Introduction

This quarter’s round-up of cases underscores a consistent theme: ethics has a direct impact on how we practice. For example, do advance conflict waivers work? Or, can non-client trust beneficiaries sue an errant drafter? And, how protected are my billing statements and invoices? On the financial front, who owns the fruits of a bankrupt law firm’s former clients? The cases address these issues and more. We have also included two ethics opinions: one from the State Bar; the other from the San Francisco Bar Association. Each gives ethics guidance on a current topic—electronically stored information and discovery; and representing a medical marijuana dispensary in spite of federal criminal law.

We welcome your comments and suggestions about recent decisions, authority or issues we might address in future editions. For immediate questions, the Legal Ethics Committee maintains a hotline that SDCBA members can call at any hour (619) 231-0781 x4145. Just follow the instructions and a Committee member will get back to you with ethics authority you might consider.

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**Issue:**
May a general advance waiver from a corporate client suffice to permit representation of a party adverse to the client’s subsidiary, which the attorney previously represented in an unrelated matter and has a unity of interests with its corporate parent?

**Holding:**
No. Hogan Lovells and its predecessor represented CH2M HILL Companies, Ltd. in nearly all of its most important corporate and regulatory issues. They had an advance waiver in their original engagement letter. Steadfast Insurance hired Hogan Lovells to represent it in a coverage dispute with CCI, one of CH2M’s subsidiaries. Hogan Lovells was not then providing services to CCI, but previously did so one time: six years earlier in a fee dispute that did not involve any coverage disputes. Hogan Lovells notified CH2M’s head of litigation matters and sent an e-mail confirming the firm would continue to represent CH2M and Steadfast. But CH2M and CCI did not provide a response or other written consent. In the months that followed, Hogan Lovells billed Steadfast several thousand hours in legal fees for ten attorneys, three paralegals, and other support staff.

For successive representations, the *Morrison Knudsen* test is used to determine whether “the attorney’s relationship with the corporate family . . . may give the attorney a significant practical advantage in a case against an affiliate.” Three factors are generally employed to make this determination: (1) whether there is a substantial relationship between representations, (2) whether the parent controls the subsidiary’s legal affairs or shares a common legal department, and (3) whether the parent and subsidiary share operations and management. For concurrent representations, the unity of interest analysis tests whether the representation “reasonably diminishes the level of confidence and trust in counsel” to fulfill duties of loyalty and confidentiality. Here, even though the subject matter was unrelated to previous representations of either CH2M or CCI, CCI did not have a separate legal department and CH2M controlled all of its legal affairs. Moreover, the expansion of the scope of Hogan Lovells’s representation of CH2M to include its subsidiaries weighs in favor of treating CCI as a concurrent client.

The engagement agreement with CH2M provided that the firm could represent any other client either generally or in which CH2M had an interest unless the other client was adverse to CH2M in a matter substantially related to services provided to CH2M. Such a waiver was unenforceable because it was broad, general, and indefinite and applied to an evolving attorney-client relationship. It also insufficiently disclosed the nature of a subsequent conflict and CH2M did not anticipate the future coverage litigation when signing the agreement.
Notes:
The court also discussed the potential prejudice caused by the delay in moving for disqualification. It concluded that a period of five months and the associated time and money spent on discovery do not amount to prejudice and delay so extreme as to justify toleration of a concurrent conflict of interest.

**Issue:**
May a lawyer be held to have a duty to the beneficiaries of a trust, the amendment of which he drafted?

**Holding:**
Yes. The decedent hired an attorney to draft an amendment to his revocable living trust. In probate litigation, the attorney admitted that his use of “beneficiaries” instead of “children” in a section of the amendment was contrary to the testator’s intent. As such, this scrivener’s error or clerical error resulted in decedent’s wife also receiving an interest in decedent’s brokerage accounts and personal and real property. The children settled the probate action with decedent’s wife and then filed a legal malpractice action against the attorney.

The trial court sustained the attorney’s demurrer without leave to amend because the decedents’ children did not allege that the attorney owed them a duty. The court of appeal reversed.

Although attorneys generally owe a duty of care only to their clients, courts have extended the duty of care to nonclients—including will and trust beneficiaries—in limited circumstances. Attorneys who effectuate clients’ testamentary instructions, realistically and in fact assume a relationship to the client and the client’s intended beneficiaries. The attorney’s actions and omissions will affect the success of the client’s testamentary scheme and the intended beneficiaries.

Here, the children, indeed, failed to allege that the attorney owed them a duty. So, sustaining the demurrer was proper. But, leave to amend should have been provided. Admissions that the testator intended to benefit the “children” and that, but for the attorney’s scrivener’s/clerical error, the trust documents would have done so, supported reversal to allow the children leave to amend to allege that the attorney owed them a duty in drafting the trust amendment.

Issue:
Does the attorney-client privilege protect outside counsel’s billing invoices to a governmental entity from disclosure through a California Public Records Act request?

Holding:
Yes. The ACLU made a Public Records Act request for invoices showing how much outside law firms had billed the County of Los Angeles for legal services provided in nine different lawsuits by inmates who alleged jail violence. The ACLU claimed that the law firms had engaged in scorched earth tactics, wasting taxpayers’ money, when those cases should have settled. The trial court granted the petition; the court of appeal reversed.

The court acknowledged that two important public interests collided: transparency in government and the effectiveness of our legal system, which depends, in part, on the confidentiality of communications between attorneys and their clients. But, since the California Public Records Act expressly exempts attorney-client privileged communications, the issue must be resolved in favor of the latter.

Relying on Costco Wholesale Foods v. Superior Court (2009) 47 Cal.4th 725, the court held that Evidence Code section 952’s definition of “confidential communication” requires only a communication between an attorney and a client, arising in the course of a representation for which the client sought legal advice. The communication itself does not need to include a legal opinion or advice to qualify as a privileged communication. Once a communication is deemed privileged, the “privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.” (Costco Wholesale Foods v. Superior Court, supra, 47 Cal.4th at p. 732.)

Notes:
The court also noted that public agencies may withhold information under a public interest or catch-all exception. That allows a public agency to “justify withholding any record by demonstrating that ... on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” But, because the Act expressly provides an exception for attorney-client information, it did not address whether the exception would also have applied to these facts.

**Issue:**
Does an allegation that, in an underlying lawsuit, lawyers solicited and received confidential information from the opposing party’s former counsel bar a special motion to strike (anti-SLAPP motion)?

**Holding:**
No. Attorney Susan Trequb and Strook & Strook & Lavan both represented David Molner and entities he controlled, including Aramid Entertainment Fund Limited, against plaintiffs. Trequb had previously represented plaintiffs and used confidential information that she had obtained against them in the Molner/Aramid litigation. Plaintiffs successfully sued Trequb for breach of fiduciary duty and professional negligence, obtaining a multi-million dollar verdict and punitive damages. They then sued the Strook firm for aiding and abetting Trequb.

The court of appeal affirmed an order granting an anti-SLAPP motion. In opposing the motion, plaintiffs contended that their claims did not arise from protected activity; rather, that the law firm had participated in the theft of confidential and privileged documents and information and in the unlawful purchase of claims to force an involuntary bankruptcy.

Although the Supreme Court in *Flatley v. Mauro* (2006) 39 Cal.4th 299 determined that illegal activity was not protected by constitutional guarantees of free speech and petition, post-*Flatley* cases have found that the rule precludes only criminal conduct from anti-SLAPP scrutiny. Conduct that is illegal because it violates a statute or the common law is still subject to a special motion to strike. Further, the plaintiffs failed to cite to the trial court the statutory violation on which they relied.

**Notes:**
The claims were barred by the litigation privilege—because the conduct related to statements made in judicial proceedings to achieve litigation objectives—and were time-barred by expiration of the one-year limitations period under Code of Civil Procedure section 340.6.

**Issue:**
May an attorney be liable for malpractice to a client when the client is convicted of forgery based on the attorneys’ advice to draw a check on an account that the client owned, but was not a signatory?

**Holding:**
No. Plaintiff alleged that she was the sole of owner of school whose ownership reverted to her. One of the school’s accounts remained in the names of previous owners, but they disclaimed any interest therein. The school’s director mistakenly placed funds in the account under the previous owners’ names and, upon the advice of counsel, the plaintiff drew a check on that account to deposit the funds in an account in her name. When plaintiff was charged with forgery and defendants denied having advised of the transfer, plaintiff sued them for malpractice.

In a legal malpractice action, when poor legal advice proximately results in otherwise avoidable litigation, a client may recover as damages attorney fees she incurs in that litigation. But a plaintiff seeking to recover such damages must allege a causal connection between the defendant’s breach of duty and the injury. Where the pleaded facts do not naturally give rise to an inference of causation, the plaintiff must plead specific facts affording such an inference.

Here, the plaintiff fails to allege causation because signing another’s name on a check drawn on one’s own account would not subject the owner to criminal or civil liability absent intent to defraud. Transfer of funds that one exclusively owns, without obligation to third parties, from one account to another does not by itself constitute fraud, even if the transfer is made through an imposture that violates the account agreement.

So, an attorney cannot reasonably foresee that a client would be prosecuted for manipulating her own accounts containing her own money to which no one else had any claim because a key element to the crime of forgery is intent to defraud, and a depositor cannot intend to defraud herself. Therefore, as a matter of law, plaintiff failed to allege her attorneys’ conduct was a substantial factor in bringing about her injury.
15.2.6 Hogan Lovells US LLP v. Howrey LLP (N.D. Cal. 2015) 2015 U.S. Dist. LEXIS 71907 (June 3, 2015)

Issue:
Does a dissolving law firm retain an interest in its clients who leave and take new matters to the firms where the dissolving firm’s attorneys go?

Holding:
No. In 2011, Howrey, LLP collapsed and its attorneys left to join new firms. Howrey’s bankruptcy trustee sought to recover profits from firms who hired former Howrey attorneys. The Court determined that whether a bankrupt partnership has a property interest in substantively new representations of its former clients by competing firms are new matters and not partnership property. A defunct partnership may claim a third-party firm’s client profits only in the limited circumstance where the matters are performed pursuant to the same retention agreements by firms that came into existence directly out of the dissolution of the former partnership. Outside of this specific context, third-party client matters are substantively new matters, and the dissolved firm does not own them. So, the partnership cannot recover profits associated with what its former attorneys earned at new firms. Since the new matters are not the bankrupt partnership’s property, unjust enrichment theories cannot apply to seize such profits either.

Issue:
May an attorney’s repeated questioning that violates in limine orders serve as grounds for reversing a judgment?

Holding:
Yes. Martinez, a motorcyclist was injured after he hit a curb while driving in a funeral train of motorcycles. The court granted motions in limine to exclude information regarding Martinez’s membership in a motorcycle gang, the 2003 termination of Martinez’s school district employment, hearsay statements from medical reports, and evidence designed to elicit sympathy for CalTrans, including its financial condition. Despite this, CalTrans counsel made eight improper comments in opening statement, including a reference to the state’s dire financial condition, which would preclude it from replacing the curb. Counsel then cross-examined Martinez and his wife about information that was precluded by the in limine orders. A combined 22 improper questions were asked following sustained objections to virtually the same question. And counsel asked Martinez’s wife whether the motorcycle that Martinez had been riding had a skull wearing a Nazi helmet. In closing argument, counsel then made several references again to California’s financial condition and characterized Martinez as a Nazi six times. The jury returned a defense verdict after answering no to a single question, whether the property was in a dangerous condition at the time of the accident.

An attorney may not pander to the prejudice, passion, or sympathy of the jury. So, an attorney for a public entity may not appeal to the jury’s interests as taxpayers. And attorneys may not besmirch a party’s general character through personal attacks, even by insinuation. Whether such attorney misconduct is prejudicial is evaluated by analyzing (1) the seriousness of the misconduct, (2) the general atmosphere, including the judge’s control of the trial, (3) the likelihood of actual prejudice on the jury, and (4) the effect of objections or admonitions under the circumstances. All four of these factors weighed toward prejudice, three of them heavily. The overwhelming cumulative effect of the conduct required reversal and a remand for further proceedings.

Notes:
Although this is an unpublished opinion, it serves as a fine cautionary tale. The opinions opening remarks are quite candid: “This is a case of egregious attorney misconduct. That word — egregious — is difficult to write, but nothing else seems adequate. Blessed with a trial judge who allowed it, trial counsel ran roughshod over opposing counsel and the rules of evidence.” Not only did the lawyer wind up costing her client a trial victory (which, even if it can be duplicated through a clean trial, will still be at the considerable expense of a second trial), but, because the reversal was based solely on prejudicial attorney conduct, she was also referred to the State Bar by the appellate court.

**Issue:**
May a law firm represent a client who is a litigation opponent of a party who disclosed confidential information to a settlement conference officer who works at the firm, but is screened from the litigation?

**Holding:**
No. Castaneda file a wrongful termination claim against Perrin Bernard Supowitz, Inc. Elsa Banuelos, an attorney with Ballard Rosenberh Golper & Savitt, served as an attorney panelist at a January 2014 settlement conference. At the conference, the parties spoke candidly about the case, including their strategies and assessments of the strengths and weaknesses of their cases. It is disputed whether such information was shared in the presence of all counsel. In July 2014, another attorney at the Ballard firm substituted into the matter to represent Castaneda’s former employer. The Ballard firm set up an ethical wall that barred Banuelos from any involvement in the litigation, but Castaneda still moved for disqualification.

In general, when a conflict disqualifies one attorney in a firm from representing a client in a matter, every attorney at the firm is disqualified. That safeguards clients’ expectations that their attorneys will protect client confidences. The court adopted the holding in *Cho v. Superior Court* (1995) 39 Cal. App.4th 113. There, the court determined that when a judicial officer receives confidential information from a party while presiding over a settlement conference, and the judicial officer subsequently joins a law firm, that law firm may not represent an opposing party in the same action, regardless of whether the law firm establishes screening procedures to prevent the former judicial officer from having any involvement with the case. Cho was factually and legally indistinguishable. Although there was no evidence that Banuelos or the Ballard firm engaged in any improper conduct, the rule exists to protect against not only wrongdoing, but also negative perceptions of the legal system. The matter was remanded for the trial court to determine whether Banuelos was privy to confidential information.

**Issue:**
Does the denial of a dispositive motion on the merits in an underlying action establish probable cause and preclude maintenance of a subsequent malicious prosecution action, even if the same trial judge later finds that the malicious prosecution defendant maintained the action in bad faith?

**Holding:**
Yes. An employer sued two former employees for theft of trade secrets. The court denied the employees’ motion for summary judgment, but found in their favor at a bench trial. Moreover, the court awarded attorney fees based on a finding that the employer had brought the trade secret case in bad faith and for anti-competitive motives. The employees then brought a malicious prosecution action against Latham & Watkins, the employer’s lawyers.

The trial court granted Latham & Watkins’ anti-SLAPP motion and the court of appeal affirmed. The employees argued that the interim adverse judgment rule did not preclude their malicious prosecution action because the trial court’s finding of bad faith after a bench trial in the underlying action negated its earlier ruling denying summary judgment. But this “hindsight approach” is inconsistent with a core principle of the interim adverse judgment rule—namely, that an interim ruling on the merits establishes probable cause in the underlying action, even though that ruling is later reversed by the trial court, a jury, or an appellate court.
**15.2.10 United States v. United States District Court for the District of Nevada, Reno (9th Cir. 2015) 2015 U.S.App.LEXIS 11064 (June 29, 2015)**

**Issue:**
May a district judge deny *pro hac vice* admission to government attorneys who were not members of the Nevada bar, unless the United States Attorney for the District of Nevada made a showing that the Nevada-admitted Assistant United States Attorneys in that district were “incapable of handling the matter.”

**Holding:**
No. District Judge Robert Jones had a policy of not admitting out-of-state Department of Justice lawyers to practice *pro hac vice*. He did it repeatedly. His policy appeared to stem from his disagreement with policy positions the Attorney General had taken, with the manner in which IRS lawyers had prosecuted cases and from a general notion that government lawyers from outside the district were not ethical.

Whenever, however, the United States filed a mandamus petition with the Court of Appeals, Judge Jones would then reverse his order, arguably mooting the petitions. Accordingly, much of the court of appeal opinion addresses the appropriateness of mandamus and mootness.

Having satisfied itself that it should hear and decide the case, the court held that the denial of *pro hac vice* admission as a matter of personal policy was “clear error.” Because the conduct had stopped (with Judge Jones’ reversal of his own orders), the court did not issue a writ, but articulated “general guidance” for the district court, with the assumption that he would follow it.

While a district court has discretion in granting *pro hac vice* admissions, its discretion is not unbounded; it cannot refuse admission arbitrarily. “Admission to a state bar creates a presumption of good moral character that cannot be overcome at the shims of the District Court.” (*Zambrano v. City of Tustin* (9th Cir. 1987) 885 F.2d 1473, 1485.) A district court’s criteria for *pro hac vice* admission must be reasonably related to promoting the orderly administration of justice or some other legitimate policy of the courts. Judge Jones’ policy fell short.

**Notes:**
Judge Wallace concurred only in the result: denial of the writ of mandamus. He believed the issue should have been addressed through a petition to the Judicial Council of the Circuit, which has administrative and supervisory authority over district judges.

**Issue:**
Does an attorney’s receipt of allegedly stolen property related to another case constitute protected activity under the anti-SLAPP statute where the property is received in conjunction with discovery efforts?

**Holding:**
Yes. A construction company sued a law firm and its attorneys for conversion, receipt of stolen property, and injunctive relief because the attorneys received a hard drive that defendants claimed was stolen. The construction company claimed that an adverse party had used a company credit card to purchase a hard drive and make copies of the company’s files. As such, the company demanded its return. The parties adverse to the company still had an equity interest in the entity and their counsel responded that it was unclear the hard drive had any files belonging to the construction company on it and offered to turn over the hard drive after making a copy. That offer was refused. Ultimately, the court ordered the drive be given to a third-party expert, who would maintain the original drive and provide each side with copies of it.

The construction company then sued opposing counsel for conversion and receipt of stolen property. The defendant attorneys filed a special motion to strike (anti-SLAPP motion) arguing that their actions were protected by the litigation privilege under Civil Code section 47. Both the trial court and the court of appeal agreed.

As an initial matter, the court concluded that receipt of the hard drive arose from acts in furtherance of the defendants’ right of free speech or right to petition. Such acts necessarily include all communicative acts committed by attorneys when representing clients in litigation. The only exception to this rule is where the defendants concede that their conduct was illegal or the facts conclusively show that the conduct was illegal. Neither circumstance was present here.

The attorneys’ conduct was protected under Civil Code section 47, which makes privileged any publication or broadcast made in any judicial proceeding. This promotes the efficacy of judicial proceedings by protecting against later derivative litigation, such as this matter. Attorneys cannot litigate a trade secret case without examining disputed materials to determine whether they constitute trade secrets or even contain any relevant data at all. And the underlying court’s ruling demonstrated this by issuing an order that permitted defendants to maintain a copy of the hard drive. So, the litigation privilege applied to defendants’ actions in terms of both receiving and retaining the drive until it was turned over pursuant to the court’s order.
Notes:
The court found that the construction company’s conduct demonstrated “a particularly nasty type of scorched earth tactics.” The dispute over the hard drive yielded an attempt to disqualify counsel, two efforts to depose counsel, a police report, complaints to the State Bar of California, and “this entirely derivative and unmeritorious second lawsuit.” The court concluded the construction company was overreaching in “a calculated effort to undermine the parties in the underlying case by turning their attorneys into fellow defendants.”
15.2.12 State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193

Issue:
What ethical duties do attorneys have when handling discovery of electronically-stored information?

Conclusion:
Attorneys’ obligations evolve as law practice technology develops. Attorney competence requires a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information (“ESI”). That duty may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation.

Attorneys also have a duty to assert the attorney-client privilege to protect confidential communications between the attorneys and their clients. In discovery, the attorney-client privilege will protect confidential communications between the attorney and client in cases of inadvertent disclosure only if the attorney and client act reasonably to protect that privilege. In contrast, a lack of reasonable care to protect against disclosing privileged and protected information when producing ESI can be deemed a waiver of the attorney-client privilege. Such a waiver could breach the duty of confidentiality. Whereas the law does not require perfection by attorneys in protecting privileged or confidential information, it requires the exercise of reasonable care.
15.2.13 The Bar Association of San Francisco Opinion No. 2015-1

**Issue:**
May a California lawyer represent a client in connection with a medical marijuana enterprise in California in spite of federal law?

**Conclusion:**
Yes. Even though the lawyer may be aiding and abetting violation of federal law, a California lawyer may ethically represent a California client in connection with lawfully forming and operating a medical marijuana dispensary that California law permits. The lawyer, however, should tell the client of potential liability under federal law and related adverse consequences, including to client confidences. And the lawyer should also be aware of the risks to the lawyer.

Federal laws prohibit, not only growing, selling, or possessing marijuana, but also aiding and abetting violation of federal marijuana laws. Even though the Department of Justice has given low enforcement priority to individuals who are in “clear and unambiguous compliance” with state medical-marijuana laws, violation of the federal law is still a crime and subject to discretionary enforcement.


California clients need representation about activity permissible under state law, especially given the uncertain interplay of state and federal law in this area and the potential risks to the client. Business and Professions Code section 6068, subdivision (a), part of the State Bar Act, requires a lawyer to support the laws of the United States and California. But when they conflict, a California lawyer should not suffer discipline for counseling a client to comply with state law.

Rule of Professional Conduct 3-210 provides, “A member shall not advise the violation of any law ... unless the member believes in food faith that such law ... is invalid.” But, advising a client to comply with state law is not the same as advising the client to violate federal law—so long as the lawyer also advises the client that the conduct will violate federal law and may subject the client to federal prosecution.
The lawyer should also warn the client that, notwithstanding the lawyer’s confidentiality obligations under Business and Professions Code section 6068, subdivision (e), there is the added risk that the crime fraud exception to the attorney-client privilege may eviscerate any privilege and require disclosure of their communications. In addition, the lawyer should warn the client that under Business and Professions Code section 6068, subdivision (e)(2), if the lawyer concludes that the client’s intended conduct is likely to cause death or bodily injury to a purchaser, then the lawyer may have the discretion to disclose the client’s confidential information. A lawyer in such a situation must comply with Rule 3-100(C) and try to dissuade the client from the conduct at issue.

**Notes:**

The opinion notes that the Office of Chief Trial Counsel may not agree with the Association’s conclusions and could opt to prosecute disciplinary actions for aiding abetting federal law violations.