California Lawyers Association

presents

A Year in Review: Legal Ethics & Professional Responsibility

1.25 Hours MCLE; 1.25 Legal Ethics; Legal Specialization in Legal Malpractice

Thursday, September 21, 2023

1:30 PM - 2:45 PM

Speakers:

Dianne Jackson McLean

Suzanne Burke Spencer

Neil Wertlieb

Conference Reference Materials

A Year in Review: Legal Ethics & Professional Responsibility

Dianne Jackson McLean
Suzanne Burke Spencer
Neil J Wertlieb

September 21, 2023

CALIFORNIA LAWYERS ASSOCIATION

2023
SAN DIEGO / SEPTEMBER 21- 23
ANNUAL MEETING
BREAKING BARRIERS
CALIFORNIA LAWYERS ASSOCIATION
#CLAAnnual

Introductions

Overview of Presentation

Presenters:

Dianne Jackson McLean: ***Partner, Goldfarb & Lipman LLP***

Suzanne Burke Spencer: ***Managing Shareholder, Sall Spencer Callas & Krueger, ALC***

Neil J Wertlieb: ***General Counsel, Milbank LLP***

Announcements

Attorney Sanctions and Professionalism

***Shiheiber v. JPMorgan Chase Bank, N.A.*, 81 Cal. App. 5th 688 (July 26, 2022) [2022 WL 2951916]**

- Issue raised: May an attorney be sanctioned for violations of local court rules governing pre-trial court filings?
    - Does trial court have power to sanction to for violation of local rules governing the conduct of trial?
    - Is bad faith a necessary predicate for attorney sanctions?
- Held: Attorney sanctions affirmed

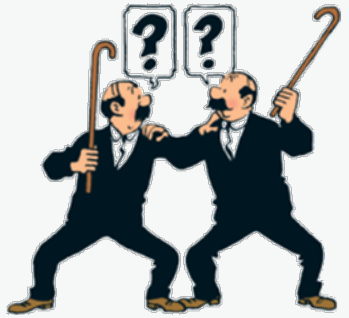
Shapell Socal Rental Properties, LLC v. Chico's FAS, Inc., 85 Cal. App. 5th 198 (Oct. 17, 2022), as modified (Oct. 31, 2022)

- **Related to CRPC 4.2-** Communication with a Represented Person. However-based on case law.
- **Facts**: Plaintiff failed to communicate with defendant counsel even after being requested to do so by defendant and filed motions for default and default judgments without notifying counsel. Trial court denied motion to set aside motion
- **Holding**: COA reversed stated "ethical and statutory" obligations to warn opposing counsel. Citing Lasalle v. Vogel (2019)(36 Cal.App.5th 127, 137, the court held that an attorney had both an ethical and statutory obligation to warn opposing counsel, if counsel's identity is known, of an intent to seek a default and to give counsel a reasonable opportunity to file a responsive pleading. The COA found that the trial court had abuse its discretion and reversed the decision.
- Interesting in this case is how the court touched upon the issues of civility and cooperation.

Civility Proposals

California State Bar Proposals pending before the California Supreme Court:

- **MCLE**
- **Attorney Oath**
- **Rule Changes**



Civility Proposals – Continued

MCLE Proposed Change:

- **Amend State Bar Rule 2.72 to mandate:**
  - **All licensees complete at least one hour of education addressing civility in the legal profession**
    - **Beginning with the compliance period ending January 31, 2025**

Civility Proposals – Continued

Attorney Oath Proposed Changes:

- **Amend California Rule of Court 9.7:**
  - **"As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."**
- **New State Bar Rule 2.3(C)(1):**
  - **If determined by the State Bar to be in noncompliance,**
    - **attorney will be enrolled as inactive and not eligible to practice law**

Civility Proposals – Continued

***First** of three Proposed Rule Changes*:

- **Add Comment to Rule 1.2 (Scope of Representation and Allocation of Authority):**
  - **A lawyer retains the authority to:**
    - **agree to reasonable requests that do not prejudice client's rights**
    - **be punctual in fulfilling all professional commitments**
    - **avoid offensive tactics**
    - **treat all persons with dignity, courtesy & integrity**
  - ***Notwithstanding the client's direction to the contrary***

Civility Proposals – Continued

***Second** of three Proposed Rule Changes*:

- **Add to Comments to 8.4 (Misconduct):**
  - **A lawyer may be disciplined for significantly unprofessional conduct that is abusive or harassing**
    - **Such conduct is prejudicial to the administration of justice**
  - **But not a violation for merely:**
    - **standing firm in the position of the client,**
    - **protecting the record for subsequent review, or**
    - **preserving professional integrity**

Civility Proposals – Continued

***Third** of three Proposed Rule Changes*:

- **New Rule 8.4.2 (Prohibited Incivility):**
  - **In representing a client, a lawyer shall not engage in incivility**
  - **"incivility" = significantly unprofessional conduct that is abusive or harassing**
    - **determined on the basis of all facts & circumstances surrounding the conduct**
    - ***N/A to speech or conduct protected by the First Amendment***

Legal Malpractice

***Mireskandari v. Edwards Wildman Palmer LLP*, 77 Cal. App. 5th 247 (Apr. 8, 2022)**

Interesting case on case within the case standard

- Client sued former attorneys for loss of anti-SLAPP against London tabloid, which also deprived him of discovery to defend disciplinary action
- Case within the case required client to show more favorable results would have been achieved in tabloid case and disciplinary case
- MSJ granted as to disciplinary case but denied as to tabloid case

> *[I]f attorneys were immune from malpractice liability for failing to advise a client* ***not to file a lawsuit****, it would allow attorneys to 'collect handsome fees for pursuing litigation, without regard to whether the litigation is likely to be successful, whether another remedy is available that may be more beneficial to the client, and whether the contemplated litigation exposes the uninformed client to unacceptable risks such as fee-shifting provisions.'"*

77 Cal. App. 5th at 263 (emphasis in original)

Attorney Disqualification

***Militello v. VFARM 1509,* 89 Cal. App. 5th 602 (Mar. 21, 2023)**

- Plaintiff's counsel used opposing party's confidential information
- Information obtained from plaintiff – not from the other side
- Defendants sought disqualification of attorney
- Held: "counsel's knowing use of the opposing side's privileged documents, **however obtained**, is a ground for disqualification." (Emphasis added).

Attorney Disqualification (con'd)

Lopez v. Lopez, 81 Cal. App. 5th 412 (July 20, 2022): Informed Consent

- **Applicable CRPCs**:
  - 3.7- Lawyer as Witness
  - 1.0.1(e)- Informed Consent
  - 1.7- Conflict of Interest
- **Relationship**: Attorney Client Relationship- Information Shared
- **Facts**: Opposing Attorney sought to dismiss appellant's counsel [Boone] under the California's advocate-witness rule. Appellant counsel opposed the motion because of the exception under rule 3.7 that permits such representation if there is informed consent. Court found that trial court failed to apply rule 3.7 and the "informed consent" exception and reversed. Case involved family dispute.

Cont. Lopez v. Lopez

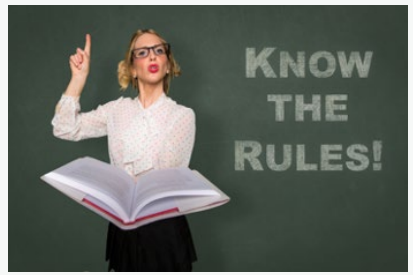
- Trial Court was “shocked” to have learned that Boone was married to his client. It was undisputed that Boone testimony was related to “minor uncontested issues”. However, respondent felt that Boone’s testimony would flavor Appellant due his marriage to appellant.
- Appellant Court reviewed the standards applicable for DQ motion
  - Is testimony genuinely needed
  - Is opposing counsel using this motion for tactical reasons
  - The combined effect the choice to choose own counsel and avoiding duplication and expense.

- **Holding**: Trial Court failed to apply DQ standards:
  - Informed Consent Exception. Court did not discuss relevancy
  - Court did not find a risk for the dual role of Boone as witness and advocacy
  - Court failed to apply the limitation of rule 3.7. by only limited it to certain pretrial activities rather than all pretrial activities;

Rule 8.3: Reporting Misconduct

Attorneys must inform the State Bar (or alternatively a tribunal with jurisdiction to investigate or act upon such misconduct) when they know of credible evidence that another lawyer has engaged in any of the following misconduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects":

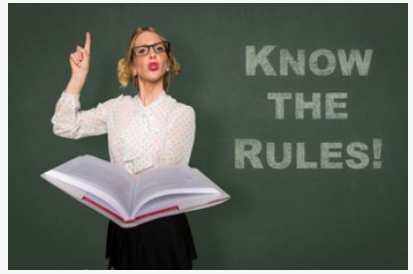
- **committed a criminal act**
- **engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation, or**
- **misappropriated funds or property**



Rule 8.3 – Continued

Consider:

- **Timing = ”without undue delay”**
- **What is “credible evidence”?**
- **Exceptions**
- **Cautionary Notes**

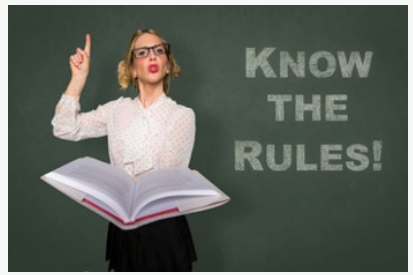


Rule 8.3 – Continued

***Proposed* new B&P Code § 9090.8:**

Attorneys must inform the State Bar when they know that another lawyer has engaged (or conspired to engage) in any of the following federal crimes:

- **seditious conspiracy**
- **treason, or**
- **rebellion or insurrection**



Anti-SLAPP and Extortion

***Geragos v. Abelyan,* 88 Cal. App. 5th 1005 (Feb. 28, 2023)**

- Fee dispute with former counsel
- New counsel raises possible filing of State Bar claim
- Former counsel files cross-complaint against former client and counsel for extortion
- Anti-SLAPP motion granted

Anti-SLAPP and Extortion (con'd)

***Flickinger v. Finwall,* 85 Cal. App. 5th 822 (Nov. 30, 2022)**

- *Flatley v. Mauro* (2006) 39 Cal.4th 299 exception to anti-SLAPP

- Prelitigation response to demand letter:

"[Y]ou mention that Mr. Pendergrast was involved in construction activities at [plaintiff's] home. . . . The relationship ended when Mr. Pendergrast determined it was likely that [plaintiff] was laundering ill-gotten money obtained while in the employ of Apple. [¶] . . . If [plaintiff] initiates litigation, Mr. Pendergrast's position will not change and he will aggressively defend himself. I suggest you discuss with [plaintiff] how such litigation may result in Apple opening an investigation into [plaintiff's] relationships with vendors."

- **Protected?**

> *"[E]xtortion as a matter of law [occurs] only where the attorney's conduct falls entirely outside the bounds of ordinary professional conduct. We find that defendant's letter falls within the boundaries of professional conduct and therefore the Flatley exception to anti-SLAPP protection does not apply."*

Flickinger v. Finwall, **85 Cal. App. 5th 822, 827 (Nov. 30, 2022)**

Conflicts of Interest - Screening

***Sierra v. Costco Wholesale Corp.*, 630 F. Supp. 3d 1199 (Sept. 23, 2022)**

- **Applicable CRPCs**:
  - 1.7- Conflict of Interest: Current Clients;
  - 1.9- Duties to Former Clients;
  - 1.10-Imputation of Conflicts of Interest; Screening
- **Relationship**: Attorney Client Relationship- Information Shared
- **Facts**: Previously represented Costco in Personal Injuries Cases. Currently representing new client against Costco in Personal Injury Case
- **Imputation**- Yes, Court found CRPC 1.10 Applicable
- **Screening**-Effective: No, no procedures implemented
- **Holding**: Motion Granted for DQ Counsel in favor of Costco.

Conflicts of Interest – Screening (con'd)

Victaulic Co. v. American Home Assurance Co., 80 Cal. App. 5th 485 (June 28, 2022)

- **Applicable CRPCs**
  - 1.7- Conflict of Interest: Current Clients;
  - 1.9- Duties to Former Clients;
  - 1.10-Imputation of Conflicts of Interest; Screening

- **Relationship:** Court Found No Personal Relationship between Attorneys Scott Greenspan and Arthur Aizley and Pillsbury Firm [current firm] and the Lawrence Klein and Sedgwick LLC [Prior Firm]

- **Facts**: Attorneys SC and AA worked at Sedgwick and later worked at Pillsbury involving claims for insurance claims, including those from AIG Companies. Both attorneys were not involved in the matters of dispute, but cases were handled by the "service partner" Lawrence Klein. Pillsbury "out of abundance of caution" screened both SC and AA.

- **Imputation**- No: No attorney-client relation found.
- Screening-Effective: Yes, in both cases, Pillsbury established "an ethical wall" in a timely manner.

- **Holding**: Motion denied to DQ Pillsbury from the representation.

CTAPP

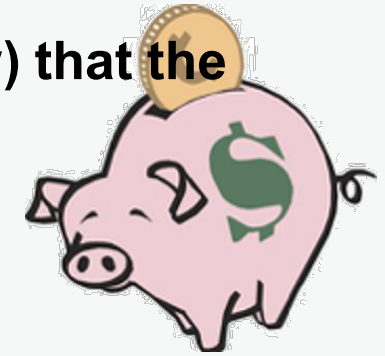
Effective January 1, 2023:

- **Revisions to Rule 1.15 (Safekeeping Funds of Clients & Other Persons)**
  - **Corresponding revision to Rule 1.4 (Communication with Clients)**
- **Rule of Court 9.8.5 & State Bar Rule 2.5**

CTAPP – Continued

Revisions to Rule 1.15:

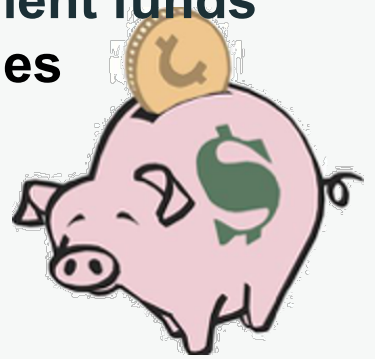
- **Notice of receipt of funds within 14 days**
  - **Rule 1.4 modified: Receipt of funds is a significant development requiring communication with the client**
- **Distribution of "undisputed" funds within 45 days**
  - **"undisputed" = lawyer knows (or reasonably should know) that the ownership interest in the funds has become fixed**
    - **and there are no unresolved disputes**



CTAPP – Continued

Rule of Court 9.8.5 & State Bar Rule 2.5 require attorneys to:

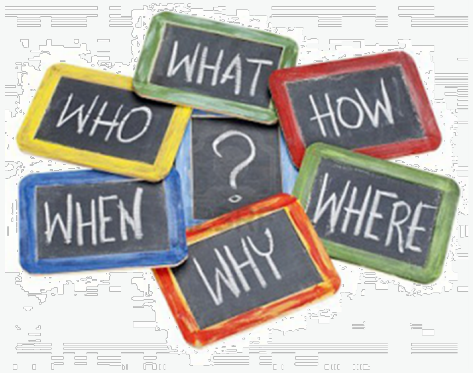
- **Report annually to the State Bar whether they are "responsible" for client trust accounts**
  - **And provide basic account information**
- **Complete an annual self-assessment**
- **Annually review the applicable rules related to safeguarding client funds**
  - **And certify to the State Bar that they comply with those rules**



Concluding Remarks

Thank you!

Questions & Answers



CALIFORNIA ETHICS ANNUAL REVIEW 2023[1]

Written by Neil J Wertlieb*

This article highlights the ethics advisory opinions that were issued during 2023 by the California State Bar's Committee on Professional Responsibility and Conduct ("COPRAC"), the American Bar Association's Standing Committee on Ethics and Professional Responsibility ("ABA"), the San Francisco Bar Association's Legal Ethics Committee ("BASF"), and the California Supreme Court's Committee on Judicial Ethics Opinions ("CJEO"), as well as recent changes in the California Rules of Professional Conduct.[2]

The conduct of attorneys licensed in the State of California is regulated by the California Rules of Professional Conduct (the "California Rules"), the State Bar Act (California Business and Professions Code, § 6000 et seq.) and opinions of California courts.[3] The advisory opinions of ethics committees in California (including those cited herein) are not binding on California-licensed attorneys, but should be consulted for guidance on proper professional conduct.[4] The advisory opinions of other bar associations (including the ABA) may also be considered, but note that such opinions may be based on rules of professional conduct (such as the ABA's Model Rule of Professional Conduct) that differ from the California Rules.

RULE CHANGES

Client Trust Account Protection Program and Revisions to California Rule 1.15 (Safekeeping Funds and Property of Clients and Other Persons) and Rule 1.4 (Communication with Clients)

On October 24, 2022, the Supreme Court of California approved amendments to California Rules 1.4 and 1.15, which went into effect on January 1, 2023. These amendments are part of the new Client Trust Account Protection Program the State Bar of California proposed to impose proactive oversight and regulation of client trust accounts, following an audit of closed discipline cases against now-disbarred attorney Thomas Girardi.

Prior to these amendments, subparagraph (d)(1) of Rule 1.15 (Safekeeping Funds and Property of Clients and Other Persons) obligated a lawyer to "***promptly*** notify a client or other person of the receipt of funds, securities, or other property in which the lawyer knows or reasonably should know the client or other person has an interest." [emphasis added] This language was amended to require such notification to occur "no later than 14 days" following the receipt of such funds, securities or other property, "absent good cause."

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[1] As of August 24, 2023.

[2] As of August 24, 2023, no ethics advisory opinions were issued during 2023 by the California Lawyers Association's Ethics Committee ("CLAEC"), the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee ("PREC"), the Orange County Bar Association's Professionalism and Ethics Committee ("OCBA"), or the San Diego County Bar Association's Legal Ethics Committee ("SDCBA").

[3] See California Rule 1.0(b)(2).

[4] See Comment [4] to California Rule 1.02(b)(2).

Similarly, subparagraph (d)(7) of Rule 1.15 obligated a lawyer to "promptly distribute, ***as requested by the client or other person***, any undisputed funds or property in the possession of the lawyer or law firm that the client or other person is entitled to receive." [emphasis added] This language has been amended to remove the phase "as requested by the client or other person," to clarify that undisputed funds should be promptly distributed regardless of whether requested by the client or other person. New Comment [4] to Rule 1.15 was added to clarify that subparagraph (d)(7) "is not intended to apply to a fee or expense the client has agreed to pay in advance, or the client file, or any other property that the client or other person has agreed in writing that the lawyer will keep or maintain."

New paragraph (f) has been added to Rule 1.15, as follows:

> "For purposes of determining a lawyer's compliance with paragraph (d)(7), unless the lawyer, and the client or other person agree in writing that the funds or property will continue to be held by the lawyer, there shall be a rebuttable presumption affecting the burden of proof as defined in Evidence Code sections 605 and 606 that a violation of paragraph (d)(7) has occurred if the lawyer, absent good cause, fails to distribute undisputed funds or property within 45 days of the date when the funds become undisputed as defined by paragraph (g). This presumption may be rebutted by proof by a preponderance of evidence that there was good cause for not distributing funds within 45 days of the date when the funds or property became undisputed as defined in paragraph (g)."

New paragraph (g) was added to Rule 1.15, to define the term "undisputed funds or property" as "funds or property, or a portion of any such funds or property, in the possession of a lawyer or law firm where the lawyer knows or reasonably should know that the ownership interest of the client or other person in the funds or property, or any portion thereof, has become fixed and there are no unresolved disputes as to the client's or other person's entitlement to receive the funds or property."

Subparagraph (a)(3) of Rule 1.4 (Communication with Clients) obligates a lawyer to "keep the client reasonably informed about significant developments relating to the representation." Comment [1] to Rule 1.4 provides, "Whether a particular development is significant will generally depend on the surrounding facts and circumstances." Comment [1] was amended to further clarify that "a lawyer's receipt of funds on behalf of a client requires communication with the client pursuant to rule 1.15, subparagraphs (d)(1) and (d)(4) and ordinarily is also a significant development requiring communication with the client pursuant to this rule."

In addition, the new Client Trust Account Protection Program will require actively licensed attorneys to: report annually to the State Bar whether they are responsible for client trust accounts and provide basic account information; complete an annual self-assessment that highlights specific rules and requirements for managing a client trust account; and annually review the applicable California Rules related to safeguarding client funds and certify to the State Bar that they comply with those rules. These additions are reflected in new rule 9.8.5 of the California Rules of Court, as further articulated in Rule 2.5 of the Rules of the State Bar of California.

These new rules may very well prove a daunting task for both lawyers in their attempts to comply with their mandates and the State Bar in proactively monitoring the compliance. In recognition of this, the State Bar and most local bar associations, as well as the California Lawyers Association, have offered webinars to help train lawyers in their new trust accounting obligations. Despite such training, however, it has been reported that approximately 2,000 California-licensed attorneys were initially placed on involuntary inactive status for failing to comply with the new Client Trust Account Protection Program.[5]

Reporting Professional Misconduct: New California Rule of Professional Conduct 8.3

The California Supreme Court has approved a new rule of professional conduct, rule 8.3 of the California Rules of Professional Conduct, that requires California attorneys to report any lawyer who engages in specified professional misconduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." This new rule went into effect on August 1, 2023.

New Rule 8.3 provides as follows:

> (a) A lawyer shall, without undue delay, inform the State Bar, or a tribunal with jurisdiction to investigate or act upon such misconduct, when the lawyer knows of credible evidence that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.
>
> (b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.
>
> (c) For purposes of this rule, "criminal act" as used in paragraph (a) excludes conduct that would be a criminal act in another state, United States territory, or foreign jurisdiction, but would not be a criminal act in California.
>
> (d) This rule does not require or authorize disclosure of information gained by a lawyer while participating in a substance use or mental health program, or require disclosure of information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.8.2; mediation confidentiality; the lawyer-client privilege; other applicable privileges; or by other rules or laws, including information that is confidential under Business and Professions Code section 6234.

[5] See, e.g., "More than 1,700 California lawyers suspended for failure to comply with new trust account rules," ABA Journal (July 31, 2023).

***PROPOSED* RULE CHANGES**

Civility *(Proposed)*

In July 2023, the State Bar of California's Board of Trustees approved certain proposed measures intended to improve the civility of California-licensed attorneys. The proposed changes, based on recommendations of the California Civility Task Force, have been submitted to the California Supreme Court for review and approval, and (as of August 24, 2023) are still pending approval. The changes, if and when approved, would include the following:

Proposed Changes to the California Rules of Professional Conduct to Address Civility: Amendments to Rules 1.2 and 8.4 and New Rule 8.4.2

The State Bar has proposed adding to Comment [1] to Rule 1.2 (Scope of Representation and Allocation of Authority) the following sentence:

> Notwithstanding a client's direction, a lawyer retains the authority to agree to reasonable requests of opposing counsel or self-represented parties that do not prejudice the rights of the client, be punctual in fulfilling all professional commitments, avoid offensive tactics, and treat all persons involved in the legal process with dignity, courtesy, and integrity.

The State Bar has proposed revising the Comments to Rule 8.4 (Misconduct), by adding the immediately following sentence to existing Comment [4] and adding new Comment [6]:

> A lawyer also may be disciplined regarding significantly unprofessional conduct that is abusive or harassing, see rule 8.4.2.
>
> [6] A lawyer's violation of paragraph (d) includes engaging in significantly unprofessional conduct that is abusive or harassing in the practice of law as defined in rule 8.4.2. A lawyer does not violate paragraph (d) merely by, for example, standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity.
>
> For further guidance, a lawyer should consult the current California Attorney Guidelines of Civility and Professionalism and other applicable legal authorities, such as the local rules of court and bar associations' codes of civility.

The State Bar has also proposed adding new Rule 8.4.2 (Prohibited Incivility):

> (a) In representing a client, a lawyer shall not engage in incivility in the practice of law.
>
> (b) For purposes of this rule, "incivility" means significantly unprofessional conduct that is abusive or harassing and shall be determined on the basis of all the facts and circumstances surrounding the conduct.
>
> **Comment**

[1] For guidance on conduct that may be significantly unprofessional that is abusive or harassing, a lawyer should consult the current California Attorney Guidelines of Civility and Professionalism and other relevant legal authorities, such as the local rules of court and bar associations' codes of civility.

[2] A lawyer does not violate this rule merely by, for example, standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity.

[3] A lawyer's violation of this rule may also constitute a violation of rule 8.4(d).

[4] "Incivility" as used in this rule does not apply to speech or conduct protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. "Incivility" as used in this rule may include speech or conduct that violates an attorney's duties under Business and Professions Code section 6068, subdivisions (b) and (f). (See California Code of Judicial Ethics, Canon 3B, advisory commentary: Canon 3B(2) noting a judge's responsibility to require lawyers under the judge's direction and control to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others.)

[5] A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

Proposed Changes to California Rule of Court 9.7 (Attorney Oath and Reaffirmation of Oath) and Adoption of New State Bar Rule 2.3

The State Bar has proposed amendments to California Rule of Court 9.7 to require lawyers to annually affirm or reaffirm their civility oath – i.e.: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

Proposed New State Bar Rule 2.3 provides (in Section (C)(1)): "A licensee determined by the State Bar to be in noncompliance with State Bar civility oath requirements will be enrolled as inactive and not eligible to practice law. The enrollment is administrative and no hearing is required."

Proposed Amendments to Rules Governing Minimum Continuing Legal Education to add One Hour on Civility in the Legal Profession

The State Bar proposed amendments to State Bar Rule 2.72 to mandate, among other things, that: "Beginning with the compliance period ending January 31, 2025, all licensees shall ... complete ... at least one hour of education addressing civility in the legal profession."

Reporting Treason, Sedition, or Insurrection *(Proposed)*

As of the date of this writing, the California Legislature is considering Senate Bill 40 (the annual State Bar Bill), which would add new Section 6090.8 to the California Business and Professions Code. In addition to new reporting requirement under Rule of Professional Conduct 8.3, paragraph (a)(1) of Section 6090.8 would provide: "A licensee of the State Bar who knows that another licensee has conspired to engage in, or has engaged in, treason, sedition, or insurrection against the State of California or the United States, shall inform the State Bar."

Conflict of Interest Evaluations for Potential State Bar Court Judges and Board of Trustees Appointees

The State Bar has released for public comment proposed amendments to California Rules of Court 9.11 and 9.90.

Pursuant to California Rules of Court, rules 9.11 and 9.90, the State Bar supports two Supreme Court-appointed committees that evaluate candidates for appointment to State Bar Court judgeships and the Board of Trustees, respectively. The Supreme Court has directed the State Bar to develop and propose to the Court amendments to these rules to require the committees to collect information on and consider candidates' actual and potential conflicts of interest.

The proposed amendments effectuate the Supreme Court's directive to propose amendments to Rules of Court 9.11 and 9.90 to require the committees that evaluate applicants to become State Bar Court judges or members of the Board of Trustees to "identify and assess each candidate's actual and potential conflicts of interest" in order to "better achieve the goal of selecting independent and unbiased candidates."

ADVISORY OPINIONS

Ethical Obligations When Working Remote: COPRAC Formal Opinion Interim No. 2023-208

Issue: What are a California lawyer's ethical duties when working remotely?

Digest: Remote practice does not alter a lawyer's ethical duties under the California Rules of Professional Conduct and the State Bar Act. Managerial lawyers must implement reasonable measures, policies, and practices to ensure continued compliance with these rules in a remote working environment, with a particular focus on the duties of confidentiality, technology competence, communication, and supervision.

Choice of Law: ABA Opinion 504 (March 1, 2023)

When a lawyer practices the law of more than one jurisdiction, choice-of-law questions arise concerning which jurisdiction's ethics rules the lawyer must follow. Model Rule 8.5 provides

that when a lawyer's conduct is in connection with a matter pending before a tribunal, the lawyer must comply with the ethics rules of the jurisdiction in which the tribunal sits, unless otherwise provided. For all other conduct, including conduct in anticipation of litigation not yet filed, a lawyer must comply with the ethics rules of the jurisdiction in which the lawyer's conduct occurs. However, if the predominant effect of the lawyer's conduct is in a different jurisdiction, then the lawyer must comply with the ethics rules of that jurisdiction.

Fees Paid in Advance for Contemplated Services: ABA Opinion 505 (May 3, 2023)

Under the Model Rules of Professional Conduct, a fee paid to a lawyer in advance for services to be rendered in the future must be placed in a client trust account and may be withdrawn only as earned by the performance of the contemplated services. This protects client funds and promotes client access to legal services in the event the representation terminates before all contemplated services have been rendered. All fees must be reasonable, and unearned fees must be returned to the client. Therefore, it is not accurate to label a fee "nonrefundable" before it actually has been earned, and labels do not dictate whether a fee has been earned.

Responsibilities Regarding Nonlawyer Assistants: ABA Opinion 506 (June 7, 2023)

A lawyer may train and supervise a nonlawyer to assist with prospective client intake tasks including obtaining initial information about the matter, performing an initial conflict check, determining whether the assistance sought is in an area of law germane to the lawyer's practice, assisting with answering general questions about the fee agreement or process of representation, and obtaining the prospective client's signature on the fee agreement provided that the prospective client always is offered an opportunity to communicate with the lawyer including to discuss the fee agreement and scope of representation. Because Model Rule 5.5 prohibits lawyers from assisting in the unauthorized practice of law, whether a nonlawyer may answer a prospective client's specific question depends on the question presented. If the prospective client asks about what legal services the client should obtain from the lawyer, wants to negotiate the fees or expenses, or asks for interpretation of the engagement agreement, the lawyer is required to respond to ensure that the non-lawyer does not engage in the unauthorized practice of law and that accurate information is provided to the prospective client so that the prospective client can make an informed decision about whether to enter into the representation.

Office Sharing Arrangements with Other Lawyers: ABA Opinion 507 (July 12, 2023)

It is generally permissible for lawyers to participate in office sharing arrangements with other lawyers under the ABA Model Rules of Professional Conduct. At the same time, office sharing lawyers should appreciate that such arrangements will require them to take appropriate measures to comply with their ethical duties concerning the confidentiality of information, conflicts of interest, supervision of non-lawyers, and communications about their services. The nature and

extent of any additional safeguards will necessarily depend on the circumstances of each arrangement.

Engagement Letter Terms That Violate California's Ethical Standards: BASF Opinion 2023-1 (April 2023)

Issue: Should certain contract provisions sometimes used by California lawyers in attorney-client fee agreements (also known as engagement agreements or engagement letters) be revised or omitted because they violate California's ethical standards?

Digest: The State Bar of California provides on its website sample hourly fee agreements and a sample contingency fee agreement, along with instructions and comments. The sample fee agreements are advisory only and include provisions that are generally permissible under California's Rules of Professional Conduct and the State Bar Act (Business & Professions Code § 6000 et seq.). The sample fee agreements, however, do not discuss other provisions sometimes used by California attorneys, some of which violate California's ethics rules and laws. These provisions include, but are in no way limited to, those that (1) shift authority to the lawyer to decide the client's ultimate objectives; (2) require the client's advance consent to settlement regardless of the circumstances, condition settlement on the lawyer or law firm's approval, or give the lawyer unlimited authority to settle on the client's behalf; (3) designate a fee for providing legal services as nonrefundable; (4) charge fees in excess of statutory limits; (5) permit the lawyer's unilateral withdrawal from the representation without compliance with California ethics rules and laws; or (6) allow for unqualified destruction of the client's file, or conditional return of the file, upon termination of the representation.

Disqualification Obligations of a Trial Judge Based on Prior Judicial Involvement in Criminal Trial Court Proceedings: CJEO Opinion 2023-021 (January 20, 2023)

Judges are ethically obligated to be neutral decision makers who must regularly consider whether their adjudicatory actions give rise to a basis for disqualification. For three distinct reasons, a trial judge who authorizes the issuance of a bench warrant for a failure to appear or who presides over a change of plea hearing is not required to disqualify in a subsequent proceeding in which a defendant is charged with a failure to appear violation (Penal Code § 1320) or challenges whether a felony conviction arising from the change of plea hearing qualifies as a prior strike (Penal Code § 1025). First, under Code of Civil Procedure, section 170.2, the fact that a judge has expressed a view on a legal or factual issue in a proceeding does not constitute grounds for disqualification unless the judge falls within certain exceptions that are not relevant here. Second, the grounds for disqualification contained in Code of Civil Procedure, section 170.1, would not support a decision to disqualify based solely on the fact that the judge issued a bench warrant or accepted a plea agreement. Third, other practical considerations weigh against disqualification under these facts.

Guidelines for Presiding Judges When Transmitting Courtwide Communications to Colleagues: CJEO Opinion 2023-022 (April 24, 2023)

Presiding judges have a general duty to keep the judicial officers of their courts informed of administrative and policy developments related to the law, the legal system, and the administration of justice. Consistent with the code, a presiding judge may send a courtwide communication at the request of an outside entity, such as another government agency, a private interest group, or a bar association, but is advised to keep in mind the following considerations: (1) the substance of the communication must not undermine public confidence in the integrity or impartiality of the judiciary; (2) the communication must not suggest that the outside entity has a special influence over the presiding judge or the court; (3) the communication must not lend judicial prestige to advance anyone's pecuniary or personal interests; (4) the communication must not constitute prohibited political activity; and (5) the communication must not include information relating to a specific pending or impending matter, which may expose a recipient to a prohibited ex parte communication or interfere with a fair trial or hearing.

Guidelines for Hosting Educational Presentations by Outside Speakers And Groups: CJEO Formal Opinion 2023-023 (July 19, 2023)

Question: The Committee on Judicial Ethics Opinions (CJEO) has been asked for guidance regarding factors that courts should consider when the court invites, or court resources are being used to host, outside speakers and groups to provide educational presentations to judges and court staff.

Summary of Conclusions: The Code of Judicial Ethics generally permits and encourages judges to participate in educational activities, and judges are required to maintain professional competence in the law.

Courts may provide educational opportunities for judges and court staff, including presentations by outside speakers and groups, on topics relevant to the work of the courts or the judicial branch. To ensure that presentations by outside speakers and groups comply with the Code of Judicial Ethics, the committee advises that: (1) the presentation does not undermine judicial impartiality; (2) the speakers represent a balance of interests and viewpoints; (3) the presentation does not lend judicial prestige to advance the interests of the outside speaker or group; (4) the presentation does not constitute improper political activity; and (5) the outside speakers or groups are not involved, or likely to be involved, in proceedings before the court.

PROPOSED **ADVISORY OPINIONS**

As of August 24, 2023, COPRAC has issued for public comment the following proposed advisory opinions, none of which have yet been approved by the State Bar of California:

Illegal Contract Provisions: *Proposed* COPRAC Formal Opinion Interim No. 19-0003

Issues: What are a lawyer's ethical duties when advising a client regarding the use of a contract provision in a transaction with a third party that is illegal under the law of the jurisdiction applicable to the transaction?

Digest: A California lawyer has a duty not to counsel or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal. That conduct includes promulgating or enforcing a contract provision in a transaction with a third party that is illegal under the law of the jurisdiction applicable to the transaction. If the lawyer knows that the provision is illegal as applied to the transaction, the lawyer should advise the client accordingly, may not recommend the use of the provision, and must counsel the client not to use it. If the client insists on the use of the illegal provision against the lawyer's advice, the lawyer may not participate in promulgating or enforcing the illegal provision against a third party. The lawyer is permitted to withdraw from the representation if the client insists on using the illegal provision and, depending on the client's continued conduct, may be required to do so. If the lawyer concludes that the client's conduct is a violation of law reasonably imputable to the organization and likely to result in substantial injury to the organization, the lawyer for an organization must report the actions of the client constituent to a higher authority within the organization, unless the lawyer reasonably concludes that it is not in the best lawful interest of the organization to do so.

Lawyer as Expert Witness: *Proposed* COPRAC Formal Opinion Interim No. 20-0001

Issue: May a lawyer ethically testify as an expert witness in matters involving current or former clients of the lawyer or the lawyer's law firm?

Digest: A lawyer may ethically testify as an expert witness in a matter adverse to a former client provided that the lawyer's testimony does not injuriously affect the former client in any matter in which the attorney formerly represented the client, disclose information acquired by virtue of the representation which is protected by Business and Professions Code section 6068, subdivision (e) or rule 1.6 of the Rules of Professional Conduct, or use such information to the disadvantage of the former client. In certain circumstances, however, judicially developed principles of disqualification may prevent a lawyer whose testimony would be permissible under the Rules of Professional Conduct from serving as an expert witness.

No ethical principle bars the law firm of a lawyer that has previously testified as an expert witness from subsequently representing a client who is adverse to the party on whose behalf the lawyer previously testified. If the lawyer remains under common law or express contractual obligations stemming from the lawyer's prior expert role and respecting those obligations would significantly limit the firm's representation of the firm's client, then the law firm must obtain the client's informed written consent prior to the representation. (See rule 1.7(b).) Even if there is no material limitation conflict under rule 1.7(b), the law firm is required to make written disclosure of the lawyer's continuing legal obligation to the adverse party under rule 1.7(c)(1).

A lawyer may ethically serve as an expert witness against a current client of the lawyer's law firm in an unrelated matter, provided that the lawyer does not disclose or use confidential

information of the law firm's current client. Depending on the circumstances, informed written consent under rule 1.7(b), or written disclosure of the relationship under rule 1.7(c)(1), may be required.

Succession Planning: *Proposed* COPRAC Formal Opinion Interim No. 20-0002

Issue: What are a lawyer's ethical obligations to engage in succession planning?

Digest: Under certain circumstances, a lawyer may have a duty to engage in succession planning to protect client interests in the event the lawyer is unable to continue practicing law. While no specific Rule of Professional Conduct requires that a California lawyer develop or adopt a succession plan, existing rules, including the duties of competence and diligence, obligate lawyers to take reasonable steps to protect the client's interests during the course of the representation. This would include taking affirmative steps to plan for an interruption or cessation of practice, voluntary or otherwise. The risk of prejudice to clients exists when their lawyer is unable to continue practicing law, either temporarily or permanently. This risk applies to all lawyers, including solo practitioners and lawyers from small firms, as well as lawyers practicing at larger firms.

* *Neil J Wertlieb, the author of this article, is an Inaugural Co-Chair and Founding Member of the California Lawyers Association Ethics Committee, a member of the California Civility Task Force, and a former Chair of the Business Law Section and its Corporations and Business Litigation Committees. Mr. Wertlieb is the General Counsel of Milbank LLP. The views expressed herein are his own.*

A Year in Review: Legal Ethics & Professional Responsibility
CLA Annual Meeting September 21, 2023

	Attorney Sanctions
1	***Shiheiber v. JPMorgan Chase Bank, N.A.* (Cal. App. 1st Dist., Div. 2, July 26, 2022) 2022 WL 2951916** The trial court sanctioned an attorney $950 under Code of Civil Procedure § 575.2 after she violated several local court rules governing the timely service and filing of materials preparatory to trial. On appeal, the attorney contended a superior court's power to impose sanctions for violations of its local rules does not extend to violations of local rules regulating the conduct of trial. She also contended that she could not be sanctioned for violating local court rules because the trial court exonerated her of acting in bad faith. Affirming, the Court of Appeal stated: "We reject both of these arguments because the statute by its terms is not limited to pre-trial proceedings and the Legislature did not incorporate, expressly or otherwise, the section 128.5 bad faith standard into section 575.2."**
	Statute of Limitations
2	***Wang v. Nesse* (Cal. App. 2nd Dist., Div. 4, July 20, 2022) 2022 WL 2825854** There is a one year statute of limitations for a legal malpractice action. (Code Civ. Proc., § 340.6.) The chronology: **December 3 or 17, 2014**: Plaintiff discharged the attorney. **December 23, 2014**: Attorney and client signed a substitution of attorney. **December 30, 2014**: Attorney filed a substitution of attorney. **December 15, 2015**: Legal malpractice action filed. **December 2017**: Attorney died. Thereafter, the attorney's estate's motion for summary judgment was granted by the trial court, after the court concluded the attorney's representation ended when plaintiff discharged the attorney. The Court of Appeal reversed, concluding there was a triable issue of fact when the attorney's representation ended.**

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Disqualification - Advocate Witness Rule and Use of Privileged Documents	
3	***Lopez v. Lopez*** **(Cal. App. 2nd Dist., Div. 4, July 20, 2022) 2022 WL 2825854** This case involved an attorney who assumed a dual role of attorney and witness, and due to the dual role the opposing counsel sought to disqualify the attorney from all phases of the litigation. The trial court ruled in favor in the opposing counsel relying on CRPC rule 3.7. The Court of Appeal reversed the trial court and found that it had abused its discretion due to the fact that it failed to apply the appropriate standards. Those standards require the Court to consider: (1) whether counsel's testimony is in fact, genuinely needed; (2) the possibility [opposing] counsel is using the motion to disqualify for purely tactical reasons; and (3) the combined effect of the strong interest parties have in representation by counsel of their choice. The court must indicate in the record that it considered all of these factors. The Court of Appeal found that none of the standards were considered in the case. Further, the trial court didn't considered informed consent or "otherwise discuss [the client's] consent or relevance." The Court relied heavily on the fact that the trial court "failed to recognized the importance of client's written consent to counsel's dual role, which should have been given great weight." This case is of interest because it examines what is informed consent in the context of an attorney who represent a client, but is later called by opposing counsel as a witness.
4	***Militello v. VFARM 1509*** **(Cal. App. 2nd Dist., Div. 7, Mar. 21, 2023) 2023 WL 2579204** Two of three officers and board members of a corporation voted to remove the third officer/member. The third officer/member sued the others and the husband of one of the others for breach of contract, breach of fiduciary duty, fraud, and other torts. Plaintiff copied private communications between one of the remaining officers/members and her husband contained in emails. Plaintiff's attorney used those communications in court documents. The other two officers/members moved to disqualify that attorney. The trial judge granted the motion. Affirming, the Court of Appeal stated: "The evidence before the trial court supported its finding that Lawrence reasonably expected her communications were, and would remain, confidential. And while we acknowledge disqualification may not be an appropriate remedy when a client simply discusses with his or her lawyer improperly. acquired privileged information, counsel's knowing use of the opposing side's privileged documents, however obtained, is a ground for disqualification."**
Attorneys Fees	
5	***Frym v. 601 Main St. LLC*** **(Cal. App. 1st Dist., Div. 5, Aug. 24, 2022) 2022 WL 3653305** The trial court denied cross-defendant's request for attorney fees in connection with an anti-SLAPP motion. It ruled the anti-SLAPP motion was moot because cross-complainant voluntarily dismissed the cross-complaint while the motion was pending. Reversing and remanding, the Court of Appeal stated: "We reverse and

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	remand to enable the trial court to make a fee determination while applying the correct legal standard as required by *Ketchum v. Moses* (2001) 24 Cal.4th 1122."**
Arbitration Clauses	
6	***Brawerman v. Loeb & Loeb LLP*** **(Cal. App. 2nd Dist., Div. 8, Aug. 3, 2022) 81 Cal.App.5th 1106** The trial court affirmed an arbitration award where the obligation to arbitrate arose from a provision in a law firm retainer agreement, and one of the attorneys who rendered legal services did so in violation of California's attorney licensing requirements. Affirming, the Court of Appeal stated: "[T]he unlicensed attorney's illegal practice of law pursuant to the retainer agreement does not render the entire retainer agreement illegal. . . . [A]n arbitration provision is severable from an agreement that is not entirely illegal (unless the arbitration provision itself is illegal). There is no claim here of any illegality in the retainer agreement's arbitration provision."**
Discharge of Client Security Fund Reimbursement Obligation	
7	***Kassas v. State Bar of California*** **(9th Cir., Aug. 1, 2022) 42 F.4th 1123** The California Supreme Court disbarred plaintiff in 2014 for violations of the State Bar Rules of Professional Conduct and the state Business and Professions Code. The California Supreme Court ordered plaintiff to pay restitution to 56 former clients, costs for his disciplinary proceedings, and any funds that would eventually be paid out by the State Bar's Client Security Fund (CSF) to his victims. Plaintiff subsequently filed for Chapter 7 bankruptcy and received a discharge from the federal bankruptcy court. The State Bar argued that plaintiff's disciplinary costs and reimbursements to the CSF were excepted from discharge pursuant to 11 U.S.C. § 523(a)(7) as "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and . . . not compensation for actual pecuniary loss." The bankruptcy court granted summary judgment for the State Bar, concluding that while restitution payments were discharged, disciplinary costs and reimbursements paid from the CSF were not. Reversing, the Ninth Circuit stated: "Indebtedness arising from a disbarred attorney's obligation to reimburse the State Bar for payments made by the CSF to victims of that attorney's misconduct are not excluded from discharge."**
Anti-SLAPP and Extortion	
8	***Water For Citizens of Weed California v. Churchwell White LLP,*** **(Cal. App. 3rd Dist., Feb. 9, 2023) 88 Cal.App.5th 270** The prevailing party in underlying litigation turned around and sued the lawyers for the losing party, alleging malicious prosecution. The Court of Appeal affirmed after the trial court granted the lawyers' anti-SLAPP motion brought pursuant to Code of Civil Procedure § 425.16. Plaintiff in

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	the instant action did not establish a probability of prevailing on the claim that the lawyers lacked probable cause and acted out of malice.**
9	***Geragos v. Abelyan*** **(Cal. App. 2nd Dist., Div. 8, Feb. 28, 2023) 2023 WL 2258094** With new counsel, a client sued his former attorneys, alleging they accepted $27,500 in fees from him but did not perform the promised legal services. The new counsel engaged in communications via email and telephone with the former attorneys' representative and discussed the possible filing of a State Bar claim. The former attorneys filed a cross-complaint against the client and his new counsel for extortion, among other claims. The client and his new counsel filed an anti-SLAPP motion, which the trial court granted. Affirming, the Court of Appeal held that discussion about the State Bar was referenced in connection with a pending lawsuit.**
10	***Flickinger v. Finwall*** **(Cal. App. 2nd Dist., Div. 8, Nov. 30, 2022) 2022 WL 17333402** Defendant is a lawyer who was representing a defendant in an underlying case. In response to a settlement letter from plaintiff's counsel in the underlying case, defendant wrote: "[Y]ou mention that Mr. Pendergrast was involved in construction activities at [plaintiff's] home. However, Mr. Pendergrast was not operating as a general contractor and [plaintiff] made his own decision to not pull permits. . . . The relationship ended when Mr. Pendergrast determined it was likely that [plaintiff] was laundering ill-gotten money obtained while in the employ of Apple. [¶] I am not sure how you came up with the figure of $125,000. This outrageous demand appears like a threat to further torment Mr. Pendergrast by all means possible, and [plaintiff] has already made retaliatory claims to the Labor Commissioner and [Contractors State License Board] and now he makes another one through you. If [plaintiff] initiates litigation, Mr. Pendergrast's position will not change and he will aggressively defend himself. I suggest you discuss with [plaintiff] how such litigation may result in Apple opening an investigation into [plaintiff's] relationships with vendors." Based on that letter in the underlying case, plaintiff sued defendant in the instant action. Defendant moved to strike the complaint pursuant to the anti-SLAPP statute (Code Civ. Proc., § 425.16). But the trial court concluded defendant's prelitigation letter, responsive to a demand from plaintiff's counsel, amounted to extortion as a matter of law so as to deprive it of § 425.16 protection under *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320. Reversing, the Court of Appeal stated: "[E]xtortion as a matter of law [occurs] only where the attorney's conduct falls entirely outside the bounds of ordinary professional conduct. We find that defendant's letter falls within the boundaries of professional conduct and therefore the *Flatley* exception to anti-SLAPP protection does not apply."**
	Legal Malpractice
11	***Gordon v. Ervin Cohen & Jessup LLP*** **(Cal. App. 2nd Dist., Div. 2, Feb. 23, 2023) 2023 WL 2178790** A client retained an attorney to amend her testamentary trust to disinherit the three children of one of her sons upon her death. Other documents related to the client's holdings did not prohibit the son from gifting to his children. Certain

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	beneficiaries of the trust sued the lawyer for legal malpractice. The trial court granted summary judgment for the lawyer. The question presented was: "Does a client's intent to disinherit someone in a testamentary trust by itself constitute clear, certain and undisputed intent to disinherit them in every subsequent transaction the client makes with the property contained in the trust?" The Court of Appeal affirmed, stating: "We conclude that the answer is no, that the attorney in this case accordingly owed no duty to guard against that result, and that the trial court properly granted summary judgment to the attorney and his law firm sued in this case by certain beneficiaries of the testamentary trust."**
12	***Mireskandari v. Edwards Wildman Palmer LLP*, 77 Cal. App. 5th 247 (2022)** Mireskandari brought a claim against his former lawyers for professional negligence and breach of fiduciary duty based on defendants' alleged failure to advise him of California's anti-SLAPP statute, CCP § 425.16, before suing a London tabloid in California federal court on his behalf. The tabloid's anti-SLAPP motion was granted, causing Mireskandari to incur substantial attorney fees in litigating and losing the motion. The anti-SLAPP motion also deprived him of discovery from the defendants which Mireskandari alleged he intended to use in defense of a disciplinary proceeding pending in the UK, in the end resulting in the loss of his law license, substantial fines and fees, and bankruptcy. The defendants' motion for summary judgment on the grounds that Mireskandari could not prove causation because he could not show that, but for the lawyers' conduct, he would have achieved a more favorable result in the case against the tabloid and/or the disciplinary proceedings. The motion was granted as to the UK disciplinary proceeding, but denied as to the attorney fees incurred in opposing the anti-SLAPP motion. "[I]f attorneys were immune from malpractice liability for failing to advise a client not to file a lawsuit, it would allow attorneys to 'collect handsome fees for pursuing litigation, without regard to whether the litigation is likely to be successful, whether another remedy is available that may be more beneficial to the client, and whether the contemplated litigation exposes the uninformed client to unacceptable risks such as fee-shifting provisions.'" 77 Cal. App. 5th 247, 263.
13	***Akhlaghpour v. Orantes* (Cal. App. 2nd Dist., Div. 7, Dec. 13, 2022) 2022 WL 17592463** Prior to filing the present legal malpractice action, plaintiff had filed for bankruptcy under Chapter 11. After she settled claims against her for fraud, embezzlement and misappropriation, the bankruptcy court dismissed the bankruptcy case. Thereafter, without seeking leave from the bankruptcy court, plaintiff brought the instant action against her court-approved bankruptcy counsel. Following the holding in *Barton v. Barbour* (1881) 104 U.S. 126—which requires that before filing a lawsuit against officers appointed or approved by the court, a plaintiff must obtain leave from the bankruptcy court that appointed or approved them—the superior court dismissed the lawsuit with prejudice. Reversing, the Court of Appeal stated: "The *Barton* doctrine did require [plaintiff] to obtain leave from the bankruptcy court for claims arising out of bankruptcy counsel's court-approved representation of her as a debtor in possession. However, the *Barton* doctrine did not require [plaintiff] to

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	obtain leave to file claims arising out of bankruptcy counsel's representation after the bankruptcy court appointed a Chapter 11 trustee and [plaintiff] was no longer a debtor in possession."**
Professionalism	
14	***Shapell Socal Rental Properties, LLC v. Chico's FAS, Inc.*** **(Cal. App. 4th Dist., Div. 3, Oct. 17, 2022) 2022 WL 9755390, as modified (Oct. 31, 2022)** In the course of the underlying lease dispute, defendant (CFI) asked plaintiff (Shapell) to direct communications regarding the subject lease to CFI's counsel. Despite that request, Shapell's counsel never communicated with CFI's counsel before requesting default and default judgment from the trial court. Shapell's counsel also did not provide either the complaint or the request for entry of default and default judgment to CFI's registered agent for service of process, CFI's corporate headquarters, or the address given in the Lease for service of notices to CFI. The trial court denied CFI's motion to set aside the default and default judgment on these grounds. Reversing and ordering the matter remanded to a different judge, the Court of Appeal stated: "An attorney has both an ethical and statutory obligation to warn opposing counsel, if counsel's identity is known, of an intent to seek a default and to give counsel a reasonable opportunity to file a responsive pleading."**
Screening	
15	**Victaulic Co. v. Am. Home Assurance Co., 80 Cal. App. 5th 485 (2022)** In this case, the Court found that the trial court did not err in denying the insurers motion to disqualify the attorneys because (i) the attorneys did not have an attorney-client relationship with the insurance companies, (2) the attorneys did not have a personal relationship with the insurance companies and thus did not meet the presumption of having acquired confidential information, (3) there was no substantial relationship between the previous representation and the current one which required that the attorneys would have obtained information in the previous representation that was material to the current representation, and (4) even though not required, the attorneys were adequately screened from involvement with the matter at the successor firm. Of note is the fact that the court recognized that an oral screening was sufficient in this case. However, Pillsbury did not have an obligation to screen, since the court found that there was no attorney-client relationship. The court noted, Pillsbury had done so "out of an abundance of caution." Pillsbury's approach reflects good practice. Under CRPC 1.10(a), had either lawyer been personally prohibited from representing Victaulic, that prohibition would have been imputed to all the lawyers in Pillsbury. In nearly any matter when a firm lawyer's possession of confidential information might be called into question and the possibility of a disqualification motion be brought (this should be established during the conflicts check when a lawyer newly arrives at a firm), it is the better part of discretion to erect a screen around the lawyer.

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16	***Sierra v. Costco Wholesale Corp***., 2022 U.S. Dist. LEXIS 172659 (N.D. Cal. 2022.). The Court found that due to the fact that the attorney did have a personal relationship with the former client that was related to the current matter of dispute there was a substantial relationship that warranted the attorney being disqualified.. Anthony Werbin has previously represented Costco over a substantial period of time in similar matters related to personal injuries. He had in fact represented Costco in twenty-one personal injury cases and had also served as trial counsel in one case. Here, the Downtown L.A. Law Group (DTLA) firm was disqualified because although Werbin was not involved in the case that one of the attorneys at DTLA was representing against Costco; DTLA was disqualified because it failed to timely screen Werbin as required under Rule 1.9. Thus in the case, the Court concluded that because of the direct attorney-client relationship and the strength of the legal and factual similarities, that Werbin should be disqualified for the representation. The Court further found that the DTLA firm did not rebut the presumption that an effective screen was implemented, which the Court stated must be imposed by the affected firm when the conflict first arises, and second that the firm must implement preventive measures. The DLTA firm failed to meet these two element for effective screening and thus was disqualified.

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