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

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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.

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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.