

Holding: **No**. The emails insurer's counsel obtained from the attorney representing the insured in the underlying FINRA actions were not attorney-client privileged communications and were not made privileged by having been transmitted by the insured to its attorney and marked "confidential." (2013 WL 1316701 at *8.) In addition, the Court found that the insurer eventually would have obtained access to these emails through discovery even had the insurer not obtained them from insured's counsel in the underlying FINRA actions. That is because the insurer was entitled to obtain from insured's counsel all documents, except privileged documents relevant to the coverage dispute, that triggered the insurer's reservation of rights. (*Id*. at *10, citing Cal. Civ. Code § 2860(d).) Because the insurer received nothing from the insured's counsel that he was not entitled to receive under California law, disqualification of plaintiff-insurer's counsel was not warranted. (*Id*. at *11-12.)

10.2.3 Attorney-Client Privilege; Tripartite Insurer-Insured Attorney-Client Privilege

Case: *Trabakoolas v. Watts Water Technologies, Inc.* (N.D.Cal. 2013) 2013 WL 1563232

Issue: In a products liability class action arising out of water damage caused by an allegedly defective toilet connector, were communications between counsel for named plaintiffs' insurer and plaintiffs, about becoming named plaintiffs in the action, covered by the attorney-client privilege where: (1) insurer's counsel initiated the contact with plaintiffs; (2) the communications occurred after the insurer had paid plaintiffs' claims for water damage; (3) at the time of the communication with insurer's counsel, plaintiffs had no interest in litigation against the defendant-manufacturers; and (4) plaintiffs ultimately were represented by a different firm in the class action?

Holding: **No**. Under California law, a "client" for purposes of the attorney-client privilege is "'a person who . . . consults a lawyer *for the purpose of retaining the lawyer or securing legal service or advice* from him in his professional capacity.'" (2013 WL 1563232 at *1, quoting Cal. Evid. Code § 951, emphasis supplied by the Court.)

First, it is not the law that a "blanket privilege" covers all communications within the tripartite attorney-client relationship. (2013 WL 1563232 at *3, citations omitted.) The communications between the insurer's attorney and the plaintiffs in this case were not for the common purpose of defeating a claim by, or prosecuting a claim against, a third party in which the attorney would be representing the insured. Plaintiffs' "own intent and purpose [in the communications] must be the focus of the inquiry" into whether the attorney-client privilege applies. (2013 WL 1563232 at *4.) Plaintiffs did not automatically become "clients" of the contacting attorney for purposes of the attorney-client privilege by virtue of being insureds. "California courts have rejected contentions that all communications exchanged in the insured-insurer attorney context are privileged." (*Ibid*., citations omitted.)

Second, neither plaintiff had any intention of suing the defendant-manufacturers when each was contacted by the insurer's attorney. They decided to become class representatives only after that contact. "As such, [plaintiffs] had neither a purpose for retaining a lawyer, nor is there any indication that they intended to secure legal services or advice during the phone call." Accordingly, the Court held that plaintiffs had failed to make the requisite preliminary showing that they were each a "client" of the insurer's attorney under California Evidence Code section 951, either directly or through any showing of a common interest. (2013 WL 1563232 at *5, citation omitted.)

Notes: Each plaintiff was ordered to reappear for a deposition not to exceed 45 minutes on the topic of their conversation with the insurer's attorney.

Defendants contended that insurer's attorney's calls to the insureds to discuss becoming named representatives in a class action against the manufacturers was "cold-calling," raising a question of whether the calls amounted to unethical solicitation. The Court declined to decide whether the communication was improper, but noted that defendants had made a "colorable argument" that insurer's counsel had sought to solicit plaintiffs. (2013 WL 1563232 at *5, note 8.)

10.2.4 Appearance of Impropriety

Case: *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489

Issue: Where a partner in a private law firm represents a city department at an arbitration in a personnel matter, may a different partner in the same law firm advise the city's decision-making body in its consideration of whether to reject or confirm the arbitrator's award if the two partners abstain from talking to each other about the matter

and the law firm establishes an ethical wall between the two partners preventing them from accessing each other's files in the matter?

Holding: **No**. The firm partner advising the city decision-making body owes a fiduciary duty to the partner who advised the city department in the personnel matter under review. (215 Cal.App.4th at 496-497.) In addition, the partner advising the decision-making body has a financial incentive to validate the work of the partner who advised the city department since doing so would enhance the firm's reputation and its business prospects. (*Id*. at 497.) Therefore, allowing the partner to provide advice concerning whether to uphold or reverse a ruling in a matter in which one of his partners advised the city department creates an appearance that the advice of the partner advising the decision-making body was tainted by impermissible bias. Such an appearance of bias is inconsistent with the constitutional due process rights of the city employee whose adverse employment action is under review. (*Ibid*.) The Court underscored that it was not holding that the attorney who advised the decision-making body in fact "intentionally skewed his advice" to promote the position his partner had advocated at the arbitration. "Rather, we acknowledge that bias can be unwitting. We also acknowledge that whenever a person serves two masters who have potentially conflicting interests, it is impossible to peer into the depths of that person's soul to determine the purity of his or her words and actions." (*Ibid*.) In short, the Court stressed that its holding was "premised *solely* on the appearance of unfairness and bias." (*Id*. at 498, emphasis added.)

The Court distinguished the rule in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586, allowing one attorney from a county counsel's office to advise a city department and another attorney from the same county counsel's office to advise the decision-making body reviewing the disciplinary decision of the city department where an ethical wall is established between the two attorneys. Unlike partners in a private law firm, public attorneys owe no fiduciary duty to one another. (215 Cal.App.4th at 497.) Moreover, the public attorney advising the decision-making body has no business incentive to validate the work of the public attorney who advised the city or county department. (*Ibid*.)

Note: The Court concluded that the appropriate remedy was to remand the matter to the city decision-making body for further consideration guided by independent counsel to "eliminate the taint" of the involvement of the firm partner who advised the decision-making body originally. (215 Cal.App.4th at 499.)

10.2.5 Rule 3-310: Avoiding Representation of Adverse Interests; Duties of Class Action Counsel; Fee Recovery

Case: *Radcliffe v. Experian Info. Solutions* (9th Cir. 2013) 715 F.3d 1157

Issue: Did class counsel's inclusion of a clause in a settlement agreement of a putative class action that conditioned class representatives' eligibility for an incentive payment on representatives' supporting the proposed settlement render class counsel inadequate to represent the class?

Holding: **Yes**. Such a clause violated Rule of Professional Conduct 3-310(C) because inclusion of a conditional-incentive-awards provision divorced the interests of the class representatives from those of the rest of the class. The incentive award, resting as it did on the class representatives' support of the settlement, undermined the duty of the class representatives to evaluate the fairness and adequacy of the settlement to the class as a whole. (715 F.3d at 1165.) "There is a lack of congruent interests between [class representatives] and the class at large because the class representatives would be expected to support the settlement so that class counsel would request awards on their behalf." (*Id*. at 1166.) That in turn caused class counsel to represent clients with actual conflicts of interest simultaneously and counsel made no effort to obtain informed written consent from the clients or to contain the conflict by alerting the district court. Consequently, class counsel was not adequate and could not settle the

case on behalf of the absent class members. (*Id*. at 1167.)

The conflict was not present from the inception of the representation, but instead developed late in the representation. On remand, the district court was ordered to determine when the conflict arose, if the conflict continues under any future settlement agreement that may be proposed, and how the conflicted representation should affect the award of attorneys' fees to class counsel. (715 F.3d 1168.) The Court of Appeals noted that the district court would have discretion to award fees "for any non-conflicted representation that created a benefit for the class." (*Id*. at 1168, note 6, citations omitted.)

Note: District Court Judge Sam E. Haddon of Montana joined the majority opinion, but wrote separately to suggest that, on remand, the district court exercise its discretion to deny all fees to class counsel upon resolution of the case on the merits. "[C]lass counsels' actions in orchestrating and advocating the disparate incentive award scenario without any concern for, or even recognition of, the obvious conflicts presented underscore, in my opinion, that class counsel were singularly committed to doing whatever was expedient to hold together an offer of settlement that might yield, as it did, an allowance of over $16 million in lawyers' fees. [¶] Such adherence to self-interest, coupled with the obvious fundamental disregard of responsibilities to all class members – members who had little or no real voice or influence in the process – should not find favor or be rewarded at any level." (715 F.3d at 1169, Haddon, J., concurring, footnote omitted.)

10.2.6 Anti-SLAPP, CCP § 425.16 – Attorney Activity Covered By

Case: *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799

Issue: Is a lawsuit against an attorney who sent a pre-litigation letter to an opposing party threatening to report the party to, among others, the California Attorney General and the Los Angeles District Attorney for tax fraud unless the party repaid the lawyer's client's alleged damages in excess of $75,000 subject to dismissal under the anti-SLAPP statute where the attorney did not list the specific crimes in the demand letter?

Holding: **No**. The letter constituted a threat to accuse the party of a crime accompanied by a demand for payment of money to prevent an accusation from being made, thus constituting criminal extortion as a matter of law. (215 Cal.App.4th at 807, citing Penal Code § 519.) Under the California Supreme Court's ruling in *Flatley v. Mauro* (2006) 39 Cal.4th 299, the anti-SLAPP statute does not apply to criminal extortion. It did not matter that, in this case, the threat was not as extreme as in *Flatley*. The rule excluding criminal extortion from the anti-SLAPP statute was a "bright line rule." (*Ibid*.)

Note: The Court of Appeal noted that rude and belligerent pre-litigation threats and demands unaccompanied by a demand for money do not constitute criminal extortion. (215 Cal.App.4th at 807, note 4.)

10.2.7 Rule 3-310: Avoiding Representation of Adverse Interests

Case: *Khani v. Ford Motor Company* (2013) 215 Cal.App.4th 916

Issue: Was disqualification of plaintiffs' trial counsel in an action under the Song-Beverly Consumer Warranty Act (Civ. Code § 1790, et seq., California's lemon law) warranted where, while at a previous firm four years before the filing of the current action, plaintiffs' trial counsel worked on 150 cases for defendant-manufacturer, including some lemon law cases?

Holding: **No**. For disqualification to be warranted based on successive representation, the former client must show that there is a substantial relationship between the former and current representations. (215 Cal.App.4th at 920, citing *City and County of San Francisco v.*

Cobra Solutions, Inc. (2006) 38 Cal.4th 839, 847.) It is not enough, however, that the legal issues between the matters handled in the former lawsuits and those presented in the current action are the same. California courts have rejected a "playbook approach" barring an attorney from ever being adverse to a former client from whom the attorney had acquired general information about the former client's structure and practices. (215 Cal.App.4th at 921, discussing *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698 and *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671.) Instead, "[t]he substantial relationship test requires comparison not only of the legal issues involved in successive representations, but also of evidence bearing on the materiality of the information the attorney received during the earlier representation." (215 Cal.App.4th at 921.)

The trial court abused its discretion in holding that the prior cases in which plaintiffs' counsel represented defendant-manufacturer were substantially related to the current action just because the same lemon law was involved. The evidence in this case did not establish that plaintiffs' trial counsel, while representing defendant-manufacturer at his former firm, had been exposed to information material to the plaintiffs in the current case. There was no evidence that defendant had any policies, practices, or procedures generally applicable to the evaluation or settlement of California lemon law cases at the time plaintiffs' trial counsel represented defendant at his former firm. Nor was there any evidence that any such policies were unchanged between the time plaintiffs' trial counsel left his former firm and the time the current action was filed. There also was no evidence that the same decision-makers that were involved in the cases that plaintiffs' trial counsel handled while representing defendant at plaintiffs' counsel's former firm were involved in this action. (215 Cal.App.4th at 922.)

Note: The Court cited an unpublished California federal district court ruling holding that an attorney's prior representation of an insurer in a bad faith case did not bar him from representing a client against the insurer in a bad faith case. (215 Cal.App.4th at 922, note 1, citing *Hartford Cas. Ins. Co. v. American Dairy and Food Consulting Laboratories, Inc.* (E.D. Cal. 2010) 2010 WL 2510999.) In that footnote, the Court reaffirmed that California courts may consider unpublished district court rulings as persuasive authority. (215 Cal.App.4th at 922, note 1, citing *Aleman v. Airtouch Cellular* (2012) 209 Cal.App.4th 556, 576, note 8.)

10.2.8 Attorney-Client Privilege; Ethics of Experts

Case: *In re Elijah W.* (2013) 216 Cal.App.4th 140

Issue: Did a juvenile trial court abuse its discretion in rejecting a public defender's request for appointment of an expert psychologist to assist the public defender in the representation of a juvenile criminal defendant where the expert said in advance that, in accordance with the duty of confidentiality imposed on an attorney and the members of his team, the expert would not disclose client information concerning child abuse or neglect to authorities, notwithstanding the mandatory reporting obligations of the Child Abuse and Neglect Reporting Act ("CANRA") (Pen. Code § 11164 et seq.), and would not disclose client information to authorities or others of any threatened violent behavior by the client toward reasonably identifiable victims, notwithstanding *Tarasoff v. Regents of California* (1976) 17 Cal.3d 425, imposing a duty on psychotherapists to protect reasonably identifiable victims from such behavior?

Holding: **Yes**. The trial court erred in denying the public defender's request for appointment of a psychotherapist who committed to respecting the attorney-client privilege as a defense expert, notwithstanding duties otherwise imposed on her as a psychotherapist. The trial court erred in limiting defense counsel to experts who were part of a court-appointed Juvenile Competency to Stand Trial panel of psychotherapists all of whom informed defense counsel that they would report information about child abuse/neglect or *Tarasoff* threats to the authorities.

The criminal defendant has a constitutional right to counsel, including the right to reasonably necessary ancillary defense services. (216 Cal.App.4th at 150.) With limited exceptions, the client has the right to refuse to disclose, and prevent others from disclosing, a confidential communication between the client and his attorney. (216 Cal.App.4th at 151, citing Evid. Code § 954 and discussing attorney's ethical duty of confidentiality under Rule of Prof. Conduct 3-100 and Bus. & Prof. Code § 6068(e).) "Taken together, these fundamental principles mandate that defense counsel's right to appointment of necessary experts, including medical or mental health experts, also includes the right to have communications made to the experts remain confidential to the same extent as communications directly between client and lawyer." (216 Cal.App.4th at 151.)

A psychotherapist appointed by the court to assist defense counsel, pursuant to the court's authority granted by Evidence Code section 730, is bound to maintain client confidentiality both by the psychotherapist-patient privilege and the attorney-client privilege. (216 Cal.App.4th at 153.) The attorney-client privilege may prevent disclosure of client confidences even where an exception to the psychotherapist-patient privilege would apply. (*Ibid*., citing California Law Revision comment.)

CANRA requires mental health professionals and others to report known or suspected instances of child abuse to law enforcement authorities. Information regarding suspected child abuse or neglect is excepted from the psychotherapist-patient privilege. Attorneys are not mandatory reporters under CANRA. (216 Cal.App.4th at 154.) There is a separate duty imposed on psychotherapists under *Tarasoff* to exercise reasonable care to protect the reasonably foreseeable victim of a patient the therapist knows or reasonably should know poses a danger to the foreseeable victim. (*Tarasoff*, 17 Cal.3d at 431, 439.) *Tarasoff* does *not* necessarily require a psychotherapist who determines that a patient poses a serious risk of violence to others to disclose that information to the potential victim or to law enforcement. The psychotherapist's duty, instead, is to exercise due care. (216 Cal.App.4th at 156, discussing *Tarasoff*, 17 Cal.3d at 439.)

The Court was obligated to avoid the serious constitutional question of whether mandating disclosure of client confidences would violate a criminal defendant's constitutional right to effective assistance of counsel and to avoid recognizing implied exceptions to the attorney-client privilege. (216 Cal.App.4th at 157.) In light of these canons of interpretation, the Court declined to read CANRA to require a psychotherapist serving as a member of the defense team to disclose confidential client communications. To read the statute that way "at the very least" would have serious implications for the defendant's right to the effective assistance of counsel. (*Ibid*.) Reading CANRA to mandate disclosure by a member of the defense team also would "plainly violate[] the lawyer-client privilege as now defined." (*Id*. at 157-158.)

Application of the same canons of interpretation excused a psychotherapist from reporting *Tarasoff* threats. First, it was far from clear that a psychotherapist acting as a member of the defense team rather than treating a patient in a standard therapeutic setting had a duty at all under *Tarasoff* to report a threat of serious danger to a known victim. (216 Cal.App.4th at 158.) Second, assuming a forensic psychotherapist does have a *Tarasoff* duty to a potential victim, that duty does not necessarily require disclosure; it only requires that the psychotherapist exercise reasonable care under the circumstances. It may satisfy this duty of care for the psychotherapist to notify the deputy public defender of a *Tarasoff* threat by their shared client which, in turn, would trigger the public defender's duty under Business and Professions Code section 6068(e)(2) and Rule of Professional Conduct 3-100(C) "to consider whether to reveal confidential information because she believes it necessary to prevent a criminal act likely to result in the death of, or great bodily harm to, an individual." (216 Cal.App.4th at 159, footnote quoting Bus. & Prof. Code § 6068(e)(2) and Rule of Prof. Conduct 3-100(C) omitted.)

In sum, the Court of Appeal concluded that the minor defendant was "entitled" to appointment of a psychotherapist expert who chose to protect client confidences of child abuse and threats of harm to others under the attorney-client privilege rather than disclose such abuse and threats. (216 Cal.App.4th at 159.) Because the members of the panel from which the public defender otherwise would have had to have selected a psychotherapist to assist in the defense "would not agree to this fundamental principle," the juvenile court abused its discretion in denying the defendant's motion to appoint its preferred expert. (*Ibid*.)

Notes: The Court expressly declined to decide whether mandatory reporting under CANRA, "if coupled with appropriate procedural safeguards," would be consistent with a criminal defendant's constitutional right to effective assistance of counsel. (216 Cal.App.4th at 157.)

The Court also declined to rule in advance whether in a particular situation a psychotherapist would satisfy any *Tarasoff* duty to a potential victim she may have by reporting it to defense counsel. The Court observed only that the psychotherapist was "certainly reasonable" in taking such a position and the juvenile court should not have dismissed the psychotherapist's willingness to risk personal liability in the service of client confidentiality. (216 Cal.App.4th at 159.)

The Court of Appeal's opinion may mean that a psychotherapist serving as a member of the defense team *must not* report child abuse under CANRA or a *Tarasoff* threat to the authorities because to do so would violate the psychotherapist's obligations under the attorney-client privilege. The Court's concluding paragraph suggests that a defendant is "entitled [as a matter of right] to the assistance of an expert" who not only believes that she *need not* report child abuse or the potential threat of violence, but also believes that she *must not* do so. (216 Cal.App.4th at 159.) If that is the case, the current members of the Los Angeles JSCT panel and those who share their views of their reporting obligations may themselves be categorically disqualified from serving as court-appointed forensic psychotherapists to evaluate minor criminal defendants as part of a defense team, at least without unspecified procedural safeguards. (Cf. 216 Cal.App.4th at 157, note 14, noting that psychotherapists are divided as to whether CANRA mandates that psychotherapists serving on defense teams must report child abuse to the authorities.)

Also, consider whether the Court would have found that the psychotherapist may discharge her duty under *Tarasoff* if the attorney with whom she was working had herself committed to the client that, regardless of what the client told the attorney, she would not disclose to anyone else the client's imminent threat of substantial bodily harm to another. California courts have not yet addressed whether an attorney must at least consider whether to disclose such client information or whether an attorney may categorically and in advance commit not to disclosing such information. If the latter option is available to an attorney, it is difficult to see how a psychotherapist working with an attorney could satisfy her *Tarasoff* duty to a reasonably foreseeable victim of violence since, under those circumstances, there is no possibility at all that either the potential victim or the authorities would be warned of the client's imminent actions.

10.2.9 Anti-SLAPP, CCP § 425.16 – Attorney Activity Covered By

Case: *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481

Issue: Attorney, shortly before acrimoniously resigning from his law firm, allegedly reviewed confidential documents on the law firm's computer system of two groups of clients, Group A and Group B that, with the firm acting as counsel for both Group A and Group B, had engaged in real estate transactions with each other. The resigning attorney provided documents and other confidential information of Group A without authorization to an attorney for Group B who in turn used that information to bring an action against Group A for fraud arising out of the real estate transactions. The

resigning attorney testified in that action. Did the anti-SLAPP statute require dismissal of claims for breach of fiduciary duty, breach of the duty of loyalty, conversion, and invasion of privacy brought by Group A against the attorney?

Holding: **No**. The attorney was unable to meet his burden under the first prong of the anti-SLAPP statute that the allegations arose out of his protected activity in connection with the lawsuit Group B brought against Group A. "A growing body of case law holds that actions based on an attorney's breach of professional and ethical duties owed to a client are not SLAPP suits, even though protected litigation activity features prominently in the factual background." (216 Cal.App.4th at 491, citing *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 702-703, collecting cases.)

The foundation of the alleged causes of action was that the attorney-defendant chose to align himself with his former clients Group A's adversaries in direct opposition to their interests, thereby breaching the duties of loyalty and confidentiality he owed those clients as a result of his former attorney-client relationship with them. The complaint alleged that that conduct specifically breached Rule of Professional 3-310 which addresses the representation of interests adverse to current or former clients. Given the nature of the allegations, the Court concluded that the challenged causes of action did not arise out of protected activity and the attorney-defendant could not meet his burden under the first prong of the anti-SLAPP statute. (216 Cal.App.4th at 493.)

It did not matter that the attorney's communications with Group B's attorney and the attorney's later testimony in that action provided the impetus for instant lawsuit. Those activities were collateral to the attorney's alleged breach of his professional duties. (216 Cal.App.4th at 494.)

10.2.10 Attorney-Client Privilege, Waiver of

Case: *Theranos, Inc. v. Fuisz Technologies, Ltd.* (N.D.Cal. 2013) 2013 WL 2153276

Issue: Did defendant-company in a patent dispute waive the attorney-client privilege over communications concerning the entire subject matter of its prosecution of the patent at issue, both before and after the patent was filed, by: (1) defendant's namesake, the alleged inventor of the invention in dispute, sending a binder of 54 emails between namesake and his patent prosecution counsel to plaintiff's board of directors, in response to a letter from plaintiff's counsel, that discussed the scope of the invention, how it legally could coexist with plaintiff's product, and how the patent in dispute addressed an issue that plaintiff and other inventors had missed and; (2) defendant later producing those emails in response to discovery in the litigation?

Holding: **Yes.** Under Federal Rule of Evidence 502(a), the disclosure of a privileged communication extends to undisclosed communications only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications concern the same subject matter; and (3) the disclosed and undisclosed communications "ought in fairness" be considered together. (See also Fed. Rule of Evid. 106, giving an adverse party the right, if a party introduces part of a writing, to require the introduction of any other part of the writing or any other writing that "in fairness ought to be considered at the same time.") The Court found that defendant, as the party resisting production, had the burden to show that fairness did *not* require waiver of the privilege over documents relating to the same subject as the documents it indisputably intentionally had disclosed to plaintiff's board. (2013 WL 2153276 at *3.)

The Court found that defendant had failed to meet its burden. Defendant did not expressly disavow its reliance in the litigation on the privileged documents its namesake had disclosed to plaintiff's board of directors. "[T]he disclosure to [plaintiff's] board combined with the production in this case [in response to discovery] and [defendant's] failure to disavow any reliance on the emails are sufficient to require any disclosure of all of the remaining documents on the entire [patent at issue]

(including the earlier provisional and nonprovisional patents), the invention and reduction to practice, and [defendant's] awareness of [plaintiff's] confidential information. [Defendant] appears primed to employ the favorable communications as a sword while guarding possibly damaging emails with the shield of the privilege, and the position undoubtedly creates an unfair prejudice to [plaintiff]." (2013 WL 2153276 at *4.)

Plaintiff was entitled to the additional documents to adduce the context of the emails already disclosed and to rebut any inferences defendant may seek to draw from those documents, particularly since the defendant's namesake had offered the absence of references to confidential information in the disclosed documents to show that he never used plaintiff's intellectual property to develop the patent in dispute. Defendant's namesake "may have chosen a representative sample of communications or he may have cherry-picked selective communications that are favorable to him. The court cannot tell which was [defendant's namesake's] motivation, and that is why disclosure is necessary." (2013 WL 2153276 at *4.)

Notes: The Court opened its opinion with the observation that "Patent cases seem to give rise to a disproportionate number of disputes regarding the scope of waiver attached to a disclosure of privileged documents." (2013 WL 2153276 at *1.)

The Court held that defendant need not produce its communications with, or work product created by, its counsel in this litigation. (2013 WL 2153276 at *5.)

10.2.11 Privileged Material, Disqualification Based on Use or Receipt of

Case: *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.* (C.D.Cal. 2013) 2013 WL 2278122

Issue: In a qui tam False Claims action alleging that relator-executives' former employer submitted false claims in the sale of medical products to U.S. government, was disqualification of counsel for putative relators warranted where counsel quoted in pleadings attorney-client privileged documents that relators took from their employer when they left, some of which documents the U.S. Attorney's office had notified counsel the government would not use in its investigation because the documents appeared to be privileged?

Holding: **Yes**. Counsel that has received an opposing party's privileged material has a duty to take "reasonable remedial action." (2013 WL 2278122 at *2, quoting *Gomez v. Vernon* (9th Cir. 2001) 255 F.3d 1118, 1134.) In such circumstances, "the path to an ethical resolution is simple: when in doubt, ask the court." (2013 WL 2278122 at *2, quoting *Gomez*, 255 F.3d at 1135, internal marks and additional citation omitted.)

Relators' counsel told their clients not to give them any privileged documents that they had taken from their former employer. The clients nonetheless had included some privileged documents among those given to the attorneys who in turn reviewed the documents and transferred them to the U.S. Attorney's office for use in the government's investigation of the claims. (2013 WL 2278122 at *1.) After the government informed counsel that it would not be using specified documents in its investigation because the government was concerned they were privileged, counsel quoted from those documents as well as other privileged documents in pleadings rather than seeking direction from the Court. (*Id.* at *2.)

When they were executives at the target company, the relators had had extensive contact with their employer's legal counsel, meaning that relators' counsel should have known that many of the documents they had taken, which included communications with the employer's attorney, were privileged. Counsel "should have sought guidance from the Court even before transferring such documents to the [government]. Relators' counsel took no such reasonable remedial action to address privilege issues; instead they transferred privileged documents to [the government] and repeatedly used them in

the pleadings." (2013 WL 2278122 at *2, footnote omitted.)

The Court rejected counsel's arguments that disqualification was not warranted. Disqualification was warranted not, contrary to relators' contention, because they were merely exposed to the privileged material, but because they quoted that material in the pleadings. (2013 WL 2278122 at *3.) In addition, the attorneys were not being disqualified because of the actions of their clients, but because of their own actions. (*Ibid*.) In addition, while it is true that an attorney may not be disqualified simply because the client is the source of privileged material that comes into the attorney's possession, it also is true that attorneys do not have a license to do whatever they wish with privileged material they obtain from their clients. (*Ibid*.) Moreover, the defendant-employer had shown sufficient risk of prejudice to justify disqualification because counsel not only used the privileged material to craft their clients' claims, but also quoted from such material verbatim in the pleadings. (*Ibid*.) Relators' counsel also had not shown that the motion to disqualify had been brought as a tactic to derail the action; the motion had been filed before any critical deadlines in these actions. (*Ibid*.) Nor was a finding of bad faith required to warrant disqualification, but even if such a finding were required, counsel's quoting from the privileged documents in pleadings without seeking guidance from the Court after being notified of the government's concerns that some of the documents were privileged was tantamount to bad faith. (*Ibid*.) Finally, there is no authority for the proposition that counsel's obligation to take reasonable remedial action upon receipt of an opposing party's privileged material was excused by defendant-employer giving final copies of the materials almost identical to the drafts of the same privileged documents relators' counsel had transmitted to the government. (*Ibid*.)

Note: The Court noted that, while a qui tam action is under seal, relators' counsel have a special obligation to contact the court for ethical guidance about how to handle an opposing party's potentially privileged materials. That is because relators' counsel cannot contact the defendant about privilege issues while the action is under seal and the defendant itself is unable to protect its privileged material. As in other kinds of ex parte proceedings, "courts expect greater care and candor from counsel." (2013 WL 2278122 at *2, note 2, citation omitted.)

10.2.12 Rule 3-310: Avoiding Representation of Adverse Interests; Tripartite Insurer-Insured Attorney-Client Privilege

Case: *Schaefer v. Elder* (2013) 217 Cal.App.4th 1

Issue: Was insured entitled to independent counsel paid for by insurer and to disqualification of his counsel appointed by insurer under a reservation of rights in action against insured arising out of insured's allegedly defective design and construction of residence in which the plaintiff-homeowner could establish liability against insured by proving that workers who did the defective work were either insured's employees or his independent contractors, but where insured would be entitled to coverage under the policy only if the workers were found to be insured's employees since insured had not satisfied contractor's special condition in the policy requiring insured to obtain an indemnity agreement and certificate of insurance from independent contractors?

Holding: **Yes.** The Court held that insured was entitled to independent counsel paid for by insurer since there was an actual divergence of the interests of insurer and those of insured. It was in insurer's interest to argue that the defective work was done by independent contractors of insured for whom insured had not satisfied the contractor's special condition of the policy; it was in insured's interest to argue that the work was done by insured's employees, such that any liability and damages would be covered by the policy. (217 Cal.App.4th at 7-8.) That raised a conflict of interest for counsel appointed by insurer since counsel had an ethical duty to insurer to try to establish that the workers were independent contractors and a conflicting ethical duty to insured to try to establish that the workers were employees. That conflict entitled insured to

independent counsel. (*Id*. at 8.)

It did not matter that insured would be liable to plaintiff-homeowner regardless of whether the workers who did the defective work were insured's independent contractors or his employees. This argument avoided rather than resolved whether there was a conflict. To establish liability, plaintiff-homeowner would "have to establish that someone did something at [insured's] bidding. Whether it was an employee or an independent contractor, which implicates two different paths for [homeowner] to establish liability, one or the other must be proven." (217 Cal.App.4th at 8.)

The Court also rejected insurer's argument that the status of the hired persons would not be resolved in the construction defect action. Plaintiff-homeowner would have to establish that those who did the defective work were related in a business sense to insured. The determination of that relationship will impact, later in the declaratory relief action regarding coverage that insurer separately had filed, whether the failure of insured to satisfy the contractor's special condition excluded coverage of the claims. (217 Cal.App.4th at 8.)

Insured also was entitled to have the firm appointed by insurer disqualified from further involvement in the matter. The firm simultaneously represented insurer and insured in the litigation. The Court had to assume that the firm received confidential information from the insured in, among other things, responding to interrogatories in which insured asserted that, contrary to the allegations in the complaint, the work on the residence primarily had been done by independent contractors rather than employees. If the firm had exclusively represented the insurer from the outset of the litigation, it might be allowed to participate in the litigation pursuant to Civil Code section 2860(f) where insured selects independent counsel, but that was not this case. (217 Cal.App.4th at 9.)

10.2.13 Disqualification of Counsel for Access to Opposing Expert; Attorney-Client Privilege; Attorney Work Product Doctrine

Case: *DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671

Issue: On remand after trial and appeal of cross-actions in a commercial real estate dispute, was disqualification of plaintiff's counsel warranted where plaintiff's counsel retained expert, an industrial real estate broker, who had testified on behalf of defendant in the prior trial, and where expert had been: first, an independent contractor to defendant prior to the litigation; then second, a consultant to defense counsel prior to being designated as a testifying expert; then third a testifying defense expert, but where there was no showing that expert possessed confidential material of the defendant relevant to the single unlawful detainer cause of action to be tried on remand?

Holding: **No.** The Court of Appeal reversed the trial court's order granting the motion to disqualify. Defendant earlier had contacted expert for assistance in learning about the availability of alternative commercial sites for the company's operations prior to being contacted by defense counsel. The Court of Appeal rejected defendant's contention that the purportedly confidential business information the expert received from the defendant. It would have been different had the expert been an employee of the defendant, especially one subject to a written confidentiality agreement, but he wasn't. He was just a broker consulted by a client. There is no authority for the proposition that a real estate broker/client relationship gives rise to a duty of confidentiality. (217 Cal.App.4th at 686-687.) Thus, conversations between the defendant and expert-broker prior to the time the expert was contacted by defense counsel were not privileged and could not be the basis of disqualification of either the expert or of plaintiff's counsel who obtained access to such information when counsel retained the expert on remand. (*Id*. at 687.)

The question remained whether disqualification was warranted because of information

defense counsel shared with the expert when expert was a consultant and then a testifying expert. The Court of Appeal acknowledged that the attorney-client privilege and attorney work product doctrine protects from discovery, and thus renders confidential, information in a pre-trial written report the expert prepares for counsel on trial preparation matters the expert conveyed as a consulting expert. "The mere fact the expert may have the dual status of a prospective witness and of advisor to the attorney, does not remove the product of his services rendered exclusively in an advisory capacity, as distinguished from the product of services which qualify him as an expert witness, from the work product limitation upon discovery." (217 Cal.App.4th at 690, quoting *Scotsman Mfg. Co. v. Superior Court* (1966) 242 Cal.App.2d 527, 531, internal marks omitted.) "In other words, an expert's opinion regarding the subject matter about which the expert is a prospective testifying expert is discoverable, but the expert's advice rendered to the attorney in an advisory capacity is still subject to conditional work product protection." (217 Cal.App.4th at 690, citation omitted.) A trial court is required to review such a report in camera and allow discovery of material reflecting information provided as a testifying expert, which is unconditionally discoverable, from information provided as a consultant, which is discoverable only a showing of good cause. (*Ibid*.)

With those principles as a backdrop, the Court of Appeal concluded that defendant had failed to meet its burden of establishing that the expert had confidential information materially related to the pending matter and entitled to the rebuttable presumption that the information has been disclosed to opposing counsel. "[A]s a testifying expert's opinions are no longer subject to the attorney-client privilege or work product protection – particularly when, as in this case, the expert has already testified – the expert is not in possession of any confidential information and there is therefore no reason that opposing counsel cannot retain the expert." (217 Cal.App.4th at 691.)

There was no support in the law for defendant's contention that the opinions of counsel orally conveyed to a dual-capacity expert in the course of discussions with the expert in his consultant capacity remain work product. "There is good reason for a general rule that the conditional protection for *any* attorney work-product conveyed to an expert has no application once the expert is likely to testify. Indeed, any time an attorney speaks with a testifying witness – percipient or expert – the attorney discloses some amount of work product, in the fact of the conversation and the matters discussed. This act of disclosure does not mean that the witness possesses confidential information which prevents opposing counsel from speaking privately with the witness. Instead, disclosing such information to the witness acts as a waiver of the work product protection. If an attorney wishes to keep the work product conveyed to a consulting expert protected, the attorney may do so by the simple expedient of not designating the expert as a testifying expert." (217 Cal.App.4th at 692, emphasis in the original.)

The Court further found that, even if work product conveyed to a consulting expert retains its protection from disclosure after the expert is designated as a testifying expert, defendant failed to show such confidential information material to the pending proceedings was conveyed to the expert. While defendant was not require to tell the court what purported work product was conveyed to the expert, defendant was required to provide the trial court with "the nature of the information and its material relationship to the proceedings." (217 Cal.App.4th at 692.)

Note: The reason plaintiff's counsel was so eager to retain the real estate broker who had testified for the defense in the first trial was that the defense expert had given testimony at trial that plaintiff's own expert had substantially undervalued the fair market rental value of the property. (217 Cal.App.4th at 678.)

10.2.14 C.C.P. § 128.7: Monetary Sanctions

Case: *Interstate Specialty Marketing, Inc. v. ICRA Sapphire, Inc.* (2013) 217 Cal.App.4th

708, 158 Cal.Rptr.3d 743

Issue: Plaintiff attached as an exhibit to a verified complaint for breach of contract an unsigned copy of a preliminary letter outline it believed reflected the final terms of the agreement. A signed copy of the final agreement, which was similar to the unsigned version letter, was attached to the cross-complaint defendant later filed. Discovery responses served by both sides confirmed that the document attached to plaintiff's complaint was not the operative agreement. The trial court denied defendant's motion for summary judgment based solely on the document error and granted plaintiff's ex parte application for leave to amend its complaint to attach the correct document. Did the trial court abuse its discretion in awarding monetary sanctions on its own motion pursuant to Code of Civil Procedure section 128.7 and common law against plaintiff and its counsel payable to defense counsel because of plaintiff's failure to catch and fix the error in its pleadings sooner where the trial court set the OSC for the sanctions at the hearing on the motion for summary judgment?

Holding: **Yes**. The sanctions order was reversed.

First, section 128.7(c)(2) prohibits the imposition of section 128.7 sanctions on the trial court's own motion unless a party has been given 21 days from the date of service of the OSC to withdraw or correct the defective filing. The trial court did not issue the OSC until the hearing on the motion for summary judgment, a hearing at which the trial court also granted plaintiff permission to correct the defective pleading. The Court of Appeal found that the trial court was incorrect that the 21-day safe harbor provision began to run against the plaintiff silently when defendant first filed the motion for summary judgment over two months before plaintiff filed its ex parte application to correct the complaint. Defense counsel did not seek section 128.7 sanctions in its summary judgment motion and nothing in section 128.7 allows for "silent running of a safe harbor statute; it's not a safe harbor if there are enemy submarines in it." (158 Cal.Rptr. 3d at 749.)

Second, plaintiff's counsel's attachment of the almost final draft of the agreement to the verified complaint was not the sort of conduct sanctionable under section 128.7. Attaching the unsigned version of the agreement was not done for the purposes of harassment or delay and there was no contention that the factual allegations and legal contentions in the complaint were frivolous. (158 Cal.Rptr.3d at 750, quoting Code of Civ. Proc. § 128.7(b).)

Third, sanctions issued on a court's own motion may not be made payable to the opposite party. (158 Cal.Rptr.3d at 750, citing *Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 443-444.)

Fourth, the trial court lacked the authority to award attorney fees as sanctions under common law. "[A] court's inherent power to supervise judicial proceedings does not encompass the power to award attorney fees as sanctions for attorney misconduct, absent specific legislative authorization or agreement of the parties." (158 Cal.Rptr.3d at 750, discussing *Bauguess v. Paine* (1978) 22 Cal.3d 626, 637-638.) There is no such legislative authority for imposing sanctions for failure to get everything exactly right in a verified complaint.

Notes: The Court of Appeal criticized the trial judge, plaintiff's counsel, and defense counsel.

In addition to having his order reversed, the trial judge was rebuked for turning to sanctions too quickly to address an attorney's error. That hastiness resulted in "three different kinds of error." (158 Cal.Rptr.3d at 745.)

While sanctions against plaintiff's counsel were reversed, the Court of Appeal took plaintiff's counsel to task for his "lamentable inattention" (158 Cal.Rptr.3d at 745) and for his "sloth" in not seeking to attach the correct agreement to the verified complaint until two months after defendant filed a motion for summary judgment based on the

document error. Counsel's inattention and sloth resulted in an unnecessary hearing and "a waste of everybody's time." (*Id.* at 748.)

The Court of Appeal was "equally disappointed by defendant's counsel" for failing to show the "little civility" that could have resolved the problem with the defective pleading early on the case. (158 Cal.Rptr.3d at 745.) Defense counsel "could have picked up the telephone or written a letter and simply explained that [plaintiff] had the wrong document, expressed a willingness to stipulate to an amendment, and only if [plaintiff] had persisted in doing nothing, brought some sort of motion or other proceeding to correct the mistake. *That* would have been the civil and professionally correct thing to do. . . . Instead, [defense] counsel yielded to the temptation to exploit an adversary's gaffe so as to deny him a hearing on the merits." The Court urged attorneys to abjure the "disturbing predisposition" in the practice of law "to pick up the sword before the ploughshare." (*Id.* at 748-749, emphasis in the original.)

For more on cases addressing limits on sanctions, see generally, "Commentary: A Trilogy of Limits on Attorney Sanctions" (EQ 7.3, October 2010): "Courts have a range of tools at their disposal to curb and deter attorney misconduct, but those tools may be used only as directed. . . . [A] court must be sure that it has not exceeded its authority in imposing sanctions on an attorney for conduct for which it is not warranted, awarding fees against a losing attorney that the law makes the responsibility of his client, and in determining the nature of sanctions against an errant attorney beyond the specific parameters of the applicable law."

Important Update: No case abstracted in the previous edition of *Ethics Quarterly* has been accepted for review or otherwise rendered uncitable.

Disclaimer: Counsel should read the full text of the cases discussed before relying on the necessarily limited discussion of them here. Counsel also should be mindful that some of the Court of Appeal cases abstracted may be subject to depublication or review by the California Supreme Court. All cases should therefore be checked to confirm they are citable.

COMMENTARY: The Occasional Ethical Imperative To Say More

Daniel E. Eaton[1]

Introduction

"Silent" Calvin Coolidge, the 30th President of the United States, once said "I have never been hurt by anything I didn't say." That is a sound aphorism, especially for lawyers. For example, the lawyer who wrote the demand letter threatening to report an opposing party to the district attorney for tax fraud unless the party paid the lawyer's client a large sum of money probably now wishes he had left some words out of that letter. (*Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799, EQ 10.2.6. See also *id*. at 807, note 4, observing that rude and belligerent pre-litigation threats that omit a demand for money do not constitute unethical criminal extortion.)

And yet two cases from this issue of *Ethics Quarterly* teach that sometimes lawyers, of which Coolidge was one, may indeed be hurt in ethically relevant ways by words they didn't say. Defense counsel in a wage and hour putative class action was precluded from using over 100 employee declarations he had obtained from his client's employees because he did not tell those employees why he was conducting the interviews and also did not tell them that the document they were signing after the interview was a sworn affidavit that could be used to limit the employees' recovery. Defense counsel also was barred thereafter from communicating with the employees about the lawsuit. (*Quezada v. Schneider Logistics Transloading and Distribution* (C.D.Cal. 2013) 2013 WL 1296761, EQ 10.2.1.) Defense counsel in a breach of contract action was rebuked for failing to tell plaintiff's counsel that the wrong version of the agreement was attached to the verified complaint before bringing a motion for summary judgment based solely on that mistake. Defense counsel was ordered, though not as a punishment, to pay plaintiff's appellate costs when a trial court's sanctions order was reversed. (*Interstate Specialty Marketing, Inc. v. ICRA Sapphire, Inc.* (2013) 217 Cal.App.4th 708, 158 Cal.Rptr.3d 743, 10.2.14.) What was the ethical imperative to say more that drove the result in these cases?

A. *Quezada v. Schneider Logistics Transloading and Distribution*: Incomplete Admonitions and the Unusable Witness Statement

In *Quezada*, a putative wage and hour class action, defense counsel diligently obtained 106 sworn statements from his client's employees after interviewing each employee for 30-45 minutes. Before each interview, the employee was told that: (1) the employee's participation was voluntary and the employee could stop the interview altogether at any time for any reason; (2) the employee's signing a declaration was voluntary; (3) the employee could revise their resulting draft declaration to reflect the

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truth; (4) the employee was a potential member of a class on whose behalf a lawsuit had been brought with claims pertaining to, among other things, unpaid wages; and (5) the lawyers represented the employer and not the interviewed employee. So the statements were usable in defending the action, right?

No, said the Court. There was an ethical imperative to say more. According to the Court, what defense counsel critically left unsaid to the employees was the fact-gathering purpose of the interviews and that the employees' statement could be used against the employees in a lawsuit. (2013 WL 1296761 at *5.) Omitting that information rendered the attorneys' communication with the employees "fundamentally misleading and deceptive because the employees were unaware that the interview was taking place in an adversarial context, and that the employees' statements could be used to limit their right to relief." (*Ibid*.)

But defense counsel's failure to provide this additional information to the employees was more than generically deceptive. According to the Court, defense counsel also thereby ran afoul of Rule of Professional Conduct 3-600(D). That provision prohibits an attorney who is representing an organization from misleading an employee into believing that any confidential information the employee shared with the attorney would be used against the employee if the organization's interest is or becomes adverse to the employee. "An employee unaware of the formal and potentially adversarial nature of the evidence-gathering interviews could acquire the false impression that he or she could communicate confidential information to the interviewer without negative consequences." (2013 WL 1296761 at *5.)

Defense counsel and their client suffered three consequences from counsel's failure to say more. First, the Court disregarded the employee declarations going forward in the litigation. (2013 WL 1296761 at *6.) Second, more speech was disseminated by the Court in the form of a curative notice to potential class members. The notice explained that any declaration that potential class members had signed would not be considered by the Court and that the defendant-employer could not retaliate against any class member-employee for cooperating with plaintiffs' counsel or otherwise participating in the lawsuit. (*Id*. at *8.) Third, to limit the likelihood of further deceptive communication, defendant and its agents were barred from further communication with defendant's employees about the case without the Court's permission. (*Id*. at *6.) In other words, because defense counsel failed to say enough when they interviewed their client's employees about the issues in the lawsuit, counsel and their client were barred from saying more to the employees about the lawsuit without court permission.

B. ***Interstate Specialty Marketing, Inc. v. ICRA Sapphire, Inc.*: The Failure to Alert Opposing Counsel to an Error and Sanctions Lost and Costs Paid**

Interstate Specialty Marketing, Inc. was a breach of contract action. Plaintiff's counsel attached to the verified complaint a preliminary and unsigned letter outlining the terms of the allegedly breached contract, attesting that the attached document was a true and correct copy of the agreement. Two months later, defendant filed a cross-complaint to which defendant attached an actual true and correct copy of the signed agreement, which was dated about two weeks later than the unsigned letter outline attached to the original complaint. Two weeks later, plaintiff's counsel filed a verified first amended

complaint. Plaintiff again attached the preliminary letter outline attached to the original verified complaint. "There is nothing to indicate counsel for [defendant] ever brought the mistake to [plaintiff's] counsel's attention by anything as clear and informal as a phone call, much less a letter." (158 Cal.Rptr.3d at 746.) That said, plaintiff's counsel could have discovered his mistake by being attentive to the pleadings and the ensuing formal discovery. For example, plaintiff itself admitted that the document attached to the verified complaints was not "the final expression of the parties." (*Ibid*.)

On March 22, 2012, defendant brought a motion for summary judgment based solely on the document error. That is, defendant contended that plaintiff could not prevail as a matter of law because plaintiff admitted that the document attached to its verified complaint was not the final contract between the parties. (158 Cal.Rptr.3d at 747.) The motion was set for hearing on June 22, 2012. Plaintiff's counsel did not get around to seeking ex parte leave from the trial court to amend the complaint to attach the correct document until June 5, 2012, less than three weeks before the scheduled hearing on the motion for summary judgment. The trial court decided to defer ruling on plaintiff's ex parte request until the hearing on the summary judgment motion. (*Ibid*.)

At that hearing, the trial court denied the motion for summary judgment since defendant had failed to identify any material differences between the preliminary document attached to the verified complaint and the final version of the agreement. The trial court also granted plaintiff's ex parte request to attach the correct version of the contract to the complaint. (158 Cal.Rptr.3d at 747.) On his own motion, however, the trial judge set a July 13 hearing date on an order to show cause why sanctions should not be imposed on plaintiff and its counsel for attaching the wrong version of the agreement to the verified complaint and taking so long to seek to correct the error. Ultimately, the trial judge imposed sanctions of over $5,000 pursuant to Code of Civil Procedure section 128.7 and "common law" on plaintiff and its counsel payable to defendant for forcing defendant to incur the expense and effort of filing a motion for summary judgment just to fix plaintiff's error. Plaintiff appealed the sanctions award. In filing a cross-complaint with the correct version of the agreement, and engaging in discovery which should have alerted plaintiff's counsel that he had attached the wrong version of the agreement to the complaint, hadn't defense counsel communicated all that was ethically necessary to be entitled to retain the sanctions awarded to his client?

No, said the Court of Appeal. There was an ethical imperative to say more, in this case, to pick up the phone and alert opposing counsel to his obvious error. The effective consequences of defense counsel not saying more were that the sanctions award was overturned and defendant was ordered to pay plaintiff's costs on appeal. Here, what is meant is not an ethical imperative imposed by the formal rules governing attorney conduct in California, namely the Rules of Professional Conduct and the California State Bar Act. Those rules comprise what may be called "big E" ethical duties. What is meant instead is an ethical imperative arising out of more general standards of professionalism and civility, what may be called "small e" ethical duties. Instead of working the case up toward a motion for summary judgment that ultimately would be denied, defense counsel could have reached out to plaintiff's counsel to explain that plaintiff had the wrong document, expressed a willingness to stipulate to an amendment, and, only if plaintiff persisted in failing to correct the error, brought a motion. "*That* would have been the civil and professionally correct thing to do." (158 Cal.Rptr.3d at 748-749, emphasis in

the original.) Instead, defense counsel declined to say more and yielded to "the temptation to exploit an adversary's gaffe so as to deny him a hearing on the merits." (*Id*. at 749.)

It is important to underscore that the Court of Appeal did not reverse the sanctions award because of anything defense counsel did or did not say to opposing counsel. The Court of Appeal reversed the sanctions award because the trial judge made four errors: (1) the trial judge did not give plaintiff the benefit of the 21-day safe harbor provision before sanctions are imposed under section 128.7; (2) attaching an almost final draft of an agreement to a verified complaint is not the kind of conduct addressed by section 128.7; (3) sanctions issued on a court's own motion may not be made payable to an opposing party; and (4) the common law gave the trial judge no authority to impose attorney's fees as sanctions. (158 Cal.Rptr.3d at 749-750.) Even though the trial court's errors resulted in the appellate court's reversal of sanctions order issued on the trial judge's own motion, defendant was ordered to pay plaintiff's costs on appeal. This was "not a punishment," said the Court of Appeal, but merely "the default cost apportionment." (*Id*. at 751.) "But it is impossible to make this order without observing that a phone call alerting opposing counsel to his corrigendum [i.e, correctable written error], would have avoided this consequence." (*Ibid*.)

Conclusion

A habit of saying no more than necessary may be self-preserving. But sometimes there is an ethical obligation to say more, whether to a client, a client's constituents, or to opposing counsel. All of that counsels pausing before deciding what to say – and deciding what not to.