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Ethics Year in Review

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I. INTRODUCTION

Evolution of the law is inevitable, and in 2006, all three branches of the California government continued to change and clarify—or cloud—the realm of legal ethics. The California State Bar released a number of proposed rules for public comment, and the California State Bar Standing Committee on Professional Responsibility and Conduct issued two formal opinions interpreting the California Rules of Professional Conduct.¹ The courts dealt with a myriad of interesting issues, most notably the practice of law by nonprofit corporations² and conflict of interest situations involving the disqualification of government lawyers and, in some cases, entire government offices.³ The Legislature attempted for a third time to pass an exception to California’s strict duty of confidentiality for government lawyer whistleblowers, but the provision was withdrawn by its author due to a lack of support.⁴ On a national level, both the United States Senate and the United States Sentencing Commission attempted to strengthen confidentiality with regard to the attorney-client privilege and its role in corporate scandal prosecutions.⁵ Finally, the American Bar

¹ See infra Part II.
² See infra Part III.A (discussing Frye v. Tenderloin Housing Clinic Inc., 129 P.3d 408 (Cal. 2006)).
³ See infra Part III.B (discussing City and County of San Francisco v. Cobra Solutions, Inc., 135 P.3d 20 (Cal. 2006); Rhaburn v. Super. Ct., 45 Cal. Rptr. 3d 464 (Ct. App. 2006)).
⁴ See infra Part IV.
⁵ See infra Part V.A.
Association (ABA) issued seven formal opinions interpreting the ABA Model Rules of Professional Conduct addressing, among many other things, a lawyer's use of metadata embedded in electronic documents.⁶

The purpose of this article is to alert practicing attorneys to various legal ethics changes that occurred in California and the nation in 2006. Section II will cover the California State Bar's issuance of proposed rules and formal ethics opinions.⁷ Next, Section III will discuss California ethics cases of note in 2006.⁸ Section IV will cover California's failed legislative attempt to create an exception to the attorney's duty of confidentiality for government lawyer whistleblowers.⁹ Finally, Section V will discuss national ethics issues including the attorney-client privilege in federal corporate prosecutions and ABA formal ethics opinions.¹⁰

II. CALIFORNIA STATE BAR


By request of the California State Bar's Board of Governors, the State Bar Special Commission for the Revision of the Rules of Professional Conduct continues to evaluate California's existing professional conduct rules in light of developments occurring since the last major updates in 1989 and 1992.¹¹ In 2006, the Commission released for public comment twenty-seven of the proposed new or amended rules "as part of a comprehensive update and proposed shift to the format of the ABA Model Rules of Professional Conduct."¹² The proposed rules will be released in four separate groups at successive intervals in 2006 and 2007.¹³ There will be a

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⁶ See infra Part V.B.
⁷ See infra Part II.
⁸ See infra Part III.
⁹ See infra Part IV.
¹⁰ See infra Part V.
¹² Id.
¹³ Id.
public hearing for each group of proposals and a final public comment period in 2008. Overall, the Commission has recommended keeping a number of existing California rules, endorsed the adoption of some parts of the ABA Model Rules, and framed some entirely new rules. The Commission has also recommended that the new California rules follow the ABA numbering system in order to promote national uniformity and to make it easier for lawyers to compare and contrast the California rules with the Model Rules and with rules from other states.

In 2005, the California Supreme Court asked the State Bar to update a previous proposal recommending permanent disbarment as a sanction for attorney misconduct. Pursuant to this request, in 2006, the State Bar's Committee on Regulation, Admissions and Discipline sent out for public comment a proposed rule of court that sets forth guidelines that the State Bar Court must consider in determining whether to recommend a permanent disbarment sanction.

14. Id.
15. Id. Existing California rules include those regarding fee sharing among lawyers. Id.
16. Id. The Commission has endorsed parts of the ABA Model Rules of Professional Conduct including Rule 2.4 regarding lawyers serving as third-party neutrals, Rules 5.1 to 5.3 regarding supervision duties within a private firm, and most of Rules 7.1 to 7.5 regarding the marketing of lawyer's services. Id.
17. Proposal to Update Standards, supra note 11. The Commission has framed entirely new rules on circumstances in which lawyers and law firms may agree that departing lawyers will forfeit compensation if they compete with their former firm. Id.
18. Id.
19. Id.
20. Wayne Gross, A Rod For Crooked Lawyers, 48 ORANGE COUNTY LAW. 55 (2006). Under Proposed California Rule of Court 951.2(e), when recommending disbarment, the State Bar Court must recommend whether a lawyer should be prohibited from seeking reinstatement and must consider the following: conviction of a crime involving malfeasance in public office which involved fraud or the embezzlement of intentional misuse of public funds; engaging in multiple instances of the intentional theft or conversion of client funds, resulting in substantial harm to one or more victims; engaging in the intentional corruption of the judicial process, including but not limited to bribery, forgery, perjury, or subornation of perjury; engaging in multiple instances of insurance fraud committed in the course of the practice of law, including but not limited to staged accidents, the submission of false or fraudulent claims for the payment of a loss or injury or repeated instances of runner-based solicitation; engaging in the unauthorized practice of law when the member knew of his or her disbarment, resignation or suspension from the practice; the member was
The proposed rule addresses the issue of double disbarment, where disbarred lawyers later seek and gain reinstatement, then get disbarred a second time for misconduct. The possibility of permanent disbarment will give the State Bar Courts increased discretion in making disciplinary recommendations. Proponents of the proposed rule claim that it will serve the important function of enhancing the public perception of lawyers.

Finally, in 2006, a California Bar task force recommended that the state embrace a rule that would require lawyers to disclose to the Bar whether or not they carry insurance. The proposed rule would also mandate that uninsured lawyers directly disclose this information to their clients. The task force noted that such disclosure provisions are in force in seventeen other states. However, no other state requires attorneys to disclose this information to both his or her clients and the State Bar. Proponents of the rule cite enhanced public protection as a justification for

previously disbarred or resigned with disciplinary charges pending; and engaging in conduct involving fraud, moral turpitude or a pattern of serious misconduct that is so egregious that the member should be permanently disbarred. See id. at 55-56; see also CAL. CT. R. 951.2(e) (Proposed Draft 2006), available at http://calbar.ca.gov/calbar/pdfs/public-comment/2006/Perm-Disbar-Prop-Rules951-RADA.pdf (last visited Apr. 6, 2007).

21. Nancy McCarthy, Board OKs Permanent Disbarment, CAL. ST. B.J., Sept. 2006, available at http://www.ahrc.com/new/index.php/src/news/sub/pressrel/action/ShowMedia/id/3122. From 1990 to 2005, six attorneys were disbarred twice. Id. Every year, approximately 100 attorneys are disbarred and approximately another 100 resign with charges pending. Id. Disbarred attorneys are entitled to seek reinstatement after five years and must demonstrate rehabilitation and their learning and ability in the law. Id. The proposed rule would additionally require a lawyer seeking reinstatement to take and pass the California Bar Exam. Id.

22. Id.

23. Id. "Permanent disbarment is a public trust issue," according to the governor of the State Bar Board of Governors, Holly Fujie. Id.


25. Id.


the disclosure requirements. Opponents fear that the rule will create a disproportionate burden on new attorneys and solo practitioners which may ultimately affect access to justice by the economically disadvantaged people that these lawyers serve.

B. Formal Opinions

In 2006, the State Bar Standing Committee on Professional Responsibility and Conduct (Committee) issued two formal opinions. These advisory opinions regarding the ethical propriety of hypothetical attorney conduct are not binding, but are designed to assist attorneys in understanding their professional responsibilities under the California Rules of Professional Conduct.

1. Formal Opinion No. 2006-170: Charging Liens in Contingency Agreements

In this formal opinion, the Committee addressed the issue of whether an attorney must comply with California Rule of Professional Conduct 3-300 regarding pecuniary interests that are adverse to clients, when entering into a contingency fee agreement that contains a provision for a charging lien. Rule 3-300 provides that a member shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless: (1) "[t]he transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and

28. Id.; see Towery, supra note 26.
31. See id.
transmitted in writing to the client in a manner which should reasonably have been understood by the client”; (2) “[t]he client is advised in writing that the client may seek the advice of an independent lawyer of the client’s choice and is given a reasonable opportunity to seek that advice”; and (3) “[t]he client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.”

In the hypothetical facts of this opinion, an attorney agrees to represent a client as a plaintiff in a personal injury suit arising from an automobile accident. The attorney and client enter into a written contingency fee agreement providing that the attorney’s fee will be thirty-three percent of the client’s recovery if the suit is settled before trial, and forty percent of the recovery if the suit is settled after trial commences. The contingency fee agreement complies with all of the requirements of Business and Professions Code Section 6147. The agreement also provides for the attorney to have a lien on any settlement or judgment that the attorney recovers for the client. The attorney does not advise the client to consult independent counsel prior to consenting to the fee agreement.

In the case of Fletcher v. Davis, the Supreme Court of California held that a charging lien in an hourly fee contract constitutes a security interest adverse to a client, thereby triggering the requirements of Rule 3-300. The court noted that “a charging lien was not inherent in the nature of the hourly fee agreement and that it was reasonably foreseeable

34. CAL. RULES OF PROF’L CONDUCT R. 3-300.
36. Id.
37. Id. For a contingency fee contract to be enforceable, the attorney must ensure compliance with safeguards found in Section 6147 of the California Business and Professions Code, which requires, among other things, that the agreement must be in writing, that the client is notified that the fee is negotiable, and that the client is notified of the percentage of the fee as well as the manner in which costs and disbursements will affect the size of the fee and the client’s recovery. Id. (citing CAL. BUS. & PROF. CODE § 6147 (Deering 2006)). Contingency fee agreements are permitted in California for the pursuit of most civil claims and are generally favored because they allow access to the courts by persons who might otherwise have no opportunity for redress due to lack of resources to pay an attorney. Id. (citing Fracasse v. Brent, 494 P.2d 9, 15 (Cal. 1972)).
38. Id.
39. Id.
40. Id. at 3.
that the charging lien could significantly impair the client's interest by delaying payment of the recovery or proceeds until any dispute over the lien could be resolved."41

The Committee considered whether the policy considerations underlying the Fletcher decision should lead to the conclusion that Rule 3-300 also applies to charging liens in contingency fee contracts, and concluded that material differences between hourly and contingency fee contracts require a different analysis and lead to a different result.42 The Committee found such material differences to include the fact that charging liens are inherent in contingency agreements and they are "almost universally found and almost universally uncontroversial in such contracts."43 This is because the attorney and client have agreed that the attorney's fee will be limited to a percentage of a successful recovery, the attorney and client share the risk of a recovery, the fee is delayed until the client obtains a recovery, and the recovery often represents the only source of funds from which the attorney can ever be paid.44 Hourly fees, in contrast, are not in any way limited in relation to the client's recovery, and a charging lien can tie up the entire recovery pending resolution of a fee dispute between the attorney and the client.45 The Committee found that the contingency client’s interests are adequately protected by the attorney's compliance with Section 6147 of the California Business and Professions Code, which requires, among other things, that the agreement be in writing.46 The client is also protected by Rule 4-200,47 which prohibits attorneys from charging an

41. Formal Op. 2006-170, supra note 33, at 3 (original emphasis omitted).
42. Id. at 5.
43. Id.
44. Id.
45. Id.
46. Id. at 6. (citing CAL. BUS. & PROF. CODE § 6147 (Deering 2006)).
47. CAL. RULES OF PROF'L CONDUCT R. 4-200 (1992) provides:
   (A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.
   (B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the unconscionability of a fee are the following:
      (1) The amount of the fee in proportion to the value of the services
unconscionable fee. Finally, the Committee found that the client is additionally protected by case law governing the attorney’s duties in this context. Therefore, the Committee noted that requiring compliance with Rule 3-300 in contingency contracts would cause clients to seek independent legal consultations without any discernable benefits.

The Committee ultimately concluded that the inclusion of a charging lien in the initial contingency fee agreement does not create an “adverse interest” to the client within the meaning of Rule 3-300. "Unlike a charging lien in an hourly case, the charging lien is a natural corollary of the contingency arrangement." However, the Committee noted that “[t]his conclusion is not intended to discourage lawyers from conforming to the standards established in Rule 3-300 in their contingency agreements.”


In this opinion, the Committee addressed whether an attorney who has properly withdrawn a fee from a client trust

performed.

(2) The relative sophistication of the member and the client.
(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
(5) The amount involved and the results obtained.
(6) The time limitations imposed by the client or by the circumstances.
(7) The nature and length of the professional relationship with the client.
(8) The experience, reputation, and ability of the member or members performing the services.
(9) Whether the fee is fixed or contingent.
(10) The time and labor required.
(11) The informed consent of the client to the fee.

Id.

49. Id.
50. Id.
51. Id. at 7.
52. Id. at 1.
53. Id.
account is ethically obligated to return any of the withdrawn funds to the trust account when the client later disputes the fee.\textsuperscript{54} Rule 4-100(A)(2) provides that any portion of trust account funds that belong to counsel “must be withdrawn at the earliest reasonable time after [his or her] interest in that portion becomes fixed,” unless the attorney’s portion is disputed by the client for any reason.\textsuperscript{55} In such an event, Rule 4-100(A)(2) further instructs that “the disputed portion shall not be withdrawn until the dispute is finally resolved.”\textsuperscript{56}

The hypothetical facts of the opinion are as follows.\textsuperscript{57} A written fee agreement between the attorney and the client states that the attorney will be paid a contingent fee equal to a percentage of the client’s “net recovery” in the matter.\textsuperscript{58} The attorney is entitled to twenty-five percent of the client’s net recovery if the matter is resolved prior to the filing of suit, and to $33 \frac{1}{3}\%$ of recovery if the matter is resolved any time thereafter.\textsuperscript{59} The case settles after a lawsuit is filed, but before trial commences.\textsuperscript{60} After the settlement agreement is executed, the adversary sends a check for $100,000, payable jointly to the attorney and the client.\textsuperscript{61} Under Rule 4-100(B)(1),\textsuperscript{62} the attorney notifies the client of receipt of funds, and under Rule 4-100(B)(3),\textsuperscript{63} the attorney provides the client

\begin{itemize}
\item \textsuperscript{55} Id. (quoting CAL. RULES OF PROF’L CONDUCT R. 4-100(A)(2) (1992)).
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id. “Net recovery” is defined as the total of all amounts received by settlement of judgment less certain scheduled costs and disbursements. \textit{Id.}
\item The agreement complies with Section 6147 of the California Business and Professions Code in all respects and contains a charging lien. \textit{Id.}
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Formal Op. 2006-171, supra note 54.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id. Rule of Professional Conduct 4-100(B)(1) provides that a member shall “[p]romptly notify a client of the receipt of the client’s funds, securities, or other properties.” CAL. RULES OF PROF’L CONDUCT R. 4-100(B)(1) (1992).
\item \textsuperscript{63} Formal Op. 2006-171 supra note 54. Rule of Professional Conduct 4-100(B)(3) provides:
\begin{itemize}
\item \textit{(B) A member shall:}
\item \textit{(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with}}
with a written accounting. The client endorses the check and signs off on the accounting, approving of the proposed distribution. Under Rule 4-100(A), the attorney deposits the $100,000 in the Client Trust Account (CTA). Promptly upon confirming that the check has cleared, and reasonably believing the fee to be fixed within meaning of 4-100(A)(2), the attorney writes one check to the client for $62,000 and another check to the attorney's general account for fees and costs of $38,000. Pursuant to the client's instructions, the attorney mails the check to the client and immediately deposits the other check in the general account. One week later, the client calls the attorney and claims that the fee is too high for the amount of work actually performed and requests that the attorney send a check for an additional $10,000.

The Committee found that in the situation presented, the attorney neither received nor held the withdrawn funds for the benefit of the client. Contrarily, at the moment of any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.


64. Formal Op. 2006-171, supra note 54. Accounting sets forth: the total settlement amount of $100,000; the itemized list of costs and disbursements in aggregate amount of $7,000; one-third of net recovery of $93,000, or $31,000 for attorney's fee; and remaining balance of $62,000 to client. Id.

65. Id.

66. Id. Rule of Professional Conduct 4-100(A) states:

   (A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited into one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the state of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction.

CAL. RULES OF PROF'L CONDUCT R. 4-100(A) (1992)


68. Id.

69. Id.

70. Id.

71. Id. Money that an attorney holds "for the benefit of clients" includes: (1) money that belongs to a client; (2) money in which the attorney and client have a joint interest; (3) money in which a client and a third party have a joint interest; and (4) money that doesn't belong to a client but which counsel is nevertheless holding as part of the subject representation. Id. (citing STATE BAR OF CALIFORNIA, HANDBOOK ON CLIENT TRUST ACCOUNTING FOR CALIFORNIA ATTORNEYS 13 (2003)).
withdrawal, the withdrawn funds are the attorney's personal property by operation of Rule 4-100(A)(2). Therefore, the Committee found that there is no authority in the text of Rule 4-100 or elsewhere to suggest that funds with trust account status, properly fixed and withdrawn, regain trust account status simply because the client later disputes the fee. The fact that the client later expresses remorse, regret or other dissatisfaction with the amount of the attorney's fee is a matter of contract to be resolved by an analysis of the engagement agreement and the respective performance of the parties.

III. CASES OF NOTE IN 2006

The California Supreme Court and courts of appeal issued a number of opinions on a multitude of ethics issues in 2006. The following is a discussion of just a few of those opinions from categories including the unauthorized practice of law, conflicts of interest, malpractice, attorney fees, prosecutorial malpractice and ineffective assistance of counsel, and the category of lawyers acting as escrow holders.

A. Unauthorized Practice of Law

1. Authority of California Nonprofit Corporations to Practice Law

There are hundreds of nonprofit corporations practicing law in California, and in the case of Frye v. Tenderloin Housing Clinic, the California Supreme Court addressed the authority of such corporations to do so. Tenderloin Housing Clinic (THC) is a nonprofit corporation that employs several attorneys to assist tenants in the San Francisco Tenderloin community in asserting their legal rights. One of THC's clients, Roy Frye, brought suit against THC alleging that it

72. Id.
73. Formal Op. 2006-171, supra note 54. Such a conclusion would create a host of problems for the practical administration of a law office, if, for example, the withdrawn funds were used to pay staff salaries or bona fide office expenses, or, if the withdrawal takes place in one tax year while the client's challenge occurs in the next. Id.
74. Id.
75. Frye v. Tenderloin Housing Clinic, Inc., 129 P.3d 408 (Cal. 2006).
76. Id. at 410.
was not licensed to practice law in California or to represent tenants. Frye alleged that THC was not in compliance with California Corporations Code section 13406(b). Section 13406(b) provides that a professional law corporation may be organized as a nonprofit public benefit corporation if it falls within either of two categories: (1) it is a qualified legal services project as defined by statute—essentially a legal aid program; or (2) all of its members and directors are licensed attorneys, seventy percent of its clients are lower income individuals or other persons who would not have access to legal services, and it refrains from entering into contingency fee agreements. THC's board and membership included non-lawyers, it did not at all times have a policy restricting its practice primarily to low-income persons, and it entered into contingent fee agreements.

Frye sought the return of a specified amount of fees and costs, statutory and punitive damages, and an injunction. He also sought the disgorgement of all of THC's allegedly unlawfully collected fees and costs plus restitution to each member of the general public who had paid THC. Frye and THC eventually entered into a stipulation to settle some of Frye's claims for an amount representing the contingency fee that THC collected from Frye. The trial court found that Frye was not entitled to any remedy and granted THC's motion for judgment on the pleadings. The court of appeal reversed in part. It found that Section 13406(b) provides the sole authority under which a nonprofit public benefit corporation is authorized to practice law. Therefore, in failing to comply with the statute, the appellate court held that THC engaged in the unauthorized practice of law.

77. Id. at 412.
78. Id. at 409-10 (citing CAL. CORP. CODE § 13406(b) (Deering 2006)). THC represented Frye in a case against his landlord, and won. Id. at 411. THC then took forty percent of this judgment pursuant to its contingency fee agreement with Frye. Id.
79. Id. at 414 (citing CAL. CORP. CODE § 13406(b)).
80. Id. at 415.
81. Frye, 129 P.3d at 412.
82. Id.
83. Id.
84. Id. at 413.
85. Id.
86. Id. at 409.
87. Frye, 129 P.3d at 413.
Supreme Court of California granted review.\textsuperscript{88}

The Supreme Court noted that judicial decisions have historically held that a corporation could neither practice law nor employ lawyers to represent third parties because the profit motive created an inherent conflict of interest for attorneys and would foster inappropriate commercialization of the profession.\textsuperscript{89} However, the court noted a number of exceptions to this general rule, including the 1968 Professional Corporations Act which contains Section 13406(b).\textsuperscript{90} The Act permits the corporate practice of law for profit, subject to various restrictions intended to safeguard client interests against the profit motive, including registration with the State Bar and, as noted above, a requirement of corporate ownership and governance solely by attorneys.\textsuperscript{91} Additionally, the traditional rule "has been subject to judicial exceptions for nonprofit corporate practice that developed both prior to and subsequent to the enactment of the Professional Corporations Act."\textsuperscript{92} Under the authority of this case law, legal aid, mutual benefit and advocacy groups have practiced law in the corporate form, and the court found no indication that the Legislature intended to abrogate or challenge these decisions when it enacted Section 13406(b).\textsuperscript{93} Furthermore, the court noted that public policy supports efforts to provide access to the courts to all members of society.\textsuperscript{94} The court also stated that case law demonstrates that the First Amendment protects the associational and expressive rights of persons, both lawyers and non-lawyers, to

\textsuperscript{88} Id. at 414. Numerous organizations representing more than seventy nonprofit organizations filed amicus curiae briefs "contending that section 13406(b) does not apply to organizations such as THC and that such organizations cannot serve in their present form if they are required to conform to the requirements of that statute." Id. The California State Bar filed an amicus curiae asserting that "it never has required organizations such as THC to register and to comply with section 13406(b), and that only five of the hundreds of nonprofit corporations [in California] that offer legal services to third parties ... have registered and organized themselves pursuant to the statute." Id.

\textsuperscript{89} Id. at 415-16 (citing People v. Merchants Protective Corp., 209 P. 363, 366 (Cal. 1922)).

\textsuperscript{90} Id. at 416 (citing CAL. CORP. CODE §§ 13400, et seq. (Deering 2006)).

\textsuperscript{91} Id. (citing CAL. CORP. CODE §§ 13401(b), 13404; CAL. BUS. & PROF. CODE §§ 6160, 6165 (Deering 2006)).

\textsuperscript{92} Id. at 416-17.

\textsuperscript{93} Frye, 129 P.3d at 417.

\textsuperscript{94} See id.
join together to employ litigation to seek redress of grievances.\textsuperscript{95}

Therefore, the court concluded that on the basis of the evident legislative intent to expand the nonprofit practice of law, the historical exceptions to the common law rule prohibiting nonprofit law practice, and constitutional problems that would be presented by the court of appeal's interpretation, Section 13406(b) cannot be construed to govern all nonprofit corporations that provide legal services to third parties.\textsuperscript{96} Additionally, the court found that THC's failure to register with the State Bar or to comply with Section 13406(b) was not a cause of injury to Frye, and therefore, there were no grounds for the disgorgement of fees.\textsuperscript{97}

The court did not conclude what authority THC practiced law under.\textsuperscript{98} It mentioned that the State Bar has permitted numerous nonprofit organizations to practice law without registering or complying with Section 13406(b) and that the Supreme Court and other courts frequently award statutory attorney fees to such nonprofit corporations.\textsuperscript{99} However, given the court's inherent responsibility and authority over the core functions of admission and discipline of attorneys, the court believed that the matter should be referred to the State Bar for further study, followed by a report and specific recommendations.\textsuperscript{100} The court instructed the State Bar to consider the practical need for additional regulation in California.\textsuperscript{101} The State Bar was further instructed to reflect upon the rationale supporting the general rule against the corporate practice of law, to reflect upon relevant constitutional principles, and to determine whether there is evidence of actual abuse or client endangerment.\textsuperscript{102} Ultimately, the State Bar was charged with the duty to consider whether the potential for harm to clients warrants

\textsuperscript{95} Id. (citing NAACP v. Button, 371 U.S. 415, 428-31 (1963)).

\textsuperscript{96} Id. at 421.

\textsuperscript{97} Id. at 423. The court also found that the remedy of disgorgement was grossly disproportionate to the asserted wrongdoing on THC's part and would constitute a totally unwarranted windfall to Frye. See id. at 424.

\textsuperscript{98} Id. at 410.

\textsuperscript{99} Frye, 129 P.3d at 424.

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 426.

\textsuperscript{102} Id. at 426-27.
regulation of the nonprofit entity itself.  

2. Prohibition of State Administrative Practice by Defrocked Lawyers

In a case regarding the practice of law by an individual, rather than a corporation, in Benninghoff v. Superior Court, the Fourth District Court of Appeal held that a defrocked lawyer is prohibited from practicing law, which includes representing parties in state administrative hearings. After attorney Benninghoff pleaded guilty to conspiracy to defraud the United States and three other felonies, he resigned from the State Bar with disciplinary charges pending. Thereafter, he represented professional licensees in state administrative hearings and federal prisoners in prison transfer applications. The California State Bar filed an application asking the superior court to assume jurisdiction over Benninghoff's practice under Business and Professions Code Section 6180, and the court granted the order.

Benninghoff filed a petition for writ of mandate, claiming that his practice was permissible because laypeople are permitted to represent parties in state administrative hearings. The court declined to resolve the issue of whether laypeople may do so, but even assuming the court had spoken on the issue, Benninghoff was not just a layperson—he was a former lawyer. The court then noted that Business and Professions Code Section 6126(b) provides that "[a]ny person who . . . has resigned from the State Bar with charges pending, and thereafter practices or attempts to practice law . . . is guilty of a crime punishable by

103. Id. at 427. In October 2006, the State Bar launched its study of nonprofit legal practice in California and invited interested parties and the public to submit comments on the matter. Public Comment Sought on Frye Ruling, CAL. ST. B.J., Nov. 2006.
105. Id. at 761.
106. Id.
107. Id.
108. See id. (citing CAL. BUS. & PROF. CODE § 6180 (Deering 2006), which authorizes a court to assume jurisdiction over the law practice of an attorney who resigns).
109. See id. at 761-62.
110. Benninghoff, 38 Cal. Rptr. 3d at 762-63.
imprisonment.”\textsuperscript{111} Therefore, “a defrocked lawyer like Benninghoff may not practice law at all.”\textsuperscript{112} The court found that in representing parties in state administrative proceedings, Benninghoff “gave legal advice to his clients and prepared legal documents attempting to secure their rights, which called for the application of his ‘legal knowledge and technique,’” all of which constituted the practice of law.\textsuperscript{113} The court further noted that provisions in Benninghoff’s written agreements with his clients disclaiming any lawyer-client relationship were ineffective and did not provide an escape from the superior court’s authority to assume jurisdiction over his practice.\textsuperscript{114} The court of appeal found that the superior court therefore correctly assumed jurisdiction over Benninghoff’s state administrative practice.\textsuperscript{115} However, it found that the superior court erred in assuming jurisdiction over Benninghoff’s federal administrative practice because state law cannot restrict the ability of federal courts and agencies to control who practices before them.\textsuperscript{116}

B. Conflicts of Interest

1. Vicarious Disqualification of Entire Government Law Office

In City and County of San Francisco v. Cobra Solutions,\textsuperscript{117} the Supreme Court of California addressed the issue of whether an entire government law office should be vicariously disqualified when the head of that office has a conflict.\textsuperscript{118} In this case, related technology companies Cobra Solutions and TeleCon Ltd. (collectively Cobra) retained the small private law firm of Kelly, Gill, Sherburne and Herrera for advice on the performance of its contract with the City and County of San Francisco regarding computer products.

\textsuperscript{111} Id. at 763.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 764 (quoting Baron v. City of Los Angeles, 2 Cal.3d 535, 543 (1970)).
\textsuperscript{114} Id. at 767.
\textsuperscript{115} Id. at 768.
\textsuperscript{116} Benninghoff, 38 Cal. Rptr. 3d at 768.
\textsuperscript{117} City and County of San Francisco v. Cobra Solutions, Inc., 135 P.3d 20, 24 (Cal. 2006).
\textsuperscript{118} Id. at 24.
and services to be provided to the Department of Building Inspection (Department).  

About one year later, Dennis Herrera, a named partner in the firm retained by Cobra, was elected San Francisco City Attorney. Thereafter, as a result of an investigation already underway when Herrera was elected, the City Attorney's Office filed a civil complaint alleging a kickback scheme involving a Department employee and payments he received from computer service providers for services they never performed. Further investigation revealed that $240,000 in checks from Cobra had been deposited into the bank account of a fictitious business entity created by the Department employee. When Herrera became aware that Cobra was implicated in the scheme, he took measures to screen himself from the case. In April 2003, the City filed an amended complaint adding Cobra as a defendant in the kickback scheme lawsuit.

The court faced the question of whether Herrera's ethical screen was sufficient to protect Cobra's confidences, or if the entire City Attorney's Office should be vicariously disqualified. Ultimately, the California Supreme Court concluded that Herrera and the entire City Attorney's office must be disqualified. The court noted that in California, judicial decisions that have upheld the ethical screening of government attorneys dealt only with subordinate attorneys and not, as here, with the City Attorney under whom and at whose pleasure all deputy city attorneys serve.

119. Id. at 22-23.
120. Id. at 23.
121. Id.
122. Id.
123. Cobra Solutions, 135 P.3d at 23. Attorneys working on the case reported to someone other than Herrera, were instructed not to discuss the case with Herrera, and “maintained locked files and computer records that were inaccessible to Herrera.” Id.
124. Id.
125. Id. at 26. “Normally, an attorney's conflict is imputed to the law firm as a whole on the rationale that attorneys, working together and practicing law in a professional association, share each other's, and their clients' confidential information.” Id. at 25 (citing People v. SpeeDee Oil Change Systems, Inc., 980 P.2d 371, 383-84 (Cal. 1999)).
126. Id. at 30.
127. Id. at 29 (citing Santa Barbara v. Super. Ct., 18 Cal. Rptr. 3d 403 (Ct. App. 2004); Chadwick v. Super. Ct., 164 Cal. Rptr. 864 (Ct. App. 1980)).
discussed that "individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts will be used."\textsuperscript{128} Attorneys serving directly under them "cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants."\textsuperscript{129}

The court also found a "compelling societal interest in preserving the integrity of the office of a city attorney."\textsuperscript{130} "Public perception that a city attorney and his deputies might be influenced by the city attorney's previous representation of the client, at the expense of the best interests of the city, would insidiously undermine public confidence in the integrity of municipal government and its city attorney's office."\textsuperscript{131}

Therefore, the California Supreme Court has adopted a rule of automatic vicarious disqualification whenever the head of a government law office has a conflict.\textsuperscript{132} The dissent suggested that trial courts should determine on a case-by-case basis the adequacy of any ethical screening procedures undertaken by the government law office, rather than making disqualification of the entire office automatic.\textsuperscript{133}


In another case involving government law offices, the Fourth District Court of Appeal addressed the issue of vicarious disqualification of the public defender's office due to prior representation of a prosecution witness.\textsuperscript{134} In Rhaburn \textit{v. Superior Court}, defendant Rhaburn was arrested and appointed a public defender.\textsuperscript{135} On the eve of trial, the prosecutor requested that the public defender's office be

\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Cobra Solutions}, 135 P.3d at 29. The power to hire and fire is a potent one. \textit{Id.}
\textsuperscript{130} \textit{Id. at} 30.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{See id.} (Corrigan, J., dissenting).
\textsuperscript{133} \textit{See id.} (Corrigan, J., dissenting).
\textsuperscript{134} Rhaburn \textit{v. Super. Ct.}, 45 Cal. Rptr. 3d 464 (Ct. App. 2006). This case addressed two similar fact patterns, one involving defendant Rhaburn and another involving defendant Baez. \textit{Id. at} 466.
\textsuperscript{135} \textit{Id.}
disqualified because it represented a prosecution witness, Barnett, in a criminal proceeding nine years earlier in 1996. The public defender objected to the disqualification, noting that office records of 1996 cases were kept off-site in a location unknown to him and that his supervisors had instructed him to make no inquiries regarding the files. Furthermore, he did not join the office until 2000 and represented to the court that "he did not feel that the fact that his office had previously represented Barnett would have any effect on his cross-examination." Nevertheless, the trial court granted the motion to disqualify.

On appeal, the court discussed California Rule of Professional Conduct 3-310(E), which provides that an attorney "may not without the informed consent of the former client, accept employment adverse to the former client where, by reason of the representation of the former client, the [attorney] has obtained confidential information." In 1980, the California State Bar Standing Committee on Professional Responsibility and Conduct issued a formal opinion interpreting Rule 3-310(E), holding that the entire public defender's office should be disqualified from representing a defendant where a previous client is also involved in the case as a potential witness. The court of appeal concluded, however, that "in the twenty-five years since the State Bar issued its opinion, courts have begun to develop more flexible strategies for dealing with potential conflicts, and, in many cases, have rejected rules [of] automatic disqualification." Specifically, the California Supreme Court held in a number of criminal cases that no actual or potential conflict of interest resulted from the former representation of a witness by the public defender's office, especially when the attorney

136. *Id.*
137. *Id.*
138. *Id.* The public defender also strongly objected to the delay in trial that a substitution would require, and Rhaburn indicated that he felt there was no conflict and that he wanted to go to trial. *Id.*
139. *Id.*
140. *Rhaburn,* 45 Cal. Rptr. 3d at 469 (citing CAL. RULES OF PROF'L CONDUCT R. 3-310(E) (1992)).
142. *Id.* at 471.
143. See *id.* at 471-73 (citing People v. Cox, 70 P.3d 277 (Cal. 2003); People v. Lawley, 38 P.3d 461 (Cal. 2002); People v. Clark, 857 P.2d 1099 (Cal. 1993)).
in the matter before the court had not received any pertinent confidential information from the witness.\textsuperscript{144}

Based on policy and practicality, the appellate court found that the trial court "erred in applying a rigid rule of vicarious disqualification in the situation presented where trial counsel did not have a 'direct and personal' relationship with the witness."\textsuperscript{145} Instead, the appellate court directed the trial court to evaluate the totality of the circumstances in determining whether there was a reasonable possibility that the individual attorney representing defendant had either obtained confidential information about the witness collected by his or her office, or may inadvertently acquire such information through file review, office conversation or otherwise.\textsuperscript{146} The court stressed that in a case "not involving a 'direct and personal' representation of the witness, the courts should normally be prepared to accept the representation of counsel, as an officer of the court, that he or she has not in fact come into possession of any confidential information acquired from the witness and will not seek to do so."\textsuperscript{147} The appellate court noted that its decision was supported by circumstances specific to the public defender's office including its heavy caseload, its lack of financial interest in its cases, and the special expertise it possesses.\textsuperscript{148}

\textsuperscript{144} Id. at 472-73 (citing People v. Cornwell, 117 P.3d 622 (Cal. 2005)).
\textsuperscript{145} Id. at 475 (citing Jessen v. Hartford Cas. Ins., 3 Cal. Rptr. 3d 877, 881 (Ct. App. 2003)). Therefore, the direct acquisition of confidential information need not and should not be presumed. Id.
\textsuperscript{146} Rhaburn, 45 Cal. Rptr. 3d at 475. Factors courts should consider include:

1) the length of time that has elapsed since the witness was represented by the public defender's office; 2) the nature and notoriety of the witness' case; 3) whether the current attorney was a member of the public defender's office at the time of the witness' case, and whether the attorney responsible for the witness' case remains with the office; [and] 4) the nature and extent of any measures or procedures established by the public defender to ensure that information acquired by one deputy in a previous case is made unavailable to the current attorney.

Id.
\textsuperscript{147} Id. at 475.
\textsuperscript{148} Id. at 473-74. "Public sector lawyers do not have a financial interest in the matters on which they work. As a result they may have less, if any, incentive to breach client confidences." Id. (citing Santa Barbara v. Superior Court, 18 Cal. Rptr. 3d 403, 407-08 (Cal. Ct. App. 2004)). "The public defender need not worry about attracting new clients or retaining the loyalty of former clients." Id. Interest of the former client is also marginal with no economic
This decision implicates that government attorneys may still properly utilize the technique of ethical screening in order to avoid conflicts of interest in certain circumstances. This is especially true when this decision is read in light of, and in contrast to, the Cobra Solutions decision. Overall, the courts in 2006 provided that screening is insufficient in instances involving heads of government law offices, and that screening may be sufficient on a case-by-case basis in instances involving subordinate lawyers with no direct and personal relationships with the government office’s former client.

3. Concurrent and Successive Representation

In a case involving a private law firm, the Second District Court of Appeal addressed issues of concurrent and successive representation. The case of Fremont Indemnity Co. v. Fremont General Corp. involved three related companies: Fremont Indemnity Company (Indemnity), Fremont Compensation Insurance Group, Inc. (Insurance Group), and Fremont General Corporation (Fremont General). At one point in time, the law firm of Morgan, Lewis & Bockius (MLB) represented Indemnity in a legal malpractice action (the Seyfarth action) at the same time it represented Fremont General in another unrelated action (the Gularte action). Indemnity’s interests and Fremont

interest at stake; he accepts representation because he must, not because he desires a confidant. Id. It is beyond dispute that public defender’s offices handle a high volume of cases—this factor is entitled to substantial consideration in these cases. Id. at 474. The average public defender “is unlikely to remember any confidential information imparted by the average past client.” Id. “Frequent disqualifications substantially increase the cost of legal services for public entities.” Id. And public law offices often develop specific expertise in particular areas of law and disqualification may deprive the People of the benefits of this acquired and cultivated experience. Id. (citing Santa Barbara, 18 Cal. Rptr. 3d at 23 n.1). Defendant Rhaburn also had an interest in conflict-free counsel and he “expressly indicated that he wanted the public defender to continue.” Id.

149. See supra Part III.B.1.
151. See Rhaburn, 45 Cal. Rptr. 3d at 475.
153. Id. at 85.
154. Id.
General's interests were not adverse to each other in either of those actions. 155 During the representations, all three companies became involved in a dispute with one another regarding the misappropriation of funds, but MLB did not represent any of the companies regarding that dispute at that time. 156 In 2004, Indemnity, through the insurance commissioner as liquidator, filed complaints against Insurance Group and Fremont General regarding the misappropriation of funds dispute. 157 MLB represented both defendants. 158

The trial court disqualified MLB from representing the defendants in both cases. 159 It found that MLB violated the Rules of Professional Conduct regarding concurrent representation—Rule 3-310(C)(3) 160—because MLB represented both Indemnity—in the Seyfarth action—and Fremont General—in the Gularte action—when the two companies had conflicting interests with regard to the misappropriations of funds dispute. 161 The trial court also found that MLB violated the Rules of Professional Conduct regarding successive representation—namely, Rule 3-310(E) 162 because of its representation of Indemnity in the Seyfarth action, where MLB would have obtained information pertaining to Indemnity's litigation philosophies and

155. Id. at 92.
156. Id.
157. See id. at 86-86.
158. Fremont Indem. Co., 49 Cal. Rptr. 3d at 86.
159. Id. at 87-88.
160. Rule of Professional Conduct 3-310(C)(3) provides:
   (C) A member shall not, without the informed written consent of each client:

   (3) [r]epresent a client in a matter and at the same time in a
   separate matter accept as a client a person or entity whose interest in
   the first matter is adverse to the client in the first matter.

   representation of parties in those circumstances presents a conflict of interest
   even if the two matters are completely unrelated and there is no risk that
   confidences obtained in one matter could be used in the other." Fremont Indem.
   Co., 49 Cal. Rptr. 3d at 91 (citing Flatt v. Super. Ct., 885 P.2d 950, 955 (Cal.
   1999); People v. SpeeDee Oil Change Systems, Inc., 980 P.2d 371, 379 (Cal.
   1999)).
161. See id. at 86, 88.
162. See supra Part III.B.2 (discussing CAL. RULES OF PROF'L CONDUCT R. 3-
   310(E) (1992)).
practices.\textsuperscript{163}

The court of appeal reversed, noting that Rule 3-310(C)(3) does not prohibit the concurrent representation of clients whose interests are adverse only in a matter in which the attorney does not represent either client.\textsuperscript{164} Therefore, MLB’s concurrent representation of Indemnity in the \textit{Seyfarth} action and Fremont General in the \textit{Gularte} action was not a proper basis for disqualification because the clients’ interests in those matters were not adverse, and therefore, the attorney’s duty of loyalty was not implicated.\textsuperscript{165}

The appellate court also noted that an attorney’s “acquisition during the first representation of general information about the first client’s ‘overall structure and practices’ would not of itself require disqualification unless it were found to be ‘material’ . . . in the second representation.”\textsuperscript{166} On this basis, the appellate court concluded that because issues in the successive misappropriation of funds representations were unrelated to the issues in the initial \textit{Seyfarth} representation, Indemnity had not established a reasonable probability that MLB obtained confidential information material to the present actions.\textsuperscript{167} In particular, “Indemnity had not shown that purported information regarding . . . ‘litigation philosophies and practices’ was material to any issue in these actions.”\textsuperscript{168} Therefore, disqualification based on the prior representation of a party was not warranted because there was no substantial relationship between the two representations.\textsuperscript{169}

Although this decision did not necessarily establish a groundbreaking ethics ruling, it did serve to clarify for California attorneys the contours of the rules relating to concurrent and successive representation as they apply to

\textsuperscript{163} See Fremont Indem. Co., 49 Cal. Rptr. 3d at 86, 88.

\textsuperscript{164} Id. at 92 (citing CAL. RULES OF PROF'L CONDUCT R. 3-310(C)(3)).

\textsuperscript{165} Id. “An attorney’s concurrent representation of parties with conflicting interest implicates the duty of loyalty. ‘Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidences in the legal profession and the judicial process.’” Id. at 90 (citing Santa Clara County Counsel Attorneys Ass’n v. Woodside, 869 P.2d 1142, 1154 n.6 (Cal. 1994)).

\textsuperscript{166} Id. at 95 (citing SLC Ltd. v. Bradford Group W., 999 F.2d 464, 467-68 (10th Cir. 1993)).

\textsuperscript{167} Id. Information is material if it is “directly at issue in, or has some critical importance to, the second representation.” Id.

\textsuperscript{168} Id.

\textsuperscript{169} Fremont Indem. Co., 49 Cal. Rptr. 3d at 95.
complex factual situations. Attorneys frequently represent interrelated companies, and this decision can help attorneys determine when it is appropriate to continue such representation when such companies become involved in disputes with one another.

C. Malpractice

1. Windfall Settlement as a Consequence of Malpractice Negates Recovery

In 2006, the Third District Court of Appeal determined that a client was unable to recover in a malpractice action against her lawyers, even accepting all of her allegations as true, because the only consequences of the lawyers' negligence and breach was a windfall settlement for the client. In *Slovensky v. Friedman*, client Slovensky retained defendant lawyers to prosecute a personal injury action against her apartment complex. The claim was eventually resolved as part of a global settlement involving twenty other plaintiffs. Following the settlement, Slovensky filed suit against her lawyers alleging malpractice in that the lawyers negligently failed to obtain an adequate recovery for her.

The lawyers did not controvert the alleged facts and instead moved for summary judgment, asserting that Slovensky's cause of action for legal malpractice lacked merit because she could not prove causation for damages. They claimed that Slovensky could not have obtained a better result absent the alleged malpractice because her underlying cause of action was barred by the statute of limitations as of the date she retained defendants. Defendants also asserted

171. *Id.* at 63.
172. *See id.* at 65. Slovensky's specific claim settled for $340,000. *Id.*
173. *Id.* at 62. Slovensky also alleged breach of fiduciary duty in that the lawyers made misrepresentations to her regarding their pursuit of her case, failed to advise her of conflicts arising from their course of pursuit, made repeated false statements and used pressure tactics to force her to settle, breached confidentiality to enlist her physician as an agent in their campaign against her, and unilaterally and without notice had her settlement check reissued to themselves. *Id.* at 72.
174. *See id.* at 65.
175. *Id.*
that her cause of action for breach of fiduciary duty had "no existence apart from her malpractice cause of action and thus it failed on the same ground."\textsuperscript{176}

Both the trial court and the appellate court agreed with defendants.\textsuperscript{177} The appellate court first determined as a matter of law that Slovensky should have realized she had a cause of action long before she retained defendants.\textsuperscript{178} The appellate court then held that "because Slovensky's claim was time-barred on the day she filed it, she was entitled to no recovery and would inevitably have lost the case had it not settled."\textsuperscript{179} Thus, the settlement the defendants obtained for her was a windfall.\textsuperscript{180} The appellate court determined that because defendants' alleged malpractice did not damage Slovensky, her malpractice claim failed.\textsuperscript{181} Likewise, the court noted that the only apparent consequence of defendants' fiduciary breach was a substantial settlement that Slovensky could not have otherwise obtained; therefore, that claim also failed for lack of damages.\textsuperscript{182}

2. Statute of Limitations Tolling

In another statute of limitations case, the Second District Court of Appeal addressed the issue of tolling during a lengthy hiatus where no attorney action was required with respect to a specific matter.\textsuperscript{183} In Fritz v. Ehrmann, Fritz sold a motel to the Patels in return for a promissory note calling for interest-only payments until the principal was due at the end of a twenty-year term, with permission to make principal reduction payments at any time without penalty.\textsuperscript{184} The note also provided that one-half of the interest for the first five years was to be deferred and paid at the end of the note's term.\textsuperscript{185} In 1995, Fritz orally modified the agreement with the Patels whereby they agreed not to prepay the note in

\textsuperscript{176} Slovensky, 49 Cal. Rptr. 3d at 65.
\textsuperscript{177} Id. at 63.
\textsuperscript{178} Id. at 70.
\textsuperscript{179} Id. at 70.
\textsuperscript{180} Id. at 70.
\textsuperscript{181} Id. at 67.
\textsuperscript{182} Slovensky, 49 Cal. Rptr. 3d at 74.
\textsuperscript{183} See Fritz v. Ehrmann, 39 Cal. Rptr. 3d 670, 679-82 (Ct. App. 2006).
\textsuperscript{184} Id. at 671-72.
\textsuperscript{185} Id. at 671.
exchange for a reduction in the interest rate. Fritz asked attorney Ehrmann to prepare a new promissory note reflecting the parties’ understanding. The note Ehrmann prepared contained the new interest rate, but was silent as to the deferred interest, and contained the original provision allowing the Patels to prepay the principal. Although the note was due in 2003, Fritz accepted partial prepayments of the principal in 2000 and in 2001. However, in January 2002, the Patels made what they described to be their last and final payment. The money amounted to the remainder of principal, but Fritz contended that they still owed him the deferred interest. Later, in 2002, the Patels brought suit to clear their title to the motel, and Fritz filed a cross-complaint seeking the deferred interest. Erhmann represented Fritz in the lawsuit until he was substituted in 2003. The suit settled a few months later.

One month after settling, Fritz sued Ehrmann for malpractice. Ehrmann admitted that he mistakenly failed to include the provisions in the second promissory note regarding the deferred interest payments and the preclusion of principal prepayment. Ehrmann argued, however, that Fritz “suffered actual injury from the mistake either when the note was signed in 1995 or in November 2000, when the Patels prepaid some of the principal on the note”; therefore, the statute of limitations had run before Ehrmann even agreed to represent Fritz in the 2002 litigation over the note. The trial court agreed, and granted Ehrmann’s motion for summary judgment.

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186. Id. at 672.
187. Id.
188. Id.
189. Fritz, 39 Cal. Rptr. 3d at 672. Fritz accepted partial prepayment of principal on the assumption that such prepayment was not permitted under the terms of the second note, but he was persuaded that there would be tax benefits to receiving the payments in increments. Id. at 677.
190. Id. at 672.
191. Id.
192. Id.
193. Id.
194. Id.
195. Fritz, 39 Cal. Rptr. 3d at 672.
196. Id. at 672-73.
197. Id. at 673.
198. Id.
The statute of limitations for attorney malpractice actions, contained in Section 340.6 of the California Code of Civil Procedure, provides that a malpractice action "shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission." The period is tolled, however, if the plaintiff has not sustained an actual injury, or if the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred. The appellate court, unlike the trial court, regarded each of the omitted provisions in the second promissory note as leading to two separate potential bases for injury to Fritz. First, he could have been injured by the Patel's prepayment of principal, and second, he could have been injured by the failure to specify in the note that the deferred interest was to be repaid at the end of the term. The court focused on the second potential injury and noted that Fritz became aware sometime between January and June of 2002 that the Patels' refusal to pay deferred interest was due to ambiguity in the second promissory note. The malpractice action was filed in November 2003. The court held that summary judgment was inappropriate in this case because the statute of limitations had been tolled pursuant to Ehrmann's continuous representation of Fritz in the matter, even though there was a lengthy hiatus when no attorney action was required with respect to the note, although Ehrmann continued to represent Fritz in other matters. The court determined that by "continues to represent" in Section 340.6, the Legislature meant:

[T]hat the statute of limitations for legal malpractice is tolled as long as the attorney continues to represent a

199. Id. at 682.
200. Id. at 673 (citing CAL. CIV. PROC. CODE § 340.6 (Deering 2006)).
201. Fritz, 39 Cal. Rptr. 3d at 673-74 (citing CAL. CIV. PROC. CODE § 340.6).
202. See id. at 676, 678.
203. Id. at 676.
204. Id. at 679.
205. Id.
206. Id.
client who comes to him or her after the potential malpractice manifests itself [in this case 2002 with regard to the deferred interest] and before the statute of limitations has run in an attempt to rectify the problem or mitigate damages.\textsuperscript{207}

D. Attorney Fees

1. Attorney Intervention for Statutory Legal Fees

In *Lindelli v. San Anselmo*,\textsuperscript{208} the First District Court of Appeal addressed the issue of "whether attorneys acting on their own behalf can intervene in a client's lawsuit and move for attorney fees."\textsuperscript{209} *Lindelli* dealt specifically with Section 1021.5 of the California Code of Civil Procedure, which provides for fee awards in cases resulting in the enforcement of important rights affecting the public interest.\textsuperscript{210} In the underlying dispute, the court of appeal held that the Town of San Anselmo violated certain stay provisions of the Elections Code by awarding an interim contract for waste management services to Marin Sanitary Service, notwithstanding the fact that an earlier ordinance awarding a contract for such services to Marin Sanitary Service was the subject of an upcoming referendum election.\textsuperscript{211} On remand, however, the successful petitioners, including Lindelli, declined to authorize their attorneys, Remcho, Johansen & Purcell (RJP), to file a motion for an award of attorney fees under Section 1021.5.\textsuperscript{212} RJP was denied leave to intervene to file a motion for attorney fees on their own behalf.\textsuperscript{213} Accordingly, RJP appealed this denial.\textsuperscript{214}

The appellate court noted that Section 387(a) of the California Code of Civil Procedure provides that any person who has an interest in the matter in litigation may intervene in the action.\textsuperscript{215} Furthermore, a third party may intervene

\textsuperscript{207} *Fritz*, 39 Cal. Rptr. 3d at 682.
\textsuperscript{208} *Lindelli v. Town of San Anselmo*, 43 Cal. Rptr. 3d 707, 709 (Ct. App. 2006).
\textsuperscript{209} Id. at 709.
\textsuperscript{210} Id.
\textsuperscript{211} Id. (citing *Lindelli v. San Anselmo*, 4 Cal. Rptr. 3d 453 (Ct. App. 2006)).
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 710.
\textsuperscript{214} See *Lindelli*, 43 Cal. Rptr. 3d at 710.
\textsuperscript{215} Id. at 711 (citing CAL. CIV. PROC. CODE § 387(a) (Deering 2006)).
where: (1) the proposed intervener has a direct interest; (2) intervention will not enlarge the issues in the litigation; and (3) the reasons for the intervention outweigh any opposition by the present parties.\(^\text{216}\) The court concluded that intervention by RJP satisfied these requirements.\(^\text{217}\) This conclusion was based on the California Supreme Court's holding in \textit{Flannery v. Prentice} that fees awarded belong to the attorneys who labored to earn them, absent an agreement allocating the award to the client.\(^\text{218}\) Therefore, the court determined that RJP had standing to move for fees, and that RJP had sufficient interest in an award of attorney fees to support a permissive intervention under Section 387(a).\(^\text{219}\)

The appellate court also concluded that "petitioner's ultimate success in obtaining a declaration that the interim contract violated the . . . Election Code . . . resulted in the enforcement of an important right and conferred a significant benefit on the general public."\(^\text{220}\) Therefore, the necessity and financial burden of the private enforcement of this public benefit made an attorney fee award to RJP appropriate.\(^\text{221}\)

2. \textit{Successor Counsel and Contingency Fees}

In an opinion on review after remand by the California Supreme Court, the Review Department of the State Bar Court of California found in \textit{In the Matter of Van Sickle}\(^\text{222}\) that successor counsel who claimed an entire contingency fee for himself in a personal injury action and expected the client to compensate her previous attorney out of her recovery charged an unconscionable fee and should be suspended from practice.\(^\text{223}\) The court also concluded that attorney Van Sickle was culpable of charging an unconscionable fee in violation of California Rule of Professional Conduct 4-200(A)\(^\text{224}\) regarding

\(^{216}\) \textit{Id.} (citing U.S. Ecology, Inc. v. State, 111 Cal. Rptr. 2d 689 (Ct. App. 2001)).
\(^{217}\) \textit{Id.} at 718.
\(^{218}\) \textit{Id.} at 713 (citing Flannery v. Prentice, 28 P.3d 860, 871 (Cal. 2006)).
\(^{219}\) \textit{Id.} at 710.
\(^{220}\) \textit{Lindelli}, 43 Cal. Rptr. 3d at 722.
\(^{221}\) \textit{Id.}
\(^{222}\) \textit{In the Matter of David M. Van Sickle}, 2006 WL 2465633 (Cal. Bar Ct.).
\(^{223}\) See \textit{id.} at 19.
\(^{224}\) Rule of Professional Conduct 4-200(A) provides that "[a] member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." \textit{CAL. RULES OF PROF'L CONDUCT R. 4-200(A)} (1992).
a contingency fee he collected for his client's worker's compensation claims.\textsuperscript{225} As to the personal injury action, Van Sickle failed to disclose to his client that no portion of his thirty-five percent contingency fee would go to the client's previous counsel in the matter, and that therefore, the client would have to pay the previous counsel from her remaining recovery.\textsuperscript{226} Van Sickle thus failed to disclose the true facts, such that the fee charged under the circumstances constituted a practical appropriation of the client's funds under the guise of retaining them as fees.\textsuperscript{227} Although void for lack of mutual assent, the agreement between Van Sickle and his client nevertheless presented strong evidence of Van Sickle's overreaching, since it contained express provisions that were anathema to his fiduciary relationship with his client, and indeed were against the public policy of California.\textsuperscript{228} The agreement prohibited the client from settling or dismissing her case unless Van Sickle agreed, and it expressly prohibited her from substituting another attorney unless Van Sickle consented.\textsuperscript{229}

As to the worker's compensation case, the court found that Van Sickle was not entitled to any contingency fee for his representation of the client in the matter.\textsuperscript{230} This was because the contingency agreement specified that Van Sickle would receive twenty-five percent of benefits, settlement, or judgment arising from the claim, yet Van Sickle did not obtain any benefits for his client; therefore, the contingency never occurred.\textsuperscript{231}

\textbf{E. Prosecutorial Misconduct and Ineffective Assistance of Counsel}

\textit{1. Misstatement of the Law and Failure to Object}

In 2006, the Fourth District Court of Appeal addressed a

\begin{itemize}
\item \textsuperscript{225} \textit{Van Sickle}, 2006 WL 2465633, at 6.
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{Id.} (citing Herrscher v. State Bar, 49 P.2d 832, 833 (Cal. 1935)).
\item \textsuperscript{228} \textit{Id.} at 8.
\item \textsuperscript{229} \textit{Id.}
\item \textsuperscript{230} \textit{Id.} (emphasis in original).
\item \textsuperscript{231} \textit{Van Sickle}, 2006 WL 2465633, at 8-9. The client only received medical reimbursement that she had obtained herself prior to hiring Van Sickle. \textit{Id.}
\end{itemize}
situation where the prosecutor misstated the law, and defense counsel failed to object. In *People v. Anzalone*, defendant Anzalone was convicted of four counts of attempted murder. Anzalone's attempt to steal a car owned by Love was thwarted when Love and three others were able to stop him, causing Anzalone to flee. A few minutes later, Anzalone drove by the four men and fired two shots into the group, barely missing one person's head. At trial, Anzalone claimed that he could not have fired the shots because he was in another location stealing someone else's vehicle at the time.

On appeal, Anzalone asserted prosecutorial misconduct and ineffective assistance of counsel. The appellate court found that the prosecutor erroneously told the jury that Anzalone's two shots could amount to four attempted murders because anytime persons are within a "zone of danger," the "indiscriminate firing of a shot at those persons amounts to an attempted murder of everyone in the group." The appellate court noted that "[c]ontrary to the prosecutor's argument, an attempted murder is not committed as to all persons in a group simply because a gunshot is fired indiscriminately at them." In fact:

[T]o be found guilty of attempted murder, the defendant must either have intended to kill a particular individual . . . or the nature of his attack must be such that it is reasonable to infer that the defendant intended to kill everyone in a particular location as the means . . . to

233. *Id.* at 878.
234. *Id.* at 878-79.
235. *Id.* at 879.
236. *Id.* at 880. Additionally, a shoe left behind near Love's car was about an inch-and-a-half too large to fit on Anzalone's foot. *Id.*
237. *Id.* at 878. Anzalone argued that defense counsel also provided ineffective assistance of counsel when he failed to object to comments by the prosecutor during argument suggesting that the reason the shoe found at the scene was not Anzalone's size was because Anzalone was an admitted thief and had probably stolen the shoes. *Id.* at 886. The court noted that attorneys are not required to make every conceivable objection and that counsel could reasonably have decided it was better to let the comment stand than risk irritating the jury by objection, especially when the alibi defense was based on Anzalone's status as a thief. *Id.*
238. *Anzalone*, 45 Cal. Rptr. 3d at 885.
239. *Id.*
killing some particular person.\textsuperscript{240} The appellate court found that the prosecutor's argument concerning zone of danger was erroneous and misleading and that he committed error when he misstated the law relevant to the definition of attempted murder.\textsuperscript{241} However, no objection was interposed to that misstatement, thereby waiving the issue of prosecutorial error.\textsuperscript{242}

The appellate court concluded that the "defense counsel was prejudicially ineffective in failing to object to the prosecutor's misstatements of the law as to three of the four attempted murder counts."\textsuperscript{243} It reasoned that had counsel objected, there was a reasonable probability that the results of the proceeding would have been different.\textsuperscript{244} The prosecutor left the jury with the "mistaken impression that by firing indiscriminately in the direction of a group of men, Anzalone was guilty of attempting to kill them all . . . [which] greatly lessened the People's burden of proof."\textsuperscript{245} The court found that "given the nature of the shooting, had the prosecutor's misstatement of the law been corrected after an objection, it was reasonably probable [that] the jury would not have found Anzalone guilty of all four counts of attempted murder."\textsuperscript{246} Therefore, the court reversed three of Anzalone's attempted murder convictions.\textsuperscript{247}

2. Failure to Present Evidence of Battered Women's Syndrome

In another case regarding ineffective assistance of counsel, the Fourth District Court of Appeal found that a client was denied her constitutional right to effective assistance of counsel because her lawyer failed to investigate and present evidence on battered women's syndrome (BWS).\textsuperscript{248} In the case of \textit{In re Nourn}, the underlying facts

\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Id. (citing People v. Valdez, 82 P.3d 296, 333 (Cal. 2004)). The portion of the court's opinion specifically addressing prosecutorial misconduct is not certified for publication. \textit{Id.} at 876 n.1.
\textsuperscript{243} Id. at 887.
\textsuperscript{244} Anzalone, 45 Cal. Rptr. 3d at 887.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id. at 888.
\textsuperscript{248} See \textit{In re Nourn}, 52 Cal. Rptr. 3d 31, 51-52 (Ct. App. 2006).
involve seventeen-year-old Nourn, who began having an affair with Ronald Barker, a married thirty-four-year-old man whom she met on the Internet. Barker was jealous and controlling, and told Nourn that if she left him, he would kill her, as he claimed to have done to other girlfriends. When Barker learned that Nourn had sex with another man, he threatened to kill the other man, Stevens. Fearing that Barker would break up with her, Nourn claimed that she would do anything Barker told her to do. Nourn then went to Stevens' apartment and lied, telling him that her car had broken down. The two of them left in Stevens' car and Barker followed. At one point, Nourn had Stevens pull the car over and Barker came up, grabbed Stevens by the neck and shot him in the head. After moving Stevens' car, Barker poured gasoline on it and set it on fire, while Nourn "just did what [Barker] told [her]." Barker threatened Nourn by telling her that if she told anyone about the murder, he would kill her. After three years of silence, Nourn contacted the police and confessed to her role in the murder.

At trial, the prosecutor argued that "Nourn was guilty of first degree murder based solely on the accomplice theory that she aided and abetted Barker's assault on Stevens and that Barker's murder of Stevens was a natural and probable consequence of that assault." Nourn's defense counsel, Cormicle, argued that Nourn did not intend to kill or assault Stevens and that Barker "abused, controlled and manipulated her behavior." He made this argument even though he later admitted that he knew that duress was not a defense to murder. Nourn was convicted of premeditated murder and

249. Id. at 35.
250. See id. at 41-42.
251. Id. at 35.
252. See id.
253. See id.
254. Nourn, 52 Cal. Rptr. 3d at 35.
255. Id. at 35-36.
256. Id. at 36.
257. Id.
258. Id. at 34-35.
259. Id. at 36 (emphasis in original).
260. Nourn, 52 Cal. Rptr. 3d at 37.
261. See id. at 47.
Based on its review of the record, including the declarations of BWS and criminal defense experts, the appellate court concluded that the performance of Nourn's trial counsel was "below an objective standard of reasonableness under prevailing professional norms." Nourn's defense counsel did not use any experts, nor did he have Nourn undergo a psychological evaluation. Cormicle "indicated that he knew Nourn's mental state was at issue but did not think that an expert would help him understand why Nourn went along with what Barker did." Additionally, Nourn told Cormicle that she lied to the police when she told them "that she did not know Barker was going to shoot Stevens until he did so." Based on those confidential statements, Cormicle decided that the version Nourn told the police presented the most sympathetic version of her participation in the homicide.

The court found that Cormicle "did not conduct an adequate investigation based on the information he possessed, which, had it been performed, may have produced evidence regarding Nourn's state of mind and duress at the time she made confidential statements to [him]. . . ." Had Cormicle "conducted an adequate investigation and received that evidence, he would have had an informed basis upon which to make a tactical decision whether or not to not present that evidence at trial. . . ." The court found that "under prevailing professional norms, [Cormicle] had no reason not to have Nourn psychologically evaluated for possible BWS, state of mind, duress, or other defenses." Evaluations by experts may have revealed that Nourn's confidential statements were not in fact true, especially in

262. Id. at 37.
263. Id. at 51.
264. Id. at 51, 54.
265. Id. at 48-49.
266. Nourn, 52 Cal. Rptr. 3d at 47. She told Cormicle that what actually happened was that Barker asked her: "If you love me so much, if I told you to kill him for me, would you do it?" Id. Nourn then said that she would, but did not know how. Id.
267. Id. at 47.
268. Id. at 51.
269. Id.
270. Id. at 52.
light of Barker's threats to kill her family if she did not take responsibility for the murder.\textsuperscript{271} Additionally, even if Nourn's statements were believed to be true, "the evaluations could have concluded that the confidential statements were not inconsistent with BWS and did not preclude a possible BWS, state of mind, duress or other defense."\textsuperscript{272} Overall, the court concluded that had counsel presented BWS or other psychological evidence at trial, it is reasonably probable that Nourn would have received a more favorable result.\textsuperscript{273} The "absence of an adequate investigation and the results of that investigation undermined the court's confidence in the outcome of Nourn's trial."\textsuperscript{274}

The court also concluded that duress can be a defense to a charge of murder.\textsuperscript{275} This defense only applies, however, if the prosecution's theory is "that the defendant aided and abetted the commission of a predicate . . . offense and a confederate's murder of the victim was a natural and probable consequence of that predicate . . . offense."\textsuperscript{276} Therefore, the defense of duress would have been a valid defense theory had Cormicle actually presented sufficient evidence of duress at trial rather than just mentioning the theory in closing argument.\textsuperscript{277} Furthermore, BWS evidence would also have been relevant, and therefore admissible, on a state of mind or mental state defense, because the intent requirement for aiding and abetting is specific intent.\textsuperscript{278} The court concluded that the record contained substantial evidence that, if obtained and presented at trial, BWS and psychological expert opinions would support a finding that it was not proven beyond a reasonable doubt that Nourn had the requisite specific intent to commit, encourage or facilitate Barker's commission of the assault on Stevens.\textsuperscript{279} Finally, the court noted that "BWS evidence, if presented at trial, could have assisted the jury in understanding why Nourn made certain statements and could have explained her behavior

\textsuperscript{271} Id.
\textsuperscript{272} Nourn, 52 Cal. Rptr. 3d at 52.
\textsuperscript{273} Id. at 61.
\textsuperscript{274} Id.
\textsuperscript{275} Id. at 56-57.
\textsuperscript{276} Id. at 56.
\textsuperscript{277} Id. at 57-58.
\textsuperscript{278} Nourn, 52 Cal. Rptr. 3d at 58-59.
\textsuperscript{279} Id. at 59.
during and after the incident, including her confidential statements to [Cormicle]...”

F. Duty of Lawyer Acting as Escrow Holder

In Virtanen v. O'Connell, the Fourth District Court of Appeal addressed the issue of a lawyer's duties as an escrow holder. Attorney O'Connell, of the firm Parker Milliken, represented the purchaser of stock that was being sold by Virtanen. O'Connell agreed to act as the escrow holder for the transaction, and Virtanen delivered the stock certificates under a cover letter containing the conditions of escrow. A few days later, Virtanen sent notice of rescission of the transaction and a demand for the return of the documents to both O'Connell and the purchaser. This notwithstanding, O'Connell proceeded to close escrow and deliver the stock certificates to the transfer agent. Virtanen sued O'Connell and Parker Milliken for negligence, breach of fiduciary duty and conversion. The jury found for Virtanen and awarded compensatory damages, but deadlocked on the issue of punitive damages. The trial court denied Virtanen's motion for a partial new trial as to punitive damages against O'Connell and Parker Milliken.

On appeal, the court concluded that O'Connor breached his duty as escrow holder. He closed the transaction “before the conditions of the escrow instructions had been satisfied, before the parties had reached agreement on material contract terms, and after he had received a notice of rescission and a demand for return of the documents.” The court found that “[w]hen an attorney faces conflicting demands from his or her own client and another party to the

280. Id. at 61.
282. Id. at 705. The firm's full name is Parker, Milliken, Clark, O'Hara & Samuelian. Id. at 706.
283. Id. at 707-08.
284. Id. at 707.
285. Id.
286. Id. at 708.
287. Virtanen, 44 Cal. Rptr. 3d at 708.
288. Id.
289. Id. at 705-06. The court also found that he converted the stock when he forwarded the certificates to the transfer agent. Id. at 705.
290. Id.
escrow, the attorney cannot favor his or her own client and completely disregard the rights of the other party, to whom he or she owes a duty as an escrow holder.\textsuperscript{291} If the competing demands are not resolved, the law provides the attorney with a mechanism to avoid both the competing demands and tort liability by filing an interpleader action.\textsuperscript{292} The attorney is not permitted to convert the escrowed property for his or her client's own use.\textsuperscript{293}

The appellate court found that there was sufficient evidence for a reasonable trier of fact to conclude that Virtanen showed "by clear and convincing proof that O'Connell acted in such a conscious and deliberate disregard for the rights of Virtanen that his conduct could be characterized as willful or wanton, giving rise to a punitive damages award."\textsuperscript{294} Therefore, the trial court abused its discretion in denying a retrial as to punitive damages against O'Connell.\textsuperscript{295} However, the appellate court concluded that the trial court did not abuse its discretion in denying a retrial as to punitive damages against Parker Milliken.\textsuperscript{296} This was because there was no evidence that Parker Milliken: (1) had advance knowledge of any unfitness of O'Connell; (2) had authorized or ratified his wrongful conduct; or (3) had itself committed fraud or acted with oppression or malice.\textsuperscript{297}

\section*{IV. California Legislation}

In 2005, for the third time, the California Legislature introduced a bill that would permit an exception to the duty of confidentiality for government attorneys who learn of government misconduct.\textsuperscript{298} In 2006, this third attempt faltered when the bill was withdrawn by its author.\textsuperscript{299}

\textsuperscript{291} Id. at 706.
\textsuperscript{292} Id.
\textsuperscript{293} Virtanen, 44 Cal. Rptr. 3d at 706.
\textsuperscript{294} Id. at 722-23 (describing punitive damages award under CAL. CIV. CODE § 3294(a) (Deering 2006)).
\textsuperscript{295} Id. at 724.
\textsuperscript{296} Id.
\textsuperscript{297} Id. at 723-24. Moreover, there was no evidence that O'Connell was an officer, director or managing agent of Parker Milliken. Id.
\textsuperscript{299} Bob Egelko, Bill to Aid Lawyers Who Blow Whistle is Withdrawn, S.F. CHRON., Jun. 13, 2006, at B2. The two former attempts were met with gubernatorial vetoes by Gray Davis in 2002 and Arnold Schwarzenegger in
Assembly Bill 1612 (AB 1612) would have created a statutory exception to every California attorney's duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Specifically, the bill would have authorized an attorney who, "in the course of representing a governmental organization, learns of improper governmental activity, as defined, to [first] urge reconsideration of the matter and to refer it to a higher authority in the organization." The bill would have also authorized the attorney, in specified circumstances, to refer the matter to a law enforcement agency or to another governmental agency and would have exempted the attorney from disciplinary action for making the referral.

Previous efforts to create this exception have consistently failed, but the position of the California State Bar on the matter has not been as consistent. In 2001, the State Bar worked with proponents of the legislation to develop amendments to the Rules of Professional Conduct that would allow government lawyer whistleblowing. These proposed amendments were subsequently rejected by the California Supreme Court. Then, the State Bar was neutral with regard to the two legislative attempts prior to AB 1612 to codify the exception. In 2006, however, the State Bar actively opposed AB 1612.

One reason for the State Bar's opposition was the previous and consistent failure of lawyer whistleblower protections. When Governor Arnold Schwarzenegger vetoed a similar bill in 2004, he stated:

This is a well-intended bill and I applaud the efforts to expose wrongdoing within government. However, this bill

300. CAL. BUS. & PROF. CODE § 6068(e) (Deering 2006).
304. Id.
305. Id.
306. Id.
307. Id.
308. Id.
would condone violations of the attorney-client privilege, which is the cornerstone of our legal system. This bill will have a chilling effect on when government officials would have an attorney present when making decisions.\textsuperscript{309}

The State Bar asserted in 2006 that the principal of confidentiality was "under siege," citing confidentiality exceptions in the ABA Model Rules, federal Sarbanes-Oxley legislation, and U.S. Sentencing Commission guidelines encouraging waiver of attorney-client confidentiality.\textsuperscript{310} The State Bar asserted itself against this siege, and relegated the issue of government lawyer whistleblowers to the Rules Revision Commission for consideration in its rewriting of the California Rules of Professional Conduct.\textsuperscript{311}

In 2006, AB 1612 passed in the California Assembly and was awaiting its initial Senate Committee hearing in June 2006, when its author, Assemblymember Fran Pavley, withdrew it.\textsuperscript{312} Pavley claimed that even if the bill passed, it faced an almost certain veto from Governor Schwarzenegger.\textsuperscript{313} Pavely based this conclusion on the fact that the bill was failing to gain any backing from Republicans in the Legislature.\textsuperscript{314} In light of the tumultuous history of proposed exceptions to the duty of confidentiality for government lawyer whistleblowers in California, it seems highly unlikely that it will arise yet again in the near future.

V. NATIONAL ETHICS ISSUES

A. \textbf{Waiver of the Attorney-Client Privilege in Federal Corporate Prosecutions}

The Department of Justice maintains a policy making waiver of the attorney-client privilege a factor to be used by

\textsuperscript{309} Public Agency Attorneys: Concomitant Duties to Clients and to Public, Assemb. B. 1612, 2005-06 Leg. (Cal. 2006), available at http://www.assembly.ca.gov/acs/acsframeset2text.htm (choose "(2005-2006)" from "Session" drop-down menu; then enter "1612" in "Bill Number" field; then click "Search" button; then follow "Assembly Committee - 01/13/06" hyperlink under "Analyses" heading).

\textsuperscript{310} McCarthy, supra note 303.

\textsuperscript{311} Id.


\textsuperscript{313} Id.

\textsuperscript{314} Id.
federal prosecutors in determining whether to criminally charge a corporation.\textsuperscript{315} This policy was articulated in a 2003 memorandum by then-Deputy United States Attorney General Larry Thompson as a result of the increasing number of corporate criminal investigations.\textsuperscript{316} The effect of this "Thompson Memorandum" was to place pressure on potential corporate defendants to waive the privilege in order to avoid an indictment.\textsuperscript{317} Following the Department of Justice's lead, the United States Sentencing Commission changed its sentencing guidelines in 2004 to encourage corporate waivers of the attorney-client privilege.\textsuperscript{318} Under these organizational sentencing guidelines, "a company could obtain a lesser sentence if it cooperated with the government."\textsuperscript{319} In particular, "the amended guidelines listed waiver of the attorney-client privilege as an element of cooperation."\textsuperscript{320} At the behest of the ABA and several other organizations, including the California State Bar Standing Committee on Professional Responsibility and Conduct, the United States Sentencing Commission voted in April 2006 to remove the mention of waiver from the guidelines.\textsuperscript{321}

The Department of Justice itself has been working on revisions to the privilege waiver policy since September 2006, after being urged to do so by the Senate Judiciary Committee.\textsuperscript{322} However, unsatisfied with the Department's lack of progress, Senator Arlen Specter (R-Pa.), outgoing chairman of the Senate Judiciary Committee, introduced a

\begin{footnotesize}
\begin{enumerate}
\item Bishop & Hazen, \textit{supra} note 315, at 48.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
bill on December 7, 2006, to overturn the policy completely.\textsuperscript{323} The bill would prohibit prosecutors from considering the waiver of the attorney-client or work product privilege as part of any cooperation determination.\textsuperscript{324} The policy as it currently stands is opposed by a diverse range of groups including the American Civil Liberties Union (ACLU), business groups and defense counsel groups.\textsuperscript{325} The bill expired at the end of the 109th Congress, but Specter plans to reintroduce the bill in the 110th Congress in 2007.\textsuperscript{326}

B. American Bar Association Formal Opinions

Although California has not adopted the ABA Model Rules of Professional Conduct, they may serve as guidelines absent on-point California authority or conflicting state public policy.\textsuperscript{327} Every year, the ABA issues formal opinions based on the Model Rules of Professional Conduct addressing hypothetical fact situations.\textsuperscript{328} California attorneys should therefore take note that seven such formal opinions were issued in 2006.\textsuperscript{329}

First, ABA Formal Opinion 06-438 addressed the issue of

\begin{flushright}
\textsuperscript{323} Id.
\textsuperscript{324} Id. The bill would also eliminate the following factors from consideration: the company's decision to provide counsel for an employee under investigation; the company's decision to contribute toward payment of an employee's attorney fees; the decision to enter into a joint defense agreement with an employee; the decision to share information with an employee; or the failure to terminate an employee under investigation. Id.
\textsuperscript{325} Id.
\textsuperscript{326} Id. The 109th Congress adjourned on December 8, 2006. Id.
\textsuperscript{327} City and County of San Francisco v. Cobra Solutions, Inc., 135 P.3d 20, 29 (Cal. 2006); see also State Bar of Cal. Standing Comm. on Prof'l. Responsibility & Conduct, Formal Op. 1998-152 (stating that the ABA Model Rules of Professional Conduct may be considered as a collateral source, particularly in areas where there is no direct authority with the public policy of California).
\end{flushright}
a lawyer proposing to make or accept an aggregate settlement or an aggregated agreement.\textsuperscript{330} The opinion notes that in seeking to obtain the informed consent of multiple clients to make or accept an offer of an aggregate settlement or aggregated agreement of their claims, a lawyer must make a number of disclosures to each client.\textsuperscript{331} Under Model Rule 1.8(g),\textsuperscript{332} a lawyer is required to advise each client of the following: the total amount or result of the settlement or agreement; the amount and nature of every client's participation in the settlement or agreement; the fees and costs to be paid to the lawyer from the proceeds or by an opposing party; and the method by which the costs are to be apportioned to each client.\textsuperscript{333} The opinion concludes that Model Rule 1.8(g)\textsuperscript{334} is a prophylactic rule designed to protect clients who are represented by the same lawyer and whose claims or defenses are jointly negotiated and resolved through settlement or by agreement.\textsuperscript{335} Unique and difficult conflicts between the clients and their lawyer, and between the clients themselves, are possible.\textsuperscript{336} By complying with Rule 1.8(g),\textsuperscript{337} the lawyer protects his clients and himself, and helps to assure the finality and enforceability of the aggregate settlement or agreement into which those clients have chosen to enter.\textsuperscript{338}

Second, Formal Opinion 06-439 addressed a lawyer's ethical obligations as applied to mediations.\textsuperscript{339} The opinion specifically analyzes caucused mediations where a third-party neutral meets with parties individually in confidence, and thus controls the flow of information in an attempt to resolve a dispute.\textsuperscript{340} The opinion concludes that under Model Rule 4.1,\textsuperscript{341} in the context of a negotiation, including a caucused

\begin{itemize}
\item[330.] Formal Op. 06-438, \textit{supra} note 328, at 1.
\item[331.] \textit{Id.}
\item[332.] \textsc{Model Rules of Prof'L Conduct} R. 1.8(g) (2003).
\item[333.] Formal Op. 06-438, \textit{supra} note 328, at 1.
\item[334.] \textsc{Model Rules of Prof'L Conduct} R. 1.8(g).
\item[335.] Formal Op. 06-438, \textit{supra} note 328, at 3.
\item[336.] \textit{Id.}
\item[337.] \textsc{Model Rules of Prof'L Conduct} R. 1.8(g).
\item[338.] Formal Op. 06-438, \textit{supra} note 328, at 3.
\item[339.] Formal Op. 06-439, \textit{supra} note 329, at 3.
\item[340.] \textit{Id.}
\item[341.] ABA Model Rule of Professional Conduct 4.1 provides:
In the course of representing a client a lawyer shall not knowingly:
\begin{itemize}
\item[(a)] make a false statement of material fact or law to a third person;
\end{itemize}
mediation, a lawyer representing a party may not make a false statement of material fact to a third person.\textsuperscript{342} However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as “puffing,” are ordinarily not considered “false statements of material fact” within the meaning of the Model Rules.\textsuperscript{343} Whether a particular statement should be regarded as one of material fact may depend on the circumstances.\textsuperscript{344}

Third, Formal Opinion 06-440 withdrew a formal opinion from 1994 and reaffirmed a 2005 opinion.\textsuperscript{345} The opinion states that Model Rule 4.4(b)\textsuperscript{346} requires only that a lawyer who receives a document relating to the representation of the lawyer’s client and who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.\textsuperscript{347} Furthermore, if the materials are not inadvertently sent, Model Rule 4.4 does not apply.\textsuperscript{348}

Fourth, Formal Opinion 06-441 addressed the ethical obligations of lawyers who represent indigent criminal defendants when excessive caseloads interfere with

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or
\end{quote}

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [regarding confidentiality of information].


343. \textit{Id.}
344. \textit{Id.} at 2 (citing MODEL RULES OF PROF’L CONDUCT R. 4.1, cmt. 2 (2003)).
346. ABA Model Rule of Professional Conduct 4.4(b) provides that “a lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” MODEL RULES OF PROF’L CONDUCT R. 4.4(b).
347. Formal Op. 06-440 at 2, supra note 329. ABA Formal Opinion 94-382 stated that that in the case of receipt of such materials the lawyer was to: refrain from reviewing the materials; notify the adverse party/lawyer; follow lawyer’s instructions; or refrain from reviewing materials until resolution of any dispute over the documents. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-382 (1994). This opinion was withdrawn because its conclusion was not based on the Model Rules of Professional Conduct themselves. Formal Op. 06-440, supra note 329, at 2.
348. Formal Op. 06-440, supra note 329, at 2
The opinion states that “[i]f workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept any new clients.” If the clients are being assigned through a court appointment system, “the lawyer should request that the court not make any new appointments.” If the lawyer is currently representing a client and cannot provide competent and diligent representation, the lawyer must move to withdraw from the representation. If the court denies the lawyer’s motion to withdraw, “the lawyer must continue the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.” In addition to the attorneys themselves, supervisors “must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct.” To that end, “supervising attorneys must, working closely with the lawyers they supervise, monitor the workload of the attorneys to ensure that their workloads do not exceed a level that may be competently handled by the individual lawyers.”

Fifth, Formal Opinion 06-442 concerned a lawyer’s review and use of metadata. The Model Rules of Professional Conduct “do not contain any specific prohibition against a lawyer’s reviewing and using embedded information in electronic documents.” The opinion concludes that the Rules generally permit lawyers to review and use metadata, such as embedded information contained in email and other electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party.

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349. Formal Op. 06-441, supra note 329.
350. Id. at 1.
351. Id.
352. Id.
353. Id.
354. Id.
Metadata may include information pertaining to the date and time that information was saved, the name of the computer that created the document, redline edits, and embedded comments. Lawyers who are concerned about the transmission of metadata can take measures to protect themselves, including avoiding use of certain editing functions, scrubbing or deleting edits, and using hard copies, scans or faxes rather than email.

Sixth, Formal Opinion 06-443 addressed the issue of contact between an opposing lawyer and the inside counsel of an organization regarding a matter when the organization is represented in that matter by outside counsel. Model Rule 4.2 prohibits a lawyer representing a client from communicating about the subject of the representation with a person the lawyer knows is represented by another lawyer in the matter. The opinion concludes that Model Rule 4.2 generally does not prohibit a lawyer who represents a client in a matter involving an organization from communicating with the organization’s inside counsel about the subject of that representation, even without obtaining the prior consent of the entity’s outside counsel. The purpose of Model Rule 4.2 is to prevent a skilled advocate from taking advantage of a non-lawyer and to protect a client against possible overreaching, interference with the client-lawyer relationship, and the disclosure of information regarding the representation without the advice of counsel. The protections provided by Model Rule 4.2 are not needed when the constituent of the organization is a lawyer-employee of that organization who is acting as a lawyer for that organization.
organization. Additionally, inside counsel may always avoid such contact by referring the opposing lawyer to other inside or outside counsel.

Finally, Formal Opinion 06-444 discussed the permissibility of restrictive covenants in lawyer agreements concerning benefits upon retirement. The opinion concludes that under Model Rule 5.6(a), a lawyer may participate in an agreement that restricts the right of a lawyer to practice after termination of the relationship only if the agreement concerns benefits upon retirement. The provision must affect benefits that are available only to a lawyer who is in fact retiring from the practice of law, and cannot impose a forfeiture of income already earned by the lawyer. Beyond that, law firms and employers have significant latitude in shaping the nature and scope of the restrictions on practice and the penalties for noncompliance.

VI. CONCLUSION

The year of 2006 was rich with ethical developments in California and the nation. The California State Bar's proposed new rules regarding permanent disbarment sanctions and malpractice insurance disclosure requirements demonstrate a focus on the public's perception of lawyers. The State Bar Standing Committee on Professional Responsibility and Conduct focused its efforts in 2006 on clarifying the California Rules of Professional Conduct as they apply to financial issues, including liens and trust accounts.

367. Id.
368. Id. at 2.
370. ABA Model Rules of Professional Conduct 5.6(a) provides:

A lawyer shall not participate in offering or making:
(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.

MODEL RULES OF PROF’L CONDUCT R. 5.6(a) (2003).
372. Id.
373. Id.
374. See supra Part II.A.
375. See supra Part II.B.
The California Supreme Court commissioned a study to determine if California's nonprofit organizations that practice law must be subject to additional regulation.\textsuperscript{376} It also created an automatic vicarious disqualification rule for government law offices in situations where the head of the office has a conflict.\textsuperscript{377} The various California courts of appeal dealt with issues of a defrocked lawyer's practice of law,\textsuperscript{378} ethical screening for government law offices,\textsuperscript{379} and concurrent and successive representation of related corporate entities.\textsuperscript{380} They also addressed issues of malpractice when a client gained a windfall settlement,\textsuperscript{381} malpractice statute of limitations tolling,\textsuperscript{382} and an attorney's right to intervene on his or her own behalf for legal fees.\textsuperscript{383} Additionally, the courts of appeal ruled on the ineffective assistance of counsel where a lawyer failed to object to a prosecutor's misstatement of the law,\textsuperscript{384} and where a lawyer failed to present evidence of Battered Women's Syndrome.\textsuperscript{385} The appellate courts also addressed a lawyer's duty as escrow holder in the face of conflicting duties to his client.\textsuperscript{386} Finally, the State Bar Court faced the situation of a lawyer charging an unconscionable fee.\textsuperscript{387}

California continued to emphasize the lawyer's duty of confidentiality to his or her clients with the withdrawal of a bill for a proposed exception to this duty in the instance of government wrongdoing.\textsuperscript{388} The United States Sentencing Commission demonstrated a focus on confidentiality as well with the amendment of its sentencing guidelines as they apply to the attorney-client privilege.\textsuperscript{389} Likewise, a bill of similar effect was introduced in the United States Senate with regard to the Department of Justice policies toward the

\begin{footnotes}
\item[376] See supra Part III.A.1.
\item[377] See supra Part III.B.1.
\item[378] See supra Part III.A.2.
\item[379] See supra Part III.B.2.
\item[380] See supra Part III.B.3.
\item[381] See supra Part III.C.1.
\item[382] See supra Part III.C.2.
\item[383] See supra Part III.D.1.
\item[384] See supra Part III.E.1.
\item[385] See supra Part III.E.2.
\item[386] See supra Part III.F.
\item[387] See supra Part III.D.2.
\item[388] See supra Part IV.
\item[389] See supra Part V.A.
\end{footnotes}
Despite the interesting changes in 2006, the ethics landscape will undoubtedly change significantly within the next two years with the release of the new California Rules of Professional Conduct. In 2007, attorneys will continue to have the opportunity to comment on these proposed rules. In 2008, California attorneys will be charged with the task of familiarizing themselves with the new rules—in both content and format. Similarly, California courts will attempt to define and clarify the new rules as they apply to the endless situations that arise in the realm of legal ethics.