ETHICS QUARTERLY

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IN THIS ISSUE . . .

Happy New Year!

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

- Does the attorney-client privilege protect a criminal defense attorney from being held in contempt for refusing to disclose to the court how she obtained documents she turned over to the prosecution that says were obtained from agents of her client without the attorney having to disclose the nature of the alleged agent's relationship to her client? (10.4.2)
- Was in-house counsel potentially liable for malpractice to a former employee for jointly defending the former employee and the corporation at a deposition in which the former employee claimed in-counsel had elicited testimony that the former employee claimed led to his firing? (10.4.4)
- Does the federal attorney-client privilege categorically shield from discovery tax returns prepared by a client's tax attorney? (10.4.7)
- Was disqualification of plaintiff's counsel in a patent infringement action warranted where he conferred with an attorney who, years before the action was filed, had a 30-minute call with defendant about possible representation in which defendant's intellectual property was discussed? (10.4.11)

The Commentary is entitled: **"Ethical Duty as Neither Shield Nor Sword."** The additional Commentary is entitled **"The Top 10 California Legal Ethics Cases of 2013."**

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CASE NOTES

10.4.1 Litigation Privilege; Anti-SLAPP, CCP § 425.16 – Attorney Activity Covered By

Case: *Getfugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141

Issue: Is litigation opponents' claim for defamation against a lawyer and his firm based on allegedly false statements the lawyer made in a press release that opponents' alleged investment scam was under criminal investigation by the FBI barred by the litigation privilege?

Holding: **No**. The Court of Appeal reversed the trial court order granting defendants' anti-SLAPP motion to strike this claim. The Court agreed with the trial court that the defamation claim directed at a press release about an alleged investment scam by a public company arose out of an issue of public interest. Investors depend on the integrity of the markets to promote their own financial security and the overall health of the economy. The lawyer and his firm satisfied the first prong of the anti-SLAPP statute. (220 Cal.App.4th at 151.)

The Court of Appeal held that litigation opponents had demonstrated the minimal merit of their defamation claim sufficient to withstand the motion to strike. The press release

was not protected by the litigation privilege because it was directed at too broad an audience. The lawyers, representing plaintiffs in a RICO action, claimed that the privilege applied because the press release was issued through an investor wire service. The press release was posted on the Internet and released worldwide. That made the press release available to the general public. *Silberg v. Anderson* (1990) 50 Cal.3d 205 and *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134 both stand for the proposition that dissemination of defamatory material beyond those with a substantial interest in the outcome of the litigation is not protected by the privilege. (220 Cal.App.4th at 153-154.) The attenuated interest of the investing public at large in the outcome of the underlying litigation was insufficient to bring the press release within the privilege. (*Ibid*.)

There was conflicting evidence about whether in fact the FBI was conducting a criminal investigation of litigation opponents as asserted in the press release. That was enough to enable the plaintiffs to survive the motion to strike. (220 Cal.App.4th at 155.)

Note: The Court of Appeal affirmed dismissal of a claim based on a "Tweet" the lawyer sent from his Twitlonger account that read: "[Opponent] runs an organization for the benefit of its officers and directors, not shareholders and employees. The RICO suit [brought by lawyer and his clients that was dismissed] was not frivolous. The 500K lawsuit is frivolous, however, so buyer be wary." The Court held that, like the press release, the Tweet was not covered by the litigation privilege because of its broad dissemination. (220 Cal.App.4th at 154.) But the Court further held that the message was nonactionable opinion about the opponent's corporate governance, meaning the plaintiffs could not establish the minimal merit to this aspect of their defamation claim. (220 Cal.App.4th at 156.) The main holding of the opinion, however, makes it clear that a lawyer may be held liable for broadcasting factually false and defamatory statements about a litigation opponent through social media

10.4.2 Attorney-Client Privilege; Sanctions, Contempt

Case: *Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389

Issue: Does the attorney-client privilege preclude a finding of contempt against a deputy public defender for refusing to answer a court's questions about how she received specific evidence that she delivered to the prosecution and that was relevant to the prosecution's case by representing to the court that she received the evidence through her client-defendant's agent or agents without providing facts necessary to establish the existence and scope of the agency relationship to the client-defendant?

Holding: **No**. In a case of first impression, the Court of Appeal upheld the finding of contempt. It was not enough for the attorney simply to represent to the trial court that her client's agent gave her the evidence without supplying facts to indicate the fact and nature of the agency relationship.

On the one hand, the Court acknowledged the importance of open communications between attorney and client and the need for counsel to investigate the good and the bad of a client's case. (220 Cal.App.4th at 403.) On the other hand, the Court was unwilling to extend the attorney-client privilege so far that an attorney could claim protection of the privilege merely by representing that an agent was involved in the delivery of evidence without establishing the existence of an agency relationship. (*Ibid*.)

Reconciling those competing policy considerations, the Court held that the attorney-client privilege was available to protect information coming to an attorney from a client's agent acting within the scope and authority of the agency. In such a situation, the attorney's observations may be privileged if they were made as a direct consequence of a protected communication. The party claiming the existence of agency has the burden of proving the existence and scope of the agency with actual facts. (220

Cal.App.4th at 403.)

The burden was not met here by a conclusory assertion that the attorney received the evidence from her client's agent. The Court was unable to determine if the attorney received both pieces of evidence at the same time, whether there was more than one agent, or the identity of the agent or agents. On such a "sparse" record, it was impossible for either the trial court or the Court of Appeal to find agency. (220 Cal.App.4th at 401-402.)

Notes: Defense counsel conceded in her petition to the Court of Appeal that she had not received the evidence directly from her client. (220 Cal.App.4th at 396-397.)

The case was remanded to the trial court "for further proceedings as necessary." (220 Cal.App.4th at 403-404.) The trial court had sentenced defense counsel under Code of Civil Procedure section 1219(a) so that she would remain in custody until she testified or the proceedings against her client ended. (220 Cal.App.4th at 395.)

10.4.3 Advertising and Solicitation

Case: *Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479

Issue: In a products liability action, did a trial court violate an attorney's constitutional right to speech when the court ordered her to remove two pages from her website, discussing her success in similar actions, to keep the jury from seeing those pages?

Holding: **Yes**. The trial court's admonition to the jury not to use the Internet to research anything about the case or anyone connected to it was the proper way to address its concerns about possible jury access to the web pages in question. The jurors presumably would follow the trial court's instructions and, if one or more jurors did not follow those instructions, the trial court could remedy it at that time. (220 Cal.App.4th at 1492.)

A prior restraint on the attorney's right to speak in the form of the commercial advertising she did through her web page was not a constitutionally available option. Such an order was not a sufficiently tight fit between harm and remedy. The order was under-inclusive in that it had no impact on web pages authored by others that contained the same information as that the trial court ordered deleted from the attorney's web site. (220 Cal.App.4th at 1490.) The order was over-inclusive in having the effect of precluding even those who were not jurors from viewing the web pages in question.

The Court of Appeal acknowledged the substantial literature about juror misuse of the Internet. (220 Cal.App.4th at 1491, note 6.) The proper way for courts to address this is to control the behavior of jurors, not that of trial participants.

Notes: The trial had ended and the web pages restored by the time the issue reached the Court of Appeal for resolution. The Court exercised its discretion to address a moot question on the merits on the basis of the public interest exception. (220 Cal.App.4th at 1485.)

The Court of Appeal initially declined to review the trial court's order. Appellate counsel then sought review by the California Supreme Court. In the petition for review before the state high court, appellate counsel had represented that the trial court had ordered plaintiff's counsel to take down her *entire* web site pending trial. The California Supreme Court subsequently ordered the Court of Appeal to issue an order to show cause why the trial court order should not be reversed, which it did. The Court of Appeal noted that, in misrepresenting the scope of the trial court's order to the Supreme Court, appellate counsel apparently violated Business and Professions Code section 6068(d), prohibiting attorneys from making misleading statements of fact or law to a judge. (220 Cal.App.4th at 1484, note 3.)

10.4.4 Rule 3-310: Avoiding Representation of Adverse Interests

Case: *Yanez v. Plummer* (2013) 221 Cal.App.4th 180

Issue: Was in-house counsel entitled to summary judgment of claims asserted by discharged employee that in-house counsel committed legal malpractice and other wrongs when in-house counsel's representation of both employee and employer without obtaining employee's informed written consent allegedly resulted in employee making statement in deposition that contradicted his earlier written statement and then led to employee's termination for dishonesty?

Holding: **No**. The Court of Appeal reversed summary judgment in in-house counsel's favor. The Court of Appeal found that there was a triable issue of material fact as to whether but for in-house counsel's representation of both employer and employee at the deposition, in violation of in-house counsel's ethical duties to obtain informed written consent from clients with conflicting interests, employee would not have been terminated.

Employee had been present when a co-worker slipped and fell on an oil-soaked floor and was injured. Employee prepared two written statements the day of the accident. The first said accurately that employee *was aware* that his co-employee had slipped and fallen; the second more detailed statement, prepared an hour later, said that employee *had seen* the co-worker slip and fall. The co-worker brought a lawsuit under the Federal Employers Liability Act.

Before employee's deposition nine months after employee had prepared the written statements, in-house counsel told employee that he was employee's attorney for purposes of the deposition. In addition, in-house counsel assured employee that his job would be unaffected if he told the truth at the deposition. In-house counsel did not discuss with employee any conflict of interest raised by in-house counsel representing both employee and employer at the deposition.

At the deposition, employee testified that he had not witnessed the accident, but was aware of it shortly thereafter. In response to questioning from co-worker's attorney, employee also gave testimony tending to prove that the working conditions were unsafe, testimony that was adverse to employer. When it was his turn to question employee, in-house counsel confirmed employee's testimony that he had not witnessed the accident, but then confronted employee with his second statement that said that he had seen the accident. Employee said that he had worded his second statement incorrectly. In-house counsel gave employee no opportunity to elaborate. After the company reviewed a copy of the deposition transcript, employee was fired for violating the company's policy against dishonesty by saying in his second written statement that he had seen the accident occur.

Given that employee's testimony was at least potentially adverse to employer as to the presence of unsafe working conditions, in-house counsel was obligated under Rule of Professional Conduct 3-310(C) to obtain both employee's and employer's informed written consent before representing both of them at deposition. He did not. Instead, he represented both employer and employee and elicited testimony from employee that presented employee in a bad light to advance the interests of in-house counsel's other client, the employer. That was sufficient evidence of in-house counsel's malpractice and breach of fiduciary duty to employee to withstand summary judgment. (221 Cal.App.4th at 189-190.)

The Court of Appeal rejected in-house counsel's contention that he played no role in causing employee's termination as a matter of law since, among other things, in-house counsel played no role in employee writing the second inaccurate statement and since, before in-house counsel questioned employee, employee had admitted in response to questioning from employee's counsel that employee had not in fact witnessed the accident. (221 Cal.App.4th at 189.) It was in-house counsel who got employee to

admit under oath that his deposition testimony that he had not seen the accident conflicted with his second written statement which said that he had. In-house counsel's highlighting this discrepancy as he had was enough to create a material issue of fact that in-house counsel had contributed to employee's termination. (*Ibid*.)

10.4.5 Rule 3-310: Avoiding Representation of Adverse Interests

Case: *TRC & Associates v. Nuscience Corporation* (C.D. Cal. 2013) 2013 WL 6044315

Issue: In an action for fraud against product manufacturer and its domestic distributor brought by a customer of defendants, was disqualification of plaintiff's counsel warranted based on his representation of a former vice president of defendant-manufacturer in a separate action brought by manufacturer alleging the former vice president wrongfully disclosed the manufacturer's trade secrets?

Holding: **No**. The Court found that manufacturer's supposition that the former vice president had shared its trade secret information with plaintiff's counsel that could be used to prosecute the instant action was unfounded. There was no evidence that the former vice president had participated in any attorney-client privileged discussions about the instant action during his employment with manufacturer. The former vice president's employment with the manufacturer ended five years before the instant action was brought. (2013 WL 6044315, distinguishing *Packard Bell NEC, Inc. v. Aztech Sys. Ltd.* (C.D.Cal. 2001) 2001 WL 880957.)

Note: The Court denied a separate motion to disqualify brought by both defendants based on plaintiff's counsel's representation of a separate party in a separate action whom defendants accused of misappropriating trade secrets.

10.4.6 Attorney Sanctions; California Rule of Court 2.30; Rule 1-300: Unauthorized Practice of Law

Case: *In re Marriage of Bianco* (2013) 221 Cal.App.4th 826

Issue: Did California Rule of Court 2.30 authorize a trial court to issue sanctions against attorney for violating Rule of Professional Conduct 1-300, prohibiting a member of the California bar from helping another person engage in the authorized practice of law, by negligently hiring an attorney ineligible to practice law to assist attorney in representing wife in a dissolution proceeding?

Holding: **No**. Rule of Court 2.30(b) authorizes sanctions only for violations of "the *rules in the California Rules of Court* relating to *general civil cases*, unlawful detainer cases, probate proceedings, civil proceedings in the appellate decision of the superior court, and small claims cases." (221 Cal.App.4th at 829, quoting Cal. Rule of Court 2.30(a), emphasis supplied by the Court.) The Court of Appeal held that the trial court abused its discretion in sanctioning the attorney under Rule 2.30 for two reasons. First, Rule of Court 2.30 does not authorize sanctions for violations of the Rules of Professional Conduct, which are rules of the State Bar, not Rules of Court. (221 Cal.App.4th at 829.) The second reason the Court concluded that Rule of Court 2.30 could not be the basis of sanctions in this case was because Rule of Court 1.6(4) expressly excludes family law proceedings from the definition of "general civil case" as used in the Rules of Court. (*Ibid*.) At the time of conduct at issue in this case, there was no parallel sanctions rule to 2.30 that applied to family court proceedings.

Notes: The trial court learned on the last day of the dissolution trial that attorney's co-counsel was ineligible to practice law at the time of trial **due to co-counsel's failure to comply with mandatory continuing legal education requirements**. The trial court declared a mistrial and invited husband to bring a motion for sanctions.

The Court of Appeal noted that effective January 1, 2013, after the conduct at issue in

this case occurred, the Judicial Council adopted new Rule 5.14 authorizing sanctions for violations of court rules in family law proceedings. (221 Cal.App.4th at 829, note 5.) Rule 5.14(a) "Application", unlike the parallel "Application" provision in Rule 2.30(a), does not say that the sanctions rule is limited to the Rules of Court. Rule 5.14(a) reads in its entirety: "This sanctions rule applies to any action or proceeding brought under the Family Code." The limitation of Rule 5.14 to violations of the Rules of Court appears in 5.14(d)(1)(A) under "Notice and Procedure," requiring the party requesting sanctions under the rule to "[s]tate the applicable *rule of court* that has been violated." (Emphasis added.) The equivalent subsection of Rule 2.30 requires a party seeking sanctions under that rule only to "state the applicable rule that has been violated." (Rule 2.30(c)(1).) Thus, the limitation of Rule 2.30 to the Rules of Court appears in the "Application" section and the limitation of Rule 5.14 to the Rules of Court appears in the "Notice and Procedure" section.

10.4.7 Attorney-Client Privilege

Case: *Dunfee v. Truman Capital Advisors, L.P.* (S.D.Cal. 2013) 2013 WL 6118361

Issue: In an action arising out of the modification of a home loan, were plaintiffs entitled to quash the defendant-bank's subpoena directed to their tax attorney seeking production of plaintiffs' tax records in conjunction with his deposition on the ground that such records were covered by the attorney-client privilege and the attorney work product doctrine?

Holding: **No.** Under federal privilege law, applicable to this action in which both federal and state claims were asserted, tax returns are discoverable where the subpoenaing party can show that the returns are relevant to the subject matter of the action and where the party seeking to quash the subpoena is unable to identify other sources of the information found in the tax returns. (2013 WL 6118361 at *4.) The bank demonstrated that the subpoenaed returns were relevant. Plaintiffs did not identify other sources in which the information in the tax returns could be found. (*Ibid*.)

The Court then held that the returns could not be withheld categorically on the basis of the federal attorney-client privilege simply because they were prepared by an attorney. Federal law does not recognize an accountant or tax preparer's privilege. A taxpayer obtains no greater privilege to withhold tax records by hiring an attorney to do what an accountant or tax preparer normally would do. The purpose of communications related to the preparation of tax returns is not the same as the purpose of communications covered by the attorney-client privilege. "'Communications from a client that neither reflect the lawyer's thinking nor are made for the purpose of eliciting the lawyer's professional advice or other legal assistance are not privileged. The information that a person furnishes the preparer of his tax return is furnished for the purpose of enabling the preparation of the return, not the preparation of a brief or an opinion letter.'" (2013 WL 6118361 at *5, quoting *United States v. Frederick* (7th Cir. 1999) 182 F.3d 496, 500.)

That said, the Court allowed that the attorney-client privilege may apply to documents in plaintiffs' tax attorney's possession. Plaintiffs were permitted to assert the privilege on a document-by-document basis at the deposition of their tax attorney.

For similar reasons, the Court held that the attorney work product doctrine did not categorically preclude disclosure of the tax records. The work product doctrine would protect tax-related documents prepared for the dual purpose of tax preparation and use in litigation only to the extent "their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." (2013 WL 6118361 at *6, quoting *In re Grand Jury Subpoena* (9th Cir. 2003) 357 F.3d 900, 909.)

In this case, plaintiffs' arguments suggested that the documents were prepared in the

regular course of assisting the tax attorney prepare plaintiffs' tax returns rather than in anticipation of litigation. "[A]nalysis of tax liabilities, while perhaps involving the weighing of legal arguments, does not constitute attorney work product." (2013 WL 6118361 at *7, citing *United States v. El Paso* (5th Cir. 1982) 682 F.2d 530, 542-543.) The Court permitted plaintiffs to reassert the protection of work product protection as to documents their tax attorneys produced at his deposition that were solely prepared in anticipation of litigation or as to dual purpose documents whose litigation purpose was sufficiently suffused with their tax preparation purpose. (2013 WL 6118361 at *7.)

Note: The case was decided under federal law. The Court acknowledged that California law provided greater, though not absolute, protection of tax records from discovery. (2013 WL 6118361 at *3, citing *Young v. United States* (S.D.Cal. 1993) 149 F.R.D. 199, 201.)

10.4.8 Attorney Sanctions; Code of Civ. Proc. § 128.7

Case: *Optimal Markets, Inc. v. Salant* (2013) 221 Cal.App.4th 912

Issue: Did a trial court err in concluding that C.C.P § 128.7 did not authorize it to sanction plaintiff's counsel for pursuing frivolous claims in a binding arbitration where: (1) plaintiff's action was originally filed by other counsel in superior court but stayed pending arbitration; and (2) confirmation of the arbitration award was uncontested?

Holding: **No**. There are several reasons a trial court lacks the power to impose sanctions under section 128.7 for an attorney's prosecution of claim before an arbitrator. First, the language of section 128.7 limits sanctions to attorneys who "present[] to the court" frivolous claims. The attorneys who were the subject of the sanctions motion were not the same attorneys who filed the original complaint in superior court. The subject attorneys were brought into the case after the matter had been ordered to binding arbitration pursuant to the parties' agreement. The Court of Appeal held that advocacy to an arbitrator does not constitute advocacy to a court for purposes of the statutory language. (221 Cal.App.4th at 923.)

Second, the "vestigial jurisdiction" a court retains after a matter is ordered to binding contractual arbitration is very limited. That jurisdiction does not include the power to impose sanctions under section 128.7, even after the arbitration award has been rendered and the case is subject to a motion to confirm the award. (221 Cal.App.4th at 923-924.)

Third, the discretionary nature of section 128.7 suggests the impropriety of a trial court imposing such sanctions for conduct of counsel the arbitrator alone has had the opportunity to assess and evaluate firsthand. "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." (221 Cal.App.4th at 925-926, quoting *In re Cortez* (1971) 6 Cal.3d 78, 85-86, other citation omitted.) Allowing a trial court to impose sanctions against counsel under section 128.7 that lacks such direct knowledge of the facts and law asserted by the attorneys subject to the motion would be improper. (221 Cal.App.4th at 926.)

Note: The Court of Appeal declined to express any views over whether section 128.7 sanctions were available in court proceedings referred to judicial arbitration pursuant to Code of Civ. Proc. § 1141.10 et seq. as opposed to the contractual arbitration proceedings at issue in the instant action. (221 Cal.App.4th at 925, note 17.)

10.4.9 Attorney Work Product

Case: *Skynet Electronic Co. v. Flextronics International, Ltd.* (N.D.Cal. 2013) 2013 WL 6623874

Issue: In a patent infringement action, plaintiff, a Taiwanese company, inadvertently produced an email chain from plaintiff's counsel to plaintiff's founder that referenced a memorandum containing the preliminary legal opinion and mental impressions of plaintiff's U.S. counsel regarding a proposed patent certificate of correction. The email chain and memorandum were prepared in anticipation of litigation over the subject patent. Did plaintiff waive the protection of the work product doctrine over the email chain and the referenced memorandum by forwarding the email chain to a Taiwanese patent attorney who is not a member of the Taiwanese bar but instead is similar to a U.S. patent agent?

Holding: **No**. The Court held that work product protection, which the Court called "work-product immunity," that would otherwise protect a document from discovery is waived by disclosure to a third party only if the disclosure is made "with an actual intention, or reasonable probability, that an opposing party may see the document. . . ." (2013 WL 6623874 at *3, citations omitted.) Disclosure of the work product to the Taiwanese patent agent did not make it substantially more likely that defendants would uncover it. Under Taiwanese law, patent "attorneys", though not members of the Taiwanese bar, are prohibited from disclosing their clients' confidential work product. (*Ibid*.)

Defendants' argument that plaintiff's disclosure of the email chain to the non-attorney patent professional waived work product protection, just as such disclosure waived any protection of the attorney-client privilege, conflated the standard for waiver of the work product doctrine with the standard for waiver of the attorney-client privilege. "The attorney-client privilege has its basis in the confidential nature of the communication and the reason for the privilege ordinarily ceases to exist if confidentiality is destroyed by disclosure to a third person. On the other hand, the purpose of work-product immunity is not to protect the evidence from disclosure to the outside world, but rather to protect it only from the knowledge of opposing counsel and client, thereby preventing its use against the lawyer gathering the materials." (2013 WL 6623874 at *3, citation omitted.)

The Court further observed that, although the Ninth Circuit had not directly addressed the issue, "the great weight of authority holds that disclosure of work product to individuals who share a common interest with the disclosing party does not constitute waiver." (2013 WL 6623874 at *3, discussing cases.) Thus, disclosure of a document to a third party may be sufficient to waive the attorney-client privilege, yet insufficient to waive the protection of the work product doctrine. (*Ibid*., citing *Ceco Steel Products Corp. v. H.K. Porter Co.* (N.D.Ill. 1962) 31 F.R.D. 142, 143.)

Moreover, even if work product protection over the email chain had been waived, the Court concluded that protection over the memorandum referenced in the email chain would not have been waived. Waiver of work product protection as to one document does not waive work product protection as to documents of the same character. (2013 WL 6623874 at *4, citing *In re EchoStar Commc'ns Corp.* (Fed. Cir. 2006) 448 F.3d 1294, 1302.)

Notes: Since the Court found that the work product doctrine protected the documents at issue from discovery, the Court declined to address whether plaintiff had waived the attorney-client privilege over the email chain and referenced memorandum by disclosure to the Taiwanese patent agent. (2013 WL 6623874 at *1.)

The Court found that plaintiff had taken adequate steps to prevent the inadvertent disclosure of the documents and had promptly asserted its claim that the documents were work product when defense counsel alerted plaintiff's counsel of the inclusion of the documents in the production. (2013 WL 6623874 at *4.)

The Court rejected defendants' argument that they were entitled to the email chain since, by conceding that the mail chain had been prepared in anticipation of litigation, plaintiff had placed in issue plaintiff's founder's state of mind in requesting the

certificate of correction from the U.S.P.T.O. Plaintiff's mere assertion that the filing of the certificate of correction would lead to litigation did not establish that the filing was improper. (2013 WL 6623874 at *4.)

The Court additionally held that defendants had failed to show that the crime-fraud exception applied to the documents. Since defendants had never had access to the referenced memorandum, defendants' argument as to that document was based on "mere speculation." (2013 WL 6623874 at *4.)

10.4.10 Civil Code § 1714.10: Civil Conspiracy Claim Against Attorney

Case: *Stueve v. Kahn* (2013) 222 Cal.App.4th 327, 2013 WL 6662979

Issue: Did Civil Code section 1714.10 require a court to strike former clients' facially valid action against law firm, filed without advance court approval, alleging that firm attorneys conspired with others to siphon off client assets through fraudulent estate planning, including the diversion of those assets to entities created and controlled by, among others, other clients of the firm?

Holding: **No**. Reversing a trial court order, the Court of Appeal held that the plain wording of section 1714.10 made it inapplicable to the former clients' conspiracy action related to attorney misconduct in connection with transactional estate planning activities. Section 1714.10(a) requires court permission only to file an attorney-client conspiracy claim "arising from any attempt to compromise a claim or dispute." (222 Cal.App.4th at__, 2013 WL 6662979 at *3.)

10.4.11 Rule 3-310: Avoiding Representation of Adverse Interests

Case: *IPVX Patent Holdings, Inc. v. 8x8, Inc.* (N.D.Cal. 2013) 2013 WL 6700303

Issue: In a patent infringement action, was disqualification of plaintiff's counsel warranted where plaintiff's counsel had conferred with an attorney who: (1) about two years before the instant action was filed, had a 30-minute call with defendant's CEO and CFO about possible representation in which confidential information about defendant's intellectual property was shared and in which the attorney offered his initial impressions of the legal issues discussed, though no engagement resulted; (2) had not received any confidential information from defendant about specific products at issue in the instant case; (3) had been co-counsel with plaintiff's counsel in an unrelated case for the original holder of the patent in dispute in this action that later assigned its patent rights to plaintiff that later substituted into the instant action; (4) after defense counsel contacted plaintiff's counsel, told plaintiff's counsel that he had not told defendant in the call that defendant did not infringe plaintiff's patent at issue but said nothing else about his call with defendant?

Holding: **No**. The Court first denied defendant's motion to disqualify the attorney who had consulted with defendant years before this action was filed. The Court found that the 30-minute consultation had established a prima facie attorney-client relationship between the attorney and the defendant even though no engagement had resulted. "'When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established prima facie.'" (2013 WL 6700303 at *3, quoting *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Sys., Inc.* (1999) 20 Cal.4th 1135, 1148, which in turn was quoting *Perkins v. West Coast Lumber Co.* (1900) 129 Cal. 427, 429.)

The Court applied the "substantial relationship" test set out in *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1145, 1454 to determine whether confidential information material to the current representation would normally have been imparted to the attorney. The Court considered: (1) the relationship between the former client and the attorney in addressing the legal problems in the former representation; and (2) the relationship between the former and the current

representations. (2013 WL 6700303 at *3, citing *Jensen v. Hartford Cas. Ins. Co.* (2003) 111 Cal.App.4th 698, 709-712.) The Court concluded that the attorney's relationship to defendant had been only "attenuated." That meant that the Court could not presume confidential information material to the current action had been imparted to the attorney. The Court further found that there was no substantial relationship between the current and former representations since there was no showing that there was any discussion of specific products that were at issue in this action. (2013 WL 6700303 at *4.)

Beyond that, the attorney was not counsel of record in this action for either plaintiff or the party that had assigned its patent rights to plaintiff, resulting in plaintiff substituting into the action. Since the attorney was not involved in the current litigation, even in any of the consolidated cases involving the patent rights at issue against parties other than defendant, the attorney could not be disqualified from the current action. (2013 WL 6700303 at *4.)

In light of this analysis, the Court went on to hold that plaintiff's counsel himself could not be disqualified by imputation. The Court found no reasonable probability that plaintiff's counsel received any confidential information material to this action from the attorney who had spoken to defendant briefly years earlier. First, the attorney who had conferred with the defendant declared in opposition to the motion to disqualify that he had not discussed any of defendant's specific products during that consultation or whether any of defendant's products infringed any patent. Second, plaintiff's counsel declared that his conversation with the attorney who had conferred with the defendant was limited to confirming that the attorney had not told defendant that its products did not infringe plaintiff's patent at issue in this lawsuit. Defendant's assertion that the attorney had shared material confidential information with plaintiff's counsel was therefore based on speculation. (2013 WL 6700303 at *5.)

Notes: The Court acknowledged that the attorney who had consulted with defendant was listed in several filings in the current action. That was because of the consolidation with this action of an action, since dismissed, in which the attorney represented the predecessor plaintiff. The Court also accepted plaintiff's explanation that the attorney's signature on the protective order in the instant case was a "clerical error on the signature block" that did not mean the attorney was appearing as counsel in the instant action. (2013 WL 6700303 at *4.)

The Court noted that defendant may have waived its right to seek disqualification of counsel by offering no explanation for waiting thirteen months after the latest date defendant could have learned of the alleged conflict to bring its motion to disqualify. The Court declined to address the issue of waiver in light of its ruling on merits of the motion. (2013 WL 6700303 at *6.)

10.4.12 Attorney-Client Privilege; Work Product Doctrine

Case: *Hawker v. BancInsurance, Inc.* (E.D.Cal. 2013) 2013 WL 6843088

Issue: A bank retained a law firm following receipt of a potential claim notice including a direct claim for damages or settlement from the FDIC as receiver threatening litigation against the insurer and its insured. In a diversity action alleging wrongful denial of insurance coverage prosecuted by FDIC as insureds' assignee, did the attorney-client privilege protect from discovery emails between insurer's law firm and an adjustment firm hired by the bank related to denial of coverage where the law firm did factual investigation before recommending denial of coverage based on policy language barring claims by receivers and where the adjustment firm adopted attorney's recommendation to deny coverage?

Holding: **Yes**. The Court rejected plaintiff's argument that the attorney was acting predominantly as a claims adjuster rather than as an attorney. The Court found that

insurer had retained the law firm to protect the interests of insurer due to the FDIC's threat of litigation and settlement demands. (2013 WL 6843088 at *4.) In addition, that the adjustment firm adopted the law firm's recommendation to deny coverage did not make the law firm the ultimate decision-maker on the claim. (*Id*. at *5.) Similarly, that the law firm engaged in investigation before making its legal recommendation to insurer to deny coverage did not destroy the privilege. "While the privilege is not applicable if the attorney is retained for a purpose other than offering legal advice, that the attorney was required to engage in some fact finding in order to render a legal opinion does not destroy the privilege." (*Ibid*., citing *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 735-736.) Having found that insurer had established a prima facie claim of an attorney-client relationship in the course of its relationship with the law firm, the Court concluded that plaintiff did not establish that the privilege did not apply or that the documents were not confidential. (2013 WL 6843088 at *5.)

The Court further held, however, that documents the law firm prepared related to denial of coverage that were not covered by the attorney-client privilege were not protected from discovery by the work product doctrine. The law firm's assignment was to prepare a formal legal evaluation on whether insurer was entitled to decline a claim by the FDIC based on an exclusion in the policy. "This would indicate that the representation was focused not on litigation, but was in the ordinary course of business to determine whether there was a legal basis to deny the claim. Defendant[-insurer] has failed to meet its burden of presenting specific evidentiary proof of objective facts demonstrating a resolve to litigate." (2013 WL 6843088 at *7, citing *Bronsink v. Allied Property and Cas. Ins.* (W.D.Wash. 2010) 2010 WL 786016 at *3.)

Notes:

The Court declined plaintiff's request to review the withheld documents in camera to evaluate the extent of insurer's law firm's involvement in the claims adjustment process. The Court pointed out that California law prohibits the disclosure of information claimed to be covered by the attorney-client privilege in order to rule on a claim of privilege. (2013 WL 6843088 at *5, citing Cal.Evid.Code § 915(a).)

The Court upheld insurer's assertion of the common interest doctrine to withhold periodic reports, prepared and edited by counsel, insurer was required to make to its reinsurers on the status of the dispute. "Under California law, where reinsurance documents include attorney-client or protected work product communications they would be entitled to the same privilege protection as would similar communications between the ceding insurer and its attorneys handling the insured's claim." (2013 WL 6843088 at *8, citation and internal quotation marks omitted.)

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: Ethical Duty as Neither Shield Nor Sword

Daniel E. Eaton[1]

Introduction

A criminal defense attorney may not use her ethical duty of confidentiality as a shield to avoid a finding of contempt for refusing to disclose to a court how she obtained client information she later felt compelled to have turned over to the prosecution. Husband's counsel in a dissolution proceeding may not use wife's counsel's alleged negligence in engaging an attorney temporarily ineligible to practice law to assist her in representing wife in violation of wife's counsel's ethical duty not to assist others in engaging in the unauthorized practice of law as a sword to obtain sanctions under California Rule of Court 2.30.

In the first case, an attorney was unable to use her asserted adherence to an ethical duty as a shield to repel a finding of contempt. In the second case, an attorney was unable to use his opposing counsel's asserted violation of an ethical duty as a sword to obtain sanctions against her. Rule of Professional Conduct 1-100(A) says in part: "Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty." Thus, outside of the disciplinary context, the rules of ethics are of only limited use, at best, as either shield or sword.

A. *Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389 (10.4.2): Duty of Confidentiality No Shield to Finding of Contempt

In the course of representing a criminal defendant, Deputy San Diego Public Defender Terry Zimmerman received a zippered leather portfolio containing various documents that purportedly belonged to the victim and eight pieces of unopened mail addressed to the victim. She lodged those documents with the court and did not object to the release of the items to the District Attorney. Ms. Zimmerman did not say how or from whom she had obtained the evidence. The prosecution sought discovery about the circumstances under which Ms. Zimmerman obtained the portfolio and the mail. When Ms. Zimmerman's office declined to provide responses to the discovery based on, among other grounds, the attorney-client privilege, the prosecution moved for an order compelling responses to the discovery. At the hearing on the motion to compel, the prosecution announced its intention to call Ms. Zimmerman as a witness at trial. The Court, finding it likely that Ms. Zimmerman would invoke the attorney-client privilege to refuse to answer questions about the portfolio and mail, convened a hearing under Evidence Code section 405 to determine the issue. Ms. Zimmerman testified at the 405 hearing, but refused, on the ground of the attorney-client privilege, to respond to such questions as when the evidence first came into her possession, where she was when she

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received it, from whom she received the evidence, and who else had handled any of the evidence. The trial court found that Ms. Zimmerman had not met her burden of showing that the questions called for information covered by the attorney-client privilege. Before imposing sanctions, the trial court allowed Ms. Zimmerman to offer comments in mitigation. She explained that she refused to testify because she honestly believed that the questions she refused to answer called for information covered by the attorney-client privilege and that, accordingly, she had a duty to refuse to answer those questions even at peril to herself. (220 Cal.App.4th at 395.) The trial court held Ms. Zimmerman in contempt, sentencing her to custody until she testified or until the proceedings against the defendant concluded.

In her writ petition to the Court of Appeal, Ms. Zimmerman conceded that she had not received either the portfolio or the mail directly from her client. She said that, to accommodate the trial court, she had eventually disclosed that she had received the evidence, that she ethically provided to the court, through agents of her client. In the Court of Appeal, Ms. Zimmerman argued that her bare statement that she had received the evidence from agents of her client was sufficient to invoke the protection of the attorney-client privilege and avoid a finding of contempt. In a case of first impression, the Court of Appeal disagreed.

The Court of Appeal set out the parameters of the attorney-client privilege, noting that the privilege extends to confidential information and observations adduced from protected communications. (220 Cal.App.4th at 396, citing *People v. Meredith* (1981) 29 Cal.3d 682, 693.) The Court went on to find that the only questions that even arguably called for Ms. Zimmerman to divulge attorney-client privileged communications as defined by Evidence Code section 952 were questions about the identity of who had given Ms. Zimmerman the evidence. (220 Cal.App.4th at 402.) Questions calling for Ms. Zimmerman to disclose the nature of the agency of the person or persons from whom she had obtained the evidence, said the Court of Appeal, were not covered by the privilege. Also not covered by the privilege was information sought by such questions as where Ms. Zimmerman was when she received the evidence and whether she received all of the evidence at the same time. "[W]e cannot extend the attorney-client privilege so far that it alleviates the burden of proving the existence of privilege to such a degree that the party invoking the privilege merely has to represent an agent was involved in the delivery of the evidence without having to prove the existence of agency." (*Id*. at 403.) As the one asserting the privilege, Ms. Zimmerman had the burden of establishing the scope and existence of the agency. Since she failed to do so, the Court of Appeal had "little choice" but to affirm the contempt order. (*Ibid*.)

The root of Ms. Zimmerman inability to overturn the contempt finding may have been that the attorney-client privilege does not extend as far as the ethical duty of confidentiality. The attorney-client privilege has certain elements that the one asserting the privilege must satisfy. By contrast, the ethical commandment is simple: An attorney shalt not disclose his client's secrets. It was the ethical duty, not the evidentiary privilege, that Ms. Zimmerman was echoing when she told the trial court she was obligated to refuse to answer the prosecutor's questions notwithstanding the "peril" to herself. (See Business and Professions Code § 6068(e)(1): It is the duty of a California attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.") The duty of confidentiality the attorney

assumes under Business and Professions Code section 6068(e) "is broader than the lawyer-client privilege and protects virtually everything the lawyer knows about the client's matter regardless of the source of the information." (*Elijah w. v. Superior Court* (2013) 216 Cal.App.4th 140, 151.) In an analysis in which the only available defense was the evidentiary privilege, the broader duty of confidentiality was no shield.

B. *In re Marriage of Bianco* (2013) 221 Cal.App.4th 826 (EQ 10.4.6): Rule Against Aiding Unauthorized Practice of Law No Sword to Obtain Sanctions in Family Court

California Rule of Court 2.30 authorizes a court to impose sanctions for violations of "the *rules in the California Rules of Court* relating to *general civil cases*, unlawful detainer cases, probate proceedings, civil proceedings in the appellate decision of the superior court, and small claims cases." (221 Cal.App.4th at 829, quoting Cal. Rule of Court 2.30(a), emphasis supplied by the Court.) The trial court learned on the last day of the dissolution trial that attorney's co-counsel was ineligible to practice law at the time of trial due to co-counsel's failure to comply with mandatory continuing legal education requirements. The trial court declared a mistrial and invited husband to bring a motion for sanctions. The trial court sanctioned wife's counsel $43,000 for violating Rules of Professional Conduct 1-300 and 1-311 prohibiting a California attorney from assisting someone in the unauthorized practice of law, even negligently.

The Court of Appeal reversed the sanctions order, not because it found that wife's counsel had engaged in conduct that was beyond ethical reproach, but because it found that the rule under which sanctions were imposed did not apply on its face. Rule 2.30 authorizes sanctions for violations of the Rules of Court. The Rules of Professional Conduct are not Rules of Court and are approved through a process different from the process used to approve Rules of Court. (221 Cal.App.4th at 829, esp. note 4.) The Court also found Rule 2.30 inapplicable because family law proceedings were specifically excluded from the definition of "general civil cases" for which Rule 2.30 authorized sanctions. (221 Cal.App.4th at 829.) In an analysis in which the only available sanctioning authority was set out in the Rules of Court, the broader duty imposed by the duty not to assist in the unauthorized practice of law was no sword, even when the violation may have impeded the efficient administration of justice. (See also *Optimal Markets, Inc. v. Salant* (2013) 221 Cal.App.4th 912 (10.4.8), holding that Code of Civ. Proc. § 128.7 did not authorize sanctions against counsel for submitting frivolous pleadings only in a contractual arbitration proceeding. See also *Lopez v. Banuelos* (E.D.Cal. 2013) 2013 WL 4815699, declining to disqualify Deputy Attorney General defense counsel for making plausible threat of criminal prosecution to obtain advantage in civil litigation in arguable violation of Rule 5-100.)

Conclusion

Whether the issue is contempt, sanctions, or disqualification of counsel, adherence to or violation of the ethical rules that govern attorneys has limited usefulness as sword or shield. That is not to say that trial courts altogether disregard those rules. In contexts that do not explicitly make those duties relevant to the analysis, however, the ethical rules may lack consequential force.

SPECIAL COMMENTARY: The Top 10 California Legal Ethics Rulings of 2013

Daniel E. Eaton

Introduction

Volume 10 of *Ethics Quarterly* abstracted 55 rulings from California state and federal courts. There was no blockbuster ethics ruling this year, even as courts clarified certain key concepts in this area of the law. The issues addressed in the ten most significant ethics-related rulings abstracted in 2013 range from whether disqualification of plaintiffs' counsel in a lemon law action was warranted because counsel had defended the same kinds of cases, involving the same law, on behalf of the same defendant four years earlier to whether in-house counsel could be subject to a claim for breach of duty for representing an employer and an employee at the employee's deposition in a way that allegedly resulted in the employee's termination to how much information a criminal defense counsel must disclose about how she obtained evidence she later had turned over to the prosecution to avoid a finding of contempt while withholding information covered by the attorney-client privilege. Each case was chosen because its core holding is expected to transcend the specific practice area in which the case arose; each case was ranked based on how broadly and deeply that impact is expected to be felt in the evolving California law of lawyering.

1. ***Khani v. Ford*** (2013) 215 Cal.App.4th 916 (EQ 10.2.7): The Court of Appeal ruled that it was an abuse of discretion for the trial court to disqualify plaintiffs' trial counsel in a lemon law action even though plaintiffs' trial counsel, while at a previous firm, had worked on California lemon law cases for defendant-manufacturer four years before this action was filed.

California has long rejected the "playbook approach" to disqualification, barring an attorney from ever being adverse to a former client whose policies, practices, and general structure the attorney had learned or played a role in developing. (See *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.) The **significance of this case** is that it requires a party seeking disqualification of counsel based on counsel's prior representation of the moving party to establish that confidential information that counsel obtained in the prior representation is directly relevant to the issues in the current action. (*Khani*, 215 Cal.App.4th at 921.) Trial courts applying *Khani* will deny a motion to disqualify unless moving party can show that, in the time since counsel's prior representation of the moving party, moving party made no change to its practices or personnel dealing with the area of law at issue in the current action. The ruling implicates instances where an attorney represents a client against one of the attorney's former clients that is any kind of institution, including insurers, manufacturers, employers, or professional services firms.

2. ***Citizens for Ceres v. Superior Court*** (2013) 217 Cal.App.4th 889 (EQ 10.3.1): : The Court of Appeal held that challengers to a development ultimately approved by a city were entitled to discovery of all preapproval communications between attorneys for the developer and attorneys for the city. The Court rejected the developer's contention that

such communications were covered by the common interest doctrine of the attorney-client privilege and attorney work product doctrine on the ground that the city and the developer recognized when the project was proposed that it was likely to be challenged in litigation.

For the common-interest doctrine to prevent waiver of applicable privileges: (1) the parties sharing such privileged communications must have a common interest in securing legal advice about the same matter; and (2) the communications must be made to advance their shared interest in securing legal advice on that common matter. (217 Cal.App.4th at 915, discussing *OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874.) At the preapproval stage, the city and the developer did not share an interest in the creation of a legally defensible environmental impact report. The city has no commitment to the project until after completion of the environmental impact review process. Consequently, the Court concluded that the city and developer had waived the attorney-client privilege and the protection of the attorney work product doctrine for all communications they disclosed to each other before the city approved the project.

The **significance of the ruling** is that it should lead different attorneys representing different clients in a matter in which the interests of the clients may later become aligned against a common challenge to focus on when the interests of the clients sufficiently align that the attorneys may share privileged material with each other. Communications shared at the point where one client is indifferent to the ultimate success of the other client may wind up in the hands of a party that later becomes the clients' adversary when the clients' interests converge.

3. ***Yanez v. Plummer*** (2013) 221 Cal.App.4th 180 (EQ 10.4.4): In-house counsel represented both an employee and an employer in defending the employee's deposition in a Federal Employers Liability Action in which the employee was not a named party. The employee claimed that in-house counsel elicited testimony from the employee at the deposition that advanced the interests of the employer at the expense of the employee. The employee was later fired for dishonesty because the deposition testimony in-house counsel elicited contradicted one of two written statements about the underlying incident the employee had prepared. Given that the employee's testimony was at least potentially adverse to employer, in-house counsel was obligated under Rule of Professional Conduct 3-310(C) to obtain both employee's and employer's informed written consent before representing both of them at the deposition. Because in-house counsel failed to do so, he was not entitled to summary judgment of employee's claims against him for malpractice and breach of fiduciary duty. (221 Cal.App.4th at 189-190.)

There are times in litigation that is brought against a company that it makes sense for the company to distance itself from the testimony of one of the company's employees or even show that the testimony is untrustworthy. The **significance of this case** is that in those instances, the company may be unable to have the same lawyer -- whether in-house counsel or outside counsel -- representing both the company and the employee. The potential conflict between the interests of the company and the interests of the employee is most apparent when both are named as parties in the matter. This case demonstrates that such an analysis must be done even as to employees not named as parties who may be critical witnesses in the matter. The failure to do so may make a lawyer who jointly

represents the employee and employer liable to the employee if the employer later punishes the employee for testimony or other conduct induced by the lawyer at the time of joint representation.

4. ***Mendoza v. Hamzeh*** (2013) 215 Cal.App.4th 799 (EQ 10.2.6): An attorney 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. The opposing party sued the attorney for civil extortion and related claims. The Court of Appeal held that the action was not subject to dismissal under the anti-SLAPP statute even though the attorney had not listed the specific crimes in the demand letter of which he intended to accuse the opposing party. The letter on its face constituted a threat to accuse a party of a crime unless money was paid. That constituted criminal extortion as a matter of law.

The **significance of the case** is that the Court of Appeal extended the seminal case of *Flatley v. Mauro* (2006) 39 Cal.4th 299 to recognize a bright-line rule that any demand letter constituting criminal extortion falls outside of the protection of the anti-SLAPP statute. The case is also significant because it was careful to note that rude and belligerent demand letters threatening litigation that are unaccompanied by a demand for money are within the protection of the anti-SLAPP statute since such demands do not satisfy all of the elements of criminal extortion. (215 Cal.App.4th at 807, note 4.) Indeed, in *Malin v. Singer* (2013) 217 Cal.App.4th 1283 (EQ 10.3.2), the Court distinguished *Flatley* and *Mendoza* on the basis that a claim for civil extortion based on an attorney's threat to file a complaint containing embarrassing information about opposing parties *was* subject to dismissal under the anti-SLAPP statute where the threat was unaccompanied by a threat to disclose the information to a prosecuting agency or the general public, a required element of criminal extortion.

5. ***Zimmerman v. Superior Court*** (2013) 220 Cal.App.4th 389 (10.4.2): A criminal defense attorney asserted that she received relevant documents she allowed to be turned over to the prosecution from agents of her client. She invoked the attorney-client privilege in refusing to answer questions in court about the circumstances under which she obtained the evidence. In a case of first impression, the Court of Appeal held that the criminal defense attorney's bare assertion that she had obtained the evidence from agents of her client was insufficient to avoid contempt for refusing to answer the questions about how she obtained the evidence. The criminal defense attorney was required to prove the scope and existence of the alleged agency to the client to avoid answering such questions on the ground of the attorney-client privilege and avoid a finding of contempt.

The **significance of the case** is that it establishes that a criminal defense attorney must disclose more than she may feel the ethical command of confidentiality allows if she seeks to avoid a finding of contempt about how she received relevant evidence she feels ethically compelled to have turned over to the prosecution. The case highlights the potential gap between what an attorney may be compelled to disclose notwithstanding the attorney-client privilege, a rule of evidence, and what an attorney may feel compelled not to disclose in light of the duty of confidentiality set forth in Rule of Professional Conduct

3-100(A) and Business and Professions Code section 6068(e)(1), a rule of ethics. Rule of Professional Conduct 1-100(A) says in part: "Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating" – or, perhaps, strictly and literally discharging -- "such a duty." The "peril" attorneys must accept under section 6068(e)(1) for keeping their clients' secret means something after all.

6. ***Jay v. Mahaffey*** (2013) 218 Cal.App.4th 1522 (EQ 10.3.9): Limited partners in a company that held a long-term ground lease brought a malicious prosecution action against the property owners and their attorneys for joining the limited partners in the underlying action for the improper purpose of pressuring the limited partners into pressuring the general partner to settle the underlying dispute with the property owners. The Court of Appeal upheld a trial court order denying an anti-SLAPP motion to dismiss brought by an associate attorney of lead counsel for the property owners. The Court rejected the associate's assertion that she could not be liable to the opposing parties for malicious prosecution because she was just following the instructions of the lead attorney. The associate attorney had signed certain of the pleadings at issue, her name appeared on deposition notices served on limited partners, and where she communicated with counsel for the limited partners.

The **significance of the case** is that it confirms that all attorneys formally associated in an action bear potential liability for malicious prosecution regardless of how limited their ability is to control the course of the litigation. The Court extended *Cole v. Patricia A. Meyers and Associates, APC* (2012) 206 Cal.App.4th 1095, which held that designated trial counsel could be liable for malicious prosecution, even where they had played no meaningful role in the litigation prior to its dismissal. Attorneys formally on the team of a piece of litigation who make an appearance of any kind in the action – whether as an associate, designated trial counsel, pro hac vice out-of-state counsel, local counsel, or any other capacity in which their role in strategic decision-making would be expected to be limited – must be alert to their non-delegable ethical duty to prosecute only an action that a reasonable attorney would maintain. (See *Zamos v. Stroud* (2004) 32 Cal.4th 958, holding that liability for malicious prosecution may be based on action continued with no reasonable basis and not just an action commenced with no reasonable basis.)

7. ***Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP*** (2013) 219 Cal.App.4th 1299 (10.3.15): Reversing a trial court order, the Court of Appeal vacated the award of an arbitrator in a legal malpractice action who had failed to disclose that, years before the arbitration, he had listed a name partner of the defendant-law firm as a reference in a resume available, and discovered by the plaintiff after the arbitration, on the Internet. It did not matter that the arbitrator, a retired judge, had had no personal relationship with the firm partner and had listed the partner as a reference only because of the partner's reputation as a litigator and based only on the partner's past dealings with the arbitrator as a judge and private neutral. "An objective observer reasonably could conclude that an arbitrator listing a prominent litigator as a reference on his resume would be reluctant to rule against the law firm in which that attorney is a partner as a defendant in a legal malpractice action." (219 Cal.App.4th at 1313.) It also did not

matter that the plaintiff-former client challenging the award could have discovered the resume online had he done the Internet research for connections to the defendant indicating potential bias before the arbitration rather than after the award. Under Code of Civil Procedure section 1281.9(a), the arbitrator was required to disclose any information that would lead a reasonable observer to question his impartiality before he was formally assigned to the case. It was not the parties' obligation to uncover it. Under Code of Civil Procedure section 1286.2(a)(6)(A), the arbitrator's failure to do so required that the resulting award be vacated. (*Ibid*.)

The **significance of the case** is that it provides a strong incentive to, and may even impose an ethical duty on, counsel representing the losing party in an arbitration to scour publicly available sources for an arbitrator's connections, past or present, to the prevailing party and its lawyers. Not all connections of any kind will warrant the vacation of an arbitration award. (See e.g., *Luce, Forward, Hamilton, and Scripps, LLP v. Koch* (2008) 162 Cal.App.4th 720, vacating of award in fee dispute arbitration not warranted where arbitrator did not disclose until the arbitration that he served on the board of a legal organization with lead counsel for law firm, a senior counsel at the firm.) The more personal the undisclosed tie, and the more it may be shown that the arbitrator is somehow invested in the reputation of a party he is adjudicating, the more likely the undisclosed tie will result in the vacation of the award. This bears some conceptual resemblance to the reasoning in *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489 (EQ 10.2.4) in which the Court of Appeal held that a City Council decision affirming an arbitration award against a city employee had to be vacated where the Council had been advised in its decision by a partner of a lawyer who had represented the city agency in the arbitration under review. One of the reasons for the Court's ruling was that the firm partner advising the Council had a financial incentive to validate the work of the different partner who had advised the city agency since doing so would enhance the firm's reputation and its business prospects. (*Id*. at 497.)

8. ***U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*** (C.D.Cal. 2013) 2013 WL 2278122 (EQ 10.2.11): In a qui tam False Claims action, putative relators were former executives of a company the relators alleged had submitted false claims in the sale of medical products to the U.S. government. The Court held that disqualification of counsel for putative relators was 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.

When counsel has received an opposing party's privileged material, he 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.) The **significance of this case** is that it affirms a simple mandate in such circumstances: "when in doubt, ask the court." (2013 WL 2278122 at *2, quoting *Gomez*, 255 F.3d at 1135, internal marks and additional citation omitted.) It was no excuse that counsel had told their clients not to give them any privileged documents they had taken from their employer. Counsel knew from the government's unwillingness to use the documents that their clients had not followed their instructions and yet counsel quoted from the privileged documents anyway. Moreover, counsel knew their clients had had extensive contact with their employer's legal counsel, meaning that

counsel should have been aware that many of the documents that had been taken, including communications with employer's counsel, were privileged. Guidance from the court should have been sought even before counsel turned the documents over to the government. The Court emphasized that counsel were being disqualified not merely because they had been exposed to the privileged material nor because of their clients' conduct alone. Instead, counsel were disqualified because counsel quoted the privileged material in pleadings. 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. (2013 WL 2278122 at *3.) The simplicity of the mandate when counsel receives privileged material belonging to an opposing party brooks no excuses for failure to adhere to it. The ruling in this federal question case was resolved under federal privilege law. The analysis is essentially the same under California privilege law as reflected in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 and its progeny.

9. ***Rickley v. Goodfriend*** (2013) 212 Cal.App.4th 1136 (EQ 10.1.5): A legal dispute arose between next-door neighbors concerning the alleged unlawful dumping of contaminated debris on the property of one couple by their next-door neighbor. In the original action, plaintiffs obtained a judgment that the required the removal of the debris according to court-approved remediation plan. The funds for the remediation were placed in the trust account of the defendant-neighbor's attorney. Plaintiffs filed this subsequent action against the defendant-neighbor and his wife, alleging that they were not in compliance with the original judgment and that this non-compliance constituted a continuing nuisance. The trial court allowed plaintiffs to add claims against defense counsel for conspiring with their clients to thwart proper enforcement of the judgment. In a 2-1 ruling, the Court of Appeal held that the trial court was right to allow the amendment because the amendment alleged that the attorney-defendants violated two independent duties owed to plaintiffs: (1) the duty not to engage in affirmative misconduct that would interfere with the remediation of the contaminated debris and (2) the duty to disburse fairly the funds from the attorneys' trust account designated to remove contaminated debris from both neighbors' properties. (*Id*. at 1148.) The complaint alleged that defendant-neighbors' attorneys interfered with the court-ordered remediation process by, among other things, contacting the third-party contractors doing the remediation work through unapproved emails thereby personally disrupting the remediation process, interfering with the remediation plan by one defendant-attorney misdirecting employees of the contractor, and even personally digging in the contaminated soil after a judge told him in a telephone conference to stop. The majority concluded that, in these ways, the attorneys conspired in the continuation of the nuisance and in violation of their independent duty to plaintiff. (*Id*. at 1155-1156.)

Civil Code section 1714.10 requires court approval before a conspiracy claim may be asserted against an attorney for representation of a client in connection with contesting or compromising a claim or dispute. There is no bar to such a conspiracy claim if the attorney has an independent legal duty to the plaintiff. (Civ. Code § 1714.10(c)(1).) "A license to practice law does not shield an attorney from liability when he or she engages in conduct that would be actionable if committed by a layperson. An attorney who

commits such conduct may be liable under a conspiracy theory when the attorney agrees with his or her client to commit wrongful acts." (212 Cal.App.4th at 1153.) The majority agreed with the plaintiffs that defense counsel owed plaintiffs a duty (1) not to engage in affirmative misconduct that would interfere with the remediation and (2) to disburse fairly the funds designated to remove contaminated debris from both neighbors' properties. The majority held that the litigation privilege, Civil Code § 47(b), did not bar including the defendants-neighbors' attorneys as parties. The alleged conduct and communications of defense counsel had the intended effect of contributing to the continuing tort of interfering with the court-ordered remediation plan. Thus, the attorneys' conduct did not constitute legitimate efforts to achieve their clients' objectives in the underlying litigation. (*Id*. at 1163.)

The **significance of the case** is that it suggests attorneys may be liable to opposing parties for carrying out the instructions of their clients as to the manner in which a judgment should be enforced. An attorney representing the losing side of a dispute that results in a judgment that is not self-executing – and few judgments are truly self-executing -- may assume the same duty to the opposing party to carry out the judgment faithfully that the judgment imposes on the attorney's client. The attorney consequently may face liability if the opposing party disagrees with the attorney and his client as to what "carrying out the judgment faithfully" means. Dissenting Justice Frances Rothschild argued that, if the allegations of the proposed conspiracy claim were true, the defendant-attorneys only were assisting their clients in the violation of the clients' duties to the defendants rather than violating an independent duty the attorneys owed the plaintiffs. (*Id*. at 1166-1167, Rothschild, J. dissenting, asserting that the majority's conclusion was irreconcilable with *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39.) The majority held that the litigation privilege does not protect an attorney against a conspiracy claim, even where the attorney contends that his actions were taken to enforce the order according its terms notwithstanding the conflicting views of the opposing side. "The difference between enforcement [of a court order] and obstruction . . . is often in the eye of the beholder. Remediation work that plaintiffs view as implementing the judgment might be viewed by defendants as beyond the judgment's scope, and conduct the defendants view as endeavoring to make sure the judgment is enforced strictly according to its terms might be viewed by plaintiffs as obstruction. The protection afforded by the litigation privilege is hollow if it can be defeated by a mere allegation that plaintiffs are right and defendants are wrong." (*Id*. at 1168-1169, Rothschild, J., dissenting.) How far will this ruling extend beyond the unusual facts that it addressed? (Incidentally, approval of the court to file a conspiracy claim against opposing counsel may not be required at all where the underlying matter at issue is a transaction rather than litigation. See *Stueve v. Kahn* (2013) 222 Cal.App.4th 327, 2013 WL 6662979 (EQ 10.4.10) in which the Court held that the plain wording of section 1714.10 limits the requirement of advance court approval to conspiracy claims "arising from any attempt to compromise a claim or dispute." (222 Cal.App.4th at__, 2013 WL 6662979 at *3.).)

10. ***Lopez v. Banuelos*** (E.D.Cal. 2013) 2013 WL 4815699 (EQ 10.3.13): A civil rights action was brought alleging wrongful behavior by two California Highway Patrol Officers. Plaintiff was expected to testify that he smoked pot for medicinal reasons. Defense counsel, a Deputy California Attorney General, sent an email to plaintiff's

counsel shortly before the scheduled start of trial to explore the possibility of settlement. Included in the email was a statement that if plaintiff set foot in California, defense counsel would "bet he never leaves as there is a very real chance he will be arrested. We do intend to have both federal and state law enforcement present during the trial." Rule of Professional Conduct 5-100 prohibits an attorney from threatening criminal prosecution to obtain an advantage in a civil dispute. The Court denied plaintiff's motion to disqualify either the individual Deputy Attorney General or his office. Whether counsel had offended Rule 5-100 or not by actually threatening criminal prosecution of the plaintiff or not, the Court found that the harm caused by any such threat could be addressed by, among other things, defense counsel being ordered not to cause the initiation of criminal proceedings against plaintiff based on plaintiff's involvement or testimony in this action. (2013 WL 4815699 at *8.) And plaintiff's request to disqualify the entire state Attorney General's office was summarily rejected as "extreme" and unsupported by any authority. (*Id*. at *6.)

The **significance of the case** is that the Court found, and plaintiff did not dispute, that a violation of Rule 5-100 requires that an attorney *intended* to threaten criminal or other proceedings. The case is also significant because the Court ruled that disqualification may be warranted for a Rule 5-100 violation, even though no case could be found in which disqualification had been ordered on that basis. (2013 WL 4815699 at *6.) Counsel may face disqualification for conduct that falls outside of such typical grounds for such motions as impermissible ex parte contacts with agents of the opposing party, conflicts of interests with a present or former client, and the probability of trial counsel being a witness at trial. (*Ibid*.) What matters is that the conduct for which disqualification is sought threatens public trust in the administration of justice.