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ETHICS YEAR IN REVIEW

Pamela Glazner*

I. INTRODUCTION

Each year California courts chip away at the jagged edges of legal ethics questions while simultaneously creating other bulges in this area of law. The ethics year in 2005 was no different. Courts issued opinions relating to attorney fees,1 conflicts of interest,2 the attorney-client privilege,3 missed deadlines,4 the scope of attorneys' implicit authority,5 and legal malpractice and ineffective assistance of counsel.6 The California Supreme Court also addressed misconduct in death penalty cases,7 and prosecutors' religious and biblical arguments fractured a court that is almost always unanimous in such cases.8 Additionally, in a rare instance, the supreme court issued a full-length opinion disbarring an attorney who had been disbarred once before.9 Finally, for the third time in as many years, a proposed government whistleblower exception to the duty of confidentiality began its march through the Assembly.10 All of these items contributed to yet another year of defining legal ethics moments and

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1. See infra Part II.
2. See infra Part III.
3. See infra Part IV.
4. See infra Part VII.
5. See infra Part VIII.
6. See infra Part IX.
7. See infra Part X.
8. See infra Part X.A. In 2005, the Court was unanimous in twenty-six of twenty-nine death penalty cases. See infra Part X.
9. See infra Part XI.
10. See infra Part VI.
highlighted emerging battles.

II. ATTORNEY FEES AND RELATED TOPICS

The issue of attorney fees and related topics received more attention than any other ethics issue the California courts of appeal faced in 2005. Attorney fee contract provisions, particularly those regarding the reciprocity requirement contained in Civil Code section 1717(a), faced appellate review in three cases. The courts of appeal also dealt with attorney fees and their intersection with conflict of interest, conspiracy, and arbitration. Additionally, the State Bar issued an opinion addressing the commingling of attorney fees.

A. Attorney Fee Contract Provisions

i. Reciprocity

Issues involving Civil Code section 1717(a)'s reciprocity mandate, which requires that attorney fee contract provisions apply to both parties to the contract, were prevalent in 2005. In Baldwin Builders v. Coast Plastering Corp., the Fourth District Court of Appeal determined that indemnity contract provisions awarding attorney fees for enforcing the agreement are reciprocal. In Baldwin, a contract between a general contractor and two subcontractors contained an indemnity clause requiring the subcontractors to indemnify the general contractor against any claim related to the subcontractors' work and to defend against any claim at the

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12. Baldwin, 24 Cal. Rptr. 3d 9; ABF, 23 Cal. Rptr. 3d 803; Paul, 26 Cal. Rptr. 3d 766.
13. See infra Part II.B.
14. See infra Part II.C.
15. See infra Part II.D.
16. See infra Part II.E.
17. Baldwin, 24 Cal. Rptr. 3d 9.
18. Id. at 10-11.
subcontractors’ expense. The contract also provided that the subcontractors would pay any costs and attorney fees incurred as a result of enforcing the indemnification agreement. The contract contained language suggesting that only the subcontractors, and not the general contractor, would have to pay these costs and attorney fees.

When the subcontractors refused to defend a suit against the general contractor at their own expense, the general contractor sought to enforce the indemnity agreement. The jury specifically found the general contractor but not the subcontractors liable. The subcontractors then filed motions to recover the costs and attorney fees incurred in defending against the general contractor’s claim against them.

The appellate court interpreted California Civil Code section 1717(a) to require reciprocity of costs and attorney fees that were incurred to enforce the indemnification agreement, despite the unilateral language of the contract. The court reasoned that the statute was limited to these “action[s] on a contract . . . [and] incurred to enforce that contract,” and did not include costs and fees incurred as an “element of loss within the scope of the indemnity.” However, the appellate court concluded that an award of the non-statutory costs and attorney’s fees was appropriate, including those the subcontractors incurred in proving that they lacked liability because they had to do so in order to prevail under the indemnity agreement.

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19. Id. at 11.
20. Id.
21. Id.
22. Id.
23. Baldwin, 24 Cal. Rptr. 3d at 11.
24. Id. at 12. California Civil Code section 1717(a) provides:
In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.
CAL. CIV. CODE § 1717(a) (2005).
25. Baldwin, 24 Cal. Rptr. 3d at 12.
26. Id. at 13.
27. Id. at 14, 16. The appellate court reversed, however, as to the actual amount encompassed by the proper statement of available recovery, and it remanded to the trial court for a determination of the correct dollar amount. Id.
Extending the reciprocity requirement, the Fourth District Court of Appeal determined that California's reciprocity requirement for attorney fee provisions also applies to contracts containing clear choice-of-law provisions. In *ABF Capital Corp. v. Grove Properties Co.*, the contract at issue contained a choice-of-law provision designating New York law as controlling, as well as a unilateral attorney fee provision requiring defendants to pay plaintiff's attorney fees in enforcing the contract. When defendants allegedly failed to perform under the contract, plaintiff sued.

The appellate court ruled that California law regarding the reciprocity of attorney fees in enforcing a contract applied in this case. It determined that although the choice-of-law provision was otherwise valid, New York's law concerning the specific issue of reciprocity of attorney fee contract provisions was contrary to California's fundamental policy in favor of reciprocity. While New York law does not have the requirement that attorney fee contract provisions be reciprocal, California's Civil Code section 1717(a) requiring reciprocity "represents a basic and fundamental policy choice by the state of California." The reciprocity requirement "reflects a general policy to prevent one-sided attorney fee provisions. Thus, it promotes certainty, and prevents overreaching both in negotiation of a contract and in the use of the courts during litigation." The court rejected the plaintiff's contention that this policy consideration did not apply to business entities who would receive the benefit of the reciprocity. With this conflict of law, the court found that California had a materially greater interest in the determination of reciprocity of attorney fees contract provisions than did New York. When litigants use

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29. *Id.* at 805.
30. *Id.*
31. *Id.* at 816.
32. *Id.* at 810.
33. *Id.* at 810-11.
34. *ABF*, 23 Cal. Rptr. 3d at 811.
35. *Id.* at 812.
36. *Id.* at 811.
37. *Id.* at 813.
California courts, California has a greater interest "in seeing its residents receive fair play with respect to attorney fees . . . than New York has in assuring the enforcement of New York law concerning attorney fees, when those attorney fees are not incurred as a result of any use of New York courts, and have no effect on the accessibility to New York courts." Therefore, California law regarding reciprocity of attorney fees applies despite choice-of-law and unilateral attorney fee provisions.

While the Fourth District Court of Appeal extended the reciprocity requirement to contracts with choice-of-law clauses selecting other states' laws that do not require reciprocity, the Second District limited the scope of the reciprocity requirement. In *Paul v. Schoellkopf*, the appellate court found that a provision in a contract between a buyer and seller of real property that provided for attorney fees for the escrow company could not be applied to award attorney fees to either the buyer or the seller. In *Paul*, the contract between a buyer and a seller of real property contained a provision providing for attorney fees for the escrow company in the event that the escrow company needed to employ an attorney to recover its fees or expenses. When a contract dispute developed between the buyer and seller, the trial court found for the buyer and awarded the buyer attorney fees.

The appellate court reversed, finding that although a buyer and seller cannot limit recovery of attorney fees to a specific type of claim as between the buyer and the seller, the provision for the escrow company's attorney fees was proper. Civil Code section 1717(a) requires that a contract provision specifically providing for attorney fees for only one party must apply to whichever party prevails. The appellate court limited Section 1717(a)'s application to disputes between the

38. *Id.*
39. *Id.* at 816.
41. *Id.* at 768. The appellate court reduced damages in an unpublished part of the opinion. *Id.* at 767.
42. *Id.* at 768.
43. *Id.* at 771.
44. *Id.* at 770.
45. *Id.* at 768-69.
buyer and seller in this case. Since the contract provision provided for attorney's fees to the escrow company in the event of dispute between the buyer/seller and the escrow company, and not a dispute between the buyer and seller, the trial court could not use that provision to award attorney's fees to the buyer in its non-escrow-related dispute with the seller.

ii. Departing Law Firm Partners

Law firm partnership agreements also generated an attorney fees dispute in 2005. In Anderson, McPharlin & Connors v. Yee, the Second District Court of Appeal ruled that an attorney who departed from a law firm had to comply with a provision of the firm's partnership agreement requiring departing attorneys to pay the firm an amount equal to twenty-five percent of the attorney's fees earned on former clients' cases within two years of departure. When a partner left with firm clients who had twenty-seven open files and refused to pay the sum, which amounted to $131,685.95 as required by the contract, the firm sued for breach of contract. The appellate court ruled that California Rule of Professional Conduct 2-200(A), which provides in relevant part "that a lawyer 'shall not divide a fee for legal services with a lawyer who is not [his] partner'" unless certain conditions including written consent of the client are met, did not apply in this situation. It did not matter that the departed attorney would be fee-splitting with his former partner; he was not fee-splitting with a non-partner in violation of the rule. "Once the client's fee is paid to an attorney, it is of no concern to the client how that fee is allocated among the attorney and his or her former partners." The appellate court also indicated that it would rule in favor of the law firm even if Rule 2-200(A) did apply.

46. Paul, 26 Cal. Rptr. 3d at 770.
47. Id.
49. Id. at 629.
50. Id.
51. Id. at 630.
52. See id.
53. Id. at 630 (quoting Jewel v. Boxer, 203 Cal. Rptr. 13, 17 (Ct. App. 1984)).
because the amount did not actually constitute fees but rather a measure of the firm's losses.\textsuperscript{54}

\textbf{B. Conflict of Interest and Attorney Fees}

The issues of conflicts of interest, attorneys' duties, and recovery of attorney fees appeared together in a single 2005 case. In \textit{Sullivan v. Dorsa}, the Sixth District Court of Appeal upheld an award of attorney fees to a law firm, despite a conflict of interest, that created land sale documents for a referee appointed to complete the sale of land necessary for a partition by sale.\textsuperscript{55} A group of real property owners filed an action to partition their property by sale.\textsuperscript{56} They agreed to have a referee appointed to conduct the sale.\textsuperscript{57} The referee hired an attorney from the Silicon Valley Law Group (hereinafter SVLG) to draft documents in connection with the sale, and the referee then executed a contract to sell the property to DiNapoli Companies (hereinafter DiNapoli).\textsuperscript{58} However, since SVLG had a conflict of interest due to its "ongoing relationship" with DiNapoli, the referee hired another law firm to help prepare the sales documents.\textsuperscript{59} Although the trial court did not confirm the sale to DiNapoli,\textsuperscript{60} it awarded attorney fees to SVLG on the referee's motion.\textsuperscript{61}

The owners appealed the award of attorney fees to SVLG arguing that SVLG should not have been awarded attorney fees because it had a conflict of interest in violation of Professional Conduct Rule 3-310.\textsuperscript{62} The court of appeal rejected this argument.\textsuperscript{63} The appellate court first noted that SVLG was counsel for the referee, not the owners, and therefore did not owe the same duties to the owners as it did to the referee.\textsuperscript{64} The appellate court also suggested that the mere presence of a conflict of interest, in the absence of

\begin{footnotesize}
\begin{enumerate}
\item Anderson, 37 Cal. Rptr. 3d at 630-31.
\item Sullivan v. Dorsa, 27 Cal. Rptr. 3d 547, 561 (Ct. App. 2005).
\item Id. at 549.
\item Id.
\item Id. at 550.
\item Id. at 551.
\item Id. at 552.
\item Sullivan, 27 Cal. Rptr. 3d at 553.
\item Id. at 559.
\item Id. at 561.
\item Id. at 560.
\end{enumerate}
\end{footnotesize}
“misconduct . . . so incompatible with the faithful performance of [a law firm’s] duties,” is not sufficient to deny attorney fees.\textsuperscript{65} Indeed, the court indicated that there must be “a serious violation of the attorney’s responsibilities before an attorney who violates an ethical rule is required to forfeit fees.”\textsuperscript{66} The appellate court found that the owners did not show that “any violation of the rules governing representation of adverse interests was serious enough to compel a forfeiture of fees,” and upheld SVLG’s award.\textsuperscript{67}

C. Conspiracy and Attorneys Fees

Civil conspiracy claims against attorneys infrequently come before courts.\textsuperscript{68} When they do, the issue is often not about the attorney’s conduct but rather about whether the plaintiff has met the statutory requirements.\textsuperscript{69} One such case came before the Sixth District Court of Appeal, which disallowed a plaintiff’s claims against an attorney because the allegations did not fall within the exceptions to Civil Code section 1714.10, which requires a special procedure for making civil conspiracy claims against an attorney, and because plaintiff failed to comply with the procedure.\textsuperscript{70} In \textit{Berg & Berg Enterprises v. Sherwood Partners, Inc.}, Pluris, a network router developer, repudiated a contract it had with Berg & Berg Enterprises, a real estate developer.\textsuperscript{71} After failing to raise enough money to satisfy a settlement with Berg, Pluris assigned all of its assets to Sherwood Partners, Inc. for the benefit of its creditors, including Berg.\textsuperscript{72} The creditors then tried to force Pluris into involuntary bankruptcy so that Berg could acquire Pluris, but Sherwood defeated the creditors’ attempt with the aid of Sherwood’s law

\textsuperscript{65} Id.
\textsuperscript{66} Id. Suggestions of possible serious violations included when the attorney’s “representation involved elements of fraud, unfairness, acts in violation or excess authority, acts inconsistent with the character of the profession, or acts incompatible with the faithful discharge of the attorney’s duties.” Id.
\textsuperscript{67} Sullivan, 27 Cal. Rptr. 3d at 561.
\textsuperscript{68} Interview with Alan Scheflin, Professor of Legal Profession, Santa Clara University School of Law, in Santa Clara, Cal. (Apr. 13, 2006).
\textsuperscript{69} Id.
\textsuperscript{71} Id. at 329.
\textsuperscript{72} Id. at 330.
firm, SulmeyerKupetz (hereinafter Sulmeyer). Berg then brought causes of action against Sherwood pertaining to an alleged breach of the fiduciary duties that Berg, as Pluris's largest creditor, claimed Sherwood owed it by virtue of being the assignee of Pluris's assets. Berg then filed a motion to amend its pleadings to add Sulmeyer as a defendant in three causes of action and to add a separate claim of conspiracy to waste corporate assets against Sherwood and Sulmeyer. Berg's basis for all four of these claims was that Sulmeyer conspired with Pluris to deplete Pluris's assets by performing unnecessary and unreasonable legal services for exorbitant fees. However, in its pleadings, Berg did not allege that Sulmeyer owed any duty to Berg, nor did it allege that Sulmeyer engaged in any fraud or obtained any financial gain outside of fees. The trial court dealt with the motion as any other motion for leave to amend and did not require compliance with Section 1714.10, which "requires a plaintiff who desires to pursue such an action [against an attorney for conspiracy] to first commence a special proceeding by filing a verified petition naming the attorney as respondent." The statute further requires that "the plaintiff demonstrate 'pleadability' and some indicia of likelihood of success on the merits before the respective claims may be pursued—usually as measured against the standard of a prima facie case. Under the statute, after the attorney has an opportunity to respond, the trial court will either grant the petition and the plaintiff may file the complaint in the main action, or the trial court will deny the petition and the plaintiff may not file the complaint.

The appellate court first looked at the revisions to Section 1714.10. In response to the California Supreme Court's interpretation of Section 1714.10, the legislature
amended the statute to include two exceptions where plaintiffs do not have comply with the special statutory procedures: "(1) where the attorney violates a duty that he or she independently owes to the plaintiff, and (2) where the attorney's acts go beyond the performance of a professional duty owed to the client and, in addition, are done for his or her own personal financial gain." If a plaintiff states a claim that falls within the ambit of the statute, but not within an exception, then the plaintiff must comply with the statute's special procedure.

The appellate court then examined *de novo* all of Berg's allegations, regardless of whether labeled as a separate cause of action or merely naming Sulmeyer as a defendant to an existing claim, as they each involved the same conduct. The court concluded that the allegations against Sulmeyer fell within the scope of Section 1714.10. It then examined whether the allegations qualified for either of the exceptions. With reference to the first exception, the court dealt with a question of first impression, which was whether an attorney for an assignee for the benefit of the creditors owes a duty to the creditors simply by virtue of representing the assignee and charging fees for services performed for the assignee. The court declined to find such a duty, analogizing the case to an attorney for a trustee or administrator for an estate who owes duties to the trustee or administrator but not to the beneficiaries or the estate. As a result, the court found that Sulmeyer did not owe an independent duty to Berg by virtue of representing Sherwood and charging fees for the services it rendered. To fall within the second exception, a plaintiff must prove both that the attorney acted outside the scope of its representation and that the attorney took actions in furtherance of its own

84. Berg, 32 Cal. Rptr. 3d at 335.
85. See id. at 335.
86. Id. at 337, 339.
87. Id. at 340.
88. Id. at 341.
89. Id. at 341-42.
90. Berg, 32 Cal. Rptr. 3d at 346. The court also rejected Berg's proposed analogies to federal bankruptcy cases. Id.
91. Id. at 343.
92. Id. at 347.
93. Id. at 348.
financial advantage. Since Sulmeyer performed services for Sherwood within the scope of its representation and did not receive compensation for anything beyond those services, its conduct did not fall within the second exception to the statute. Thus, because the allegations did not fall within either of the exceptions, Berg had to comply with Section 1714.10. Since Berg could not, as a matter of law, comply with the special procedure requirements, the appellate court disallowed its pleadings for civil conspiracy.

D. Arbitration and Attorney Fees

Helping to clarify the contours of arbitration of attorney fee disputes, the Sixth District Court of Appeal held that clients’ waivers of their rights to arbitration of attorney fee disputes as listed in the Mandatory Fee Arbitration Act (MFAA) is not exclusive and that clients can otherwise waive their rights to arbitration. In Law Offices of Dixon R. Howell v. Valley, a client signed an unsecured promissory note for payment of attorney fees. When the law firm sued the client for breach of the promissory note, the client argued that the attorney’s claim must be dismissed because the law firm failed to give the client notice of his right to arbitrate as required by the MFAA. The trial court, after nearly fifteen months without the client asking for arbitration, dismissed the law firm’s action and awarded the client attorney fees based on the attorney fee provision in the promissory note. The law firm appealed the ruling, and the client appealed the

94. Id. at 350. The court interpreted this furtherance of its own financial advantage to mean something more than being compensated for services rendered in furthering the interests of the client. Id.
95. Id. 349-50.
96. Berg, 32 Cal. Rptr. 3d at 350.
97. Id. Berg could not make out a prima facie case as a matter of law because the only viable claims for attorney-client conspiracy are those that fall within Section 1714.10’s exceptions. Id. at 335.
99. Id. at 503.
100. Id. at 504. “[T]he MFAA was enacted to require, at the option of the client, that the attorney arbitrate any fee dispute,” id. at 505, and it “requires that the attorney give the client notice of its right to arbitrate at or before the time the attorney brings suit or other proceeding to collect on unpaid fees or costs.” Id. at 506.
101. Id. at 504.
attorney fee award.\textsuperscript{102}

The appellate court found that the trial court erroneously assumed that an attorney's failure to give the client notice of his right to arbitrate under the MFAA required mandatory dismissal of the action for attorney fees.\textsuperscript{103} Instead, the appellate court found that dismissing an action for failure to give the client notice was within the discretion of the court.\textsuperscript{104} The trial court therefore abused its discretion in failing to recognize and utilize its discretion.\textsuperscript{105}

In finding that the denial of the law firm's summary judgment motion was incorrect, the appellate court rejected all of the client's defenses to the summary judgment motion.\textsuperscript{106} First, the appellate court found that although the law firm failed to give proper notice under MFAA, the client waived his right to arbitrate.\textsuperscript{107} Although MFAA lists specific instances where a client waives his right to notice and to arbitration generally, the court ruled that this list is not exclusive.\textsuperscript{108} If the list were exclusive, then clients could manipulate the court system to their advantage and avoid paying attorney fees when attorneys failed to give notice under MFAA, even when the clients knew of their arbitration rights.\textsuperscript{109} Second, the appellate court rejected the client's claim that the execution of an unsecured promissory note violated Rule 3-310 of the California Rules of Professional Conduct because an unsecured promissory note does not give the attorney a present interest in the client's property.\textsuperscript{110}

\textbf{E. Commingling}

In one of the two formal opinions issued in 2005, the State Bar addressed the issues of overdraft protection on client trust accounts ("CTA") and commingling; an attorney's ethical obligations when a check is issued against a CTA containing insufficient funds; and when an attorney must withdraw his or her fees once they become fixed, and the

\begin{thebibliography}{99}
\bibitem{102} Id.
\bibitem{103} Id. at 508.
\bibitem{104} \textit{Law Offices}, 29 Cal. Rptr. 3d at 508.
\bibitem{105} Id. at 509.
\bibitem{106} Id. at 511.
\bibitem{107} Id. at 511.
\bibitem{108} Id. at 512-13.
\bibitem{109} Id.
\bibitem{110} \textit{Law Offices}, 29 Cal. Rptr. 3d at 520.
\end{thebibliography}
funds have been deposited into the CTA. The State Bar posed the following hypothetical: an attorney has an office business account and a client trust account at a bank. The attorney adds overdraft protection to the CTA by linking the CTA to the business account. A settlement check for the client comes to the attorney, the attorney’s fee becomes fixed, and she deposits the check in the CTA. However, the bank mis-deposits the check into the business account. The attorney issues a check against the CTA for the expenses incurred in pursuing the client’s case. Since the settlement check was mis-deposited, there are insufficient funds in the CTA, so the overdraft protection on the CTA kicks in, and the bank honors the check. The bank notifies the attorney and the State Bar that it paid the check against insufficient funds in the CTA. Three months after the settlement check arrived, the attorney issues a check to the client and to herself for her fees. With this second issuance of checks against insufficient funds, the bank contacts the attorney, realizes its mistake, and corrects the error.

First, the State Bar distinguished between the types of overdraft protection that are ethical and those that are not ethical because of the prohibition on commingling. Two types of overdraft protection do not result in commingling: linking a CTA to a business account and extending a line of credit. These are acceptable because they “compensate[] exactly for the amount that the overdraft exceeds the funds on deposit, do[] not subject the client’s funds to claims of the attorney’s creditors, and do[] not permit the attorney to use

112. Id.
113. Id.
114. Id.
115. Id.
116. Id.
118. Id.
119. Id.
120. Id.
121. Id. “Commingling is committed when a client’s money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney’s personal expenses or subjected to claims of his creditors.” Id. (quoting Clark v. State Bar, 246 P.2d 1, 9 (Cal. 1952)).
the client's funds."123 The State Bar's hypothetical posed a
linkage overdraft protection program, which did not violate
the ethical rule against commingling.124 The State Bar
distinguished this scenario with "an overdraft protection
program that automatically deposits a fixed amount into a
CTA leaving a residue after the overdraft is satisfied."125 This
type of overdraft protection program may subject the attorney
to discipline for commingling.126

Second, the State Bar explained the obligations that
accompany the personal and non-delegable duty of an
attorney to "take reasonable care to protect client funds."127
The attorney must: (1) deposit funds, which may include his
or her personal funds, sufficient to satisfy any check written
against the CTA; (2) take reasonably prompt action to
determine what condition or event caused the overdraft; and
(3) possibly inform the client of the overdraft on the CTA if
the overdraft will negatively affect the client.128 Since the
bank in the hypothetical honored the check drawn on the
CTA due to the overdraft protection, none of these obligations
was triggered.129

Third, the State Bar clarified the time period in which an
attorney must withdraw his or her earned fees from the
CTA.130 Although attorney fees need not be withdrawn
immediately, they "must be withdrawn at the earliest
reasonable time after the [attorney's] interest in that portion
becomes fixed."131 The State Bar gave a "rule of thumb" for a
reasonable time as "suggested by the standards for preserving
the identity of the funds and property of a client," which
require a monthly reconciliation: "an attorney should
withdraw the attorney's fees from the CTA at the time of the
monthly reconciliation after that portion has become fixed."132
Thus, since the attorney in the hypothetical did not withdraw
her funds until three months had passed since her fees

123. Id.
124. Id.
125. Id.
126. Id.
127. Id.
129. Id.
130. Id.
131. Id. (quoting CAL. RULES OF PROF'L CONDUCT 4-100(A)(2) (1992)).
132. Id.
became fixed and the funds were deposited, she may not have done so at the earliest reasonable time.\textsuperscript{133}

III. CONFLICT OF INTEREST

Attorneys' conflicts of interest, in both civil and criminal cases, composed another major area of review in 2005. The California Supreme Court and four courts of appeal issued opinions regarding attorneys' conflicts of interest.\textsuperscript{134} The opinions addressed three types of conflicts of interest: conflicts between attorneys' interests and their clients' interests,\textsuperscript{135} concurrent representation,\textsuperscript{136} and successive representation.\textsuperscript{137}

A. Conflicts Between Attorneys' and Clients' Interests

A conflict of interest issue between attorneys' interests and their clients' interests appeared in two cases in 2005.\textsuperscript{138} The California Supreme Court issued one of the opinions ruling that an attorney who testified at a defendant's second competency trial did not have an actual or potential conflict of interest when the same attorney represented the defendant in the penalty phase of his death penalty trial.\textsuperscript{139} In \textit{People v. Dunkle}, the defendant, who was diagnosed with chronic paranoid schizophrenia,\textsuperscript{140} was convicted and sentenced to death for the murders of two teenage boys.\textsuperscript{141} The defendant had two competency hearings,\textsuperscript{142} and his attorney testified about his interaction with the defendant at the second competency hearing.\textsuperscript{143} The judge in the first competency hearing, and the jury in the second, found the defendant competent to stand trial.\textsuperscript{144}

On his automatic appeal to the California Supreme

\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{See infra} Part III.
\textsuperscript{135} \textit{See infra} Part III.A.
\textsuperscript{136} \textit{See infra} Part III.B.
\textsuperscript{137} \textit{See infra} Part III.C.
\textsuperscript{138} \textit{People v. Dunkle}, 116 P.3d 494 (Cal. 2005); \textit{Apple Computer, Inc. v. Superior Court}, 24 Cal. Rptr. 3d 818 (Ct. App. 2005).
\textsuperscript{139} \textit{Dunkle}, 116 P.3d at 530-33.
\textsuperscript{140} \textit{Id.} at 509.
\textsuperscript{141} \textit{Id.} at 502.
\textsuperscript{142} \textit{Id.} at 509.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.}
Court, the defendant claimed that his trial counsel labored under a conflict of interest because his trial counsel had testified at the defendant's second competency hearing and then represented the defendant in the penalty phase of his trial where the defense centered on the defendant's mental state. The defendant claimed that the trial court knew or should have known of this conflict and, by not taking action to deal with it, violated his constitutional right to counsel without conflicts. Under the United States Constitution, a defendant must show an actual conflict of interest, meaning one that affected counsel's performance. However, under the California State Constitution, "a defendant need only show a potential conflict of interest, so long as the record supports an 'informed speculation' that the asserted conflict adversely affected counsel's performance." The defendant claimed that there was a conflict of interest because the attorney had an ethical obligation to withdraw from the case and testify for the defendant in the penalty phase of the trial, but the attorney instead promoted his self-interest in continued employment on the case.

The supreme court failed to find either a potential or an actual conflict of interest. "[A]n attorney must withdraw from representation, absent the client's informed written consent, whenever he or she knows or should know he or she ought to be a material witness in the client's cause." To determine whether the defendant's attorney should have withdrawn from the case to testify at the penalty phase, the court applied the factors laid out in Comden v. Superior Court, and concluded that defendant's attorney did not have a duty to withdraw from the case and testify. Although the court declined to say that there could never be an actual conflict of interest in this type of case, it refused to recognize an actual conflict of interest in the mere fact that a defense attorney has some unique personal information as to the

145. Dunkle, 116 P.3d at 530.
146. Id. at 530-31.
147. Id. at 531.
148. Id. (quoting People v. Frye, 959 P.2d 183, 241 (Cal. 1998)).
149. Dunkle, 116 P.3d at 531.
150. Id. at 531-32.
152. Dunkle, 116 P.3d at 532.
153. Id.
defendant's competency that might be relevant to the penalty phase because this situation is present in every case. The court also did not find a potential conflict of interest because, based on the facts known to the trial court, there was no possibility of a conflict of interest that obligated the trial court to make a further inquiry. The court rejected all of defendant's factual arguments for why the trial court should have made a further inquiry, citing tactical and strategic decisions that an non-conflicted attorney would make.

The conflict between an attorney's own interests and those of his client also arose in the context of class-action lawsuits. The Second District Court of Appeal disqualified a law firm and its co-counsel firm who were serving as class counsel in a class action in which an attorney from the law firm was also the class representative. In Apple Computer, Inc. v. Superior Court, attorney Lawrence Cagney was the named plaintiff in a class action lawsuit against Apple Computer, Inc. alleging that Apple, in connection with one of its rebate programs, had collected excess tax from consumers in violation of California's unfair competition statute. Two firms were engaged to represent the class: Westrup Klick LLP, where Cagney was an attorney, and the Law Offices of Allan A. Sigel. Sigel served as co-counsel on the case, as well as on thirteen other class actions filed under the same statute within four years. Apple moved to disqualify both Westrup and Sigel. The trial court denied the motion, Apple appealed, and then Westrup withdrew from the case.

The appellate court ruled that the trial court abused its discretion in failing to disqualify both Westrup and Sigel "because an insurmountable conflict of interest exists between the attorneys for the putative class (including plaintiff) and the putative class itself." First, the court
noted that class attorneys, their relatives, or their business associates are generally barred from serving as class representatives.164 This is because courts fear that class attorneys, induced by the possibility of huge attorney fees, will settle on terms that are not as favorable to the absent class members’ interests as they could be.165 Further, the class representative has a duty to monitor the class attorney “to ensure that [class counsel does] not sacrifice the interests of the class in order to maximize its own recovery.”166 The court applied the same rationale to law firms such as Westrup and Sigel.167 As for Westrup, “substituting a partner as counsel [would] not suffice as an antidote” to the conflict of interest problem.168 Indeed, “Cagney and Westrup . . . placed themselves in a position of divided loyalties—their own financial interest in recovery attorney fees versus their obligation to the putative class to maximize the recovery of monetary and other relief,” and Westrup therefore had to be disqualified.169 Likewise, Sigel had to be disqualified because of the “close business connection” between Cagney, Westrup, and Sigel.170 Since the two firms maintained thirteen other similar class actions, six of which were still active, the court recognized a “financial relationship and interdependence between Cagney and the Sigel firm” which could result in Cagney failing to perform his monitoring duties as class representative and Sigel improperly seeking to maximize its attorney fees.171 As a result, the appellate court disqualified the Sigel firm.172 Lastly, although the court found that “[b]ecause Cagney, as an attorney at Westrup Klick, may benefit from attorney fees recovered in the other litigation [in which the two firms were involved], he is not sufficiently independent to serve as the class representative in this

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Westrup’s withdrawal. Id. at 822.
164. Id. at 822.
165. Id.
166. Id. at 832 (quoting In re Cal. Micro Devices Sec. Litig., 168 F.R.D. 257, 262 (N.D. Cal. 1996)).
167. See Apple Computer, 24 Cal. Rptr. 3d at 823-24, 831.
168. Id. at 824 (quoting Kramer v. Scientific Control Corp., 534 F.2d 1085, 1092 (3d Cir. 1976)).
169. Apple Computer, 24 Cal. Rptr. 3d at 829.
170. Id. at 830.
171. Id. at 831.
172. Id. at 833.
it did not order Cagney's removal as class representative.\textsuperscript{174}

B. Concurrent Representation

Without informed, written consent, concurrent representation, in which an attorney simultaneously represents two or more clients with adverse interests, is unethical regardless of whether there is a substantial relationship between the cases or whether confidences have passed.\textsuperscript{175} The rule against concurrently representing clients with adverse interests is \textit{per se}\textsuperscript{176} because the concern is the duty of loyalty, not only the duty of confidentiality.\textsuperscript{177}

Concurrent representation was the subject of one case in 2005. In \textit{Cal West Nurseries, Inc. v. Superior Court}, the Fourth District Court of Appeal ruled that a law firm may not represent concurrent clients whose interests are adverse even if the law firm represents one client in an unrelated action, and the other client in an action in which both clients are parties but the representation is against only non-client parties.\textsuperscript{178} In \textit{Cal West}, A.J. West Ranch was a defendant in a tort action, and it cross-complained for equitable indemnity and contribution against Cal West Nurseries.\textsuperscript{179} Cal West likewise filled a cross-complaint against Ranch for implied indemnity and comparative appointment.\textsuperscript{180} Ranch hired the law firm of Lewis Brisbois Bisgaard & Smith, LLP to represent it in its action against Cal West.\textsuperscript{181} When Lewis sought to take depositions of Cal West witnesses, Cal West objected because Lewis represented it in an unrelated

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{173} \textit{Id.} at 832.
\item \textsuperscript{174} \textit{See id.} at 833.
\item \textsuperscript{175} \textit{Cal West Nurseries, Inc. v. Superior Court}, 29 Cal. Rptr. 3d 170, 173-74 (Ct. App. 2005).
\item \textsuperscript{176} \textit{Id.} at 174.
\item \textsuperscript{177} \textit{Id.}
\item \textsuperscript{178} \textit{Id.} at 172.
\item \textsuperscript{179} \textit{Id.} at 173.
\item \textsuperscript{180} \textit{Id.} at 172.
\item \textsuperscript{181} Lewis also represented another party, Brongo Construction against whom Cal West had cross-complaints. \textit{Cal West}, 29 Cal. Rptr. 3d at 171. Cal West objected to Lewis representing Brongo, and Lewis likewise ceased from representing Brongo. \textit{Id.} However, Cal West apparently initially did not move to disqualify Lewis from representing Brongo, \textit{see id.} at 172, and waited to argue that the law firm should be disqualified from representing all other parties to the action until its reply on appeal. \textit{Id.} at 176. The court of appeal thus refused to consider the claim. \textit{Id.}
\end{enumerate}
\end{footnotesize}
Lewis withdrew its representation of Ranch in both the cross-complaints between Ranch and Cal West, but it continued to represent Ranch on its cross-complaints against other parties to the action.\textsuperscript{183} Cal West moved to disqualify Lewis, but the trial court denied the motion, and Cal West appealed.\textsuperscript{184}

The appellate court ruled that Lewis could not represent Ranch against any other parties to the action.\textsuperscript{185} Although Lewis ceased representing Ranch against Cal West, it represented Ranch against other parties to the action.\textsuperscript{186} Lewis argued that by no longer representing one client against another directly, it eliminated any conflict.\textsuperscript{187} The court rejected this argument because Ranch and Cal West were still adverse to each other in the action, regardless of whether Lewis was representing one directly against the other.\textsuperscript{188} The court rejected the approach of the New York City Bar Association and Restatement Third of Law Governing Lawyers, which allows a lawyer to avoid the conflict by limiting the scope of representation.\textsuperscript{189} Instead, it found that California allows attorneys to continue representation of clients with adverse interests in unrelated matters only when they obtain written consent after full disclosure.\textsuperscript{190} As a result, the court ruled that Lewis must comply with its duty of loyalty to Cal West and disqualified Lewis from representing Ranch against any party to the action.\textsuperscript{191}

\begin{itemize}
  \item \textsuperscript{182} Id. at 172.
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Id.
  \item \textsuperscript{186} Id. at 174.
  \item \textsuperscript{187} Cal West, 29 Cal. Rptr. 3d at 174.
  \item \textsuperscript{188} Id. The court explained that a client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship.
  \item \textsuperscript{189} Id. (quoting Flatt v. Superior Court, 36 Cal. Rptr. 2d 537, 542 (1994).
  \item \textsuperscript{190} Id.
  \item \textsuperscript{191} Id.
\end{itemize}
C. Successive Representation

In cases of successive representation, the main concern is the duty of confidentiality. California Rule of Professional Conduct 3-310(E) prohibits an attorney from representing a new client whose interests are adverse to a former client when the attorney obtained confidential information that is material to the representation of the new client. Courts apply a "substantial relationship test" to begin the analysis of whether an attorney must be disqualified. If there is a substantial relationship between the former and current representation, and material, confidential information normally would have passed between the attorney and former client, then the court will assume that confidences have passed, and the attorney will be disqualified unless he or she can prove that confidences have not passed. If no substantial relationship exists, then the presumption that confidences have passed does not apply, and the attorney may be able to represent the new client as long as confidences did not actually pass. In addition to the successive representation rules, courts will apply "vicarious disqualification" and disqualify an entire law firm if an attorney at the firm is conflicted. With this imputation of the conflict, disqualification is mandatory unless an attorney "can show that there was no opportunity for confidential information to be divulged." Two cases addressed disqualification of attorneys where successive representation was an issue.

In one case, the Fifth District Court of Appeal ruled that plaintiffs' counsel must be disqualified after associating outside counsel who had a one-hour interview with defendants' counsel three years prior to associating with

192. Id. at 173.
194. Id. at 121.
195. Id.
196. See id.
197. Id.
198. Id. (quoting City Nat'l Bank v. Adams, 117 Cal. Rptr. 2d 125, 135 (Ct. App. 2002).
plaintiffs’ counsel.200 In *Pound v. DeMera DeMera Cameron*, “[t]he contentious nature of [a] corporate divorce set[] the stage for the dispute.”201 The attorney for the defendant accountancy corporation that plaintiff-employees were leaving interviewed various attorneys to represent two individual defendants.202 One of the attorneys interviewed was Peter S. Bradley.203 Defendant-corporation’s attorney declared that he had a one-hour interview with Bradley in which “he discussed the case in specific terms, including issues, personalities, vulnerabilities, and other topics properly described as attorney work product.”204 Defendants, however, chose to employ another attorney.205 Three years after the interview with defendant-corporation’s counsel, plaintiffs’ counsel, Andrew B. Jones consulted with and associated Bradley as counsel.206 “The only thing Bradley told Jones about his meeting with [defendant-corporation’s counsel] was that the case involved corporate law issues and Jones was the adverse attorney.”207 On defendant’s motion, the trial court disqualified Bradley but did not disqualify Jones.208

The appellate court reversed the trial court’s decision not to disqualify Jones.209 The appellate court ruled that Bradley was properly disqualified because he successively represented clients whose interests were adverse, and there was a substantial relationship since it was the same case, so confidential information presumptively passed.210 The court also found that Jones had to be disqualified because he associated Bradley as counsel, who had “the most egregious conflict of interest.”211 The fact that Bradley was associated as counsel and not hired as a partner or associate of Jones’ firm did not alter the application of vicarious

201. *Id.* at 925.
202. *Id.* at 924-25.
203. *Id.* at 925.
204. *Id.*
205. *Id.*
206. *Pound*, 36 Cal. Rptr. 3d at 925.
207. *Id.*
208. *Id.*
209. *Id.* at 930.
210. *Id.* at 926.
211. *Id.* at 928, 926 (quoting People ex rel. Dep’t of Corps. v. SpeeDee Oil Change Sys., Inc., 980 P.2d 371, 379 (Cal. 1999)).
Another appellate court examined whether confidences had actually passed in the context of a law firm. The Second District Court of Appeal ruled that, in determining whether to disqualify a law firm, a trial court may inquire into whether confidences actually passed between an attorney who represented a former client whose interests are adverse to a current law firm client and other lawyers in the firm when that attorney has since left the firm. In *Goldberg v. Warner/Chappell Music, Inc.*, former in-house counsel to Warner/Chappell Music, Inc. sued Warner for, among other claims, gender discrimination, violation of the whistleblower statute, and retaliatory termination. The plaintiff then moved to disqualify Warner's counsel, Mitchell Silberbger & Knupp LLP because she claimed that she divulged confidential information regarding her employment contract with Warner to former Mitchell Silberbger partner Eugene Salomon.

The appellate court held that Mitchell Silberbger should not be disqualified because there was no indication that Salomon had disclosed any confidential information, and he had left Mitchell Silberbger approximately three years before Goldberg's matter began. The appellate court found that the trial court appropriately inquired into whether Salomon had actually passed confidential information to other attorneys at Mitchell Silberbger and properly denied the motion to disqualify the firm when it determined that confidences did not pass. In so doing, the appellate court agreed with another appellate court that "at some point, it ceases to make sense to apply a presumption of imputed knowledge as a lawyer moves from firm to firm." Indeed, "[w]hen . . . the relationship between the tainted attorneys and nontainted attorneys is in the past, there is no need to rely on the fiction of imputed knowledge to safeguard client

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212. *Pound*, 36 Cal. Rptr. 3d at 928.
214. *Id.* at 118.
215. *Id.* at 119.
216. *Id.* at 118, 120.
217. *Id.* at 123.
218. *Id.* at 123 (agreeing with *Adams v. Aerojet-Gen. Corp.*, 104 Cal. Rptr. 2d 116 (Ct. App. 2001)).
confidentiality’ and opportunity exists for a ‘dispassionate assessment’ of whether confidential information was actually exchanged.”219 The court found support for this more relaxed rule in the fact that both the ABA and other jurisdictions follow such a rule.220 The court did, however, distinguish situations in which an attorney is still employed at a firm, in which case vicarious disqualification would likely apply because, for example, “there would be no practical way of ensuring that, despite his best intentions, Salomon would not let slip some confidential information he may not even be aware that he possesses.”221

IV. ATTORNEY-CLIENT PRIVILEGE

The California Supreme Court issued the only opinion regarding the attorney-client privilege in 2005. The court held that an unincorporated organization, including those that do not fall into the categories specifically listed in the comment to Evidence Code section 951, may hold the attorney-client privilege, but it reiterated that when the holder is a natural person, the privilege ends when the estate is probated and the personal representative is discharged.222 In HCL Properties, Ltd. v. Superior Court, HCL Properties, an entity formed by Bing Crosby’s executor and heirs to manage Crosby’s various financial interests, sued MCA Records for underpaying royalties it owed on three record contracts.223 During discovery, HCL and Crosby’s former law firm failed to produce certain documents, claiming the attorney-client privilege protected the information.224

The supreme court first determined that under Evidence Code sections 953 and 954, “an individual, an association, or an organization may qualify as a client, and a living or existing client is the holder of the privilege initially.”225 HCL argued that “Bing Crosby Enterprises”, a loosely-termed entity formed during Crosby’s lifetime that contained

219. Goldberg, 23 Cal. Rptr. 3d at 125 (quoting Adams, 104 Cal. Rptr. 2d at 123).
220. Id. at 126.
221. Id. at 123.
223. Id. at 562.
224. Id.
225. Id. at 564.
Crosby's assets and that Crosby's employees informally named, was an informal corporation that held the privilege initially. While the supreme court found that an informal organization, including one that does not fall into one of the categories listed in the comment to Evidence Code section 951 defining "client," may be the holder of the privilege, Bing Crosby Enterprises did not hold the privilege in this case. The court found that the key person managing Crosby's assets, as well as his attorneys, believed that they worked for Crosby personally and individually. Furthermore, Crosby paid his employees personally. The evidence thus indicated that Crosby himself ran his business affairs, not Bing Crosby Enterprises in a representative capacity. As a result, the court ruled that Crosby himself held the privilege, not Bing Crosby Enterprises.

As a consequence of Crosby personally holding the privilege, the privilege could not transfer to HCL by successorship. Only a personal representative of the deceased can claim the privilege because the privilege passes to the personal representative upon the client's death. When the estate is probated, and there is no longer a personal representative to claim the privilege, the privilege terminates. The court further held that an estate is not an organization capable of receiving the privilege and passing it to a successor organization because the legislature clearly wanted to limit the privilege to passing only to the personal

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226. *Id.* at 562-63.
227. *Id.* at 564.
228. *HCL Props.*, 105 P.3d at 565. Indeed, the supreme court specifically stated, 

[We do not suggest that entities formed to manage the business affairs of a natural person can never be clients or never hold the attorney-client privileges in their own right. Nor do we find that a personal representative's assertion of the privilege categorically forecloses others from claiming it as to the same communications.

*Id.* at 569.
229. *Id.* at 566.
230. *Id.* at 565-66.
231. *Id.* at 565.
232. *Id.* at 566.
233. *Id.*
234. See *HCL Props.*, 105 P.3d at 569.
235. *Id.* at 567.
236. *Id.*
representative upon the client's death.\textsuperscript{237} Thus, when Crosby's estate was probated and his personal representative was discharged, the privilege terminated.\textsuperscript{238} As a result, HCL could not claim the attorney-client privilege.\textsuperscript{239}

V. CONFIDENTIALITY

In the second of two formal opinions issued in 2005, the California State Bar clarified the potential duties of confidentiality of attorneys who maintain websites through which visitors seeking legal advice and counsel can communicate with attorneys by electronic means.\textsuperscript{240} The State Bar posed the following hypothetical: a law firm maintains a website with a link allowing visitors to submit information about their legal problems.\textsuperscript{241} Before the visitors can submit the information to the law firm, they must agree to terms, which include the fact that visitors will not pay for the initial response; no attorney-client relationship will be formed; no confidential relationship will be formed; and to retain the law firm, the visitor must enter into a fee agreement with the law firm, which is not completed by the initial, free response.\textsuperscript{242} A woman seeking advice about a potential divorce and custody battle writes to the law firm through the website, revealing a prior extramarital affair about which the husband does not know.\textsuperscript{243} After receiving this information, the law firm realizes that it already represents the husband.\textsuperscript{244} The issue then is whether the law firm may be disqualified after its initial consultation with the wife.\textsuperscript{245}

The State Bar first noted that an attorney may owe a duty of confidentiality to a potential client even when no attorney-client relationship exists.\textsuperscript{246} For purposes of the hypothetical situation, the State Bar assumed that neither an

\begin{itemize}
\item \textsuperscript{237} Id. at 567-68.
\item \textsuperscript{238} Id. at 567.
\item \textsuperscript{239} See id. at 568.
\item \textsuperscript{240} Cal. State Bar, Formal Op. 168 (2005).
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id.
\item \textsuperscript{244} Id.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Cal. State Bar, Formal Op. 168 (2005).
\end{itemize}
express nor implied attorney-client relationship existed. It then addressed whether a duty of confidentiality still existed. A duty of confidentiality may arise if the prospective client engages the attorney in his or her professional capacity for the purpose of gaining legal advice or representation. For the duty of confidentiality to attach, the attorney must "evidence, by words or conduct, a willingness to engage in a confidential consultation with [the prospective client]." This requirement was satisfied in the hypothetical because the website invited visitors to relate facts about their legal problems.

Whether an attorney owes a duty of confidentiality ultimately depends on whether the prospective client had a reasonable belief, gathered from the surrounding circumstances, that he or she was consulting the attorney in his or her professional capacity and that the information passed was confidential. In the hypothetical, the State Bar found that the prospective client (the wife) had a reasonable belief that the information she gave would be confidential because merely stating that there was no confidential relationship was not a sufficient explanation for a non-lawyer. The wife simply could have thought that not having a confidential relationship was synonymous with not having an attorney-client relationship. As a result, if a court deemed the information the wife related to be material to the divorce or custody battle, then the law firm could be disqualified from representing the husband.

Although the law firm's disclaimer in this hypothetical was not sufficient to negate the wife's reasonable belief that her information would be kept confidential, the State Bar gave two possible ways for a law firm to avoid the duty of confidentiality to prospective clients visiting the website. One is to more clearly explain in layperson's terms what

247. Id.
248. Id.
249. Id.
252. Id.
253. Id.
254. Id.
255. Id.
256. Id.
agreeing to a lack of a confidential relationship means.\textsuperscript{257} The State Bar indicated that the wife would not have had a reasonable expectation of confidentiality if the website had said, "I understand and agree that Law Firm will have no duty to keep confidential the information I am now transmitting to Law Firm."\textsuperscript{258} The second is to first solicit only information relevant to a conflicts check (e.g., names of spouses) before gathering confidential information.\textsuperscript{259} Although these solutions are not exclusive, the State Bar cautioned, "it is important that lawyers who invite the public to submit questions on their web sites, and do not want to assume a duty of confidentiality to the inquirers, plainly state the legal effect of a waiver of confidentiality."\textsuperscript{260}

VI. LEGISLATIVE PROPOSAL: GOVERNMENT WHISTLEBLOWERS

One legislative proposal, introduced by Assembly Member Fran Pavley, which is moving through the California Assembly, would alter the contours of government attorneys' duties of confidentiality, particularly when those attorneys become whistleblowers. Assembly Bill 1612 ("AB 1612") would grant attorneys who, in the course of representing a government agency, learn of improper government activity, two avenues for addressing the conduct: report up the ladder and out the door.\textsuperscript{261} First, an attorney who learns of such activity may "[u]rg[e] reconsideration of the matter while explaining its likely consequences to the organization" and/or "[r]ef[er] the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on

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\item \textsuperscript{257} Cal. State Bar, Formal Op. 168 (2005).
\item \textsuperscript{258} Id.
\item \textsuperscript{259} Id.
\item \textsuperscript{260} Id.
\item \textsuperscript{261} Assemb. B. 1612, 2005-06 Leg., Reg. Sess. (Cal. 2005), available at http://www.assembly.ca.gov/acs/acsframeset2text.htm. AB 1612(e) defines "improper government activity" as conduct by the governmental organization or by its agent that meets one or more of the following requirements: (1) It constitutes the use of the organization's official authority or influence by the agent to commit a crime, fraud, or other serious and willful violation of law. (2) It involves the agent's willful misuse of public funds, willful breach of fiduciary duty, or willful or corrupt misconduct in office. (3) It involves the agent's willful omission to perform his or her official duty.
\end{itemize}

Cal. Assemb. B. 1612(e).
In addition to these up-the-ladder options, under certain circumstances, and "[n]otwithstanding subdivision (e) of [Business and Professions Code] Section 6068," attorneys may go out the door to "the law enforcement agency charged with responsibility over the matter or to any governmental agency or official charged with overseeing or regulating the matter." In order to use this out-the-door approach, the attorney must have used the up-the-ladder approach, or must reasonably believe that the up-the-ladder approach would be unreasonable and futile, or must reasonably believe that the top official who could act for the organization participated in the improper activity. If one of these conditions is met, the attorney may go out-the-door only if the seriousness of the conduct warrants it, and the law does not otherwise prohibit it; the improper conduct uses the organization's authority or influence to commit a crime or perpetrate a fraud; and the action is necessary to prevent or rectify "substantial harm to the public interest or to the governmental organization resulting from the improper governmental activity."

The up-the-ladder approach does not implicate confidentiality concerns, and Rule of Professional Conduct 3-600 already authorizes it. However, the out-the-door approach does implicate confidentiality concerns. As Business and Professions Code section 6068(e) provides, "It is the duty of an attorney . . . to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Further, under existing law, an attorney who exhausts the up-the-ladder options may only withdraw from representation. Although government whistleblowers receive protection against retaliation as civil servants under whistleblower protection laws, they

266. CAL. RULES OF PROF'L CONDUCT 3-600 (1988).
presently may be subject to discipline under Business and Professions Code section 6068(e).\textsuperscript{270} AB 1612 creates an exception to section 6068(e) by providing that attorneys who utilize the second of these approaches "reasonably and in good faith" will not be subject to discipline.\textsuperscript{271}

The State Bar Board of Governors proposed an amendment to the Rules of Professional Conduct to address the problem of government whistleblowers being subject to discipline in 2002.\textsuperscript{272} The California Supreme Court, however, declined to adopt the rule because it conflicted with Business and Professions Code section 6068(e).\textsuperscript{273} Thus, AB 1612 is an attempt to codify the amendment that the State Bar proposed.\textsuperscript{274} The State Bar Board of Governors recently voted to oppose AB 1612 because, as the State Bar deputy executor director explained, new developments, such as the Sarbanes-Oxley legislation, were already placing the duty "under siege."\textsuperscript{275} The Board of governors did, however, refer the matter to the Commission on the Revision of the Rules of Professional Conduct.\textsuperscript{276}

AB 1612's two predecessors, proposed in 2002 and 2004 and essentially identical, were passed unanimously by the Legislature.\textsuperscript{277} However, each was vetoed by Governors Gray Davis and Arnold Schwarzenegger.\textsuperscript{278} Governor Schwarzenegger gave the following explanation for vetoing

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\item \textsuperscript{270} Cal. Bus. & Prof. Code § 6068(e) (2006). Although Department of Insurance attorney Cindy Ossias was not disciplined for exposing Commissioner Chuck Quackenbush's wrongdoing, the law is not clear that other government whistleblowers likewise will not face discipline. \textit{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.
\item \textsuperscript{271} Cal. Assembl. B. 1612(c).
\item \textsuperscript{273} Id.
\item \textsuperscript{274} Id.
\item \textsuperscript{276} Id.
\item \textsuperscript{278} Id.
\end{enumerate}
the former bill: "This is a well-intended bill and I applaud the efforts to expose wrongdoing within government. However, this bill 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."²⁷⁹

In response, proponents of AB 1612 point out that government attorneys represent the government entity, not the official.²⁸⁰ With this third attempt moving through the legislature, and its referral to the Revision Commission, the government whistleblower exception will likely remain an issue in 2006.

VII. ATTORNEYS MISSING THE STATUTE OF LIMITATIONS

In the one opinion addressing the problem of missed statute of limitations deadlines in 2005, a court of appeal faulted an attorney for such a failure but did not recommend disciplinary action.²⁸¹ In County of Los Angeles v. Superior Court, the Second District Court of Appeal ruled that a plaintiff's claim against the county for, among other things, negligently hiring, supervising, and retaining an employee who raped her while she was housed in a juvenile facility was time barred.²⁸² The attorney in the case filed a claim with the County on behalf of the minor plaintiff, though neither the attorney nor the minor's mother knew where plaintiff was at the time.²⁸³ Nearly a year later, the County mailed the attorney notice that plaintiff's claim was denied, but the attorney never received that letter.²⁸⁴ More than a year and a half after the County mailed the notice of denial, the plaintiff filed an action in court.²⁸⁵ The County moved for summary judgment arguing that the claim was time barred.²⁸⁶

The appellate court found that Code of Civil Procedure Section 340.1, which governs the statute of limitations for victims of childhood sexual abuse, was not the applicable law

²⁷⁹. Id.
²⁸⁰. Cal. Assemb. B. 1612 (legislative findings (3)).
²⁸². Id. at 447.
²⁸³. Id.
²⁸⁴. Id.
²⁸⁵. Id. at 447-48.
²⁸⁶. Id. at 448.
but rather that Government Code section 954.6, part of the California Tort Claims Act that governs actions against public entities and employees, governed. Section 954.6 requires that an action be filed within six months of when the public entity places notice of denial of the claim in the mail. This six month statute of limitations applies "regardless of whether notice is actually received." The court of appeal placed the blame for failing to file the plaintiff's claim within six months of the mailing of the County's denial on the attorney:

Having filed the claim on plaintiff's behalf, [the attorney] was charged with knowledge of the six-month period and was obligated to inquire as to the status of the claim if he did not receive a written rejection notice within a reasonable time after the County's time to act or reject the claim passed.

VIII. ATTORNEYS ENTERING INTO STIPULATIONS FOR CLIENTS

The scope of an attorney's implicit authority was the subject of one court of appeal decision. The Second District Court of Appeal upheld monetary and terminating sanctions against a plaintiff who violated a discovery request stipulation into which his attorney entered, which was not signed by the court or the referee. In Mileikowsky v. Tenet Healthsystem, the plaintiff, a medical doctor, sued a medical center claiming that the medical center violated his due process rights in rejecting his challenge to a determination that he voluntarily resigned from the medical center where he performed medical and surgical procedures. The lower court granted plaintiff a preliminary injunction preventing the medical center from restricting plaintiff's medical and surgical privileges. Plaintiff filed a new complaint alleging that the medical center violated the preliminary injunction by having security personnel accompany him everywhere, and

287. County of Los Angeles, 26 Cal. Rptr. 3d at 448-50.
288. Id. at 448.
289. Id.
290. Id. at 451.
292. Id. at 833.
293. Id.
that the medical center retaliated against him for reporting violations of medical standards and for assisting another plaintiff in a malpractice action against the center.\textsuperscript{294} During the discovery process, the medical association made five motions to compel plaintiff to comply with discovery requests.\textsuperscript{295} After the fifth motion to compel, counsel for plaintiff and defendant signed a "stipulation and order" agreeing that plaintiff would supplement his discovery responses by a specified date.\textsuperscript{296} Neither the court nor the referee signed the document.\textsuperscript{297} On defendant's fifth request for terminating sanctions, defendant argued that plaintiff violated the stipulation because he did not provide the additional discovery.\textsuperscript{298}

The appellate court upheld the trial court's award of terminating and monetary sanctions.\textsuperscript{299} First, the court observed that an attorney may enter into a stipulation that is binding on the client if it is within the implicit authority of the attorney.\textsuperscript{300} "An attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action . . . including enter[ing] into stipulations and agreements in all matters of procedure during the progress of the trial."\textsuperscript{301} In this case, when the attorney properly entered into a stipulation regarding the discovery requests, that stipulation served as the order that was necessary to impose the sanctions.\textsuperscript{302} The court saw "the stipulation . . . as tantamount to the requisite order."\textsuperscript{303} Indeed, "by signing the stipulation, counsel essentially waived [plaintiff's] right to insist on a formal order compelling responses as a precursor to an issuance of evidentiary, issue, or terminating sanctions. That the court and referee did not sign the stipulation did not negate the fact

\textsuperscript{294} Id. at 834. The reason the medial center gave for requiring security personnel to accompany plaintiff everywhere was that members were concerned about plaintiff's alleged history of abusive behavior and violence against medical personnel. Id.
\textsuperscript{295} Id. at 838.
\textsuperscript{296} Id. at 839.
\textsuperscript{297} Mileikowsky, 26 Cal. Rptr. 3d at 839.
\textsuperscript{298} Id.
\textsuperscript{299} Id. at 844.
\textsuperscript{300} Id.
\textsuperscript{301} Id.
\textsuperscript{302} Id. at 842.
\textsuperscript{303} Mileikowsky, 26 Cal. Rptr. 3d at 843.
that this was the parties’ agreement.” Lastly, “[a] stipulation may result in impairment of a party’s rights. ‘But a poor outcome is not a principled reason to set aside a stipulation by counsel.’”

IX. LEGAL MALPRACTICE AND INEFFECTIVE ASSISTANCE OF COUNSEL

Criminal cases monopolized both the legal malpractice and ineffective assistance of counsel decisions in 2005. In one legal malpractice case, the Fourth District Court of Appeal ruled that former criminal defendants with claims against their defense attorneys for legal malpractice have a right to a jury trial on the question of actual innocence. In *Salisbury v. County of Orange*, a concert-goer named Chad Salisbury, represented by a public defender, was convicted of assault with a deadly weapon along with a hate crime enhancement. With the aid of private counsel, Salisbury was granted a new trial on claims of newly discovered evidence and ineffective assistance of counsel, and he was acquitted. Salisbury then filed a legal malpractice action against his former counsel alleging that he was innocent and that he would not have been convicted but for the negligence of the public defender. The lower court judge ruled that Salisbury had not established that he was actually innocent, and therefore dismissed the case. Salisbury appealed arguing that a jury rather than the trial judge should have determined whether he was actually innocent.

All plaintiffs in a civil legal malpractice action must prove that their attorneys breached their duties to use professional skill, causation, and actual damage or loss. Plaintiffs with claims against their criminal defense attorneys generally must prove two further requirements: relief from criminal conviction and actual innocence by a

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304. *Id.* at 844.
305. *Id.* (quoting *County of Sacramento v. Workers’ Comp. Appeals Bd.*, 92 Cal. Rptr. 2d 290 (Ct. App. 2000)).
307. *Id.*
308. *Id.* at 833.
309. *Id.*
310. *Id.* at 835.
311. *Id.*
312. *Salisbury*, 31 Cal. Rptr. 3d at 835.
The requirement of actual innocence is necessary even though it means that a civil damages remedy for legal malpractice is not available for guilty criminal defendants who received negligent representation.\textsuperscript{314} This, the California Supreme Court once reasoned, is justifiable because the safeguards present in the criminal justice system, such as an ineffective assistance of counsel claim on appeal or in a habeas corpus petition, provide guilty criminal defendants adequate protection.\textsuperscript{315}

Despite the limited availability of this legal malpractice claim, the appellate court ruled that people with a legal malpractice claims have a right to a jury trial on the issue of factual innocence.\textsuperscript{316} Under the California Constitution, there is a right to jury trial in civil actions, including legal malpractice actions.\textsuperscript{317} However, when there is a trial-within-a-trial, such as when one must prove actual innocence, whether there is a right to a jury trial depends on whether the issues are factual or legal.\textsuperscript{318} When the issues are factual, as with the question of actual innocence, there is a right to a jury trial.\textsuperscript{319} Thus, Salisbury had a right to a jury trial to determine actual innocence.\textsuperscript{320}

In another legal malpractice action, for public policy reasons, the Fourth District Court of Appeal ruled that a criminal defendant who knowingly and willfully engages in conduct that subjects him to criminal punishment cannot maintain a legal malpractice action against the attorney who caused the defendant to engage in the conduct.\textsuperscript{321} In \textit{Chapman v. Superior Court}, a member of the Board of Commissioners of the San Diego Unified Port District told the Port Board’s attorney that he planned to enter into a business relationship with a power company after learning that the Port District planned to enter into various agreements with

\begin{thebibliography}{99}
\bibitem{313} Id.
\bibitem{314} Id. at 836.
\bibitem{315} Id. (referencing Wiley v. County of San Diego, 79 Cal. Rptr. 2d 672, 677-78 (1998)).
\bibitem{316} Salisbury, 31 Cal. Rptr. 3d at 832.
\bibitem{317} Id. at 836. The court distinguished the situation in which a trial court judge could rule on a summary judgment motion where there are no issues of triable fact regarding actual innocence. \textit{Id.} at 838.
\bibitem{318} Id. at 837.
\bibitem{319} Id.
\bibitem{320} Id. at 838.
\bibitem{321} Chapman v. Superior Court, 29 Cal. Rptr. 3d 852, 855 (Ct. App. 2005).
\end{thebibliography}
the power company to operate and then decommission aging power plants.\textsuperscript{322} The Port District's attorney told the board member that he could enter into a business relationship with the power company, but that he had to disclose any income he received from the power company and had to abstain from any board decisions that involved the power company.\textsuperscript{323} The board member entered into a contract with the power company to attempt to purchase a power plant.\textsuperscript{324} Eventually the business relationship turned into a consulting contract between the board member and the power company, which prohibited the board member "from advising, counseling or otherwise assisting any competitor or potential competitor of [the power company], including the Port District."\textsuperscript{325} The board member was making a six-figure salary from the contract.\textsuperscript{326} The Port District attorney again advised the board member to disclose income from and refrain from decisions involving the power company.\textsuperscript{327}

When a memorandum from the attorney to the Port District revealing the consulting relationship and the attorney's advice leaked to the media, the board member resigned and pled guilty to one felony violation of Government Code section 1090, which "prohibits an officeholder from having a financial interest in any contract made by the public agency of which he or she is a member."\textsuperscript{328} The court imposed $11,000 in fines and required the board member to pay $249,000 in restitution.\textsuperscript{329} The board member then sued the Port District's attorney and the Port District on a respondeat superior theory for legal malpractice alleging that the attorney should have advised the board member to resign from the Board to comply with section 1090.\textsuperscript{330}

The appellate court granted summary judgment to the Port District and its attorney.\textsuperscript{331} Analogizing the case to a

\begin{thebibliography}{9}
\item \textsuperscript{322} Id.
\item \textsuperscript{323} Id.
\item \textsuperscript{324} Id.
\item \textsuperscript{325} Id. at 855-56.
\item \textsuperscript{326} Id. at 856.
\item \textsuperscript{327} Chapman, 29 Cal. Rptr. 3d at 856.
\item \textsuperscript{328} Id. at 857, 854.
\item \textsuperscript{329} Id. at 857-58.
\item \textsuperscript{330} Id. at 858.
\item \textsuperscript{331} Id. at 864.
\end{thebibliography}
Texas court of appeal case,\textsuperscript{332} the appellate court held that public policy prohibited someone who knowing and willfully engages in conduct that subjects him or her to criminal liability from maintaining a legal malpractice action against the attorney whose advice caused the person to engage in the conduct.\textsuperscript{333} "To allow damages . . . suffered in consequence of [a] conviction would in tendency make it profitable to violate the law, and oppose the principle of denying any redress for a violation of law."\textsuperscript{334} Thus, the appellate court ruled that despite the Port District attorney's advice, common sense should have told the board member not to engage in self-dealing, and the board member could not maintain a legal malpractice action against the attorney and the Port District.\textsuperscript{335}

While a malpractice action was not available for the criminal defendant in \textit{Chapman}, a defense attorney's defective representation caused one appellate court to reverse a defendant's criminal conviction. The Second District Court of Appeal determined that a criminal defendant was necessarily prejudiced by his defense attorney's failure to complete an adequate pretrial factual investigation, and was therefore entitled to a new trial.\textsuperscript{336} In \textit{In re Rocha}, the defendant was charged with murder and premeditated attempted murder following a shooting match that occurred at a party that mostly high school students attended.\textsuperscript{337} After the convictions were affirmed on appeal, the defendant filed a petition for writ of habeas corpus alleging ineffective assistance of his trial counsel.\textsuperscript{338}

After examining the mixed questions of law and fact,\textsuperscript{339} the appellate court granted the petition on the grounds that "the deficient performance trial counsel rendered in conducting his pretrial investigation necessarily was prejudicial to petition and thus requires a new trial."\textsuperscript{340}

\textsuperscript{332} \textit{Id.} at 862 (analogizing to Saks v. Sawtelle, 880 S.W.2d 446 (Tex. App. 1994)).
\textsuperscript{333} \textit{Chapman}, 29 Cal. Rptr. 3d at 862-63.
\textsuperscript{334} \textit{Id.} at 862 (quoting \textit{Saks}, 880 S.W.2d at 470).
\textsuperscript{335} \textit{Chapman}, 29 Cal. Rptr. 3d at 863-64.
\textsuperscript{336} \textit{In re Rocha}, 37 Cal. Rptr. 3d 345 (Ct. App. 2005) (depublished).
\textsuperscript{337} \textit{Id.} at 347.
\textsuperscript{338} \textit{Id.}
\textsuperscript{339} \textit{Id.} at 348.
\textsuperscript{340} \textit{Id.} at 352.
Although "the failure to find some of [the potential witnesses] generally constitutes incompetence only when counsel has refused to investigate leads that potentially would beneficial to the defendant . . . trial counsel's approach to the investigation was so deficient that it was tantamount to a refusal to investigate." Trial counsel knew that there would be extra work in locating and convincing witnesses to talk to him because many were high school students, and he neglected to begin his investigation until five months after he began representation and five weeks before the trial date. Furthermore, he failed to properly utilize an investigator he hired. Trial counsel did not meet with his predecessor, or his predecessor's investigators, and did not follow up on a note in the case file indicating that one person was an "essential" witness for the defense. Three weeks before the rescheduled trial date, trial counsel admitted that his investigation of the potential witnesses was incomplete. Finally, trial counsel could only produce timesheets indicating that he had worked eight and half hours on petitioner's case and that his investigator worked only thirteen hours in six days. In light of these facts, the court determined that "this is such an extreme defalcation of the duty to conduct a timely and reasonable factual investigation of the case as to constitute a breakdown in the adversarial process," and that the petitioner must be granted a new trial.

X. MISCONDUCT IN DEATH PENALTY CASES

In 2005, the California Supreme Court issued twenty-nine death penalty opinions, two of which were on habeas

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341. Id. at 349.
342. Rocha, 37 Cal. Rptr. 3d at 350.
343. Id.
344. Id.
345. Id. at 351.
346. Id.
347. Id.
348. Rocha, 37 Cal. Rptr. 3d at 352.
349. People v. Young, 34 Cal. 4th 1149 (2005); In re Hawthorne, 35 Cal. 4th 40 (2005); People v. Benavides, 35 Cal. 4th 69 (2005); In re Sakarias, 35 Cal. 4th 140 (2005); In re Tauno Waidla, 35 Cal. 4th 140 (2005); People v. Harrison, 35 Cal. 4th 208 (2005); People v. Vieira, 35 Cal. 4th 264 (2005); People v. Smith, 35 Cal. 4th 334 (2005); People v. Panah, 35 Cal. 4th 395 (2005); People v. Stitely, 35 Cal. 4th 514 (2005); People v. Roldan, 35 Cal. 4th 646 (2005); People v.
corpus petitions and the rest of which were on automatic appeal. The supreme court reversed the lower court in only three of those cases. However, in one of the reversals, the majority reversed because of prosecutorial misconduct. In another reversed decision, Justice Joyce Kennard would have reversed the defendant's death sentence for prosecutorial misconduct reasons, while the majority reversed a life sentence on other grounds but affirmed the death sentence. In the remaining cases that were affirmed on appeal, the court found that either there was no misconduct, the defendant had waived the misconduct by failing to object at the trial level, or the misconduct was harmless.

Dickey, 35 Cal. 4th 884 (2005); People v. Samuels, 36 Cal. 4th 96 (2005); People v. Ward, 36 Cal. 4th 186 (2005); People v. Wilson, 36 Cal. 4th 309 (2005); People v. Davis, 36 Cal. 4th 510 (2005); People v. Kennedy, 36 Cal. 4th 595 (2005); People v. Blair, 36 Cal. 4th 686 (2005); People v. Dunkle, 36 Cal. 4th 861 (2005); People v. Carter, 36 Cal. 4th 1114 (2005); People v. Carter, 36 Cal. 4th 1215 (2005); People v. Moon, 37 Cal. 4th 1 (2005); People v. Cornwell, 37 Cal. 4th 50 (2005); People v. Gray, 37 Cal. 4th 168 (2005); People v. Schmeck, 37 Cal. 4th 240 (2005); People v. Harris, 37 Cal. 4th 310 (2005); People v. Elliot, 37 Cal. 4th 453 (2005); People v. Manriquez, 37 Cal. 4th 547 (2005); People v. Robinson, 37 Cal. 4th 592 (2005).

350. Hawthorne, 35 Cal. 4th 40; Sakarias, 35 Cal. 4th 140.

351. Young, 34 Cal. 4th 1149; Benavides, 35 Cal. 4th 69; Harrison, 35 Cal. 4th 208; Vieira, 35 Cal. 4th 264; Smith, 35 Cal. 4th 334; Panah, 35 Cal. 4th 395; Stately, 35 Cal. 4th 514; Roldan, 35 Cal. 4th 646; Dickey, 35 Cal. 4th 884; Samuels, 36 Cal. 4th 96; Ward, 36 Cal. 4th 186; Wilson, 36 Cal. 4th 309; Davis, 36 Cal. 4th 510; Kennedy, 36 Cal. 4th 595; Blair, 36 Cal. 4th 686; Dunkle, 36 Cal. 4th 861; Carter, 36 Cal. 4th 1114; Moon, 37 Cal. 4th 1; Cornwell, 37 Cal. 4th 50; Gray, 37 Cal. 4th 168; Schmeck, 37 Cal. 4th 240; Harris, 37 Cal. 4th 310; Elliot, 37 Cal. 4th 453; Manriquez, 37 Cal. 4th 547; Robinson, 37 Cal. 4th 592.

352. Hawthorne, 35 Cal. 4th 40 (reversed because of mental disability issues); Sakarias, 35 Cal. 4th 140; Vieira, 35 Cal. 4th 264.

353. Sakarias, 35 Cal. 4th 140.

354. Vieira, 35 Cal. 4th at 305.

355. See, e.g., Roldan, 35 Cal. 4th at 741. One example of the court finding misconduct but ruling it was harmless appeared in People v. Young, in which the court said, "We agree to the extent the prosecutor characterized defense counsel as 'liars' or accused counsel of lying to the jury, the prosecutor's remarks constituted misconduct." Young, 34 Cal. 4th at 1193. In another instance, the court found misconduct in a prosecutor's remark during closing argument that "defendant's continued claim of innocence during the penalty phase could be considered as an aggravating factor in determining the penalty." Kennedy, 36 Cal. 4th at 635. However, the court found that the defendant failed to object, thereby forfeiting the claim, and it nevertheless found that the error was not prejudicial. Id. at 636.
A. Prosecutorial Misconduct

Of prosecutorial misconduct, judicial misconduct, and ineffective assistance of defense counsel, defendants most often claimed prosecutorial misconduct. Defendants alleged prosecutorial misconduct in twenty of the death penalty cases decided in 2005. Defendants alleged prosecutorial misconduct in the guilt phase of the trial in eighteen cases, and in the penalty phase of the trial in fourteen cases. In twelve cases, defendants claimed prosecutorial misconduct in both the penalty and guilt phases.

356. As used in this piece, prosecutorial misconduct includes the following: (1) Griffin error, where the prosecutor argues that evidence is un-contradicted when the evidence could only be contradicted by the defendant's own testimony, and the defendant has exercised his or her right not to testify, see, e.g., Harrison, 35 Cal. 4th at 257-58; (2) Davenport error, in which the prosecutor improperly argues that the lack of mitigating factors in the penalty phase constitutes an aggravating factor, see, e.g., id. at 259-60; (3) Caldwell error, where the prosecutor argues that the responsibility for determining whether the death sentence is appropriate rests with someone besides the jury, see, e.g., Samuels, 36 Cal. 4th at 134-35.

357. See infra Part X.A. Claims of juror misconduct and spectator misconduct were not included in the tally.

358. Young, 34 Cal. 4th at 1184-98, 1218-24; People v. Benavides, 35 Cal. 4th 69, 107-08 (2005); Sakarias, 35 Cal. 4th at 151-67; Harrison, 35 Cal. 4th at 240-249, 256-60; Vieira, 35 Cal. 4th at 294-97; People v. Smith, 35 Cal. 4th 334, 359-60, 372 (2005); People v. Panah, 35 Cal. 4th 395, 454-64, 496-97 (2005); People v. Stitely, 35 Cal. 4th 514, 557-60, 567-72 (2005); Roldan, 35 Cal. 4th at 719-21, 741-44; Samuels, 36 Cal. 4th at 124-26, 128-29, 133-35; People v. Ward, 36 Cal. 4th 186, 215-16 (2005); People v. Wilson, 36 Cal. 4th 309, 332-39, 358-60 (2005); Kennedy, 36 Cal. 4th at 617-27, 629-36; People v. Carter, 36 Cal. 4th 1114, 1203-05 (2005); People v. Carter, 36 Cal. 4th 1215, 1263-68, 1277 (2005); People v. Moon, 37 Cal. 4th 1, 16-19 (2005); People v. Cornwell, 37 Cal. 4th 50, 91-93 (2005); People v. Gray, 37 Cal. 4th 168, 214-18 (2005); People v. Schmeck, 37 Cal. 4th 240, 263-65, 285-90, 298-301 (2005); People v. Harris, 37 Cal. 4th 310, 341-46 (2005).

359. Young, 34 Cal. 4th at 1184-98; Sakarias, 35 Cal. 4th at 151-67; Harrison, 35 Cal. 4th at 240-249; Smith, 35 Cal. 4th at 359-60; Panah, 35 Cal. 4th at 454-64; Stitely, 35 Cal. 4th at 557-60; Roldan, 35 Cal. 4th at 719-21; Samuels, 36 Cal. 4th at 124-26, 128-29; Ward, 36 Cal. 4th at 215-16; Wilson, 36 Cal. 4th at 332-39; Kennedy, 36 Cal. 4th at 617-27; People v. Carter, 36 Cal. 4th 1114, 1203-05 (2005); People v. Carter, 36 Cal. 4th 1215, 1263-68 (2005); Moon, 37 Cal. 4th at 16-19; Cornwell, 37 Cal. 4th at 91-93; Gray, 37 Cal. 4th at 214-218; Schmeck, 37 Cal. 4th at 263-65, 285-90; Harris, 37 Cal. 4th at 341-46.

360. Young, 34 Cal. 4th at 1218-1224; Benavides, 35 Cal. 4th at 107-08; Sakarias, 35 Cal. 4th at 151-67; Harrison, 35 Cal. 4th at 256-60; Vieira, 35 Cal. 4th at 294-97; Smith, 35 Cal. 4th at 372; Panah, 35 Cal. 4th at 496-97; Stitely, 35 Cal. 4th at 567-72; Roldan, 35 Cal. 4th at 741-44; Samuels, 36 Cal. 4th at 133-35; Wilson, 36 Cal. 4th at 358-60; Kennedy, 36 Cal. 4th at 629-36; People v. Carter, 36 Cal. 4th 1215, 1277 (2005); Schmeck, 37 Cal. 4th at 298-310.
of the trial.\textsuperscript{361}

As indicated above, prosecutorial misconduct drew the attention of the justices in two of the cases that were reversed,\textsuperscript{362} though it drew the attention of only a dissenting judge in one of those cases.\textsuperscript{363} In the first case, a 6–1 decision, the California Supreme Court granted a habeas corpus petition to a death row inmate due to the inconsistent arguments of a prosecutor that deprived the defendant of due process of law.\textsuperscript{364} In \textit{In re Sakarias}, defendants Peter Sakarias and Tauno Waidla were convicted of the same murder in separate trials, and juries sentenced each to death.\textsuperscript{365} The prosecutor’s argument at each trial was that the defendant personally dealt three blows to the victim with a hatchet, the first of which resulted in the victim’s death.\textsuperscript{366} However, the evidence showed that the first fatal blow could only have been inflicted by a single person,\textsuperscript{367} that Waidla delivered that first blow, and that Sakarias delivered two postmortem or perimortem blows after the victim received abrasions from being dragged to a bedroom.\textsuperscript{368} Indeed, to argue that Sakarias had inflicted the first fatal blow, the prosecutor had to avoid eliciting testimony about the postmortem abrasions from an expert, previously elicited in Waidla’s trial, that revealed that the only blows Sakarias dealt came after the victim’s death.\textsuperscript{369} The prosecutor submitted as evidence the same photographs at each of the trials, with the exception of the abrasion photograph at Sakarias’s trial, to deliberately avoid presenting evidence “‘inconvenient’ to his new and different theory of the

\begin{thebibliography}{99}
\bibitem{362} \textit{Sakarias}, 35 Cal. 4th at 140; \textit{Vieira}, 35 Cal. 4th 264.
\bibitem{363} \textit{Vieira}, 35 Cal. 4th at 305.
\bibitem{364} \textit{Sakarias}, 35 Cal. 4th at 144.
\bibitem{365} \textit{Id.}
\bibitem{366} \textit{Id.} at 147-48.
\bibitem{367} \textit{Id.} at 145.
\bibitem{368} \textit{Id.} at 147.
\bibitem{369} \textit{Id.} at 148.
\end{thebibliography}
Although the court found that such misconduct was harmless in the case of Waidla because the evidence supported the fact that he delivered the antemortum blow that resulted in the victim's death, it granted Sakarias relief because "the prosecutor violated his due process rights by intentionally and without good faith justification arguing inconsistent and irreconcilable factual theories in the two trials." The court held that "fundamental fairness does not permit the People, without good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed."

Only Justice Marvin Baxter dissented, arguing that neither Sakarias nor the other defendant should have been granted relief. Justice Baxter did not find any bad faith in the prosecutor's conduct, and he thought that the People could properly rely on the defense to expose gaps such as the one in this case. When there is uncertain evidence and the prosecution did not introduce false evidence, Justice Baxter would leave decisions about which case against each defendant was stronger to the prosecution and would not "second-guess the prosecution's strategy." However, he did leave open the possibility that he would find prosecutorial misconduct in the use of irreconcilable theories in a case with different facts.

In the second reversed decision in which the defendant claimed prosecutorial misconduct, a prosecutor's biblical argument caused Justice Kennard to dissent and require reversal of the death sentence. In People v. Vieira, the prosecutor made religious and Biblical references during the penalty phase of trial. As cited in both the majority and the dissenting opinions, the prosecutor said,

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370. Sakarais, 35 Cal. 4th at 153.
371. Id. at 167.
372. Id. at 145.
373. Id. at 156.
374. Id. at 171.
375. Id. at 172.
376. Sakarais, 35 Cal. 4th at 177.
377. Id. at 179.
378. People v. Vieira, 35 Cal. 4th 264, 305 (2005). The majority reversed this case on other grounds. Id. at 305.
379. Id. at 308.
People from time to time have a problem because they say, "Gee, in the Bible it says, 'Thou shall not kill,' and 'Vengeance is mine sayeth the Lord. I will repay.'" That's found in Romans. But in the very next passage . . . , it goes on and calls for capital punishment and says, "[t]he ruler bears not the sword in vain for he is the minister of God, a revenger or to execute wrath upon him that doeth evil." He's talking about the ruler, the government, whatever.

Now, the Judeo-Christian ethic comes from the Old Testament I believe the first five books called the Torah in the Jewish religion. And there are two very important concepts that are found there. And that's, one, capital punishment for murder is necessary in order to preserve the sanctity of human life, and two, only the severest penalty of death can underscore the severity of taking life.

The really interesting passage is in Exodus, chapter 21, verses 12 to 14: "Whoever strikes another man and kills him shall be put to death. But if he did not act with intent but they met by act of God, the slayer may flee to a place which I will appoint for you." Kind of like life without possibility of parole, haven, sanctuary. "But if a man has the presumption to kill another by treachery, you shall take him even from my alter to be put to death." There is no sanctuary for the intentional killer, according to the Bible.

Now, I'll leave it at that. That was just in the event any of you have any reservations about religion in this case.380

Prosecutors commit misconduct when they make improper religious or biblical references.381 As the court has stated, "The primary vice in referring to the Bible and other religious authority is that such argument may diminish the jury's sense of responsibility for its verdict and . . . imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions."382 Furthermore,

[w]hen prosecutors invoke religious rhetoric, or when they

380. Id.
381. People v. Roldan, 35 Cal. 4th 646, 743 (2005). "We cannot emphasize too strongly that to ask the jury to consider biblical teachings when deliberating is patent misconduct." People v. Hill, 952 P.2d 673, 692 n.6 (1998).
argue based on what they take to be the true meaning of scriptural passages, all to convince a jury to impose the death penalty, they create and encourage an intolerable risk that the jury will abandon logic and reason and instead condemn an offender for reasons having no place in our judicial system.\textsuperscript{383}

Both the majority and the dissent in \textit{Vieira} found the above-quoted argument improper.\textsuperscript{384} However, the court disagreed on whether the misconduct required reversal of the defendant's death sentence.\textsuperscript{385}

The majority concluded that the defendant waived his right to appeal because his counsel failed to object, and it found that although the argument constituted misconduct, it was not prejudicial.\textsuperscript{386} The court reasoned that the argument "was only a small part of a prosecutorial argument that primarily focused on explaining to the jury the mitigating factors."\textsuperscript{387} Justice Kennard dissented because she found the biblical argument to be prejudicial to the defendant because "without the prosecutor's improper biblical argument, the jury would not have returned a verdict of death."\textsuperscript{388}

Beyond \textit{Vieira}, prosecutors' religious and biblical arguments have created a divided court.\textsuperscript{389} In \textit{People v. Harrison}, Justice Carlos Moreno disagreed with the

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\item \textsuperscript{383} \textit{Roldan}, 35 Cal. 4th at 743. Another problem with prosecutors arguing that the Bible or religion calls for capital punishment is that those arguments may distort what the religious authorities actually say about retribution. As the California Supreme Court said, "[A]lthough such matters of theology are, of course, well beyond our purview, we observe some scholars have suggested reliance on the \textit{lex talionis} [the ancient law of retributive justice] in this context may oversimplify the meaning of the pertinent scriptural passages." \textit{Hill}, 17 Cal. 4th at 836 n.6.
\item \textsuperscript{384} See \textit{Vieira}, 35 Cal. 4th at 297, 310.
\item \textsuperscript{385} See \textit{id}.
\item \textsuperscript{386} \textit{Id.} at 297.
\item \textsuperscript{387} \textit{Id}.
\item \textsuperscript{388} \textit{Id.} at 310 (Kennard, J., dissenting).
\item \textsuperscript{389} One other case in 2005 dealt with a defendant's claim that the prosecutor committed misconduct by referencing the Bible. In \textit{People v. Roldan}, the court unanimously held that the defendant forfeited his right to appeal on that issue because his counsel failed to object, and that the prosecutor's argument did not render the trial so unfair as to cause the court to address the issue regardless of the lack of objection. \textit{People v. Roldan}, 35 Cal. 4th 646, 743 (2005). The court did, however, explicitly mention that prosecutors' use of arguments, such as that the Bible requires the death penalty, constitutes "patent misconduct." \textit{Id.} (quoting \textit{People v. Hill}, 17 Cal. 4th 800, 836 n.6 (1998)).
\end{itemize}
majority's conclusion that a prosecutor's religious and biblical references in the guilt phase of the trial did not constitute misconduct.\textsuperscript{390} Justice Moreno, accompanied by Justice Kathryn Werdegar, found fault with "the prosecutor's extended metaphor invoking the Four Horsemen of the Apocalypse (see Revelation 6:1-6:8), his description of defendant as 'the disciple of Satan,' and his charge to the jury to 'take the sword from [defendant] and cast it down and tell him that he was wrong and may go no further.'\textsuperscript{391} The majority explained that a prosecutor's biblical argument at the guilt phase of the trial is just as improper as at the penalty phase, though for a different reason.\textsuperscript{392} At the guilt phase, such arguments are improper because they have no place in the process of deciding questions of historical fact and applying those facts to the law.\textsuperscript{393} Nonetheless, the majority found that not all biblical references are improper, and that the above argument did not constitute misconduct because it amounted to merely literary allusion and "a powerfully dramatic illustration of the gravity and enormity of defendant's crimes."\textsuperscript{394} Justice Moreno, however, found that the prosecutor's argument "crossed the line between permissible allusion to the Bible and impermissible religious exhortation," particularly because it suggested to the jury that it should use Biblical rather than California law to decide the case.\textsuperscript{395}

A prosecutor's biblical argument created a similar schism in the court in \textit{People v. Samuels}. In \textit{Samuels}, during a small portion of her penalty phase argument, the prosecutor referenced passages of the Bible.\textsuperscript{396} The prosecutor followed the biblical references with a clear statement that the jurors were not to supplant California law with biblical law, and that the reference was merely to assuage concerns jurors may have that the Bible forbids capital punishment.\textsuperscript{397}

\textsuperscript{390} People v. Harrison, 35 Cal. 4th 208, 261 (2005). Justice Moreno, however, concurred in the judgment of death because he found that the argument was not prejudicial. \textit{Id}.
\textsuperscript{391} \textit{Id}.
\textsuperscript{392} \textit{Id} at 247.
\textsuperscript{393} \textit{Id}.
\textsuperscript{394} \textit{Id} at 248.
\textsuperscript{395} \textit{Id} at 262-63 (Moreno, J., concurring).
\textsuperscript{396} People v. Samuels, 36 Cal. 4th 96, 144-45 (2005).
\textsuperscript{397} \textit{Id} at 145.
majority found that, even if the argument was error, it was harmless because it constituted only a small part of her overall argument. Although Justice Kennard determined that the argument was not improper because it indicated that jurors should not be swayed by biblical or religious teachings, she disagreed with the majority's conclusion that a prosecutor's improper religious argument would be harmless if it was only a small part of the overall argument. Instead, Justice Kennard said "an impermissible reliance on religious authority by the prosecutor may be prejudicial even when, as here, the biblical references are only a short part of the prosecutor's argument." Thus, the court in 2005 was divided on whether a prosecutor's biblical argument in either the guilt or penalty phase of the trial constituted misconduct and whether it was prejudicial.

B. Ineffective Assistance of Counsel

Defendants claimed ineffective assistance of counsel in seven cases. Defendants claimed ineffective assistance of counsel in the guilt phase in six of cases, while only two claimed it in the penalty phase, and only one claimed it in both the penalty and guilt phases. One interesting ineffective assistance of counsel claim arose in People v. Carter. In Carter, the California Supreme Court ruled that
defendant's trial counsel did not render ineffective assistance of counsel even though his counsel failed to make an opening statement, present any evidence on defendant's behalf, or make any substantive closing argument regarding the prosecution's failure to reach its burden of proof. The court concluded that since the record on appeal failed to illuminate why defense counsel failed to present a defense, defendant's claim must fail, especially because trial counsel's decisions were likely tactical. For example, reasonably competent counsel . . . could have determined that in view of the strong evidence linking defendant to the murders, a guilty verdict was virtually a foregone conclusion, and that defendant's prospects of avoiding the death penalty would be improved if the defense refrained from placing its "credibility" at risk by suggesting an implausible defense.

The only insight the record disclosed for the trial counsel's failure to present a defense at the guilt phase indicated that the decision was tactical, "influenced by the relative strengths and weaknesses of a decision to present a defense, as well as by the pendency of the murder charges against defendant in other counties." The defendant also claimed that his counsel improperly injected his failure to testify into the proceedings, thereby allowing the jury to draw inferences of guilt. The court, however, refused to extend to defense attorneys the rule forbidding prosecutors from inviting adverse inferences from a defendant's failure to testify. Likewise, the court rejected defendant's assertion that he was denied the opportunity to present a defense and to effective representation because of a conflict with his counsel. Defense counsel thought it tactically appropriate not to present a defense, but defendant claimed he wanted to testify. The court found that the trial court did not have to relieve defendant's counsel, and that

408. Id. at 1190.
409. Id.
410. Id.
411. Id.
412. Id. at 1191-92.
413. Carter, 36 Cal. 4th at 1197.
414. Id. at 1198.
415. Id. at 1197.
defendant could have asserted his right to testify, even if his
counsel did not present any other witnesses.416

A conflict of interest that a defendant himself created
also gave rise to a claim of ineffective assistance of counsel.
In People v. Roldan, the defendant made numerous and
varied claims against his defense counsel.417 Defense counsel
requested that the defendant be examined by a mental health
expert because he doubted the defendant's competence.418
The trial court granted the request, and Dr. Michael Maloney,
a clinical psychologist, examined the defendant.419 During the
course of his interviews, the defendant said that he planned
to kill the prosecutor.420 After the prosecution refused to plea
bargain and indicated its decision to seek the death penalty,
defense counsel made a motion for a continuance.421 At the
hearing, defense counsel explained that he had attempted to
speak with the defendant fourteen or fifteen times, that the
defendant refused to speak with him, and that the
defendant's family members were not helpful in getting the
defendant to speak with his attorney.422 The defense attorney
also revealed that Dr. Maloney had warned him about threats
the defendant had made against the defense attorney, and
that he had taken precautions to protect his family.423 Defense counsel urged the court to grant the continuance so
that he could try "to repair his relationship with
defendant,"424 explaining that the defendant's threat to his
life was "going to play on [his] mind night and day," and that
he could not objectively represent his client at that
moment.425 The court denied the motion for continuance,
indicating that it believed the defendant was "trying to
manufacture a possible delay."426 Defense counsel later
declared a conflict of interest twice, once before trial, and once
during the guilt phase of the trial when defendant again

416. Id. at 1199.
418. Id. at 667.
419. Id.
420. Id.
421. Id. at 668.
422. Id.
423. Id., 35 Cal. 4th at 668.
424. Id.
425. Id.
426. Id. at 669.
threatened his life to another mental health expert.\textsuperscript{427} Each time, the trial court denied the motion indicating again its belief that the defendant was trying to delay or inject error into the trial, and that defense counsel was “doing an exemplary job.”\textsuperscript{428} At the penalty phase of the trial, the trial court ruled that Dr. Maloney could testify that the defendant “had said he wanted to hurt the prosecutor; specifically, he mentioned gouging the prosecutor’s eyes out.”\textsuperscript{429} To mitigate the effect of this statement, the trial court allowed defense counsel to testify that defendant’s “extremely depressed and angry” mental state at the time he learned that the prosecution refused to plea bargain explained his outrageous comments and that he did not actually intend to harm the prosecutor.\textsuperscript{430}

The defendant first claimed that the trial court inappropriately denied defense counsel’s motion to withdraw thereby denying the defendant his federal and state constitutional rights to effective assistance of counsel.\textsuperscript{431} Although to assure effective assistance of counsel, a trial court cannot deny a defendant and his attorney the reasonable opportunity to prepare for trial,\textsuperscript{432} “it is settled law . . . that the denial of a request for a continuance, which such request is premised on an accused’s persistent failure to cooperate with counsel and his deliberate refusal to assist counsel, is not arbitrary.”\textsuperscript{433} Therefore, the supreme court concluded that the denial of the continuance was within the trial court’s discretion and did not violate the defendant’s constitutional rights.\textsuperscript{434}

Second, the defendant claimed that his attorney labored under a conflict of interest because he feared for his life due to the defendant’s threats.\textsuperscript{435} The defendant argued that “counsel acted to ensure his personal safety and thereby deprived defendant of the undivided loyalty a criminal

\begin{itemize}
  \item \textsuperscript{427} Id.
  \item \textsuperscript{428} Id.
  \item \textsuperscript{429} \textit{Roldan}, 35 Cal. 4th at 722.
  \item \textsuperscript{430} Id. at 725.
  \item \textsuperscript{431} Id. at 666.
  \item \textsuperscript{432} Id. at 670.
  \item \textsuperscript{433} Id.
  \item \textsuperscript{434} Id.
  \item \textsuperscript{435} \textit{Roldan}, 35 Cal. 4th at 671.
\end{itemize}
defendant should expect from his legal representative.”

The court rejected this argument noting that “[t]here is something perverse in this argument, for . . . defendant’s own behavior created the alleged conflict and threatened to undermine his lawyer’s effectiveness.” The court indicated that it was “reluctant to recognize a rule of law that would empower criminal defendants to inject reversible error into their trials simply by threatening their lawyers.” Although the court said “no rigid rule exists to preclude relief whenever a claimed conflict of interest with counsel originates in a defendant’s own actions,” the court found that the circumstances here posed neither a potential nor actual conflict of interest.

Third, the defendant appealed the trial court’s denial of its three Marsden motions. A defendant can make a Marsden motion at any time during trial “to discharge his appointed counsel and substitute another attorney,” and he “is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.” The court found no abuse of discretion in the trial court’s denial because defense counsel was providing effective assistance, and the conflict, which the defendant created, did not substantially impair his right to effective assistance of counsel.

Fourth, the defendant claimed the trial court erred in allowing Dr. Maloney to testify as to what he said about harming the prosecutor because it was protected under the attorney-client privilege. The court reasoned that since Dr. Maloney was a defense expert, the privilege extended to the defendant’s communications with him and should not have been disclosed. Although the court found merit in the

436. Id. at 674.
437. Id.
438. Id.
439. Id. at 675.
440. Id.
441. Roldan, 35 Cal. 4th at 677.
442. Id. at 681.
443. Id. at 681-82.
444. Id. at 723.
445. Id. at 724.
defendant's claim, it determined that the error was harmless.\textsuperscript{446}

Fifth, the defendant claimed that his counsel had a second conflict of interest because his attorney testified at trial as to the circumstances surrounding his threats regarding the prosecutor.\textsuperscript{447} The court found that the defendant could not claim a conflict because the conflict was explained to him by an independent attorney, and the defendant expressly waived the conflict in open court.\textsuperscript{448}

In another case, a defense counsel's failure to object at trial spurred a concurring opinion regarding a work product privilege issue that the supreme court may one day revisit. In \textit{People v. Gray}, the defendant claimed that he was denied effective assistance of counsel because counsel failed to object based on the work product privilege to the prosecutor's comment that the failure of defense experts who had access to the evidence to testify meant that the defense experts' testimony would have corroborated the prosecution experts' testimony.\textsuperscript{449} The majority did not resolve the issue because it found that defense counsel's failure to object was not prejudicial.\textsuperscript{450} Justice Chin, joined by Justice Baxter, indicated his concern with the ruling in \textit{People v. Coddington},\textsuperscript{451} which "suggested that the work product privilege . . . would preclude a prosecutor from even arguing that the defendant's failure to call defense experts who had examined forensic evidence at the crime scene logically indicated they had nothing helpful to contribute."\textsuperscript{452} Justice Chin "wonder[ed] whether [Coddington's] work product analysis was flawed, being directly inconsistent with the general rule that the prosecutor may comment on the defense's failure to call a retained expert or other logical witness to rebut the People's case."\textsuperscript{453} Thus, Justice Chin indicated his willingness to disapprove \textit{Coddington} on this point.\textsuperscript{454}

\begin{itemize}
\item \textsuperscript{446} \textit{Id.} at 725.
\item \textsuperscript{447} \textit{Roldan}, 35 Cal. 4th at 726.
\item \textsuperscript{448} \textit{Id.} at 727-28.
\item \textsuperscript{449} \textit{People v. Gray}, 37 Cal. 4th 168, 207-09 (2005).
\item \textsuperscript{450} \textit{Id.} at 208.
\item \textsuperscript{451} \textit{People v. Coddington}, 2 P.3d 1081 (Cal. 2000).
\item \textsuperscript{452} \textit{Gray}, 37 Cal. 4th at 238.
\item \textsuperscript{453} \textit{Id.}
\item \textsuperscript{454} \textit{Id.} at 239.
\end{itemize}
C. Judicial Misconduct

Defendants claimed judicial misconduct, particularly judicial bias, in the guilt phase, in three cases. In People v. Harris, the court dealt with a defendant's claim of judicial bias. The defendant claimed the following instances of judicial bias: "[the court's] direct statements of disbelief in defendant's case; interjecting its own objection during cross-examination of a police officer . . . ; [making] disparaging remarks to defense counsel during cross-examination of the evidence technician; interjecting its own objection during cross-examination of the fingerprint technician . . . ; and conduct[ing] its own cross-examination of defendant." The majority found that there was no evidence of judicial bias against the defendant. The majority determined that the court only commented on the evidence outside the presence of the jury, curbed vague questions to maintain "reasonable control of the trial to avoid irrelevant or unduly prolonged testimony," challenged questions posed by both sides, and curbed repetitious questioning within its discretion to expedite examination. Although the majority found some of the court's questioning of the defendant "inappropriate," it found no prejudice.

Justice Kennard, however, found that there was judicial bias in the way the court questioned defendant, although she found the bias to be harmless. Justice Kennard pointed to questions that did nothing to clarify the evidence, made defendant repeat information that would be damaging to the defense, or were argumentative or repetitive. Justice Kennard determined that "certain of the court's questions may well have conveyed to the jury the judge's opinion that defendant's testimony was not credible. In doing so, the judge

456. Harris, 37 Cal. 4th at 346-51.
457. Id. at 346.
458. Id.
459. Id. at 347.
460. Id.
461. Id. at 348.
462. Harris, 37 Cal. 4th at 348.
463. Id. at 350.
464. Id. at 367 (Kennard, J., dissenting on other grounds).
465. Id. at 371.
became an advocate for the prosecution, abandoning the neutrality required of a judge.”  

XI. DISBARMENT

The California Supreme Court rarely issues opinions on attorney discipline largely because of its usual deference to the Review Department of the State Bar Court, though it still has ultimate jurisdiction over such matters. The supreme court did, however, issue one full-length opinion in 2005. Ronald Robert Silverton was disbarred in 1975 for “his felony convictions for conspiracy to obtain money by false pretenses and to present a fraudulent insurance claim as well as for soliciting another to commit or join in the commission of grand theft.” Then, after unsuccessfully re-applying to the bar three times, Silverton was re-admitted in 1992. Less than two years later, Silverton began a fee scheme that created the basis for the present disciplinary action. Silverton, a personal injury attorney, after winning or settling a case, would routinely offer to clients immediate payment (usually rounding their recovery up to the nearest thousand) in exchange for the right to negotiate their medical bills and to retain the savings he obtained. Silverton generally did not disclose all of the information about the agreement, did not advise his clients of their right to seek independent legal advice, and could not show that the agreement was fair and reasonable as required by Professional Conduct Rule 3-300 governing business transactions. As a result, the Review Department found that Silverton had committed violations of Rules 3-300 and 4-200 prohibiting unconscionable fees. It also found three uncharged violations of Rule 3-300, and three uncharged violations of Rule 4-100 for giving clients their settlement checks before the settlement was deposited in the client trust

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466. Id. at 367.
468. Silverton, 113 P.3d 556.
469. Id. at 557.
470. Id.
471. Id.
472. Id. at 557-561.
473. Id. at 557-61.
474. Silverton, 113 P.3d at 559, 560.
account.\textsuperscript{475}

The Review Department recommended a stayed two-year suspension, an actual sixty-day suspension, and three years probation.\textsuperscript{476} In so doing, the Review Board declined to apply Standard for Attorney Sanctions for Professional Misconduct 1.7(a),\textsuperscript{477} which provides that

\begin{quote}
[i]f a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline . . . , the degree of discipline shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline would be manifestly unjust.\textsuperscript{478}
\end{quote}

The supreme court denied Silverton's petition for review, but granted review on its own motion, "indicat[ing] reservations about the level of discipline that the Review Department intended to impose."\textsuperscript{479} The court found that the Review Department failed to apply the two portions of the exception and improperly applied the first part of the exception for remoteness.\textsuperscript{480} Contrary to the Review Department, the court found that "although 19 years elapsed between Silverton's disbarment and his new misconduct, he was ineligible to practice law for all but 22 months of that period. We therefore give little weight to the remoteness of the prior discipline."\textsuperscript{481} Applying the second part of the exception, the court found that Silverton's previous offenses were quite severe, and therefore the exception to Standard 1.7(a) did not apply.\textsuperscript{482}

Finally, considering the purposes of sanctioning attorneys, and since the standards are not binding and the Review Department imposed a lesser sanction, the court held that

\begin{quote}
when an attorney has previously been disbarred,
\end{quote}

\begin{itemize}
\item \textsuperscript{475} Id. at 561.
\item \textsuperscript{476} Id.
\item \textsuperscript{477} Id. at 562.
\item \textsuperscript{478} STANDARDS FOR ATTORNEY SANCTIONS FOR PROF'L MISCONDUCT 1.7(a).
\item \textsuperscript{479} Silverton, 113 P.3d at 557, 561.
\item \textsuperscript{480} Id. at 562.
\item \textsuperscript{481} Id.
\item \textsuperscript{482} Id.
\end{itemize}
disbarment is the appropriate sanction for subsequent professional misconduct unless the exception set forth in standard 1.7(a) is satisfied or the attorney can otherwise establish "grave doubts as to the propriety" of disbarment in the particular case. In this context, the burden should be on the attorney to demonstrate the existence of extraordinary circumstances justifying a less sanction.\footnote{Id. at 562-63 (quoting Lawhorn v. State Bar, 743 P.2d 908, 912 (Cal. 1987)).}

The court then concluded that Silverton had not met his burden, partially because he refused to acknowledge any wrongdoing in either of his disbarment proceedings.\footnote{Silverton, 113 P.3d at 564-65.} As a result, the court ruled to disbar Silverton again.\footnote{Id. at 565.}

**XII. CONCLUSION**

The year in ethics in 2005 included opinions from the California Supreme Court, the California Courts of Appeal, and the State Bar regarding attorney fees and related issues,\footnote{See supra Part II.} conflict of interest,\footnote{See supra Part III.} the attorney-client privilege,\footnote{See supra Part IV.} confidentiality,\footnote{See supra Part V.} missed deadlines,\footnote{See supra Part VII.} entering into stipulations,\footnote{See supra Part VIII.} and legal malpractice and ineffective assistance of counsel claims.\footnote{See supra Part IX.} Notably, in addressing misconduct in death penalty cases, the California Supreme Court faced a schism regarding prosecutor's religious and biblical arguments.\footnote{See supra Part X.A.} These claims will likely continue to fill the court's opinions, and it will be interesting to see how the new justice, Justice Carol Corrigan, who replaced Justice Janice Rogers Brown, will influence the debate.\footnote{Justice Carol A. Corrigan was confirmed to the California Supreme Court on January 4, 2006. Courts: Supreme Court: Justices, http://www.courtinfo.ca.gov/courts/supreme/justices.htm (last visited Sept. 8, 2006).} Also noteworthy was the court's rarely issued full opinion ordering disbarment of an attorney.\footnote{See supra Part XI.} Government attorneys should

\footnote{483. Id. at 562-63 (quoting Lawhorn v. State Bar, 743 P.2d 908, 912 (Cal. 1987)).}
\footnote{484. Silverton, 113 P.3d at 564-65.}
\footnote{485. Id. at 565.}
\footnote{486. See supra Part II.}
\footnote{487. See supra Part III.}
\footnote{488. See supra Part IV.}
\footnote{489. See supra Part V.}
\footnote{490. See supra Part VII.}
\footnote{491. See supra Part VIII.}
\footnote{492. See supra Part IX.}
\footnote{493. See supra Part X.A.}
\footnote{494. Justice Carol A. Corrigan was confirmed to the California Supreme Court on January 4, 2006. Courts: Supreme Court: Justices, http://www.courtinfo.ca.gov/courts/supreme/justices.htm (last visited Sept. 8, 2006).}
\footnote{495. See supra Part XI.}
also monitor the legislative rumblings about an exception to
the duty of confidentiality for government whistleblowers,
which resurfaced in 2005.496

As attorneys and others continue to grapple with new
ethics issues and opinions each year, they should remember
that the Commission for the Revision of the Rules of
Professional Conduct is in the process of revising the rules.497
The Commission does not expect to have the rules completed
and submitted to the State Bar Board of Governors for
adoption and the California Supreme Court for approval
before 2008.498 However, the Commission will circulate its
proposed rules for public comment beginning in 2006.499 This
is an opportunity for attorneys to voice their concerns and
ideas about the laws and rules that govern their profession.

496. See supra Part VI.
497. E-mail from Harry Sondheim, Chair of the Commission for the Revision
of the Rules of Professional Conduct, to Pamela Glazner, author (Apr. 24, 2006,
17:40:04 PST) (on file with author).
498. Id.
499. Id.