ETHICS QUARTERLY

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Daniel E. Eaton, Editor-in-Chief November 2012 Vol. 9, No. 3

INTRODUCTION

This edition of Ethics Quarterly covers cases from June 16, 2012 through September 15, 2012. Committee members Dan Eaton and Peggy Onstott prepared this edition. Eaton prepared the Commentary, **"Clearing Waivers: Rulings Bring Clarity to Waiver of the Attorney-Client Privilege and Attorney Work Product."**

The Legal Ethics Committee's annual program in connection with the MCLE compliance deadline will be presented on Thursday, January 24, 2013 from 5:30 – 7:30 p.m.. This year's program is called: "Our Town, Our Ethics: An Interactive Program in Legal Ethics in Three Parts" and is two hours, instead of the three-hour program we have presented in the past. To register, please go to: https://www.sdcba.org/index.cfm?pg=admin&mca_s=4&mca_a=31&mca_tt=12&mca_ta=editEvent&bc=e&eID=8090

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As a reminder, the San Diego County Bar Association maintains a hotline staffed by members of the Legal Ethics Committee offering general guidance on legal ethics questions. The hotline may be reached at **619-321-4145**.

Comments about Ethics Quarterly should be directed to the Chair of the Legal Ethics Committee, Jack Leer at leer@scmv.com.

CASE NOTES

9.3.1 Rule 3-310: Avoiding Representation of Adverse Interests

Case: *Transperfect Global, Inc. v. MotionPoint Corporation* (N.D.Cal. 2012) 2012 WL 2343908

Issue: In a patent infringement action, was disqualification of defense counsel warranted six months before trial based on defense counsel's current representation of plaintiff-closed corporation's two 99% co-owners where: (1) an estate planning partner at the firm prepared prenuptial and postnuptial agreements on behalf of one co-owner; (2) the partner represented both co-owners with respect to a draft buy-sell shareholder agreement the partner had first prepared at her former firm; (3) neither co-owner signed an engagement agreement that included an advance waiver of conflicts in matters not related to services provided to them; (4, and all of the co-owners' legal bills were paid by plaintiff-corporation?

Holding: **Yes**. As a threshold matter, the Court concluded that plaintiff-corporation had standing to bring the motion to disqualify because defense counsel's representation of the company's co-owners was "inextricably intertwined" with the business of the company. (2012 WL 2343908 at *7-8.) The company was an S corporation whose net income was passed to the co-owners; the two co-owners were co-CEOs of the company and its only two shareholders; and the drafting of one co-owner's prenuptial and postnuptial agreements was critical to ensuring the company's survival. In addition, the buy-sell

agreement allowed for the possibility of continuity of ownership upon the death of either co-owner. (*Id.* at *8.)

Relying on among other cases *People v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, the Court observed that under California law, a firm may generally avoid automatic disqualification for simultaneous representation only "if full disclosure of the situation is made to both clients and both agree in writing to waive the conflict." (2012 WL 2343908 at *9, citation and footnote omitted.) The parties agreed that there was no document that the co-owners signed that explicitly disclosed the conflict. The Court rejected defendant's contention that the conflict could be waived by the co-owners' receipt of their engagement letter for estate planning services, which did not mention the defendant or the instant litigation, because the co-owners conducted themselves in accordance with the engagement letter. The rule and applicable law plainly require that otherwise conflicted counsel obtain the clients' written consent and defense counsel failed to do this. "The requirement of informed written consent is clear and excusing the need to confirm consent in writing would undermine the rule's purpose and rationale." (*Ibid*., footnote omitted.)

The Court also rejected defendant's contention that application of the per se rule of automatic disqualification for simultaneous representation in this case would be an unwarranted inversion of the duty of loyalty since plaintiff's co-owners became clients of defense counsel only after defendant had been a client of the firm. The Court acknowledged that there was support for that view in *Friskit, Inc. v. RealNetworks, Inc.* (N.D.Cal. 2007) 2007 WL 1994204, *2: "[T]he duty of loyalty runs to the existing client, and is not subordinate to any duty owed to a later-acquired client." The Court accepted the conclusion in a later Northern District ruling, however, that *Friskit* does not represent the prevailing view in California courts. (2012 WL 2343908 at *9-10, discussing *Fujitsu Ltd. v. BelkiNLt'l In.* (N.D.Cal. 2010) 2010 WL 5387920.)

The Court agreed with defendant that a court may consider delay in bringing a motion to disqualify as one of many factors in deciding a motion to disqualify, even where disqualification is based on concurrent rather than successive representation. (2012 WL 2343908 at *11.) The Court went on to conclude, however, that delay in bringing a motion to disqualify and prejudice to the resisting party without a suggestion of tactical abuse are insufficient without more to deny a disqualification motion based on concurrent representation. "Limiting the delay exception to only the successive representation context is supported by the different interests involved with both conflicts – the duty of confidentiality for successive conflicts, and the duty of loyalty for concurrent conflicts. . . . The delay exception's limitation is consistent with the higher level of difficulty associated with disqualifying counsel due to successive conflict as opposed to concurrent conflict." (*Id.* at *12.)

The Court found that any delay in bringing the motion to disqualify was understandable. The co-owners were legitimately surprised when they realized for the first time six months before trial that the firm representing their company's adversary was the same firm that was representing the co-owners individually in certain matters. The surprise was legitimate even though the co-owners each performed the "ministerial" act of signing a form transferring their file from the estate lawyer's former law firm to her current law firm, the same firm representing the defendant in this action. (*Id.* at *12-13.)

The Court recognized that disqualification is a drastic measure, but concluded that it was necessary here. Defense counsel owed the same duty of loyalty to the co-owners of plaintiff as the firm owed to defendant and breached that duty of loyalty by representing the defendant against the plaintiff-corporation. Allowing defense counsel to drop co-owners as clients and continue to represent defendant in the patent infringement action against a company in which the co-owners held a 99% stake "is not the best way to restore confidence in the legal profession." (*Id* at *14, citation

omitted.)

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

Case: *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141

Issue: Was non-client's lawsuit against attorneys, who handled her husband's settlement of a putative class action claim to which non-client husband's was a party and which involved a dispute over resort memberships, for allegedly mishandling the settlement proceeds subject to a motion to strike under the anti-SLAPP statute?

Holding: **Yes**. The Court first found that plaintiff's claims arose from the attorneys' conduct on behalf of their clients in the underlying litigation and thus fell within the anti-SLAPP statute, which "protects lawyers sued for litigation-related speech and activity." (207 Cal.App.4th at 154, citations omitted.) "[L]egal advice and settlement made in connection with litigation are within section 425.16, and may protect defendant attorneys from suits brought by third parties on any legal theory or cause of action 'arising from' those protected activities." (*Ibid*., citations omitted.)

The Court rejected plaintiff's argument that her lawsuit was outside of the anti-SLAPP statute since it concerned breach of a settlement agreement and one party to a settlement agreement may sue another party to the agreement for breach. While that is true, this case alleged breach of plaintiff's husband's agreement with defendant law firm to handle the litigation, not breach of the settlement agreement in the underlying action. (*Id*. at 157.)

The Court also rejected plaintiff's argument that her lawsuit fell outside of the anti-SLAPP statute because it was based on the defendant attorneys' breaches of their fiduciary duty and on fraud. "[I]f the plaintiff is a nonclient who alleges causes of action against someone else's lawyer based on the lawyer's representation of other parties, the anti-SLAPP statute is applicable to bar such nonmeritorious claims." (*Id.* at 158.)

Turning to the second step in the anti-SLAPP statute analysis, the Court concluded that plaintiff had failed to demonstrate a likelihood of prevailing on the merits. Plaintiff could not and did not show that she was a third-party beneficiary of the contract her husband had with the defendant attorneys or that she was an owner of the settlement funds disbursed to her husband in the underlying litigation. "An attorney who undertakes to represent one spouse does not become the legal representative of the client's wife or husband: A community property or marital interest in the spouse's recovery does not create either an attorney-client relationship or a duty to the non-client spouse." (*Id*. at 160, internal marks and citation omitted.)

9.3.3 Cal. Code of Civ. Proc. § 2018.010 et seq.: Attorney Work Product

Case: *Coito v. Superior Court* (2012) 54 Cal.4th 480

Issue: Is a witness statement that has been obtained through an attorney-directed interview entitled to protection from discovery under the work product doctrine?

Holding: **Yes**. Witness statements obtained through attorney-directed interviews are entitled to at least qualified work product protection.

A unanimous California Supreme Court first concluded that witness statements are not

automatically entitled to absolute work product protection; such statements do not always reveal an attorney's thought process. (54 Cal.4th at 495.) A showing that a witness statement is absolute work product must be made on a case-by-case basis. An attorney who seeks absolute protection over a witness statement must make a preliminary showing that disclosure of the statement would reveal his impressions, conclusions, opinions, or legal research or theories. It is then up to the trial court to determine, after in camera review if necessary, whether some or all of the material is entitled to absolute work product protection. (*Id*. at 495-496.)

While such witness statements do not necessarily reveal the attorney's thought process, the Court found that they do necessarily implicate two other interests that led to enactment of the statutory work product doctrine. First, protecting such statements from discovery prevents an attorney from free-riding on the industry of opposing counsel. (*Id*. at 496.) Second, extending work product protection to such statements tends to encourage attorneys to prepare their cases thoroughly, investigating both the favorable and unfavorable aspects of their cases. "If attorneys must worry about discovery whenever they take a statement from a witness, it is reasonably foreseeable that fewer witness statements will be recorded and that adverse information will not be memorialized. . . . This result would derogate not only from an attorney's duty and prerogative to investigate matters thoroughly, but also from the truth-seeking values that the rules of discovery are designed to promote." (*Id*. at 496-497.)

Accordingly, a party seeking disclosure of a witness statement obtained through an attorney-directed interview, that the resisting attorney cannot show is protected as absolute work product, has the burden of establishing that denial of disclosure of the statement will unfairly prejudice the party in preparing his claim or defense or will result in an injustice. (*Id*. at 499-500, citing C.C.P. §2018.030(b).)

Notes: The Court remanded to the trial court to determine the extent to which absolute or qualified work product protection applied to the recorded witness interviews. (*Id*. at 500.)

The Court left undisturbed the trial court's finding that the resisting party waived work product protection over a recording used to examine a witness during a deposition. (*Ibid*.)

The Court also addressed the application of work product protection to form interrogatory 12.3, which asks for the identity and contact information of any witnesses from whom the responding party had obtained a written or recorded statement. The Court declined to hold that identifying such witnesses would always disclose an attorney's mental impressions, thus bringing it within absolute work product protection. Instead, the Court held that this interrogatory "usually must be answered." (*Id*. at 502.) If a party can make a preliminary showing that answering the interrogatory would reveal the attorney's "tactics, impressions, or evaluation of the case" or would allow opposing counsel to take undue advantage of the attorney's efforts, however, the trial court should determine whether absolute or qualified work product protection applies to the information called for under the circumstances of the dispute. The trial court also should consider any privacy concerns of non-party witnesses. (*Ibid*.)

9.3.4 Fee Recovery

Case: *In re Estate of Wong* (2012) 207 Cal.App.4th 366

Issue: Is a probate attorney entitled to statutory compensation for work on behalf of the executor of an estate following his discharge and replacement by other counsel even though: (1) the parties did not execute a written fee agreement; and (2) the executor rescinded her attorney services agreement with the attorney seeking fees because the attorney allegedly committed constructive fraud by misleading the executor about the

attorney's intention to seek statutory fees from the probate court?

Holding: **Yes**. Compensation for "ordinary services" rendered to the executor of an estate is governed by Probate Code section 10810 et seq. Under that statute, payment for the attorney's ordinary services is "based on the value of the estate accounted for by the personal representative" and is calculated pursuant to a statutory formula. (207 Cal.App.4th at 376.)

The Court of Appeal noted that the executor-appellant implicitly conceded that "the statutory scheme governing attorney compensation for ordinary probate work does not require a written fee agreement between the executor and her attorney." (*Ibid*.) The Court rejected the executor's contention that Business and Professions Code section 6148(a), which requires a written fee agreement where it is reasonably foreseeable that the total expense to the client will exceed $1000, nonetheless required a written fee agreement. "[A]ttorney compensation for services rendered to the personal representative of a probate estate is *not* paid by the client, but out of the estate. Therefore, it is not simply unlikely but actually impossible that the 'total expense' to the client of an attorney rendering ordinary probate services will exceed $1,000." (*Id*. at 377, citation omitted, emphasis in the original.) The Court rejected as "not supported by any reasoning or case authority" contrary guidance given in the CEB guide *California Decedent Estate Practice*. (*Id*. at 378.)

The Court rejected executor's claim of rescission based on constructive fraud for three reasons. First, the executor failed properly to raise the issue of constructive fraud in the trial court. (*Id*. at 353-354.) Second, the executor failed to take the steps necessary to effect a unilateral rescission: (1) giving notice of rescission to the other party upon discovering the facts giving him the right to rescind; and (2) restoring to the other party everything the rescinding party has received from the other party under the contract or offering to do so on the condition that the other party do likewise unless unable or unwilling to do so. (*Id*. at 382-383.) In making this point, the Court was "extremely concerned" that the executor and her counsel appeared unfamiliar with the law of rescission. (*Id*. at 382.) Third, there was substantial evidence in the trial court that the executor was not in fact deceived by about her attorney's intention to seek a statutory fee for the ordinary probate work. (*Id*. at 384.)

9.3.5 Attorney Sanctions

Case: *Valdez v. Kismet Acquisition, LLC* (S.D. Cal. 2012) 474 B.R. 907

Issue: Bankruptcy court sanctioned counsel pursuant to court's inherent authority for counsel's (1) advising client to disobey a bankruptcy court order directing client to transfer certain foreign assets; (2) collaterally attacking the order by pursuing an injunction against the transfer in a foreign court; and (3) filing generally meritorious objections to transfer documents solely for delay and knowing that the client had no intention of signing the documents. Did bankruptcy court err in not considering the extent of sanctioned counsel's specific responsibility for the opposing party's actual loss and sanctioned counsel's ability to pay the amount of the sanctions?

Holding: **Yes**. On review, the district court found that bankruptcy court had correctly found that sanctions were warranted. The district court rejected counsel's contention that her initial efforts to persuade her client to comply with the bankruptcy court order negated later advice to obtain a injunction in a foreign court against that order. (474 B.R. at 917-918.) The Court also found that counsel properly was sanctioned for bad faith assertion of even meritorious objections to the proposed transfer documents since she knew her client had no intention of signing any proposed transfer documents. (*Id*. at 918-919.)

The Court nonetheless remanded the sanctions order to the bankruptcy court to consider: (1) the extent to which sanctioned attorney's "particular conduct" resulted in

actual losses to the opposing party; and (2) the sanctioned attorney's ability to pay the amount of the sanctions. (*Id*. at 922-923.) The Court noted that the losses incurred by the opposing party were primarily caused by the sanctioned attorney's client's refusal to sign the transfer documents in addition to being caused by the conduct of other attorneys who were not held jointly and severally responsible for the sanctions. "[W]hile the finding that [sanctioned attorney] prolonged the proceedings is not clearly erroneous, there were no specific findings of fact that the size and scope of the sanction were tied to or proportionally related to the extent of the delay resulting from her particular actions." (*Id*. at 923.) The bankruptcy court's failure to consider sanctioned counsel's ability to pay up to $700,000 in sanctions for which she was found jointly and severally liable with her client was an independent legal basis for vacating the monetary sanctions. (*Ibid*.)

9.3.6 Attorney Sanctions

Case: *Haynes v. City and County of San Francisco* (9th Cir. 2012) 688 F.3d 984

Issue: Did the district court abuse its discretion when it failed to take into account an attorney's ability to pay when imposing sanctions under 28 U.S.C. §1927 for the opposing attorneys' fees and costs in a meritless lawsuit?

Holding: **Yes**. "[A] district court may, in its discretion, reduce the amount of a §1927 sanctions award, and may do so, among other reasons, because of the sanctioned attorney's inability to pay. We do not suggest by this holding that when the district court decides to reduce an amount on account of a sanctioned attorney's inability to pay, it must reduce the amount to an amount it determines the attorney is capable of satisfying. Just as it is within the discretion of the district court to decide whether to reduce the amount at all, the amount to which the sanction will be reduced is equally within the court's discretion." (688 F.3d at 988.)

Finding the question to be one of first impression for the Ninth Circuit, the district court looked to the Seventh Circuit which had previously compared a § 1927 violation to an intentional tort, where a tortfeasor's assets play no part in damages, only the victim's loss. (*Id.* at 987, citing *Shales v. General Chauffeurs, Sales Drivers and Helpers Local Union No. 330* (7th Cir. 2009) 557 F.3d 746, 749.) The Ninth Circuit found fault with the reasoning and conclusion of the district court, noting that damages for an intentional tort are determined as a matter of fact, while the district court has discretion to award and determine the amount of a §1927 sanction. (688 F.3d at 988-989.)

The Court of Appeals adopted the reasoning of the Second Circuit in a similar case, holding that it is within the district court's discretion to consider a violating attorney's ability to pay a § 1927 sanction. (*Id.* at 987, citing *Oliveri v. Thompson* (2d Cir. 1986) 803 F.3d 1265, 1281.)

Note: The Court also pointed out that, while a sanctions award may be less than the total excess costs and expenses incurred by the opposing party, the award may in no case be more than the total costs and expenses incurred by the opposing party. (688 F.3d at 987.)

9.3.7 Attorney-Client Privilege, Waiver of

Case: *Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc.* (N.D.Cal. 2012) 2012 WL 3062294

Issue: Pension trust funds brought an ERISA enforcement action against the alleged successor of the sponsoring employer. Did plaintiff waive the attorney-client privilege and work product protection over a pre-litigation email sent by plaintiffs' counsel to plaintiff-fund's trustee that detailed plaintiffs' counsel's understanding of the facts of the case

and the legal merits of potential claims, where the trustee forwarded counsel's email to a non-party union official asking whether defense counsel had a conflict of interest and where, through a series of additional forwards, the email wound up in the hands of various union members and defense counsel himself?

Holding: **Yes**. Applying the federal law of privilege in this federal question case, the Court found that plaintiffs had met their initial burden of establishing that the email was covered by the attorney-client privilege. The email carried the headline "Attorney-Client Privileged/Attorney Work Product" and the substance of the email was a standard, candid attorney statement of the facts of the case as the attorney understood them and analysis of applicable law to those facts. (2012 WL 3062294, *4.)

The plaintiffs did not, however, meet their burden of showing that the privilege had not been waived. The Court found that plaintiffs had expressly waived the attorney-client privilege when the trustee forwarded the email to non-party union officials. The common interest privilege did not apply even though the interests of the pension fund and the union were partially aligned in that some monies collected by the fund pay union pensions. "[T]he parties are not aligned in a joint litigation effort" and the email, "which was forwarded for an entirely different reason (to inquire about a potential conflict of interest), is not indicative of any such relationship." (*Id*. at *5, parenthetical in the original.)

The Court similarly found that the email, which represented counsel's legal analysis of a then-potential case, constituted protected work product. (*Id*. at *6.) The defense made only "minimal effort" to show a compelling need for the email. Instead, the defense asserted that plaintiffs had waived work product protection by the manner in which the email had been forwarded. (*Ibid*.) The Court agreed.

Under the common interest exception to the federal work product doctrine, there is no waiver of work product protection where the non-party to whom work product is sent shares a common interest with the disclosing party that is adverse to the party seeking discovery, even where that common interest is financial or commercial in nature. "Essentially, a court must determine if disclosure is consistent with the work product doctrine's purpose of preserving the adversary system." (*Ibid*., citation omitted.) While the Court found that the pension fund and the union shared a common financial interest in collecting benefit contributions from participating employers, the Court also found that the email "eventually left the sphere of common interest." (*Id*. at *7.) The trustee forwarded counsel's email with instructions to pass trustee's concerns upstream with no request that the information in the email be kept confidential. Trustee's later "statement that he was 'shocked' that the e-mail escaped into the hands of the adversary and that this was not his intention is immaterial." The way the trustee forwarded the email "substantially increased the likelihood of – and in fact led to – disclosure to an adversary and was thus inconsistent with preserving the adversary system." (*Ibid*., internal citation to docket omitted.)

The Court found that waiver of protection over the email did *not* result in a subject matter waiver over all related privileged and protected materials. "[T]here is no fairness justification for finding that the e-mail's disclosure results in a waiver for all of Plaintiffs' counsel's opinions about this case." (*Id*. at *8.) The typical justifications for finding subject matter waiver did not apply: plaintiffs did not selectively disclose the email, would not make testimonial use of the protected materials, and did not raise reliance of counsel issues. (*Ibid*.)

The defendant's assertion of a counterclaim that the action had been brought in bad faith did not place plaintiffs' counsel's opinions at issue. "Defendant cannot simply raise an issue and thereby claim entitlement to protected materials. This sort of 'reverse' issue injection would destroy – not preserve – the adversary system by making it easy to circumvent the work product doctrine." (*Ibid*.)

The Court concluded that, while defendant could keep plaintiffs' counsel's email, and

could ask about the email in a 30(b)(6) deposition, defendant was prohibited from inquiring about counsel's opinions about the issues in the case beyond what was contained in the email. (*Id*. at *8, note 3.)

9.3.8 Fee Recovery

Case: *Rickley v. Goodfriend* (2012) 207 Cal.App.4th 1528

Issue: Did trial court err in holding that an attorney, representing herself as well as her spouse in connection with post-judgment contempt proceedings due to violation of a court order in a nuisance action against neighboring homeowners, was not entitled to an award of attorneys' fees for the successful outcome under C.C.P §1218(a) without considering whether the attorney had an attorney-client relationship with her spouse in the action?

Holding: **Yes.** The judgment denying a motion for attorney fees was reversed and remanded to the trial court to examine the question of an attorney-client relationship and to award fees if the existence of an attorney-client relationship is found.

In reviewing the case de novo as a legal question of entitlement to attorney fees and not a fee dispute, the Court of Appeal noted no prior California case law on the precise question, but reviewed California Supreme Court and Court of Appeal cases on the issue of attorney awards for pro se attorney litigants. (207 Cal.App.4th at 1541.) In a number of different contexts, the Supreme Court had reviewed the language of the authorizing statute and consistently had not allowed pro se awards for those litigating for themselves and not "incurring" liability for attorney fees, but recognized an attorney's right to fees in a pro se litigation where an attorney had assisted a pro se litigant in an attorney-client relationship and the litigant had "incurred" a liability for fees. (*Id*. at 1544, citing *Masaelian v. Adams* (2009) 45 Cal.4th 512.) A Court of Appeal case seemingly on point denied fees to a homeowner attorney representing himself and his spouse, finding the attorney's interests were not separate from his spouse, and no liability for fees was established. (*Id*. at 1545, citing *Gorman v. Tassajara Development Corporation* (2009) 179 Cal.App.4th 44.)

In analyzing the instant case, the Court of Appeal looked to the purpose of the contempt statute. In pertinent part, CCP §1218 states: "[A] person who is subject to a court order as a party to the action, or any agent of this person, who is adjudged guilty of contempt for violating that court order may be ordered to pay the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by this party in connection with the contempt proceeding."

In prior cases the Court of Appeal had found contempt proceedings to be quasi-criminal in nature, with purposes of encouraging wronged parties to prosecute and indirectly encouraging all involved parties to comply with court orders. (207 Cal.App.4th at 1546, citations omitted.) The Court of Appeal found the appellants had enforced an important public interest by garnering the respondents' compliance, though the attorney- spouse took the risk that she would not be paid any attorney fees. The Court found no clarity in the representation status with her spouse and whether others similarly situated would benefit from the contempt citation. The trial court did not analyze whether or not an attorney-client relationship existed. (*Ibid*.)

"Despite the language in *Gorman*, we do not feel that identical damages, nor joint and indivisible interests between the spouse-attorney and the other spouse defeat the attorney-client relationship." Instead, the dispositive question is whether the non-attorney spouse consulted the attorney-spouse "in her professional capacity and whether their relationship in terms of this lawsuit, was for the purposes of obtaining legal advice," a matter left to the trial court on remand. (*Id*. at 1538.) If the trial court found such a relationship, the trial court was directed to grant the request for fees. (*Id*.

at 1539.)

9.3.9 Attorney-Client Privilege, Waiver of

Case: *Garcia v. Progressive Choice Ins. Co.* (S.D.Cal. 2012) 2012 WL 3113172

Issue: In an insurance bad faith action, did defendant-insurer waive the attorney-client privilege over newly discovered emails between claims adjuster and outside counsel concerning plaintiff's claim that were recovered after: (1) disclosure to plaintiff of communications between outside counsel and claims adjuster as part of turning over the underlying claims file "subject to objection on the grounds of attorney-client privilege," but also after (2) insurer withdrew its advice of counsel defense?

Holding: **Yes**. The Court in this diversity action applied California privilege law, under which the party asserting the privilege has the initial burden of establishing that the communication was made in the course of an attorney-client relationship and the opponent then bears the burden that the privilege does not for some reason apply. (2012 WL 3113172 at *3.) The Court found that the insurer had expressly waived the privilege over the newly discovered communications by earlier disclosing "a significant part" of communications between insurer and outside counsel in previously producing emails between outside counsel and claims adjuster that were contemporaneous with those over which insurer was asserting the privilege after withdrawing its advice of counsel defense.

While the Court acknowledged that the waiver of the attorney-client privilege is narrowly construed (*id*. at *5), the Court also found that waiver by a party's disclosure of a significant part of privileged communications is not limited to each individual communication partially disclosed, but may extend to related contemporaneous communications. "The attorney-client privilege is designed to foster open communication between client and attorney, in this case, between [outside counsel] and Defendant. However, Defendant voluntarily disclosed a large amount of communications it had with [outside counsel] regarding" the underlying claim, "and the purpose of that privilege was lost." (*Id*. at *7.)

Note: In ruling that disclosure of a "significant part" of a privileged communication may result in waiver of the privilege over other related and otherwise privileged contemporaneous communications, the Court rejected the statement in the Rutter Group practice guides on professional responsibility and civil trials and evidence that "[d]isclosure of a significant part of a privileged communication waives the privilege only with respect to that communication." (*Id*. at *4, emphasis in practice guides omitted in Court's ruling.)

9.3.10 Attorney Sanctions

Case: *People v. Whitus* (2012) 209 Cal.App.4th Supp. 1

Issue: Was referral to the State Bar in lieu of monetary sanctions warranted of a lawyer appealing trial court sanctions whose oral argument to the appellate department of the Superior Court consisted of "a parade of insults and affronts" including: (1) referring to the appellate division as the fox watching the hen house; (2) demanding that each member of the appellate panel say on the record whether he had discussed the case with the trial judge; and (3) making disparaging comments about the trial judge?

Holding: **Yes**. On the substance of the appeal, the appellate division of the Superior Court held that the trial court had not abused its discretion in sanctioning the attorney $750 under Code of Civil Procedure section 177.5 for failure to appear at several misdemeanor trial readiness conferences. (209 Cal.App.4th Supp. at 10.)

After addressing the merits of the appeal, the Court turned to its "grave concern" with the way the attorney had handled oral argument. The Court quoted only some of the comments the appellate panel found objectionable. The Court added: "[W]hat is missing from the discussion is the *tone* of [the attorney's] entire argument, something not captured in a written transcript, which can best be described as confrontational, accusatory and disdainful." (*Id*. at 13, emphasis in the original. In a footnote to this passage, the Court indicated it was making the electronic recording of the hearing part of the record for purposes of further appellate review. *Id*. at 13, note 6.)

The Court considered monetary sanctions for counsel's behavior, but decided that "something more therapeutic needs to be done. There is no place for this sort of argument in any courtroom, state or federal, trial or appellate. It demeans the profession, lowers public respect and, if left unaddressed, conveys the impression that it is acceptable behavior, perhaps even effective advocacy. Most assuredly, it is neither acceptable behavior nor effective advocacy." (*Id*. at 14.) The Court ordered the clerk to send the opinion to the State Bar for consideration of discipline, expressing "no opinion on what discipline, if any, is to be imposed." (*Id*. at 15.)

9.3.11 Attorney-Client Privilege, Attorney Work Product

Case: *California Earthquake Authority v. Metropolitan West Securities, LLC* (E.D. Cal. 2012) __ F.R.D. ___, 2012 WL 3150263

Issue: A publicly-run, privately-funded insurer retained an auditing firm to conduct an investigation, under the supervision of plaintiff's general counsel, of a failed investment in anticipation of litigation and also to advise plaintiff how to modify its investment policies to reduce the risk of similar investment losses in the future. The auditing firm conducted an extensive investigation, but never completed a report. In a case against an investment bank arising out of investment losses, did the federal attorney work product doctrine bar the bank from discovery of investigation-related documents from the auditing firm such as its work papers and draft reports?

Holding: **Yes**. The Court held that plaintiff's litigation purpose for conducting the investigation was inextricably intertwined with the non-litigation purpose of seeking review of, and guidance on revisions to, plaintiff's investment policies and procedures. Under the federal work product doctrine, that shielded from discovery among other things correspondence between the auditing firm and plaintiff's general counsel, notes from the auditing firm's interviews with individuals affiliated with plaintiff, and drafts of the never-completed audit report.

The litigation purpose of the investigation was demonstrated by plaintiff's general counsel initiating a litigation hold on documents related to plaintiff's investments and investment policies at the same time he contacted plaintiff's outside counsel to discuss the possibility of litigation over the loss and shortly before contacting the auditing firm about conducting the investigation under the supervision of plaintiff's general counsel. "Certainly the timing of the negotiations and ultimate retention of [the auditing firm], contemporaneous with [plaintiff's] discussions with outside counsel and the institution of a litigation hold, plausibly suggests that [the auditing firm] was retained in anticipation of litigation." (2012 WL 3150263 at *5, citation omitted.) In addition, the auditing firm's engagement letter referred to its services being used to assist the general counsel in giving legal advice to plaintiff. (*Ibid*.)

The Court rejected defendant-bank's contention that the business purpose of the

investigation precluded application of the attorney-client privilege to the auditing firm's investigation-related documents. For example, the bank contended that it had cooperated in the audit based on representations that the audit was being conducted to improve plaintiff's investment practices and further pointed out that the bank continued to serve as plaintiff's investment advisor throughout the audit. The bank contended that plaintiff never advised the bank that one of the purposes of the audit was to prepare for litigation against the bank and, had the plaintiff done so, the bank would not have cooperated in the audit. The Court did not doubt that plaintiff had "cajoled [the bank] into cooperation with vague and generalized statements about the audit." (*Id*. at *9.). But the bank provided no emails or other documentation suggesting that plaintiff had misrepresented the purpose of the audit. The bank had independent incentives to cooperate in the investigation; failing to cooperate threatened the loss of plaintiff as a client and heightened the risk plaintiff would sue. There also was no evidence the bank requested a hold-harmless agreement in exchange for its cooperation. (*Ibid*.)

The Court acknowledged that an assertion of work product protection may be overcome where the requesting party shows a substantial need for the materials and that the party would suffer undue hardship were the documents not produced. The bank made no such argument and the Court declined to consider it on its own. (*Ibid*.)

Notes: The Court declined to consider whether California's attorney-client privilege, which was applicable in this diversity action, also protected those categories of documents it found covered by the federal work product doctrine. The Court did hold that the attorney-client privilege protected correspondence between plaintiff's staff and its general counsel or outside counsel that plaintiff provided to the auditing firm as background documents potentially relevant to the investigation. The Court rejected bank's contention that plaintiff had waived the privilege over these documents because providing the documents was not reasonably necessary to conduct the investigation into the investment losses. Plaintiff's general counsel and general counsel's staff culled these privileged documents from plaintiff's files based on their relevance to the investigation. (*Id*. at *11.)

The Court ordered plaintiff to submit a privilege log to the bank with "foundational details for asserting the privilege as to the documentation in this category," but declined to order plaintiff to explain why each communication was given to the auditing firm. To require such detail "would essentially compel [plaintiff's] General Counsel to reveal his analysis and strategy, and would unduly interfere with the attorney-client relationship." (*Ibid*.)

9.3.12 Fed. Rule of Bankruptcy Proc. 2014(a): Disclosures in Application for Employment of Attorney

Case: *In re Thomas* (N.D.Cal. 2012) 476 B.R. 579

Issue: Was bankruptcy court required to disqualify attorney and order attorney to disgorge fees who failed to disclose in his application for employment of attorney in a Chapter 11 case that his retainer was paid by debtors' son where record revealed that attorney disclosed that information in two separate documents filed with debtors' bankruptcy schedules, including the Statement of Financial Affairs?

Holding: **No.** The bankruptcy court's ruling that it was required to disqualify attorney under those circumstances was error requiring remand.

The employment of an attorney for a debtor-in-possession in a Chapter 11 case is governed by §327(a) of the Bankruptcy Code and requires approval of the bankruptcy court. To enable the bankruptcy court to evaluate an attorney's potential for employment, an application for employment of attorney must be accompanied by a

verified statement disclosing the attorney's connections with "the debtors, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." (Fed. Rule Bankruptcy Proc. 2014(a).) "The purpose of such disclosures is to permit the bankruptcy court and parties in interest to determine whether the connection disqualifies the applicant from the employment sought or whether further inquiry should be made before deciding whether to approve the employment. This decision should not be left to counsel, whose judgment may be clouded by the benefits of the potential employment." (476 B.R. at 586, quoting *In re Lee* (Bankr.C.D.Cal. 1988) 94 B.R. 172, 176.) The disclosure provision is applied "strictly." (476 B.R. at 585, quoting *In re Park-Helena* (9th Cir. 1995) 63 F.3d 877, 881.)

While the two other documents in which the information about the source of the retainer was disclosed serve purposes different from the application for employment, the bankruptcy court had discretion to consider that disclosure had in fact been made in these other documents in deciding whether disqualification and disgorgement of fees were warranted. (476 B.R. at 587.) The bankruptcy's court's finding that the attorney had failed to disclose the information in any document was error warranting reversal and remand. "This error was understandable given the fact that the bankruptcy court decided the attorney's fees motion on an issue not briefed by the parties, and therefore the retainer disclosure issue was not fully flushed out at the time of the hearing." (*Id*. at 586.) Since the bankruptcy judge indicated that he may have made a different ruling had he been aware that the information about the source of the retainer had been disclosed in other documents, the matter was remanded for further consideration. (*Id*. at 587.)

Note: The U.S. Trustee argued that the bankruptcy court's order was correct on the alternative ground that the attorney failed to disclose his relationship with, and the substantial involvement in the representation of, an attorney subject to discipline at the time who referred the debtors to the attorney seeking the fees. The applicant-attorney claimed he was using the disciplined attorney only as an unpaid "courier." (*Id*. at 582, note 1.) The bankruptcy court had not made a finding on the impact of this relationship, and the failure of the attorney to disclose it, on the attorney's fee application. The district court declined to rule on the issue on appeal in the first instance, leaving it to the bankruptcy court to consider the issue on remand. (*Id*. at 587.)

9.3.13 Rule 2-100: Ex Parte Contact with a Represented Party

Case: *Guthrey v. California Department of Corrections and Rehabilitation* (E.D.Cal. 2012) 2012 WL 3249554

Issue: In an employment discrimination lawsuit brought by a former counselor at a correctional facility, was plaintiff's counsel entitled to discovery of the home addresses and phone numbers of rank-and-file correctional officers, who allegedly witnessed a brief encounter between plaintiff and a supervisor at the facility that plaintiff contended was evidence of the supervisor's hostility toward him based on religion and perceived race and ancestry, for the purpose of contacting those officers ex parte?

Holding: **No**. The Court found that these correctional officers could not be contacted ex parte as "public officers" under Rule 2-100(C)(1) since that exception applies only where an individual is exercising his constitutional right "to contact a policy level official for change in policy or to address a grievance," which was not the case here. (2012 WL 3249554 at *5, following *U.S. v. Sierra Pacific Industries* (E.D.Cal. 2010) 759 F.Supp.2d 1206 (EQ 8.2.20).)

The Court further found that the officers were "represented parties" under Rule 2-100 since, under Federal Rule of Evidence 801(d)(2), a statement the officers made concerning a matter within the scope of their employment could constitute a party

admission. (2012 WL 3249554 at *6.) The Court declined to follow *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187 (EQ 1.1.1), limiting the prohibition on ex parte communication to a party's "managing agents," because *Snider* applied California's more limited party admissions rule. (*Ibid*.) The Court instead followed *U.S. v. Sierra Pacific Industries* (E.D.Cal. 2011) 2011 WL 5828017 (EQ 8.4.7) reaching the same result for the same reason on similar facts. "Here, Plaintiff is attempting to elicit statements from [correctional facility employees] concerning the substance of Plaintiff's civil claims. These statements, if made, would concern a matter within the scope of his or her employment during the existence of that employment relationship. Thus, a statement from a [correctional facility employee] may be imputed to [the correctional facility] in a manner creating civil liability." (2012 WL 3249554 at *6.)

In sum, plaintiff's counsel could not contact the correctional officers ex parte under the "public official" exception to Rule 2-100 because the officers did not make policy and counsel could not contact the officers as outside of the scope of the represented party-agency because the officers' statements about matters within the scope of their employment could be considered party admissions under federal evidence law.

Notes: The Court denied plaintiff's motion to compel production of the officers' home addresses and phone numbers on the primary ground that the benefits of producing the information to plaintiff did not outweigh the burden of the production on the safety of the correctional officers and their families. (*Id*. at *3, note 2.) The Court addressed the issue of ex parte contact with the officers to provide guidance to the parties because, except for a single statement in the defendants' brief on the privacy rights and security interests of the officers, the parties focused exclusively on whether plaintiff's counsel could contact these officers ex parte if the Court did not allow plaintiff to take more than the ten depositions to which plaintiff was limited under Federal Rule of Civil Procedure 30. (*Ibid*.)

The Court denied plaintiff's request to take more than ten depositions as premature. The Court explained that plaintiff had not yet taken the deposition of either of the two witnesses plaintiff had identified to the brief encounter at issue between him and the correctional facility supervisor. Plaintiff therefore could not show good cause that depositions of the 19 correctional officers were warranted. (*Id*. at *7.)

9.3.14 Fee Recovery

Case: *Rodriguez v. Disner* (9th Cir. 2012) 688 F.3d 645

Issue: Did the district court abuse its discretion in denying attorneys' fees to class counsel in an antitrust class action suit where: (1) class counsel contracted to submit a request to the Court for an additional incentive award to the initial five class representatives, thereby excluding the rest of the class plaintiffs, based on the amount of recovery; but (2) where the amount of the settlement negotiated substantially exceeded the settlement sum that would have triggered the maximum incentive payment to the initial class representatives?

Holding: **No.** The district court had "broad discretion to deny fees to an attorney who commit[ted] an ethical violation." (688 F.3d at 655.) "The egregiousness of the violation is often the critical factor." (*Ibid*., citations omitted.) The Court of Appeals found no case in which a California appellate court had overturned a trial court decision to deny attorney's fees to an attorney engaged in dual representation of clients with actual conflicts of interest. (*Ibid*.)

Class counsel did not dispute, and the Court of Appeals held, that the arrangement between class counsel and the initial class representatives created, at its inception, a conflict of interest between the interests of the class representatives and the interests of the remainder of the class in violation of California Rule of Professional Conduct 3-

310(C). (688 F.3d at 656-657.) The class representatives had an interest only to secure a settlement triggering the maximum incentive award and foregoing a trial that would have put that award at risk in return for only a marginal additional gain even if the verdict substantially exceeded the settlement. (*Ibid*.) The rest of the class had an interest in securing the highest recovery possible, even if it meant rejecting a settlement that would have triggered the maximum incentive award to the class representatives and proceeding to trial.

The Court of Appeals rejected class counsel's contention that the district court had erred in finding that counsel's ethical violation warranted "automatic" forfeiture of legal fees. Class counsel contended that *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, which allowed a trial court to consider the degree of harm suffered by the client as a result of the ethical violation, justified the award of fees in this case since the class ultimately benefitted handsomely from the attorneys' work. The Court of Appeals rejected this reasoning, observing that California cases were persuasive authority, but ultimately federal equitable principles guided the decision. (*Id*. at 657.)

The Court of Appeals found class counsel's simultaneous representation of these conflicting interests particularly "egregious" because it was willfully created at the inception of the representation. (*Id*. at 657.) Counsel further violated its fiduciary duties to the class and its duty of candor to the court by not disclosing the agreement it had with the class representatives. (*Id*. at 657-658.)

The Court of Appeals agreed with class counsel that the district court could have awarded at least some fees, since the incentive agreements with the class representatives did not actually injure the rest of the class since counsel had achieved a settlement well above the sum at which the maximum incentive award would have been triggered. But the Court of Appeals's conclusion that this would have been a reasonable approach for the district court did not make the district court's decision to deny all fees an abuse of discretion. (*Id*. at 658.)

Notes: This was the second time this settlement was before the Court of Appeals. In *Rodriguez v. W. Publ'g Corp.* (*Rodriguez I*) (9th Cir. 2009) 563 F.3d 948, the Court of Appeals upheld the settlement as fair and reasonable. The Court of Appeals agreed with the district court's ruling denying the incentive awards to the class representatives on the ground that it created a conflict of interest between the class representatives and the rest of the class. The Court of Appeals in *Rodriguez I* reversed the district court's order awarding $7 million in attorneys' fees to class counsel, the full amount requested, and remanded the matter to the district court to consider the impact of the ethical violation on the award of fees. The district court's ruling denying fees to class counsel through the time of the approval of the settlement and the rejection of the incentive awards was the subject of the appeal in this case. The Court of Appeals's earlier opinion largely controlled the Court's disposition of this appeal.

The Court of Appeals rejected the contention of certain objectors to the settlement that the district court had abused its discretion on remand in awarding $500,000 to class counsel for work performed *after* the district court denied the request for incentive awards to class counsel. "The district court properly determined that its rejection of the incentive awards cured any conflict of interest and that [class counsel's] services thereafter were properly performed and conferred a benefit on the class." (688 F.3d at 660, note 12, citing *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 12, holding that an attorney was entitled to fees for work preceding an ethical breach.)

9.3.15 C.C.P. §1281.9: Arbitrator's Duty To Disclose

Case: *Nemecek & Cole v. Horn* (2012) 208 Cal.App.4th 641

Issue: Must an arbitration award in an attorney-client fee dispute be vacated because of: (1) arbitrator's previous involvement in a 186-member bar association committee with a witness for respondent; (2) arbitrator's appearance with respondent's expert witness as a panelist at various seminars and their service together on the board of governors of the Association of Business Trial Lawyers; (3) arbitrator's employment as of counsel to a law firm representing legal malpractice clients in five cases (including two for itself) in an otherwise criminal defense and civil litigation firm; or (4) a prior appearance by respondents once before the arbitrator when the arbitrator was a district court judge?

Holding: **No.** Though arbitrators are required by the California Arbitration Code (CCP §1281.9) to timely disclose any and all matters that could raise doubts a proposed neutral arbitrator would be unable to be impartial, an arbitrator is not required to disclose ordinary and insubstantial business relationships resulting from involvement in the legal or business community. The arbitrator's relationships were not substantial and did not involve financial considerations that could create the impression of possible bias. (208 Cal.App.4th at 646-647.)

Reviewing the case de novo as a matter of law, the Court of Appeal looked to the case of *Luce, Forward, Hamilton & Scripps v. Koch* (2008) 162 Cal.App. 4th 720 (EQ, 5.2.8), which opined that participation in a large organization within the legal community with other members was "slight and attenuated," absent a close and personal relationship. This is consistent with other rulings of the Courts of Appeal. (208 Cal.App.4th at 646-647.)

As to the of counsel law firm employment, the Court examined *Benjamin, Weill, & Mazer v. Kors* (2011) 195 Cal.App.4th 40, where an arbitration award was vacated as the arbitrator was found to be primarily employed in legal malpractice and had financial considerations at stake. The present case, however, found no such consideration at stake as the law firm to which the arbitrator was of counsel was focused primarily criminal defense and civil litigation with a total of three legal malpractice cases since its founding, and two more defending itself. The Court of Appeal found no financial bias could be inferred from these few cases in which the arbitrator was not involved. (208 Cal.App.4th at 647-648.)

Finally, the Court of Appeal found the argument that the arbitrator should have disclosed a single prior appearance by attorneys at the respondent law firm when the arbitrator was a federal judge borderline frivolous. (*Id*. at 648.) "[T]here is no requirement that an arbitrator disclose that attorneys appeared before the arbitrator in one case during his four years as a district court judge." (*Ibid*.)

9.3.16 C.C.P. §1281.9: Arbitrator's Duty To Disclose

Case: *Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790

Issue: In an international commercial arbitration conducted pursuant to C.C.P. §1297.11 et seq., did an arbitrator's failure to disclose timely that he had represented a client who had an account and over which he had signatory authority warrant vacation of the arbitration award?

Holding: **No.** The Court of Appeal observed that an arbitrator's duties under California's international commercial arbitration statutes ("international arbitration statutes") and the consequences from failure to disclose materially differ from those governing domestic disputes. The requirements of the international commercial arbitration statutes expressly supersede those under the domestic arbitration statutes. (C.C.P. §1297.17.) An international commercial arbitrator's failure to disclose a C.C.P §1297.121 disqualifying ground is not specifically listed in C.C.P. §1286.2(a) as a basis for vacating an arbitration award, even though subsection 6 of §1286.2(a) makes an

arbitrator's failure to disclose a ground for disqualification of which the arbitrator was then aware a ground to vacate the award in a domestic dispute. (208 Cal.App.4th at 822.) A litigant in an international commercial arbitration may challenge such a failure to disclose by way of writ petition rather than through a post-award judicial vacatur order. (*Ibid*.)

Note: The Court of Appeal also rejected defendants' argument that the award should be vacated because it was secured through corruption, fraud, or other undue means because, among other things, the arbitrator overbilled both sides for his services. The billing errors were the result of negligent miscalculation, were corrected, and were to the detriment of both sides. (*Id*. at 825-826.)

9.3.17 Penal Code §1424: Prosecutorial Recusal

Case: *Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93

Issue: Was disqualification of the entire Los Angeles District Attorney's office from prosecuting the alleged misconduct of an official with the City of Bell warranted where: (1) the prosecution related in part to the official's role in the hiring of the city's Chief of Police for a substantial salary that was concealed from the City Council; (2) the official alleged that the person ultimately hired as Chief of Police had spoken to the District Attorney about the city's offer to become Chief; and (3) the District Attorney had allegedly encouraged the person to accept the job?

Holding: **No**. In *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 (*Cobra Solutions*) (EQ 3.2.13), the California Supreme Court ruled that the rule of vicarious disqualification of a law firm in a civil matter where one firm attorney has a conflict of interest equally applies where the head of a government office formerly represented a person the office is currently pursuing in a civil matter. The Court of Appeal here ruled that the vicarious disqualification rule announced in *Cobra Solutions* does not apply to criminal cases. (209 Cal.App.4th at 105-106.) The Court of Appeal pointed out that Penal Code section 1424 provides for the disqualification of a local prosecuting office only when "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial," a tighter standard for disqualification than the *Cobra Solutions* rule. (209 Cal.App.4th at 103, quoting §1424.) The appearance of conflict is insufficient under section 1424 to warrant disqualification of an entire local prosecuting office.

Applying section 1424, the Court of Appeal ruled that, even assuming that the successful applicant for Chief of Police's contacts with the District Attorney prior to the applicant signing his contract with the city established that the District Attorney himself had an actual or apparent conflict, any contention that such conflict made it unlikely the official would receive a fair trial was based on speculation that the Chief's testimony would exonerate the official, that the Chief would exercises his Fifth Amendment right not to testify at trial, and that the District Attorney would not offer the Chief immunity from prosecution. The official offered no evidence to support any of those theories. (*Id*. at 107-108.)

Note: Ruling on a question of first impression, the Court of Appeal explained what a party must show to be entitled to an evidentiary hearing on a motion to disqualify under section 1424. The Court held that a party seeking an evidentiary hearing on a motion to disqualify under section 1424 must make a prima facie showing by affidavit establishing facts through admissible evidence which, if credited, would justify disqualification of the office. (*Id*. at 111-112.) The Court further concluded that the official had not satisfied that burden by offering "mere speculation" of an unfair trial and that the trial court therefore had not abuse its discretion in denying the motion to disqualify without an evidentiary hearing. (*Id*. at 112.)

9.3.18 Attorney-Client Privilege

Case: *Stephan v. Unum Life Ins. Co. of America* (9th Cir. 2012) __ F.3d __, 2012 WL 3983767

Issue: In an ERISA action asserting that disability plan administrator-insurer abused its discretion in excluding beneficiary's bonus to calculate his predisability earnings, were internal memoranda between administrator's, an insurer, claims analyst and its in-house counsel about how the policy should be interpreted discoverable under the fiduciary exception to the attorney-client privilege where the communications did not address any liability the administrator might face and the communications did not indicate they were prepared with such liability in mind, but where they were created after beneficiary's counsel had contacted the plan administrator about benefits but before the administrator has made a final decision on whether to grant or deny benefits?

Holding: **Yes**. An insurer that serves as a plan administrator has a structural conflict of interest in processing claims since it decides who gets benefits and also pays for those benefits, giving it a financial incentive to deny claims. (2012 WL 3983767 at *9.) In a question of first impression in the Ninth Circuit Court of Appeals, the Court recognized that the fiduciary exception to the attorney-client privilege, which bars an administrator from asserting the privilege over communications with counsel on administrative matters such as whether to grant or deny benefits, applies to insurers acting as plan administrators. The Court of Appeals agreed with the analysis in *Klein v. Northwestern Mutual Life Ins. Co.* (S.D. Cal. 2011) 806 F.Supp.2d 1120 (EQ 8.3.7) and the majority of other courts to address the issue. Courts that have recognized the fiduciary exception to the attorney-client privilege have done so on one of two bases. Some courts have recognized the exception based on the ERISA trustee's duty to disclose to beneficiaries all information about plan administration. (2012 WL 3983767 at *11.) Other courts have reasoned that the beneficiaries, not the ERISA fiduciary who acts as the representative of the beneficiaries of the plan, are the real "clients." (*Ibid*.) Under either theory, the Ninth Circuit concluded that the duty to disclose all information regarding plan administration applies equally to insurance companies and trustees alike. (*Ibid*.)

The Court of Appeals reversed the trial court order denying discovery of the disputed documents on the ground, even assuming that the fiduciary exception applied to insurers, the documents had been created after contact from the beneficiary's counsel and therefore after an adversarial relationship had begun. Having reviewed the disputed documents in camera, the Court of Appeals found that they related solely to how the policy should be interpreted and whether beneficiary's bonus should be included in the calculation of his pre-disability monthly earnings as opposed to bearing any indication that they were created in contemplation of any criminal or civil liability the plan administrator may face. (*Id*. at *12.) There was no binding precedent in the Ninth Circuit on when the interests of the plan fiduciary and the beneficiary become so adverse that the fiduciary exception does not apply. (*Id*. at *13.) The Court of Appeals sided with *Klein* and other courts that have held that "it is not until after the final determination – that is, after the final administrative appeal – that the interests of the Plan fiduciary and the beneficiary diverge for purposes of application of the fiduciary exception." (*Ibid*.)

"In sum, advice on the amount of benefits [beneficiary] was owed under the Plan, given before [plan administrator] had made any final determination on his claim, constitutes advice on plan administration. Such advice was given before the interests of [beneficiary] and [fiduciary] became adverse. The fiduciary exception to the attorney-client privilege therefore applies to the documents at issue here. " (*Ibid*.)

Note: The district court was directed on remand to allow discovery of the documents "[a]bsent some other basis for withholding them." (*Ibid*.)

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 addressed may be subject to depublication or review by the California Supreme Court. All cases should therefore be checked to confirm they are citable.

COMMENTARY: Clearing Waivers: Rulings Bring Clarity to Waiver of the Attorney-Client Privilege and Attorney Work Product

Daniel E. Eaton[1]

Introduction

It is black letter law in California that ordinarily "waiver" is the intentional relinquishment of a known right after knowledge of the facts. (See e.g., *Don Johnson Productions, Inc. v. Rysher Entertainment* (2012) 209 Cal.App.4th 919, 934.) For purposes of the attorney-client privilege and the attorney work product doctrine, waiver results "by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection. Waiver also occurs by an attorney's voluntary disclosure or consent to disclosure of the writing to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing." (*Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 679 (EQ 5.3.8), internal marks and internal and external citations omitted.)

But what about where a party maintains, and the circumstances credibly suggest, that the party did not intend to relinquish the protection of those protections, even where the party took intentional steps that resulted in the privileged information somehow getting into the hands of, or becoming known to, the party's legal adversary? What separates cases where waiver is found from those where it is not? And where waiver of these protections is found over a particular communication or piece of work product, is such a waiver limited to the particular document, does the waiver include all privileged documents related to the subject matter of the document, or something in between such as all communications between the same people, around the same time, on the same topic? Cases abstracted in this edition of *Ethics Quarterly* offer useful new answers to aspects of these frequently recurring questions.

A. *Coito v. Superior Court*: Use It and Lose It

Coito v. Superior Court (2012) 54 Cal.4th 480 (EQ 9.3.3) is a wrongful death action brought against the State of California and others following a drowning on public property. Counsel for the state sent two investigators to interview four witnesses. Counsel for the state provided the investigators with the questions he wanted asked. Each of the interviews was audio-recorded. (*Id.* at 487.) When one of the witnesses was then deposed, counsel for the state used the content of the recorded interview in questioning the witness. (*Ibid.*) Days later, plaintiff served a demand for documents seeking the audio recordings of the witnesses interviewed and moved to compel production of the recordings when the state resisted.

The essential holding of the California Supreme Court's unanimous ruling in *Coito* is that a witness statement that has been obtained through an attorney-directed interview is entitled to at least qualified work product protection. (*Id.* at 499-500.) The

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Court also held that such a witness statement may be entitled to absolute work product protection, protected from discovery even if the requesting attorney can show unfair prejudice from withholding it, if the attorney seeking to withhold it can show that the statement would reveal the attorney's impressions, conclusions, opinions, or legal research or theories. (*Id*. at 495-496). Having announced the applicable rule, the Court remanded the case to the trial court for consideration of whether the state could show that the absolute privilege applied to all or part of the recordings and, if not, whether the plaintiff could show that he would be unfairly prejudiced if the audio recordings were not produced. (*Id*. at 500.) The ruling, admirably free of footnotes, provides vital clarity in the law of privilege as it applies to witness statements and easily is among the most important California ethics decisions to come down so far this year.

But *Coito* also had something to say about how work product protection may be waived. The Court did not disturb the trial court's ruling that the state had waived the protection of the work product doctrine as to the recording of the interview the content of which the state's counsel had used to examine the witness at the witness's deposition. (*Ibid*.) Thus, an attorney's intentional use of work product against an opposing party -- in this case in the deposition of a percipient witness -- in such a way that the substance of the work product is disclosed relinquishes the right to claim the protection of the work product doctrine over the material so used.

The Supreme Court's remand order makes it clear that waiver as to the recording used to question the witness did not waive the protection as to all of the recordings. So the question remains: If waiver is found, how far beyond the particular document or communication over which protection has been stripped does the waiver extend? Does such a waiver open to discovery the entire subject matter to which the erstwhile privileged communication relates? Not necessarily.

B. ***Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc.*: Forward Email, Unravel Privilege**

Email is a convenient way for an attorney and client to communicate with each other about the subject of the representation. The unguarded use of email, however, may compromise the privilege over those communications, such as where the client has given consent to a prospective litigation adversary to review his or her email. (See *Holmes v. Petrovich Development Co.* (2011) 191 Cal.App.4th 1047 (EQ 8.1.6).) Email also may easily be forwarded. And, as virtually anyone knows, sometimes an email is forwarded to the wrong person and sometimes the forwarding of the email has consequences.

That is what happened in *Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc.* (N.D.Cal. 2012) 2012 WL 3062294 (EQ 9.3.7). An attorney emailed his client, the trustee of a pension fund, a preliminary, pre-litigation analysis of the strengths and weaknesses of an ERISA enforcement action the client was considering bringing against the alleged successor of a contributing employer to the trust fund. (*Id*. at *1). Both the predecessor company and the alleged successor company denied the existence of a successor relationship. The email was clearly marked "Attorney-Client Privileged/Attorney Work Product." (*Id*. at *2) The client-trustee forwarded the email to a higher-up in the union, a non-party, questioning whether the attorney for the predecessor company had a conflict of interest in defending the suit. The client did not ask the union to keep the forwarded email and attachment confidential. (*Id*. at *7.)

Predecessor company's attorney was a board member of a union-affiliated and union-funded industry association and the trustee was concerned that the attorney was lending his expertise to a union adversary. (*Id*. at *2, note 1.) After a series of additional forwarding of the email, the email and attachment wound up in the hands of several members of the industry association – including the attorney for the predecessor company who in turn provided the email to counsel for the defendant, the alleged successor company.

Defendant contended that the manner in which the email had been forwarded deprived plaintiff of any work product and attorney-client privilege over the document and indeed gave the defendant the right to "unlimited" discovery into the plaintiff's counsel's analysis of, and opinions about, various legal issues in the case. (*Id*. at *1.) Defense counsel served a Federal Rule of Civil Procedure 30(b)(6) deposition notice, including document requests, seeking this information. (*Id*. at *2.) Plaintiff sought a protective order to shield from discovery the original email and attachment and all subsequently prepared attorney-client communications and work product.

Applying the federal law of privilege in this federal question ERISA action, the Court found that the original email and attachment initially were covered by both the attorney-client privilege and the attorney work product doctrine. (*Id*. at *4, *5-6.) But the Court further found that plaintiff had waived both protections by the manner in which the trustee forwarded the email. (*Id*. at *4-5, 6-7.) Trustee's later "statement that he was 'shocked' that the e-mail escaped into the hands of the adversary and that this was not his intention is immaterial." The way the trustee forwarded the email "substantially increased the likelihood of – and in fact led to – disclosure to an adversary and was thus inconsistent with preserving the adversary system." (*Id*. at *7, internal citation to docket omitted.) The question remained how far the waiver of the privilege extended. Did plaintiff waive protection over all related and subsequently created privileged materials?

The Court concluded that there had been no such subject matter waiver. It would be unfair to find such a categorical waiver, said the Court, since subject matter waiver typically depended on a party's deliberate, strategic use of confidential material such as its selective disclosure, testimonial use, or necessary incorporation into an advice of counsel defense of sorts in support of a litigation position. None of that applied here. (*Id*. at *8.)

The Court also rejected defendant's contention that defendant's assertion of a counterclaim for attorneys' fees placed the assertedly privileged material at issue since the material would be needed to show that the action was brought in bad faith. "Defendant cannot simply raise an issue and thereby claim entitlement to protected materials. This sort of 'reverse' issue injection would destroy – not preserve – the adversary system by making it easy to circumvent the work product doctrine." (*Ibid*.) Similarly unavailing was defendant's contention that plaintiff placed all work product at issue by using the forwarded email, along with the threat of withdrawing union funding for the industry association, as leverage to get a better result in the litigation by getting predecessor company's counsel, who sat on the industry association's board, removed from the case and replaced with less capable counsel. (*Id*. at *8, note 2.) The Court found that it was unlikely plaintiff would use the work product to obtain a better outcome since plaintiff's counsel's analysis discussed shortcomings in plaintiff's case. Moreover,

defendant failed to explain how the discovery it sought into plaintiff's counsel's analysis was relevant to plaintiff's alleged efforts to leverage a better outcome. (*Ibid*.)

The micro lesson in the Court's finding that protection had been waived over the email and attachment is that attorneys should discourage their clients, particularly constituents of institutional and organizational clients, from forwarding confidential attorney-client communications without at least clearing it with the attorney in advance. An attorney should consider adding to the standard subject line warning on emails sent to clients, "Attorney-Client Privileged/Attorney Work Product," the additional phrase "Do Not Forward." The broader lesson in this ruling is that even if waiver is found, carefully crafted arguments rooted in fairness and relevance may limit the damage if discovery ultimately is confined to a particular communication or piece of work product. The Court in this case limited the discovery over privileged information to what was contained in the email and attachment. (*Id*. at *8, note 3.) But can counsel count on preventing discovery into privileged communications created at the same time as, and inextricably intertwined with, a communication over which a court finds the attorney-client privilege or attorney work product protection has been waived? The answer to that question apparently is no.

C. ***Garcia v. Progressive Choice Ins. Co*.: Documents Found, Privilege Lost**

In *Garcia v. Progressive Choice Ins. Co.* (S.D.Cal. 2012) 2012 WL 3113172, Plaintiff-insured alleged that her insurer had wrongfully denied her claim that the theft and burning of her Jeep was covered by her insurance policy. (*Id*. at *1.) The insurer initially asserted that its reliance on advice of counsel demonstrated that the insurer had not acted unreasonably. (See *Id*. at *1, note 3, pointing out that California law does not treat advice of counsel as an affirmative defense in a bad faith action, but that advice of counsel can be used to show the insurer did not act unreasonably.) Accordingly, the insurer produced the claims file to plaintiff, which included a substantial number of the communications the insurer had had with its outside counsel. Then, prompted by testimony at the deposition of a claims adjuster, defendant uncovered emails between the adjuster and outside counsel that were not part of the claims file but that were found on an email system the insurer no longer used. Some of those documents were disclosed to plaintiff, but others were withheld. The newly discovered emails caused the insurer to reconsider and withdraw its advice of counsel defense. (*Id*. at *1.) The insurer also submitted an amended privilege log listing previously disclosed communications.

The question was whether the insurer's production of privileged communications during the time it asserted reliance of counsel as part of its defense waived protection over newly uncovered contemporaneous privileged communications that had not yet been produced to plaintiff and that defendant had uncovered before deciding no longer to make advice of counsel part of its defense. Had defendant disclosed "a significant part" of the newly discovered documents by earlier disclosing a large number of privileged communications made around the same time as the newly discovered documents? Applying California privilege law in this diversity action, the Court ruled that yes, the insurer had and had thereby waived the privilege over the newly discovered documents.

The Court rejected defendant's contention that a party could disclose one group of otherwise privileged emails while retaining the privilege over other contemporaneous emails between the same people on the same topic. (*Id*. at *5.) Notwithstanding contrary

guidance in certain respected California practice guides, the Court carefully analyzed California authority and concluded that the waiver that comes from the disclosure of a "significant part" of a privileged communication may extend beyond the particular communication itself to include related communications between the same people at the same time. The Court did not find that the defendant had acted in bad faith and no sanction was imposed. Nor did the Court compel the defendant to assert any particular defense. "The sole conclusion reach by this Court is that Defendant expressly waived attorney-client privilege with respect to communications between it and [its outside counsel] concerning Plaintiff's claim." (*Id*. at *7.)

There are two salient lessons from this ruling. The first lesson is that a party that discloses a significant subset of a large group of otherwise privileged documents may open to discovery privileged communications or other documents created at the same time between the same people on same topic. The second, more defensive lesson is that the broader waiver may not extend to the full extent of the subject matter of those communications regardless of when the communications were created, but instead may be limited by time, topic, and correspondents.

Conclusion

Arguably an attorney's most important duty is to keep from a client's legal adversary the client's secrets and the attorney's work product. That means being vigilant about preserving the protection of the attorney-client privilege and the attorney work product doctrine. A client may waive the privilege, which after all belongs to the client, by oversharing attorney-client privileged communications even where the client does not specifically mean to waive the protection of the privilege. An attorney may waive work product protection by using such material tactically in pursuit of his client's interests. As the cases addressed above illustrate, even where waiver is found, there are rules that may limit the extent of a waiver so that the confidentiality that is at the heart of the attorney-client relationship is, in the main, preserved.