LABOR AND EMPLOYMENT LAW

CALIFORNIA LAWYERS ASSOCIATION

presents

14th Annual Advanced Wage and Hour Conference

Pay Dirt! | Lunch/Keynote Presentation

Thursday, July 18, 2024
12:00 p.m. – 1:00 p.m.

Speaker:

Brian Schwartz

Conference Reference Materials

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The California Lawyers Association is an approved State Bar of California MCLE provider.

California Lawyers Association – Advanced Annual Wage & Hour Seminar

Wage & Hour Ethics – Q&A

www.BryanSchwartzLaw.com

Objective: learn ethics rules that apply in wage and hour litigation, with wage and hour class action members and corporate witnesses, objectors, in class settlements, and more, in a game show format.

Corporations $100

Q: Can you initiate an investigative interview with a former managing agent at a company regarding wage and hour allegations?

A: Yes

Rule 4.2 (Communication with a Represented Person) does not apply to former employees, regardless of whether they would have been considered a "party" while employed. *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 118–19. Under Rule 4.2, an organization's opponent's attorney may contact former managerial employees and elicit substantive, damaging information without the consent of the organization's counsel.

Corporations $200

Q: Can a plaintiff's attorney contact mid-level employees who are not managing agents of a corporation to investigate wage violations?

A: Yes

In *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, the court found that counsel defending a former employee being sued for unfair competition and misappropriation of trade secrets did not violate the rule when he contacted mid-level employees who were not "managing agents" of the corporation.

See also Doe v. Superior Court of San Diego Cty. (2019) 36 Cal. App. 5th 199, 207 (citing *Snider* for "the fundamental proposition that not every current employee of a represented organizational entity is a "represented" person for purposes of Rule 4.2," and noting, "Indeed, Rule 4.2 (and former Rule 2-100) affirmatively permit[ ] opposing counsel to initiate *ex parte* contacts with ... present employees (other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in

connection with the matter which may bind the [organizational entity], be imputed to it, or constitute an admission of the [entity] for purposes of establishing liability." [citations]).

Corporations $300

Q: Can you represent a company in one matter and represent a class of wage claimants against that company in another, wholly unrelated matter?

A: Not without informed written consent

Rule 1.7 Conflict of Interest: Current Clients (Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall not, without informed written consent from each client … represent a client if the representation is directly adverse to another client in the same or a separate matter.

(e) For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, **or action that is focused on the interests of specific persons, or a discrete and identifiable class of persons.**

Comment 1: The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. (*See Flatt v. Superior Court* (1994) 9 Cal.4th 275.)

Also, *see Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 796–97 (2010) ("if the former client can demonstrate a substantial relationship between the subjects of the former and the current representations, it is presumed that the attorney had access to confidential information in the first representation which is relevant to the second representation" – if there is a "substantial relationship," [quoting *Flatt,* 9 Cal. 4th at 283] "disqualification of the attorney's representation of the second client is mandatory; indeed, the disqualification extends vicariously to the entire firm.").

Corporations $400

Q: Can corporate officials communicate information with class members related to a pending wage and hour class action at the behest of the corporation's in-house or outside counsel?

A: No

Rule of Professional Conduct 4.2 is on point. *See San Francisco Unified Sch. Dist. ex rel. Contreras v. First Student, Inc.* (2013) 213 Cal. App. 4th 1212, 1234–35, discussing former rule 2-100 (now 4.2):

The State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion No.1993–131 (1993) (Opinion No.1993–131) 1993 WL 284525, states that attorneys "need not discourage clients from direct communication with one another" and "[i]nformation obtained by a client from an opposing party represented by counsel where there has been no prohibited direct or indirect communication under rule 2–100 may properly be communicated by the client to the attorney and used by the attorney as is otherwise appropriate. [¶] ... [¶] [On the other hand,] [w]hen the content of the communication to be had with the opposing party originates with or is directed by the attorney, [the communication] is prohibited by rule 2–100. Thus, an attorney is prohibited from drafting documents, correspondence, or other written materials, to be delivered to an opposing party represented by counsel even if they are prepared at the request of the client, are conveyed by the client and appear to be from the client rather than the attorney.... [¶] An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney." In general, "counsel should be guided by the overriding purpose of rule 2–100, which is to prohibit one side to a dispute from obtaining an unfair advantage over the other side as a result of having ex-parte access to a represented party." (Opn. No.1993–131, *supra*.)

Corporations $500

Q: Is plaintiffs' counsel prohibited from contacts with non-agents of the corporation because the non-agents have supposedly privileged information, based upon prior contacts with defendant's counsel or defendant's officials acting upon the advice of counsel?

A: Probably not

See Triple A Mach. Shop, Inc. v. State of California (1989) 213 Cal. App. 3d 131, 141-43:

The scope of the attorney-client privilege in cases of corporate clients was established by our Supreme Court in *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 736–738:
"[R]eason dictates that the corporation not be given greater privileges than are enjoyed by a natural person merely because it must utilize a person in order to speak. If we apply to corporations the same reasoning as has been applied in regard to natural persons in reference to privilege, and if we adapt those rules to fit the corporate concept, certain principles emerge clear. These basic principles may be stated as follows:
"1. When the employee of a defendant corporation is also a defendant in his own right (or is a person who may be charged with liability), his statement regarding the facts with which he or his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents (or will represent) either or both of them, is entitled to the attorney-client privilege on the same basis as it would be entitled thereto if the employer-employee relationship did not exist;
"2. When such an employee is not a codefendant (or person who may be charged with liability), his communication should not be so privileged unless, under all of the circumstances of the case, he is the natural person to be speaking for the corporation; that is to say, that the privilege will not attach in such case unless the communication constitutes information which emanates from the corporation (as distinct from the nonlitigant employee), and the communicating employee is such a person who would ordinarily be utilized for communication to the corporation's attorney;
"3. When an employee has been a witness to matters which require communication to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, he is an independent witness; and the fact that the employer requires him to make a statement for transmittal to the latter's attorney does not alter his status or make his statement subject to the attorney-client privilege;
"4. Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer;
"5. If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged;
"6. When the corporate employer has more than one purpose in directing such an employee to make such report or statement, the dominant purpose will control, unless the secondary use is such that confidentiality has been waived;
"7. ....
"8. ....
"9. And in all corporate employer-employee situations it must be borne in mind that it is the intent of the person from whom the information emanates that originally governs its confidentiality (and hence its privilege); thus where the employee who has not been expressly directed by his employer to make a statement, does not know that his statement is sought on a confidential basis (or knowing that fact does not intend it to be confidential), the intent of the party receiving and transmitting that statement cannot control the question of privilege;
"10. ....

"11. Finally, no greater liberality should be applied to the facts which determine privilege in the case of a corporation than would be applied in the case of a natural person (or association of persons), except as may be necessary to allow the corporation to speak."

Thus, it is clear that not all corporate employees are necessarily encompassed within the attorney-client privilege, just as rule [4.2] does not bar contact with all corporate employees. For example, it is possible in any given case that a corporate officer or director covered by rule [4.2] may not be privy to information protected by the attorney-client privilege, while a lower level employee who is not shielded from contact under rule [4.2] may be in possession of substantial privileged information. However, this does not enable corporate counsel to automatically assert the privilege as to every corporate employee and on that basis enjoin opposing counsel from any and all contact with employees not covered by rule [4.2].

Objectors $100

Q: Can objector's counsel contact wage and hour class action class members to recruit additional objectors through a letter challenging the settlement?

A: No

In *Hernandez v. Vitamin Shoppe* (2009) 174 Cal.App.4th 1441, an attorney unilaterally, without court approval, sent letters to class members after the court had reviewed and approved a proposed settlement, conditionally certified the class, appointed class counsel, and ordered the claims administrator to send notice to the class. The attorney represented dissenting class members he recruited through the letter to challenge the settlement. The *Hernandez* Court of Appeal held an injunction to preclude the attorney's improper contacts with represented parties was proper.

Objectors $200

Q: Can class counsel and Defendant collaborate to pay off objectors?

A: Yes, with the Court's approval

Federal Rule of Civil Procedure 23(e)(5)(B):

"***Unless approved by the court*** after a hearing, no payment or other consideration may be provided in connection with: (i) forgoing or withdrawing an objection, or (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal."

Rule 23(e)(5)(C):

"Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 [Indicative Ruling on a Motion for Relief that is Barred by a Pending Appeal, to allow *inter alia* for the court to state that it would grant a motion if the court of appeals were to remand for that purpose] applies while the appeal remains pending."

Objectors $300

Q: Does the rigid, prophylactic rule to prevent a former client's confidences and secrets from being used against him/her (requiring former client informed written consent before adverse representation against him/her subsequently) – Rule 1.9 – apply with respect to class counsel and an objector who class counsel formerly represented?

A: No

See In re Corn Derivatives Antitrust Litig., 748 F.2d 157, 165 (3d Cir. 1984) (in concurrence)

"[A]lthough the importance of maintaining client confidences cannot be minimized, a rigid "prophylactic rule" in the area of client confidentiality in class actions would appear to be inappropriate. *Cf.* Note, *The Attorney-Client Privilege in Class Actions: Fashioning an Exception to Promote Adequacy of Representation,* 97 Harv.L.Rev. 947 (1984) (confidentiality should give way when it impedes basic representational aspects of a class action). Instead in a class action context in which disqualification potentially threatens the viability of the representational suit, the court should require some showing by the party urging disqualification. Relevant considerations include the amount and nature of the information that has been proffered to the attorney, its availability elsewhere, its importance to the question at issue, such as settlement, as well as actual prejudice that may flow from that information. *Cf. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Cop.,* 518 F.2d 751, 759 (2d Cir. 1975) (Adams, J., concurring) (suggesting, because of countervailing factors, a showing of knowledge of confidential and *pertinent* information). I*n*

camera review of the information might be in order in some cases to safeguard the class members from the harm caused by disclosure in open court. *See* Note, 97 Harv.L.Rev. at 960. These factors should then be balanced against the costs to the opposing party, and the possibility of securing new counsel. Such costs will likely be affected by the point in the litigation at which the conflict develops; the burden is perhaps less at earlier stages."

California follows the *In re Corn Derivatives* concurrence. *See, e.g., Kullar v. Foot Locker Retail, Inc.* (2011) 191 Cal.App.4th 1201, 1207:

"The putative class members favoring the proposed Kullar settlement may be adverse to objectors in the sense that they disagree as to the adequacy of the settlement and in their desire to have it approved or rejected (*cf. Lazy Oil Co. v. Witco Corp.* (3rd Cir.1999) 166 F.3d 581, 589), but their common interests in the outcome of the litigation are unaffected by that disagreement. There is no suggestion that [the law firm] has obtained any confidential information from the putative class members who favor the settlement, nor have the attorneys engaged in any conduct displaying disloyalty to any of the putative class members. Disqualification under the circumstances here would be no more justified than the automatic disqualification of class counsel whenever a dispute arises among class members or class representatives as to the advisability of settlement. (*See ibid.; In re Corn Derivatives,*748 F.2d at 162; *In re "Agent Orange" Prod. Liab. Litig.* (2d Cir.1986) 800 F.2d 14, 18–19.)"

Generally, class counsel may oppose a current or former class rep or current or former class member who that class counsel previously represented, when seeking approval of a class action settlement, because the fiduciary duty to the class's interest trumps the duty to the individuals. *See, e.g., In re Agent Orange,* 800 F.2d 14, 18-19 (2d Cir. 1986); *Charron v. Wiener,* 731 F.3d 241 (2d Cir. 2013), *cert. denied*. "Class counsel is supposed to represent the class, not the named parties: that the named parties objected does not prove the settlement was unfair or that the class counsel acted improperly." *Charron,* 731 F.3d at 254 (citing *Laskey v. Int'l Union*, 638 F.2d 954, 956 (6th Cir. 1981)). *See generally Lazy Oil,* 166 F.3d at 588-590 ("in the class action context, once some class representatives object to a settlement negotiated on their behalf, class counsel may continue to represent the remaining class representatives and the class, as long as the interest of the class in continued representation by experienced counsel is not outweighed by the actual prejudice to the objectors of being opposed by their former counsel."). "California law does not require automatic disqualification for simultaneous conflicts of interest in class actions." *Radcliffe v. Hernandez*, 818 F.3d 537, 546–47 (9th Cir. 2016)

Objectors $400

Q: An objector is objecting to the extent of attorneys' fees proposed. As to this objection, may class counsel be compensated from a class action settlement based upon non-monetary relief obtained, under the ethics rules?

A: Yes

"Non-monetary benefits" to the Class, such as causing the defendant "to change its personnel classification practices," are "a relevant circumstance" in evaluating fees.

Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1048-50 (9th Cir. 2002). *See also In re Bluetooth Headset Prod. Liability Litig.,* 654 F.3d 935, 941 (9th Cir. 2011); *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 922-23 (9th Cir. 2014) (vacated on other grounds); *Bebchick v. Washington Metropolitan Area Transit Comm'n*, 805 F.2d 396 (D.C. Cir. 1986) (fee award appropriate to reflect benefits to the public flowing from litigation).

But, the non-monetary relief must be meaningful. *Cf. Koby v. ARS Nat'l Servs., Inc.,* 846 F.3d 1071, 1079 (9th Cir. 2017) ("There is no evidence that the relief afforded by the settlement has any value to the class members, yet to obtain it they had to relinquish their right to seek damages in any other class action.")

Objectors $500

Q: An objector raises the simultaneous negotiation of fees and the class recovery - can class counsel negotiate their fees at the same time as they negotiate the class's recovery?

A: Yes, but with caution

There is nothing inherently wrong with simultaneous negotiations of fees and plaintiff/class recovery. *See, e.g., White v. N.H. Dep't of Employment Sec*., 455 U.S. 445, 453 n.15 (1982); *Ayers v. Thompson*, 358 F.3d 356, 375 (5th Cir. 2004). However, some courts have recognized that simultaneous negotiations of the fees and class recovery presents a risk "that the interest of plaintiffs' counsel in counsel's own compensation will adversely affect the extent of the relief

counsel will procure for the clients." *Cizek v. National Surface Cleaning Inc.*, 954 F. Supp. 110, 110-11 (S.D.N.Y. 1997). Counsel must ensure that the negotiations "did not create improprieties or conflicts." *Szu v. TGI Friday's Inc.*, 2013 U.S. Dist. LEXIS 88854, *3 (E.D.N.Y. June 24, 2013).

Regardless, the fee award should relate to the value of the recovery by the class. *See, e.g., In re Online DVD-Rental Antitrust Litig.,* 779 F.3d 934, 953 (9th Cir. 2015) (crux is whether end result is reasonable).

Class Members $100

Q: Does class counsel have a duty to alert class members to any claims being released if they are beyond the scope of the basic wage/hour claims for which counsel was retained and appointed as class counsel?

A: Yes

"In California, an attorney may still have a duty to alert the client to legal problems if they are reasonably apparent, as they were in this case, even though they fall outside the scope of the retention."

Ito v. Brighton/Shaw, Inc., 2008 WL 3378120, at *6 (E.D. Cal. Aug. 8, 2008) (citing *Janik v. Rudy, Exelrod & Zieff,* 119 Cal.App.4th 930 (2004))

Class Members $200

Q: In California, can class counsel send out mailed solicitations to class members under the header "Newsletter?"

A: No

Under the 2018 Rules of Professional Conduct, the term "Newsletter" was deleted as an acceptable label, when RPC 1-400 became Rule 7.3.

Old rule 1-400 and related reg:

Pursuant to rule 1-400(E) the Board has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means **which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page**. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, **the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.**

New Rule 7.3(c):

Every written,* recorded or electronic communication from a lawyer soliciting professional employment from any person* known* to be in need of legal services in a particular matter **shall include the word "Advertisement" or words of similar import on the outside envelope**, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person* specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

Class Members $300

Q: Is it improper for plaintiffs' counsel to contact class members who have signed releases and/or arbitration agreements?

A: No

The Supreme Court, in *Gulf Oil Co. v. Bernard,* 452 U.S. 89 (1981) rejected a court's ban on communications with such class members as an unconstitutional restraint on free speech, absent explicit findings of abuses by class counsel. Class counsel must follow California's solicitation rules (especially Rule of Professional Conduct 7.3) if solicitation is occurring during such communications.

Class Members $400

Q: Can certain class members recover in a wage-hour class settlement proportionally more than other class members?

A: Yes, but it must be based upon the strength of their claims

A settlement may not single out a large group of non-named plaintiff class members for higher payments without regard to the strength of their claims. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). In *Staton,* less than 2% of the class would have received more than half of the monetary reward.

When real and cognizable differences exist between the likelihood of ultimate success for different plaintiffs, a settlement can weigh distribution in favor of plaintiffs with claims more likely to succeed. *See, e.g., In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997)

Class Members $500

Q: Can class members' unclaimed settlement allocations be redistributed to others who are not a part of the class?

A: Yes, through *cy pres,* but it should be tethered to the nature of the lawsuit and the interests of the silent class members

See, e.g., Nachshin v. AOL, LLC, 663 F.3d 1034 (9th Cir. 2011) ("When selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court.")

Class Reps $100

Q: May class reps be paid additional compensation for settling and waiving claims in addition to those waived on behalf of a class?

A: Yes

Defendant can pay a class rep additional compensation for a broader release, including non-class claims. *See, e.g,. Dent v. ITC Serv. Group*, 2013 WL 5437331, at *4 (D. Nev. Sept. 27, 2013); *Jaffe v. Morgan Stanley & Co.*, No. C 06-3903 TEH, 2008 U.S. Dist. LEXIS 12208, at *15 (N.D. Cal. Feb. 7. 2008) (over objection, court approved class action settlement with a separate $125,000 payment to settle an individual claim and a $25,000 incentive payment *Jaffe* explained: "[T]his Court is not called upon to determine the merit of Ms. Curtis-Bauer's separate claims or the wisdom of the settlement. Instead, it must determine whether the settlement of her non-class claims renders Ms. Curtis-Bauer an inadequate class representative (or makes the class settlement as a whole unfair)." *Id.* at *16.

Class Reps $200

Q: Can class reps be promised enhancement payments if they agree to accept a class settlement?

A: No

Though service payments or enhancements are commonplace, counsel cannot guarantee them to Plaintiffs or make such payments conditional on acquiescence to a settlement. *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1164-66 (9th Cir. 2013); *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-60 (9th Cir. 2009).

The "class representatives' lack of adequacy—based on the conditional incentive awards—also made class counsel inadequate to represent the class." *Radcliffe*, 715 F.3d at 1167.

White v. Experian Info. Sols., 993 F. Supp. 2d 1154, 1159 (C.D. Cal. 2014), as amended (May 1, 2014) (C.D. Cal. May 1, 2014) (citing *Radcliffe,* 715 F.3d at 1167).

Class Reps $300

Q: Are fee retainer agreements with class representatives protected by a state law evidentiary code?

A: Yes

Business and Professions Code section 6149 states that "[a] written fee contract" is entitled to the protections of Evidence Code section 952. Also, we have an ethical duty to hold this document confidential under Business and Professions Code 6068(e).

A written fee contract shall be deemed to be a confidential communication within the meaning of subdivision (e) of Section 6068 and of Section 952 of the Evidence Code.

Class Reps $400

Q: Can class counsel ensure that named plaintiffs receive preferential treatment in a class wage and hour settlement?

A: No

It is unacceptable to give "preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members." *E.g., Vassalle v. Midland Funding LLC*, 708 F.3d 747, 755 (6th Cir. 2013). Recovery for the named plaintiff must relate to plaintiff's efforts/claims, not be disproportionate; it cannot be just a windfall to quiet a disgruntled plaintiff. *See, e.g., Chavez v. Lumber Liquidators, Inc.*, 2015 WL 2174168, at *5 (N.D. Cal. May 8, 2015) (rejecting settlement – enhancement 37x average recovery, 7% of common fund).

Class Reps $500

Q: Does counsel have a duty to disclose any individual settlements in connection with the case reached during the course of the lawsuit to the court?

A: Yes, they should

Fed.R.Civ.P. 23(e)(3) provides, "The parties seeking approval [of a proposed class settlement] must file a statement identifying any agreement made in connection with the proposal."

2003 Advisory Committee notes:

"[Rule 23(e)(3)] aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. **The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties.** The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement."

In California, it is advisable to at least notify the approving court of the existence of any individual settlements, even if related to other claims (*e.g.,* separate discrimination and retaliation claims settled as to a wage-hour class representative).

Final Pay Dirt

Q: May a court invalidate declarations collected by an employer (working with counsel) from putative wage-hour class, collective, or representative action members after a wage-hour suit was filed, but before it was certified, based upon ethical concerns? To win, you must name a California case discussing the issues *and* identify a California Rule of Professional Conduct at issue.

A: Yes

Under Rule 1.13(f) – formerly 3-600(D) – an employer and its representatives must explain who the client is and the apparent adverse interests.

Under Rule 4.3 – Dealing with Unrepresented Person:

"In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

In *Barriga v. 99 Cents Only Stores LLC* (2020) 51 Cal. App. 5th 299, 330–32, the Court of Appeal explained (citing a host of federal authorities):

"In considering whether pre-certification communications between employers and employees are sufficiently deceptive or coercive to warrant relief, courts have considered several factors, including whether the employer adequately informed the employees about: (1) the details underlying the lawsuit, (2) the nature and purpose of the communications, and (3) the fact that any defense attorneys conducting the communications represent the employer and not the employee. [Citations.] Additionally, federal courts in California have found that any violation of

California Rules of Professional Conduct 3-600 [addressing, inter alia, communications between counsel for a corporation and its employees] weighs in favor of finding that improper communications have taken place." [Citations.]….

Barriga quoted *Quezada v. Schneider Logistics…*, . 2013 WL 1296761 at *5, 2013 U.S. Dist. Lexis 47639 at pp. *13-*14 (C.D. Cal. Mar. 25, 2013), in which the court concluded the attorneys' communications with employees violated rule 3-600(D) (now Rule 1.13(f)), invalidated declarations, issued corrective notice, and barred further communications with putative class members absent prior court permission:

"Even if defendant provided its employees with some information about the lawsuit and with notice that the attorneys represented [the employer], the communications were deceptive because the interviewing attorneys failed to notify the employees of the nature and purpose of the communications. Crucially, the employees were never told that the purpose of the interviews was to gather evidence to be used against the employees in a lawsuit. In fact, the employees were not even told that the document they were asked to sign at the close of the interview was a sworn declaration, nor were they apprised of the significance of signing a declaration under penalty of perjury. The employees were instead misleadingly told that the interviews were only an 'internal investigation….Failing to inform the employees of the evidence-gathering purpose of the interviews rendered the communications fundamentally misleading and deceptive because the employees were unaware that the interview was taking place in an adversarial context, and that the employees' statements could be used to limit their right to relief."

Barriga ultimately reversed the trial court, which erroneously believed it did not have the authority to strike the declarations, imposing a duty to carefully scrutinize the declarations submitted by an employer in opposition to a class certification motion for coercion and abuse, and requiring that the trial court understand the scope of its discretion to strike or discount the evidentiary weight to be given to those declarations if it found evidence of coercion and abuse, in violation of the Rules of Professional Conduct. *Barriga*, 51 Cal. App. 5th at 338.

In *Woodworth v. Loma Linda Univ. Med. Ctr.* (2023) 93 Cal. App. 5th 1038, 1059, *reh'g denied* (Aug. 17, 2023), *rev. granted* (Nov. 1, 2023), the Court of Appeal discussed similar issues but did not reverse, finding that the trial court was within its discretion *not* to invalidate the declarations, based upon the evidence in that case. In *Woodworth,* the Court distinguished both *Barriga* and *Richardson v. Interstate Hotels & Resorts, Inc.*, 2018 WL 1258192, 2018 U.S.Dist. Lexis 40377 (N.D. Cal. Mar. 12, 2018), in which, based upon ethical concerns, the district court also invalidated declarations, imposed other restrictions, and considered disqualifying defense counsel, which represented class member declarants at their depositions. In *Woodworth,* there was no allegation that the employer's counsel represented the class members at their depositions (*i.e.,* in violation of the bar on representing adverse parties without informed written consent). The *Woodworth* court found evidence that defense counsel explained the fact that employees could be class members if Woodworth prevailed on her motion and that the employer-defendant was going to use the declarations to try to prevent the case from becoming a class action. Further, defense counsel explained that that they represented the employer-defendant. The

employees cited no evidence that the employees were left with the impression that defense counsel represented them or that defense counsel provided legal advice. Unlike in *Barriga,* the *Woodworth* record demonstrated that the trial court carefully scrutinized the declarations for coercion and abuse and was not of the erroneous opinion that it lacked the authority to strike the declarations.

See also generally Dominguez v. Better Mortgage Corp., 88 F.4th 782 (9th Cir. 2023) (not citing ethics rules specifically, but holding that arbitration and release agreements gathered by employer after wage-hour suit filed could be invalidated based upon failure to disclose potentially adverse interests and impact of agreements adequately to unrepresented putative class/collective action members).