

# ETHICS QUARTERLY

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## Introduction

The fourth quarter of 2015 was disproportionately light in ethics-related cases. The two anti-SLAPP cases, however, underscore that this fast-track motion to dismiss is not necessarily a lawyer's panacea. In both, the motions were unsuccessful. The latter, *Lanz v. Goldstone*, also drives home the point that courts take a dim view of lawyers making unfounded accusations of unethical conduct against other lawyers. It is a reminder of the regicidic caveat: he who would shoot the king had better not miss!

The Second Commission for the Revision of the Rules of Professional Conduct has itself "fast-tracked" two proposed rule changes, which we discuss. On January 5, the California Supreme Court heard oral argument in *Ardon v. City of Los Angeles*, the case that was the subject of a commentary in the third quarter of 2015 edition. We look forward to reporting the Court's decision in the first quarter of 2016 edition.

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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## In This Issue:

### 15.4.1 *Sprengel v. Zbylut*

Can an anti-SLAPP motion defeat an LLC's 50% owner's claim that she was an "implied" client, such that lawyers breached their fiduciary duty of loyalty to her in their allegedly conflicted representation of the LLC and the other 50% owner in litigation against her?

### 15.4.2 *Crawford v. JPMorgan Chase Bank, N.A.*

May court properly impose terminating sanctions where an attorney representing himself threatens opposing counsel at a deposition with pepper spray and a stun gun?

*Continue on next page*

## In This Issue: Continued

### **15.4.3 *Lanz v. Goldstone***

Will a lawyer-defendant's anti-SLAPP motion prevail against a malicious prosecution complaint based, in part, on the lawyer-defendant's allegation in the underlying action that the opposing lawyer breached his ethical duty to a former client by, among other things, including a lien provision in a contingent fee agreement without complying with Rule of Professional Conduct 3-300?

### **15.4.4 *M'Guinness v. Johnson***

Should a court disqualify an attorney who represents a shareholder in litigation against other shareholders and the corporation when the attorney entered into an open-ended representation agreement with the corporation years earlier and never terminated it?

### **15.4.5 The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194**

When an attorney is engaged in negotiations on behalf of a client, are there ethical limitations on the statements the attorney may make to third parties, including statements that may be considered "puffing" or posturing?

### **Proposed Rules 5-110 and 5-220**

The fourth quarter of 2015 saw the Second Commission for the Revision of the Rules of Professional Conduct releasing the first two proposed rules for public comment.

### 15.4.1 *Sprengel v. Zbylut (2015) 241 Cal.App.4th 140* - Second Appellate District, Division Seven, October 13, 2015

**Issue:**

Can an anti-SLAPP motion defeat an LLC’s 50% owner’s claim that she was an “implied” client, such that lawyers breached their fiduciary duty of loyalty to her in their allegedly conflicted representation of the LLC and the other 50% owner in litigation against her?

**Analysis:**

No. The lawyers’ motion failed to meet the first anti-SLAPP prong. Two individuals went into business together—50/50—to publish and market a guidebook for treating the side effects of chemotherapy. They had a falling out.

One of them, Mohr, hired Zbylut and other lawyers to represent both the LLC and Mohr herself in the dispute with the other 50% owner, Sprengel.

After that litigation resolved, Sprengel sued the lawyers claiming an “implied” attorney -client relationship (as a 50% owner of the LLC) and a resultant breach of the duty of loyalty to her by their conflicted representation of Mohr and the LLC against her. She alleged, *inter alia*, a violation of Rules of Professional Conduct, rule 3-310. The trial court denied the lawyers’ anti-SLAPP motion and the court of appeal affirmed.

The lawyers argued that the only basis for Sprengel’s claims was based on their representation of Mohr and the LLC in litigation—something that was barred by the litigation privilege—constituted protected activity for anti-SLAPP purposes, such that the attorneys had established the first prong under Code of Civil Procedure section 425.16.

The court of appeal disagreed. It reasoned as follows.

*A cause of action does not ‘arise from’ protected activity simply because it is filed after protected activity took place. [Citation.] Nor does the fact [t]hat a cause of action arguably may have been triggered by protected activity’ necessarily entail that it arises from such activity. [Citation.] The trial court must instead focus on the substance of the plaintiff’s lawsuit in analyzing the first prong of a special motion to strike.*

(241 Cal App. 4th at p. 150 [quoting *Pergrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Ca.App.4th 658, 669-670].)

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Sprenkel claimed the lawyers breached duties that they owed her, including the duty of loyalty found in Rules of Professional Conduct, rule 3-310 3-310, and various other fiduciary duties. She asserted that they violated those obligation by pursuing the LLC's interests and Mohr's in the underlying litigation, which were directly adverse to her own interests, and also that they used her money (payments from the LLC) for their legal services without her consent. She alleged that their representation of the LLC gave rise to an implied agreement that they would also represent her as a 50% owner.

Citing a number of cases that establish the proposition, the court reaffirmed that actions based on a lawyer's breach of professional and ethical duties owed to a client are generally not subject to anti-SLAPP dismissal, even if protected litigation activity features prominently in the factual background. Accordingly, the court affirmed the trial court, holding that Sprenkel's breach of fiduciary duty allegation, based on a conflicted representation, was the core of her claim, and thus that the lawyers had failed to establish the first anti-SLAPP prong. The court rejected the lawyers' contention that Sprenkel had not established an attorney-client relationship—critical to her breach of fiduciary duty claim. That, the court held, conflated the second prong (likelihood of success on the merits) with the first: protected activity.

## 15.4.2 *Crawford v. JPMorgan Chase Bank, N.A.* (2015) 242 Cal. App. 4th 1265 – Second Appellate District, Division Six (December 9, 2015)

### Issue:

May court properly impose terminating sanctions where an attorney representing himself threatens opposing counsel at a deposition with pepper spray and a stun gun?

### Analysis:

Yes. As the court of appeal said:

*If ever a case required a terminating sanction, this is it. Crawford [a lawyer not currently eligible to practice law,<sup>1</sup> representing himself] threatened to use pepper spray and a taser on opposing counsel and was openly contemptuous of the trial court. He made it impossible to continue with the litigation. Far from the trial court abusing its discretion, it would have been an abuse of discretion not to impose a terminating sanction.*

(*Id.* at p. 1271.)

Crawford sued the bank, *inter alia*, because one of its investment advisors sold his 79-year-old mother (since deceased) a \$200,000, 29-year annuity, ignoring instructions in her bank file to notify him about any withdrawal from her account over \$5,000. Although the bank reversed the annuity transaction, Crawford sued for lost interest on the \$200,000.

The sanction grew out of the bank’s attempt to depose Crawford’s brother, Matthew, the beneficiary of the annuity. Crawford ended one session, walking out after Matthew was sworn. The bank’s informal attempts to resume the deposition failed; motions to compel the deposition followed. Finally, under court order, Crawford and Matthew appeared. As soon as Matthew was sworn, Crawford took out a can of pepper spray, aimed it at the bank’s lawyer’s face, about three feet away, and said: “I will pepper spray you if you get out of hand.” He then took out a stun gun, threatened to use it as well and fired it close to the bank’s lawyer. The bank’s lawyer terminated the deposition and brought the sanctions motion.

In opposing the motion, Crawford referred to the trial judge as the “pet dog” of the bank’s lawyer and referred to the judge, among other things, as “sick and demented.” He also filed a motion to disqualify the trial judge, which the court dismissed as untimely and for failing to identify any statutory ground for disqualification.

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<sup>1</sup> State Bar Court order, dated July 16, 2015, recommending disbarment and placing Crawford on involuntary inactive enrollment; State Bar Court order, dated February 11, 2015, entering his default for his failure to appear after the first day of his trial on charges against him.

The court of appeal upheld the termination sanction based on a court's inherent authority, which, it noted, must be exercised "only in extreme situations, such as when the conduct was clear and deliberate and no lesser sanction would remedy the situation." The court cited *Del Junco v. Hufnagel* (2007) 150 Cal.App4th 789, 799. It concluded that this case fit the criteria.

### **Earlier Action Against the Bank and Sanctions.**

This was not the first clash between Crawford and the bank. In *Crawford v. JPMorgan Chase Bank, N.V.*, Case No. DO61854, 4th Dist., Div. 1 (March 27, 2013) a unanimous court upheld some \$11,000 in attorney fees awarded against Crawford, and imposed another \$14,000 in sanctions.

Crawford had filed a petition in the Superior Court of California, County of San Diego, to have the bank recognize him as his mother's attorney-in-fact. The bank requested that he voluntarily transfer the action to Ventura county, where bank records showed his mother resided. Crawford refused and the bank filed a motion to transfer venue, which he opposed. His mother died eleven days later on November 1. Yet, Crawford filed additional pleadings with the court on January 9. He did not inform the court or the bank, however, until the January 17 hearing that his mother had died two and a half months earlier. In the meantime, he had propounded written discovery, noticed depositions, and had taken other actions as his mother's attorney-in-fact. The court held that, under the Probate Code, Crawford's authority to act as his mother's attorney-in-fact terminated upon her death. It awarded the bank \$11,000 in attorney fees. The court of appeal not only upheld the trial court's award, but imposed another \$14,000 in sanctions for a frivolous appeal.

### **State Bar Proceedings.**

The State Bar Court recommended Crawford's disbarment (order dated July 16, 2015), resulting from an earlier order (February 11, 2015) entering his default. According to that order, he appeared at the first day of his State Bar trial, left after the State Bar's opening statement, and failed to return.

The State Bar's case grew out of the conduct described in the cases discussed above. He was found to have violated the State Bar Act, Business & Professions Code section 6068, subdivision (c), (employ means only consistent with the truth) for having falsely implied, if not actually represented, that his mother was still alive in his January 9 pleading, more than two months after she had died. He was also found to have violated section 6068, subdivision (o)(3), by failing to report the sanctions imposed on him, and section 6104 (violation of a court order) by not paying those sanctions. Finally, he was found to have committed acts of moral turpitude (violation of section 6106) by threatening to use pepper spray and a stun gun at a deposition and discharging the stun gun while he pointed it towards opposing counsel.

### **15.4.3 *Lanz v. Goldstone* (2015) 2015 Cal. App. LEXIS 1171 – First Appellate District, Division 2 (December 29, 2015)**

**Issue:**

Will a lawyer-defendant’s anti-SLAPP motion prevail against a malicious prosecution complaint based, in part, on the lawyer-defendant’s allegation in the underlying action that the opposing lawyer breached his ethical duty to a former client by, among other things, including a lien provision in a contingent fee agreement without complying with Rule of Professional Conduct 3-300?

**Analysis:**

No. The plaintiff-lawyer met his burden under the second anti-SLAPP prong: he demonstrated a probability of success on all three elements of his malicious prosecution claim.

Lanz had represented a client in a *Marvin* action for which he had a contingency fee agreement. The *Marvin* action settled on the third day of trial. Then Lanz and his client had a dispute about the value of the settlement because it involved real property—and hence the amount of his fee. Ultimately, Lanz sued his former client. Goldstone represented the client and filed a cross-complaint alleging that Lanz had breached his fiduciary duty, committed professional negligence and violated several Rules of Professional Conduct and the State Bar Act, including by acting with “moral turpitude” in violation of Business & Professions Code section 6106.

Threatening that he could make defending the cross-complaint so expensive that it would far exceed the amount Lanz claimed the former client owed on the contingent fee agreement, Goldstone sent Lanz an unfiled copy of the cross-complaint and demanded that Lanz withdraw his complaint and walk away from his fee claim. Lanz declined.

The cross-complaint charged that Lanz had failed properly to prepare for trial; had failed adequately to advise his former client about the consequences of the settlement; had put his own financial interests before the interests of his former client; had acted with moral turpitude; had violated Rules of Professional Conduct rule 3-110 (competence); rule 3-300 (financial dealings with a client), and rule 3-500 (communication). The cross-complaint alleged that the rule 3-300 and the Business & Professions Code 6147, subdivision (a)(4), violations arose when Lanz acquired an “invalid” charging lien against any future judgment or recovery in his contingent fee agreement with his former client.

Goldstone filed an anti-SLAPP motion to dismiss Lanz’s malicious prosecution complaint. The trial court denied the motion and the court of appeal affirmed.

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The court found that the trial court outcome on one of Lanz’s claims in the underlying action had been a total victory for Lanz. Two others were decided in his favor because the former client, who had declared bankruptcy, failed to list her claims against him as assets in her bankruptcy case. The court of appeal deemed that failure the equivalent of abandonment and, hence, also favorable termination on the merits.

The court held that the most serious charge in the cross-complaint was that Lanz had violated the Rules of Professional Conduct. Specifically, Lanz put his own financial interests before that of his client by the “invalid” charging lien in the contingency fee agreement. Since *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38—which held that Rule 3-300 does not apply to a contingency fee agreement—had been decided almost a year before Goldstone filed the cross-complaint, no reasonable attorney would assert a violation of rule 3-300 in that setting. Goldstone’s unawareness of *Plummer* was no excuse. The court was particularly incensed by the wholly unsupported “moral turpitude” allegation, which under Business & Professions Code 6106 is grounds for disbarment or suspension.

Goldstone’s thinly veiled threats of protracted and costly litigation unless Lanz capitulated, among other things, was sufficient evidence of malice.

### 15.4.4 *M'Guinness v. Johnson (2015)* 2015 Cal. App. LEXIS 1171 – Sixth Appellate District (December 30, 2015)

**Issue:**

Should a court disqualify an attorney who represents a shareholder in litigation against other shareholders and the corporation when the attorney entered into an open-ended representation agreement with the corporation years earlier and never terminated it?

**Analysis:**

Yes. M'Guinness and Johnson were shareholders in a small construction firm, Think It, Love It, Construct It, Inc. (TLC). In 2013, M'Guinness filed a complaint against Johnson and TLC. Johnson, represented by the law firm of Casas, Riley & Simonian, LLP, cross-complained against M'Guinness, TLC, and the third TLC shareholder, Scott Stuart. The Casas firm had been retained by TLC as its counsel in 2006, TLC had never discharged the Firm, and the Firm had never withdrawn as counsel.

At its core, a motion to disqualify “involve[s] a conflict between the clients’ right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145-1146.)

The undisputed facts showed the Law Firm had an ongoing relationship with TLC, including assistance with at least six matters between 2006 and 2012, that required disqualification. The Law Firm’s client agreement provided: “Nature of Legal Representation: Advice and representation concerning TLC Builders, Inc., and other general legal work directed by you from time to time.” The agreement thus provided that the Firm’s engagement was a broad and open-ended one. And no evidence showed that it was terminated by either party. So, there was a concurrent representation of Johnson and his litigation opponent, TLC.

In instances of concurrent representation, where an attorney’s duty of loyalty may become conflicted, a stringent test is applied. Even if the dual representations “may have nothing in common, and there is no risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be required. Indeed, in all but a few instances, the rule of disqualification in simultaneous representation cases is a per se or ‘automatic’ one.”

## **15.4.5 The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194**

### **Issue:**

When an attorney is engaged in negotiations on behalf of a client, are there ethical limitations on the statements the attorney may make to third parties, including statements that may be considered “puffing” or posturing?

### **Analysis:**

Yes. Although attorneys zealously advocate for their clients, attorneys’ statements, regardless of whether they occur during negotiations, may not be dishonest or deceiving. So, attorneys may not make false factual statements or implicitly misrepresent material facts during negotiations. For example, a plaintiff’s attorney may not negotiate a settlement to a personal injury lawsuit on behalf of a client who has passed away without disclosing the death.

But, puffery and posturing, such as statements about a party’s negotiating goals or willingness to compromise, are generally permissible because they are not considered statements of fact.

## Proposed Rules 5-110 and 5-220

Although the fourth quarter of 2015 provided disproportionately few new opinions, it saw the Second Commission for the Revision of the Rules of Professional Conduct releasing the first two proposed rules for public comment.

New proposed rule 5-110: Special Responsibilities of a Prosecutor provides in its entirety as follows:

*The prosecutor in a criminal case shall:*

- (A) *Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;*
- (B) *Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;*
- (C) *Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;*
- (D) *Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;*
- (E) *Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:*
  - (1) *The information sought is not protected from disclosure by any applicable privilege or work product protection;*
  - (2) *The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and*
  - (3) *There is no other feasible alternative to obtain the information;*
- (F) *Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.*

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(G) *When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:*

(1) *Promptly disclose that evidence to an appropriate court or authority, and*

(2) *If the conviction was obtained in the prosecutor's jurisdiction,*

(a) *Promptly disclose that evidence to the defendant unless a court authorizes delay, and*

(b) *Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.*

(H) *When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.*

### **Discussion**

[1] *A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilty is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.*

[2] *Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.*

[3] *The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although rule 5-110 does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and rule 5-110 is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.*

[3A] *The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.*

[4] Paragraph (F) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (F) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[5] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (F) will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (G) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (G) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[7] Under paragraph (H), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (G) and (H), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

The most discussed portion of the rule involves subdivision (D), where a second alternative was proposed:

(D) Comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

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with a related alternate version of comment [3] stating that:

*The disclosure obligations in paragraph (d) apply only with respect to controlling case law at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively.*

The essential difference with this alternate version is that the information required to be disclosed, that which “tends to negate the guilt of the accused or mitigates the offense” is expressly limited to that which the law requires to be disclosed. The proposed rule’s limitations appear in comment [3] and are limited to disclosures that are cumulative or protected, and without change to the timing that information must be provided.

There were several reasons offered in support of each, but the majority of the discussion centered around the breadth of the rule. The proponents of alternative 1 suggested that it created a clear standard not subject to interpretation. The proponents of alternative 2 suggested its additional language was necessary because alternative 1 would subject prosecutors to discipline if they do not provide discovery that complies with a standard broader than that mandated by either the Constitution or California law.

Related proposed rule 5-220, regarding suppression of evidence, is also pending public comment. The less-debated rule states:

*A member shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.*

### **Discussion**

*See rule 5-110 for special responsibilities of a prosecutor.*

More information regarding both proposed rules may be found on the State Bar’s website at <http://www.calbar.ca.gov/AboutUs/PublicComment/201518.aspx>. The public comment period for the rules close on February 29, 2016. Comments should be directed to:

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